

# Exploiting the Limits of Law

Swedish Feminism and the Challenge to Pessimism

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## Chapter 4

# Legal Texts as Discourses<sup>1</sup>

Johanna Niemi-Kiesiläinen, Päivi Honkatukia and Minna Ruuskanen

Exploiting the limits of law often means that the focus of the inquiry is on the relationship between the legal system and the other normative systems of a society. The question whether the legal system can or should be delimited and defined as opposed to other social systems and social practices can be approached from different angles. In legal theory, a relationship between legal arguments and other value arguments is often acknowledged, either openly or discreetly, in the formulation of legal principles or teleological arguments (see for example Aarnio 1997, 185). In this chapter we explore the interaction between legal and other social discourses, including the discourses of other scientific disciplines. Our starting point is that the limits of the legal system are constructed and that other social discourses participate in the construction of the concepts and limits of law. Likewise legal discourse is an important social discourse that participates in the construction of social phenomena.

We have found the discourse analytical methods developed in sociology and cultural sciences fruitful for the analysis of legal discourses, and we discuss the application of these methods to legal texts. As we will explain later, discourse analysis refers to symbolic and language based methods of constructing reality. By using examples from our own work we wish to show that this approach is fruitful 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 readings of legal texts arises out of our research on legal issues related to violence against women. It is common knowledge in the social sciences that violence against women is a widespread and persistent problem

<sup>1</sup> The authors participated in Research Project VISE: Violence in the Shadow of Equality: Hidden Gender in the Legal Discourse, funded by the Finland's Academy in 2001–2004. We thank other participants of the project, especially Sari Näre, PhD, Heini Kainulainen LL and Helena Karma LLM and Dr of Law Kaijus Ervasti for vivid discussions on social construction of reality. We wish to thank participants of the doctoral seminars in Helsinki and Umeå (2002–2005), of the panel on Sociology of Law at the Law and Society Conference in Vancouver, June 2002, and of Socio-legal Research Methods Workshop, Onati, April 2003 and of the 5th European feminist research conference in Lund, August 2003 for constructive critique and comments. We also thank an anonymous referee whose vehement critique has considerably improved this chapter.

An earlier version of this chapter has been published in Finnish in Niemi-Kiesiläinen, Honkatukia, Karma and Ruuskanen 2006.

and that it is often either neglected or ignored by the criminal justice system.<sup>2</sup> For example, the police often do not recognize 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 (Honkatukia 2001; Ruuskanen 2001, 319).

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 which we studied eluded us. The legal language of court cases, police protocols, *travaux préparatoires*, etc., was sex and gender<sup>3</sup> neutral. The legal discourse did not recognize 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.<sup>4</sup>

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 violence, sexuality in rape law, and the distinction between private and public domains (Ruuskanen 2001; Honkatukia 2001; Niemi-Kiesiläinen 2004, 167). In short, we became interested in how concepts are constructed in legal texts.

As a sociologist and two lawyers with an interest in sociology of law, we started to look at how we could read the legal texts as social discourses. We started to look at how language is used by, and in relation to, law and its institutions using discourse analysis as a method. We soon discovered, however, that this kind of reading was not at all common within sociology of law, and theorized even less. As we will argue

2 There is an abundance of evidence of inefficient response to violence against women by the police. An important classic in this, as in so many other issues concerning domestic violence against women, is Dobash and Dobash 1992. Even though notable improvement has taken place due to the conscious policy reforms, problems still exist. See, for example; Boychuck and Ferraro 1992; Edwards 1996; Hoyle 1998; Lundberg 2001. For example, in Sweden about one third of complaints to the police did not lead to prosecution; see SOU 1995:60 B. The situation had not considerably changed by 2004; see SOU 2004:121, 87.

3 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.

