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THE RELATIONSHIP OF VOLITIONAL, METALINGUISTIC AND ARGUMENTATIVE FUNCTIONS OF SILENCE IN LEGAL ARGUMENTATION

The article sets the feature of argumentative function of silence, which involves both volitional and metalinguistic functions of silence. Based on this position, it is noted that performing volitional function in legal argumentation, silence can be a means for implementation act of agreement, to be a protection against self-incrimination act and the way to implement fraud. Caution during performing the act of warning about the right to remain silent use words that content falls under metalinguistic function. Performing in legal argumentation the argumentative function, silence can be represented both, as the way of manipulation in dispute, and as an argument (referred to arguments ad rem). In the latter case, silence acts as the prohibition on communication that determined by international standards.
Key words: legal argumentation, silence, volitional function of silence in legal argumentation, metalinguistic function of silence in legal argumentation, argumentative function of silence in legal argumentation, silent fraud.

The modern theory of argumentation is a complex set of theoretical approaches, each one defines the argument basing on a goal of research. A large number of works related to the analysis of argumentation is published, themed international conferences are conducted. There are various competing theoretical approaches to constructing a theory of argumentation, but none covers all the subject matter of the argumentation as a whole. First, it is connected to the complex nature of the argumentation phenomenon. One of the main application fields of theoretical achievements of argumentation researchers is the branch of law. The specifics of the legal activity and theoretical developments of theorists of law, which related to argumentation problems research in this field, have led to formation of a legal argumentation as an independent research in legal science. Different methods, techniques that make up the argument tactics are analyzed within these studies. It is relevant to appeal to the problem of definition and relationship of functions phenomenon of silence in legal argumentation in this connection.

Referring to the realm of the legal argumentation in my researches I have pointed for several times the specificity of understanding and application of silence in it[1]. Silence here can be represented as the way of manipulation in dispute and as an argument (the argument ad rem). Silence in this sense has in it a powerful defensive capacity, protecting from the destructive consequences of inappropriate or untimely taken word.

Modern scientific literature considers the phenomenon of silence is in its various aspects. Silence belongs to one of the types of speech activity, namely non-activity or to specific forms of behavior, namely to non-action and counteraction. Silence belongs to a number of phenomena that are in the focus of modern philosophy, psychology, linguistics. Communicatively significant silence has been the subject of research

[1] Щербина, Е.Ю. (2013). Понимание логиком специфики феномена молчания в правовой аргументации. *Системная трансформация общества: инновации и традиции. Сборник научных трудов кафедр социально-гуманитарных наук, Вып. X.* Брест: УО «Брестский государственный технический университет», 235–239.

of such linguists as N.D. Arutyunova, L.A. Aznabayeva, V.V. Bogdanov, G.E. Kreydlin, S.V. Krestynskyy, N.D. Formanovska, G.G. Pocheptsov and others.

The purpose of this article is to determine the feature of argumentative function by demonstrating relationship of volitional, metalinguistic and argumentative functions of silence in legal reasoning.

By focusing on the features of argumentative function of silence, we will demonstrate that silence performing this function in legal argumentation, realizes volitional and metalinguistic functions of speech (and therefore silence). Volitional function is based on speech acts: the use of words (eloquent silence) to activate the recipient. The second person is at the center of this function: Other ("You"). Speaking (or silence) here is not used for (true or false) statement (about the outside world – the third person), but is itself a speech act. Metalinguistic function uses the language not as a tool, but as a purpose of investigation. There is a question that remains controversial among scientists, it's a question of the possibility of metalinguistic functioning of silence, of using it for comment or express the question about the structure of the language. In this regard, we should note that M. Ephratt showed the role of eloquent silence as a designation on a turning point in the dialogue that defines silence as a marker of discourse that plays metalinguistic role in dialogue thus activates the interlocutor (volitional function)[1].

