

Chapter 5

Institutional Constraints of Topical Strategic Maneuvering in Legal Argumentation.

The Case of ‘Insulting’

Harm Kloosterhuis

Abstract Strategic maneuvering refers to the efforts parties make to reconcile rhetorical effectiveness with dialectical standards of reasonableness. It manifests itself in *topical selection*, *audience-directed framing* and *presentational devices*. In analyzing strategic maneuvering one category of parameters to be considered are the constraints of the institutional context. In this paper I explore the institutional constraints for topical selection for the legal argumentative activity type *insulting*. I will make a distinction between statutory constraints, constraints developed in case law and constraints regarding language use and the logic of conversational implicatures.

5.1 Introduction

Frans van Eemeren explains in *Strategic Maneuvering in Argumentative Discourse* (2010, p. 40) how the theoretical reconstruction of argumentation should incorporate *strategic maneuvering* of parties in a discussion. Strategic maneuvering refers to the efforts parties make to reconcile rhetorical effectiveness with dialectical standards of reasonableness. It manifests itself *topical selection*, the *audience-directed framing* of the argumentative moves, and in the purposive use of *presentational devices*. In analyzing strategic maneuvering the following parameters must be considered: (a) the results that can be achieved, (b) the routes that can be taken to achieve these results, (c) the constraints of the institutional context and (d) the mutual commitments defining the argumentative situation (Van Eemeren 2010, p. 163). In chapter 10 of his study – ‘Setting up an agenda for further research’ – Van Eemeren proposes further research to the theoretical exploration of these four parameters for specific argumentative activity types. In this paper I want to do this for a specific legal argumentative activity type: the discussions about the accusation

H. Kloosterhuis (✉)

Erasmus School of Law, Erasmus University College, Erasmus University Rotterdam,
Rotterdam, The Netherlands

e-mail: Kloosterhuis@law.eur.nl

of *insulting*. In these discussions there is often disagreement because language users can opt for *indirect insulting*. The problem of indirect insulting is that there is a difference between sentence- and speaker meaning. This difference results in problems regarding the interpretation and reconstruction of the argumentation for and against the accusation of insulting. This aspect of insulting has received little attention in legal research and it is my aim in this contribution to solve some of these problems by providing a theoretical framework for the analysis of strategic maneuvering in legal discussions about insulting, using the parameters distinguished by Van Eemeren. I will focus on topical selection and the parameter institutional constraints by giving a specification of the argumentative activity type *adjudication in cases about insulting* and an analysis of the constraints of this activity type. I will make a distinction between statutory constraints, constraints developed in case law and constraints regarding language use and the logic of conversational implicatures.

5.2 The Statutory Constraints of the Institutional Context

In order to shed some light on the constraints of the institutional context let us first take an example of an accusation of insulting, taken from Dutch case law. 10 March 2009 the Supreme Court of the Netherlands ruled in a case about the accusation of insulting. The case was about article 137c of the Criminal Code, which makes insulting statements about a group of people a crime. The Supreme Court acquitted a man who stuck a poster in his window with the text ‘Stop the cancer called Islam’ of insulting Muslims. According to the district court and the court of appeal, this statement was insulting for a group of people due to their religion, considering the strong connection between Islam and its believers. But the Supreme Court argued that criticizing a religion, is not automatically also insulting its followers. According to the Supreme Court the appeal court gave too wide an interpretation of the expression ‘a group of people according to their religion’ in Article 137c. People expressing themselves offensively about a religion are not automatically guilty of insulting its followers, even if the followers feel insulted. The Supreme Court ruled that ‘the statement must unmistakably refer to a certain group of people who differentiate themselves from others by their religion’. While people may not insult believers, they can insult their religion. The sole circumstance of offensive statements about a religion also insulting its followers is not sufficient to speak of insulting a group of people due to their religion.

Discussions about the accusation of insulting can be analysed as species of the argumentative *activity type adjudication*. Van Eemeren argues that argumentative discourse in practice takes place in different kinds of activity types, which are to a greater or lesser degree institutionalized, so that certain practices have become conventionalized. Activity types and the speech events that are associated with them can be identified on the basis of careful empirical observation of argumentative

practice.¹ One of the activity types Van Eemeren (2010, p. 147) distinguishes is *adjudication*:

Adjudication aims for the termination of a dispute by a third party rather than the resolution of a difference of opinion by the parties themselves. It is commonly understood as taking a dispute to a public court, where a judge, after having heard both sides, will make a reasoned decision in favor of either one of the parties. The judge determines who is wrong and who is right according to a set of rules. Most of these rules are tantamount to specifications of rules for critical discussion aimed at promoting that the dispute be terminated in a reasonable way.