4 See, for example, the discussion about the reform to amend the Swedish Criminal Code with a special section on breach of women's peace, Nordborg and Niemi-Kiesiläinen 2001; Svensson 2001.

in this chapter, one reason for this situation is that this kind of discourse analysis approaches texts in a fundamentally different way from legal scholarship.

Feminist legal studies, on the contrary, has taken up the challenge of the 'linguistic turn' (see Svensson this volume) in social sciences. Several reasons have contributed to this development in feminist legal studies. First, as Nicola Lacey argues, the constructionist understanding of sex and gender is a common characteristic of various branches of feminist theory, including feminist legal theory (Lacey 1998, 3). 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 (Naffine and Owens 1997). Second, it can hardly be denied that the duality of sexes is an organizing factor in our society and social relations, including law (Lacey 1998; Svensson 2001). Third, despite their importance, sex and gender are not explicitly recognized in many social contexts, including the contemporary Nordic legal system (Nousiainen and Niemi-Kiesiläinen 2001). Fourth, contemporary feminist theory is essentially interdisciplinary. Feminist legal studies is 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 assumptions hidden within the law.

In this chapter we reflect on discourse analysis both as a theory and as a method of reading legal texts. Our point is largely pedagogic in that we wish to point out the differences between the doctrinal legal scholarship and the discourse analytic reading of legal texts as well as between dominant forms of the sociology of law and the discourse analysis. In doing so, we often paint a simplified picture of the models of thinking and reasoning that we contrast with each other. We believe, however, that this use of 'ideal types' is justified to highlight the differences in the reasoning.

First, we briefly discuss the dominant conceptualizations of the sociology of law and contrast them with social constructionism and discourse analysis. In the second part of the chapter 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 scholarship. In the third part of the chapter we discuss discourse analysis in more concrete terms. As we are interested in the relationship between the legal discourse and other social discourses, our interest is focused on 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 (Banakar 1998). Although this thesis was largely undisputed by those who responded to Banakar's article, no agreement was reached on whether this shortcoming was beneficial or to the detriment of the sociology of law. Nor was an agreement reached on whether it was feasible to construct such a fundamental paradigm (Hydén 1999; Dahlberg-Larsen 2000).

Banakar used the metaphor 'stepchild' to describe the position of the sociology of law between sociology and legal scholarship. As many scholars have observed, the two disciplines have quite different expectations of the sociology of law (Banakar 1998, 7; see also Cotterrell 1998 and Nelken 1998). These conflicting expectations may have contributed to the situation in which there has been relatively little theorizing about discourses in the sociology of law.

For lawyers, the sociology of law is often an auxiliary discipline that is oriented to produce empirical data to the legal decision-making and law drafting. Those who draft laws are especially keen on empirical information about the frequency of certain behaviour. 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, for 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.

Social theorists, to the contrary, have been interested in posing grand questions and, as Banakar put it, to answer them by grand theories (Banakar 1998, 9). Functionalism has been especially influential in the sociology of law. Indeed, it seems more than appropriate to ask questions concerning the functions of law and of legal practices in socio-legal studies.<sup>5</sup> In addition, sociological inquiry during the 20th century has studied '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. In Talcott Parsons' (1902–79) structural and functionalist theory, the underlying structures are assumed to exist deeper than the surface of social life which we can observe and which they affect. In sociology of law, Niklas Luhmann's theory of autopoietic law has been a well known and much cited example of system theory (Luhmann 2004).

These lawyers' and sociologists' approaches to the sociology of law seem difficult to reconcile. Furthermore, neither the lawyer's nor the social theorist's approach as outlined above focus on the sociological aspects of legal thinking.<sup>6</sup> In recent years, interesting qualitative socio-legal studies have emerged, including work using different forms of discourse analysis. For example, ethnomethodological and anthropological studies of legal and other normative systems have analyzed the construction of norms and interaction between different norm systems (see for example Banakar and Travers 2005).

