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Building a Winning Team: The Development of Arguments in Criminal Cases

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ABSTRACT: When ‘making a case’ in court, the defense lawyer engages different arguments in a situated performance. At the same time, these arguments have developed over time in front of different audiences. In this paper I will follow the construction of arguments in an actual criminal case from preparation to the trial by focusing on the developments and refinements of the arguments that inform and shape the case.

KEYWORDS: career, ethnography, legal argumentation, theme, topos.

On April 24th a green car drives on a main road in C-city. It hits a woman and two children who tried to cross the street. The car only briefly slows down before speeding up and leaving the scene of the accident. Later the car is found abandoned and unlocked in a side street. The car had no liability insurance issued for it. As the owner the police determine Kevin Becker¹ who will four weeks later become the client of “my lawyer”. Kevin Becker claims that he had given the car to an acquaintance – Frauke Schumann. After the police locate the real driver, Kevin withdraws his statement. He claims that he has been afraid of the driver, his friend Tim Schobanowski, and therefore invented Frauke. Kevin is indicted for lending out a car without liability insurance, obstruction of justice and false allegation. He receives a rather harsh sentence of 14 months on probation and appeals the verdict. At the end of the appeal hearing the judge reads out the reasons for the verdict. The prison sentence is slightly reduced to 10 months. The defense had hoped for a conversion into a fine. In the read out verdict two themes gain prominence: Kevin’s fear and his ethos.

Looking at this case with an interest in argumentation, many approaches to legal argumentation would concentrate on the verdict. It is here, where the “legal arguments” are clearly visible. Especially in the inquisitorial, German system the reasons given by the judge in the verdict play a pivotal role and are subject to many analyses and studies (see for example Christensen/ Kudlich 2001, Sobotta 1996). The reasons for the verdict mark the end of a proceeding and thereby present a conclusion not only in inferential but also in temporal terms. Concentrating on the analysis of verdicts reflects an understanding of legal argumentation as argumentation by legal professionals. But as one can see in the brief summary above, it is not only the judge but also the defendant, Kevin, who introduces arguments in this case.

One way to capture the contribution of lay argumentation to the proceeding would be to turn to so called courtroom studies. These studies focus on the interaction in the courtroom, many of them drawing on insights from Ethnomethodology and Conversation Analysis. They fill the gap the sole analysis of the verdict produces on

¹ All names of persons and places as well as dates have been changed to ensure anonymity.

first sight by addressing the question how trials are interactionally accomplished. At the same time, argumentation is rarely a relevant category in court-room studies. Komter (1998), for instance, in her splendid study on dilemmas in the courtroom discusses among others the relation between accusation and defenses as well as between explanations and understanding. In her work these categories are not linked to argumentation. Still, the activities she refers to could also be framed in the sense of giving of and asking for reasons. Her not doing so is certainly not a shortcoming but merely a different interest: Courtroom studies are less interested in the reasons themselves – they are interested in the activities by which participants produce meaning. Also, argumentation, it seems, is an uneasy concept for descriptive empirical work as it is always carrying normative baggage. This baggage consists among others in the notion, that crucial parts of the argument – premises, topoi, themes – stay implicit and are not visible on the discursive surface (see Deppermann 2003, p. 14). Also, as a further problem for Conversation Analytic or Ethnomethodological studies in general, argumentation is often not a participant category. Rarely would participants refer to their conversational activities as argumentation.²

Kindt (2001) has urged discourse studies to pay more attention to the concept of argumentation. This is especially appropriate in studies of the legal realm. The serious obstacle that argumentation is rarely a participant category in conversations needs to be qualified for the context of German criminal law. In the case above, the verdict states the mentioned themes explicitly as reasons. The aim of the participants in the proceeding is to get the own explanation, justification, motive, etc. under this heading, that is, to make it fit into the category of ‘reasons for the verdict’. In this sense argumentation is a category that informs the actions by the participants – at least by the professional participants.

