

Law and Crisis: Reflections on how legal problems are constructed and how they can be studied

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Abstract

Using the social construction of crises as a starting point the article draws a parallel between construction of a crisis and a legal problem. The question how legal problems are constructed has not received much attention in legal theory. Within theories of social constructionism Carol Bacchi's What's the problem approach provides a basis to study how legal problems are constructed in the legal texts, practices and discourses. Contrasting rational legal argumentation theory and social constructionism the article argues that the latter allows a reflection between different problem formulations and interpretations. Discourse analysis is proposed as a method for such analysis.

1 Introduction

We live in a time of crisis. There is environmental crisis, economic crisis, population crisis, you name it. The most pronounced crisis talk in Europe in the recent years has been about the migration crisis and, thus, there is reason to reflect upon how we have talk about and define that crisis. A crisis has often legal repercussions, and the connections between laws and crises have intrigued legal scholars lately.<sup>1</sup>

In this article I am interested in how a crisis or a legal issue is defined, framed and constructed. Law and legal systems are social phenomena, constructed and agreed upon by men. A crisis is a real life event that is given a name and a perspective by people, media and increasingly social media. In this article using parallels in these processes of naming, framing and constructing, law and legal systems are discussed as social constructs.

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<sup>1</sup> This article is based on and inspired by a key note talk at the Finnish biannual Legal Studies – conference with the theme Law and Crisis in Turku Aug 31<sup>st</sup> – Sept 1<sup>st</sup>, 2017. <https://www.utu.fi/en/units/law/news/events/law-and-crises/Pages/home.aspx>. Also Kent Critical Law Society organized a conference with the title Law in Times of Crisis, March 2017: <https://www.kent.ac.uk/law/news/index.html?view=2129>; also European narratives of crisis. University of Helsinki, May 17-18<sup>th</sup>, 2018.

I thank the participants of the conference for their interest, even enthusiasm about the talk. I also thank Professor Anne Alvesalo-Kuusi, PhD Liisa Lähteenmäki and PhD Anu Isotalo for encouragement and comments in developing the paper and two anonymous referees for attentive reading and critical observations that helped to improve the article.

Crisis talk is an example of how an issue is socially constructed and accepted in everyday speech and media, without much reflection. How we define a crisis is paramount because it guides the reactions and measures taken. The talk about the “migrant crisis”, alternatively migration, refugee or asylum crisis, started in the autumn of 2015 when tens of thousands of people from Iraq, Afghanistan and Syria literally walked into Europe and a total of 1.2 million people applied for asylum.<sup>2</sup>

This “crisis” migration was circa 0.24 per cent of the total population of the European Union, circa 500 million. Most of world’s refugees are close to their countries of origin, outside Europe, in countries that are much poorer than Europe. For example, Lebanon alone hosts 1 million refugees and Ethiopia over 700.000. Turkey hosted 2.5 million refugees in 2015 before the agreement between the EU and Turkey.<sup>3</sup> Historically, Europe has seen bigger refugee flows. During and after the Second World millions of people fled their home countries. For example, circa 400.000 Karelian people who had to leave their homesteads in the now Russian territory were settled in Finland. Compared to that, 30.000 asylum seekers arriving in Finland in 2015 does not look like a ‘crisis’.

My aim is not to ignore problems, but to remind that naming a social problem is not neutral. The refugee crisis is named from a European context. The crisis could be and has been named differently, from the context of war and conflict, but in Europe the dominant talk about refugee crisis has filtered into the legal area, especially into asylum and immigration law.<sup>4</sup> As Martti Koskenniemi has pointed out, international law is Eurocentric also at a more general level.<sup>5</sup>

Words and language are not innocent. This argument is no novelty; there is a long history in the Western political and philosophical thought analyzing and theorizing about how concepts are constructed and how the language affects the ways in which we conceive an issue.<sup>6</sup> In Georg Orwell’s newspeak, concepts were given the opposite meaning compared to the one they normally have, such as “War is peace” etc.<sup>7</sup> Term doublespeak, similar to doublethink by

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<sup>2</sup> [https://en.wikipedia.org/wiki/European\\_migrant\\_crisis](https://en.wikipedia.org/wiki/European_migrant_crisis).

<sup>3</sup> UNHCR Statistical Yearbook 2015 (United Nations High Commissioner for Refugees, 2017).

<sup>4</sup> FRA, Fundamental Rights Report 2017 p 126 (European Union Agency for Fundamental Rights, 2017).

<sup>5</sup> Martti Koskenniemi, *A History of International Law Histories* (Oxford: Oxford University Press, 2012).

<sup>6</sup> See, for example, Norman Fairclough, *Critical Discourse Analysis: The Critical Study of Language* (Harlow: Pearson Education, 2010). In the legal context, see Robert M. Cover, *Narrative, Violence, and the Law: The Essays of Robert Cover* (Ann Arbor: University of Michigan Press, 1992).

<sup>7</sup> George Orwell, *Nineteen Eighty-Four* (1949).

