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Citation

Aonuma, S. (2024). Between IS and AS: Legal Fiction as Rhetorical Argument. *Proceedings Of The Tenth Conference Of The International Society For The Study Of Argumentation*, 104-114. Retrieved from <https://hdl.handle.net/1887/4107757>

Version: Publisher's Version

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Note: To cite this publication please use the final published version (if applicable).

Between IS and AS: Legal Fiction as Rhetorical Argument

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ABSTRACT: “Legal fiction” is a technical tool enabling the law to create assumptions or treat situations as if they were true although they may not correspond to empirical reality. Focusing on “legal person,” a typical legal fiction treating a non-natural person entity as a person in the law, the paper discusses the rhetorical-argumentative functions it performs in legal discourse.

KEYWORDS: analogy, Kenneth Burke, legal fiction, legal person, metaphor, personification

1. INTRODUCTION

The relationship between the law, argument, and rhetoric should be obvious to all of us. Since antiquity, the theory and practice of rhetoric have been closely associated with the law and legal argument. In Athens, the “forensic” was one of the three branches of rhetoric in the Aristotelian schemes; in Rome, Cicero practiced the rhetorical art not only as a statesman but also as a lawyer. Skipping over the Middle Ages, in modern times, the law has become one of the most favorite “argument fields” (e.g., Matlon, 1982; Mills, 1976; Rieke, 1982) for rhetoric and argument scholars to inquire into. Scholarly journals in our discipline have published numerous essays discussing the issues pertaining to the law and legal practice (e.g., Esposito & Tuzet, 2020; Feteris, 2012; Hasian, 1997; Jones, 1976; Rountree, 2001; Sanbonmatsu, 1971); book-length studies addressing these issues also abound (e.g., Dorland & Charland, 2002; Fish, 1989; Hariman, 1990; Perelman, 1980).

Equally important, those studying or practicing law have also recognized their own profession’s intimate relationship with rhetoric and argument. We have a plethora of law review articles as well as book-length works discussing the law in terms of language, persuasion, storytelling, metaphor, and other rhetorico-argumentative constructs (e.g., Brooks & Gerwitz, 1996; Greenhaw, 1995; Harrinton, Series & Ruck-Keene, 2019; MacCormick, 2001). Among these most rhetorically-sensible in the law, James Boyd White, a respected law professor at the University of Michigan, wrote as follows:

When I say that we might regard law as a branch of rhetoric, I may seem to say only the obvious. Who ever could have thought it was anything else? The ancient rhetorician Gorgias (in Plato’s dialogue of that name) defined rhetoric as the art of persuading the people about matters of justice and injustice in the public places of the state, and one could hardly imagine a more compendious statement of the art of the lawyer than that. A modern law school is, among other things, a school in those arts of persuasion about justice that are peculiar to, and peculiarly effective in, our legal culture.... What do people think law is if it is not rhetoric, and why do they think so? (p. 29)

Building on these previous studies, this essay attempts to further explore the law's relationship to rhetoric and argument. Specifically, the essay will pick what is called "legal fiction" and discuss its rhetorical nature. Legal fiction is a legislative and legal technique to create assumptions or treat situations as if they were true, even though they may not correspond to real-world facts. Just as a technique of rhetorical invention in creative writing, it works to create the discursive-textual reality in the law. But it is a special kind of invention. While it is fictional or fictitious, legal fiction is an established legal concept, hence legally binding. As it allows the law to depart and liberate from the constraints imposed by hard facts and natural circumstances, legal fiction enables us to better cope with practical and conceptual challenges, resolve ambiguities, or address other problems in the law.

The rhetorico-argumentative analysis in what follows will place a particular focus on "legal person," the most typical form of legal fiction. Legal person is a status of personhood given to non-natural person entities in legal discourse. While corporations are its most representative type (Bakan, 2005; James, 1993), there also exist other non-natural person entities that could potentially be legal persons, such as the natural environment and non-human animals (Franceschini, 2022). Most recently there has emerged a debate on whether we could extend the legal person status even to human-made machines such as artificial intelligence (AI) (Gunkel & Wales, 2021; Lau, 2019; Mocanu, 2022; Negri, 2021). After delineating the rhetorical nature of legal fiction whose existence owes to language of the law alone, the essay proceeds to examine corporation, the non-natural person entity whose status as a legal person seems least controversial, and AI, a possible and perhaps the most controversial legal person, from the perspective of metaphor, more specifically of "personification" (Lakoff & Johnson, 1980), of "analogical extension" (Burke, 1984), and of the combination of these two (Morrison, 2021).