In this paper I would like to offer an analysis of argumentation in the legal realm from a process perspective.³ German criminal trials are, as one scholar put it at a conference, proceedings “out of the file and into the file”. Hence, the continuity of the process and the building-up of cases plays a pivotal role. Although the trial (the *Hauptverhandlung*) is the central and public stage of the proceeding, it is highly informed by the pre-trial preparation that is documented in the file, which is shared by all participants, and will itself become part of the file. Hence, the criminal trial or appeal hearing is just one event in a procedural flow. What I am interested in in this paper is how the reasons that appear in the verdict at the last instance have developed over time in the proceeding.

In the following I shall first address the conceptual question of the unit of analysis and discuss briefly the relation between topos, theme and argument. Then I will introduce my methodological starting point in terms of an ethnography of argumentation in order to then turn to the analysis of two themes.

² This issue arises of course only if one takes arguing as the giving and taking of reasons with respect to a controversial point, not if one includes quarrelling and other forms that not necessarily involve reasoning. This issue is rather unproblematic for the German context, because *argumentieren* always relates to reasoning.

³ Although I would also call this analysis a rhetorical one, the notion of process here is understood in contrast to event, not to procedure or product. Hence, I am not referring to the tripartite model of (perspectives on) argumentation.

THEMES AND ARGUMENTATION

How does an argument move through the proceeding? How *is* it moved through the proceeding? In order to answer these questions one would need to clarify first what is meant by ‘an argument’ – what is the unit of analysis? I suggest to take *theme* as the unit. Not unlike a theme in music, this theme in argumentation exhibits a clear and recognizable structure, yet stays flexible and encounters changes in the course of the proceeding.

The notion of theme helps to address the problematic concept of topos and its relation to actual arguments. Topos is a rather fuzzy concept, accommodating formal (topos as argument scheme or argument move), material (topos as general concept like liberty, solidarity, etc.) and “trivial” understandings (topos as overused commonplace). In this paper I understand topos in the sense of material topos⁴ but, even more important, as a generative unit.⁵ Hence, topoi are the places that provide the substance for arguments, but never appear on the discursive surface themselves. Once a topos is mobilized, it loses its generality and is adjusted to the specific case. Hence, designing an argument relates to the state between taking up a topos – in the sense of a neutral, generic discursive quality that only leaves traces on the discursive surface – and the fully fleshed argument. This notion is close to what Luhmann (1971) introduced as themes⁶. He takes themes – with regard to public opinion – to be „more or less undetermined and viable complexes of meaning ... that can be talked about with the same but also with differing opinions“ (“mehr oder weniger unbestimmte und entwicklungsfähige Sinnkomplexe ... über die man reden und gleiche, aber auch verschiedene Meinungen haben kann” p. 13). Different from topoi, themes are visible on the discursive surface, they are not as stable as topoi and have a career that can be witnessed. Also, although being neutral in the beginning – one can talk about the theme without necessarily expressing an opinion – the theme can force the participants to take a stance. At a certain point in the career of a theme everybody who talks about it needs to take sides (see p. 14). This holds especially true for legal (and in this paper criminal) cases. The introduction of a theme always implies its introduction as a theme for an argument. The criminal proceeding presents to the participants the imputation to argue. Every theme that gets introduced or adhered to, ceases to be neutral.

In this paper, I am interested in the relation between the development of two themes, which are taken from two topical areas that will always feature in German criminal proceedings. With Quintillian these are *loci a re* and *loci a persona* (see Ueding/ Steinbrink 1994, p. 238). As Komter (1998) puts it for the Netherlands, quite comparable to Germany: “In the courtroom, two kinds of explanations are generally brought forward for the offenses: the suspects’ immediate motives for their acts and their biographical backgrounds and life circumstances” (p. 60). Hence, the defense

⁴ I understand material topos following Kopperschmidt (1992) as a concept an argument appeals to. Freedom, free markets, solidarity, etc. would be classic examples of material topoi. Hence I do not refer to topoi in the sense of argument schemes or moves, nor to the notion of topoi as overused commonplaces.

