DISCOURSIVE ACTIONS
IN LEGAL DISPUTES

A study of the 1861-1864 Isaacs Trial
The Case of the Mule Colts
An Approach to the Semiotics of Law

Doctoral Thesis

Doctoral Candidate: Norman Augusto Javier Tafur González

Thesis Director:
Dr. Fabio Jurado Valencia

Universidad del Valle
School of Humanities
PhD in Humanities – Discourse Analysis Cohort Study
Santiago de Cali
December 7, 2016

Introduction

It is asserted, in a generally simple and colloquial way, that to argue is as natural an action as to converse; that any form of argumentation is a form of conversation; that we argue when we give reasons for or against a proposal, or when we make our views clear or refute the opposite ones, or advocate a solution or raise an issue. That is the view held by Luis Vega Reñón (2003), to whom we wish to say that we argue when we cite rules, values or reasons to lead the feelings of an audience or the mood of a jury in a certain direction, to provide the basis for a verdict, to justify a decision or to rule out an option.

Argumentation is relevant to law and, most specially, to legal disputes. Therefore, given its deep pragmatic and humanist implications, this study has been chosen using an approach to legal semiotics in which the contribution of the different language sciences is incorporated. One could even claim that, today, analytics, dialectics and rhetoric have a way of making simultaneous contributions and have elements in common. This way they overcome the silos or isolated compartments in which they were intended to be placed in the past. In fact, at present reasonable evidence (proof) can be accompanied by reasoned debates in which appropriate or inappropriate (fallacious) actions can be discerned, as well as by pragmatic and contextual analyses, together with a convincing (persuasive, deterrent) discourse in personal communication processes and the utilization of resources to induce belief, willingness or actions. The in-depth study of argumentation is an extremely large, rich and multifaceted area. It allows the introduction of useful and functional theoretical and conceptual observations to better understand the legal dispute, study argumentation and teach law.

This doctoral thesis is presented from the perspective of legal semiotics, supported by narrative structure, and it is based on the theories of argumentation and the analysis of discourse. The paper, written in the context of contentious discourse (discourse and counter-discourse) deals with discursive actions in legal disputes and posits the theory that discourse organization and its use in different styles, depending on the type of practice and the social discourse, play a fundamental role. They help the parties in dispute, as discourse

subjects, to organize their actions in accordance with the narrative programs on which they are grounded or that they use, their strategies, tactics, techniques and dynamic adjustments, to get their objectives and reach their goals.

As the basis for the proposed thesis, some general theoretical and methodological considerations are introduced to be later checked against the selected corpus (Isaacs trial, 1861-1864) and, in this context, against the objections raised by Braulio José Romero, through his legal attorney, in the Jorge Enrique Isaacs Adolfus probate proceeding regarding the arrangement with creditors after the funeral.

This study – as is our aim – is a contribution to the analysis of discourse in legal arguments. In that regard, note should be taken of the way in which García Máynez (2007) analyses the logic of reasoning and relevant topics, linking them to the process used by the authorities in charge of rendering judgment when they apply generic rules to concrete cases in the legal experience. In his *Lógica del raciocinio jurídico* (The logic of legal reasoning), after establishing the relation between law and logic (see Klug, Neri Castañeda, Miró Quesada, Kalinowski, Paradies), the author examines the major problems of law implementation, i.e., identifying whether it is in force, its interpretation or hermeneutics, its mainstreaming to fill gaps and the search of discourse areas that might give rise to ambiguities. Máynez (2007) specifically deals with the Kelsenian distinction between logical conflicts and axiological conflicts. His studies on legal syllogisms and the integrative process for normative and unforeseen cases have become classics. The *Analogía ortodoxa de la teoría pura del derecho* (Pure Theory of Law Orthodox Analogy) by Salazar Guerrero (1991) runs along the same lines.