Silence as an argument on the merits of the case in legal argumentation serves as the prohibition of communication defined by international standards. The right not to testify or to explain anything about oneself – is, above all, the right of the accused to remain silent. The Fifth Amendment to the US Constitution states that no person shall be compelled in any criminal case to be a witness against himself. The right to remain silent – is one of the fundamental rights of person that suspected or accused of a crime who has the right to refuse to testify and give explanations about himself, family members or close relatives. The combination of these rights world community calls "Miranda warning" that emerged in 1966 thanks to Ernest Miranda, for whom police officers didn't explain his right to refuse to testify and the right to have an attorney. After an hours-long interrogation, he confessed to the crime. These testimonies served as the proof of his guilt and became the basis of conviction. However, E. Miranda's lawyers appealed the sentence by making a statement that according to the Fifth Amendment to the US Constitution, he did not have to testify against himself, which he did not know because he did not know the respective right and other rights, and also right had not been explained either by police during the arrest or the prosecution during the investigation or trial. That is how a phrase which states the right to remain silent, which police officers didn't say, became the basis for the abolition of conviction by the US Supreme Court in the case of E. Miranda. Indeed, this phrase is a constitutional norm and law, which it is given by it, is not limited to pretrial stage of the criminal process, but also to trial. The US Supreme Court found it necessary to cancel the decision of conviction as based on testimonies that are not credible.

Mentioned precedent caused resentment among police and prosecutors, and for two years was made the first unsuccessful attempt to abolish the "Miranda warning" when US Congress passed a law that allows prosecutors to use voluntary confessions of the defendants, who were not warned about the possibility to remain silent in the case. However, the US Supreme Court canceled the Congress decision by its resolution, noting that legal precedent has precedence over the law. Representatives of the police and representatives of the Prosecution of the United States did not stop on it, and thirty years later was made another attempt to cancel the precedent. Representatives of the Prosecution argued that the rule not as much protected the rights and freedoms of citizens as helped lawyers. Again, the US Supreme Court took citizens side and by the majority of votes left "Miranda warning" unchanged. According to Chief justice of the United States, the rate for which argue has become "part of the national culture".

In the so-called Miranda warning stating that the person that is in custody, should be clearly informed before interrogation that he has the right to remain silent, and all that he says will be used against her in court; he must be clearly informed that he has the right to consult a lawyer and to a lawyer during his interrogation, and if he is poor, then the lawyer will be appointed to represent his interests.

British privilege against self-incrimination originated in the sixteenth century and since then has undergone many changes. The wording of the modern prevention in the UK is different from that statement that contains the "Miranda warning": "You do not have anything to say for yourself if you don't want this, but I must warn you that if you refuse to point any fact, on which you rely in your defense in court, your refusal to use this opportunity to point it could be used in court as supporting any relevant evidence against

[1] Ephratt, M. (2008). The functions of silence. *Journal of Pragmatics, vol. 40 (11),* 1909–1938.

you. If you really want to say anything, that what you say can be used as proof"[1].

As we see from the wording of the British privilege from the accusation is different from the American "Miranda warning". The latter contains the word "silence", emphasizing the right to remain silent. There is no word "silence" in British wording, it is stated that anyone does not have anything to say if he (she) does not want to do it. But both these warnings, to perform an act of prevention, use words which content falls under metalinguistic function. The point is that the content of the mentioned warnings contains a double meaning sense of caution. First, speech (speaking) during interrogation and in court differs from other thoughts exchanges and therefore may have different consequences. Secondly, silent during questioning and in court can be interpreted in different ways. The first aspect includes the possible consequences of speech (speaking), the second – possible interpretations of realization of the right to remain silent. Such interpretations are selected in three classes: 1) silence as a sign of (admission) fault; 2) silence as the appropriate way to show pragmatic competence, i.e. the context in which the suspect understands that there is no need to answer; 3) demand the right to remain silent as a privilege that satisfies the metalinguistic needs more about the manner of speech (shape) than its content[2].

Considered benefits demonstrate of silence volitional function of silence, which aims to activate the listener (suspect, accused person, witness) to protect from giving unfavorable for himself accusation i.e. it means silence as a defense against self-incrimination. A special case of the silence is silence as a direct speech act, through which its (silence) volitional function is implemented. Here we mean the silence as an admission of guilt. Silence in the sense of "silence as an admission of guilt" is a means of implementation to an act of agreement. It is established in jurisprudence, where the burden of proof relies on suspect / accused.

