Legal Texts as Discourses
Johanna Niemi-Kiesiläinen, Päivi Honkatukia & Minna Ruuskanen

Introduction

Legal scholarship and discourse analysis have much in common. They both concern reading and interpreting texts, both are preoccupied with the meaning of texts, and both seem to assume that texts have a life of their own that is independent of their authors. Law is, after all, an inherently societal discourse, albeit quite a specific one. Therefore, within sociology of law it seems appropriate to look at those sociological methods that analyse how language is used by, and in relation to, law and its institutions. Nevertheless, it has taken sociology of law a long time to become interested in discourse analysis as a method of research. This lack of interest has been partly caused by the general orientation of research within sociology of law, which privileges the more traditional forms of empirical research, and mainstream sociological theorising about law, which remains under the influence of various forms of structural functionalism.\(^1\) We would like to argue that another reason for this reluctance has been that discourse analysis approaches texts in a fundamentally different way than legal science.

The aim of this chapter is to discuss the application of the methods of discourse analysis to legal texts. By using examples from our own work we wish to show that this approach is fruitful for the analysis of legal discourse, for an understanding of the relationship between what is normative and what is factual and for grasping the relationship between social and legal theory.

Our interest in discourse analytic reading of legal texts arises out of our research on legal issues related to violence against women.\(^2\) It is common knowledge in the social sciences that violence against women is a widespread and persistent problem and that it often is either neglected or ignored by the criminal justice system.\(^3\) For example, the

---

1 As the chapters in this book show, interesting work using different forms of discourse analysis have been employed in socio-legal studies, critical legal studies and feminist legal studies. Having said that, we still claim the mainstream sociology of law has been surprisingly little affected by the constructionist methodologies.

2 The authors are members of Research Project VISE: Violence in the Shadow of Equality: Hidden Gender in the Legal Discourse.

police do not often recognise violence against women committed by their partners if the violence followed a quarrel, or if the woman was hysterical or drunk at the time. In addition, the fact that violence or the threat of violence is repeated or habitual is often considered to be irrelevant in a case of battery, women’s claims of self-defence are often ignored, and rape cases involving acquaintances are often down-graded.  

When we started our respective studies on the approaches of the Finnish legal system towards violence against women, our initial problem was that the problems we studied eluded us. The legal language of court cases, police protocols, *travaux preparatoires*, etc., was sex and gender neutral. The legal discourse did not recognise some issues related to violence against women. We were even told by some colleagues and judges that there were no legal problems associated with violence against women because the law is the same for everyone. If, for example, the cases are not reported to the police, the problem lies within the community, not in the criminal justice system itself. The legal discourse even resisted taking specific legal measures to combat such violence.

We became intrigued by this apparent neutrality of language and started to ask whether there were hidden assumptions about sex and gender behind the seemingly neutral language of the law. In addition, we started to ask how the assumptions about sex and gender were reflected in discourses on other legally relevant concepts, such as

---


5 In this chapter we use the phrase “sex and gender” and avoid the debate on whether this distinction is theoretically founded. While all the studies we use as examples are based on the theoretical belief that sex and gender are, at least partly, socially constructed, some of the studies are more interested in the construction of social meanings connected to sex (for example studies on rape law), while some of the studies are more interested in social and gendered roles in the society.

6 We can say that this was an example of that sort of harm that Francoise Lyotard has conceptualized as différend as the experience was suppressed and the language did not contain appropriate terms to articulate it. J-F Lyotard, *The Différend: Phrases in Dispute* (Minneapolis, MN, University of Minnesota Press, 1988).


In short, we became interested in how concepts are constructed in legal texts.

For a lawyer, there is a crucial difference between applying methods of legal interpretation and using methods of discourse analysis in the study of legal texts. Lawyers are trained to apply a set of norms (law) to existing facts. For a lawyer, the facts exist independently of any legal text or discourse, and the law is applied to them. These facts are organised in a certain way, independently of the normative world, for example in predetermined categories of two sexes. Discourse analysis, on the other hand, is based on social constructionist theory, which sees discourse, including legal discourse, as constructing the social world. For a constructionist, legal discourse is involved in constructing what is factual and what is conceptual. In discourse analysis, such concepts as sex and gender or debtors and creditors are not categories existing independently of law but concepts that are constructed socially in the legal discourse.