2. LEGAL FICTION

Jeremy Bentham (1843), a renowned 19th-century English jurist, once distinguished two kinds of entities our language deals with: the real and the fictitious. The former is an entity, "the existence of which is made known to us by one or more of our five senses." The latter is an entity, "the existence of which is feigned by the imagination,—feigned for the purpose of discourse, and which, when so formed, is spoken of as a real one" (lo.1735). *Prima facie*, nothing belonging to the realm of the fictitious should be given its place in the law. After all, the term forensic originates in the truth-seeking nature of argumentation in the Athenian court. Who wants the feigned imagination to prevail over the truth and fact in forensic rhetoric? Who wishes the judge to buy fiction and reject evidence during the course of a courtroom debate?

While it seems natural that many of us have such a "fear of fiction" (Petroski, 2019, p.26) in the law, however, the problem is much more complex than it may look. As "[t]hings we 'learn' from fictional narratives may... affect our beliefs, decisions, and actions more broadly (Petroski, 2019, p.55), even Bentham recognized a very "possibility for literary fiction to have impacts on reality" (Wrobel, 2020, p.417). For instance, a fictional story may have stronger appeal to readers because they find it more "realistic" than objective news reports. In addition, the distinction between fact and fiction is much

less stable than we wish it to be. “[F]ictional discourse can... *include* statements that are factually accurate. It is also possible to make factual statements about fictional matters; indeed, factual statements about fictional things... are not only possible but common” (Petroski, 2019, pp.35-6, italics original). In legal discourse, a fact is what is defined as such in the law. This is not to say, however, that statements we make about factual matters are always factual. What if something defined and stated as a fact is more fictional than factual, then? It is in this context that Stolzenberg’s (1999) observation on Bentham’s take on fiction makes sense: The commonly held view that Bentham was a “scratching critic of legal fiction” is misleading, given his theory of evidence in which he “classified legal facts as a species of fiction” (p.223).

As the law indeed has this hidden “legal-fictions tradition” (Petroski, 2019, p.28), it is no wonder that legal fiction is an inevitable part of the contemporary legal culture. Treating a situation or a phenomenon as if it were another, the law has created many fictions that do not correspond to real-world facts. For instance, one way to create legal fiction is through the language of “deem.” In some legal contexts, signing a contractual document not only means you agree to enter the contract; you are also “deemed” to have read and understood each and every word in the document, which, however, is not true and factual in many cases. Or in Japanese law, those who are missing for more than seven years are to be “deemed” to have been dead, and this fiction is to be treated as real in legal discourse with no factual evidence available to support it.

Some legal fictions are too “natural” to be recognized to be fictional or fictitious; yet, if demanded, several reasons can be offered to justify their existence and utility in the law (Dyschkant, 2015; Fuller, 1967; Moglen, 1998). “In this age of fact, fancy is at a discount. Consequently legal fictions... have fallen not only disuse but also disfavor. Many of them, however, have done good work in the past, and some are doing it now” (Miller, 1910, p.623). For instance, legal fictions make our legal system more flexible, enabling the law to adapt to new and changing circumstances and needs of a society. They can fill the gap in the law as well, helping us to resolve legal issues for which no established rule or precedent exists. Legal fictions are also employed for pragmatism and efficiency in the law, as in the case of deem. In any case, legal fictions are linguistically-created legal realities: While they are fictitious, they are unrebuttable and treated as real all through legal proceedings even though they do not correspond to the real and factual in the empirical world.