Turning to Ukrainian legislation, we should note that in the law of Ukraine "On Militia" (expired on 07.11.2015), Article 5 "The militia activity and the rights of citizens" was prescribed the rights of person that was delivered to the militia department. From the Article content we understand that citizens of Ukraine have the right to remain silent and to demand the presence of a lawyer. "Persons during detention or arrest (custody) by militia: ... are provided with oral explanation of the first part of the Article 63 of the Constitution of Ukraine, the right to refuse to give any explanation or testimony before defender arrival and simultaneously – clarification of Articles 28, 29, 55, 56, 59, 62 and 63 of the Constitution of Ukraine and the rights of detained or arrested (in custody) persons, established by law, including the right to defend their rights and interests personally or with defender help from the moment of detention or arrest (custody) of the person, the right to refuse to give any explanation or evidence to the moment of their defender arrival, in print"[3].

In the Law of Ukraine "On the national police", which was adopted on 02.07.2015, said that the police are guided by the headship of law principle, which is applied with taking into account the European Court of Human Rights practice. Although the Convention on Human Rights and the fundamental freedoms does not contain the formulation of the privilege against self-incrimination and close relatives and family members incrimination as a separate norm, but case-law practice of the European Court of Human Rights based on the usage of fair procedure notion. Mentioned concept covers the protection of the accused from coercion by the authorities, prohibits the prosecution to use evidences that obtained against the will of an accused person, through coercion or violence. In para. 2, Art. 33 Law of Ukraine "On the national police" determined that "giving the information by the person is voluntary. A person may refuse to give information"[4].

Although the Ukrainian legislation, which concerns the description of the police measures, namely, questioning the person does not contain the word "silence", but the content of clarification demonstrates the sense of the right to refuse to give any explanations or testimonies to the moment of their defender arrival, as well as rights, that defined for this context by appropriate articles of the Constitution of Ukraine. Thus,

[1] Cotterill, J. (2005). 'You do not have to say anything': instructing the jury on the defendant's right to silence in the English criminal justice system. Multilingua: *Journal of Cross-Cultural and Interlanguage Communication, vol. 24 (1/2),* 8.

[2] Ephratt, M. (2008). The functions of silence. *Journal of Pragmatics, vol. 40 (11),* 1930–1931.

[3] *Закон про міліцію* (прийнятий 20.12.1990 р., втратив чинність від 07.11.2015 р.) (Верховна Рада України). *Офіційний сайт Верховної Ради України*. <http://zakon4.rada.gov.ua/laws/show/565-12>.

[4] *Закон про національну поліцію 2015* (Верховна Рада України). *Офіційний сайт Верховної Ради України*. <http://zakon5.rada.gov.ua/ laws/show/580-19> (2015, July, 02).

we can talk about the implementation of silence volitional function, namely, silence as a defense against self-incrimination.

The right of the suspect/accused to silence, the right not to testify against himself is established in the Criminal Procedure Code of Ukraine (paragraph 4 of Part 3 of Article 42), although the word "silence" is missing in this norm. This norm is referred to the fact that a suspect, accused has the right "not to say anything about the suspicions against him, accusal or any time refuse to answer the questions"[1].

Doing its volitional function, eloquent silence can be a direct act of verbal threat. Silence as a punishment (execution of threats and promises), such as, "If you pay the debt, I will not reveal your secrets," acting as a kind of blackmail.

One of the varieties of silence that performing its volitional function is silence as a concession. It is that silence in this case is evidence of agreement. Silence can have lawmaking force, if the law or agreement of the parties provides such quality to it. In these cases, silence indicates expression of the subject's will to generate or prevent legal consequences. In p. 3., Art. 205 "The form of competence. Ways of will in the Civil Code of Ukraine is defined: "In the cases established by the contract or the law, will of a party to commit competence can be expressed by his silence"[2].