In this article we reflect on discourse analysis both as a theory and a method of reading legal texts. First we briefly touch on the present paradigm of sociology of law, which has neglected the potential of discourse analysis. In the second part of the article we explore social constructionism as the theoretical background of discourse analysis and discuss its theoretical assumptions by contrasting them with the approach in (normative) legal science. In the third part of the article we discuss discourse analysis in more concrete terms. As we are interested in how a researcher identifies a discourse, our interest is focused on what is called critical discourse analysis.

The Identity of the Sociology of Law

A few years ago, Nordic legal sociologists became engaged in a lively debate on the disciplinary identity of the sociology of law in Retfærd: The Nordic Journal of Law and Justice. The discussion was initiated by Reza Banakar, who argued that the sociology of law lacked a fundamental paradigm capable of uniting the various socio-legal approaches. Although this thesis was largely undisputed by those who responded to Banakar’s paper, no agreement was reached on whether this shortcoming was beneficial or to the detriment of the sociology of law. Nor an agreement was reached on whether it

---

was feasible to construct such a fundamental paradigm. The problem Banakar identified, however, was an important one. In this article we argue that the lack of a common paradigm may be a consequence of the emphasis on empirical and functional orientations and the lack of interest in discursive methods within the sociology of law.

Banakar used the metaphor “stepchild” to describe the position of the sociology of law between sociology and legal science. As many scholars have observed, the two disciplines have quite different expectations of the sociology of law. The same tension is present in the discussion between Nelken and Cotterrell in the Journal of Law and Society. While Cotterrell argues that law needs greater sociological insight, that is, interpretation of law systematically and empirically as a social phenomenon, taking the sociologist’s point of view, Nelken underlines the limits of sociological analysis of various aspects of law and emphasises an insider view of law.

For lawyers and socio-legal scholars with a legal point of view, the sociology of law is an auxiliary discipline that is oriented to legal decision-making and legal scholarship. Lawyers expect sociological information to enrich the application of law. The lawyers’ approach is often rather empirical. Those who draft laws are especially keen on so-called hard facts, such as how common certain behaviour is. The interest of the courts in sociological knowledge is somewhat different and perhaps less common. The courts are more interested in behavioural sciences, such as psychiatry and psychology, in the form of expert evidence. The pattern of social knowledge is the same, however. The questions that arise might take the form of, for example, how typical certain behaviour is for a rape victim or perpetrator, a victim of domestic violence, etc. The problem is that the courts always decide individual cases, whereas the knowledge produced by social sciences almost always concerns populations. Thus, there seems to be a constant dilemma between sociological data and decision making by the courts.

One reason why discourse analysis has been slow to gain ground in the sociology of law is the ambition of sociological theory to pose grand questions and, as Banakar put it, to answer them by grand theories. Above all, functionalism has been well suited to the purposes of sociology of law. As sociological inquiry during the 20th century has

---

11 Banakar n. 9 at 7.
13 Banakar n. 9 at 9.
been interested in such questions as what societies are like and how a society is possible in the first place, it has studied entities called “social structures”, i.e. political, economic and other social institutions, from the point of view of the existence of a society as an integrated whole. These entities are understood as static elements of social life that affect individual behaviour. Talcott Parsons (1902-79), studied the functions of different institutions, like the state, family, education or religion, in the society while distancing himself from the Weberian tradition, in which the individual meanings of actions are of primary importance. Questions concerning the functions of law, legal practices and social control through the justice system have been successfully addressed by this tradition. In Parsons’ system theory, the underlying structures are assumed to exist somewhere deeper than can be observed on the surface of social life. These structures are understood as larger, stronger and more stable components of society than individual human beings and their everyday lives.

These lawyer’s and sociologist’s approaches to sociology of law seem difficult to reconcile. Furthermore, they seem to miss the core issue, the sociological analysis of the legal discourse itself. Neither lawyers nor sociologists focus on the sociological aspects of legal thinking. We do not want to underestimate the need for empirical sociological inquiries into legal and quasi legal practices, nor the importance of structural analyses of the legal system and its functions. We think, however, that there is a mission for sociology of law that goes beyond the customary approaches to it. That mission concerns the epistemological relationship and interaction between what is normative and what is factual. If we take seriously the critique of the autonomy of the legal system, we need to explore the ways in which the normative is influenced by the factual. To explore that relationship, analysis of discourses, especially of inter-textual discourses, is essential. As Nelken argues “the attempt to deploy social insights so as to help law’s reflexivity requires us to pay more rather than less attention to their disciplinary and discursive connections”.