⁵ For a more comprehensive treatment of this notion of argument theme as in between topos and argument see Hannken-Illjes et al. (2007) and Hannken-Illjes (in press).

⁶ Luhmann does not link his discussion of the career of themes in public discourse to argumentation or to topos. Knoblauch (2000), however, argues that Luhmann’s sense of theme could be compared to topos in rhetoric. This reading is quite debateable, as Luhmann stresses that themes at a certain point of their career cannot be employed neutrally anymore but imply a partisan stand. This would contradict one of the most basic characteristics of topoi: their neutrality.

needs to work on both broad thematic streams and mobilize both. How do they do that?

ETHNOGRAPHY OF ARGUMENTATION

Before turning to the analysis, I shall briefly describe and discuss its methodological background. This study is part of a broader project on the „Comparative Microsociology of Criminal Proceedings“. ⁷ The project comprises four case studies from four different countries, England, US, Italy and Germany, thereby including two different procedural systems in criminal law: the adversarial and the inquisitorial. The case analyzed here stems from my data, collected in two extended periods of fieldwork in two defense-lawyer's firms. My objective during this fieldwork was to follow the development of criminal cases from their first appearance in the law firm to the final decision. The data I collected consists of copies of files, audio recordings of lawyer-client meetings, ethnographic interviews, protocols of court hearings and field notes.

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

At the same time the production of arguments, the mobilization of themes always implies an audience. Hence, describing the mobilization of a theme is an inherently rhetorical way of looking at legal argumentation. The theme is mobilized for a specific case and for specific audiences as will be shown in the analysis. One can already see from the introduction, that in legal proceedings (and in this case criminal proceedings) reasons do not come alone but form an ensemble. Most likely, they interact with each other (there might be a critical mass for the number of themes that can be employed) and depend on each other. To keep it feasible, in this paper I will follow two themes through the proceeding, belonging to the two central topical areas that every verdict needs to address.

KEVIN IS AFRAID

As the brief introduction of the case at the beginning of this paper stated, Kevin is charged with obstruction of justice because he made false allegations in order to protect a friend, Tim. He explains in a letter to the prosecutor that he made these false allegations due to fear of "his friend". The theme of fear here functions as a justification for another argument that failed impressively: the made-up Frauke Schumann. The following table shows the career "fear" makes during the pre-trial

⁷ Located at the Freie Universität Berlin since 2003, this project has been lead by Thomas Scheffer.

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phase.⁸

10.09.00	Letter by lawyer to prosecutor	Objecting her exclusion from the testimony by Ms Vogel, a main witness. "This apprehension is based on the statements the witness made in her testimony at the police, where she admitted fear of the accused Schobanowski".
10.09.00	Letter by client (Kevin) to prosecutor	Retracting his earlier account. Gives as reason for this wrong account his fear of Tim Schobanowski. "I made my initial testimony of having given my car to Frauke Schumann because I had promised so to Tim Schobanowski and Regina Vogel for fear of potential consequences by Mr. Schobanowski. In my discussions with Mr. Schobanowski I had become aware that he would not flinch from turning to violence if anybody would not act according to his interests. On August 8, 2000, I found an envelope containing two bullets in my mail box in Entenpfad. The envelope had not been addressed and must have been inserted between 07/30 and 08/08. For on 07/30/2000 I had been to my flat and emptied the mail box for the last time before. This made me once again aware of the fact that I had to take Mr. Schobanowski's and his accomplices' threats seriously."
17.09.00	Note by the lawyer	„unmarked paper envelope – defense statement 10.09.2000, client touched bullets in order to look at them ...“
18.09.00	From lawyer to prosecutor	Copy of the complaint against a person unknown.
18.09.00	From lawyer to police	Report against a person unknown. "In the name and on the instructions of my client I report the following matter: On August 8, 2000, my client found an unaddressed envelope containing two bullets in his mail box in Entenpfad. This letter must have been inserted between July 30 and August 8, 2000. For my client had emptied his mail box for the last time on July 30, 2000. My client took the bullets out to inspect them. Doing so he touched the bullets with his fingers. My client is accused, among other things, in an investigation for failing to stop after being involved in an accident. In this context he gave information on the course of events that

