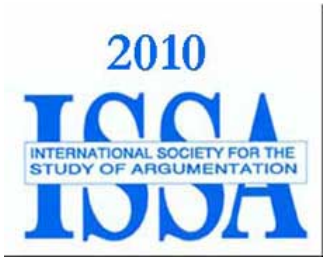
ISSA Proceedings 2010 – Implicitness Functions In Family Argumentation



1. Introduction

Argumentation is a mode of discourse in which the involved interlocutors are committed to reasonableness, i.e. they accept the challenge of reciprocally founding their positions on the basis of reasons (Rigotti & Greco Morasso 2009). Even though during everyday lives of families argumentation proves to be a very relevant mode of discourse (Arcidiacono & Bova, in press; Arcidiacono et al., 2009), traditionally other contexts have obtained more attention by argumentation theorists: in particular, law (Feteris, 1999, 2005), politics (Cigada, 2008; Zarefsky, 2009), media (Burger & Guylaine, 2005; Walton, 2007), health care (Rubinelli & Schulz, 2006, Schulz & Rubinelli, 2008), and mediation (Jacobs & Aakhus, 2002; Greco Morasso, in press).

This paper focuses on the less investigated phenomenon of argumentative discussions among family members. More specifically, I address the issue of the implicitness and its functions within argumentative discussions in the family context. Drawing on the Pragma-dialectical approach to argumentation (van Eemeren & Grootendorst, 1984, 2004), the paper describes how the implicitness is a specific argumentative strategy adopted by parents during dinner conversations at home with their children.

In the first part of the paper I will present a synthetic description of the basic properties of family dinner conversations, here considered a specific communicative activity type**[i]**. Subsequently, the current landscape of studies on family argumentation and the pragma-dialectical model of critical discussion will be taken into account in order to provide the conceptual and methodological frame through which two case studies are examined.

2. Family dinner conversations as a communicative activity type

Dinnertime has served as a relevant communicative activity type for the study of family interactions. Its importance as a site of analysis is not surprising since

dinner is one of the activities that brings family members together during the day and serves as an important occasion to constitute and maintain the family roles (Pan et al., 2000). Indeed, family dinner conversations are characterized by a large prevalence of interpersonal relationships and by a relative freedom concerning issues that can be tackled (Pontecorvo & Arcidiacono, 2007).

Several studies have contributed to the understanding of the features that constitute the dinnertime event, the functions of talk that are performed by participants, and the discursive roles that family members take up (Davidson & Snow, 1996; Pontecorvo et al., 2001; Ochs & Shohet, 2006). For instance, Blum-Kulka (1997) identified three contextual frames based on clusters of themes in family dinner conversations: An instrumental dinner-as-business frame that deals with the preparation and service of food; a family-focused news telling frame in which the family listens to the most recent news of its members; a world-focused frame of non-immediate concerns, which includes topics related to the recent and non-recent past and future, such as talk about travel arrangements and complaints about working conditions. In addition, she identified three primary functions of talk at dinnertime: Instrumental talk dealing with the business of having dinner; sociable talk consisting of talking as an end in itself; and socializing talk consisting of injunctions to behave and speak in appropriate ways. All these aspects constitute a relevant concern to focus on dinnertime conversations in order to re-discover the crucial argumentative activity that is continuously developed within this context.

In the last decade, besides a number of studies which highlight the cognitive and educational advantages of reshaping teaching and learning activities in terms of argumentative interactions (Mercer, 2000; Schwarz et al., 2008; Muller Mirza & Perret-Clermont, 2009), the relevance of the study of argumentative discussions in the family context is gradually emerging as a relevant field of research in social sciences.

The family context is showing itself to be particularly significant in the study of argumentation, as the argumentative attitude learnt in family, above all the capacity to deal with disagreement by means of reasonable verbal interactions, can be considered “the matrix of all other forms of argumentation” (Muller Mirza et. al., 2009, p. 76). Furthermore, despite the focus on narratives as the first genre to appear in communication with young children, caregiver experiences as well as observations of conversations between parents and children suggest that

family conversations can be a significant context for emerging argumentative strategies (Pontecorvo & Fasulo, 1997). For example, a study done by Brumark (2008) revealed the presence of recurrent argumentative features in family conversations, as well as the association between some argumentative structures and children's ages. Other works have shown how families of different cultures can be characterized by different argumentative styles (Arcidiacono & Bova, in press) and how specific linguistic indicators can trigger the beginning of argumentative debates in family (Arcidiacono & Bova, forthcoming). They also demonstrate the relevance of an accurate knowledge of the context in order to evaluate the argumentative dynamics of the family conversations at dinnertime (Arcidiacono et al., 2009).

For the above-mentioned reasons, family conversations are activity types in which parents and children are involved in different argumentative exchanges. By this study, I intend to focus on the implicitness and its functions within argumentative discussions in the family context, showing how it is a specific argumentative strategy adopted by parents during dinner conversations at home with their children. It is important to emphasize that argumentation constitutes an intrinsically context-dependent activity which does not exist unless it is embedded in specific domains of human social life. Argumentation cannot be reduced to a system of formal procedures as it only takes place embodied in actual communicative and non-communicative practices and spheres of interaction (van Eemeren et al., 2009; Rigotti & Rocci, 2006). Indeed, as van Eemeren & Grootendorst (2004) suggest, knowledge of the context is relevant in the reconstruction; and, more specifically, the so-called "third-order" conditions (ibid: 36-37), referring to the "'external' circumstances in which the argumentation takes place must be taken into account when evaluating the correspondence of argumentative reality to the model of a critical discussion. Thus, in analyzing family conversations, the knowledge of the context has to be integrated into the argumentative structure itself in order to properly understand the argumentative moves adopted by family members. Accordingly, the apparently irregular, illogical and incoherent structures emerging in these natural discourse situations (Brumark, 2006a) require a "normative" model of analysis as well as specific "empathy" towards the subject of the research, as both elements are necessary to properly analyze the argumentative moves which occur in the family context.

3. Data and method

The present study is part of a larger project**[ii]** devoted to the study of argumentation within the family context. The general aim of the research is to verify the impact of argumentative strategies for conflict prevention and resolution within the dynamics of family educational interactions. The data corpus includes video-recordings of thirty dinners held by five Italian families and five Swiss families. All participants are Italian-speaking.

In order to minimize the researchers' interferences, the recordings were performed by families on their own**[iii]**. Researchers met the families in a preliminary phase, to inform participants about the general goals of the research, the procedures, and to get the informed consent. Further, family members were informed that we are interested in "ordinary family interactions" and they were asked to try to behave "as usual" at dinnertime. During the first visit, a researcher was in charge of placing the camera and instructing the parents on the use of the technology (such as the position and the direction of the camera, and other technical aspects). Families were asked to record their interactions when all family members were present. Each family videotaped their dinners four times, over a four-week period. The length of the recordings varies from 20 to 40 minutes. In order to allow the participants to familiarize themselves with the camera, the first recording was not used for the aims of the research. In a first phase, all dinnertime conversations were fully transcribed**[iv]** using the CHILDES system (MacWhinney, 1989), and revised by two researchers until a high level of consent (80%) was reached.

After this phase, the researchers jointly reviewed with family members all the transcriptions at their home. Through this procedure, it has been possible to ask family members to clarify some unclear passages (in the eyes of the researchers), i.e. allusions to events known by family members but unknown to others, low level of recordings, and unclear words and claims.

3.1 The model of Critical Discussion

In order to analyze the argumentative sequences occurring in family, we are referring to the model of Critical Discussion (hereafter CD) developed by van Eemeren and Grootendorst (1984, 2004). This model is a theoretical device developed within the pragma-dialectics to define a procedure for testing standpoints critically in the light of commitments assumed in the empirical reality of argumentative discourses. The model of CD provides a description of what argumentative discourse would be as if it were optimally and solely aimed at

resolving a difference of opinion about the soundness of a standpoint**[v]**. It is relevant to underline that CD constitutes a theoretically based model to solve differences of opinion, which does not refer to any empirical phenomena. Indeed, as suggested by van Eemeren (2010), "*in argumentative reality no tokens of a critical discussion can be found*" (p. 128).

The model of CD consists of four stages that discussants should go through, albeit not necessarily explicitly, in the attempt to solve a disagreement. In the initial *confrontation* stage the protagonist advances his standpoint and meets with the antagonist's doubts, sometimes implicitly assumed. Before the *argumentation* stage, in which arguments are put forth for supporting/destroying the standpoint, parties have to agree on some starting point. This phase (the *opening* stage) is essential to the development of the discussion because only if a certain common ground exists, it is possible for parties to reasonably resolve – in the *concluding* stage – the difference of opinions**[vi]**.

In order to fully understand the logics of the model, it is necessary to refer to what van Eemeren and Houtlosser (2002) have developed as the notion of strategic maneuvering. It allows reconciling "*a long-standing gap between the dialectical and the rhetorical approach to argumentation*" (p. 27), and takes into account the arguers' personal motivations for engaging in a critical discussion. In fact, in empirical reality discussants do not just aim to perform speech acts that will be considered reasonable by their fellow discussants (dialectical aim), but they also direct their contributions towards gaining success, that is to achieve the perlocutionary effect of acceptance (rhetorical aim).

In the present study, the model is assumed as a general framework for the analysis of argumentative strategies in family conversations. It is intended as a grid for the investigation, having both a heuristic and a critical function. In fact, the model can help in identifying argumentative moves as well as in evaluating their contribution to the resolution of the difference of opinion.

3.2 Specific criteria of analysis

According to the model of CD and in order to get an analytic overview of some aspects of discourse that are crucial for the examination and the evaluation of the argumentative sequences occurring in ordinary conversations, the following components must be elicited: The difference of opinion at issue in the confrontation stage; the premises agreed upon in the opening stage that serves as

the point of departure of the discussion; the arguments and criticisms that are – explicitly or implicitly – advanced in the argumentation stage, and the outcome of the discussion that is achieved in the concluding stage. Besides, once the main difference of opinion is identified, its type can also be categorized (van Eemeren & Grotendoorst, 1992). In a *single* dispute, only one proposition is at issue, whereas in a *multiple* dispute, two or more propositions are questioned. In a *nonmixed* dispute only one standpoint with respect to a proposition is questioned, whereas in a *mixed* dispute two opposite standpoints regarding the same proposition are questioned.

4. Dinnertime conversations: A qualitative analysis

In this section I will present a qualitative analysis carried out on transcripts. In this work, I have identified the participants' interventions within the selected sequences and I have examined the relevant (informative) passages by going back to the video data, in order to reach a high level of consent among researchers. Finally, I have built a collection of instances, similar in terms of criteria of the selection, in order to start the detailed analysis of argumentative moves during family interactions. As each family can be considered a "case study", I am not interested here in doing comparisons among families. For this reason, and in order to make clear and easy the presentation of the excerpts, the cases below present situations considered and framed in their contexts of production, accounting for certain types of argumentative moves.

4.1 Analysis

In order to analyze the functions of implicitness within family argumentations, I am presenting two excerpts as representative case studies of argumentative sequences among parents and children, in which parents make use of sentences with a high degree of implicitness, with the goal of verifying to what extent implicitness can be considered a specific argumentative strategy adopted by parents during dinner conversations with their children in order to achieve their goal. I have applied the above-mentioned criteria of analysis in order to highlight the argumentative moves of participants during the selected dinnertime conversations.

The first example concerns a Swiss family (case 1) and the second is related to an Italian family (case 2). In the excerpts, fictitious names replace real names in order to ensure anonymity.

4.2 Case 1: "The noise of crisp bread"

Participants: MOM (mother, age: 35); DAD (father, age: 37); MAR (child 1, Marco, age: 9); FRA (child 2, Francesco, age: 6).

All family members are seated at the table waiting for dinner.

1 *FRA: mom. [=! a low tone of voice]
2 *MOM: eh.
3 *FRA: I want to talk:: [=! a low tone of voice]
→ *FRA: but it is not possible [=! a low tone of voice]
→ *FRA: because <my voice is bad> [=! a low tone of voice]
4 *MOM: absolutel not
→ MOM: no::.
5 *FRA: please:: mom:
6 *MOM: why?
7 *FRA: [=! nods]
8 *MOM: I do not think so.
→ *MOM: it's a beautiful voice like a man.
→ *MOM: big, beautiful::.
9 *FRA: no.
%pau: common 2.5
10 *MOM: tonight: if we hear the sound of crisp bread ((the noise when crisp bread is being chewed)) [=! smiling]
11 *FRA: well bu [:], but not::: to this point.
%pau: common 4.0

The sequence starts with the intervention of the child (turn 1, "*mom*") that selects the addressee (the mother), with a low tone of voice as sign of hesitation. After a sign of attention by the mother (turn 2, "eh"), Francesco makes explicit his request "turn 3, ("*I want to talk*") and the problem that is at stake. When he explains the reason behind his opinion, the mother expresses her disagreement and tries to moderate her intervention through repetition of the genitive mark and the prolonging of the sound (turn 4, "*absolutely not, no::*"). At this point, the discussion is at the phase of the confrontation stage. In fact, it becomes clear that there is a child's standpoint (*my voice is bad*) that meets the mother's contradiction. In particular, in turn 5 Francesco does not provide further arguments to defend his position. In fact, for him, it is so evident that his voice is bad and he tries to convince the mother to align to this position through a recontextualization (Ochs, 1992) of the claim ("*please:: mom:*"). The prolonging of

the sound is thus a way to recall the mother's attention to the topic of discussion (and the different positions about the topic). In turn 6 the mother asks the child the reason behind such an idea ("*why?*"), expressing her need for explanation and clarification. From an argumentative point of view, the sequence turns to a very interesting point. In fact, Francesco does not provide further arguments to defend his position, but he answers with a non-verbal act which aimed at confirming his position (*he nods as to say that it is self-evident*). Despite the mother's request, it is clear that the child evades the burden of proof. At this point the mother states that she completely disagrees with her child (turn 8, "*I do not think so*"), and by assuming the burden of proof she now accepts to be the protagonist of the discussion. Indeed, she provides arguments in order to defend her standpoint (*your voice is not bad*), telling her child that his voice is beautiful as that of a grown-up man.

At this point, the mother uses an ironic expression, an argument with a high degree of implicitness (turn 10, "*tonight if we hear the sound of crisp bread*"). Indeed, she tells the child that if that evening, strange noises were heard, such as that of crisp bread being chewed, it would be her child's voice. It is interesting to notice that the mother uses the first person plural ("*we hear the sound*") in order to signal a position that puts the child *versus* the other family members. The presumed alliance among family members reinforces the idea that the claim of Francesco is not supported by the other participants. The use of epistemic and affective stances (turn 8, "*a beautiful voice…big, beautiful*") and the irony (turn 10) emphasize the value of the indexical properties of speech through which particular stances and acts constitute a context.

In pragma-dialectical terms, from turn 5 to turn 10, the mother and the child go through an argumentation stage. In turn 11 Francesco maintains his standpoint but he decreases its strength in a way ("*well but not to this point*"). Indeed, we could paraphrase Francesco's answer as follows: *Yes, I have a bad voice, but not so much! Not to that point, not as strange as the noise of crisp bread being chewed!* The child's intervention in turn 11 is an opportunity to re-open the conversation about the voice, in particular if we consider the beginning of the claim ("*well*") as a proper key site (Vicher & Sankoff, 1989) to potentially continue the argumentative activity. However, the common pause of 4 seconds closes the sequence and marks the concluding stage of the interactions.

In argumentative terms, we could reconstruct the difference of opinion between

the child and his mother as follows:
Issue: *How is Francesco's voice?*
Protagonist: both mother and child
Antagonist: both mother and child
Type of difference of opinion: single-mixed

Mother's Standpoint: (1.) *Francesco's voice is beautiful*
Mother's Argument: (1.1) *It is big, like a grown-up man*
Child's Standpoint: (1.) *My voice is bad*
Child's Argument: (1.1.) (non-verbal act: *he nods as to say that it is self-evident*)

4.3 Case 2: "Mom needs the lemons"
Participants: MOM (mother, age: 32); DAD (father, age: 34); GIO (child1, Giovanni, age: 10); LEO (child2, Leonardo, age: 8); VAL (child3, Valentina, age: 5).
All the family members are eating, seated at the table.
1 *LEO: Mom:: look!
→ *LEO: look what I'm doing with the lemon.
→ *LEO: I'm rubbing it out.
→ *LEO: I'm rubbing it out!
→ *LEO: I'm rubbing out this color.
%sit: MOM takes some lemons and stoops down in front of LEO so that her face is level with his.
%sit: MOM places some lemons on the table.
2 *LEO: give them to me.
3 *MOM: eh?
4 *LEO: can I have this lemon?
5 *MOM: no:: no:: no:: no::
6 *LEO: why not?
7 *MOM: why not?: because, Leonardo, mom needs the lemons
8 *LEO: why mom?
9 *MOM: because, Leonardo, your dad wants to eat a good salad today
10 *LEO: ah:: ok mom

During dinner, there is a difference of opinion between Leonardo and his mother. Leonardo, in fact, wants to have the lemons, that are placed on the table, to play with (turn 2), but the mother says that he cannot have them (turn 5).

5 *MOM: no:: no:: no:: no::
The mother's answer is clear and explicit: she does not want to give the lemons to her child. The discussion is at the phase of the confrontation stage. In fact, it becomes clear that there is a child's standpoint (*I want the lemons*) that meets the mother's contradiction.

At this point Leonardo (turn 6) asks his mother why he cannot have the lemons. The mother answers (turn 7) that she needs the lemons. But as we can note from the Leonardo's answer in turn 8, this argument is not sufficient to convince him to change his opinion. In fact, he continues to ask his mother:

6 *LEO: why not?
7 *MOM: why not?: because, Leonardo, mom needs the lemons
8 *LEO: why mom?

At this point, the mother uses an expression with a high degree of implicitness:

9 *MOM: because, Leonardo, your dad wants to eat a good salad today

Indeed, she tells the child that his dad wants to eat a good salad, and that in order to prepare a good salad she needs the lemons. In pragma-dialectical terms, from turn 6 to turn 9, the mother and the child go through an argumentation stage. In turn 10 Leonardo accepts the argument put forward by the mother and, accordingly, marks the concluding stage of this interaction.

In argumentative terms, we could reconstruct the difference of opinion between the child and his mother as follows:
Issue: *Can Leonardo have the lemons?*
Protagonist: both mother and child
Antagonist: both mother and child
Type of difference of opinion: single-mixed
Mother's Standpoint: (1.) *You can't have the lemons*
Mother's Argument: (1.1) *mom needs the lemons*
Mother's Argument (1.2) *dad wants to eat a good salad today*
Child's Standpoint: (1.) *I want the lemons*

5. Discussion
In both sequences parents make use of the implicitness during conversations at home with their children in order to achieve their goal. In the first excerpt, the

mother puts forward an argument with implicit meaning in order to persuade her child to retract his standpoint. In turn 10, by saying:
10 *MOM: tonight [:] if we hear the sound of “bread schioccarello” ((the noise when crisp bread being chewed)) [=! smiling] [=! ironically]
she is telling the child that if that evening all family members (‘*we hear*’) heard strange noises, such as that of crisp bread being chewed, it would be the child’s voice. In my opinion, the child’s answer makes it clear that he understood the implicit meaning of the mother’s argument. Indeed, Francesco maintains his standpoint, but in a certain way, he decrease its strength.
11 *FR1: well bu [:] but not:: to this point.
We can paraphrase Francesco’s answer as follow: “*Yes, I have a bad voice, but not so much! Not to that point, not as strange as the noise of crisp bread being chewed!*”.

According to leading scholars, commenting ironically on the attitudes or habits of children, appears to be a socializing function adopted by parents in the context of family discourse (Rundquist 1992; Brumark 2006b). In the first excerpt, commenting ironically Francesco’s standpoint by means of an argument with a high degree of implicitness, could be also interpreted as the specific form of strategic maneuvering adopted by the mother with her child in order achieve her goal. Furthermore, it is important to stress that a necessary condition for the effectiveness of this form of strategic maneuvering is that the implicit meaning is clear and shared by both arguers (i.e. Francesco understands the implicit meaning of the mother’s utterance).