17 Nelken n. 12 at 410.
In the following discussion of discourse analysis as a socio-legal method, we make an attempt to contrast it with the legal way of thinking in order to illustrate how discourse analysis could contribute to it.

Social Constructionism as a Challenge to Legal Scholarship

Social constructionism, which challenges the use of the “grand theories”, provides the backdrop against which discourse analysis presented in this chapter. The roots of social constructionism can be traced back to the phenomenological sociology founded by Edmund Husserl (1859-1938) and further developed by Alfred Schutz (1899-1959). The American sociologist Harold Garfinkel (1917-) turned its more or less abstract ideas into the practice of conducting empirical research on everyday interactions between people, calling this approach “ethnomethodology”. Further, in their classical book “The Social Construction of Reality” Peter L. Berger and Thomas Luckmann brought Max Weber’s and Herbert Mead’s basic assumptions on social action together with the phenomenological tradition to form their own theory that emphasised the meaning of everyday knowledge and interaction between people.

Social constructionism and discourse analysis were influenced by the “linguistic turn” in social sciences and helped to draw the attention of social scientists to the significance of the linguistic and symbolic processes for social life. Above all, Foucault’s work on “grand” historical processes, which showed how social phenomena (such as sexuality or punishment) are construed in professional discourses, has strongly influenced later discourse analysis. Further, discourse analysis derives from postmodernism, which criticises the Enlightenment’s undertaking to search for truth with the aid of objective and rational methods. Instead, it emphasises the co-existence of a multiplicity and variety of meanings. Nowadays, the term discourse analysis comprises a cluster of methodologies in different disciplines, based on somewhat different epistemological premises.

A legal scholar is probably more familiar with different theories about the relationship between law and language. In the European legal theory, a school that is

---

19 D Howarth, *Discourse* (Buckingham, Open University Press, 2000) at 1 and 16
21 Lyotard n. 6.
22 Burr n. 16 at 12–17.
23 Howarth n. 19.
often called discourse theory has been quite dominant during the past twenty years. This theory, represented by such prominent scholars as Robert Alexy, Niel MacCormick, Aulis Aarnio, Alexander Peczenick and Jerzy Wróblewski is a normative theory about the valid argumentation in the interpretation of law. For example, Wróblewski and MacCormick state the purpose of such a normative theory in the following way: ‘The process of stating reasons for a decision or an opinion on the law ought to be treated as one aimed at showing how and why the decision is a justified decision in its legal context.’ …‘Their adequacy or lack of it as statements of justificatory reasons are wholly independent of their accuracy or lack of it as accounts of the way in which the Court came to regard the decision as the one to be given in the case.’

This normative theory on legal argumentation has been strongly influenced by the hermeneutics, to which we will return below, and Jürgen Habermas’ theory of communicative action. Also the latter theory is connected to the normative nature of the legal argumentation theory as it explores the conditions of valid communication.

Legal argumentation theory has been influenced by John Austin’s theory of speech acts which is concerned with performative speech acts, that is, constitutive expressions that may have legal character (for example, promises) and the capacity to change relationships, status, or factual circumstances. Austin’s theory is interested in speech acts that bring about changes in (legal or other) positions and statuses, whereas our interest here focuses on the underlying assumptions of the legal discourses and non-determinate construction of social reality, concepts and relations through legal language. Thus, it is a social constructionist theory. Our interest in legal discourses as social processes that construct the social world is even more related to John Searle’s analysis of how institutional facts are constructed through social and linguistic processes.

While these theories are related to social constructionism and the “linguistic” turn, we will here follow theories and methodological approaches that are more related to the study of everyday discourses, especially those methodological approaches which are inspired by French philosophy and pay attention to the construction of identities, social change and power relations.
Therefore, we have been especially interested in the idea that people construct their own and each other’s identities through their everyday encounters with other people. We have felt that understanding of legal practices should not be sought (solely) in social structures but in the interactive processes that routinely take place between people in courtrooms, police stations and various legal texts. We think that the construction of meanings in legal texts can be studied in the same way as Berger and Luckmann studied the interaction between ordinary people and focused on what is regarded as [self evident] knowledge and how that kind of knowledge is constructed. Especially they considered the use of language as crucial in how we construct meanings and knowledge.29

Furthermore, it is important to study how interaction constructs social institutions and structures. From the 1970s onwards, constructionist orientation has been concerned with social problems, for example, by studying how claims to bring about social change are made. Strict constructionists are interested solely in the processes of defining whereas contextual and critical constructionists pay attention to societal and political situations, cultural features and historical processes.30 The aim to bridge cultural phenomena and societal structures has also been visible in the work of later sociologists, including Giddens, Bourdieu and Habermas.31

**The relationship between reality and language**

The relationship between language and reality constitutes our primary concern here, which why we shall discuss the principles of social constructionism further by focusing more closely on the role of language in social research.