The epistemological relationship and interaction between what is normative and what is factual should be a target for socio-legal inquiry. If we take seriously the

5 A vivid observation on the influence of functionalism on sociology of law was presented by Mathiesen in the debate Banakar initiated in *Retfærd: Nordic Journal of Law and Justice*. Mathiesen 1998, 68.

6 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. Both are needed.

critique of the autonomy of the legal system and the exploration of its limits, we need to explore the ways in which the normative is influenced by the factual. To explore that relationship, analysis of discourses and 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' (Nelken 1998, 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 legal scholarship.

### Discourse Analysis and the Lawyer

Both legal scholarship and discourse analysis concern reading and interpreting texts, 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. For a lawyer, however, 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 the facts. These facts are organized 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, concepts such as sex and gender or debtor and creditor are not categories existing independently of law but concepts that are constructed socially in the legal discourse.

While this fundamental difference in thinking may work as a barrier against using discourse analysis as method, we will in the following discuss the background theory of discourse analysis, social constructionism.

### Social Constructionism as a Challenge to Legal Scholarship

Social constructionism has taken distance from grand sociological theories. 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* (Berger and Luckmann 1966) Peter L. Berger and Thomas Luckmann brought Max Weber's and Herbert Mead's basic assumptions on the importance of meaning of social actions together with the phenomenological tradition to form their own theory. Berger and Luckmann emphasized the meaning of everyday knowledge and interaction between people.

Social constructionism and discourse analysis were influenced by the 'linguistic turn' in the social sciences and helped to draw the attention of social scientists to the significance of the linguistic and symbolic processes for social life (Howarth 2000, 1, 16). Above all, Foucault's theoretical work and work on 'grand' historical processes, work which showed how social phenomena (such as sexuality or punishment) are construed in professional discourses, has strongly influenced later discourse analysis (Foucault 1977, 1978). Further, discourse analysis derives from postmodernism, which criticizes the Enlightenment's undertaking to search for truth with the aid of objective and rational methods. Instead, it emphasizes the co-existence of a multiplicity and variety of meanings (Burr 1999, 12–17) and their conditions for existence (Foucault 1989). Nowadays, the term discourse analysis comprises a cluster of methodologies in different disciplines, based on somewhat different epistemological premises (Howarth 2000).

Legal scholarship also theorizes about legal discourses, that is, legal argumentation. In European legal theory, a school that can be called theory of legal argumentation or legal justification<sup>7</sup> has been very influential during the past twenty years. This theory, represented by such prominent scholars as Robert Alexy, Neil MacCormick, Aulis Aarnio, Alexander Peczenick and Jerzy Wróblewski, is a normative theory about argumentation in the interpretation of law and the justification of legal decisions. A central tenet of such normative theories is the doctrine of legal sources, that is, which arguments are valid arguments 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.' Furthermore, in legal theory the interest is not on how a certain decision is constructed in practice. According to the same authors, '[t]heir 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' (Wróblewski and MacCormick 2003).

The normative theory on legal argumentation has been strongly influenced by hermeneutics and Jürgen Habermas' theory of communicative action (Habermas 1992). The latter theory is also connected to the normative nature of legal argumentation theory as it explores the conditions of valid communication (Tuori 2002; Habermas 1981).

The hermeneutic legal theory 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 (see for example Aarnio 1997, 103). 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 assumes that it is possible to

arrive at a correct interpretation of the law and the application of law to given facts. The hermeneutic legal theory is still the perspective of legal institutions, particularly the courts, and an 'inside'-perspective of law. We wanted to explore the processes in which the facts and concepts are constructed and, thus, become relevant to legal interpretation, in a wider social context.

Legal argumentation theory has been influenced by John Austin's theory of speech acts. His theory 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 1984). Austin's theory analyses speech acts that bring about changes in (legal or other) positions and statuses, whereas our interest here focuses on the underlying assumptions of legal discourses and non-determinate construction of social reality, concepts and relations through legal language. Our interest in legal discourses as social processes that construct the social world is more closely related to John Searle's analysis of how institutional facts are constructed through social and linguistic processes (Searle 1995).