3. LEGAL PERSON

3.1 *Personifying corporation*

Among all the legal fictions we now have, “legal person” is a typical, if not the most typical, one. A legal person is a status given to a non-natural-person entity so that it can be treated as a person with certain rights, obligations, and legal capacity in the law. It is fictitious in that it is not a real-life person in the empirical world. As it is an established legal concept, in legal discourse it should be treated as a person just like other natural person individual entities. Its prime example is corporation. While a corporation may be composed of persons, it itself is not a person. Yet, it can gain the status of personhood once it is feigned

as a person in the law. As a legal person, it is authorized to act as if it were a single entity. Just as a natural person, it can enter into contracts, own property, sue or be sued in court, and engage in various other legal transactions.

The 1896 court ruling on *Salomon v. A Salomon Co & Limited* in the United Kingdom granted a “separate legal personality” for a corporation (James, 1993). Also called the “Salomon Principle,” this landmark decision established that “a properly formed registered company is a separate legal entity from its shareholders and has distinct rights and liabilities as an autonomous legal person” (“Separate legal personality,” 2023). Similarly, in 1970 the Japanese supreme court ruled that a corporation may exercise its own right to political participation independent of its employees and even of its shareholders. The court held that “the articles of fundamental rights in the [Japanese] Constitution should be applied to corporations” and that “corporations should enjoy the same liberty as natural persons to carry out political activities such as supporting, endorsing, or objecting to specific policies of the government or political parties” (Hasebe, 2007, p.304).

Speaking in rhetorical terms, when a corporation becomes a person in the law, “personification” happens. Personification is a metaphor that attributes human qualities, characteristics, or actions to non-persons, which allows us to “comprehend a wide variety of experiences with nonhuman entities in terms of human motivations, characteristics, and activities” (Lakoff & Johnson, 1980, p.33). For instance, “Inflation has attacked the foundation of our economy,” “Inflation has pinned us to the wall,” “Our biggest enemy right now is inflation,” and “Inflation has robbed me of my savings” are all metaphorical expressions that personify inflation. “Viewing something as abstract as inflation in human terms has an explanatory power of the only sort that makes sense to most people. When we are suffering substantial economic losses due to complex economic and political factors that no one really understands,” these metaphors “[give] us a coherent account of why we’re suffering these losses” (Lakoff & Johnson, 1980, p.34). Likewise, when we are ascribing the legal person status to a corporation, the rights, liabilities, and obligations are to be given to it just as individual natural persons. As a corporation enters into a contract as a legal person, we expect it to behave just as natural persons, keeping the contractual agreement as responsibly as other real-life persons.

Needless to say, even if a corporation is personified in the law, it does not mean that it becomes a real-life human being. It is a “mere” metaphor, not a full-fledged metamorphosis. In many instances, however, we see its identity as a (legal) person being extended beyond the law. In fact, to talk about a corporation as if it were a person seems too natural to be recognized as an instance of personification, i.e., a product of rhetorical artistry. There exist a plethora of non-legal texts and discourse treating corporations as if they were persons. For instance, Joel Bakan (2005) discussed a modern-day corporation as if it were a person with anti-social mentality, criticizing its “pathological character” that “pursue[s], relentlessly and without exception, its own self-interest, regardless of the often harmful consequences it might cause to others” (pp.1-2). Similarly, Davis, Chun, and da Sliva (2001) found that we measure corporate reputations as if they were the personality of individual human beings.

At this point, we perhaps should realize that calling a real-life human being a person itself is metaphorical. From what can be termed an “etymological” standpoint, American jurist Lon Fuller (1967) wrote:

Those who contend that “corporate personality” is and must be a fiction should be reminded that the word “person” originally meant “mask”; that its application to human beings was at first metaphorical. They would not contend that it is a fiction to say that Bill Smith is a person; their contention that “corporate personality” must necessarily involve a fiction must be based ultimately on the notion that the word “person” has reached the legitimate end of its evolution and that it ought to be pinned down where it now is. (p.19)

This should be all familiar to rhetorically-trained argument scholars, given a host of studies on the rhetorical power of “person/*persona*” in various persuasive discourses (e.g., Black, 1970; Gibbons, 2021; Morris, 2002; Ware & Linkugel, 1982; Wander, 1984). Person/*persona* is not what we are; it is rather what we (are obliged to) wear and perform in public, hiding our private selves. We should also realize that, unlike Fuller’s observation just above, perhaps the definitional evolution of the term person/*persona* may continue further, and someday it may reach the point where it gets to include not only a natural person but also a variety of other non-person entities. It will be interesting to see how our legal system will respond to that when it happens.