There are two different ideas of the relationship between reality and the text or the language studied.32 The realistic approach has been the foundation of social science from its beginning33 and it is still often used in traditional empirical research, such as surveys. According to positivist epistemology, language is a reflection of reality and a

---

29 Berger and Luckmann n. 18.
30 Burr n. 16 at 7C10; A Jokinen, ‘Diskurssianalyysin suhde sukulaistraditioihin’ in A Jokinen, K Juhila and E Suoninen (eds), *Diskurssianalyysi liikkeessä* (Tampere, Vastapaino, 1999) at 51.
33 Burr n. 16 at 6.
means to study the facts that exist in reality. Language is used in order to describe reality in the search for the truth. A researcher poses questions concerning a reality that exists independent of the researcher and research objects are forced to answer these questions. The researcher ensures access to the facts through certain procedures that the researcher must follow: for example, s/he must have a sample of the appropriate size, make a random selection of the potential interviewees, use standardised questions and perform certain statistical tests. The researcher answers to questions such as how many, what proportion, which subgroups, what causes what etc. A task for a social scientist is to make generalisations and give explanations.

This seems to be a major problem for many lawyers interested in the sociology of law. We often encounter doctoral students with legal training who want to probe deeper into legal decisions or other legal practices. These students, who are familiar with basic sociological theories and methods, often think that the only purpose of a socio-legal inquiry is to make generalisations. They become anxious when they realise that they cannot achieve this because of their small sample of cases, interviews, contracts or other legal documents. As a result, they experience what we could call “validity angst”.

The second approach, which can be called “anti-realistic” sees reality and language as intertwined. Language is not just a reflection or a picture of reality as the realistic approach assumes. The anti-realistic approach assumes that reality cannot be approached independently of language. This does not, however, mean that reality does not exist without language, but that human activity and language are very deeply intertwined. A person always interprets and constructs his/her actions via language and needs language and conceptual thinking to describe actions and observations. Thus, it is emphasised that there are different realities and potential meanings of things. Also, situationality, which indicates that the language or the text is produced in a certain situation, is regarded as important.

An “anti-realistic” researcher sees, for example, interviewees as experiencing subjects who actively construct their social worlds and give meanings to the facts and experiences they report. Interview data is never simply raw or pure data but situated and

---

35 Burr n. 16 at 6.
36 Burr n. 16 at 6.
37 Eskola and Suoranta s. 32 at 221.
38 Alasuutari n. 34 at 21.
contextual, and this must be taken into consideration in the analysis. Facts are always socially constructed, no matter who presents them.

Discourse analysis is based on the anti-realistic approach. Using discourse analysis and other qualitative methods the researcher can make observations about what discourses exist and how they are used. These are quite often the questions a legal scholar wants to ask her data. To answer these types of questions one does not need statistically large samples. To answer questions like “what kinds of discourses exist?” a fairly small sample of, for example, 10-20 texts may be sufficient. For the purposes of conducting an analysis of how discourses are used, even one text, such as a Supreme Court decision may be enough, even though we are generally cautious about relying on such limited data. Our student is relieved of her “validity angst” once she realises that discourse analysis and other qualitative approaches are interested in understanding and the meaning of social behaviour, they do not enable a researcher to make general statements regarding the frequency of various practices.

The hermeneutic school has made an attempt to analyse the relationship between the application of a norm and the selection of relevant facts in a case. The crucial concept for hermeneutics is pre-understanding. The judge, from whose point of view the theory is usually constructed, has a pre-understanding of both the legal system and the factual world. Through reflection the judge then proceeds along a hermeneutic circle, selecting the relevant norms to be applied as well as the relevant facts. According to the hermeneutic theory, the interpretation of facts by courts is guided by legal concepts that are applied to the case in question. While discourse analysis is closely related to hermeneutics, we find the hermeneutic approach insufficient, because it is interested in the correct interpretation of the law and the application of law to given facts. We wanted to explore the processes in which the facts and concepts are constructed and, thus, become relevant to legal interpretation.

