Argumentation ina complex action game : a court judgment as dialogic suasive text

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ARGUMENTATION IN A COMPLEX ACTION GAME: A COURT JUDGMENT AS A DIALOGIC SUASIVE TEXT

In western legal culture, a court judgment should be viewed as an argumentative text that provides reasoning for the judge's decision, clarifies the logic behind it and explains why it is correct and just. The aim of this paper is to closely examine a court judgment, point out its dialogic nature and analyze it as a complex action game.

A court judgment is a dialogic text created by the interaction between judges. Its dialogic nature may be clearly illustrated by underscoring the many cases of quotations included in it. The paper focuses on one type of quotation that served the purpose of refutation and on a discourse structure that we call concession.

In this structure, the speaker uses the quotation in a complex way: After quoting her interlocutor's opinion, she expresses agreement with one part of it and then expresses disagreement with another part. The consequence is a rejection of the other participant's stance, a rejection that may be explicit or implicit. This structure may have various functions: rational, rhetorical, social-interpersonal and perhaps even social-public.

Keywords: argumentation, action game, legal discourse, concession, quotation.

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1. Introduction

The aim of this paper is to closely examine a court judgment, point out its dialogic nature and analyze it as a complex action game.

Following Weigand's concept of "Dialogic action game" (Weigand 2000; 2002, forthcoming), it may be assumed that every communicative action can be defined as having specific dialogic purposes that are carried out by specific dialogic means. Communicative purposes are dialogically oriented: This involves a combination of action and reaction, or initiative and reactive action function.

Accordingly, language use may be viewed as a set of different action games ranging from simple, minimal action games - which consist of a minimal action-reaction pair - to enlarged action games and complex action games - which may consist of several parts or phases.

Another assumption is that in Western legal culture, legal decisions are expected not be arbitrary, but rather that they be justifiable by "good reasons". Judicial decisions are expected to satisfy such values as justice under the law, objectivity, predictability, repeatability, and so on, to the highest possible degree. (Dascal and Wroblewski 1991: 428). Hence, a court judgment is not merely the consequence of a former argumentation or procedure; it is an argumentative text whose purpose is to provide reasoning for the judge's decision, clarify the logic behind it and explain why it is correct and just. Its argumentation is directed simultaneously at numerous different addressees or audiences. (Perelman 1976). As such, it can be expected to use a variety of persuasive means.

2. A court judgment as a dialogic action game

A juridical verdict is "dialogic" in many respects - it involves a dialogue between the judges and the contesting parties, previous verdicts, the general public etc. - an extremely complex action game in which various participants take part. However, for the present purpose of this paper, the analysis will be limited to the dialogue between the judges themselves. The text will be analyzed as a dialogue involving three participants - a verdict handed down by the Supreme Court of Israel in the year 2000 by a panel of three judges.

In cases involving a panel of judges, the practice in Israel is for the judges to confer after summations have been heard, and decide which member of the panel will be the first to write his or her opinion. After that opinion has been drawn up, the judge that authored it then gives it to the other members of the panel to peruse. If they agree with the verdict, they may sign their names to the first judge's opinion adding the words "I agree." However, if they take a dissenting view, they write their own opinions. Judges may choose to write their own texts even if they agree with the verdict, and this is generally done when they wish to present a different argumentation for the same outcome.

In the court judgment that I will present here there is basically one text that appears as the initiative text, and it appears first in the verdict (Judge-1). The text that appears second (Judge-2) naturally contains dialogic elements that relate to the first text. Unexpectedly, however, we find that the first text also contains dialogic elements explicitly relating to the second text. From this, it becomes obvious that the judge that wrote the first text read the second text, and following that reading, added elements to the original text, which in effect are a reaction to the second one.

Thus, what we have before us is a text that was created as part of a dialogue with an interlocutor of sorts.

The third text (Judge-3), in turn, contains elements that relate to the two previous texts, neither of which is given priority over the other, leading us to conclude that neither is viewed by the third judge as the initiative text. However, the text of neither Judge-1 nor Judge-2 contains any explicit reference to the Judge-3 text, which leads us to conclude that the Judge-3 text is a reaction to the other two texts.