Now how is the practice of discussions about insulting conventionalized? Which institutional rules and constraints are relevant? In the following I will make a distinction between three types of rules: statutory rules, rules from case law and rules regarding language use.

In the first place there are *statutory* rules about this criminal act in the penal code. The relevant statutory rule in the example ‘Stop the cancer called Islam’ is Article 137c of the Dutch Penal Code:

Article 137c

He who publicly, verbally or in writing or image, deliberately expresses himself in a way insulting of a group of people because of their race, their religion or belief, or their hetero- or homosexual nature or their physical, mental, or intellectual disabilities, will be punished with a prison sentence of at the most one year or a fine of third category.

This rule contains the following partially complex necessary conditions for the application: (1) there is an act of insulting of (2) a group of people, (3) there is an intention to insult, (3) the insult is in public, (4) verbally or in writing or image, (5) because of race, religion or belief, or hetero- or homosexual nature or physical, mental, or intellectual disabilities. This structure implies that a successful defence of the standpoint that someone is guilty of the criminal act insulting contains a coordinative argumentation of five arguments based on the five necessary conditions in the norm. A successful attack of this standpoint results in single or multiple argumentation, based on a refutation of one or more of the five necessary conditions.

5.3 Constraints Developed in Case Law and Linguistic Constraints

In the second place there are rules developed in *case law*. These rules refine and specify the five necessary conditions, but the case law about 137c also resulted in a new condition for the application. According to the rules from case law about the application of article 137c three questions should be answered. The first question is whether or not an utterance is an insult and whether or not the other conditions of 137c are fulfilled. If the utterance is an insult and the other conditions are fulfilled,

¹Unlike theoretical constructs such as a critical discussion and other ideal models based on *analytic* considerations regarding the most pertinent presentation of the constitutive parts of a problem-valid procedure for carrying out a particular kind of discursive task (Van Eemeren 2010, p. 145).

the next question is whether or not the utterance is part of a public debate. And if the insult is an utterance in a public debate the third question is whether or not the utterance is unnecessary offensive.

Let us now focus on the first question: is the utterance insulting? Here the relevant rules are not legal, but *linguistic* in nature. This third category of rules are conventionalized *semantic* and *pragmatic* rules. In answering the question about the insulting nature of the utterance a distinction has to be made between *direct* and *indirect* insulting. In order to qualify an utterance as a direct insult the words themselves and semantic rules may often suffice, but often one may require the *context* to understand the actual meaning of the words. It could be clear, for instance, that the tone of the entire text is ironic. Those few words which in isolation may be construed as insulting, would then in their totality, in conjunction, be ironic and hence have an entirely different meaning.

As I have shown in Kloosterhuis (2012) the cases of *indirect* insulting are often more complicated to analyse. In these cases semantic rules are not sufficient as basis for the qualifications that an utterance is an insult. Here we need *pragmatic* rules. Let us look at some examples. According to Dutch case law the following utterances count as insult Kloosterhuis (2012):

1. Calling a police-officer a ‘homo’.
2. Greeting a police-officer with ‘Heil Hitler’.
3. Saying ‘I am gonna fuck you’ to a police-officer.
4. Having a tattoo or a bomberjack with the text ‘1312’ or ‘ACAB’ (All Cops Are Bastards).
5. Referring to a passage in the Bible where Pilatus washes his hands.
6. Saying or implicating that the Holocaust did not happen

These utterances are less clear than direct insults. This vagueness often results in discussions about meanings, between parties, between parties and judges and between judges. In example 1 for instance – Calling a police-officer a ‘homo’ – the judge of the district court ruled that the utterance ‘homo’ is not insulting, but a neutral term. In contrast with this decision the court of appeal decided that this utterance ‘in context’ had to be considered as an insult. Another form of defence to the accusation of insulting in these cases is that there was no intention to insult. And sometimes the meaning – or to be more precise the propositional content – of a word is disputed. One of the counterarguments against the accusation of an insult in the ACAB-cases (example 4) was that ACAB does not mean ‘All Cops Are Bastards’ but ‘Acht Cola Acht Bier’ (‘Eight Cola Eight Beer’).