While these theories are related to social constructionism and the 'linguistic' turn, we will here follow theories and methodological approaches that have more in common with 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 (Burr 1999, 47).

Therefore, we have been especially interested in the idea that people construct their own and each other's identities through their 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. In particular they considered the use of language as crucial in how we construct meanings and knowledge (Berger and Luckmann 1966).

Furthermore, it is important to study how interaction constructs social institutions and structures. From the 1970s onwards, the 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 (Burr 1999, 7; Jokinen and Juhila 1999, 51). The aim of bridging cultural phenomena and societal structures has also been visible in the work of later sociologists, including Giddens, Bourdieu and Habermas (Heiskala 2000, 102–103).

7 Even the term 'discursive theory' has been used. See Aarnio 1997.

## The Relationship Between Reality and Language

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

In this part of the chapter we will contrast the two basic understandings of the relationship between reality and language, which we call the positivist and constructionist approaches.<sup>8</sup> We will highlight the differences between them to make our point. In doing so, we downplay the fact that the borderline between quantitative empirical research and qualitative methods in social sciences is not at all clear cut. To the contrary, even though some methodological disputes still exist, the methodological positions of 'empiricists' and 'constructionists' seem to approach each other. In particular, many researchers who use quantitative empirical data are conscious that the way data is gathered has an impact on the content of it and few constructionists deny the importance of quantitative analyses. Nevertheless, we believe that the following exposition of the different understandings of the relationship between reality and language is justified by pedagogic reasons and still reflects to some extent different research traditions.

The positivist approach has been the foundation of social science from its beginning (Burr 1999, 6) and it is still often used in quantitative empirical research, such as surveys. According to positivist epistemology, knowledge is a reflection of reality and language is a means to study the facts that exist in reality (Alasuutari 1993, 9; Silverman 1993, 90–91). Language is used in order to describe reality in the search for the truth (Burr 1999, 6). A researcher poses questions concerning a reality that exists independently of the researcher and the respondents answer these questions. The researcher follows certain procedures to ensure access to the facts. For example, sample size, the selection process of potential interviewees, respondents or source document, the use of standardized questions and statistical tests are important criteria for the validity of the results. The research questions can be of following types: how many, what proportion, which subgroups, what causes what etc. On the basis of such research the social scientist is qualified to make generalizations and suggest explanations.

The picture of sociology that many lawyers interested in the sociology of law have is informed by these kinds of procedures for good quantitative research and the structural theories of society we described in the preceding part of this chapter. We often encounter doctoral students in law who want to probe deeper into legal decisions or other legal practices. These students often think that the only purpose of socio-legal inquiry is to make generalizations. They become anxious when they realize 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'.

<sup>8</sup> Also realism and anti-realism or positivism and post-positivism have been used. See Eskola and Suoranta 1998; Taylor 2001, 11. We have chosen positivism/constructionism to emphasize the epistemological notions of the terms.

The second approach, which can be called constructionist, sees reality and language as intertwined. Language is not just a reflection of reality. The constructionist 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 (Eskola and Suoranta 1998, 221). 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 emphasized 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 (Alasuutari 1993, 21).

A constructionist researcher sees, for example, interviewees as experiencing subjects who actively construct their social worlds and give meanings to the facts and experiences that they report. Data are never raw or pure data but situated and contextual, and this is reflected in the analysis (Silverman 1993, 90–95, 199, 208). Facts are always socially constructed, no matter who presents them (Juhila and Suoninen 1999, 234).