The court case involves a school that prepares students for university entrance examinations. The school's advertising slogan in Hebrew is "*lex titztayen*!" - literally "Go excel!". The slogan, however, sounds very similar to the Hebrew equivalent of the equally crude expletive "Fuck off". In Hebrew, the difference between the two expressions involves just one consonant, and it is this strong similarity between the two that makes the slogan so powerful. The school uses the slogan in its television commercials, newspaper ads, and posters as well as on the covers of the books it publishes. When the school wanted to use the slogan in advertisements on national government radio, the director of radio and the Israel

Broadcast Authority refused to allow it to do so, arguing that the slogan was offensive. The court debate consequently centered on two issues: The application of freedom of speech to commercial advertising, and the degree of offense to public tastes that mandates restrictions of freedom of speech.

The position taken by Judge-1 was that the radio commercial should be allowed, based on the principle of freedom of speech.

Judge-2 dissented and took the position that the principle of freedom of speech applies to commercial advertising only to a minimal degree, and that because the radio commercial was likely to offend public sensibilities, it should be banned.

Judge-3 concurred with the position taken by Judge-1 and the majority verdict handed down was that the radio commercial should be allowed.[1]

3. The role of quotation

In uncovering the dialogic nature of this text, the most striking element is the fact that in their written opinions, the judges quote one another. Quotes, which are highly typical of legal texts on the whole, serve several purposes, for example, to support an argument. In this case, the argument that is quoted is one that the speaker considers valid. The speaker's argument and the argument that is quoted take the same argumentative direction.

This type of quotation can be shown in Judge-2 text. The judge quotes a previous court judgment, upon which he relies in his decision. In the previous court judgment we can see the words "**trifling and inconsequential**", which are used again a few lines later. The purpose of the quotation is to provide support for the judge's argument:

> Over twenty years ago the High Court of Justice heard a petition in the matter of a radio commercial [...] Judge Etzioni held [...] that there is no need to consider the question of jurisdiction [...]: "To my mind, the whole matter, for which Adv. Evron is fighting so fervently, as noted by my honorable colleague, is **trifling and inconsequential**. This is not a case of refusal to broadcast an advertisement, but a refusal to broadcast a single word out of the whole advertisement [...]."

[1] *High Court of Justice 606/93*. A full translation of the text is available by the author.

> As is his wont, Judge Y. Cohen put it succinctly, thus: "On the face of it, the petition does not reveal any real allegation of discrimination or use of unreasonable considerations. **This matter is not one that requires the rendering of equitable relief** [...]."
>
> Invoking the freedom of speech in defense of broadcasting the commercial "Go excel!" is nothing short of unworthy use of the concept of freedom and liberty, akin to mixing trifles with major issues. The matter at hand is "**trifling and inconsequential**" in the words of Judge Etzioni - truly trivial - and is not "**a matter that requires the rendering of equitable relief,**" as put by Judge Y. Cohen. (Judge-2).

A quote may also be used for the purpose of refutation. This kind of quotation takes an opposite argumentative direction and the argument quoted is one whose validity the speaker rejects.

This latter type of quotation is the kind most interests us here, because of its dialogic nature. In the following example, the function of the quotation is to serve as a sort of introduction, before the author expresses an opposite stance.

> My honorable colleague Judge Heshin says that the case before us is "**trifling and inconsequential**," "**truly trivial**", and thus is not the type of matter requiring the granting of equitable relief.
>
> I find it hard to subscribe to such a point of view. The answer to the question as to whether in a certain country or regime the rule of law is maintained, or the principles of democracy are preserved, and more specifically in our matter: whether, in practice, there is strict safeguarding of the individual's freedom in general, and of the freedom of speech and expression in particular, is determined, to my mind, in great measure by paying attention to the "small," day-to-day decisions with regard to the "small" and ordinary citizen, and not necessarily by examining the special, "big" and extraordinary decisions alone, that deal with a handful of subjects of paramount concern.
>
> Just because it so happens that the aforesaid issue is brought before us for the first time in connection with the commercial "Go excel!" I do not find that the matter is too "**trifling**" to warrant our attention and decision in principle and in practice. (Judge-3).

Here we have a quote from another judge and an expression of disagreement with the content of the quoted words. An explicit expression of disagreement is underlined.

In the following example, however, it should be noted that immediately following the quote, the first point made is that of agreement. The reservation with the quote comes only at a later point.

> Even my colleague, Judge Heshin, holds that **a commercial expression falls under the category of freedom of expression, although the degree of defense extended to such an expression is lesser than that extended to other expressions**, namely, political or artistic expressions. Needless to say, I concur with him on all points. Except that my colleague is of the opinion that the matter raised by the petitioner is nothing but "**'trifling and inconsequential'... truly trivial**" hence, there is no room for extending equitable relief to the petitioner.
>
> However, if the freedom of commercial expression is not granted even in minor, inconsequential and trivial matters, what significance and value will remain to it? (Judge-1).