In legal argumentation fraud in latent form, which varieties are fraud by default of a part of legally significant information (using half-truths fraud) and silent fraud of one of the communicants, can carry information about his unlawful infringement on other's will. This refers to the fact that the will of a person who is under the influence of fraud, was formed under the influence of circumstances that distort his true will.

In case of using half-truth fraud we mean deliberate concealment of information by subject of argumentation about any facts or circumstances which the recipient had to be informed about, that is designed to mislead him (the recipient) or in support of the recipient's mistake in order to motivate him to commit or not to commit specific actions for the benefit of deceiver (subject) from recipient's own will.

An example of such fraud can be conscious concealment of part of important information during the agreement by one party that intends to receive the benefit for him, which aimed at creating a wrong, false picture of the true state of things by the other party.

Silent fraud in legal argumentation can be defined as the deliberate concealment (hiding) by the subject of all information about certain facts, circumstances, past, present or future time events in order to distort recipient's worldview and encourage him to do or not to do specific action for the subject's interests of his own will.

An example of a silent fraud may be such fraudulent actions of one part during the conclusion of agreement, which are expressed in inaction, namely in deliberate concealment of facts, knowing of which may impede the conclusion of the agreement. Lack of knowledge about these facts influenced the will of the other party during conclusion of an agreement.

To this type of fraud belongs such kind of fraudulent deception that happens in relation to the action of laws and norms which issued by public authorities and government, and this fraud is to mislead the victim about the content and interpretation of legal norms described in these acts. For example, a person being a part of an agreement, applies the norm that lost its force with the aim of criminal occupation of property during the committing the property type agreement. We talk about complete concealing of the fact of the loss of norm legal force. In this case, the will of the other party in the agreement is based on false picture of the true state of affairs created by interested party.

The feature of silent fraud in legal argumentation is that the subject abstains from messaging (hide) all the circumstances of which he had to inform the recipient, but did not. Because silence as a part of communication is different from the pause and non-speaking, i.e. as non-action, which follows from the absence of sound. In this context, "not reporting" did not coincide with the meaning of "not talking". In the considered aspect "not reporting" means abstaining from messaging. We talk about understanding the abstaining as a way of behaving. This is something for which the agent may be responsible[3]. "Non-

[1] *Кримінальний процесуальний кодекс України 2012* (Верховна Рада України). *Офіційний сайт Верховної Ради України*. <http://zakon5.rada.gov.ua/ laws/show/4651-17/page 2> (2015, August, 16).

[2] *Цивільний кодекс України 2003* (Верховна Рада України). *Офіційний сайт Верховної Ради України*. <http://zakon3.rada.gov.ua/ laws/show/435-15/page 4> (2015, September, 30).

[3] Вригт, Г.Х. фон. (1986). *О логике норм и действий. Логико-философские исследования: Избр. тр.* Москва: Прогресс, 258.

messaging" in this case means not doing what is expected or has to be done according to duty. This behavior of the subject enters recipient into such misconception that excites him to commit or not to commit significant for deceiver acts.

Thus, analyzing the relationship of volitional, metalinguistic and argumentative functions of silence in legal argumentation, we should note the following. Performing in legal argumentation volitional function, silence can be a means of implementation of act of agreement ("silence as an admission of guilt", "silence as a way of will" for cases where it has lawmaking force), can act as protection against self-incrimination, and the way of implementation of fraud. In the latter case the fraud through reticence of part of legally significant information and silent fraud of one of the communicants can carry information about his unlawful infringement on other's freedom. Cautions during warning about the right to remain silent use words which content falls under metalimguistic function. We talk about the possible consequences of speech and possible interpretation of the right to remain silent. Performing in legal argumentation argumentative function, silence can be represented both, as the way of manipulation in dispute, and as an argument (referred to arguments ad rem). As the way of manipulation in dispute silence in legal argumentation can be a "silence of continence" (eg., Of one of the parties in the trial dispute) and "silence of courage" (eg., Refusal to testify, to not to "hurt" someone else). Silence as an argument on the merits in the legal argumentation serves as the prohibition on communication defined by international norms. Thus, as a feature of argumentative function of silence in legal argumentation, we can determine that during the implementation of this function, it realizes both volitional and metalinguistic functions.

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