⁸ These extracts have been translated for the purpose of this paper.

		is suitable to incriminate other persons. My client supposes that the envelope with the bullets has been sent to him as a sign of a serious threat in order to influence his testimony in this proceeding under this impression.”
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Kevin introduces a new theme into the defense strategy: he lied to the police because he was afraid. He substantializes this fear by linking it to a threat. This theme is not only introduced to the defense ensemble during the pre-trial phase but also to the restricted public of the proceeding at this time. Hence, the prosecution, police and later on the judge will know of this theme and its argumentative employment prior to the trial. This is necessary on the one hand as it fills an important blank: it is the rationalization for the invention of Frauke. On the other hand, the employment of this theme seems to carry little risk as it does not appear for the first time in the case. The first document mentioning fear (the letter by the lawyer to the prosecutor) points to this: the lawyer does not take up fear with respect to her client, it is not his fear she is talking about. She refers to the fear a witness brought in as a reason why she stayed quite so long.

With the first document the defense aims at dissociating the ‘fear’ from Kevin as the source. This is the only way he can later become the target. This first document points at an earlier introduction of the theme by other participants that can be followed in the file. The following extracts from three documents show how fear becomes an issue in the proceeding prior to Kevin’s statement and how it is received by the participants.

08.07.00	Police/ inquiry report	“Ms Vogel has mentioned her fear of Schobanowski again and again. She made a statement in the way that Schobanowski would do something to her parents if she testified.”
09.07.00	Prosecutor/ decree	“With regard to the fact that the accused Schobanowski has threatened Ms Vogel severely should she testify (p. 166, 168) ...”
22.07.00	Testimony Manon Stock	“He [Schobanowski] always sends his kids. – What do you mean by ‘kids’? – That means, that he does not take care of it on his own but sends folks who do it for him. That means he [Becker] get punched. I cannot say, if that actually happened.”

Two witnesses in the proceeding reference fear of Tim Schobanowski as a motive for their own or other’s behavior. A file note by the police states that Ms Vogel, who sat in the car with Tim when the accident happened, addressed several times the fact that Tim threatened to harm her parents. A day after the file note, the prosecution issues a motion, stating that Ms Vogel will give testimony in front of a judge prior to the trial, so that she will not need to face Tim Schobanowski. The reason he gives for this motion is that Schobanowski has threatened Ms Vogel on several occasions. Hence, the prosecution takes up on a theme that Ms Vogel has introduced into the proceeding and uses it as an argument, thereby marking it as a valid theme in this judicial proceeding.

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The theme of fear also appears in a witness testimony by an acquaintance of Kevin and Tim. She states that Schobanowski sends his guys for beating up other people referring to Kevin in particular. The theme of fear as a fear developing from threats emerges here independently from the first introduction. The latter witness testimony also dissociates Becker from Schobanowski by naming him as the target rather than the source of violence and threats. This testimony supported Kevin's lawyer in her move to disconnect Kevin from Tim, as she does in her first letter to the prosecutor.

This history of the theme "fear" in the file is relevant for the development of Kevin's argumentation because it is known to the defense. The file built by the prosecution is available to the defense. Kevin, with his introduction of fear as a reason for why he lied to the police, can profit from the earlier statements in the file in two ways. First, fear as a valid theme has been ratified by the prosecution. Second, the threat going out from Tim Schobanowski has been stated by two other witnesses before and again builds the ground for the reasonable fear.