5.4 Constraints Related to the Logic of Conversational Implicatures

The interesting problem with the examples like ‘I am gonna fuck you’ is that there is a (possible) difference between the sentence meaning and the speaker meaning. According to Grice’s theory about conversational implicatures a speaker or writer

can use utterances as ‘I am gonna fuck you’ and defend that there was no insult meant. To explain this logic of the conversational implicatures in cases of indirect insulting, we should first give a precise definition of the *speech act insulting*. In the analysis of speech act theory, language users performing speech acts have illocutionary and perlocutionary purposes. The successful performance of an illocutionary act will always result in the effect that the hearer understands of the utterance produced by the speaker. But in addition to the illocutionary effect of understanding, utterances normally produce and are often intended to produce, further perlocutionary effects on the feelings, attitudes and subsequent behaviour of the hearers. An assertive speech act as asserting or argumentation may result in the perlocutionary effect of convincing or persuasion and a commissive speech act as a promise may create expectations. Searle (1971) and Searle and Vanderveken (1985) claims that there are five and only five types of illocutionary acts:

1. *assertive* illocutionary acts that commit a speaker to the truth or acceptability of the expressed proposition, for example making a statement.
2. *directive* illocutionary acts that are to cause the hearer to take a particular action, for example requests, commands and advice.
3. *commissive* illocutionary acts that commit a speaker to some future action, for example promises and oaths.
4. *expressive* illocutionary acts that express the speaker’s attitudes and emotions towards the proposition, for example congratulations, excuses and thanks.
5. *declarative* illocutionary acts that change the reality in accord with the proposition of the declaration, for example baptisms, pronouncing someone guilty or pronouncing someone husband and wife.

The successful performance of illocutionary acts is dependent on the fulfillment of different conditions (Searle 1971, p. 47; van Eemeren and Grootendorst 1984, p. 21). A successful performance of a speech act results in a perlocutionary effect, for example being convinced in case of the illocutionary act argumentation. Within the framework of speech act theory we are now able to give a more precise definition of the effect ‘being insulted’: *being insulted is a perlocutionary effect that is intended by the speaker or writer and that is based on rational considerations on the part of the addressee.*²

²In order to make clear what this perlocutionary effect involves Van Eemeren (2010, p. 37) makes the following distinctions. First, he distinguishes between effects of the speech act that are intended by the speaker or writer and consequences that are brought about accidentally. Van Eemeren reserves the term act, in contradistinction with ‘mere behavior’, for conscious, purposive activities based on rational considerations for which the actor can be held accountable. As a result, bringing about completely unintended consequences cannot be regarded as acting, so in such cases there can be no question of the performance of perlocutionary acts. According to Van Eemeren a rough and ready criterion for distinguishing between the performance of perlocutionary acts and the bringing about of unintended consequences is whether the speaker can reasonably be asked to provide his/her reasons for causing the consequences in question. Second, Van Eemeren distinguishes between consequences of speech acts whose occurrence may be regarded to be based on rational considerations on the part of the addressee and consequences that are divorced from reasonable decision-making, like being startled when someone shouts boo.

The next question now is how the perlocutionary effect of being insulted is related to the five types of illocutionary acts in cases of indirect insulting. How, in other words, is a language user capable of inferring an ‘insult’ from an assertion, a promise, a question, a compliment or a declaration? According to Van Eemeren and Grootendorst the associated perlocutions are connected to the essential condition or illocutionary point of the illocutionary act.³ There are five and only five illocutionary points. (1) The assertive point is to say how things are. (2) The directive point is to try to get other people to do things. (3) The commissive point is to commit the speaker to doing something. (4) The declarative point is to change the world by saying so. (5) The expressive point is to express feelings and attitudes.

