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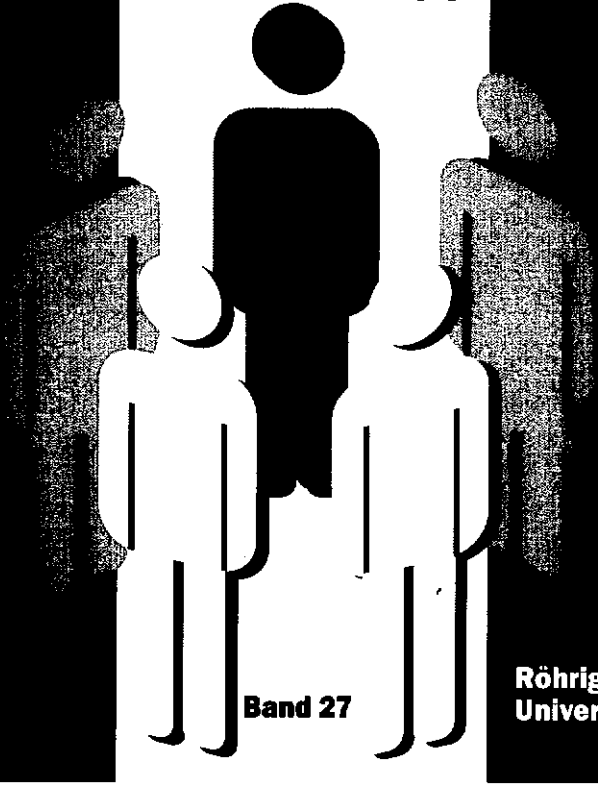

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On the Becoming and Failing of Argument Themes *1*

Criminal proceedings have at their heart processes of mobilization.2 In the German context, first the prosecution, later the court inquire into an instance and thereby produce knowledge that may function as premises for arguments. This production can be understood as the mobilization of available themes, which are taken up and "argumentatized". Parallel to this, although less visible, the defense is preparing for the case as well. Here, too, themes are weighed for and against the client, arguments are constructed and mobilized, (strong) premises produced.

The taking up and mobilizing of themes is a practical accomplishment of the participants in the proceeding, informed by procedural rules, legal norms and the theme's history. It is this practice of producing arguments by mobilizing themes I am interested in in this paper. Focusing on these mechanisms of production, I will not concentrate on the successful candidates, that already made it into the court room, but on becomings and their failing in the course of the proceeding.3 This focus on failing offers a perspective beyond any success-bias on the mechanisms of production for strong arguments in criminal proceedings. It also opens the view on a more conceptual question of what it really is that is failing: an argument? A theme? A topos?

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1 This paper is an offspring of a paper written jointly with Livia Holden, Alexander Kozin and Thomas Scheffer. See Hannken-Illjes, K.; Holden, L.; Kozin, A.; Scheffer, T. 2007: Trial and Error – Failing and Learning in Criminal Proceedings. In: International Journal for the Semiotics of Law, 20: 159-190.

2 On courses of mobilization of statements see Scheffer 2003.

3 Many studies that focus on the production of meaning in situ can be seen as having a success-bias, as they cannot take into account what is not being said anymore and what is not being said yet. For the area of legal talk, this applies for example to so-called court-room studies. See for example Atkinson/ Drew 1979, Komter 1998 and Wolff/ Müller 1997.

Structurally this paper will describe a circle or rather a helix. I shall first address the question of the unit of analysis and discuss briefly the concept of topics in argumentation in the legal realm, linking it with Luhmann's (1971) concept of themes in public opinion. I shall secondly provide one example in order to then come back to the question of what actually is the unit of analysis here. Although theoretical from the outset, this question has an impact on understanding the practice of law.

Method

Before heading to the conceptual and empirical part, let me briefly report on the methodological background of this work and the data it draws on. The data stem from my work in an interdisciplinary research project.4 This project has concerned itself with the linkage between pre-trial and trial in criminal proceedings from the defense's perspective and thus aims at describing the development of criminal cases. The research has included two periods of field-work in four different countries, the US, England, Italy, and Germany, each lasting four to five months. I conducted my fieldwork in two small law firms in Germany, following the cases rather than the lawyers. The data I collected includes copies of files, audio recordings of lawyer-client conferences, protocols of trials, ethnographic interviews and field notes.

The study is ethnographic in nature, informed by insights from ethnomethodology and Science and Technology Studies. In the sense of Latour (1985) and Marcus (1998) the objective is to follow a phenomenon through the field rather than describing an *a priori* defined field. That is, we follow cases and in the cases narratives, arguments, themes on their way through the proceeding. For this paper I concentrate on following a theme through an unfolding case from the de-

4 The project is titled „Comparative Microsociology of Criminal Proceedings", and headed by Thomas Scheffer. The group has been working since 2003 at the Freie Universität Berlin.

fense's perspective. In Marcus' sense this is a way of "following the thing" (1998, pp. 106), thereby taking a theme as a discursive materiality.