3.2 *AI and analogical extension*

Having spoken of the metaphor of person/*persona* in the law, another way to discuss the rhetorical construction and working of legal fiction is through what American rhetorical critic Kenneth Burke called “analogical extension.” In his *Permanence and Change* (1984), Burke explained the idea this way:

[W]e have... considered man as the son of God, as an animal, as a political or economic brick, as a machine, each such metaphor, and a hundred others, serving as the cue for an unending line of data and generalizations. The attempt to fix argument by analogy as a distinct kind of process, separable from logical argument, seems increasingly futile. The most practical form of thought that one can think of, the invention of some new usable device, has been described as an analogical extension, as when one makes a new machine by conceiving of some old process, such as the treadle, the shuttle, the wheel, the see-saw, the wedge, etc., carried over into some set of facts to which no one had previously felt that it belonged. (pp.95-6)

Analogy is a mode of inference based on similarity and closeness. It draws a conclusion on something by comparing it to something else but similar and close to each other. Metaphor also works as comparison, but, unlike the comparison in analogy, the metaphoric comparison is between two *prima facie* dissimilar things. “Harvard College and Bates College are both liberal arts colleges in the US. What is true about Harvard, therefore, is true about Bates.” is an example of analogy; “You are my sunshine, my only sunshine; you make me happy when skies are grey.” is an example of metaphor. Namely, while analogy is premised upon the similarity or relationship between two things, no such similarities or relationship is assumed for metaphor; metaphor rather invents them by way of discourse. It is important to note, however, that Burke novelly and strategically confuses these two when explaining the rhetorical operation of analogical extension. In other words, his analogical extension first invents certain similarities or relationship between dissimilar things and then exploits them for rhetorical purposes.

If we follow this logic, then, there may be no limit to analogical extension. As we invent the similarity and relationship between two different things and exploit them

rhetorically, we could infinitely extend one construct to another or, to borrow Burke's words above, "to which no one had previously felt that it belonged." In terms of the law, however, there do exist limits to such extensions. For analogical extension to take place in legal discourse, the existence of the similarity and relationship is not sufficient. That is, when extending the concept of personhood to non-person entities in the law, we will have to consider various other aspects, such as legal frameworks, philosophical perspectives, ethical considerations, societal norms, practical implications, and cultural beliefs. Needless to say, the law is made to exist to serve human interest; our legal systems thus are necessarily human-centric. As they are primarily designed to address human needs, interactions, and responsibilities, in many cases, extending the legal person status to non-person entities is difficult. While similarities between humans and certain highly intelligent non-human mammals (such as dolphins and anthropoid apes) can be relevant in highlighting their capacity for sentience, emotions, or certain cognitive abilities, for instance, this does not necessarily mean that these non-human animals should be granted the same legal person status as natural persons (e.g., Franceschini, 2022).

On the other hand, the concept of corporation as a legal person is very fit for our reality of (post)modern, global capitalism. As big corporate conglomerates and multinational capitals have replaced individuals and become the main socio-economic actors, personifying a corporation in legal discourse seems not only natural but also desirable and preferable from the anthropocentric/capitalistic viewpoint. While "[t]he concept of the corporation as a separate legal personality is... essentially a metaphorical use of language," wrote Nicholas James (1993), a personified corporation has a powerful rhetorical presence as it is "both analytical and ideological, descriptive and prescriptive" (p.218).

Besides legally personified corporations, there is another interesting case of analogical extension of personhood in the law: robotics and AI. We have seen the AI-operated home robots become part of some families. More significantly, we now have highly advanced generative AI such as ChatGPT. It is not a real-life person but a human-made machine that can exchange messages meaningfully and intelligibly in a way very similar to natural persons. Recall the etymology of person/*persona* that originally denotes a mask, a non-person entity; calling a real-life human being by the name of person is metaphorical after all. "If legal personhood is already dissociated from the human substrate," as Sergio Avila Negri (2021) noted, "there would be no way to deny personhood to robots due to the non-existence of any human characteristic in these artefacts" (p.6). For instance, if we were to write and publish a scholarly paper with some assistance from ChatGPT, should we acknowledge it just as this author does? Or should we even list it as one of our co-authors? If so, is the authorial credit or the copyright to be given to ChatGPT? Legal scholars and practitioners already started debating these complex issues (e.g., Gunkel & Wales, 2021; Lau, 2019; Mocanu, 2022; Negri 2021). Perhaps we as scholars of rhetoric and argument may have to join them and discuss these issues soon.