Now it is clear from these illocutionary points that none of the five illocutionary acts is related in a direct conventional way with the perlocution ‘being insulted’. Calling a police officer a homo or comparing an employer with Pontius Pilatus are assertive illocutionary acts, in which a proposition is presented as representing a state of affairs, with an associated perlocution as accepting a description or being convinced, but not being insulted. Saying ‘I am gonna fuck you’ to a police-officer is a commissive illocutionary act – a promise or a threat – in which the speaker commits himself to carrying out an action. The associated perlocutionary effects of commissives are accepting the promise or being intimidated, but not being insulted. Greeting a police-officer with ‘Heil Hitler’ is an expressive illocutionary act with an associated perlocution as accepting the greeting but again – not being insulted.

So, the question now is: how is it possible to derive the perlocutionary effect ‘being insulted’ from illocutionary acts whose associated perlocutionary effects is primary a different one. The key to an answer to this question is treating the examples as forms *conversational implicatures* as analyzed by Grice. In order to analyze the difference between sentence meaning and speaker meaning, Grice (1975, pp 26–30) postulated a general Cooperative Principle and four maxims specifying how to be cooperative:

Cooperative Principle. Contribute what is required by the accepted purpose of the conversation.

Maxim of Quality. Make your contribution true; so do not convey what you believe false or unjustified.

Maxim of Quantity. Make your contribution as informative as is required for the current purposes of the exchange. Do not make your contribution more informative than is required.

Maxim of Relation. Be relevant.

Maxim of Manner. Be perspicuous; so avoid obscurity and ambiguity, and strive for brevity and order.

³ Van Eemeren en Grootendorst (1984, p. 53) are of the opinion that there is a conventional relation between illocutionary acts and associated perlocutionary effects. They describe the associated perlocution as ‘something like the rationale’ for performing the illocution; it is, as it were, in the nature of the illocution to bring about the perlocution. Central in their analysis is the relation between the essential condition or illocutionary point of the illocutionary act and its rationale. They explain that the relation between the illocution argumentation and the perlocution convincing can be characterized as ‘conventional’ in Lewis (1977) sense of regularity, normativity and mutual expectations.

According to Grice it is common knowledge that people generally follow these rules for efficient communication and, so long as there are no indications to the contrary, assume that others also adhere to the maxims. Cases in which the speaker leaves certain elements implicit, yet the listener still understands what he means over and above what he 'literally' says, can then be explained by assuming that, in combination with the cooperative principle, these maxims enable the language users to convey conversational implicatures. So, if a speaker is able to adhere to the maxims, yet deliberately and openly violates one of the maxims, even though there is no reason to suppose that he has completely abandoned the cooperative principle, then it is possible to derive a conversational implicature.

In order to give a more precise description of inferring conversational implicatures Van Eemeren and Grootendorst (1984) propose to combine the maxims of Grice with Searles conditions for the performance of illocutionary acts. For the performance of an assertive the preparatory conditions are that the speaker has reasons for acceptance the truth of the propositional content and the sincerity condition is belief. For the performance of a commissive the propositional content condition is that the propositional content represents a future course of action of the speaker, the preparatory condition is that the speaker is able to perform this course of action and the sincerity condition is intention. For the performance of a directive the propositional content condition is that the propositional content represents a future course of action of the hearer, the preparatory condition is that the hearer is able to perform this course of action and the sincerity condition is desire. For the performance of a declarative there are no special propositional content conditions, the preparatory condition is that the speaker is capable of bringing about the state of affairs represented in the propositional content solely in virtue of the performance of the speech act and the sincerity conditions are belief and desire. For the performance of an expressive there are no general propositional content, preparatory and sincerity conditions. But most expressives have propositional content conditions (you cannot apologize for the law of *modus ponens*), the preparatory condition that the propositional content is true and the sincerity condition about a state of affairs that the speaker presupposes to obtain.

These conditions presuppose Grice's Cooperation Principle and can be viewed as specifications of the four maxims. Let us now try to explain how a hearer is able to derive an insult in our examples. The line of reasoning of the public prosecution defending the standpoint that an utterance counts as an insult would be as follows.

Someone who calls a police-officer a homo implicates an insult by openly violating one of the maxims. When the assertive is not true, the speaker violates the maxim of quality, or in terms of the conditions for performing an assertive, the speaker infringes the preparatory and sincerity conditions. When the assertive is true the speaker violates the maxim of relevance, or in terms of the conditions for performing an assertive, the speaker violates the essential rule, because there is no sense or point.

The fired employee who compares his employer with Pontius Pilatus does not say that his dismissal is like the condemnation of Jesus, but he is implicating it by openly violating the maxim of quality, or more precise the preparatory and sincerity conditions for an assertive illocutionary act.