In my work I focus specifically on the practice of argumentation in criminal proceedings. It could be framed as an ethnographic argumentation analysis, in the sense of Prior's (2005) request that argumentation studies should concentrate on the practice of the production of premises rather than on the inferential linkage between already established premises. "Whereas argument studies has focused on the challenge of identifying backing, their work points to the field-dependent and problematic character of data/ evidence, the work needed to produce such grounds for argument" (135). Prior asks how premises are produced and – as one might also put it – how they are made available for the process of linking and concluding. The stress on the practice of failing implies to ask how themes become unavailable, immobile and how they vanish.

Topos and theme in criminal proceedings

When in a case the defendant states at an early police interview that he lives with his grandma, and this gets taken up by the attorney, who tells in court the story of the good boy who still lives with his grandma, while the prosecutor argues during the trial that him still living with his granny shows quite the opposite, as it assures for easy living – what is it that is mobilized here? Is it a topos?

In classical rhetoric topoi have their place in the inventio, that is in the finding and constructing of argument themes that will then be elaborated. The topic in this sense is an art of finding – *Findekunst* in German. Hence, topoi are themes the speaker can take up in order to respond to a certain exigency in front of a specific audience. They are neutral and "just" form the basis for arguments and argumentation. Hence, the same topos can be employed by different parties with different and even opposing conclusions.

The concepts strength and weakness at the same time is its fuzziness. The notion of topos oscillates between formal concepts (topoi as abstract argument schemes), "trivial" notions (topoi as overused

common places and proverbs) and substantial or material understandings (topoi as the categories and concepts an argument appeals to) (see among others Kopperschmidt 1989, Rehbock 1988, Kienpointner 1992).

In this paper I will understand topos as *argument theme*. This notion refers to the material content of an argument, that is, the conceptual areas from which the arguments are drawn and on which they rely. The idea of argument *theme* carries some baggage that is worth to be considered. Knoblauch (2000) views the concept of topos as important especially to the sociology of knowledge and explains the sociological tradition of the concept. As one sociological concept close to that of topos he names the notion of theme in Luhmann's theory, although Luhmann himself does not draw this connection. The relation between the two – topos and theme – is a rather interesting one. Luhmann (1971) defines themes – with respect to public opinion – as viable complexes of meaning, that can be subject of talk but that allow for diverging opinions (see 13).5 This characterization grasps one of the fundamental features of topoi – their neutrality. Luhmann stresses that the distinction between opinion and theme emerged as an outcome of the growing complexity of social systems and subsystems. Distinguishing the two functions means to reduce complexity as not everything that can be talked about (and can have an opinion attached to it) but only those things that have already become themes. Becoming a theme includes a career in which the theme has gained attention and therewith becomes available to a greater audience. In this sense the notion of theme is very close to that of topos – material topoi also represent those issues that can be used in order to build arguments. They will be generally accepted or anticipated to receive broad acceptance. The function of catalogues of topoi is exactly to manage for the speaker the vast array of possibilities to construct arguments and reduce them to those that have proven beneficial. Hence, topoi in the

5 The German original puts it as "mehr oder weniger unbestimmte und entwicklungsfähige Sinnkomplexe ... über die man reden und gleiche, aber auch verschiedene Meinungen haben kann" (Luhmann 1971, 13)

material sense seem to resemble themes. Yet, themes are closer to the discursive surface and their careers can be short-lived. The concept of topics on the other hand carries a generative quality. Topoi are visited in the invention, it is only their offspring that can be found on the discursive surface. Also, only a limited range of themes can be made available to a discourse. For criminal cases that means only a certain number of topoi can and will be actualized and taken up. Hence, the concept of theme seems to point rather at a stage between topos and argument – the becoming of an argument.

The concept of the topic has the advantage that it is also a crucial concept in some strands of jurisprudence. In this sense it can be viewed as a participant category on the theoretical level. In jurisprudence the concept of the topic is part of methodological disputes. On the one side there is the positivist, dogmatic approach, that is characterized by the role of subsumtion and therewith by formal deductive logic. On the other side there is a rhetorical-topical approach that stresses the creativity as well as the inseclusiveness of the legal system (see among others Viehweg 1974, Seibert 1996).

Despite the latter connection between creativity and topic, topoi are in general characterized exactly by being preformed and decipherable (see Gülich 2005). Thus, they are already stabilized to a certain degree or with Latour (1987) black boxed. In this sense topoi do not have to be constructed but *re*constructed. Interestingly, Viehweg (1974) distinguishes for the legal realm between first and second order topoi. The former are the products of a creative invention process, that looks for solutions to a legal problem. The latter are part of topoi catalogues, hence they are topoi that have already proven themselves and can be regarded as acceptable. This tension between the preformed, the inventive and the reconstruction through the development of arguments characterizes the peculiar open seclusiveness of the legal system. Yet, although stable as a thematic pattern, the employment of a topos is a risky undertaking. It can collapse in one case while staying unharmed for other cases, and it can disappear silently through the back door without ever returning. In how far that what is being mobilized can be taken as a topos or rather as a theme shall be left to the analysis to an-

swer (or say: hint at some answers). The reader is invited to put topos in his mind every time I will speak of "theme" in the following.