In the following we discuss four fundamental assumptions of social constructionism and how they can be interpreted and used when doing legal research. For this purpose we take Vivien Burr’s list of four key assumptions of social constructionism as our point of departure.

39 Silverman n. 34 at 90–95, 199, 208.
40 Juhila and Suoninen n. 30 at 234.
42 Burr n. 16 at 3–8.
A critical standpoint towards taken-for-granted knowledge

In civil legal cultures of the Nordic countries, law is regarded to be a normative science, within which taken-for-granted knowledge and a hierarchy of knowledge play central roles. This is most obvious in the doctrine “sources of law” or “sources of legal information”. What law prescribes can hardly be questioned. In Finland, the rulings of the Supreme Court are the most valuable source when deciding on how to interpret the law. Similarly, the writings of certain authors are often more authoritative than those of others and are often referred to as a source of authoritative information without much questioning. We are even used to writing that “X has said this and Y has said the same thing” and, thus, this is the norm. Although one can say, of course, that this is simply bad legal science (or legal reasoning), the legal community has nevertheless been tolerant of this kind of argumentation. A philosopher or a mathematician would call this an *ad hominem* argument, an argument that is based on a personal authority and as such has little or no scientific value. When making legal decisions as a practising lawyer it is perhaps difficult to distance oneself from this tradition, but at least in legal research we must take the fundamental principles of science seriously.

A critical standpoint towards taken-for-granted knowledge means, according to Vivien Burr, that social constructionism questions the validity of statements we usually take as authoritative.\(^{43}\) She challenges the view that our observations report objectively about reality and instead argues that no knowledge is innocent or value free.\(^{44}\) Consequently, one needs to be aware of one’s always partial standpoint towards reality as well as of that of participants to the discourse that one is studying.

Discourse analysis focuses on how meaning is constructed through various forms of linguistic exchanges and expressions. Thus, the discourse in question is viewed independently of those who participate in it. The meanings constructed in a discourse are not necessarily, nor usually, the same as the meanings the participants intended to confer on their contributions. In discourse analysis of legal texts we may have a special interest in the discourse of the Supreme Court, but unlike doctrinal studies, this interest is not necessarily, or in the first place, concerned with the legal implications of what the Supreme Court intends to express in its decisions, but in how the discourse of the Court constructs basic categories of social life, such as sex or gender, violence or sexuality.

---

\(^{43}\) Burr n. 16.

\(^{44}\) Burr n. 16 at 3.
Our ideas and concepts are historically specific. In social sciences this usually refers to such concepts as sexuality, childhood or gender. In addition, all ways of understanding are historically and culturally relative. What does this mean in legal research?

Legal concepts have also their historical and cultural background. They have been developed under certain circumstances within a certain society. For example, one can analyse self-defence, a concept in criminal law, from a historical and cultural viewpoint. One can ask whom was this type of justification designed to protect and, more importantly, whether this intention is valid and still influences our thinking. It can be said, for example, that the rules of self-defence were designed to meet the needs of someone who was defending himself and his family and his property against an illegal intruder or an attack by a stranger. When attacked he could use the same kind of a weapon as the attacker, he should not act if the attacker had already turned his back etc. Do we perhaps still regard these “fair fight” rules as the key elements of an argument based on self-defence? And if so, do we realise that we are indeed talking about the rules of “fair fight” when we talk about equal force and so on? What are the consequences of working with concepts from another time and from another culture than the one that we live in?

Knowledge is created and mediated in social processes

According to the third principle of social constructionism, knowledge is created in interaction between people, particularly through language. The focus is on the processes and dynamics of social interaction. What is regarded as truth is a result of on-going social processes and interactions. Therefore, discourse analysis asks how questions instead of why questions. For example, confusion surrounds the concept and definition of sexual harassment. A positivistic researcher would solve the problem by accepting a certain definition and trying to find out how common it is and why it happens. From a discourse analytic perspective, by contrast, the confusion over the definition is a research topic; the question is how or through which kind of processes is sexual harassment defined and what consequences might different definitions have.

---

45 Ruuskanen n. 4.
What might this mean in the context of legal knowledge? It might mean, for example, that legal truth is created in interaction between lawyers and/or legal scholars and judges. Situating the participants of the discourse is important. The argument that even the legal language used by courts is not quite objective raises questions. One could argue, for example, that the court only uses the language the parties themselves have used. This is, however, not the case. In many cases the court has to translate, so to speak, the language used by parties into legal jargon. And even if the court uses the language used by the parties, it in most cases has to make a choice between at least two different discourses, since the language used by the parties, or by the witnesses, often reflects different conceptions of the same phenomenon.