4. AN EXCURSION ON OTHER LEGAL METAPHORS

Focusing on legal person, this essay has explored the problem of legal fiction from the rhetorical perspective. To further discuss the rhetorical problem of metaphor in legal

argumentation, at this point two little excursions are to be taken, the one onto the idea of “intellectual property,” the other the “bundle-of-rights.”

4.1. Intellectual property as a metaphor

The basic idea of intellectual property is to grant certain rights exclusively to creators and owners of intangible assets such as artistic creations, literary works, inventions, and trademarks. While it is a relatively new legal concept, intellectual property is an established legal concept, and it has already become part of the legal system and subjected to legal protections and regulations in many countries and regions, both in common law and written law traditions.

Some legal scholars, however, have questioned the way intellectual property has been conceptualized in the law (e.g., Frye, 2015; St. Clare, 2010; Tamura, 2014, 2021). Specifically, they point out problems concerning the “metaphorical” nature of intellectual property. While the idea of property traditionally refers to tangible possessions such as real estate and automobile, intellectual property assumes no such tangible possessions. In reality, intellectual property is not a property but something else: They are entities that are dissimilar to each other. Yet, because it is called as such, we erroneously assume that intellectual property has qualities similar to those of tangible property. Expressing his anti- metaphorical position rather overtly, Bryan Frye (2015) wrote:

[T]he rhetoric of intellectual property is metaphorical. In theory, intellectual property is justified on welfarist grounds, because it solves market failures in innovation and thereby increases the public surplus. But in practice, the scope of intellectual property rights is unrelated to their ostensible welfarist justification. Intellectual property metaphors prevent us from understanding intellectual property by obscuring the lack of connection between its theoretical justification and its actual scope. (p.736)

Seen from this standpoint, then, intellectual property is a metaphor that masks the problem it itself creates. Rather than stimulating innovation and creativity and increasing the public surplus, argued these critics, it overemphasizes the exclusive right to individual creators and owners of the property, unfairly limiting the other’s access to that property, going against the public interest, and serving the economic interest of the small number of neoliberal capitals.

4.2. The “bundle of rights” metaphor

Because it is a metaphor, intellectual property may be problematic in the law. It does not necessarily follow, however, that we should do away with any and all metaphors altogether in legal discourse. At this point, it should be pointed out that metaphors are a rhetorical device that helps us communicate with each other more effectively, efficiently, and persuasively; they enable us to convey a complex, abstract, and unfamiliar concept in a simpler, more concrete, and more familiar term. While these are benefits of metaphors in general, they should not be underestimated when it comes to the law as well. There should exist metaphors that help us communicate better in the law. As they are “our primary sources of generated and reflected light,” noted American jurist Linda Berger (2013), metaphors are “the primary ways in which we understand new information..., determine

where something new likely fits..., or suggest a different point of view” (p.148) in legal argumentation.

Property as a “bundle of rights” is one such metaphor. Widely and primarily used in common law countries such as the United States and United Kingdom, many find this metaphor very useful when discussing the idea of property in the law. Specifically, it helps to explain the idea of property which, in fact, is far more complex than it may look. Namely, the ownership of a property is not to be seen as a single, indivisible right; rather, it should be taken as a combination of various multiple rights and entitlements. Jane Baron (2014) of Temple University Law School further explained:

Bundle-of-rights analysis helps to specify the legal relations of parties in both simple and complex property arrangements, to identify explicitly the normative choices implicitly in those arrangements, to assess the quality of the human relationships that property entails, and to force the production of information pertinent to those issues.... Indeed, the complexity of contemporary property issues—in particular, their growing connection to the alternative legal fields of “privacy” and “intellectual property”—makes the bundle conceptualization all the more fruitful. (p.60)

With this bundle of rights metaphor, we can better understand and deal with the complex nature of property and its ownership both of which are not unitary and monolithic. If you own some area of land, for instance, you legally have a property. But what you actually and legally have is the bundle of rights and entitlements regarding the land, such as timber rights, the right to build a home, mineral rights, access rights, the right to sell, etc. Rather than giving the exclusive right to the property owner wholistically, therefore, each one of these rights can be dealt with separately by the balancing of interest among them.