Discourse analysis is based on the constructionist approach. Using discourse analysis and other qualitative methods the researcher can make observations about what discourses exist and how they are used. These are often the questions a socio-legal scholar wants to ask of his or her data. To answer these types of questions one does not necessarily need statistically large samples. When answering such questions as 'what kinds of discourses exist?' the concept of saturation is used. When the data do not contain new discourses, its saturation point is achieved and there is no need to collect more data. A fairly small sample 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.<sup>9</sup> Our student is relieved of her 'validity angst' once she realizes that by using discourse analysis and other qualitative methods she can analyse the existence of discourses and the meanings they construct. She cannot make general statements regarding the frequency of various practices but that is often not necessary for a legal scholar with a socio-legal interest.

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 (Burr 1999, 3–8).

### *A Critical Standpoint Towards Taken-for-Granted Knowledge*

In the civil law cultures of the Nordic countries, law is regarded as a normative science, within which taken-for-granted knowledge and a hierarchy of knowledge play central roles. This is most obvious in the doctrine of 'sources of law' or of 'sources of legal information'. What law prescribes can hardly be questioned. In written law countries, the rulings of the Supreme Court are a most valuable source

<sup>9</sup> Taylor 2001, 25, on the selection of highly specific documents for the analysis because of their powerful origin.

when deciding on how to interpret the law.<sup>10</sup> Also, the writings of certain authors are often more authoritative than those of others and are often referred to as a source of authoritative information or reference is made to the prevalent opinion in the relevant field of law. A philosopher or a mathematician would call this an *ad hominem* argument and in legal theory the statements of the legal scholars are valued according to the reasoning they contain. Nevertheless, in the legal community this kind of argumentation is used to confirm the normative content of the law.

A critical standpoint towards taken-for-granted knowledge means, according to Vivien Burr, that social constructionism questions the validity of statements that we usually take as authoritative (Burr 1999). Discourse analysis focuses on how meaning is constructed through various forms of linguistic exchanges and expressions. The meanings constructed in a discourse are not necessarily, nor usually, the same as the meanings that the participants intended to confer on their contributions. In the discourse analysis of legal texts we may have a special interest in the discourses of the Supreme Court, but unlike doctrinal studies, this interest is primarily not 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. These constructions do not necessarily correspond to the way the member of the Court would express their opinions when asked.

Even though the meanings constructed in the texts are not necessarily the same as those the participants intend to express, the position or role of the participant may be important in the analysis. These positions are also constructed in the discourses as are other identities.

#### *Historical and Cultural Specificity of Ideas*

Our ideas and concepts are historically specific. In addition, all ways of understanding are historically and culturally relative. Foucault's broad historical analyses of the historical construction of punishment and sexuality are perhaps the most famous examples of this kind of analysis (1977, 1978).

What does the historical and cultural specificity of meanings mean in legal research? Legal concepts have also their historical and cultural background. They have been developed under certain circumstances within a certain kind of society. For example, one can analyse self-defence, a concept in criminal law, from a historical and cultural viewpoint. One can ask whom this type of justification was designed to protect and, more importantly, whether this intention is valid and whether it 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 against an attack by a stranger. When attacked, the use of the same kind of weapon as the attacker was accepted. He

10 We do not have a possibility to discuss different doctrines of legal sources here. It has to be noted, however, that the position of case law is quite different in Common law countries and the countries which rely more on statutory law. Differences exist also inside those groups. For a comparison see MacCormick and Summers 1997.

was not allowed to use force 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 realize that we are indeed talking about the rules of 'fair fight' when we talk about the use of 'equal force'? (Ruuskanen 2001).

In discourse analysis, we try to make visible the historical and cultural connections and underpinnings of concepts.<sup>11</sup> In the further legal analysis, we may discuss 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. Likewise a lawyer would ask what is the legal definition and apply it the facts. 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 (Thomas and Kitzinger 1997).

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, since some positions are more powerful in the discourse than others.