In the first case, we saw how the mother can use an argument with implicit meaning in order to persuade her child to retract his standpoint. On the other hand, in the second excerpt, the mother tries to convince her child to accept her standpoint. Indeed, in turn 9 she says:
9 *MOM: because, Leonardo, your dad wants to eat a good salad today

In this case it is clear and explicit that the mother refers to father’s anger and authority, and she does so implicitly. Besides, by anticipating the possible consequences of his behavior, the mother is implicitly telling the child that the father might be displeased by the person who was the cause of him not having a good salad. Now, the mother’s behavior could be interpreted as the specific form of strategic maneuvering adopted with her child in order achieve her goal.

Furthermore, as suggested by Caffi (2007), using an argument with a high degree of implicitness can "mitigate" the direction of an order. Accordingly, the order is presented in a less direct way, we could say "more gentle", and so the child perceives it not as an imposition. For instance, saying that the child cannot have the lemons because dad wants to eat a good salad, can appear in the child's eyes as a desire that has to be carried out, and not an order without any justification.

6. Conclusion

In this paper I have tried to show how implicitness can be considered a specific argumentative strategy adopted by parents during dinner conversations with their children in order to achieve their goals. At this point it seems appropriate to take stock of the acquisitions of the ongoing research presented here, listing also the approximately drawn solutions that need to be specified.

Firstly, implicitness appears to be a specific argumentative strategy used by parents in family conversations with their children. Indeed, implicitness in the cases analyzed has two specific functions: In the first case, implicitness is a specific form of strategic maneuvering adopted by the mother to persuade her child to retract or reduce the strength of his standpoint. In the second case, anticipating the possible consequences of his behavior, by means of an argument with a high degree of implicitness, is another form of strategic maneuvering adopted by the mother in order to persuade her child to accept her standpoint.

Secondly, considering the two cases analyzed, we have seen that in order to be an effective argumentative strategy, implicitness has to be clear and understood by both parties. Lastly, parents seem to make use of the implicitness to put forward their arguments in a less directive form. In other words, by means of implicitness parents mitigate the direction of an order.

Considering the two cases as part of a larger research project, some questions about the argumentative moves of family members at dinnertime still remain unanswered. In particular, to provide further analyses of the collected data, we need to understand to what extent family argumentation corresponds to a reasonable resolution of the difference of opinion, to highlight the specific nature of argumentative strategies used by family members and to construct a typology of the several functions of the implicitness in the argumentative exchanges between family members, defining whether it is possible to consider young children as reasonable arguers, by taking into consideration their communicative

and cognitive skills.

Appendix: *Transcription conventions*
. falling intonation
? rising intonation
! exclaiming intonation
, continuing intonation
: prolonging of sounds
[simultaneous or overlapping speech
(.) pause (2/10 second or less)
( ) non-transcribing segment of talk
(( )) segments added by the transcribers in order to clarify some elements of the discourse

NOTES
[i] The notion of activity type has been developed by Levinson (1979), in order to refer to a fuzzy category whose focal-members are goal-defined, socially constituted with constraint on participants, settings and other kinds of allowable contributions. According to van Eemeren (2010), communicative activity types are conventionalized practices whose conventionalization serves, through the implementation of certain "genres" of communicative activity, the institutional needs prevailing in a certain domain of a communicative activity. Within this framework, family dinner is a specific communicative activity type within the domain of communicative activity named interpersonal communication. In their model of communication context, Rigotti and Rocci (2006) characterize the activity type as the institutional dimension of any communicative interaction – interaction schemes – embodied within an interaction field.
[ii] I am referring to the Research Module "Argumentation as a reasonable alternative to conflict in family context" (project n. PDFMP1-123093/1) founded by Swiss National Science Foundation. It is part of the ProDoc project "Argupolis: Argumentation Practices in Context", jointly designed and developed by scholars of the Universities of Lugano, Neuchâtel, Lausanne (Switzerland) and Amsterdam (The Netherlands).
[iii] From a deontological point of view, recordings made without the speakers' consent are unacceptable. It is hard to assess to what extent informants are inhibited by the presence of the camera. However, I tried to use a data gathering procedure that minimizes this factor as much as possible. For a more detailed

discussion, cf. Arcidiacono & Pontecorvo (2004)..

[iv] For the transcription symbols, see the Appendix.

[v] Standpoint is the analytical term used to indicate the position taken by a party in a discussion on an issue. As Rigotti and Greco Morasso (2009) put it: "*a standpoint is a statement (simple or complex) for whose acceptance by the addressee the arguer intends to argue*" (p. 44).

[vi] I agree with Vuchinich (1990) who points out that real-life argumentative discourse does not always lead to one "winner" and one "loser". Indeed, frequently the parties do not automatically agree on the interpretation of outcomes. In this perspective, the normative model of critical discussion has to be systematically brought together with careful empirical description.

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ISSA Proceedings 2010 – The Latin Cross As War Memorial And The Genesis Of Legal Argument: Interpreting Commemorative Symbolism In Salazar V. Buono

In 1934, the Veterans of Foreign Wars (VFW), a private organization, erected a Latin cross**[i]** on federal land in the Mojave Desert to memorialize the veterans of World War I.**[ii]** The Mojave Cross is located in the *Mojave National Preserve*, on land known as Sunrise Rock.**[iii]** The presence of the cross first became an issue in 1999, when the Park Service denied a request from a Utah man to add a Buddhist shrine to the land

near the cross. Subsequently, in 2001, Frank Buono, a former Park Service employee, filed suit against the Park Service alleging the cross violates the Establishment Clause of the First Amendment to the United States Constitution, which sets parameters regarding the relationship between government and religion.**[iv]**

In 2002, the lower (trial) court found for Buono and ordered the Park Service to remove the Mojave Cross. On appeal, the Ninth Circuit Court of Appeals (Ninth Circuit) agreed with the lower court, affirming the conclusion that "the presence of the cross on federal land conveys a message of endorsement of religion," and permanently enjoined the government from maintaining the cross on federal land (*Buono v. Norton*, 2004). The Park Service prepared to remove it. Meanwhile, in 2001, the U.S. Congress prohibited the use of federal funds to remove the cross (Consolidated Appropriations Act, 2001). Then, in 2002, the Mojave Cross was designated a national memorial (Department of Defense Appropriations Act, 2002).**[v]** Congress again prohibited the use of federal funds to remove the cross (Department of Defense Appropriations Act, 2003). And, finally, Congress transferred one acre of land, on which the Mojave Cross sits, to the Veterans of Foreign Wars with the requirement that if it ceased to be a war memorial the land would revert to the federal government (Pub. L. No. 108-87, 2003).**[vi]** The Ninth Circuit concluded that this last move was merely an attempt to circumvent the constitutional violation and thus stopped the transfer (*Buono v. Kempthorne*, 2007). The Department of Justice appealed this latter decision to the U.S. Supreme Court, arguing that the government would have to tear down a "memorial."**[vii]** The VFW filed an *amicus* brief arguing that if the Ninth Circuit's opinion were to be affirmed, memorials in national cemeteries would have to be removed, including the Argonne Cross and the Canadian Cross of Sacrifice at the Arlington National Cemetery (Veterans of Foreign Wars *et al.,* 2009). In contrast, the Jewish War Veterans of the United States filed an *amicus* brief arguing that the Mojave Cross is "a profoundly religious Christian symbol," rather than a universal commemorative symbol of war dead, and that the federal government's actions toward the cross and adjoining land underscores, rather than remedies, its endorsement of that religious symbol (2009, p. 5).

The Supreme Court decision in *Salazar v. Buono* was announced April 28, 2010. The Court chose to narrow its consideration to the validity of the land transfer, ruling 5-4 that the transfer did not constitute a violation of the original injunction.

The Court also remanded the case back to the lower court to decide whether or not the land transfer constituted an "illicit governmental purpose" (*Salazar v. Buono,* 2010, pp. 1819-21). In narrowing the grounds for the decision in this way the Court left unresolved many of the questions that are raised by the presence of any cross on federal land, no matter how remote. Nevertheless, the written opinions of the Justices strayed far beyond the narrow confines of the decision itself, addressing many of the arguments used for and against the land transfer, the significance of the memorial, and its propriety.

This paper will examine the Mojave Cross case to explore the argumentative connection between religious symbols and public memorials. Our argument is that war memorials, such as the Mojave Cross, constitute a classical enthymematic (visual) argument that the U.S. Supreme Court attempted to silence by altering the space containing the memorial (or argument), thereby secularizing the memorial and stripping it of its (religious) meaning. We begin with histories of the legal precursors to the case and the generic evolution of war memorials, illuminating the contested nature of memorializing. Next, we use the Mojave Cross case to examine how monuments function as arguments, articulating three premises: that physical space is a key argumentative factor in memorializing; that placement in and ownership of the space serve as the memorial's "voice" or marker of intent; and that this spatial context aids in negotiating the secular/religious dichotomy. The policy implications raised by this case are significant, for both past and future memorializations and for legal arguments that can be made regarding the relationship of the individual to the state in matters of religious observance. What appears to be a relatively simple case on its face opens up a broad range of significant theoretical issues fraught with complicated legal and commemorative significance.

1. Background

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" (U.S. Const. amend. I.). These prohibitions are referred to, respectively, as the Establishment Clause and the Free Exercise Clause.

Specifically, the Establishment Clause prevents the government from promoting or affiliating itself with any religious doctrine or organization (*County of Allegheny v. American Civil Liberties Union,* 1989, pp. 590-91), or from having an official preference for one religious denomination over another. "Government in

our democracy, state and national, must be neutral in matters of religious theory, doctrine and practice" (*Larson v. Valente*, 1982, p. 244). The Establishment Clause has been used to challenge religious prayer in public schools and Christmas displays on government property, among other issues.

Supreme Court jurisprudence has fluctuated on whether the Establishment Clause demands complete separation of religion and government or, alternatively, whether it simply commands non-preferential accommodation of religious speech and symbols. This ambivalence has resulted in a number of legal tests that are used to determine whether a specific government symbol violates the Establishment Clause. Among the criteria are whether the symbol advances or inhibits religion, whether a reasonable observer of the display would perceive a message of governmental endorsement or sponsorship of religion, and whether there is a perceived coercive effect. Recently, the Supreme Court employed a "passive monument" test, which inquired whether a plainly religious display conveyed a historical or secular message, as opposed to a religious message, in a specific non-religious context (*Van Orden v. Perry*, 2005).

The identity of the speaker matters tremendously under First Amendment jurisprudence. "[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect" (*Santa Fe Indep. Sch. Dist. v. Doe*, 2000, p. 302).

In *Pleasant Grove City v. Summum*, the Court addressed the speech of government owned monuments in particular: "government-commissioned and government-financed monuments speak for the government" because "persons who observe donated monuments routinely – and reasonably – interpret them as conveying some message on the property owner's behalf." Whether the government commissions, finances, or displays a memorial on its own land, "there is little chance that observers will fail to appreciate the identity of the speaker" (2009, p.1133). Similarly, Justice Stevens, dissenting in *Capitol Square Review & Advisory Bd. v. Pinette*, observed, "[T]he location of the sign is a significant component of the message it conveys" (1995, p. 800).

These two cases not only instantiate the notion of monuments in general as government speech, they also serve as precedent for the Mojave Cross case, illustrating that, even as a national monument, the cross engaged in a form of

government speech. The question then should be the propriety of using a universally Christian symbol to "speak" for the government on behalf of all veterans of World War I.

2. A Brief History of War Memorials Prior to WWII

The sponsorship of war memorials has been a major area of controversy, involving veterans groups, state and federal organizations, and most recently, public insistence on private donations. However, according to architectural historian Teresa B. Lachin, "between 1880 and 1915, veterans groups and patriotic organizations were among the most active sponsors of monument crusades," when newly established groups such as the American Legion and the Veterans of Foreign Wars became effective lobbyists for state and local projects (pp. 21, 44). In 1923, the U.S. Congress created the American Battle Monuments Commission, which "established official commemorative standards for military monuments built on battle sites and federally-owned property" (Lachin, p. 32). Differences in opinions over the appropriate design of the war memorials arose as the result of a general shift in architectural style away from a legacy of Civil War memorializing, conflicted feelings over U.S. participation in World War I, and a focus on overseas memorializing at notable battlefield sites. "Religious images and Christian symbols were…commonly used to express the ideals of 'sacrifice,' collective heroism, and the 'sacred vocation' of military service, themes which had emerged in Europe and America in the early twentieth century," and these spiritual dimensions of military service were embraced strongly by sponsoring veterans groups (Lachin, p. 32).

The lack of symbolic universality implied by the cross was a consideration during World War I. Sectarian, yet inclusive, forms of religious symbolism occurred in gravesites of American war dead across Europe, which employed "spacious fields of uniformly lined American crosses" along with "intermittent Stars of David headboards [which] marked the dead of the Jewish faith" (Budreau, p. 120). Even then, the aesthetics of different sectarian grave markers led U.S. Army Chaplain Charles C. Pierce to recommend in July 1919 a standardized grave marker, similar to U.S. battlefield cemeteries and devoid of religious symbolism (Budreau, p. 122).

At the end of World War I, returning veterans, as well as the U.S. government, were initially more concerned with overseas memorializing. They wanted to make certain battlefields and cemeteries were properly marked and commemorated;

stateside commemoration of World War I veterans was left largely to state and local organizations. Thus it is not surprising that veterans organizations and local community leaders "preferred traditional designs because they were familiar and even reassuring symbols of 'sacrifice' and fraternal or civic duty" as well as the fact that "vernacular designs…were among the most affordable and readily available monument types" (Lachin, p. 45). Moreover, "local and community groups were more limited in their economic resources and generally used traditional and vernacular designs to honor their 'World War' veterans" (Lachin, p. 42).

King argues in his book about World War I memorials in Britain that, "the common purpose amongst all who commemorated the dead was…expressed in their recognition of the sanctity of memorials"; and the most straightforward artistic convention to mark the memorial as sacred "was the use of the cross, recognizable both as the sacred symbol of Christianity and as, by the early twentieth century, a common form of grave marker, more especially the typical marker used during the war to identify the graves of soldiers" (1998, pp. 230, 231). King also notes that "the process of transformation through which traditional forms acquired connotations relating them specifically to the recent war [World War I] was most conspicuous in the case of the cross" (p. 129). In 1921, Charles Jagger, a British sculptor and World War I veteran, proclaimed that the cross "has been, and probably always will be the symbol of the Great War" (in King, p. 129).

Indeed, the VFW members who erected a memorial in the Mojave Desert employed exactly this symbol. And it is the presence of the cross specifically that drives this case, complicated by the National Park Service's refusal to allow a Buddhist shrine to share space with the cross. This raises the question of what it is the cross represents – a war memorial or something more (or less)? There is no question it was originally intended to be a memorial to dead comrades-in-arms at the time that it was erected by returning war veterans.**[viii]** Yet the Mojave Cross was erected on federally owned land, without the express permission of the government. By declaring the Mojave Cross a national memorial (while the appeal was pending), Congress further complicated the case, thereby raising the question of whether one can nationally memorialize private speech without endorsing the message.

The identity of the speaker is also tied to space when the issue is a religious

artifact on federal land. How is space negotiated in memorializing? What is being memorialized; is it the event or the war dead? Public memorializing such as the Vietnam Veterans and World War II Memorials undergo complex vetting processes that explicitly consider First Amendment issues and multiple audiences. Privately created shrines such as the Mojave Cross are personal, driven by grief and an immediate connection with the dead, and while they may hold symbolic meaning to a wider audience, they are not necessarily created for that audience, nor are they beholden to the religious neutrality that the federal government is expected to undertake.

Thus, when the Mojave Cross was declared a national memorial in 2002, its religious symbolism became a significant problem with regard to public memorializing. Classical commemorative architecture, used for many memorials, embraced signs which are "self-referential and limited to a closed system of legitimate signifiers" (Blair *et al*., 1991, p. 266) and which can consistently be decoded by audiences familiar with both the sign and signifier [*e.g*., the cross]. Yet the reliable interpretation of a sign is tied to the viewer's understanding of its conventions – or "agreement about how we should respond to a sign" (Crow, 2003, p. 58) – and "habits and conventions may of course change over time" (Kurzon, 2008, p. 288-289). As social symbols, "war memorials are not endlessly rigid and stable. Their significance has to be continually defined and affirmed by manifestation of the relevant sentiments" (Barber, 1949, p. 66). Such reaffirmation is made difficult in this case since there is no longer a plaque to identify the cross as a war memorial. When the signifiers change in meaning, or when the linguistic community changes, then war memorials, like other symbolic forms, change or lose their meaning: "[T]here are a large number of memorials from previous wars which have lost their meaning for the present generation" argues Barber (p. 66). Especially when considering the relationship between the symbolic and the aesthetic, "the aesthetic aspect of the memorial place or object must not offend those who want their sentiments symbolized" (Barber, p. 67). In the increasing religious pluralism of late-20th to early-21st century America, a symbol with such religious specificity as a Latin cross violates this commemorative expectation when declared a national symbol of the war dead.

We contend that the message conveyed by war memorials in general, and the Mojave Cross in particular, is not only government speech, but an argumentative claim about how to view both the war and the war dead. Recent Supreme Court

precedent supports this view (see *Capitol Square Review and Advisory Bd. V. Pinette*, 1995, and *Pleasant Grove City v. Summum*, 2009). Indeed, the recognition that monuments make an argumentative claim is the underlying assumption of the rulings on government speech. The essence of the Establishment Clause is to preclude the argumentative nature of government speech surrounding religious symbols on government property. If the symbol is not argumentative, there can be no violation of the Establishment Clause.

Smith (2007) explains how monuments and other visual symbols work argumentatively, once Aristotle's notion of the enthymeme is understood in its classical sense of a "syllogism based on probabilities or signs" (p. 121). Smith notes, "Enthymemes consist not only of logical propositions, expressed or implied, but also of appeals to emotions and character. For Aristotle, these modes of appeal are very closely related because even an emotional response requires reasoned judgment…" (p. 120).

Successful enthymemes identify with the "common opinions of their intended audiences" (Smith, p. 120). Those who create visual enthymemes [*e.g.,* war memorials and monuments] discover these common opinions in the culture and in the immediate context of the memorial, "incorporating them into their messages" (Smith, p. 120). Birdsell and Groarke (1996) contend that commonplaces – culture-specific grounds of potential agreement between speakers and audiences – are not limited to verbal arguments; rather, visual commonplaces argue just as verbal ones do. Thus, according to Smith, a 'speaker' – whether government or private citizen – who "creates images that identify with an audience's common opinions can be said to be arguing" (Smith, p. 121).

However, these "common opinions" take many forms and have more than one side, which, in a visual argument, are not presented. The inability of visual arguments to depict multiple sides of an argument does not mean these opposing sides do not exist; they are simply not articulated (Blair, 1996; Smith, 2007). The Supreme Court explicitly acknowledged this argumentative characteristic of memorials when it rejected the idea that "a monument can convey only one 'message'"; indeed, a public memorial "may be intended to be interpreted, and may in fact be interpreted by different observers, in a variety of ways" (*Pleasant Grove City v. Summum*, 2009, pp. 1135, 1136).

Thus, the argument occurs enthymematically through the form and placement of

the memorial. Foss (1986) elaborates this notion in her essay on persuasive facets of the Vietnam Veteran's Memorial, arguing that the number of messages a memorial can convey is limited by the creator's intent and the material features of the display, thereby diminishing or eliminating any interpretive ambiguity. The form of this particular memorial – the Latin cross – significantly lessens the variety of ways it may be interpreted, adding to its argumentative power. Similarly, the placement of the cross on federal land (or surrounded by federal land) shapes the viewers' understanding of the speaker in this instance.

The Supreme Court has acknowledged the relationship between form and surroundings when determining an Establishment Clause violation. In a case questioning the display of the Ten Commandments on the grounds of a local courthouse, Justice Scalia argued that, in combination with other symbols, a statue in the form of a tablet depicting the commandments would be interpreted as a religious icon, but would be read in conjunction with the other legal images present so that the viewer would understand the symbol's "argument" – namely that Judeo-Christian commandments undergird American law (*McCreary County v. American Civil Liberties Union of Ky.*, 2005). However, as noted above, no contextual or supporting visual cues exist with the Mojave Cross. Indeed, the sign that originally identified the cross as a war memorial was lost over time and was never replaced. Thus, it is unreasonable to expect an observer to "read" the enthymematic argument in the way the Court describes; it is just as likely to be read as government endorsement of a particular reading of a religious artifact.