Judging from the file then, "fear" appears to be a strong theme prior to the trial, a theme that has been concretized to be the fear with respect to Tim Schobanowski. It has been used by different participants and ratified by the defense's potential antagonist. Also, it has been stabilized by materializing the threat in the form of the two bullets. With this history in mind the trial takes a rather unexpected turn.

12./23.01.01	Trial (<i>Hauptverhandlung</i>)	blank
16.02.01	Written verdict	States that Kevin Becker has not given a statement during the trial. The defense statement by Becker, written on the 10 th of September is referenced. The theme of fear is not elaborated in the verdict.

The protocol of the trial shows a notable absence. Fear is not thematized by the defense. This pause is even more notable when taking into consideration the main hearing's role in the German criminal proceeding. Everything that goes into the verdict needs to be presented orally in court. Hence, the theme that has been developed in the restricted public of the pre-trial does not take the crucial step into the forum of the general public. The theme does however reappear in the verdict, but only in a very weak sense, linked to parts of the file that have been read out during trial. Hence, fear has been attributed to Becker in the trial by presenting pre-trial documents himself, but he has not claimed it.

Kevin Becker lodges an appeal, appealing to the sentencing decision, not to the established facts. Here the theme of fear reappears.

16.06.00	Appeal hearing	In the appeal hearing, the judge introduces the first instance verdict and states that not the factual grounds but the legal interpretation of the facts are questioned by the defense. He continues that to his knowledge the defendant did not give a statement at the first instance because he was afraid of his co-defendant. The judge asks Kevin directly if he was,
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		indeed, afraid of his friend. “Yes”, Kevin responds. The prosecutor points out that Kevin never said anything like that during trial and that he even could sit next to Tim. Kevin insists: “But I was afraid, and nobody could take away that fear”.
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After a long pause during the main stage in the proceeding ‘fear’ reappears as a theme. It is, however, introduced not by the defense but by the presiding judge. Once introduced, the defense – and in this case the defendant – takes up on the theme. Again, the defense uses the theme only after it has been marked as valid by other participants in the trial. However, for the first time in proceeding ‘fear’ is attacked as a theme Kevin could claim for his argument. The prosecutor points out that Kevin missed the opportunity to utter or to act according to this theme at the trial.

The theme of fear has developed in the open. This ‘open’ however, takes different shapes. It is introduced by the defense to the restricted public of the pre-trial proceeding. Here it receives no rebuttal but not much recognition either. To the general public in the trial it is only presented via the introduction of the file not by the defense itself. Due to its public life in the file, its absence in the trial becomes notable. It produces a blank.

KEVIN HAS A JOB

Parallel to “fear”, another theme is developed by the defense – the ethos of the defendant. On second sight however, ethos does not qualify as a theme, as it is too broad and splits up into different themes, that taken together aim at showing the defendant to be a good person. In this case of Kevin Becker the ethos combines the following themes: employment, paying the rent, and in general “staying out of trouble”. The lawyer asks or rather warns the client a couple of times to “be careful! Do not block the last remaining chances for the defense.” I shall concentrate on the development of the theme “employment” in the following. Very differently from the first theme this one is mobilized and stabilized solely backstage. Also, it is not initiated by the defendant but by the lawyer. She is taking care of this theme, as is shown by its presence in the lawyer’s file.⁹ The following notes show the traces of this mobilization left there.

10.07.00	Note by the lawyer	Client has not found a job yet, four job interviews this week.
25.09.00	Note by the lawyer	Client will apply for a permanent position at an insurance company on Friday. Client will go through a test day as a co-driver at a delivery service.
30.09.00	Notes from lawyer-client conference	Client continues to apply for long-term positions.

The defense has continuously invested into the theme of employment. Other than the

⁹ Besides the shared file, all participants keep their personal files with notes, correspondence etc.

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theme fear, the development of this theme seems to be rather unspectacular; the highs and lows in the effort to mobilize it are visible, and thus potentially problematic, only for the defense.