Here too we have a quote and disagreement, except that here it is part of a more complex structure. The judge here presents two quoted statements, one of which she explicitly accepts and the other of which she completely rejects.

The words "needless to say" imply that the judge's agreement to this part has no real argumentative value. In other words, it does not in any way undermine the validity of the argument. This is because the claim with which she is agreeing is presented as obvious. This may be the reason that the first statement is presented in indirect speech, while the second is in direct speech. The consensual statements are presented in free indirect speech, while the statements that are rejected are directly quoted, word by word, in part or in full. This can be shown also in the following example. The source that is quoted is the following:

> "Good taste," a value that competes with the freedom of expression, reflects the general consensus prevailing in Israel's enlightened society. In this matter, one should not take into account the feelings of a minority, be it of the connoisseurs or of those holding extreme puritanical views. (Judge-1).

Now let us see how it is quoted by another judge.

> But whose opinion determines in the matter of good taste? My colleague Judge Dorner writes: "**In this matter, one should not take into account the**

feelings of a minority, be it of the connoisseurs or of those holding extreme puritanical views."

I agree with the second part of that same proposition, which says that those holding particularly radical outlooks are not the ones to determine the desirable norm that should guide us. My colleague's general thesis, however, whereby "**'good taste,' a value that competes with freedom of expression, reflects the general consensus prevailing in Israel's enlightened society,**" from whence it follows that "**one should not take into account the feelings of a minority,**" appears to me too general and sweeping. (Judge-3).

4. Concession: explicit rejection and implicit rejection

I suggest that this structure of agreement-disagreement, or acceptance-rejection, be viewed as concession. The argumentative structure of concession is as follows:

I agree that X, and therefore my agreement may have conclusion Q, but I don't agree with Y, so the conclusion is not Q.

The concession in the examples presented here includes a quote from another judge accompanied by a partial agreement with the statement. Hence, it is a discourse structure that is by nature dialogic. Partial agreement is usually expressed, accompanied by an examination of the specific case. The reasons why the judge ultimately does not agree with his or her colleague's decision are then presented. The partial agreement serves as a means of rebuttal. Mentioning the opposing views ultimately bolsters the argument.

The concession structure in the above examples is explicit, and involves a pendulum-like movement between expressions of agreement, approval and reinforcement on the one hand, and expressions of disagreement, doubt and reservation, on the other. This pendulum-like movement can be clearly shown in the text of judge-3.

Generally speaking, I agree with the position taken by Respondent 2 and that of my colleague Judge Heshin, that Respondent 2 need not give in and change his position just in view of the fact that the petitioner uses the same 'Go excell!' advertisement in the newspapers as well as on TV's Channel 2, without any objections. It is right that the position endorsed by other media editors cannot obligate the Respondent to "toe the line" and embrace their approach.

> Nevertheless, it seems to me that one cannot entirely ignore this factor. A sense of proportion and the rules of common sense lead to the conclusion that if the public encounters this form of advertisement every day, both on TV and in the press, and we haven't heard of any public uproar or serious reactions on the part of the listeners or readers in the wake of such advertising, then there is no longer any serious reason for objecting to the airing of the same advertisement also on the radio.
>
> This last consideration is tied, of course, to the central consideration, which is the degree of infringement of good taste. Were the infringement severe and appalling, all the other considerations would pale, as a result.
>
> But it does not seem to me that such is the case in the matter at hand.
>
> Undoubtedly, the words "Go excel!" have that associative connection, which my colleagues have already enlarged on. But it is clear that there is no disguised attempt here on the part of the petitioner to hurt the students or curse them. These students are truly being urged to seek excellence, which the petitioner claims can be achieved by joining the courses it organizes. (Judge-3).

In the following example, however, the rejection of the other opinion is less explicit.

> My colleague, Judge Dorner, holds forth at great length in praise of freedom of speech, and to substantiate her words, draws on numerous references from Israel and abroad to prove and illustrate what a pretty pass things will come to, God forbid, if we chip away at this freedom. And I will second her words, each and every one. Indeed: Freedom of speech is one of the basic rights of the citizens and residents in our country, which since the "Kol Ha'am" ("People's Voice") affair, has struck deep roots in law, evolving into a well-entrenched, highly developed and greatly ramified concept that no one today would dream of revoking or curtailing. I agree with all those theoretical points stated in regard to the foundations of the freedom of speech as well as the extent of its application. The right to life and all things that life depends on - the right to breathe, the right to drink, the right to eat - is the mother of all rights, the essence of man. Second in importance is the freedom of speech and expression - in all its variety and diversity - the essence of communication between individuals; that which forges the society we live in, and without which we would have come to naught. This is what renders us superior to animals. Chipping away at freedom of expression is akin to crumbling the foundation on which society stands. [...]