Constructionist readings cannot take the legal system as an autonomous system. On the contrary, a constructionist is interested in and explores the relationship between the legal discourse and the other normative systems of a society. It is acknowledged that laws have and reflect their historical and cultural background. In the legal field we have at least two types of social interaction: everyday interaction and legal interaction. The knowledge produced in these two forms of interaction may reinforce but also challenge each other. The concepts used in everyday interaction (or exchanges) may be applied in legal discourse and have an effect on legal reasoning. For example, everyday concepts of violence against women may influence the legal analysis of the cases. Legal language also constructs reality and everyday understanding of what violence against women is.

Knowledge and social action go hand in hand

The fourth main principle of social constructionism states that knowledge and social action go hand in hand. This concerns also the relationship between the legal scholar and the object of research, for a researcher not only describes social reality but also creates it. At this point one must emphasise that the way we understand a certain phenomenon affects the way we deal with it. For example, in some societies

47 In court practice, evidence is still often taken at face value. Documents and the testimony of witnesses are often taken as accurate descriptions of reality. When the evidence is contradictory, the court takes pains to explain why some of the testimony is more reliable than the other, sometimes dismissing testimony as lies, more often just dismissing some of the evidence. Empirical and theoretical research in eye-witness psychology challenged these attitudes. Both perception and recollection of facts by a witness are affected by existing knowledge structures of the witness and by post-event information consciously or unconsciously absorbed by the witness. Briefly, as eye-witness testimony is communicated by language, the facts it contains are constructed and interpreted. J Haapasalo, K Kiesiläinen and J Niemi-Kiesiläinen, Todistajansykologia ja todistajankuulustelu (Helsinki, Lakimiesliiton kustannus, 2000).
14 drunkenness is no longer regarded as a crime but instead as a form of sickness, and this has brought changes to how the problem is dealt with.48

Legal knowledge is created in interaction between individuals. It is constructed in courts and universities, always by people for other people, and for a purpose. Consequently, it is important that as researchers we acknowledge our own position. As researchers, not only we explain and describe, but also partake in the process in which knowledge is created.

Reading Legal Texts

Discourse analysis is not only one methodology, but refers instead to a methodological framework that allows many ways of conducting a study. In this section, we examine some concrete questions in our critical discourse analytical approach. Using discourse analysis one penetrates the surface of legal documents, such as court rulings. A certain sentence might have been meted out correctly in accordance with customary legal practice and valid law. The same sentence might, nevertheless, be regarded as problematic when its underlying assumptions of are examined.

Discourse analysis is interested in different meanings people give to social events and interaction and asks what consequences these meanings might have for those involved in interaction. We define discourse as a coherent expression or a meaning structure which constructs reality in a certain way. It does not simply represent the world but signifies, constitutes and constructs social identities, (power) relations between people and systems of knowledge.49 How it does this must always be analysed by the researcher. Discourses thus include interpretations of data by the researcher.

A common problem for those who have attempted to provide discourse analytic readings of legal texts is the scarcity of discourses in the texts. Legal documents include various forms of technical argumentation. For example, the decisions of the European Court of Human Rights may include a technical and complicated discussion of the admissibility of the case, while the substantive reasoning for the decision is short.50 That is why a researcher has to use detective skills to find relevant discourses. How, then, do we detect discourses?

There are two basic starting points for finding a discourse. According to one view, represented by ethnomethodology, phenomenology and analytic discourse analysis, the

---

48 From punishment to medical or other treatment, see Burr n. 16 at 5.
50 In all fairness, it must be noted that the ECHR is known for its good and full argumentation.
researcher should approach the texts without preconceived ideas of relevant discourses. The researcher should be as open-minded as possible and let the text speak for itself. The scarcity of (substantive) discourses in legal texts easily leaves a researcher empty-handed. A theoretical argument against this view is that as no researcher can relieve him/herself from all preconceptions, it is better to be conscious of one’s theoretical assumptions and anticipated discourses. Even so, a researcher should be open-minded *vis-à-vis* other discourses and our experience shows that one usually finds also some unanticipated discourses.