After reviewing the state of the art, it may be relevant to refer to the studies dealing with those kinds of discussion, especially those that have approached it from the perspective of argumentation. And speaking of this *monistic view* — from a purely syllogistic standpoint — it should be acknowledged that the panorama was even more difficult in our milieu in mid-20th century (1950-1970), as Professor Ernesto Peña Quiñones (2010) recalls that the prevalent criteria in legal studies came from the continental

European law that was predominant at the time. Language philosophical studies, together with those on legal logic and the new rhetoric of Chaim Perelman and Olbrechtsh-Tyteca, as well as of Stephen Toulmin y Frans van Eemeren y Rob Grootendorst, are relatively new among us and it took a long time for these to be incorporated in university law study programs.

Legal processes presuppose human behavior, conflicts of interest between the parties, legal actions, ritual and order, a claim, objections and conflict resolution (a ruling). The process allows the civilized pursuit of a dispute settlement between subjects seeking justice. That is the break point (Echeverría, 2003: 110) to overcome the taking the law into one´s own hand, the vendetta and other barbaric actions and unlawful conduct (Carnelutti, 1961: 29). A series of actions is encompassed by the procedure, from its opening to the outcome sought from the legal authorities. In a broader and more fundamental sense, Amossy (2014) defends the social value of disputes, without any derogatory connotation, understood as something inherent to social life.

In view of the dispute subtype, it is necessary to explain some of the fundamentals of civil trials, the concept of the process itself, its purpose and its bases (Bohórquez Botero, 2013: 1860). Once the legal dispute is elucidated and the nature of the procedure governing it is examined, it is validated by the traditional forensic practice, case law, and a predominant monistic (syllogistic) thesis to anticipate and confront the opposition before the judicial courts.

Law scholars have not overlooked the contributions of language sciences. On the contrary, they often refer to logic, rhetoric, hermeneutics and, ultimately, to argumentation theories, communicative actions and analysis of discourse. These sciences have considerably enriched the understanding of the law subject and have underlined the relationship it maintains with language. However, it is worthwhile to determine contact points and relationships that have not been specifically explored thus far.

There are countless monographs, theses and general studies on the topic of argumentation and legal communication, but very few of them deal expressly with *the modes of discursive, narrative and descriptive organization* even though, in addition to the argumentative mode, there exist other modes and that *narratio* was already a specific part of ancient rhetoric.

Professor Francisco Salazar Guerrero (1962: 79) used to insist that the law meant a full, valuable human life given to inter-subjective interference and under the risk of sanction. This research explains inter-subjective actions with the help of discourse. The process becomes a space that accommodates the parties and subjects in a judicial proceeding for their interaction. What these subjects do belongs to the linguistic, cognitive, axiological and pragmatic realm and refers to what is known as "*semiotic competence*." (Serrano, 2013) These relationships are loaded with meaning and empowered by certain efficacy resulting from the monopoly of force (coercive power) exerted by the State.

The concept of inter-subjectivity was further developed by Goffman (1998) in his sociological findings on the *presentation of self* in social interactions and mutual influences. This author highlighted the fact that the image of the subjects is built within the interaction itself, in a dynamic process, in accordance with the situation, the same way actors play their roles. This concept, that has been built on and developed by language sciences, also complements the study of legal controversy and is very useful to analyze the ethological construct in the enunciations by the parties involved in judicial proceedings.

Once the narrative of the process is examined, it should be noted that the subjects in legal proceedings participate in the legal discussion through linguistic actions of a descriptive nature (*reporting on the state of affairs*), narrative nature (*reporting on the shift from one status to another*), and argumentative nature (*attempting to persuade the listener*), adhering to the forensic practice. Their memoranda (texts) and interventions are set for the relevant occasion, corresponding to the stable characteristic genre of a meeting where specialized discursive types and modes are used.

In the context of the argumentative nature of linguistic actions, it should be kept in mind that these go beyond the intention of persuading the listener by giving causal explanations. For example, among the actions taken by discursive subjects, the parties in a trial use multiple modes and ways to reach their goals. The causal link is only one type of argumentative structure, and, although the intention to persuade is a constituent element of every argument, not all arguments are based on causality to this effect.