Writing the plurality opinion in *Salazar*, Justice Kennedy asserts that the observer should consider the intent of those who placed the cross on Sunrise Rock to "honor fallen soldiers," rather than "concentrat[ing] solely on the religious aspects of the cross, divorced from its background and context" (p. 1820). Yet Kennedy's assertion is problematic, when considered against standards of visual argument. Foss (1986) argues that a signifier cannot be devoid of material meaning – its form suggests meaning – and is central to the viewer's understanding of the meaning of the artifact, through the enthymematic process. The iconic form of the Latin cross enthymematically reflects both the Christian attitudes of the VFW members who placed it, as well as the shared attitude of the people who took active steps to save it – namely, Congress. Thus, we argue, the Christian message is in large part *their* story, not simply the local VFW's story. Justice Stevens made this point in his dissent when he suggested that, post-

transfer, the message is even clearer, because after being enjoined from displaying it, Congress transferred the land specifically for the purpose of preserving the display (*Salazar*, p. 1832-33).

Such confusion of meaning stems from the duality of voice that comes from commemorative sites in general. Such sites put forth two dramas: "One story… is 'its manifest narrative – the event or person heralded in its text or artwork.' The second is 'the story of its erection or preservation'" (Balthrop, Blair, and Michel, p. 171). Part of the dispute over the meaning of the Mojave Cross comes from the duality of its voice, as the plurality and dissenting opinions in *Salazar* diverge along the lines of these narratives. The plurality opinion, written by Justice Kennedy, asserts that the proper way to read the Mojave Cross is to consider its manifest narrative, spoken in the voice of the veterans who constructed it. Seen this way, the cross was placed with the intent to "honor fallen soldiers," and "although certainly a Christian symbol, the cross was not emplaced on Sunrise Rock to promote a Christian message" (*Salazar*, 2010, p. 1816). Using this reading of the Mojave Cross, Kennedy asserted that Congress was only attempting to preserve the manifest narrative of the commemorative site by transferring the land into private ownership. Now that the Mojave Cross is in private hands, concurred Justice Scalia, the only question that matters is whether that manifest narrative is legal.

Justice Stevens considers the second story – the story of the site's preservation – in his dissent in *Salazar*. Stevens argues that when "Congress passed legislation officially designating the 'five-foot-tall white cross'…'as a national memorial commemorating United States participation in WWI and honoring the American veterans of that war,'… the cross was no longer just a local artifact; it acquired a formal national status of the highest order" (*Salazar,* 2010, p. 1834). This means that, for Stevens, changing the scene of the Mojave Cross does not change the voice: "Once that momentous step was taken, changing the identity of the owner of the underlying land could no longer change the public or private character of the cross. The Government has expressly adopted the cross as its own" (*Salazar*, 2010, p. 1834). In focusing on the first story, the Court attempts both to freeze contemporary readings of the Cross in the [interpreted] voice of the original authors, "made whole" in the plurality's mind when the land was transferred to private ownership, and to ignore the changes to the symbol made by the second story – the one of its preservation.

Palczewski and McGeough (2010) argue persuasively, however, that "public memorializing is not a simple process of fixing history. What is memorialized is not a given, and in the process of memorializing particular public arguments are advanced. This explains why 'public memorials become sites of ideological struggle whenever they seek to shape and direct the past, present, and future in the presence of competing articulations'" (p. 33). Congress had several options in dealing with the Mojave Cross controversy: it could have allowed other religious symbols to be added; it could have changed the memorial to more clearly reflect the stated message or to avoid the sectarian message; or it could have allowed the cross to be removed, as was Park Service policy. Instead, the actions performed by the federal government in relation to the Mojave Cross included: denying a petition to place a Buddhist shrine next to it; passing an act to declare it a national memorial; passing a separate act to forbid the removal of national memorials commemorating World War I (of which there is only one – the Mojave Cross); and, finally, transferring the land to private owners under the condition that they keep the land as a war memorial or else forego their property rights. This story of preservation is not only remarkably active – it also highlights the significance and strategic use of space in defining the "voice" of the memorial.

3. The Role of Space in Visual Argument

Key to the Mojave Cross case, and to memorializing in general, is the sense of space. Unlike other war memorials employing religious symbolism, the Mojave Cross sits on land that holds neither spatial or historical connection to the war, nor to the soldiers that its builders commemorated. The only significance provided by the space, then, is its ownership. This fact renders the space surrounding the cross fungible, a feature that has been key to this controversy. We argue here in support of the following observations: first, that physical space is a key element of memorializing; second, that the secular/religious dichotomy is negotiated by the symbol's spatial context; and finally, that the "voice" or intent of the symbol is tied to the geography and ownership of that space.

The lack of physical space memorializing World War I veterans was significant, because, as we note above, post-war memorials either focused on overseas battlefields or on utilitarian "living memorials," usually in the form of named highways or auditoriums. The functional, living memorials of the post-World War I era United States "could not fulfill the human desire for monumentality and 'the need of the people to create symbols which reveal their inner life, their actions

and their social conceptions'" (Lachin, p. 47). Furthermore, "physical objects and places are almost always required for the localization of the memorial symbol…[and] most war memorials implicitly recognize this social function of physical space" (Barber, p. 65).

Thus, during oral arguments for *Salazar v. Buono* in the U.S. Supreme Court, Justice Scalia asserted that the cross is "erected as a war memorial…in honor of all the dead," and that "the cross is the most common symbol of…the resting place of the dead" (transcript, 2009, pp. 38-39). The above-mentioned history of war memorializing indicates that the latter part of Scalia's observation is true; yet there are no war dead in the Mojave Desert. Scalia's point of view comes from battlefields and cemeteries, where religious symbols have been used throughout the 20th century, although they were not exclusively crosses. The scene is different, and the "sacred" ethos of the memorial comes from the interment, not from the symbol. Even then, many of these memorials used various [*e.g.,* non-Latin] crosses such as the Celtic Cross and the Cross of Sacrifice (or War Cross), which was specifically designed by the Imperial War Graves commission in World War I to differentiate it from more general Christian iconography.**[ix]**

The presence of crosses marking war dead also changes the argument made by a memorial. In the context of a military cemetery – rows and rows of markers on a battlefield – the cross becomes secularized, marking sacred space sanctified by the blood of the fallen. The cross as gravestone marks an already sacred space, and serves as a sign for the site of a dead soldier. The cross-as-grave-marker is not generally interpreted as intending to promote Christianity to the viewer; rather, it serves as an indicator of the place of rest for an individual's remains, and potentially of that person's religious belief – just as Stars of David adorn the gravesites of Jewish war veterans.

Thus, in most instances when religious symbols are used, they are the symbol of the referent – the "sacred" ground of the battlefield or cemetery, where the blood of the war dead consecrated the space. But in this case, the reverse has occurred – it is only the presence of a commemorative cross that makes this space sacred. The current fight in the Mojave Cross case is over the land, and the only thing that makes this land different than anything around it is the cross: it holds no other commemorative significance. As Donofrio points out in her analysis of the World Trade Center attack site, "contestations over place, memory, and identity

give rise to questions over who possesses the authority to direct place-making. When multiple parties claiming place-making authority advance conflicting conceptions of place, space can become a site of protest or campaign advocacy" (p. 153).

Palczewski and McGeough (2010) assert that "the interrelation between… memorials and the sacred deserves special consideration. Within the United States, '[b]y and large, patriotic space is sacred space…' and memorials, in particular, are 'fundamentally rhetorical sacred symbols'" (p. 25). Assuming the intent of the creators posited by the Court, the Veterans of Foreign Wars built the Mojave Cross to sacralize an otherwise unremarkable space, with the goal of commemorating their comrades-in-arms. Maoz Azaryahu, a geography scholar who studies the intersection of urban landscapes and memory, argues that this act, in itself, can render the land sacred: "authentic expression of popular sentiments, …anchored in specific traditions of popular culture," can indeed form a "sacred ground" through "unregulated public participation" (1996, p. 503). A "spontaneously constructed memorial space… exudes the sacredness with which the place is invested by the community of mourners," argues Azaryahu – "as long as it belongs to the local landscape" (p. 503). This only holds true for as long as the public brings meaning to the memorial space through ongoing public participation in the specific traditions, however. When those traditions fade or were nonexistent to begin with, or when the space no longer belongs to the "local landscape," then, "by virtue of their very physical location, those war memorials are unsuited to their essential purpose" (Barber, p. 66).

Implicit in Barber's argument is the assumption that as goes the land, so goes the voice. When the memorial space is cared for privately, the cross is "authentic expression," a commemorative symbol of fallen brethren. However, its location on (or surrounded by) vacant federal property attended to by the National Park Service regulates both the message and the scene of the symbol. It regulates the message because, when land is federal, the religious symbol "speaks" with a federal voice. Furthermore, Congressional action removed the spontaneity and unregulated public participation crucial to the commemorative meaning of the space, thus replacing any remnant of the public commemorative voice. The subsequent attempt to make the land private was an attempt to return the Mojave Cross to its original meaning. It could not: the meaning had changed because the scene had changed. And without the scenic link to the original meaning, all that

remains, symbolically, is a Latin cross, whose Christian exclusivity offends twenty-first century pluralist sensibilities.

Congress attempted to change the status of the space in order to change the voice. Faced with the application of the Establishment Clause, and recognizing that the cross on federal land was inappropriate whatever its purpose, Congress chose to transfer the land in order to quiet the perception of the federal voice endorsing a religious artifact. Similarly, the Supreme Court limited its decision to the space, namely the land transfer, for the same reason and because space can be controlled, whereas perceptions cannot. While it is true that the appeal challenged the land transfer, the Court was not limited to a narrow judgment on that issue alone. Certainly the government's case was more broadly cast, opening the door for the Court to rule on the propriety of such memorializing, or even on the propriety of religious symbols on federal property. Instead, the Court elected to decide only the narrow question of the propriety of the land transfer as it related to the original injunction. In taking this approach the Court avoided having to rule on the presence of the cross.

Faced with a persuasive argument for an Establishment Clause violation, the Congress and the Supreme Court together created a situation where the only solution they saw was to try to accommodate both sides by making no decision on the propriety of the cross on government land, allowing the land transfer and arguing that, even so, the cross is a permissible symbol of war sacrifice. Thus, they manipulated space to alter voice in order to accommodate – whom? To silence the argument made by the memorial? In the process, they attempted to secularize the cross, removing its religious meaning and substituting a secular, albeit patriotically sacred, message.

4. Where Does This Leave the Establishment Clause?

To argue that something violates the Establishment Clause of the U.S. Constitution would seem to be a fairly straightforward task. The Court has developed a number of tests to determine whether something is a violation. Yet the argument, as it has evolved, is not so simple. Despite its guarantees of religious freedom, the United States essentially sees itself as a Christian nation that accommodates other belief systems. The Court cannot be unmindful of public opinion and it has, in recent years at least, trod carefully the margin between protected speech, government speech, and accommodation of religious symbols.

In this case, the Justices diverged from one another on the question of the cross and the argument(s) it makes. Justice Alito, for example, argued that since the cross is not speaking in a government voice, therefore it is not propositional, thereby vitiating the Establishment claim. Alito ignores Court precedent in making what is, essentially, a circular argument. Justice Stevens, on the other hand, argued that Congress gave the cross a federal voice by making it a national monument, using federal money to maintain it, then prohibiting the use of federal money to remove it. Such actions would seem to support the claim of a violation of the Establishment Clause. In the end, though, the Court's plurality opinion narrowly circumscribed the grounds for the debate to technical issues, without addressing the propriety of turning the Mojave Cross into a national war memorial and then ensuring its continued existence in private hands.

5. Conclusion

Less than two weeks after the Supreme Court issued its decision, the Mojave Cross – which had been covered by pieces of plywood during the litigation proceedings – was stolen from its place on Sunrise Rock. On May 11, 2010, the Barstow *Desert Dispatch*, a local newspaper, posted an article describing correspondence they had received about the cross. The author claimed to know the thief, and explained that the cross was "moved…lovingly and with great care…[and] has been carefully preserved" (2010, online). The author claimed that the person who removed it was a veteran who intended to replace it with a non-sectarian monument because both the "favoritism and exclusion" of the cross and the governments efforts to keep it in place violate the Establishment Clause. More specifically, the thief was offended by Justice Kennedy's assertion that the Latin cross represented all World War I veterans, an argument which "desecrated and marginalized the memory and sacrifice of all those non-Christians that died in WWI" (*Desert Dispatch*, 2010). "We as a nation need to change the dialogue and stop pretending that this is about a war memorial," argued the writer: "If it is a memorial, then we need to …place a proper memorial on that site,…one that is actually recognizable as a war memorial" (*Desert Dispatch*, 2010*)*. Local commentators blamed atheist activists. Then, on May 20, a new Latin cross was placed on Sunrise Rock – which the Park Service promptly took down, as it violated the ongoing injunction. Most of the coverage of these events came from either Christian or atheist newspapers and websites, revealing a continuing focus on the religious, not the commemorative, symbolism of the Mojave Cross.

Separated from a battlefield or military cemetery, the Latin cross loses its contextual referent to wartime. In order for a war memorial to have meaning to an audience other than the ones who created it, it "'must simply, and powerfully, crystallize the loss of life and urge us to remember the dead'" (Balthrop *et al.*, p. 176). To do otherwise renders the memorial's symbolism "culturally illegible as a marker of the event it commemorates" (Balthrop *et al.*, p. 176). All that the "reasonable observer," to borrow the Court's parlance, is left with is a Latin cross, the conventional meaning of which is a sign of Christianity. And because it has been declared a national memorial, the conclusion of the enthymeme is that the federal government endorses and protects the Latin cross as a national symbol. Moreover, the symbolic force and conventional stability of the cross cannot be overridden by verbal claims to the contrary: "The cross cannot take on a nonsectarian character by congressional (or judicial) fiat," argued Justice Stevens in the dissent. "Making a plain, unadorned Latin cross a war memorial does not make the cross secular. It makes the war memorial sectarian" (*Salazar*, 2010, p. 1835).

NOTES

[i] A Latin cross consists of a vertical bar and a shorter horizontal bar at right angles to each other. The Mojave Cross is between five and eight feet tall and is made of four-inch diameter pipes painted white.

[ii] The Mojave National Preserve, operated by the National Park Service, is located in southeastern California. It encompasses nearly 1.6 million acres (approximately 640,000 hectares) between the cities of Barstow, California, and Las Vegas, Nevada. The Preserve is primarily federally owned land with approximately 86,600 acres of the land in private hands and another 43,000 acres belonging to the State of California (*Buono v. Norton*, 2002).

[iii] Since 1935, the cross has been a gathering place for Easter Sunrise services; visitors have also used the site to camp *(Buono v. Norton*, 2002).

[iv] The Establishment Clause prevents the government from promoting or affiliating itself with any religious doctrine or organization (*County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 1989), or from having an official preference for one religious denomination over another (*Larson v. Valente*, 1982). To survive an Establishment Clause challenge, a government symbol must (1) have a secular purpose, (2) have a primary effect that neither advances nor inhibits religion, and (3) does not foster excessive state entanglement with religion (*See Lemon v. Kurtzman*, 1971).

[v] Congress designated the cross and its adjoining land "a national memorial commemorating United States participation in World War I and honoring the American veterans of that war." (Department of Defense Appropriations Act, 2002). The Secretary of the Interior was directed to expend up to $10,000 to acquire a replica of the original cross and its memorial plaque and to install the plaque at a suitable nearby location. §8137(c). After it was declared a national memorial, the Mojave Cross became the only national memorial specifically dedicated to World War I.

[vi] The land was transferred to the Veterans Home of California – Barstow, VFW Post 385E, in exchange for a parcel of land elsewhere in the Mojave National Preserve. *See* Pub. L. No. 108-87, (2003).

[vii] The district court stated "Buono is deeply offended by the cross display on public land in an area that is not open to others to put up whatever symbols they choose. A practicing Roman Catholic, Buono does not find a cross itself objectionable, but stated that the presence of the cross is objectionable to him as a religious symbol because it rests on federal land." *Buono*, 212 F. Supp. 2d at 1207.

[viii] "The cross was erected in 1934, 60 years before Congress created the Preserve [although it owned the land]. Photos show the presence of wooden signs near the cross stating, "The Cross, Erected in Memory of the Dead of All Wars," and "Erected 1934 by Members Veterans of Foregin [sic] Wars, Death Valley Post 2884." The wooden signs are no longer present, and the original cross, which is no longer standing, has been replaced several times by private parties since 1934" (*Buono v. Norton*, 2002).

[ix] The Cross of Sacrifice, or "War Cross," was developed by Sir Reginald Blomfield of the Imperial War Graves Commission, based on the shape of the Latin cross but including the shape of a bronze sword, turned downward. A Cross of Sacrifice stands in the U.S. Arlington National Cemetery to honor the Canadian war dead of World War I (King, pp. 128-129).

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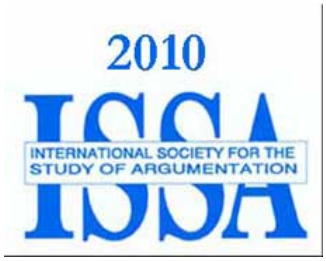
ISSA Proceedings 2010 – Argumentation Schemes In The Process Of Arguing



1. Introduction

A look to the literature of the last years should be enough to realize that argumentation is a very complex phenomenon with many sides and manifestations and that many of the, some times, contradictory considerations about several aspects relative to the matter have their source in this complexity.

The definition of argumentation, provided by van Eemeren (2001, p. 11), constitutes a good place to start our reflection now, i.e *"argumentation is a verbal, social and rational activity aimed at convincing a reasonable critic of the acceptability of a standpoint by advancing a constellation of propositions justifying or refuting the propositions expressed in the standpoint".*

In this definition van Eemeren stresses the role of the argumentation as an activity, but most of the work done in the field is devoted to the analysis and evaluation of argumentations.

We want to stress here that the expressions "rational activity" or "reasonable critic" are related, most of the time, with probable or defeasible truth (Walton, Reed & Macagno, 2008). As Zarefsky (1996, p. 53) pointed out *"argumentation should be regarded as the practice of justifying decisions under conditions of uncertainty".* The uncertainty may be relative to *the cognitive environment* of the interlocutors, as defined by (Tindale, 1999), or it could be an intrinsic quality of the issue in question, as a consequence of the influence of many unknown or

difficult to foresee factors. Even if some times there is enough data to reach an unarguable conclusion, the opposite is much more frequent in everyday situations because ordinary argumentations deal, in most of the cases, with issues in which ethical or aesthetic values, personal tastes and other subjective feelings play a decisive role.

The uncertainty involved in much of the argumentations of real life makes difficult to fulfill the demands of deductive reasoning and, even after a careful reconstruction of the argument, we think that it is problematic to consider most of the ordinary reasoning as deductive, as proposed by the rules for a critical discussion of the pragma-dialectic. We think that in the practice the recourse to inductive inferences and to the use of heuristics, best explanations, analogies and other resources to achieve the resolution of the argumentation is necessary and frequent. The reconstruction of the reasoning done in practical argumentation as deductive, although helpful to assess it, in general does not correspond to what happens in actual practice.

The end of an argumentation may, as well, differ from the resolution defined by the ninth rule of the pragma-dialectic, "resolution, when it occurs at all, is rarely if ever absolute" (Jackson, 2008, p. 217). In negotiations, especially, but in other kind of dialogs also, both parts may reach an agreement considered acceptable for both sides, even if they maintain their initials points of view. But even in more knowledge related environments, as scientific discovery, the selection of the most promising path for an investigation can be provisional, maintaining the parts, in the while, their opposite views.

One of the aspects we should pay more attention to is the substantive differences between argumentation considered as a process and argumentation taken as a product. First of all, we need to note that for 'process' we will take a slightly different meaning from the one used in the literature (Tindale, 1999) and that, for our purposes, we won't be differentiating the dialectical and the rhetorical sides of the argumentation. We will take the word process to include roughly all the aspects to consider when producing an argumentation.