The argument that the language used by courts is not objective raises questions. One could argue, for example, that the court only uses the language that the parties themselves have used. But while the court has to translate, so to speak, the language used by the parties into legal jargon, it also interprets what the parties have said. And even if the court uses the language used by the parties, in most cases it 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 reading cannot take the legal system as an autonomous system. On the contrary, the constructionist is interested in and explores the relationship between legal discourse and other normative systems of a society. It is acknowledged that laws 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 interpretations produced in these two forms of interaction may reinforce but also

11 A fascinating example of historical specificity of legal ideas is presented by Robberstad 1999, where she explores the transformation of the criminal procedure from a 'fair fight' between the victim (including her kin) and the offender to a trial between the prosecutor and the suspect.

challenge each other. The concepts used in everyday interaction (or exchanges) may be applied in the 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 is violence against women.

### *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. Legal knowledge is created in interaction between individuals. It is constructed in courts, law offices and universities by people for other people and for a purpose.

This concerns also the relationship between the legal scholar and the object of research, as a researcher not only describes social reality but also creates it. At this point one must emphasize that the way in which we understand a certain phenomenon affects the way in which we deal with it. For example, in some societies drunkenness is no longer regarded as a crime but instead as a form of sickness, a change which scientific discourse has influenced and which has brought changes to how the problem is dealt with (Burr 1999, 5).

Consequently, it is important that as researchers we acknowledge our own position. As researchers, we not only explain and describe, but also partake in the process in which knowledge is created. The scientific knowledge contains in itself powerful discourses that construct social relationships, but it is all too easy to forget it from the inside perspective of the research.

### **Reading Legal Texts**

Rather than a method, discourse analysis is 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. Discourse analysis is interested in the different meanings that people give to social events and interaction and asks what consequences these meanings might have. We define a discourse as a coherent expression or a meaning structure that 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 (Fairclough 1996). The researcher's job is to analyse how this is done. Identification of discourses, thus, includes interpretations of data by the researcher.

A common problem for those who have attempted to provide discourse analytic readings of legal texts is that the technical nature of many legal texts masks their embeddedness in discourse. Partly, the problem is that it is difficult to change the role and read the texts as constructing instead of defining.<sup>12</sup> For most lawyers, it is

<sup>12</sup> This is a problem that almost all lawyers interested in discourse analysis recognize, stating that it is very difficult to 'find discourses' in legal texts. Social scientist, who are more familiar with the method, do not think legal texts are somehow specific in this respect and many of them have met us with critical comments on this issue.

very difficult to distance oneself from the 'lawyer's way of reading' the texts. How, then, can we develop our methods and strategies to recognize discourses?

Legal texts are almost always written in an objective and neutral style from a position of a legal authority or expert that masks their discursive and constructive nature. One way of reading the text is to look at what it excludes and silences, thus, constructing the normality. For example, a decision of the European Court of Human Rights (ECHR) may include a technical and complicated discussion of the admissibility of the case, while the substantive reasoning for the decision is short.<sup>13</sup> We have read the decision *Christine Goodwin v. Great Britain* of the said court concerning the rights of a transsexual person (11.7.2002) and analysed how sex and gender are constructed in the decision. We find a medical discourse on sex that alternates with a discourse based on sex and gender as a choice of a person. The text does not include references to heterosexuality but, in our analysis, it constructs the sexes as binary and heterosexual.

There are two basic starting points for recognizing discourses. According to one view, represented by ethnomethodology, phenomenology and analytic discourse analysis, the 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, especially if the researcher is not well trained in discourse analysis. 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 towards other discourses. Our experience is that one usually finds also some unanticipated discourses.

In our research project we have been influenced by critical discourse analysis (see for example Fairclough 1996; Van Dijk 2001). Studies utilizing critical discourse analysis have often been interdisciplinary and have concentrated on social problems. They have analysed the abuse of social power, how dominance and inequality are reproduced and resisted, and they have also taken an explicit position to 'understand, expose and resist social inequality' (Van Dijk 2001, 352–353). Critical discourse analysis focuses on the use of discourses as a 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 (Foucault 1978; Fairclough 1996, 12; Burr 1999, 62). Power makes itself visible as a strategy used by different people in the discourses that they use. Thus, some 'truths' or states of affairs are legitimated and others marginalized. 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 kinds of oppressive relationships are created and reproduced (Eskola and Suoranta 1998, 199).