In this regard, it may be relevant to consider that there are argumentation premises relating to values, as well as to moral, legal and cultural value hierarchies, judicial and extrajudicial facts, truths and assumptions, pragmatic means-to-end arguments, and, similarly, analogies, metaphors, dissociation, and various types of arguments whose logical relationship are not and cannot be reduced to a causal relation. Likewise, many arguments are based on ethos and pathos, without these necessarily being causalities, although they indeed generate persuasion by continuity, similitude and empathy by means of a broad display of ethological descriptions.

Traditionally, the argumentative mode has been preferred in the argumentation of the parties to carry out their persuasive activity (Morris, De Plaza Arteaga, Bobbio, Cossio, Salazar Guerrero, Copi, etc.), given its capacity to veil and hide the presence of other modes. In this sense, it is important to indicate that the participants in the legal proceedings, as discursive subjects, avail themselves of these multiple modes to make a point and to refer to others and to themselves with a persuasive aim to reach their objectives.

As already stated, the proposed hypothesis is tested against the analysis of the texts in the interventions by the parties in the Jorge Enrique Isaacs Adolfus probate proceeding for the subsequent necessary arrangement with creditors, and within this, the objections raised by Braulio José Romero through his attorneys in what is known as "*The Case of the Mule Colts.*" This work explores the enunciation dynamics, highlighting the discourse organization modes that are most relevant to this kind of controversy by referring to semiotics, narrative and argumentation theories. It clearly explains: (1) the narrative structure of legal controversies and their attendant actions and proceedings; (2) the styles

prevailing in each of those actions; and (3) the discursive modes found in the actual styles used in court, which are available to the parties in the trial to persuade the judge, with their discourse, to reach their goals.

The legal controversy is lived, narrated and recorded in the enunciations that make up the legal proceeding, which is at the same time the narrative and the discursivization of a semiotic process. By studying the enunciation, discursive strategies can be identified in the modes used in the organization of discourse and the discursive genres occurring during the trial. To approach the study of persuasion in legal controversies through the theories of discourse analysis helps to further develop the understanding of the making of the parties in the trial as discursive agents. It particularly means a reassessment of the traditional approach, in which analysis is limited to the consideration of the argumentative mode, a pluralistic explanation of persuasion as ancillary to the discourse strategies and modes of organization, as illustrated by Charaudeau, Adam and Rastier conceptual developments.

Therefore, after observing the state of the matter, it may be asserted that this doctoral thesis, written from the perspective of semiotics, supported and assisted by the art of narrative and the new argumentation theories, offers a new way of approaching the law area, especially the legal controversy, linking it at the same time to the history of the country by choosing the corpus extracted from the 1861-1864 Isaacs trial.

Legal semiotics may be understood here as the place where law is framed in a general discourse theory and the practice of rules, as claimed by Landowski (1993). The work is divided in four chapters. Chapter I is the introduction to the proposed thesis and its link with legal semiotics, explaining the interrelationship between the discourse organization modes and textual genres, and their connection with the social type and practice of discourse used in the formulation of texts throughout the legal controversy. The notion of discourse is examined in-depth, as well as the transition from elemental and virtual semiotic narratives to actual and specific discursive structures, to the enunciator located at the crossroad between syntactic and semantic constrictions that will determine its

scope and relative freedom space. The dependence of the text on the genre, and of the genre on a certain culture is also discussed.

This paper highlights the point that any type of fact is really a set of genres, and any genre is identified as such because of its belonging to some social or linguistic practice. It reaffirms the social anchoring of linguistic signs showing the relevance of the communication situation and its variations. The narrative shows the functionality of the discursive types and modes and their significant contribution to textual disciplines.

In the specific field of law, this work contrasts the strictly argumentatist traditional approach with the persuasive discourse to show the importance of the organization modes in the persuasive dimension. Regarding the actual argumentation, emphasis is placed on the study of the Aristotelian Triad — ethos, logos and pathos — but with a new approach as to the way to understand these elements of the discourse and, specially, the discourse and counter-discourse characteristic of legal polemics.