To illustrate the kind of differences we mean, we can mention, for example, that what can be an important step for the analysis and the evaluation of the product of an argumentation, may be unconscious and fully implicit in the process or arguing. For instance, we use fast and incomplete inferences that are the

outcome of “intuitive” processes of reasoning and that work efficiently in cognitive familiar settings. These kinds of inferences are different from the “reflective” inferences that deal with unfamiliar or more complex problems. Both terms are proposed by (Mercier & Sperber, in press) as an attempt to clarify the dual system view of reasoning proposed by several researchers in the field of psychology (Evans, 2003). This theory distinguishes two systems of reasoning: the system 1 processes are taken as automatic, mostly unconscious and heuristic; they work efficiently in ordinary circumstances but are inappropriate to deal with novelty or complexity; the system 2 cognitive processes are slower and require more effort but they are more reliable. The evaluation of the argumentation and the planning of written argumentations, stress the view of argumentation as a product, and help to trigger this kind of conscious processes, while in oral discussions and when we spontaneously recall an argument to justify a claim, the system 1 processes are likely to play a more important role.

It is important, as well, to take care of the particular controversial environments which give rise to different kind of argumentative dialogs as critical discussions, scientific inquiries, negotiations, debates etc. Nowadays it is widely accepted, that each type of argumentative dialog (Walton, 1989; Walton et al., 2008) calls for different requirements and dialectical moves, and that some of these moves would be unacceptable or even fallacious in one type of dialog but would be acceptable in another context. Even in scientific practice, in which we work under high logical standards and methodological constrains, we find examples of the powerful influence of contextual factors. Take for instance the logical form of what is generally known as an abductive argumentative scheme and that the philosopher of science Marcello Pera (1994) puts in the class of the inductive arguments:
“an argument with this form: ((p → q) & q) → p. Should we say it is deductive and invalid according to deductive logic, or that it is inductive and correct according to inductive logic? Only the context provides an answer. If it is used to prove a proposition p, then the argument is deductive and deductive logic is pertinent to it. If it is used to confirm a hypothesis p, then it is inductive and falls within the legislation of inductive logic. Thus the very same argument with the very same form is potentially fallacious if it is used for one purpose and potentially good if used for another”. (Pera, 1994, p. 109).

We have to take into account also the noticeable differences that arise in

everyday argumentations due to epistemological attitudes and motivations. For example, Schwarz and Glassner (2003) prove that students in ordinary contexts of argumentation do have better dialectical skills than the finished products they present; the contrary happens in scientific domains.

"…in every day issues we are generally highly skilful in challenging, counterchallenging, justifying or agreeing during conversation but the argument we hold are mediocre according to analytical criteria…We know "to move forward" but we don't know very well "where to go", …

… In contrast, in scientific domains we are used to accept well-made arguments, but generally do not use them in further activities to convince, challenge or justify our view points. We "see the point" but "cannot move forward";" (Schwarz and Glassner, 2003, p. 232).

Besides, there are important differences between oral and written argumentation. To cite some of the more compelling, we note that in oral argumentation the statements are generally shorter; we have an immediate feedback from the opponent that helps us to find the path to retrieve the necessary information from our long term memory and also to decide the next move; it is almost always possible to give some kind of answer to the objections the opponent raises, often weakening or negotiating our point to accommodate the challenges, and to facilitate the communication and build consensus; and finally, our performance has to take into account both, the objections that make shift the burden of the proof back and forth between the two parts in the dialog, and the conversational turns of it; In written argumentation, the opponent is not present and the abstraction to represent him/her makes more difficult the articulation of the arguments. The physical absence of the audience is one of the most salient characteristics of written argumentations (Bereiter & Scardamalia, 1987; Kellogg, 1994); and it is also well known that writing arguments becomes a difficult cognitive activity appearing many years after the children are able to defend their own points of view on oral discussions (Golder & Coirier, 1994, Golder & Puit, 1999). We also need to use more stylistic resources to make our point, because we have no access to non-verbal communication; and finally, the ordering and linearization of the text has to make sense, because there is no chances to improve it with the immediate feed-back of the opponent.

Furthermore, it is necessary to consider that these different factors interact

among themselves in different ways and also with other elements of the social context, as, for instance, the status of the participants and their interest in maintaining the quality of the relationship between the interlocutors. Arguing is an interaction in which a person tries to persuade someone of something, but, on the other hand, the interlocutors are simultaneously strengthening or weakening the bonds between them. In many everyday discussions the two components are of similar importance and, so, we can't improve adequately our argumentative skills looking only to the cognitive side of the activity.

Pragma-dialectic provides a good framework for critical discussions that explains much of the complexities of argumentation, especially with the progressive inclusion of strategic maneuvering in the theory (van Eemeren & Houtlosser, 2002, 2009). Nevertheless it seems necessary some kind of expansion of this theory for practical or didactical purposes, namely, considering adaptations for types of argumentative dialogs different from critical discussion and including some more specific steps that those they already consider, to account for the differences between written and oral argumentations and also for those found between the production and the analysis of argumentation.

Furthermore, it would be useful, as well, to explore the integration of psychological frameworks and problem solving strategies used in the argumentative process with the more philosophical oriented, pragmatic and dialectical approaches to argumentation. These interdisciplinary frameworks should inspire the design of protocols and other tools for the different tasks involved in the practice of argumentation.

2. Argumentation as process

Considering the argumentative process as explained above, we think that it can't be understood if we don't consider its rhetorical perspective. The evaluation of argumentation is often approached from a logical, formal or informal, perspective that usually presupposes a schematization of the argument that eliminates all the "rhetorical" elements of it, sketching mostly its dialectical skeleton. The role of the context is almost reduced to help to fulfill the implicit premises necessary to complete (mostly in a deductive sense) the inferences. Nevertheless, the study of argumentative processes is not possible without the integration of the arguer, the audience, the uttered arguments and the cognitive and social environment.

In order to persuade the audience, many strategic decisions have to be made

about the selection of the arguments, their order, the choice of the words and the amount of information that will remain implicit, and these choices depend on broader contextual elements: *"Naturally occurring arguments are subsumed by and subsume other contexts of action and belief".* (Jackson, 2008, p. 217).

Data and other kind of information about the topic available to the arguer and the intended audience are the first constituents of the context; the second and not less important element refers to the audience's views about the issue because, as we acknowledged, the difference of opinion that triggers the argumentation has its source in the existence of different points of view about an issue or even in a conflict of interests. Even in this last situation, when the parts agree to resolve their differences by argumentative means, they implicitly accept some rules and boundaries of reasonableness in which the dialog should take place.

The monitoring of the process can be better understood in a problem solving framework that integrates different levels of cognitive processing. Much of the work is made more or less automatically using competences mastered in the past, as consequence of maturing or learning processes. Other work has to be done consciously and requires careful planning, monitoring and revising. These processes change in function of the type of argumentative task: it is different to participate in a face to face debate, in a forum in the Internet, to write an argumentative essay, or to simply read an argumentative text.

In the next passages we will stress some differences between the processes of reading and analyzing a text, and that of writing one, before we focus in the role of the argumentative schemes in the process of writing.

The processes of reading and writing argumentative texts have some cognitive activities in common. The contrary would be uneconomical *"and it seems highly implausible that language users would not have recourse to the same or similar levels, units, categories, rules and strategies in both the productive and the receptive processing of discourse"* (van Dijk & Kintsch, 1983, p. 262) and the advances as critical reader and as argumentative writer interact with each other in a complex way, making their combination a good pedagogical strategy (Hatcher, 1999).

Nevertheless, even if we accept the fact that the writer or the speaker follows pragmatic rules, as, for instance, Grice's conversational rules to make

communication possible, and that the reader uses those same rules to interpret the intentions of the writer, it doesn't mean we are dealing with the same task.

If, for example, we attempt to design a protocol putting forward the steps necessary to analyze an argumentative essay, and another one suggesting a procedure to write an argumentative text, the differences soon arise, and in our opinion, both processes have remarkable differences that difficult their reduction. In fact, the suggestions to direct the production of written argumentations inspired in analytical procedures, as in the critical thinking approaches, go usually far away from the previous model of analysis, and introduce the inputs relative to other specific aspects of argumentative writing that are usually considered as rhetoric.

To review an argumentation is a better-defined task than to write an argumentative text. Even if analyzing a text requires always some grade of interpretation of the sentences, and delicate decisions about which implicit premises need to be made explicit before checking the relevance, the sufficiency and the acceptability of the premises, the existence of fallacies, or the soundness of the inference, writing is a far more open-ended task. There are many different ways to write an argumentation that would reach successfully the intended goal of gaining the audience's adherence, and the writer has to choose among these different possibilities. When we analyze a text, these choices are done and the task of the reader is reduced to check the reasonableness of the argumentation in order to accept or not its claim.

Second, before we accept or not the standpoint of an argumentation, weighing the strength of the given arguments, we bring together the relevant information from the text (or the conversational context) in order to decide if it convinces us. But as writers we need also to keep in mind all the communicational and stylistic and rhetorical elements useful to maintain the attention of the reader, to keep a positive atmosphere in the relationship, to allow the reader to negotiate the outcome, etc. All these ingredients are necessary to allow the flow of the communication, and to reach the persuasive goal of the text. Certainly, the reader will focus his/her attention into the claim and into the strength of the reasons to defend it, and he/she will be less conscious of the role of those other elements, especially if the communicative quality of the text is adequate. Nevertheless, these elements are very important in the production and subsequent manipulation as a writer, of the text. A writer reviewing her/his argumentation needs to

consider carefully not only the epistemological quality of the reasons and the soundness or reasonableness of his/her reasoning, but a much broader set of elements which are necessary to achieve her/his communicative purpose.
Briefly, the analysis and evaluation or the argumentation deals with the argumentation as a product, but writing a persuasive text is by itself a process open to a rich variety of possible outcomes that could match the goals and intentions of the writer. Therefore, the procedures to deal with one of the tasks or with the other have to show substantial differences.

3. Argumentive schemes
It is not necessary to tell that when we argue to defend or to rebut a definite standpoint, the arguments we provide have to be somehow linked to the standpoint. This link, which is currently known as the argumentative core of the argumentation, if adequate, assures the arguer that the acceptability of the arguments is transferred to the standpoint.

The consideration of argumentative schemes as an input in the process of elaboration of argumentations has its grounds in the venerable tradition of classical rhetoric (Tindale, 2004; Walton et al., 2008; Rubinelli, 2009). The Aristotelian notion of *topoi* and its correlative notion of *loci* in the roman rhetorical tradition, as in the influential work of Cicero, were purported as tools to help the future orators to find arguments for different kinds of dialectical discussions or rhetorical settings. It was, then, a system of invention intended to provide guidelines for finding and selecting the proper arguments to support a claim. The actual term "argument scheme" was first used by Perelman and Olbrechts-Tyteca in French, but, by then, several other authors used this ancient notion with different names (Garssen 2001, p. 82)

Garssen (2001) gives an overview to the most important, classical and modern, approaches to this subject. He explains that the argumentative schemes can be used also as tools for the evaluation of argumentation and as a starting point for the description of argumentative competence in a certain language.

Several works on argument schemes as (Hastings, 1963), (Kienpointner, 1992), (van Eemeren and Grootendorst, 2004), (Walton, 1996), (Walton et al., 2008), among several others, have tried to put some order in the field, proposing different criteria to assure their cogency and to classify them. Nevertheless, both the criteria and also the amount of schemes taken into account vary largely,

considering among them, for instance, from deductive patterns as *modus ponens,* to, in some cases, some of the classical rhetorical figures.

Presumptive argumentative schemes (Walton 1996; Walton et al. 2008) have their source in actual examples of commonly used patterns of reasoning. They correspond to defeasible reasoning and although they can be sufficiently strong to support a claim depending on the argumentative situation, the claim they support can be defeated if the circumstances change.

In the pragma-dialectical typology three main categories are considered, symptomatic argumentation, comparison argumentation and instrumental argumentation. Following (Hastings, 1963), each scheme comes together with a set of critical questions that helps to guarantee the correct application of the scheme. The questions are to be used by the antagonist in the dialectical process in case of doubt, and if asked, they automatically shift the burden of the proof from the antagonist to the protagonist. The pragma-dialectical classification is coherent, easy to grasp and fulfills its main function, i.e., help the user to assure the transference of the acceptability of the premises to the standpoint and, generally speaking, it can be sufficient to apply to the evaluation of arguments. Nevertheless this typology becomes clearly insufficient if we try to use it in the process of generating new arguments.

If we take into account the number of schemes proposed, we could put (Walton, 1996) and (Walton et al., 2008) proposals on the other side of the balance. Following Aristotle's idea of rhetorical topics and also most of the works above cited, they gather an extended list of argument schemes (around 60 in the last typology), each of what comes together with its corresponding set of critical questions; these questions are to be used in the same way as in the pragma-dialectic approach. In (Walton et al., 2008) they also attempt to provide a more systematic, if tentative, classification of the schemes, and to explore the use of them in artificial intelligence settings. Although, they also say, that much more work should be done to improve the proposals in this field, they mention the progress made in the use of the schemes and their critical questions in software designed to help arguers to analyze and to write new argumentations, and in multi-agent systems and automated reasoning.

Tindale (2004) thinks that argumentation is essentially rhetorical and, following Perelman's constructive conception of the argumentation, he considers it as a

kind of communicative practice that helps us to change our point of view and directs our actions. He maintains that "elements of argumentative speech must have occurred as long as language has been in use" (Tindale 2004 p. 32) Argumentation as a form of communication invites collaboration; the arguer and the audience interact in a way that makes them coauthors of the argumentation. Tindale's rhetorical view extends the typology of schemes to some of the rhetoric figures that appear in the work of the sophists as set of strategies or types of arguments. For example he includes figures like the *peritrope*, which involves the reversal of positions that can be traced "in the writings of current argumentation theorists who advocate the importance and value of considering all sides of an issue, including that of ones opponent" (Tindale, 2004, p. 46).

For Garssen (2001; 2009) figures have probative force but they are not real schemes: figures have no associated critical questions, and the schemes don't posses the changes of language use that characterize rhetorical figures. Kraus (2007) analyzes in detail one rhetorical figure (*contrarium*) and shows that in general they are poorly warranted and based on defeasible commonsense arguments, but that they exert enough psychological or moral pressure on the audience to make them accept the implicit warrants without any protest or further request for argumentative backing, and so, becoming then, in some cases actual fallacies.

In his book *Fallacies and argument appraisal*, (Tindale, 2007) considers the relationship between argumentative schemes and fallacies, and stresses, as some other authors also do, that the deceptive nature of some fallacies comes from the illegitimate use of an argumentative scheme that is in principle acceptable in other circumstances. Nevertheless, he also says that there are fallacies, as the *straw man*, which does not correspond with legitimate argumentative schemes. In any case, the criteria of appraisal call for a careful analysis of the rich and varied contexts in which they occur. The strategy to help arguers dealing with fallacies follows the critical questions procedure proposed by many other researchers for the evaluation of argumentative schemes.

Coming back to the beginning of this work, and without any doubts of the interest of the use of the schemes and critical questions to appraise the cogency of the argumentations, in the following section, we will be concerned mostly with the use of them in the first sense, i.e. as argument generators.

4. The role of the argumentative schemes in the process of writing.

In order to study the role of the argumentative schemes in the process of writing we need to overview the process as a whole. As we have seen, the process is the result of the interaction of multiple factors that have a different weigh in the various stages of the writing process. The relative importance of these factors depends, as well, of contextual circumstances related to the topic, the social context and the idiosyncratic features of the interlocutors. In consequence, the process of writing argumentation should integrate besides the traditional logical, dialectical and rhetorical elements, also inputs relative to the textual linearization or linguistic coding, the motivation and goals of the arguers and some other psychological and contextual considerations. Nor cognitive psychology not argumentation theory alone have given a satisfactory account of the process of writing argumentative texts. As we have said the motivation of the arguers or the importance the issue at stake has for them is a crucial factor that determines much of the depth of the argumentation. For example (Igland, 2009) shows that adolescent students argue differently according to the challenges they face: arguing about a practical matter, a more abstract point or about a question related to similar controversies and discussions in the social environment. She also shows that they react differently when they think that there is some space for negotiation or that the matter is not negotiable.

In the first place, writing an argumentation requires the monitoring of the different steps needed to reach the goal of the argumentation: planning the general strategy of the argumentation, translating to words, checking for local coherence… and finally reviewing the resultant text using linguistic, epistemological and rhetorical criteria. (Kellogg, 1994).

A second ingredient is the acquisition of the knowledge about the issue and about the concrete argumentative situation in which it occurs: social context, audience's characteristics, time constrains, possible sources of information, means, helps… The more the arguer masters the topic under discussion, the better the product will be.

A third focus of attention should be pointed to the epistemological or dialectical space: from the more automatic reasoning, followed by logic inferences and pragmatic processes, to the more conscious reflection about the global structure, argumentative stages and the adequate and reflexive use of argumentative schemes to support the claim.

And last but no least, the integration of the rhetorical space in order to negotiate

with the audience, As (Golder, 1996) says, the negotiation with the addressee is one of the principal constituents of the argumentation, because the argumentative discourse is by itself polyphonic (Anscombre & Ducrot, 1983): even in writing argumentation the voice of the reader or the readers needs to be integrated in the text. The use of communicational and rhetorical devices designated in classical rhetoric as disposition and style, is also needed to make clear the content of the argumentation, to maintain the attention of the reader, to develop a positive ethos for the writer, and, as a consequence, a receptive attitude in the audience.

There is not a definitive psychological explanation of the way in which our brain or cognitive system realizes ordinary inferences, nevertheless, there are nowadays more and more suggestions to indicate that some of the skills that interact in the argumentative process are unconscious and automatic; others, nevertheless, as the overall planning, for example, require constant attention and monitoring.

Writers most of the times don't need to explicit all the implicit premises to grasp the logic of the inference, that is, the link between the reasons and the conclusion. They do it in an automatic form linking it with common knowledge taken from the actual situation in which they place themselves and the audience; the process occurs fast and unconsciously. (As an example, we think that the premise that states that "smoking is unhealthy" is enough to discourage smoking without any other implicit premise as "anything that is a danger to the health should be avoided"). Besides, even if we try to explicit some of the information needed to strength the inferential nature of the argument, in many cases, it is quite difficult to decide where to stop it.

Some of the argumentative schemes are known and used by very young children in oral discussions with peers. To make the use of them conscious and to learn in a practical way when they lack the strength necessary to support a claim or even when they can become fallacies is important, but, nevertheless, even in Aristotle's pioneering works the knowledge of the schemes, by itself, was not a sufficient help to find the necessary arguments to justify a claim. As Rubinelli (2009) says, *"arguments ultimately derive from premises that put forward specific contents, and it is the ability to find these premises that enables speakers to argue actual cases. Readers can experience this for themselves. Try to use any of the topoi listed in the Topics to discuss a certain subject with someone. If you do not master a body of relevant material on the topic at stake, any topos chosen will be*

of no use; if you use inadequate material, your efforts will be vain! But if speakers have adequate material at their disposal, knowing the topoi will help them structure this material in an efficient argumentative framework". (Rubinelli 2009, p. 32)

The goal of written argumentation is to produce a meaningful text containing not only a sequence of ordered arguments but also other communicative elements as explanations, clarifications, etc., directed to persuade the audience of a standpoint supposedly in doubt or in dispute. A minimal argumentation will use a unique scheme, but in an elaborate written argumentation, due to the debatable character of the subject, there are always several arguments, each of them using one or a combination of schemes to justify the claim. There will be also other arguments to answer to presupposed objections and criticisms.

The writer has to cope simultaneously with linguistic requirements and rhetorical strategies that introduce elements of our actual and real world experiences. The dialectical and the rhetorical space can be dissociated for theoretical purposes but as Leff (2002) said, in the practice they have to interact if we want to achieve "effective" persuasion.

The use of the schemes depends on the choice of the arguments. But this task is decided in function of a general strategy that integrates the relevant knowledge about the topic, the appropriate use of the schemes and their rhetorical properties. This, being a challenging cognitive process, could be made easier by the systematic learning of some of the schemes, *topoi* and fallacies with their respective critical questions. If we have a set of critical questions in mind when we plan to write argumentation, our arguments will be stronger and we could be ready to anticipate a rebuttal and to add some additional premises to reinforce or to warrant an argument. Some critical questions appear intuitively in the actual dialectical situation when we argue orally. For example, if we think that an "expert" can't be considered as such and if we are interested in arguing, we will always ask for more information about him/her. But in writing the audience is not present, so it is good to have in mind some of these intuitively natural questions associated to the most used schemes. But once again, the study of the schemes should be integrated in a more general framework and to learn in an effective way it should be completed with intended practice, using debate first to reinforce our arguments and afterwards writing the corresponding argumentative texts.