Before going into the analysis let me briefly conceptualize what I refer to when I talk of failing. I take failing to be the temporal or permanent unavailability of options to act (see Junge 2004). For the context of my study this means that the theme, the argument cannot be employed anymore and ceases to be an actor in the proceeding. This failing can be gradual as well as total. Hence, the theme can loose considerable strength or become entirely unavailable for the proceeding.

"I was afraid"

With one case from my data I want to discuss, how the (failing) mobilization of a topos can be described. I encountered the following case of Kevin Becker6 in my second field phase. This case I could follow from right after the main hearing (the trial) up to the appeal hearing. I also had access to the inquiry file as well as the lawyer's file and could sit in on some lawyer-client meetings. 7

> The client, Kevin, is charged with obstruction of justice because he made false allegations in a case in order to protect a friend, Tim. He explains in a letter to the prosecutor that he made the false allegations due to fear of "his friend". During the pretrial, the client hands his lawyer two bullets – he says, that he received them in an envelope without any note. The lawyer contacts the police, indicating that she and her client view this as a threat by some of Tim's (the perpetrator's) acquaintances. She files a notice with the police against a person unknown.

The defense ensemble, Kevin and his lawyer, start to mobilize a theme in order to give reasons for the criminal behavior of the client.

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

7 For reasons of space and because all my data is in German I present the case and the development of the theme in question in narrative form. The narrative draws on the different kinds of data mentioned above.

This theme has been present in the case already before Kevin's admission. The witness, a young woman, who led the police to the trace of the real offender was very reluctant to testify, stating several times that she was afraid of Tim. Her fear was acknowledged by the police and prosecution and resulted in her giving testimony in front of a judge prior to the public trial in order to protect her from intimidation. Hence, the main prosecution witness has already mobilized the theme of fear successfully in the proceedings, and Kevin can exploit this success by relying on the same line of reasoning. He also feeds into the theme by handing in the two bullets.8

During the main hearing, the trial, Kevin sits next to Tim and his fear is not thematized. Kevin is sentenced to twelve months on probation and lodges an appeal.

The trial marks a pause of the theme. It is not taken up in any way and does not feature in the protocol of the trial. Nothing is invested into it, it is not actualized by the defense and thereby neither attacked nor stabilized. The pause at the stage of trial can be viewed as an instance of failing. It does not fail "in the open" but vanishes silently. On the other hand, fear as a theme in itself can be viewed as serving a universal exit strategy as it can always come in itself as the reason for not bringing it up. But, as can be seen in the continuation of this case, the vanishing of the theme and the sitting next to each other of the defendants can also be regarded as the total failure of the theme in the way the prosecutor addresses it in the appeal hearing.

In the appeal hearing, the judge introduces the first instance verdict and states that the factual grounds are not questioned but the legal interpretation of the facts. 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, 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".

8 This is not to suggest, that I believe the threat or the bullets to be fake. I do not know if the threat existed or not, my interest lies solely in the question how a theme is nourished.

In the appeal hearing the theme of fear reappears, introduced by the judge. In an earlier phone call with the defense lawyer the judge pointed out that he could imagine to reduce the sentence and alter it from a prison sentence on probation to a fine. The theme of fear comes thus in as a foundation for this kind of argumentation. The defendant strengthens the theme, while at the same time it is attacked for the first time in the open. The prosecutor does not question the relevance and validity of fear as a theme, he does question the missing actualization in trial. Hence, the status of the theme in terms of its availability is controversial.

> In the verdict, the sentence is slightly reduced, however not changed into a fine as hoped by the defense. The judge decided that no massive threat existed. However, some slight fear may have been the motivation for the defendant to remain silent.

In this case we see how a theme, that has gained quite some stability in the proceeding seems to fail and by this seeming failure produces a pause that weakens it considerably. The defense can apply it only in a very restricted sense, as they did not feed it constantly. At the same time, the theme does not loose its validity as an argument theme. It is only for the defense that this theme failed. Hence, the failing – having come about by malnourishment – is not only restricted in time (to the case) but also to persons (the defense ensemble).

Conclusion

What is "fear" in this case? Is it an argument? Certainly not, as "fear" itself has no conclusion attached to it and hence has no direction. It also lacks specificity. Although it appears on the discursive surface, fear takes different forms: threats, bullets, silence. I guess that one could make the case for viewing fear as a topos, probably even one of the clear cut cases as it appears clearly visible in the data. On the other hand, it is exactly this visibility that seems to resist the conceptionalization as a topos. For this, it is too specific already, applied to a single case and stripped off its universality.

Hence, it might be the concept of theme that can best describe the in-between of topoi and arguments, the becoming of premises. Arguments and themes develop over time, they have histories and futures. And it is **becoming** that should receive more attention. It will allow to receive more insight into the practice of argumentation.

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