Given the importance of the persuasive dimension of interpreting the enunciation, this work delves in the New Rhetoric and in audience studies, where most recent legal semiotic analysis breakthroughs have occurred. According to the hypothesis formulated, parties to the proceedings, as discursive subjects, should be considered enunciation actors that play an acting role at the same time as the narrative in the proceeding, the point of reference and the enunciators are developing, adjusting their voices to the demands of the narrative program with the objective of persuading the audience.

In this chapter the relevance of the integrative approach proposed by Serrano (2008: 8) is emphasized. Social practice is articulated with the discursive practice appropriate to the ~~(~~type of~~)~~ area or domain in which it takes place. It is expressed through the genres created to match the chosen discourse organization, as required by the need of the enunciation situation throughout the entire textual sequences. Thus, using the concepts of discourse, text, type, genre and mode, anchored in social and discursive practice, with their morphosyntactic and cultural constrictions, permits the clarification of the complex

discursive organization process involved in the creation of text and the coexistence of social determinants, ways of life and personal freedom.

Chapter II is devoted to Mr. Jorge Enrique Isaacs Adolfus probate proceeding and the subsequent arrangement with his creditors, specifically the objection raised in "The Case of the Mule Colts." It contains a summary, and the thesis is compared with the corpus for the corresponding analysis of the case. It explains how all legal controversy genres, even those apparently neutral and objective, play a role in the legal practice. It reveals how each genre, because of its nature, performs a distinct function in the tactics used by the parties in litigation as discursive subjects, along the lines of basic narrative programs and strategies.

The matching of modes with the discursive genres clearly reveals their function in narrative programs and strategies. In this section of the study the somatic acts by the interveners (subjects) are considered in relation to physical objects during the trial narrativization. Likewise, regarding the cognitive dimension, mutual knowledge, beliefs and information among the subjects and their relationship with objects are also observed, together with the thymic dimension, state and emotional process of the parties. The universe of the action takes place in the pragmatic dimension; knowledge is placed in the cognitive dimension; the axiological dimension refers to the range of values; and the thymic dimension modulates the emotional state. All these dimensions are reflected in the text production and interpretation, and those issues are explained in this chapter.

Chapter III refers to the legal controversy narrative structure. In this case, the analysis shows the existence of a narrative structure constituted by three acts, i.e., set-up of the story, confrontation and resolution. This doctoral thesis identifies and defines the appropriate discursive genres for each of the three acts in the narrative structure, since each one of opportunities in the proceeding requires the competent use of the discursive genres to intervene. During the evaluative process, the judgement that puts an end to the dispute

stands out as a subsumption characteristic of the trial. [1] Having failed to overcome their differences through conciliation, the parties resort to a third party, which in this case is the Administration of Justice, in the civil court of the Palmira circuit, in the Sovereign State of Cauca.

Chapter IV reflects on the intention and examines the strategies by the parties in the proceeding, emphasizing their interest in its ethological construction. As a conclusion, final considerations are presented in the thesis regarding the important complementary emphasis provided by the *Análisis mediato del discurso* (Mediated Discourse Analysis), that makes it possible to distinguish between discursive and non-discursive practice and their materialization, indispensable for an interdisciplinary approach to law from the legal semiotics perspective and with the assistance of language sciences.

It may be illustrative to mention that the integrative perspective chosen for this study has been based on the proposals that have been emerging in the textual disciplines and in social sciences. One of those proposals is that of Bourdieu (2001: 7), who criticizes what he calls the inaugural intention of structural linguistics when it presents itself as pure theory. He states that one must go beyond the limits imposed by this theory. This sociologist argued against the — quote unquote — bracketing out of the social, that helped linguistics to treat language or other symbolic objects as an end within itself, "*for it endowed the 'pure' exercises that characterize a purely internal and formal analysis with the charm of a game devoid of consequences.*"

For the reasons above, and to be free from those "*forms of domination which linguistics … exercise today,*" as described by him when discussing that model, he proposed to reassert the social nature of language and its heterogeneity as an inseparable characteristic. Bourdieu (2001: 11) insisted that one should not forget the communication relations par excellence constituted by linguistic exchanges, which "*are also relations of symbolic power in which relations of force between interlocutors or their respective groups*