We also think that a useful list of schemes depends somehow on the field, in which they will be used, be it legal argumentation, software design, education, etc. For pedagogical purposes it would better than the use of a whole list of argumentative schemes, the adaptation of it to the age of the students and the adoption of the pedagogical approach known as constructivism. As much of the mastering of the use of the schemes is grasped simultaneously with the natural process of learning the language, the teaching of the schemes would be more efficient if we could relate them to the actual abilities of the students, making the topic knowledge affordable to them and arousing their interest and motivation. The new knowledge, as proposed by constructivism teaching, should be built on the actual knowledge of the learner.

As a consequence, the decision of including or not different argumentative schemes among the teaching strategies should be the result of empirical research. A good point to start the selection could be the study of the argumentative schemes used by arguers at different ages in natural environments both in oral and in written argumentations.
Another source to select the schemes and their fallacious counterparts, considered as wrong inferential moves, is a revision of the lists proposed by critical thinking, rhetorical and argumentation courses and textbooks and software tools for argumentation.
For instance, *Rationale* is a software tool, based on research done at the University of Melbourne that helps students grasp the essence of good essay-writing structure. *Rationale*, is designated to facilitate the analysis of argumentations and the production of good reasoning in learning environments, so, there is a simple list of sources for arguments to support a claim (assertions, definitions, common beliefs, data, example, expert opinion, personal experience, publications, web, quote and statistics). Not every source has the same strength supporting a claim, and some of the possible reasons to support it could be presented using more than one of the categories. Nevertheless, the list and the critical questions associated with every item, offers a practical guide for students and people looking for an improvement of their arguing skills. Many critical thinking textbooks offer similar strategies.

The list proposed by *rationale* includes sources that appear in the classifications of argumentative schemes quoted above, as expert opinion and statistics. Other elements they use, as common beliefs or personal experiences, are more related

to the topics of classical rhetoric, and finally, others are more linked to common scientific methodology or epistemological approaches.

Summarizing, we consider necessary to link the learning of the argumentative schemes to the progressive acquisition of them when acquiring the different communicative skills of the language. In general, we think that it is better to introduce them after their use and strengthening in oral argumentations, by means of strategic critical questions prompted in the debate. After being made conscious in these dialectical settings, they should be used for argumentative writing and marked by the teacher with more critical questions, if the arguers themselves have not given enough thought to the most salient of them, in order to reinforce the argumentation.

As an example, we can look at the argument form expert opinion (*ad verecumdiam* in the rhetorical tradition). It is one of the schemes that appear in almost every classification of the different traditions, because it is one of the most used schemes. The argument from expert is presented by Tindale (2007), Walton et al. (2008) and many others as one of the defeasible argumentative schemes that could be a fallacy, if improperly used. The ubiquity of this scheme, even in early stages of the development of oral argumentation, and its persuasive efficacy justify its treatment in a pedagogical program of argumentative writing. First, we should confront the students with good and bad uses of the scheme and facilitate, with the help of critical questions, their thoughts and conscious grasping of it. Then we would have to discuss the relative strength of expert opinion, compared with arguments from other sources, as data or personal experience, considering the adequacy of the choices for the intended audience.

The goal of instruction is then to foster the metacognitive skills of the writer, *"argumentative discourse is one of the most subtle and most elaborate ways to use language. In contrast to narration, in which temporal markers are often sufficient, it is more highly structured, containing many more modal expressions (might, may, sure, seem, likely, certainly, proves), that is, those in which speaker is implicated. In sum, argumentative discourse implies being able to think in both a metacognitive and a metalinguistic framework."* (Kuhn 1991, p. 271)

The argument could be used to justify the claim or to reply to possible objections of the audience, but the argument needs to be integrated in an argumentative essay that has to fulfil all the communicative goals of the writer with respect to an

intended audience. The choice of the title, the style, the introductory paragraphs, the length of the text, the use of reiterations, the emphasis, the order of the arguments, the use of metaphors are to be decided to adapt the text to the audience. In sum, all those elements that will be part of the argumentative text need to be considered in the process of writing.

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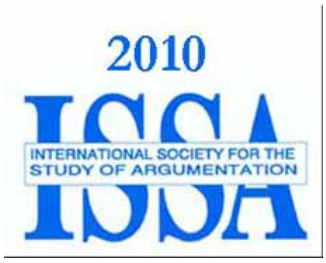
ISSA Proceedings 2010 – Are Motivational Thoughts Persuasive And Valid?



1. Introduction

In this paper, I would like to examine the rhetorical status of the *1948 Human Rights declaration*.

In order to do this, I first go back to Perelman's theory of argumentation by shedding a light on its juridical thought. This approach will question the status of "*natural law*" from a rhetorical point of view, as it is expressed in the *1948 Human Rights Declaration*, considered as an expression of natural law today.

Second, I describe four levels of belief expression, and their discursive and rhetorical functions, as they appear in the Human Rights charter:
– a literal level
– a conventional level
– a fictional level
– a motivational level

It will be argued that such a complex construction is possible thanks to rhetorical skills that are shared by every speaker and hearer.
Finally, I analyze the human rights charter's first article in the light of four levels of representation.

2. Perelman and Natural Law

Let us go back to Perelman and Natural Law. As it is argued by Francis J. Mootz (2009), there are no explicit links between Perelman's theory of argumentation and his legal thought. But it is nevertheless possible to build this link. Mootz develops such a point of view in an article entitled: «Perelman's Theory of Argumentation and Natural Law». Indeed, we can claim that the Perelmanian theory of argumentation is for a large part grounded in his judicial culture. As Mootz wrote:
"The New Rhetoric is a rich resource for describing the ontological space in which laws operates, and also for providing normative guidance to those engage in legal practice." (Mootz 2009, p. 2).

As I will argue, such an "ontological space" may be described in the Human Rights charter thanks to a rhetorical approach that surmises various parts and also different levels for representation, i.e. the literal, conventional, fictional and motivational. Such a description will lead me to argue that a charter is a kind of rhetorical *genre*. Actually, an important question about the validity and the efficiency of a charter is grounded in the question of the "backing" (in a Toulminian sense) of human rights principles. Are they natural or transcendental? Of course, such a question has to deal with the philosophical and judicial question of natural law.

As it is well known, the theory of natural law claims that laws have natural foundations, either religious or human. This is the case in classical thought, in Christian thought, but also in Enlightenment philosophy that inspired the first Declaration of Human Rights in France (1789). It is also the case for Independence Declaration of American (1776).
And this was finally the case in the so-called "logicist" conception of rationality as it was thought in Europe in the 20th Century. In such a conception, "logicism" has to be seen as an optimistic trust toward logic in order to ground rationality.

Let us be reminded that Perelman firmly opposed such a conception of rationality. It is the reason why he proposed to establish a difference between, on the one

hand, validity for empirical facts and, on the other hand, reasonableness for social facts. This is of course an important starting point for a possible link between his argumentative theory and his judicial thought.

Mootz examines the possibility to build a link between Perelman's theory of argumentation and his judicial thought through the status of the Universal Audience. Indeed, in his critique of a "logicist" conception of argumentation, Perelman claims that the concept of Universal Audience relies on the idea that a speaker's rationality is grounded neither in validity nor in truth, like it seems to be the case in all theories of natural law. But, at the same time, the critique of such a positivist point of view often leads to a relativistic vision where it is argued that truth or validity are completely relative, since they have no stable ground.

Finally, the whole history of rhetoric is trapped in a tension between relativism and positivism.
In order to overcome this tension, Mootz proposes to introduce the concept of "*naturalizing rhetoric*", a concept which I consider to be very fruitful. He claims that we have to keep in mind a naturalistic criterion when we are analyzing rhetorical exchanges, but that it has to be found in our very "rhetorical nature":
"We "naturalize" rhetoric when we regard human "nature" as rhetorical. Simply put, it is our fixed human condition to be recreating ourselves and our society through continuous rhetorical exchanges with others. A naturalized rhetoric embraces the paradox that non-essentialism is essential to our being, that we can find a foundation for reflection in anti-foundationalism." (Mootz 2009, p.10).
Now, one may argue that such a definition of our "rhetorical nature" leads to a *petitio principii*, i.e.: "Our nature is to be rhetorical beings, so rhetoric is natural".

But Mootz promptly adds an important precision:
"Perelman is less vigorous in his critique of Cartesian rationalism than Vico, who argued against the incipient rationalism of the Western tradition by defending the priority of rhetoric and its connections to our imaginative capacities and the metaphoric structure of human understanding. By naturalizing rhetoric in the humanist tradition exemplified by Vico we can elaborate the ontological claims that subtend Perelman's theory of argumentation." (Mootz 2009, p. 10).

In the following, I will develop Mootz's concept of rhetorical nature by examining the case of the Human Rights charter. Indeed, such a concept perfectly fits with the naturalist conception of rationality that I have been trying to develop

(Danblon, 2002). Moreover, I will argue that imagination, as an expression of our rhetorical nature, i.e. as an expression of our rationality is necessary to both the efficacy and the validity of a charter. This point will be demonstrated by describing the various levels of thought in the Human Rights charter.

3. The Human Rights charter as an expression of rhetorical rationality

Let us now describe the Human Rights charter from a rhetorical point of view (see Danblon & de Jonge 2010).

As most of the charters, the Universal Declaration of Human Rights is divided into three parts. First, there is a preamble where one generally finds the recent story of people who are concerned with the charter. Such a storytelling aims at justifying the proclamation of the charter. Second, there is a proclamation that is always expressed by a performative speech act. In the 1948 Declaration, one finds the following expression:

"Now, therefore, the General Assembly proclaims this Universal Declaration of Human Rights as a common standard of achievement (…)."

Such a performative speech act aims at creating a new common world.

Third, there are articles that describe the way in which every human being is supposed to behave in the new common world. Articles have thus a regulative function, which is expressed by assertive or directive speech acts.

Consequently, these three parts (preamble, proclamation and articles) have each a precise discursive status (respectively: storytelling, performative speech act, assertive/directive speech acts) in which each fulfils a rhetorical function (respectively: justifying the creation of a new common world, creating the new common world, regulating the behaviour of actors of the new common world).

These discursive status and rhetorical functions are represented under this figure:

Part of a charter	Discursive status	Rhetorical function

Preamble	Storytelling	Justifying the creation of a common world
Proclamation	Performative speech act	Creating a common world
Articles	Assertive and directive speech acts	Regulating the behaviour of actors belonging to the common world

Such a description allows us to claim that a charter is a rhetorical genre since it presents stable discursive parts and rhetorical functions, that are associated with institutional roles.

4. Discussion about the "ontological" status of a charter

Now, the current philosophical question about such a document is: on what is it grounded? And as a consequence, at which conditions is it either efficient or valid (or both)?

Here comes back the "natural law" question from a rhetorical point of view. Indeed, one often hears that such a charter has no reason to pretend to universal validity since it was thought and wrote in a precise historical and geographical context. Nevertheless, it is well known that such a text was written with the explicit intention to address to the whole humanity. In Perelman's terms, the Human Rights charter addresses to the Universal Audience (Perelman and Olbrechts-Tyteca 1969; see also Crosswhite 1989; Christie 2000; Danblon 2004). At this stage, we should face the question of the natural grounds of such particulars principles and values. In the following, I will go back to Mootz's idea of naturalizing rhetoric in order to try to go beyond such a difficulty.

5. Four levels for representation

In order to argue in this sense, I will first show that the Human Rights charter

does not aim at describing the reality. Consequently, it has to be understood as a convention and not as a description. In order to describe the different levels of representation, let us consider the first part of article 1. from the human rights charter, in order to determine more precisely the kind of *ontological space* (cf. Mootz) that is relevant here:
All human beings are born free and equal in dignity and rights.

Let us first try to interpret such a sentence as a description, at a literal level. Obviously, as a factual description, it is false. Keeping in mind such an interpretation would be irrational, precisely because of the fact that the description is obviously false.
Let us now assume that such a sentence is a convention. Such a convention would have no real efficiency if it is not linked at all with reality, like it is often the case with arbitrary conventions in games.

Third, lets us try to interpret the sentence on a fictional level. In this case, one has to act "as if" *all human beings are born free and equal in dignity and rights*. I think that here, more than in the literal and conventional interpretations, the fictional interpretation is offending from an ethical and political viewpoint. Indeed, such a fiction would appear as a sinister farce: life is not a game where social rules may be totally invented.
At this stage, no satisfying "ontological space" was described in order to interpret such an article in a way that it is valid and efficient.

As I argued elsewhere (Danblon 2010), the best way to interpret such a sentence is at a "motivational" level. I borrow the concept of "motivational belief" from (Clément 2005) who tries to describe the cognitive functions of what he calls "credulity", i.e. a cognitive and rhetorical function using our "natural" ability of imagination. A motivational thought is a representation that is both possible and desirable. I think that this is exactly the case for the sentence: "*all human beings are born free and equal in dignity and rights*": it is not true but it is both desirable and possible. In such an interpretation, the sentence perfectly fulfils its rhetorical regulative function, expressed by an assertive speech act, even if this assertion is neither a description of reality, nor an arbitrary convention, nor a metaphorical fiction.

Now, following this description, we have to admit that human ability of imagination is one of the conditions for its rationality, which is very useful in all

domains where we need to exert rhetorical skills: politics, law, ethic, education, etc (see also Schaeffer 2002).

But to be honest, a motivational thought becomes both valid and efficient if and only if we are able to meet our rhetorical nature that allows us to use multiple levels of conventions and especially imagination. And, as it was underlined by (Vico 1986) and also by (Mootz 2008), such an ability has to be practiced (see also Girard 2009):

"Exercising the imagination through topical argumentation is necessary because there is no substitute for the accumulation of experience. One cannot become prudent by deducing answers to practical problems; one becomes prudent through the exercise of judgment based on insight, which actually is a way of apprehending the world by cultivating a rhetorical engagement with it. Vico stresses that education in rhetoric can develop this capacity. " (Mootz 2008, p.18).

6. Conclusion

Motivational thoughts are persuasive and valid if they are exercised. Such a practice is one of the most important functions in rhetoric. It is the only way to build a common world thanks to imagination and representation of possible worlds. Indeed, imagination is neither a fallacy nor a masquerade, but we have to exercise it regularly in order to understand the cognitive importance of this rhetorical function. In this perspective, charters illustrate a genre, which fulfils essential political and regulative functions in society. Old Europe is faced with a problem: it no longer believes in Utopia and therefore refrains from exercising imagination.

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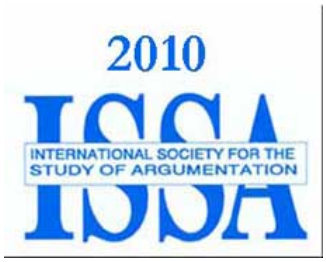
ISSA Proceedings 2010 – "The Truth And Nothing But The Truth?": The Argumentative Use Of Fictions In Legal Reasoning



1. Introduction: the concept of legal fiction ***[i]***

In eighteenth-century England, as we can see from a notorious story reproduced in different contemporary pieces of writing in the philosophy and history of law (Perelman 1999, p. 63; Perelman 1974, p. 348; Friedman 1995, p. 4, part II), the provisions of the criminal law insisted on the death penalty for every culprit accused of "grand larceny". According to the same law, "grand larceny" was defined as the theft of anything worth at least two pounds (or 40 shillings). Nevertheless, in order to spare the lives of the defendants, the English judges established a regular practice which lasted for many years, to estimate every theft, regardless of its real value, as though it were worth 39 shillings. The culmination of that practice was the case when the court estimated the theft of 10 pounds, i.e. 200 shillings, as being worth only 39 shillings, and thus revealed an obvious distortion of the factual aspect of that, as well as of many previous cases.

The said situation and the corresponding judicial solution of it represent one of the most utilized classical examples of the phenomenon of what is called "legal fiction" (or more adequately in this case, "jurisprudential fiction"). This concept designates a specific legal technique based on the qualification of facts which is contrary to the reality, that is, which supposes a fact or a situation different from what it really is, in order to produce a certain legal effect (Perelman 1999, p. 62; Salmon 1974, p. 114; Foriers 1974, p. 16; Delgado-Ocando 1974, p. 78, 82; Rivero 1974, p. 102; de Lamberterie 2003, p. 5; see also Smith 2007, p. 1437, Moglen 1998, p. 3, part 2 A).

However, this definition is not free from internal difficulties. Namely, the use of the terms "facts" and "reality" in its formulation immediately triggers the controversy between the common-sense, unreflective concept of factual reality as something that is simply "out there", waiting to be checked and identified, and the more sophisticated concept of "facts" and "reality" appropriate for the legal context. Namely, the latter takes into account the constructive capacity of institutional norms and rules to produce complex forms of legally relevant realities ("theft", "murder", "marriage", "contract", "association", etc.), consisting of a specific mixture of "brute" and "institutional" factual elements (Searle 1999, pp. 122–134).

That is why some authors insist on the point that in order to be counted as proper

legal fictions, it is not enough that the fictional legal statements simply involve an element of counterfactuality opposed to the common-sense reality; they must, moreover, be contrary to the existing *legal* reality. Thus, for instance, Perelman claims that if the existent legal reality is established by the legislator, like in the case of associations and other groups of individuals that are treated as legal personalities, then we are not entitled to consider it legal fiction, although it deviates from the psychological, physiological and moral reality in which the persons are identified as individual human beings. However, if, Perelman argues, a judge grants the right to sue a group of individuals that does not represent a legal personality, while the right to sue is reserved only for groups constituted as legal personalities, he is in fact resorting to the use of legal fiction (Perelman 1999, pp. 62-63). A similar position is also advocated by Delgado-Ocando, who subscribes to Dekker's view that legal fiction should not be considered a violation of "natural facts", but, essentially, a deliberately inaccurate use of the actual legal categories (Delgado-Ocando 1974, p. 82). Thus, using the above-mentioned definition of legal fictions as "a qualification of facts contrary to reality", I will bear in mind this specific meaning of "contrary-to-legal-reality", because I see as convincing the view that the existing legal reality, which includes the factual components but is not reducible to them, is the real target of the fictional reconfiguration by means of this peculiar legal technique.

Within this conceptual framework, the main goal of my approach to the issue of legal fictions will be twofold. First, through the analysis of some practical examples of legal fictions taken from different national jurisprudences, I will attempt to isolate the general argumentative mechanism of legal fictions by using some of the fundamental ideas and insights developed in different branches of the contemporary argumentation theory. Second, given the possible abuse of legal fictions as an instrument of legal justification, the emphasis will be placed on the issue concerning the possibility for the formulation of certain criteria in establishing the difference between the legitimate and the illegitimate use of this argumentative technique. However, in order to do this it will be necessary, first, to define the distinction between legal fictions and another kind of legal phenomena with which they are sometimes confused – legal presumptions, and second, to distinguish the different kinds of legal fictions that exist. Those distinctions will enable us to focus our attention solely on those aspects of the complex issue of legal fictions which are relevant for the purpose of this paper.

2. Legal fictions vs. legal presumptions

On a theoretical level, the question concerning the relation of legal fictions to legal presumptions is still a controversial one. The reason for this is most probably the fact that both legal fictions and legal presumptions establish a sophisticated relationship to the element of factual truth involved in a legal case in the sense that they both treat as true (in a legally relevant sense) something which is not, or may not be true in a factual sense. Thus, the presumption may be defined as an affirmation which the legal officials consider to be true in the absence of proof of the contrary, or even, in some cases, notwithstanding the proof of the contrary (cf. Goltzberg 2010, p. 98: "Affirmation, d'origine légale ou non, que le magistrat tient pour vraie jusqu'à preuve du contraire ou même dans certains cas nonobstant la preuve du contraire"). For example, a child born to a husband and wife living together is presumed to be the natural child of the husband; an accused person is presumed innocent until found guilty; an act of the state administration is presumed to be legal, etc., although in some cases those presumptions may be shown not to correspond to the factual state of affairs.