> But do these things apply - with the full intensity and feeling with which they were said - to a commercial as well, such as an advertisement for detergent or helium balloons? Do they apply to the case at hand, even to a lesser degree? Will the noble and lofty statements to which the court gave utterance, and justifiably so, in the matter of "Kol Ha'am" [...] Should we raise with noble and lofty statements a glorious canopy above a commercial that promotes one or another unseemly product or service? Does applying the principle of freedom of expression in all its force to a commercial, not involve - even to a small degree - a loss of a sense of proportion? This, then, is the question we must present and which we are obligated to answer. (Judge-2).

What we have here is an *implicit* rejection. The judge never explicitly says "I disagree", but rather formulates his argument in such a way so that his disagreement is implied. He asks questions, states that they should be answered, and does not answer any of them. However, a negative answer is implied in the questions themselves, mainly by the contrast established between the "canopy" metaphor and the adjectives "noble", "lofty", and "glorious" in referring to the freedom of speech on the one hand, and detergents and helium balloons on the other.

5. Functions of concession

In this section I would like to return to the notion of concession, and analyze its various functions within the dialogic action game. What is the role of the agreement that precedes the disagreement? Or in other words, if you ultimately do not agree with the other opinion, why is it so important to express your explicit agreement with part of it?

(a) *Rational function.* Clearly, the main function of concession is rational: The participant in the dialogic discourse seeks to sketch out the precise boundaries of the disagreement. This hones the debate and makes it possible to save argumentative efforts on claims with which all the participants agree.

(b) *Rhetorical function.* Concession plays a well-known rhetorical role. According to Azar (1997), following Robrieux (1993), when using a concession, the speaker states in advance what may have been an unfavorable argument for his belief, and by so doing, he firstly eliminates a possible

unfavorable intervention, and secondly reinforces the credibility of his argument. This is because the recipients are brought to believe that the speaker has already considered all possible objections, or at least all the important ones, and has rejected them all. (Azar 1997: 308).

This is precisely what happens in our examples. When judge A specifies which parts of the judge B's opinion she agrees with, she prevents, in advance, a potential attack regarding this part. Furthermore, she gives the impression that her distinction takes all aspects into account and is therefore more analytic then that of judge B.

(c) *Social function.* The concessional structure minimizes the sense of conflict between the judge and her colleagues and re-affirms their membership in a select guild. It can help save the 'positive face' of the opponent (Goffman 1967, Brown and Levinson 1978). Note, for example, how Judge-3 begins his comments:

> I enjoyed reading the instructive and well-reasoned opinions of both my colleagues, Judge Dorner and Judge Heshin, and agree with extensive parts of the words of each of my colleagues. (Judge-3).

Ultimately he will agree with one of the judges and disagree with the other, but he considers it important to start by expressing agreement with, and appreciation for both of them. This kind of utterance may be considered a conventional expression of "positive politeness", in Brown and Levinson's terms, whose purpose is to prevent a threat to the "face" of a respected colleague.

This last line of thought may lead us to suggest a further function for the use of consessional structure, which might seem rather speculative: Expressing agreement may help to prevent giving the impression to the public that there may be lack of agreement among those in charge of meting out justice, which might undermine the public's trust in the justice system. (And indeed, it is interesting to note that despite of the fact that numerous decisions are made by the court following intense disagreement, the public image of the justice system in Israel is perceived to be that of a body with a single "opinion" and "position," as if it were in fact monolithic).

6. Concluding remarks

A court judgment may be viewed as a dialogic text created by the interaction between judges. It is a complex action game that may be analyzed into several action-reaction pairs. Its dialogic nature may be clearly illustrated by underscoring the many cases of quotations included in it, which may serve various purposes. We have focused on one type of quotation that served the purpose of refutation and found a discourse structure that we have called *concession*. In this structure, the speaker uses the quotation in a complex way: After quoting her interlocutor's opinion, she expresses agreement with one part of it and then expresses disagreement with another part. The consequence is a rejection of the other participant's stance, a rejection that may be explicit or implicit. This structure may have various functions: rational, rhetorical, social-interpersonal and perhaps even social-public.

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