[1] Fort the purpose of this research, the terms claim, litigation, case, polemic, controversy, discussion and dispute will be treated as synonyms and equivalents, without overlooking the fact that in other contexts some precise distinctions are established among these (Dascal, 1995). However, there is some acceptance of these uses in the legal field to refer to a conflict that is subject to a judicial decision.

actualize themselves." And he pointed out (2001: 13): "*What circulates on the linguistic market is not `language' as such, but rather discourses that are stylistically marked both in their production, in so far as each speaker fashions an idiolect from the common language, and in their reception, in so far as each recipient helps to produce the message which he perceives and appreciates by bringing to it everything that makes up his singular and collective experience.*"

Building on Bakhtin´s theory (2007: 14), Bourdieu contends that there are no «neutral» words; that «there are no longer innocent words».[2] Because of this position regarding linguistics, and specifically regarding what is known as «cultivated» discourse, Bourdieu (2001: 15) notes that these communications are derived from the "*hidden correspondence between the structure of the social space within which they are produced — the political field, the religious field, the artistic field, the philosophical field —and the structure of the field of social classes within which the recipients are situated and in relation to which they interpret the message.*"

This sociologist stresses that the most specific properties of these symbolic productions come from the social conditions of their production and, more precisely, the position of the producer in the field of production. Bourdieu recognizes that this position determines at the same time, through different forms of mediation, the expressive interest, the form and the force of the censorship imposed upon it, as well as the competence that allows this interest to be satisfied within the limits of those constraints. The conclusion might be reached that language is a product of the accumulated work of thought dominated by the relations of power between classes, and, even more, that it is "*the product of fields dominated by the interests and values of the dominant classes.*" (2001: 121) Certainly, social conditions impact language, the way of life and the way it is lived.

[2] Bourdieu (2007: 15) specifies that "*This objective effect of unveiling destroys the apparent unity of ordinary language. Each word, each expression, threatens to take on two antagonistic senses, reflecting the way in which it is understood by the sender and the receiver. The logic of verbal automatisms which insidiously lead back to ordinary usage, with all its associated values and prejudices, harbors the permanent danger of the ´gaff´ which can instantly destroy a consensus carefully maintained by means of strategies of mutual accommodation.*"

The above considerations are reiterated by the different authors referred to in the study. Therefore, when looking at the whole, approaching the various textual disciplines from an integrative perspective may be relevant. It must be recalled that the *Trivium* consisted of grammar, logic and rhetoric and that hermeneutics was a realm reserved for academics. In view of the mutual character of those disciplines, Rastier is in favor of bringing them together and learning how they feed one another. In his view, in the contact of linguistics with other disciplines, especially with literary studies, it should not just content itself with looking at the rules of languages, but should instead gain a lot by raising the issue of ideographic description.

Finally, in his *Arts et sciences du texte*, Rastier ends his introduction explaining the reasons for his chosen methodology (2012: 24):

> the disciplines to which we will successively refer can be modestly grouped into two tetralogies. The first – composed of linguistics, semiotics, philology and hermeneutics – relates to all texts; the second – composed of rhetoric, stylistics, thematics and poetics – presently relates to literary texts. It should be noted that no attempt was made to set hierarchies or to link them artificially, keeping in mind the original idea of finitude recognized by Ricoeur. In the first tetralogy, linguistics and semiotics are in competition to deal with texts in the first place. Later we will demonstrate how philology and hermeneutics complement each other. The second tetralogy mainly encompasses the disciplines related to discourse and special texts, rhetoric and stylistics; this is then followed by the rules, topics and poetics of genres.

The present work was done using an integrative approach, with its inherent constrictions. Different interpretive semiotic models and analysis of discourse were applied to the Isaacs trial, trying to be consistent in the use of fundamental concepts despite the difficulties posed by the technical terms in argumentation theory, semiotics and pragma-dialectics, added to the diversity of conceptual assumptions that constitute the respective theoretical corpus of those sciences.