When discussing the issue of the relationship of legal fictions and legal presumptions, it is necessary to mention the classical dichotomy of presumptions into presumptions *juris tantum* and presumptions *juris et de jure*, i.e., "simple", rebuttable presumptions, which admit proof of the contrary, and "absolute", irrefutable presumptions, which do not admit proof of the contrary. For instance, the presumption of the paternity of the legitimate husband is rebuttable because it can be proven that the husband is not the real biological father of the child born within the marital union; on the other hand, the presumption that everyone knows the law ("no one is supposed to ignore the law", or in the well-known Latin formulation, "nemo censetur ignorare legem") is usually treated as an example of an irrefutable presumption because it is not possible to avoid liability for violating the law in criminal or in civil lawsuits merely by claiming ignorance of its content.

This distinction is significant in the issue of legal fictions because they are sometimes assimilated into the category of irrefutable presumptions. Thus, for instance, Wróblewski argues that irrefutable presumptions are the source of legal fictions because they cannot be discarded and because they formulate assertions which cannot be demonstrated to be false by reference to reality (Wróblewski 1974, p. 67: "Particulièrement la source des fictions se trouve dans les présomptions irréfragables, *praesumptiones iuris et de iure*, car elles ne peuvent

être écartées, elles formulent donc des assertions dont la fausseté n'est pas démontrable par une référence à la réalité").

However, the reasons for accepting this view do not seem to be conclusive. First, irrefutable presumptions and legal fictions establish different relations to the element of factual truth involved in a legal dispute. Namely, the irrefutable presumption just makes it irrelevant, in the sense that this kind of presumption does not allow the claims of the factual truth contrary to the presumed truth to be even taken into consideration in deciding the case. On the other hand, the legal fiction starts with the identification of the factual reality in the case at hand, but then distorts the standard qualification of facts that would be appropriate for this case in order to include them in another legal category and to produce the desired legal effect. Second, it seems reasonable to claim, as Foriers does, that legal presumptions and legal fictions belong, in fact, to different segments of legal theory and practice: the presumptions are related to the theory (and practice) of legal proof, regulating the possible objects of proof and the distribution of burden of proof between the parties, while legal fictions are related to the theory (and practice) of the extension of legal norms, or of their creating and legitimatizing (Foriers 1974, p. 8). That is why in the present approach, adopting the view of a fundamentally different nature of legal presumptions and legal fictions, my interest will be restricted only to the latter, without underestimating, of course, the genuine interest that legal presumptions legitimately raise as an object of study of contemporary research in legal argumentation.

3. Kinds of legal fictions

Legal fictions, as an interesting technical device, the use of which represents a pervasive trait of the legal practice from Roman times to the present, are not a homogenous class. The kinds of legal fictions vary depending on the segment of the legal system in which they are created and utilized. Thus, according to the criterion of their origin, we can distinguish legislative, doctrinal and adjudicative (jurisprudential) fictions (Delgado-Ocando 1974, p. 92; Foriers 1974, p. 16).

Legislative fictions, being those established by the legislator himself, can be further sub-divided into the categories of "terminological" and "normative" fictions. In the case of terminological fictions, the legislator fictionally qualifies a factual situation which is obviously contrary to the common-sense conceptual reality, like in the case when the law stipulates that some physically movable objects – animals, seeds, utensils, etc. – are to be considered immovable goods

(Article 524 of the French and Belgian Civil code). Normative legislative fiction, on the other hand, is that which adds a complementary norm to the terminological stipulation, because without invoking that norm it would be impossible for the fiction to play out its role. An example of this situation may be found in Article 587 of the French and Belgian Civil code, in which the legislator regulates the rights and duties of the usufructuary (a person who has the right to enjoy the products of property they do not own). Namely, the right to usufruct usually presupposes the conservation of the object (i.e. not damaging the property) that is being used. However, in order to further extend the right to usufruct also to things that cannot be used without being consumed, like money, grains, liquors, etc., the legislator is obliged to include a supplementary norm that, following the completion of the usufruct, the usufructuary should replace the consumed objects with such of similar quantity, quality and value. Thus, in this case, the fictional assimilation of expendable goods in the category of legitimate objects of usufruct is made possible by the introduction of a "meta-rule" that should justify or counterbalance the violation of the fundamental nature of the institution of usufruct (Foriers 1974, pp. 19-20).

Although the distinction between legislative and doctrinal legal fictions is not always easy to establish, it may be said that doctrinal fictions are theoretical devices whose function is to pave the road for the reception of new legal categories or to justify the implicit ideological basis of the legal system. Thus, the theories of the "declarative function of the judge" (judges are not entitled to create or to interpret the law, that being the function of the legislator) and of the "inexistent gaps in the law" (the system of law is complete and capable of regulating every legal dispute) are treated as examples of "doctrinal fictions", which attempt to assure the theoretical and systematic stability of the actual legal order (Delgado-Ocando 1974, p. 99).

However, for the purpose of this paper, the most important and the most interesting for argumentative analysis are the fictions of the third, adjudicative kind (usually called "jurisprudential fictions", especially in the French-speaking tradition). These are the fictions used in judicial reasoning as strategic instruments in attaining the desired aim by a deliberately inaccurate use of the existent legal categories and techniques of legal qualification. The specificity of jurisprudential fictions lies in their dynamic and unpredictable nature, in the sense that they are created "ad hoc" in the function of the resolution of a

particular, usually difficult and complex legal case. As Perelman points out, their use is particularly frequent in criminal law, when the members of the jury or the judges strive to avoid the application of the law that they find unjust in the circumstances of the specific case. This is the case not only in the classical "39-shillings" example, but also in the twentieth-century French and Belgian legal practices, when in several cases involving euthanasia the jury did not find the defendants guilty of the death of the deceased, although in the corresponding national legislatives there was no established distinction between euthanasia and simple murder (Perelman 1999, p. 63).

Nevertheless, jurisprudential fictions are not restricted solely to criminal cases; they may also be used in other legal areas, such as constitutional, civil, administrative, international law, etc. One particularly illustrative example can be taken from a former Yugoslavian and, subsequently, Macedonian legal practice from the area of contract law in the late 1960s. Namely, the existent law on the sale of land and buildings recognized legal validity only to those agreements concluded in written form, explicitly denying it to the non-written ones. However, in deciding the practical cases in which the sources of the dispute were orally concluded agreements, and in order to prevent manipulations with their consequences (for instance, the attempts of their annulment following the completion of the transfer of the property and money), the court decided to assimilate oral agreements into the category of written agreements and to accord them the same legal status, provided that they had been carried out (decision of the supreme Court of Yugoslavia R. no. 1677/65 from 18.03.1966; cited from Чавдар 2001, p. 155).

Although jurisprudential fictions are usually generated in order to deal with perplexing practical cases, they may also function as a source in creating new legislative rules (as was actually the case with the "39-shillings decision", or with the decision of the Yugoslavian Supreme Court to treat oral agreements, under certain conditions, as if they were written ones, which were later incorporated in the law in the form of general rules). This is, amongst others, one of the important reasons which make the phenomenon of jurisprudential fictions worthy of theoretical and practical attention and which will be further commented on in the concluding section of this paper.

4. Jurisprudential fictions and their argumentative role

Regardless of the definition of legal fictions that we are ready to adopt, it is

obvious that the strong counterfactual element necessarily involved in fictions which are used in judicial reasoning and motivation of judicial decisions makes their nature extremely controversial. Namely, it obviously collides with one of the fundamental demands of legal procedures – the need to establish the factual truth which lies in the basis of a lawsuit and to stick to it in the determination of the outcome of the legal dispute. Even if we agree that the concept of truth does not have the same meaning in the courtroom, in a scientific or philosophical investigation, or in everyday use, it cannot be denied that the mechanism of jurisprudential fictions is based on the deliberate refusal to adhere, for legal purposes, to the established truth of the facts in the case (for instance, the truth that the value of the theft is more than 39 shillings, or that the defendant voluntarily caused the death of another human being, or that the contract was not concluded in writing, etc.).

On the other hand, it is a well-known fact that the demand for the adherence to the truth in the adjudicative context cannot be easily disregarded because it arises primarily from the need to assure objectivity, impartiality and legal certainty in the administration of justice. Consequently, every aberration from it spontaneously raises suspicions that the respect of those fundamental values may be somehow placed in danger. This is perhaps the main reason why, in the history of legal thought, especially in the common law tradition in which the use of legal fictions in the process of adjudication was especially frequent, they were often perceived in a negative light, as a technique of manipulation by the judges, which corrupted the normal functioning of the legal system. The most prominent representative of that stance is Jeremy Bentham, in whose opinion legal fictions were simply usurpations of legislative power by the judges. He even compares the fiction to a nasty disease, syphilis, which infects the legal system with the principle of rottenness (cf. Smith 2007, p. 1466; Klerman 2009, p. 2; Fuller 1967, p. 2-3). Furthermore, in a contemporary context, there are also opinions which label legal fictions as dangerous and unnatural technical means in the law (cf. Stanković, 1999, p. 346).

However, there is also another side to this, which, being more sympathetic to the phenomenon of legal (or, in this context, jurisprudential) fictions, treats them as an important, useful and generally legitimate legal technique. In this perspective, they are viewed, essentially, as instruments that help their authors to determine and justify the correct outcome of a legal dispute, to obtain a result which would

be compliant to equity, justice or social efficiency (Perelman; cf. de Lamberterie, 2003, p. 5), especially in difficult and perplexing legal situations, when the established legal rules cease to "encompass neatly the social life they are intended to regulate" (Fuller 1967, p. viii). Thus, legal fictions are sometimes described as "white lies" of the law (Ihering; cf. Fuller 1967, p. 5), lies "not intended to deceive" and not actually deceiving anyone (Fuller 1967, p. 6), lies which are also "benefactors of law" (Cornu; cf. de Lamberterie 2003, p. 5) because they serve as a means to protect the important values of the legal and social world which may sometimes be endangered precisely by the very mechanical application of the existing legal rules.

As it is obvious even from this simplified description, the phenomenon of legal fictions mobilizes a corpus of very deep questions concerning the relations of law, reality and truth, the hierarchisation of legal values, the distribution of power between the legislative and the adjudicative officials within the framework of the legal system, the legitimate and illegitimate use of judicial discretion, etc. However, in my present approach, I shall focus only on those elements of the phenomenon of legal, or, more precisely, of jurisprudential fictions which are relevant for the analysis of legal reasoning from the point of view of the argumentation theory. Namely, it seems to me that the unveiling of the complex mechanisms of reasoning which those fictions use in applying the norms to the distorted factual reality is of crucial significance for the better understanding also of the other aspects of their functioning within the socio-legal context.

As a theoretical platform for analyzing the phenomenon of jurisprudential fictions, I would suggest a combination of two general ideas developed in the different orientations of the contemporary argumentation theory: first, the idea of legal justification as the essence of legal argumentation, and second, the idea of strategic maneuvering as an indispensable instrument of legal technique, especially in what is called "difficult cases". Allow me to briefly comment on each of the above-mentioned.

4.1. Jurisprudential fictions as justificatory devices

The importance of justificatory techniques in legal, and especially in judicial reasoning, is nicely summarized in the formulation that the acceptability of a legal decision is dependent on the quality of its justification (Feteris 1999, p. 1). However, some theoreticians of legal argumentation, as for example, Robert Blanché, are prepared to go even further and to affirm that judicial

argumentation is, in its essence, justification. Namely, according to this view, behind the façade of an impartial derivation of legal conclusions from the normative and the factual premises, in the judicial reasoning there is always an effort to justify a certain axiologically impregnated legal standpoint (Blanché 1973, pp. 228–238).

The main point of this insistence to the justificatory nature of legal argumentation is the need to emphasize the fundamentally regressive character of legal reasoning. The qualification "regressive" in this context means that in this type of reasoning the starting points are not the principles from which we progressively derive the consequence, but rather the consequence itself, from which we regress to the principles from which it may be derived (Blanché 1973, p. 12). Thus, in the context of legal reasoning, whilst the deliberation is treated as a progressive procedure in which the judge is seeking a solution for a legal problem, starting from a complex of legal principles, the justification is essentially a regressive procedure, which begins from the decision, that is, from the solution of the problem, and seeks the reasons and arguments which can support it (Blanché 1973, pp. 228-230).

It seems that the existence and the functioning of jurisprudential fictions strongly support the thesis of a fundamentally regressive character of legal argumentation. Namely, the need to use a fiction in the motivation of a judicial decision emerges only when it is necessary to find a way to justify a legal conclusion which, for some reason, does not fit in the existing legal framework, but which has already been estimated by the judge as the most satisfactory solution to the legal issue at hand. However, legal fictions are a type of non-standard justificatory device because they demand a deeper, riskier and more artificial argumentative maneuver than a search for reasons and arguments, which can simply be extracted from the existing regulation. In fact, the very need for fictional justification of a legal decision is a symptom of the disputable status of its legitimacy in the current legal framework, or an indicator that in the previous process of judicial deliberation which led to that decision, the boundaries of the system, for better or worse, have already been transgressed (for the difference in the justificatory function of "classical" and "new" legal fictions, see Smith 2003).

From the above-mentioned examples it is clear that the need to use jurisprudential fictions arises in situations when no exception to the rule, no

alternative interpretation and no ambiguous rule can be invoked by the judge in order to evade the unacceptable result of the application of the relevant legal norm and to justify the desired legal outcome of the case (for instance, sparing the life of a petty thief, granting the legally relevant status of orally concluded, yet realized agreements, etc.). Thus, not being entitled to assume, not openly at least, a legislative role and to change the legal rule which generates the undesired conclusion, the author of the jurisprudential fiction resorts to the modification of the other element on which the syllogistic structure of their reasoning is based – the factual premise.

From an argumentative point of view, the false qualification of facts, their deliberate assimilation in a legal category to which they obviously do not belong, represents a procedure which combines the techniques of reasoning *a contrario* and *a simili* in an idiosyncratic and rather radical argumentative maneuver (for the use of arguments *a contrario* as a technique of justification of judicial decisions, see Canale & Tuzet 2008, and Jansen 2008). Namely, the use of fiction is based on the identification not of similarity, but precisely of the essential difference between the categories to which the technique of assimilation is applied ("grand" and "small" larceny, "oral" and "written agreement", etc.). In fact, the fiction is in demanding an analogical treatment of two legally relevant acts in spite of the explicit recognition of their inequality (Delgado-Ocando, 1974, p. 82).

This analogical treatment of obviously different legal facts, which amounts to the assimilation of some of them in a category other than that they would normally belong to, is the key move which makes it possible for the judge to use the logical force of the subsumptive pattern of legal reasoning in order to justify his/her decision. For instance, if the rule of law provides that only written agreements are legally valid, and the oral agreement which is the object of the dispute is fictionally assimilated into the category of written agreements, it follows that it is also legally valid and should be protected by the law. To wit, the new, modified factual premise is now suitable for generating the desired conclusion under the general and unchanged normative premise.**[ii]**

4.2. Jurisprudential fictions as instruments of strategic maneuvering

The treatment of judicial fictions as specific justificatory instruments of "last resort", by which the judge attempts to fulfill his/her strategic role – that of legitimatizing a decision which cannot, *stricto sensu*, be justified by the standard

means in the existing legal framework – is very close to the conceptual horizon opened up by the theory of "strategic maneuvering" applied in a legal context (van Eemeren & Houtlosser 2005; Feteris 2009).

Legal, and especially judicial argumentation, like any other kind of argumentation, represents a goal-directed and rule-governed activity, with a strongly manifested agonistic aspect. However, one of the peculiarities of judicial argumentation is the fact that the justification and the refutation of legally relevant stances, opinions and decisions is realized within a strictly defined institutional framework, bounded by many restrictions not only of a logical, but also of a legal, substantial, as well as a procedural nature. Moreover, because of the conflicts of values, conceptions and interests in the social context, the judicial decisions are usually the object of numerous controversies and should be capable of withstanding sharp criticism in a dialogically structured (potential or actual) argumentative exchange. That is the reason why the argumentative strategies and instruments used in legal justification, especially in difficult cases, are complex and multi-layered; to wit, they have to represent an optimal plan to justify a particular decision taken as the most adequate and fair solution of the case at hand, in accordance with the strict demands of the legal system, and to defend it against any possible argumentative attack.

The concept of the argumentative maneuver in a legal context comes into play in those challenging situations when the judicial conviction of the fairness and rightness of a particular decision conflicts with the relevant norms applicable to the specific case. In that kind of situation, the judge operates in the (usually, fairly limited) space left for his/her "margin of appreciation", trying to find argumentative means to fulfill the strategic goal of justification by using the instruments which are placed at his/her disposal by the legal system.

In general, the techniques of interpretation of legal rules (linguistic, genetic, systematic, historical, etc.), which enable to broaden or to restrict their scope by invoking the intention of the legislator, the origin and the evolution of the rule, the nuances of meaning of terms in its formulation, etc., are used as tools in this strategic maneuvering (on this point, besides the above-mentioned Feteris 2009, it could be instructive to see also van Rees 2009 and Ieţcu-Fairclough 2009). Viewed, generally, as an "attempt to reconcile dialectical obligations and rhetorical ambitions" (van Eemeren & Houtlosser 2005, p.1), the strategic maneuvering in the justification of judicial decisions is an indispensable

instrument in resolving the tension "between the requirement of legal certainty and the requirement of reasonableness and fairness" (Feteris 2009, p. 95).

This general function of strategic maneuvers used in legal justification is the main reason for suggesting that the phenomenon of legal fictions could also be treated as a specific type of such maneuvering, although comprised in a broader sense than the interpretative maneuvers *stricto sensu*, capable of being adequately accounted for by the pragma-dialectical analytical apparatus (like, for instance, in Feteris 2009). Namely, in the above-mentioned examples of the judicial use of fictions, the refusal to apply (at least, in a straightforward way) the general legal norm to the established facts of the case was inspired by the need to meet the standard of reasonableness and fairness of the decision, while the move of falsely qualifying the facts was intended to integrate the judicial solution into the structure of paradigmatic legal reasoning, as one of the warrants of legal certainty. Nevertheless, the specificity of legal fictions compared to other forms of strategic maneuvering in the legal area lies in the fact that the target of this maneuver is not the rule itself and its possible interpretations, but the very facts of the case which make it possible (or impossible) to subsume it under that particular legal rule. However, this move reveals, simultaneously, the inherently controversial connotations of the notions "maneuver" and "maneuvering", which may sometimes also denote an implicit attempt to undermine or to subvert the legitimate functioning of legal rules, while creating only the impression that they are being consistently observed.

In that way, the use of fictions as strategic means in legal reasoning and argumentation shares the crucial question treated in the contemporary theory of strategic maneuvering in argumentation: how to establish the difference between the legitimate and the illegitimate use of this technique, between its "sound" and its "derailed" instances (van Eemeren & Houtlosser 2009)? Namely, when it is affirmed that the use of fiction aims to produce a desired legal outcome, the adjective "desired" is burdened by a particularly dangerous form of ambiguity. The effect desired by a corrupted or biased judge, to bear in mind the Benthamian warnings, may be, for example, the protection of particular political, economic or personal interests, the discreditation or elimination of political adversaries, the legitimatizing of an oppressive politics by a (nationally or internationally) dominant class or ideology, etc. Obviously, the fictional distortion of existent reality in order to bring about legal consequences is a pricey move, a move which

may serve the search for justice and equity equally well as it may hinder it.

The problem of the criteria in distinguishing the legitimate and the illegitimate use of legal fiction as a technique of justification of judicial decisions, especially in difficult legal cases in which "the legal reasoning falters and reaches out clumsily for help" (Fuller 1967, p. viii), is too complex and too difficult to be resolved by a simple theoretical gesture. On this occasion, I would venture only to make two suggestions in the direction of making preparations for its more elaborate treatment in the future.

First, it seems that the criteria of sound and derailed argumentative use of fictions are not an absolutely homogenous class, but that they could be differentiated according to the legal area to which the case with fictional justification belongs: civil, criminal, constitutional, etc. The reason for this is the fact that in different legal areas there are different articulations of the fundamental legal relationships between the concerned subject and agents, different standards of acceptable methods of proof and justification. For instance, as it is well known, the use of analogical reasoning in criminal law is not allowed, whilst in civil law the norms governing its use are more permissible. Thus, a detailed identification of the existent standards of use of argumentative techniques in each legal area could represent a useful clue to the elaboration of criteria of the acceptable application of the fictional legal devices in it.