Someone who greets a police-officer with ‘Heil Hitler’ implicates an insult by openly violating the maxime of relation, or more precise the sincerity conditions for performing an expressive illocutionary act. Someone who promises or threatens a police-officer to fuck him implicates an insult by openly violating the maxime of quality of relation, or more precise the preparatory and sincerity conditions for performing a commissive illocutionary act.

Saying or implicating that the Holocaust did not happen counts as an insult because it is (or counts as) a violation of the maxime of quality. In terms of the conditions for performing the assertive illocutionary act this utterance can be analyzed as a violation of the preparatory and maybe also the sincerity conditions for performing an assertive illocutionary act.

5.5 Conclusion: The Constraints of Topical Strategic Maneuvering in Cases of Indirect Insulting

The analyses of insulting shows that there are three kinds of institutional constraints of strategic maneuvering: statutory constraints, constraints developed in case law and constraints regarding language. In cases of indirect insulting the rules of conversational implicatures are highly relevant constraints for the analysis of topical strategic maneuvering. In the cases discussed, I showed how indirect insults can be reconstructed as conversational implicatures. The violation of the gricean maxims results in a potential obstruction of the communication, for reasons that go beyond these maxims. But it is a *potential* obstruction, because of the uncertainty related to the implicature. The examples of indirect insulting illustrate two important characteristics of conversational implicatures. The first is that the presence of the implicature must be capable of being worked out for even if it can in fact be intuitively grasped, unless the intuition is replaceable by an argument, the implicature (if present at all) will not count as a conversational implicature. The second characteristic is that a conversational implicature is always *contextually cancellable* if one can find situations in which the utterance would simply not carry the implicature (Grice 1989, p. 44). In other words, in using an ‘indirect insult’ there is *plausible deniability*. These two characteristics are the explanation for the *topical space* in discussions about the accusation of an indirect insult. The party who claims that a certain illocutionary act carries the implicature ‘insulting’ and the perlocutionary effect ‘being insulted’ claims that there are good arguments for this standpoint, given the conventional meaning of the utterance and the conventional rules for conversations. Because of the plausible deniability the accused can argue that there was no insult at all. In the examples mentioned this was precise one of the types of argumentation to defend the standpoint that there was no insult.

Let us to illustrate this point take a closer look to the argumentation in the case ‘Stop the Cancer called Islam’ Is it possible to analyze this utterance as implicating an insult because the writer openly violates one of the maxims or conditions for

performing a directive illocutionary act? The analysis of the utterance as an open violation of the maxime of quality and the sincerity conditions for the performance of an assertive – Islam is not a cancer – can easily be countered with the argument that it was meant metaphorically. The analysis of the utterance as a violation of the maxime of relation and the essential condition for an assertive, can be countered by arguing that this utterance was part of a public debate. This was in fact the point the defence made in this case.

References

- Grice, H.P. 1975. Logic and conversation. In *Syntax and semantics 3: Speech acts*, ed. P. Cole and J. Morgan, 43–58. New York: Academic.
- Grice, H.P. 1989. *Studies in the way of words*. Cambridge: Harvard University Press.
- Kloosterhuis, H.T.M. 2012. The logic of indirect insulting in legal discussions. A speech act perspective. In *Explorations in language and law. An international, peer-reviewed publication series*, 69–82. Aprilia: NOVALOGOS/Ortica Editrice Soc. Coop.
- Lewis, D.K. 1977. *Convention; a philosophical study*. Cambridge: Harvard University Press.
- Searle, J.R. 1971. What is a speech act? In *The philosophy of language*, ed. J.R. Searle, 39–53. London: Oxford University Press.
- Searle, J.R., and D. Vanderveken. 1985. *Foundations of illocutionary logic*. Cambridge: Cambridge University Press.
- van Eemeren, F.H. 2010. *Strategic maneuvering in argumentative discourse. Extending the pragma-dialectical theory of argumentation*. Amsterdam/Philadelphia: John Benjamins Publishing Company.
- van Eemeren, F.H., and R. Grootendorst. 1984. *Speech acts in argumentative discussions. A theoretical model for the analysis of discussions directed toward solving conflicts of opinion*. Dordrecht: Foris.