Preparing the grounds to argue with the defendant's ethos is a default strategy. No matter what the charges are, the lawyer will always work on the theme of the "good person", mobilizing those themes that are known to be crucial or especially beneficial for the defendant. Different from the theme 'fear' that functions to explain a certain action, the ethos cannot be prepared openly. This points to the issue of validity claims of truthfulness, which cannot be followed up on discursively but only performatively (see Habermas 1995, p. 69). It would not be useful to communicate the reasons that speak for the client as a person to the different audiences in the pre-trial. The development of the theme is not part of the shared file. Rather, the defense shows at the trial the deeds that have come out of the preparation: the steady job. Here, an argument is not only mobilized by discursive means but needs to be accompanied by the respective actions (or, most of the time, non-actions). The strength of the prepared arguments can only be tested at the trial, in the general public.

12./23.01.01	Trial	Judge reads out at the end of the trial prior convictions, asks Kevin Becker about education, <i>employment status</i> , children and income, talks about his efforts to get employed and to cover his prior sentences (fines)
16.02.01	Written verdict	In the first round of reasons for the verdict, Kevin Becker is characterized with respect to age, marital status, education, <i>employment</i> and prior convictions.
14.6.01	Appeal hearing	Kevin says the following about his current personal situation: "I have a work contract on a permanent position, perspective to receive advanced training"

What is apparent in the preparation by the defense lawyer is that the argumentation is directed at the judge and not at the victim. Hence, the construction of ethos may include the display of remorse (in the case that the defendant admits to the charges) but not necessarily. The argument is not directed at the past to achieve reconciliation but to the future, to argue that the defendant from now on will abide the law.

CONCLUSION

The analysis depicted the careers of two themes. These two themes cover the two main areas of reasons in the verdict: the deed and the person. Both could be traced throughout the proceeding, in lawyer's notes, letters, testimonies, and the trial. This interest in the development of a theme allows for focusing on what is needed in order to turn something into an argument that can play a role in the trial. The trial as the public performance of the proceeding functions as a central checkpoint the defense ensemble has to anticipate.

As the manner in which to trace the developing or becoming arguments I suggested to understand them as themes that are located between topos and argument. The notion of theme allows to describe different arguments as linked and depending on each other while at the same time it is more specific than topos. Topos as a generic

concept, a place, that one needs to go to and fetch arguments, is not something that can be found and described on the discursive surface. What is taken from a topos is a theme that needs to be made available and that needs to be ratified as a theme independently of its argumentative employment. Following the career of an argument theme means to follow a process of making available.

But although the two themes developed parallel to each other in the preparation by the defense, they developed in very different ways. Fear was taken up by the defense after it had already been communicated and ratified in the restricted public of the pre-trial proceeding. Starting from there, it was nurtured by claiming it publicly through letters to the prosecution and also through nurturing it materially by the two bullets in the envelope. Precisely because the career of ‘fear’ had been a public one, its absence during the trial was notable, marking a gradual failure of the theme.

‘Employment’ as part of the ‘good Kevin’ was mobilized very differently. It developed in the backstage of the lawyer-client relationship. Its traces could be found in the lawyer’s file, not the shared file. Only in the trial, the outcome of this mobilization could be harvested when Kevin could talk about his new life (including a new job). The mobilization of this theme appears in the lawyer’s file and also in the client-lawyer interactions I witnessed rather as “out of case”, as the general interest of a lawyer who understands her job as including to help people get back on the right track. On second sight it reflects an interest by the lawyer in the client that is shared by the law – both want to know, who the client is. The mobilization of the ethos is thus a default strategy for the lawyer. No matter if the defendant wants to confess, to counter the accusations or to remain silent, the lawyer always will have to produce arguments that show the person in a favorable light.

This analysis of two themes in a single criminal case shows, how differently arguments are produced and mobilized: in different venues, before different audiences and with different means. The analysis of themes as becoming arguments might contribute to a better understanding of how arguments become stable and accepted.

[link to commentary](#)

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