We usually find a complex of discourses in the text that 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

<sup>13</sup> In all fairness, it must be noted that the ECHR is known for its good and full argumentation.

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, 'violence as power and control', 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 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 that are mobilized in different situations.

Here discourse analysis stands in contrast to the legal reading of a source, especially as practised in the Continental civil law traditions, where lawyers seek a systematically coherent interpretation of the law (Aarnio 1997; Nousiainen and Niemi-Kiesiläinen 2001). 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 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 (for a critical account see Smart 1991). Sometimes the technical legal discourses, which we referred to above, operate by excluding some and including some other identities or relations and, thus, are quite powerful.

The power strategies include, for example, appeals to nature (sexuality is typically constructed as 'natural' in one way or another) or categorizing 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 (Honkatukia 1999). She analysed a particular feature of the interviews: how the interviewees repeatedly referred to other girls whom 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 discourse may have (Jokinen, Juhila and Suoninen 1993). Discourse analysis is interested in different explanations that are used in social interaction, and it asks what consequences these explanations may have (Juhila and Suoninen 1999, 247–248). For example, the way in which violence against women is explained has legal consequences. The court does not have to take a specific stance on the underlying causes when handling a case. However, using discourse analysis one can find that

the court often does in fact take a stand, and that 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. After all, how can one justifiably defend oneself against a relationship? (Ruuskanen 2001, 2005).

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 and may reflect on their relationship to legal discourse. As an example of 'intertextuality' (Fairclough 1996), it has been shown that the discourses of 'violence as power and control' and of 'interaction and family' identified earlier have their firm roots in the process by which violence against women has been defined as a social problem in the Finnish society at large (see for example Nyqvist 2001).

Another approach is to turn to the theoretical social sciences. Our work has been influenced by feminist theories and the construction of gender and gendered subjectivities. Our reading of the Goodwin decision was informed by theories of heteronormativity, developed especially in queer studies. Sometimes comparative materials help to identify relevant discourses. Reading and comparing texts from different legal cultures or historical periods may make the researcher more sensitive to the meanings that are given in the discourses of one's own culture. In a historical and comparative study of Finnish and Swedish rape law, the historical constructions of subjectivity and sexuality were used to help to recognize and highlight the cultural constructions in the comparative legal texts. The discourses in the *travaux préparatoires* reveal that the Finnish rape law of 1998 is based on liberal assumptions of sex and sexuality. A Swedish reform proposal, to the contrary, constitutes an attempt to incorporate a feminist view into the law (Niemi-Kiesiläinen 2004).

## Conclusion

Feminist theory has been the most important theoretical influence on our analyses of legal discourse. We believe, however, that feminist theory has relevance beyond our individual development as researchers. As we explained in the beginning of this chapter, feminist legal scholarship shares the view that sex and gender are constructed categories but, nevertheless, quite fundamental to legal interpretation. Therefore, feminist legal theory offers the most fundamental challenge to contemporary legal theory. It challenges the objectivity of legal language, the autonomous character of

the legal system and it encourages exploring the relationship between legal discourse and other social discourses.

The benefits of discourse analysis are by no means limited to feminist analysis. On the contrary, discourse analysis can be utilized to examine any legal discourse in which identities, categories, boundaries and concepts are defined. Discourse analysis does not challenge legal dogmatic science in the search for a correct interpretation of law. While discourse analysis is concerned with how cultural and social values are reflected in the concepts and interpretations of the law, such analysis may indirectly have consequences for the interpretations of law. 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 and should therefore be of special interest to social and socio-legal scholars.

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