5. CONCLUSION

As part of the collective attempt to further explore the law’s relationship to rhetoric and argument, this essay has discussed the rhetorical nature of legal fiction, more specifically of legal person. As a legislative-legal technique, legal fictions create situations as if they were true, even though they may not correspond to real-world facts. Focusing on legal person, their most typical example, the essay sought to show that legal person can be conceived as a product of rhetorical invention, more specifically of personification and analogical extension. While they are linguistically-created legal realities that do not necessarily correspond to real-life facts, they are to be treated as real in the law, exerting influences even outside the legal discursive domain. This norm-generating power of legal fictions should not be underestimated; the rhetorical function they perform goes beyond the realm of “mere” rhetoric (e.g., Farrell, 1993).

Before closing, two brief observations are in order. First, the preceding analysis suggests that we should approach legal argumentation not only from logical-demonstrative perspectives but also from ana-logical as well as metaphorical ones. While argument scholars do recognize that metaphor is a significant rhetorical move, not many studies have treated it as substantive part of argumentative discourse (e.g., van Poppel, 2021). Yet, the modern law has traditionally dealt with both the real and fictitious entities. Accordingly, we should draw our scholarly attention not only to the logical-demonstrative but also the reality- creative functions of discourse in legal argumentation. Borrowing Bentham’s words

once again, legal fiction is a linguistic existence “feigned by the imagination” but “is spoken of as a real one” in the law.

Second, the analysis also hints that we may need to further reconsider the idea of person/*persona* in the law. This essay picked and discussed the two specific cases of legal person, i.e., corporation and AI. Behind the personification of, and the analogical extension of personhood to, these two obvious non-person entities, there exist more delicate and complex cases. For instance, the *New York Times* reported that, in the United States, anti-abortion activists are pushing for so-called “fetal personhood law” granting fetuses the same legal rights and protections as any already-born person (Zernike, 2022). Different but similar politico-legal issues have emerged in term of persons with disabilities as well. As Paolo Heritier (2022) noted, “The legal technique of *fiction iuris* [legal fiction] is the premise for analyzing contemporary problems” concerning the attribution of rights and responsibilities not only to “non-human personalities, such as robots” but also to “persons with disabilities. The contraposition of [these two entities], understood as opposing visions of anthropological and human models, is part of the philosophical dispute between humanism and post- or transhumanism” (p.1334). Given these cases, the study of legal fiction cannot but expand its analytical scope, dealing not only with the intersection between the law, argument, and rhetoric but also with the one between what Thomas Goodnight (1982) called the “technical” and “public” spheres of argumentation,¹ or even with the one between natural law and legal positivism.

ACKNOWLEDGEMENTS: This research is funded through the Grand-In-Aid for Scientific Research (C) (21K00463) and the Grand-In-Aid for Challenging Exploratory Research (20K20743) by the Japan Society of the Promotion of Science. In drafting the final version of this essay, the author greatly benefitted from the exchange and comments by those who attended the Legal Context III session at the 10th ISSA Conference; he also wishes to thank Narufumi Kadomatsu, Yoshiyuki Tamura, Takeshi Fujitani, Takuya Hatta, Hiroo Sono, Akira Tokutsu and other legal scholars who attended “Property as Rhetoric and Metaphor,” a workshop held at Kobe University, Japan in February 2022. Finally, the author would like to acknowledge that he brainstormed and tested his embryonic ideas with ChatGPT during the early phase of this research.

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¹ Goodnight's idea of argument spheres is not based on Jurgen Habermas' (1990) distinction between *der Öffentlichkeit* (translated in English as “the public sphere”) and *der Privatsphäre* (translated in English as “the private sphere”) (pp.89-90) but is an extension of Stephen Toulmin's (1958) argument fields.

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