In our research project we have been influenced by critical discourse analysis.\(^{51}\) Studies utilising critical discourse analysis have often been interdisciplinary and have concentrated on social problems. They have analysed abuse of social power, how dominance and inequality are reproduced and resisted, and they have also taken explicit position to “understand, expose and resist social inequality”.\(^{52}\) Critical discourse analysis focuses on the use of discourses as means of exercising power. Power can be interpreted as inequalities concerning access to such desirable resources as money, leisure time etc as well as the capacity to have some influence on one’s own and other people’s lives.\(^{53}\) Power makes itself visible as a strategy used by different people in the discourses they use. Thus, some “truths” or state of affairs are given legitimation and others marginalised. We want to ask what discourses are used to silence others and what states of affairs are made possible by using certain discourses and what sorts oppressive relationships are created and reproduced.\(^{54}\)

We usually find a complex of discourses in the text we have chosen to study. It is possible to analyse what kinds of roles (subject positions) are given to different actors and the relationships between different actors in the discourses. For example, we have discovered two discourses of violence against women in the legal documents we have studied, two explanations for its causes and consequences. The first discourse, that of “violence as power”, talks clearly about the perpetrator and the victim and sees men’s use of violence as an expression of an unequal power relation between the parties. The second discourse, “interaction or family discourse”, describes violence as mutual and seeks to explain it in terms of the relationship between the parties. Anyone taking part

---


\(^{52}\) Van Dijk n. 51 at 352–353.

\(^{53}\) Burr n. 16 at 62; Fairclough n. 49 at 12; M. Foucault, *The History of Sexuality I: An Introduction* (New Your, Pantheon,1978)

\(^{54}\) Eskola and Suoranta n. 32 at 199.
in the legal process can take part in either or both of these discourses, including the parties themselves and their lawyers. This kind of analysis sheds light on the contradictory nature of accounts: one and the same person can use different discourses. Discourses are cultural resources which are mobilised in different situations.

Here discourse analysis stands in contrast with the legal reading of a source, especially as practiced in the Continental civil law traditions, where lawyers seek a systematically coherent interpretation of the law. While discourse analysis reveals contradictory discourses, it does not directly contribute to doctrinal studies of law, which are based on the traditional forms of legal interpretation. Rather, it can challenge generally accepted interpretations of law by critically analysing and revealing their underlying concepts and taken-for-granted assumptions.

Power relations can be studied by asking which discourses become dominant and which are silenced and how this happens or what strategies are used in different discourses. A dominant discourse within the criminal justice system is a powerful tool in silencing other discourses. It appears as uncontested truth. These power strategies include for example naturalisation (reference to nature; sexuality is a typically understood as “natural” in one way or another) or categorising people by giving them inflexible identities. For example, in her study of young girls and their relationship towards delinquent behaviour Honkatukia conducted group interviews with adolescent girls. She analysed a particular feature of the interviews: how the interviewees repeatedly referred to other girls they disliked or despised. These girls were given inflexible identities, such as “sluts”, violent girls or girls who drink too much. They were seen solely as representatives of those negative femininities from which the girls wished to disassociate themselves. Other strategies in attempting to gain a hegemonic position for a certain discourse are, for example, references to general or expert knowledge or to cultural or religious conventions.

Power is also analysed when a researcher asks what consequences the usage of certain discourses may have. Discourse analysis is interested in different explanations that are used in social interaction and asks what consequences these explanations may

56 For a critical account see C Smart, Feminism and the Power of Law (Routledge, London 1991)
The way violence against women, for example, is explained has legal consequences. The court does not have to take a specific stance on the underlying causes when handling a case. However, by using discourse analysis one can find that the court often does in fact take a stand, and this stand has social and legal consequences. If the court, when describing violence against a woman in a relationship, states that “the parties frequently argued and the arguing led to violence” or “A and B quarrelled a lot which, has led to threats against life and physical abuse” the formulations have social and legal consequences in and beyond the ruling of the case. In these two formulations, the court describes violence as mutual and draws a parallel between arguing, which refers to a verbal confrontation, and physical violence. In a way, the system is in accordance with the understanding that draws parallels between verbal confrontation and physical confrontation and therefore shows a tendency to blame the victim. One possible legal consequence might be that if the criminal justice system sees violence in a relationship as mutual and as part of the relationship, it is difficult for a woman to put forward a claim of self-defence B after all, how can one justifiably defend oneself against a relationship?  