Second, if we feel that notwithstanding the differences in the area of application, there should be a more general formulation of the criterion of the legitimate use of legal, or, more precisely, jurisprudential fictions, perhaps we should explore the direction open by the formulations of the "principle of universalizability" (cf., for instance, Hare 1963) suitable for the legal context – like, for example, Perelman's "rule of justice" (Perelman & Olbrechs-Tyteca 1983, p. 294), or Alexy's "rules of justification" in the rational practical discourse (Alexy 1989, pp. 202-204). Namely, in all of these examples the underlying idea is that one of the fundamental features of fair application of legal rules is its capacity for universalisation, in the sense that the treatment accorded to one individual in a given legally-relevant situation, should also be accorded to any other individual who is in a similar situation in all relevant aspects. Applied to the problem of jurisprudential fictions, it would mean that if the judge is prepared, in an ideal speech situation, to openly declare the normative choice obfuscated by the fictional means and to plead for its universalisation to the status of precedent for

other cases or of a general rule that should be explicitly incorporated in the legal system, then it can be treated as a positive sign (although not as an absolute or clear-cut criterion) of the legitimacy of its previous use. Supposedly, the protection of partial political, economic or ideological interests "covered" by the derailed uses of fictions in judicial reasoning should not be able to pass the hypothetical or the actual test of universalizability.

In fact, in a historical sense, the universalisation, i.e. the extension of a particular judicial solution to other similar cases, was the general effect of the use of some famous legal fictions, including those from our examples, which contributed to the sensibilisation of legal and social authorities to the existing gap between the reality and the norms, and to the overcoming of it by creating new legal rules. In that way, legal fictions, in spite of their controversial nature, or perhaps just because of it, are shown to be, not only in history, but also in the present, a powerful impetus of the conceptual and normative evolution, in the legal, as well as in the philosophical and logical sense of the word.

5. Conclusion

In this paper, an attempt was made to approach the issue of legal and, especially, jurisprudential fictions by using the theoretical and conceptual tools developed within the framework of the contemporary argumentation theory. Two ideas were discussed as particularly suitable in the realization of this goal: the idea of legal justification as a fundamental aspect of legal argumentation and the idea of strategic maneuvering as an indispensable tool of the technique of justification of legal decisions, especially in "difficult" legal cases. From this perspective, legal fictions used in judicial reasoning have been treated as peculiar, non-standard justificatory devices and instruments of strategic maneuvering. Their main function is related to the attempt to reconcile the desirability of a certain judicial solution seen as the most reasonable and fair decision in the case at hand, with the demands of the existing legal order, especially the demands of legal certainty. Given the possibility of the abuse of fictions as an instrument in legitimatizing the inappropriate usurpation of normative power by judges, particular attention was accorded to the issue of the criteria of their legitimate and illegitimate use, and the potential of universalization of a particular legal fiction was suggested as a possible indicator of the appropriateness of being resorted to in judicial reasoning.

NOTES

i The author wishes to thank the editors and the two anonymous reviewers for their helpful comments on a previous version of this paper.

ii An interesting question, which deserves a more elaborate treatment and more detailed research, is the question if the reasoning mechanisms involved in the creation and utilization of legal fictions can be plausibly accounted for from the point of view of the contemporary theories of defeasible reasoning in law (on the problem of defeasibility in judicial opinion cf. Godden & Walton 2008).

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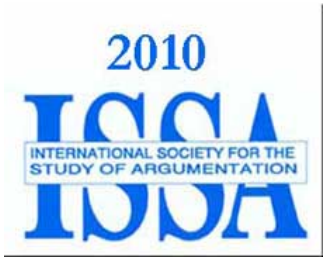
ISSA Proceedings 2010 – Meta-Argumentation: Prolegomena To A Dutch Project



What I want to do in this essay is to discuss the notion of meta-argumentation by summarizing some past work and motivating a future investigation (which, for obvious reasons, I shall label the *"Dutch"* project). The discussion is meant to make a plea partly for the theoretical and methodological importance and fruitfulness of meta-argumentation in general, and partly for approaching from the viewpoint of meta-argumentation a particular (Dutch-related) topic that is especially relevant on the present occasion for reasons other than methodology and theory. I hope that the potential appeal of this aspect of the essay – combining methodological orientation and theoretical conceptualization with empirical and historical content – will make up for whatever shortcomings it may possess from the point of view of substantive detail about, and completed attainment of, the Dutch project.

1. Historical Context of William the Silent's Apologia (1581)

In May 1581, the States-General of the Low Countries met here**[i]** in Amsterdam to draft a declaration of independence from Philip II, King of Spain, who had ruled this region since 1555. In the course of the summer, this congress moved to The Hague, where the declaration was concluded at the end of July. This declaration is called the *"act of abjuration"*, meaning that these provinces were thereby abjuring their allegiance to the King of Spain.**[ii]**

This act of abjuration was taking place in the midst of an armed conflict that had already lasted twenty-five years and was to continue for another quarter century. The conflict was partly a war of national independence for the modern Netherlands. However, the conflict was also a civil war within the Low Countries stemming from religious and ethnic differences: the main religious difference was between Catholics and Protestants, while the main ethnic difference was between Dutch-speaking northerners and French-speaking Walloons in the south; eventually this civil war was partially, although not completely, resolved by the split between Belgium and The Netherlands. Finally, the conflict was partly a

democratic revolution, in which the people were objecting to taxation without representation and defending local rights vis-à-vis centralized government.

The act of abjuration was occasioned by a proclamation issued the previous year by King Philip against the leader of the revolt, William of Nassau, Prince of Orange, now known as William the Silent. Philip's proclamation banned William from the Low Countries and called for his arrest or assassination, promising the assassin a large sum, a title of nobility, and a pardon for any previous crimes.

William was the most important leader of the revolt, popular among the nobility as well as common people, influential among Catholics as well as Protestants, and fluent in both French and Dutch. He was becoming increasingly effective in his leadership, especially in the provinces of Holland and Zealand, which were more independent-minded than the other fifteen. Although the difficulty of the struggle and his assassination four years later prevented him from seeing his efforts come to fruition, he paved the way for the later success. For even after his death his qualities could serve as a model: he was usually regarded as thoughtful, prudent, moderate, tolerant, and politically astute and skillful.

William had been the first-born, in 1533, to the Protestant Count of Nassau, in Germany. At age eleven, he inherited from a cousin vast possessions in the Low Countries and elsewhere, including the small principality of Orange in France and the title of Prince. This inheritance was approved on one condition by Charles V, Holy Roman Emperor, King of Spain, and father of Philip II: that William's parents relinquish their parental authority. Thus, he was thereafter educated as a French-speaking and Dutch-speaking Catholic in the Low Countries. Later, however, in 1573, he re-joined the Reformed Church, while continuing to uphold as supreme the right of freedom of conscience.

In response to Philip's proclamation, William produced a document entitled *Apologia* (William 1581; 1858; 1969). This was presented to the States-General in December 1580. The following year it was published as a booklet of one hundred pages in the original French version, as well as in English, Dutch, German, and Latin translations. Copies were sent to all rulers of Christendom.

Thus, in the years 1580-1581, in the context of the ongoing armed conflict in the Low Countries, the Netherlands revolt produced a remarkable triad of documents: a proclamation of proscription and assassination by King Philip II of Spain against

William of Orange; a defense by William from Philip's accusations; and a declaration of independence from Philip's sovereignty by the States-General of the Low Countries. Of these documents, William's *Apologia* is the most informative, because it is the longest, because it summarizes Philip's charges, and because it anticipates the declaration of independence. It is not surprising that the *Apologia* went through sixteen editions in the following two decades (Wansink 1969, p. vii).

William's *Apologia* is also a more argumentative text than the other two. It is an intense piece of argumentation, for it attempts to do several things: to refute Philip's accusations; to advance countercharges; to justify William's own behavior; and to justify the right of the Low Countries to independence.

This judgment about the argumentational import of William's *Apologia* is widely shared. For example, Voltaire described it as one of the most beautiful arguments in history.**[iii]** The nineteenth-century American historian John Motley expressed the following judgment: William "possessed a ready eloquence – sometimes impassioned, oftener argumentative, always rational. His influence over his audience was unexampled in the annals of that country or age, yet he never condescended to flatter the people" (Motley 1883, vol. 3, p. 621); and Motley was the author of a monumental history of the Netherlands revolt, in seven volumes, totaling 3400 pages (Motley 1856; 1860). Even a more critical historian, himself a Dutchman, who was the dean of twentieth-century scholars of Dutch history, Pieter Geyl, judged the following: William of "Orange's greatness as a leader of the Netherlands people lay precisely in his unsurpassed talent for co-operating with the States assemblies … Persuasion was what he excelled in" (Geyl 1958, p. 193). Finally, in the past decade William's *Apologia* has attracted the attention of Frans van Eemeren and Peter Houtlosser (1999; 2000; 2003), who have examined it from the point of view of the pragma-dialectical theory of argumentation. In fact, I can report that it was their articles that first awakened my interest in this text. Their judgment, added to that of Voltaire, Motley, and Geyl, and my earlier historical considerations, suggest that William's *Apologia* is a candidate for analysis on the present occasion.

2. Universal Cultural Significance of William's Apologia

Nevertheless, I hesitate to undertake an analysis of this work. For I am sensitive to the potential criticism that it is risky, rash, or arrogant for an outsider like myself who lives about 10,000 kilometers from The Netherlands to rummage

through local history and expect to find anything new or insightful to tell locals (or other interested parties). It's as if a visitor were to lecture at my University of Nevada, Las Vegas, and pretend to give locals lessons about gambling, hotel administration, or popular entertainment.
On the other hand, an analysis of William's *Apologia* may be worthwhile for other reasons, above and beyond the *ad hoc*, localistic, or antiquarian considerations advanced so far. These additional reasons are philosophical or general-cultural, as well as methodological or epistemological.

The main cultural reason is that William's *Apologia*, and the Netherlands revolt which it epitomizes, are of universal significance, and not merely historical curiosities of interest to people who happen to descend from those protagonists.
For example, I have already mentioned that a crucial issue over which William fought was freedom of religion and of individual conscience. Now, let me simply add the obvious, namely that this cluster of freedoms and individual rights is one of the great achievements of modernity, and that it certainly is not going to be superseded by anything which so-called post-modernists have proposed or are going to propose. To be sure, this freedom is subject to abuse, misuse, and atrophy from non-use, as well as perversion and subversion, and so it must be constantly safeguarded and requires eternal vigilance. But these caveats too are a lesson that can be learned from the Netherlands revolt. In fact, in that period, it often happened that, once the Calvinist Protestants got the upper hand in a town or province, they had the tendency to reserve that freedom only for themselves and deny it to the Catholics. However, in William we have someone who defended the legitimate rights of both sides, and opposed the abuses of both.

A second example is provided by the similarities between the 1581 act of abjuration and the American Declaration of Independence of 1776. The similarities center on the political right of the governed to give or withhold their consent to the governors. That is, the Netherlands declaration antedates by about two centuries the American declaration, and thus must be regarded as one of the founding documents in the history of political democracy. And again, needless to say, the same caveats apply to the democratic ideal that apply to the ideal of religion liberty.

Let me conclude these considerations on the universal significance of the Netherlands revolt and William's *Apologia* with some quotations from the works of John Motley, the nineteenth-century American mentioned earlier as the author

of a monumental history of the revolt. For the eloquence and inspired zeal of this outsider are themselves eloquent and inspiring testimony of that universality.

Motley's book begins with these words: "The rise of the Dutch Republic must ever be regarded as one of the leading events of modern times … [It was] an organized protest against ecclesiastical tyranny and universal empire … [For] the splendid empire of Charles the Fifth was erected upon the grave of liberty. It is a consolation to those who have hope in humanity to watch, under the reign of his successor, the gradual but triumphant resurrection of the spirit over which the sepulchre had so long been sealed" (Motley 1883, vol. 1, p. iii).
Here, Motley is attributing to the Netherlands revolt two merits, namely its contribution to the ideals of religious freedom and national liberation. But next he speaks of a third merit, which is an epoch-making contribution to the art of politics: "To the Dutch Republic … is the world indebted for practical instruction in that great science of political equilibrium which must always become more and more important as the various states of the civilized world are pressed more closely together … Courage and skill in political and military combinations enabled William the Silent to overcome the most powerful and unscrupulous monarch of his age" (Motley 1883, vol. 1, pp. iii-iv).

3. The Historical-Textual Approach to Argumentation
So much for the universal significance of William's *Apologia*, providing a cultural reason for undertaking an analysis of its argumentation. Now, I go on to the methodological considerations. These are really more pertinent, and it is they that have made me overcome my hesitation in tackling a subject that is apparently so distant from my scholarly concerns.

For a number of years, I have advocated an empirical approach to the study of argumentation which I call the historical-textual approach (Finocchiaro 1980, pp. 256-307; 2005, pp. 21-91). In this approach, the working definition – indeed almost an operational definition – of argumentation is that it occurs typically in written or oral discourse containing a high incidence of illative terms such as: therefore, so, thus, hence, consequently, because, and since.

Here, I contrast the empirical primarily to the apriorist approach, an example of the latter being formal deductive logic insofar as it is regarded as a theory of argument. On the other hand, I do not mean to contrast the empirical to the normative, for the aim of the historical-textual approach is the formulation of

normative and evaluative principles besides descriptive, analytical, and explanatory ones. Another proviso is that my empirical approach ought not to be regarded as empiricist, namely as pretending that it can study argumentation with a *tabula rasa*.

This historical-textual approach is my own variation on the approaches advocated by several scholars. They have other labels, different nuances, and partly dissimilar motivations and aims. Nevertheless, my approach derives partly from that of Michael Scriven and his probative logic; Stephen Toulmin and his methodological approach, as distinct from his substantive model of argument; Henry Johnstone Jr. and his combination of philosophy and rhetoric; and Else Barth and her empirical logic.**[iv]** Moreover, my approach overlaps with that of Ralph Johnson, Tony Blair, and informal logic; Alec Fisher and his logic of real arguments; and Trudy Govier and her philosophy of argument, meaning real or realistic arguments.**[v]**

Typically, the historical-textual approach involves the selection of some important text of the past, containing a suitably wide range and intense degree of argumentation. Many of the classics fulfill this requirement, for example, Plato's *Republic*, Thomas Aquinas's *Summa Theologica*, *The Federalist Papers* by Alexander Hamilton, John Jay, and James Madison, and Charles Darwin's *Origin of Species*. Not all classics would be appropriate: some for lack of argumentation, some for insufficient intensity, and some for insufficient variety. In some cases works other than the classics would serve the purpose, for example collections of judicial opinions by the United States Supreme Court or the World Court in The Hague.

Given this sketch of the historical-textual approach, together with my earlier remarks about William's *Apologia*, now perhaps you can begin to see the connection, that is, a possible methodological motivation for undertaking an analysis of that work. But this is just the beginning, and I am not sure that what I have said so far would provide a sufficient motivation for me. So let me go on with my methodological justification.

Following such an historical-textual approach, many years ago I undertook a study of Galileo Galilei's book, *Dialogue on the Two Chief World Systems, Ptolemaic and Copernican*. This book is not only the mature synthesis of astronomy, physics, and methodology by the father of modern science, but also

the work that triggered Galileo's Inquisition trial and condemnation as a suspected heretic in 1633; it is also full of arguments for and against the motion of the earth. My study led me to a number of theoretical claims (Finocchiaro 1980, pp. 311-431; 1997, pp. 309-72; 2005, pp. 34-91, 109-80).

For example, the so-called fallacies are typically either non-fallacious arguments, or non-arguments, or inaccurate reconstructions of the originals; but many arguments can be criticized as fallacious in various identifiable ways. There are important asymmetries between the positive and the negative evaluation of arguments, although one particular alleged asymmetry seems untenable, namely the allegation that it is possible to prove formal validity but not formal invalidity. One of the most effective ways of criticizing arguments is to engage in *ad hominem* argumentation in the seventeenth century meaning of this term, namely to derive a conclusion unacceptable to opponents from premises accepted by them (but not necessarily by the arguer). Finally, argumentation plays an important and still under-studied and unappreciated role in science.

4. The Meta-argumentation Project

All this may be new to some of you, familiar to a few others, but almost ancient history to me. For more recently, I have been focusing on meta-argumentation. It's not that I have abandoned my historical-textual approach, but that I have found it fruitful to apply it to a special class of arguments, called meta-arguments. On this subject, I want to acknowledge Erik Krabbe (1995; 2002; 2003) as a source of inspiration and encouragement. Paraphrasing his definition of metadialogue, I define a meta-argument as an argument about one or more arguments. A meta-argument is contrasted to a ground-level argument, which is typically about such topics as natural phenomena, human actions, or historical events.

Meta-arguments are special in at least two ways, in the sense of being crucially important to argumentation theory, and in the sense of being a particular case of argumentation. First, meta-arguments are crucially important because argumentation theory consists, or ought to consist, essentially of meta-argumentation; thus, studying the meta-arguments of argumentation theorists is a meta-theoretical exercise in the methodology of our discipline. Second, meta-arguments as just defined are a particular case of argument-tation, and so their study is or ought to be a particular branch of argumentation theory.

Consequently, my current project has two main parts. In both, because of the historical-textual approach, the meta-arguments under investigation are real, realistic, or actual instances of argumentation. But in the meta-theoretical part, the focus is on important arguments from recent argumentation theory. In the other part, the focus is on famous meta-arguments from the history of thought.

Before illustrating this project further, let me elaborate an immediate connection with William's *Apologia*. In fact, William's text is not just an intense and varied piece of argumentation, as mentioned before, but it is also a meta-argument since it is primarily a response to King Philip's proclamation. But Philip's proclamation gave reasons why William should be proscribed and assassinated, and however logically incoherent and mean-spirited those reasons may have been, they constitute an argument, at least for those of us who uphold the fundamental distinction between an argument and a good argument. On the other hand, Philip's proclamation is a ground-level argument, and the same is true of the States-General's act of abjuration. Thus, my motivation for undertaking an analysis of William's *Apologia* can now be fleshed out further. I can go beyond my earlier remark that it is a candidate for study by argumentation scholars because it is a famous example of intense and varied argumentation; now I can add that the text is a *good* candidate for analysis in a study of *meta-argumentation* conducted in accordance with the *historical-textual approach*.

However, how promising is such a project? I must confess that the stated motivation, even with the addition just made, would still be insufficient, at least for me, if this were my first study of a famous meta-argument in terms of the historical-textual approach; that is, if I had not already conducted some such studies and obtained some encouraging results. Moreover, it is important that this project plans to study famous meta-arguments in conjunction with currently important theoretical arguments because, as mentioned earlier, the hope is not merely to contribute to a particular branch of argumentation studies, however legitimate that may be, but also to address some key issues of argumentation theory in general. Thus, I need to at least summarize some of my previous meta-argumentative studies, in order to strengthen my methodological plea for an analysis of William's *Apologia*.

5. Meta-argumentation in the Subsequent Galileo Affair

Let me begin by saying a few words about one of my previous studies of meta-argumentation (Finocchiaro 2010) that is intermediate between my current

project and my earlier study of the ground-level arguments in Galileo's *Dialogue*. At a subsequent stage of my research, I discovered a related set of significant arguments that are primarily meta-arguments. Their existence was not as easily detectable, because they are not found within the covers of a single book, and because initially they do not appear to focus on a single issue. This discovery required a laborious work of historical interpretation, philosophical evaluation, and argument reconstruction.

I am referring to the arguments that make up the subsequent Galileo affair, as distinct from the original affair. By the original Galileo affair I mean the controversy over the earth's motion that climaxed with the Inquisition's condemnation of Galileo in 1633. By the subsequent affair I mean the ongoing controversy over the rightness of Galileo's condemnation that began then and continues to our own day. The arguments that define the original affair (and that are primarily ground-level) are relatively easy to find, the best place being, as mentioned, Galileo's own book. On the other hand, the arguments that make up the subsequent affair (and that are primarily meta-arguments) must be distilled out of the commentaries on the original trial produced in the past four centuries by all kinds of writers: astronomers, physicists, theologians, churchmen, historians, philosophers, cultural critics, playwrights, novelists, and journalists.