Legal discourses do not appear out of the blue, but are part of social discourses and influenced by them. Legal scholars may be informed of the everyday discourses of the people and reflect on their relationship to the legal discourse. Another approach is to turn to the theoretical social sciences. For example, liberal theories and welfare theories about contemporary society are frequently used in analyses of legal regulations. They have shown, for example, how debtors and creditors are constructed in different legal regimes, using a liberal as opposed to a welfare state discourse and that these constructions have a bearing on how laws on consumer bankruptcy are formulated and interpreted.

Legal discourses also influence social discourses. As an example of “intertextuality”, it has been shown that the discourses of the “violence as power” and “interaction/family” identified earlier have their firm roots in the process by which

59 Juhila and Suoninen n. 16 at 247–248.
60 Ruuskanen n. 4.
62 Fairclough n. 49.
violence against women has been defined as a social problem in the Finnish society at large. Moreover, legal discourses have a privilege among the social discourses as they have the power of the state behind them. This status gives legal discourses an exceptional power to shape social relations.

**Feminism and Social Sciences**

Feminist theory has been the most important theoretical influence on our analyses of legal discourse. In our version of critical discourse analysis we have made certain assumptions and value judgements concerning the structures of society. We pay attention to hierarchical relations between the gender groups that are reproduced via discourses. For several reasons we believe that feminist theory has relevance for our individual development as researchers.

First, a constructionist approach to sex and gender is a common characteristic of various branches of feminist theory. Irrespective of whether or not biological sex is a category that predates language, for the most part the meanings attributed to sex and gender are constructed discursively. Thus, feminist legal theory offers examples of discourse analytic readings of legal materials. Secondly, we can hardly deny that the duality of sexes is an organising factor in our society and social relations. Thirdly, despite its importance, sex and gender are not explicitly recognised in many social contexts, one of which is the contemporary Nordic legal system. Discourse analysis has been used as a method to make sex and gender visible. For this reason also, feminist legal science offers examples of discourse analysis for the analysis of other discourses in law as well. Fourthly, contemporary feminist theory is essentially interdisciplinary. Feminist legal studies are undertaken in interaction with feminist studies in other disciplines and, especially, in women’s studies and feminist theory. Feminist theories offer a theoretical context which helps to identify discourses of sex and gender in law and to reveal hidden assumptions.

These developments in feminist studies and feminist legal theory offer the most fundamental challenge to contemporary legal theory. They challenge the objectivity of

---

63 See for example L Nyqvist, Väkivaltainen parisuuhde, asiakkuus ja muutos (Helsinki, Ensi- ja turvakotien liitto, 2001)
66 Svensson n. 7.
67 Nousiainen and Niemi-Kiesiläinen n. 55.
legal language, the autonomous character of the legal system and they encourage exploring the relationship between legal discourse and other social discourses.

According to basic principles of social constructionism, social reality is formed by using of language, and language is never totally objective. Legal reality is thus likewise formed in the use of legal language and legal language is never objective. If reality is indeed created through language, one can say that this is even more so in the field of law since law, in essence, is language. In legal research using discourse analysis, one must also acknowledge that a judicial system is a part of society. The system does not exist without people and judges are members of society at large, as are legal scholars as well. Thus, the system is not immune to social changes, general attitudes and so on even if we would like to believe that it might be.

The benefits of discourse analysis are by no means limited to feminist analysis. On the contrary, discourse analysis can be utilised to examine any legal event in which identities, categories, boundaries and concepts are defined or meanings given to human actions. Even though constructionist readings do not challenge legal dogmatics in the search for a correct interpretation of law, they are concerned with how cultural and social values are reflected in the concepts and interpretations of the law. To this extent, such readings may have also consequences for interpretations of law.

68 The most important contemporary example of social constructionism, however, is the construction of ethnic identities in the former Yugoslavia that were forced on the population by ruthless propaganda in the media and later by force. The ethnic identities in the area are totally constructed, since there are no ethnic differences among the population. Religion was one of the tools that were used to antagonize groups against each other. Ivana Maček has written an excellent account of the more subtle construction of ethnic identities in everyday life during the blockade in Sarajevo during the war from 1992-1996. It should be of considerable interest to lawyer that the constructed ethnic identities were confirmed by a legal framework in the 1996 Dayton peace agreement that was dictated by Western countries. I Maček, War Within. Everyday Life in Sarajevo under Siege (Uppsala, Acta Universitatis Upsaliensis, 2000)