Let me give you some examples, both to give you an idea of the substantive issues of the subsequent affair and of the fact that it consists of meta-arguments. To justify the claim that the Inquisition was right to condemn Galileo, the following reasons, among others, have been given at various times by various authors (see Finocchiaro 2010, pp. xx-xxxvii, 155-228). (1) Galileo failed to conclusively prove the earth's motion, which was not accomplished until Newton's gravitation (1687), Bradley's stellar aberration (1729), Bessel's annual stellar parallax (1838), or Foucault's pendulum (1851). (2) Galileo was indeed right that the earth moves, but his supporting reasons, arguments, and evidence were wrong, ranging from the logically invalid and scientifically incorrect to the fallacious and sophistical; for example, his argument based on a geokinetic explanation of the tides is incorrect. (3) Galileo was indeed right to reject the scientific authority of Scripture, but his supporting reasoning was incoherent, and his interference into theology and scriptural interpretation was inappropriate. (4) Galileo may have been right scientifically (earth moves), theologically (Scripture is not a scientific authority), and logically (reasoning), but was wrong legally; that is, he was guilty

of disobeying the Church's admonition not to defend earth's motion, namely not to engage in argumentation, or at least not to evaluate the arguments on the two sides of the controversy.

After such meta-arguments are found and reconstructed, one must evaluate them. In accordance with my historical-textual approach, part of the evaluation task involves reconstructing how such arguments have been assessed in the past four centuries. But I also had another idea. One could try to identify the essential elements of the approach which Galileo himself followed in the original controversy over the earth's motion, and then adapt that approach to the subsequent controversy. This turned out to be a fruitful idea.

In particular, two principles preached and practiced by Galileo were especially relevant. Influenced by the literature on informal logic, I label them the principles of open-mindedness and fair-mindedness, but here I am essentially paraphrasing his formulations. Open-mindedness is the willingness and ability to know and understand the arguments against one's own claims. Fair-mindedness is the willingness and ability to appreciate and strengthen the opposing arguments before refuting them.

Thus, I was led to the following overarching thesis about the meta-arguments making up the subsequent Galileo affair: that is, the anti-Galilean arguments can and should be successfully criticized by following the approach which Galileo himself used in criticizing the anti-Copernican arguments, and this is an approach characterized by open-mindedness and fair-mindedness. In short, at the level of interpretation, I argue that the subsequent Galileo affair can be viewed as a series of meta-arguments about the pro- and anti-Copernican ground-level arguments of the original affair; at the level of evaluation, I argue that today, in the context of the Galileo affair and the controversies over the relationship between science and religion and between institutional authority and individual freedom, the proper defense of Galileo should have the reasoned, critical, open-minded, and fair-minded character which his own defense of Copernicanism had.

6. Theoretical Meta-arguments

Let us now go on to my current project studying meta-argumentation in an historical-textual manner. I begin with some examples of the meta-theoretical part of this project.**[vi]**

One of these meta-arguments is Ralph Johnson's justification of his dialectical

definition of argument (cf. Finocchiaro 2005, pp. 292-328). I start with a contrast between the illative and the dialectical definitions, but distinguish three versions of the latter: a moderate conception for which the dialectical tier is sufficient but not necessary; a strong conception for which the dialectical tier is necessary but not sufficient; and an hyper conception for which the dialectical tier is necessary and sufficient. Johnson's conclusion is the strongly dialectical conception. His argument contains an illative tier of three supporting reasons, and a dialectical tier consisting of four criticisms of the illative conception and replies to six objections. The result of my analysis is the conclusion that the moderate conception is correct, namely, that an argument is an attempt to justify a conclusion by *either* supporting it with reasons, *or* defending it from objections, *or both*. My argument contains supporting reasons appropriated from the acceptable parts of Johnson's argument, and criticism of his strong conception. I also defend my moderate conception from some objections.

Another example involves the justification of the hyper dialectical definition of argument advanced by Frans van Eemeren and the pragma-dialectical school (cf. Finocchiaro 2006). The hyper dialectical definition of argument claims that an argument is simply a defense of a claim from objections. Their meta-argument is difficult to identify, but it can be reconstructed. Before criticizing it, I defend it from one possible criticism, but later I argue that it faces the insuperable objection that the various analyses which pragma-dialectical theorists advance to support their definition do not show it is preferable to all alternatives. Then I advance an alternative general argument for the unique superiority of the hyper definition over the others, but apparently it fails because of the symmetry between supporting reasons and replies to objections. My conclusion is that the moderately dialectical conception is also preferable to the hyper dialectical definition.

Next, I have examined the arguments for various methods of formal criticism by Erik Krabbe, Trudy Govier, and John Woods (cf. Finocchiaro 2007a). This turned out to be primarily a constructive, analytical, or reconstructive exercise, rather than critical or negative. Krabbe (1995) had shown that formal-fallacy criticism (and more generally, fallacy criticism) consists of metadialogues, and that such metadialogues can be profiled in ways that lead to their proper termination or resolution. I reconstruct Krabbe's metadialogical account into monolectical, meta-argumentative terminology by describing three-types of meta-arguments

corresponding to the three ways of proving formal invalidity which he studied: the trivial logic-indifferent method, the method of counterexample situation, and the method of formal paraphrase. A fourth type of meta-argument corresponds to what Govier (1985) calls refutation by logical analogy. A fifth type of meta-argument represents my reconstruction of arguments by parity of reasoning studied by Woods and Hudak (1989).

Another example is provided by the meta-arguments about deep disagreements. Here, I examine the arguments advanced by such scholars as Robert Fogelin, John Woods, and Henry Johnstone, Jr., about what they variously call deep disagreements, intractable quarrels, standoffs of force five, and fundamental philosophical controversies (see Fogelin 1985, 2005; Woods 1992, 1996; Johnstone 1959, 1978). As much as possible their views, and the critiques of them advanced by other scholars, are reconstructed as meta-arguments. From my analysis, it emerges that deep disagreements are rationally resolvable to a greater degree than usually believed, but that this can be done only by the use of such principles and practices as the following: the art of moderation and compromise (codified as Ramsey's Maxim); open-mindedness; fair-mindedness; complex argumentation; meta-argumentation; and *ad hominem* argumentation in a sense elaborated by Johnstone and corresponding to the seventeenth-century meaning, mentioned earlier.

Finally, another fruitful case study has dealt with conductive meta-arguments. The term "conductive" argument was introduced by Carl Wellman (1971), as a third type of argumentation besides deduction and induction. In this context, a conductive argument is primarily one in which the conclusion is reached nonconclusively based on more than one separately relevant supporting reason in favor and with an awareness of at least one reason against it. Conductive arguments are more commonly labeled pro-and-con arguments, or balance-of-considerations arguments. They are ubiquitous, especially when one is justifying evaluations, recommendations, interpretations, or classifications. Here I reconstruct Wellman's original argument, the constructive follow-up arguments by Govier (1980; 1987, pp. 55-80; 1999, pp. 155-80) and David Hitchcock (1980; 1981; 1983, pp. 50-53, 130-34; 1994), and the critical arguments by Derek Allen (1990; 1993) and Robert Ennis (2001; 2004). My own conclusion from this analysis is that so-called conductive arguments are good examples of meta-arguments; for a crucial premise of such arguments is a balance-of-considerations

claim to the effect that the reasons in favor of the conclusion outweigh the reasons against it; such a claim can be implicit or explicit; but to justify it one needs a subargument which is a meta-argument; hence, while the conclusion of a conductive argument is apparently a ground-level proposition, a crucial part of the argument is a meta-argument.

7. Famous Meta-arguments

These examples should suffice as a summary of the meta-theoretical part of my study of meta-argumentation in accordance with the historical-textual approach. The other part was a study of famous meta-arguments that are important for historical or cultural reasons. Obviously, the meta-arguments in William's *Apologia* are of the latter sort. So it will be useful to look at what some of these previous studies have revealed.

A striking example is provided by chapter 2 of John Stuart Mill's essay *On Liberty* (cf. Finocchiaro 2007c). It can be reconstructed as a long and complex argument for freedom of discussion. The argument consists of three subarguments, each possessing illative and dialectical components. The illative component is this. Freedom of discussion is desirable because, first, it enables us to determine whether an opinion is true; second, it improves our understanding and appreciation of the supporting reasons of true opinions, and of their practical or emotional meaning; and third, it enables us to understand and appreciate every side of the truth, given that opinions tend to be partly true and partly false and people tend to be one-sided. The dialectical component consists of replies to ten objections, five in the first subargument, three in the second, one in the third, and one general.

So reconstructed, Mill's argument is a meta-argument, indeed it happens to be also a contribution to argumentation theory. For its main conclusion can be rephrased as the theoretical claim that freedom of argument is desirable. A key premise, which Mill assumes but does not support, turns out to be the moderately dialectical conception of argument. And one of his principal claims is the thesis that argumentation is a key method in the search for truth.

Another famous meta-argument occurs in Mill's book on *The Subjection of Women* (cf. Finocchiaro 2007b). The whole book is a ground-level argument for the thesis that the subjection of women is wrong and should be replaced by liberation and equality. The meta-argument is found in the first part of chapter 1. Then in the

rest of that chapter, he replies to a key objection to his own thesis. Finally, in the other three chapters he articulates three reasons supporting that thesis. Mill begins by formulating the problem that the subjection of women is apparently a topic where argumentation is counterproductive or superfluous. He replies by rejecting the principle of argumentation that generates this problem and replacing it by a more nuanced principle. However, this principle places on him the burden of causally undermining the universal belief in the subjection of women, to pave the way for argumentation on the merits of the issue. Accordingly, he argues that the subjection of women derives from the law of the strongest, but that this law is logically unsound and morally questionable, and hence that custom and feeling provide no presumption in favor of the subjection of women. Additionally, Mill thinks that in this case he can make a predictive extrapolation; accordingly, he argues that there is a presumption against subjection based on the principle of individual freedom. This predictive extrapolation and the causal undermining are complementary meta-arguments.

Now, these two meta-arguments may also be viewed, respectively, as the criticism of an objection, and the statement of a supporting reason, and hence as elements of the dialectical and illative tiers, rather than as a distinct meta-argumentative part of the overall argument. This possibility raises the theoretical issue that there may be a symmetry between meta and ground levels analogous to the symmetry between illative and dialectical tiers; if so, then meta-argumentation would be not only an explicit special type of argument, but also an implicit aspect of all argumentation,**[vii]** distinct from but related to the illative and dialectical components.

A third example of famous meta-argumentation is the critique of the theological design argument found in David Hume's *Dialogues concerning Natural Religion* (cf. Finocchiaro 2009). Hume's critique is a complex meta-argument, consisting of two main parts, one interpretive, the other critical. His interpretive meta-argument claims that the design argument is an inductive ground-level argument, with a complex structure, consisting of three premises and two sub-arguments, one of which sub-arguments is an inductive generalization, while the other is a statistical syllogism. Hume's critical meta-argument argues that the design argument is weak because two of its three premises are justified by inadequate sub-arguments; because its main inference embodies four flaws; and because the conclusion is in itself problematic for four reasons. Finally, he also argues that the

design argument is indirectly undermined by two powerful ground-level arguments, involving the problem of evil; they justify conclusions that are in presumptive tension with the conclusion of the design argument, while admittedly not in strict contradiction with it.

Here, the main theoretical implication is along the following lines. Hume's critique embodies considerable complexity, so much so that it could be confusing. However, such complexity becomes quite manageable in a meta-argumentation approach; this means that the concept of meta-argument can serve as a principle of simplification, enhancing intelligibility, but without lapsing into over-simplification.

8. Conclusion

In summary, (F) the analysis of William the Silent's *Apologia* is a very promising project in argumentation studies, for two reasons, a general one involving my historical-textual approach, and a more specific and important one involving my meta-argumentation project.

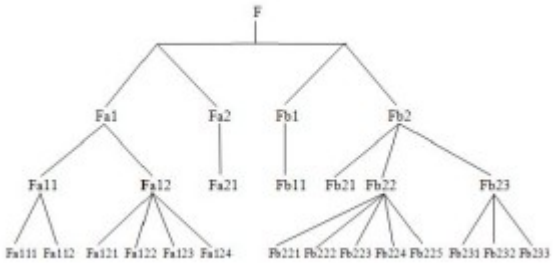
First, generally speaking, (Fa11) this work contains argumentation that is intense and varied, as revealed by (Fa111) even a cursory reading, as well as (Fa112) the considered judgment of many authorities. Moreover, (Fa12) the issues it discusses are universally significant because they involve (Fa121) freedom of religion, (Fa122) the right to national independence, (Fa123) the ideal of democratic consent, and (Fa124) the art of political equilibrium. Thus, (Fa1) this text is susceptible of being analyzed in accordance with the historical-textual approach to argumentation in general. But we have seen that (Fa2) the historical-textual approach is fruitful; for example, (Fa21) it has yielded interesting results by studying the arguments about the motion of the earth in Galileo's *Dialogue*.

More specifically and more importantly, (Fb1) William's *Apologia* is a piece of meta-argumentation since (Fb11) it is a response to a proclamation that is itself an argument. But we have seen that (Fb2) the historical-textual study of meta-arguments is proving to be a fruitful project. For example, (Fb21) it has already yielded some results with regard to the meta-arguments that constitute the subsequent Galileo affair. More to the point, (Fb22) it is yielding interesting results with regard to the meta-arguments of leading argumentation theorists, dealing with topics such as (Fb221) the strongly dialectical concept of argument, (Fb222) the hyper dialectical concept of argument, (Fb223) methods of formal

criticism, (Fb224) deep disagreements, and (Fb225) conductive arguments; and (Fb23) it is also yielding interesting results with regard to famous meta-arguments, such as Mill on (Fb231) liberty of argument and on (Fb232) women's liberation, and (Fb233) Hume on the theological design argument.

What I have just summarized is (dare I say it?) my argument, such as it is, in this address here today; that is, the reasons why I think it would be fruitful to analyze William's *Apologia* from the point of view of meta-argumentation and the historical-textual approach; that is, my prolegomena to a future meta-argumentative and historical-textual study of this Dutch classic.

If I had more time, I might discuss the details of the propositional macrostructure of my argument, as you can visualize in the following diagram:**[viii]**



This would reinforce the fact that, after all, I have been arguing for the past hour, however modestly in intention, execution, and results. Could I have done anything less? Or different? I suppose I could have described the details of William's meta-argumentation, which of course I am now committed to doing sooner or later. But this description, even without motivation or justification, would have taken the whole hour. Moreover, my describing by itself would not have been an actual instantiation of argumentation, let alone meta-argumentation. On the contrary, in this address I wanted, among other things, to practice what I preached.

NOTES

[i] A slightly shorter version of this paper was delivered as a keynote address to the Seventh Conference of the International Society for the Study of

Argumentation at the University of Amsterdam, on 30 June 2010. This venue accounts for my choice of this word here, as well as for the similar self-referential remarks in the last two paragraphs in section 8 below.

[ii] This episode is discussed in Motley 1883, vol. 3, pp. 507-9; Wedgwood 1944, p. 222; Geyl 1958, pp. 183-84; and Swart 1978, p. 35. My account in the rest of this paper is also based on these works, but from here on no specific references will usually be given, except for quotations and a few other specific items.

[iii] Quoted in Eemeren and Houtlosser 2003, p. 178. I am paraphrasing, for Voltaire said *monument*, which I am reading as *argument* because the "monument" we are dealing with is linguistic rather than physical. Motley (1883, vol. 3, p. 493) paraphrases *monument* as *document*.

[iv] See Scriven (1976; 1987) and cf. Finocchiaro 2005, pp. 5-7; see Toulmin 1958 and cf. Finocchiaro (1980, pp. 303-305; 2005, pp. 6-7); see Johnstone (1959; 1978) and cf. Finocchiaro (2005, pp. 277-91, 329-39); see Barth 1985, Barth and Krabbe 1992, Barth and Martens 1982, Krabbe et al. 1993, and cf. Finocchiaro (2005, pp. 46-64, 207-10).

[v] See Blair and Johnson 1980, Johnson 1987, Johnson and Blair 1994, and cf. Finocchiaro (2005, pp. 21-33); and see Fisher (1988; 2004) and Govier (1987; 1999; 2000, pp. 289-90), and cf. Finocchiaro (2005, pp. 1-105, 329-429).

[vi] One of the referees raised an objection to this part of the project along the following lines: in order to assess the arguments that make up a given argumentation theory, one has to use either the evaluation criteria of the same theory or those of another theory; but if one uses the same criteria, it is not obvious that such self-reflective exercise is possible or fair (the latter because it might automatically yield a favorable assessment); on the other hand, if one uses the evaluation criteria of another theory, then it is also not obvious that such an external evaluation is possible or fair (the latter because it might automatically yield an unfavorable assessment); therefore, this meta-theoretical project is doomed from the start since it may very well be impossible or unfair.

My reply is that this objection seems to assume uncritically a relationship between the theory and the practice of argumentation that may be the reverse of the right one. My inclination is practically oriented, in the sense of giving primacy to the *practice* of meta-argumentation. That is: let us try to do the meta-theoretical exercise; if it can be done, that shows that it is possible; moreover, let us try to be fair-mined in doing it; if we succeed in doing it fairly, that shows that the meta-theoretical evaluation can be fair; thus, let us postpone questions of possibility and fairness until afterwards. Moreover, the objection perhaps proves

too much, in the sense that if what it says about evaluation or assessment were correct, then it would be likely to apply also to interpretation or reconstruction, in which case it would be suggesting that theoretical meta-arguments perhaps cannot even be understood, at least not from an external point of view; and such a parallel objection strikes me as being a *reductio ad absurdum* of its own assumptions.

[vii] As one of the referees pointed out, this hypothesis may be viewed as a special case of a thesis widely held in communication studies. For example, Bateson (1972, pp. 177-78) has claimed that "human verbal communication can operate and always does operate at many contrasting levels of abstraction. These range in two different directions … metalinguistic … [and] metacommunicative." Similarly, Verschueren (1999, p. 195) has maintained that "all verbal communication is self-referential to a certain degree … all language use involves a constant interplay between pragmatic and metapragmatic functioning … reflexive awareness is at the very core of what happens when people use language."

I take this coincidence or correspondence as an encouraging sign, but I think it would be a mistake to exploit it for confirmatory purposes. In particular, such general theses cannot be used to justify my particular hypothesis about meta-argumentation because they are formulated and defended in a context and with evidence that does not involve the phenomenon of argumentation, but rather other linguistic and communicative practices. For example, Bateson (1972, pp. 177-93) is dealing with such phenomena as playing, threats, histrionics, rituals, psychotherapy, and schizophrenia; and of Verschueren's (1999, pp. 179-97) fifty-four examples of metapragmatic use of language, only two involve (simple, ground-level) arguments. Thus I feel they have not established that their generalizations apply to argumentative communication, and the question whether this particular application holds is the same question whether my meta-argumentation hypothesis is correct. Moreover, I would stress that both authors (Bateson 1972, p. 178; Verschueren 1999, pp. 183-87) are keen to point out that the metalevel aspect of the phenomena they study is a matter of degree and is usually implicit; on the other hand, my own meta-argumentation project focuses on very explicit cases.

The same referee also pointed out the other side of the coin of this potential confirmation of my hypothesis by the widely held generalization from communication studies. That is, perhaps my distinction between ground-level and meta-argumentation, together with my hypothesis about the implicitly meta-

argumentative aspect of all argumentation, is afflicted by the difficulties stemming from the self-referential paradoxes such as Russell's and the liar's paradox. For example, Bateson (1972, pp. 179-80) is worried that when two humans or animals are playing by simulating a physical combat, the meta-communicative "message 'This is play' … contains those elements which necessarily generate a paradox of the Russellian or Epimenides type – a negative statement containing an implicit negative metastatement. Expanded, the statement 'This is play' looks something like this: … 'These actions in which we now engage, do not denote what would be denoted by those actions which these actions denote'." Recall that Russell's paradox exposes the self-contradiction of the notion of a set of all sets that are not members of themselves, and that the liar's paradox is the self-contradiction of the statement that this statement is false.

However, my reply to this potentially negative criticism is analogous to my reply to the earlier potentially strengthening confirmation. I see the difficulty with the Russellian set and with the liar's sentence, and I see some similarity between them and Bateson's meta-communicative message that "this fighting is play"; but I see no similarity with my notion of a meta-argument, its distinction from a ground-level argument, and their relationship; and until and unless a similar paradox is specifically derived regarding meta-argumentation, I shall not worry.

[viii] For an explanation of such diagrams, which are now common in the literature and come in various slightly different versions, see, for example, Scriven (1976, pp. 41-43) and Finocchiaro (1980, pp. 311-31; 1997, pp. 309-35; 2005, pp. 39-41).

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