Orwell, has come to denote the political use of language to give a positive flavor to politics that the speaker supports.<sup>8</sup>

Other examples of the use of political language to underline favored policies are plenty. In health policies, the construction of obesity as a ‘crisis’ is one example.<sup>9</sup> Alon Lisinsky’s discourse analysis indicates that the economic crisis since 2008 has been mainly constructed with a focus on effects and remedies on the financial markets, rather than causes or effects on public finance and employment.<sup>10</sup> Journalist Steven Poole noted that pro-choice and pro-life groups have successfully hogged terms with an inherently positive connotation (“pro”). In Finland a major reform of health care and social work is labeled as “freedom of choice” legislation.<sup>11</sup> Considering that there has never been any obstacle to choose private health care services, supported modestly by public funds, the reform is actually about the financing of such choices. Thus, it would be equally correct to call the reform “privatization” or an issue of public spending.

The purpose of this article is to discuss law as a constitutive discourse and practice, instead of a normative system separate from the factual world. In part 2 of the article I look at how legal problems are constructed by drawing an analogy between the naming of a crisis and the framing of a legal problem. The starting point of a legal case or a legal analysis of a situation is some type of “crisis”, that is, a situation that requires a legal solution. Such a situation is defined as a legal problem that in some cases can be framed in alternative ways. I argue that the construction of legal problems is an overlooked issues in legal theory, yet how a legal problem in conceived is fundamental to its solution. Drawing on Carol Bacchi’s What’s the problem approach, I will reflect upon how legal problems are constructed.

In part 3, I discuss how legal thinking and analysis can be enriched by constructionist understanding of law and legal practices. The difference between modern and postmodern theorizing is highlighted with examples from the continental analytical school of legal

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<sup>8</sup> In UK, even a committee to counteract doublespeak was set up in the 1970s. See William Lutz, *Doublespeak* (New York: Ig Publishing, 2016). In the same vein, journalist Steven Poole named this way of using language as Unspeak. Steven Poole, *Unspeak: Words are Weapons* (New York: Grove Press, 2006)..

<sup>9</sup> Mark K. McBeth, Randy S. Clemons, Maria A. Husmann, Elizabeth Kusko & Alethea Gaarden, “The Social Construction of a Crisis: Policy Narratives and Contemporary U.S. Obesity Policy”, *Risk, Hazard & Crisis in Public Policy* 4(3) (2014): pp. 135–163.

<sup>10</sup> Alon Lisinsky, “In times of crisis: A corpus approach to the construction of the global financial crisis in annual reports”, *Critical Discourse Studies* 8(3) (2011): pp.153-168.

<sup>11</sup> Regional government, health care and social services reform: <http://alueuudistus.fi/en/frontpage>.

dogmatics, represented by Aulis Aarnio, Neil MacCormack and Aleksander Peczenik.<sup>12</sup> I have chosen this group of legal theorists for two reasons. First, this theory represents modernist, rational legal theory at its height and therefore makes contrasting it with constructionist thinking interesting. Secondly, these scholars have had a paramount influence on the legal mindset of lawyers who are in dominant positions in judiciary, advocacy and civil service today. I argue that a constructionist understanding of legal discourses could help lawyers to recognize the limits of rational chains of arguments and to reflect on different problem formulations, arguments and interpretations, which are necessarily present in the contemporary multicultural and pluralist world.

Asking in what alternative ways we could analyze legal problem formulation and argumentation (part 3), my argument goes on to the specific methodologies, especially discourse analysis, which can be useful in analyzing how legal problems, concepts and facts are constructed. Social constructionism and discourse analysis are established theories and methods in social sciences and cultural studies since the linguistic turn in the middle of the last century. Despite the post-modern influences on legal science and philosophy of law, scholars in specific fields of law often feel insecure in using constructionist methodologies which are in use in related disciplines, such as criminology, international relations and security studies. For example, the construction of basic concepts of the disciplines, such as crime, deviance and security, have been analyzed with constructionist and discourse analytic methods.<sup>13</sup> Also in legal science law is increasingly understood as a socially constructed discourse and also analyzed as such. One purpose of this article is to encourage young legal scholars to use these methods, without losing their identity as a lawyer. Throughout the article I argue that law is an important discourse that does not only respond to the crises or legal problems but also contributes to their construction.

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<sup>12</sup> There are differences between these great legal theorists but also networking. They comment each other's texts and, so to say, speak the same language. From my perspective, the adherence to the same rationality is more important than subtle differences.

<sup>13</sup> Gabe Mythen & Sandra Walklate, "Counterterrorism and the Reconstruction of (In)security: Divisions, Dualisms, Duplicities", *British Journal of Criminology* 56(6) (2016): pp. 1107–24; Rob I. Mawby & Sandra Walklate, *Critical Victimology: International Perspectives* (London: Sage, 1995); Adam Crawford & Steven Hutchinson, "The Future(s) of Security Studies", *British Journal of Criminology* 56(6) (2016): pp. 1049–67. Anna Holzscheiter, "Between Communicative Interaction and Structures of Signification: Discourse Theory and Analysis in International Relations", *International Studies Perspectives* 15(2) (2014): pp. 142-162.

## 2 How to frame a legal problem?

### Legal problems and legal disciplines

The framing of a legal issue is not problematic in the majority of cases, which are handled rather routinely.<sup>14</sup> In hard cases the framing of the legal setting in the court depends on the parties and their lawyers. It happens that they invoke different rules, as opposed to different interpretations of the same rule, in order to explain the situation legally.

The framing of legal problems is central in legal pedagogics. Legal education is commonly organized according to legal disciplines and each legal discipline frames legal problems in congruence with its own doctrines. When legal pedagogics shift from reading legal texts by heart towards case based pedagogics,<sup>15</sup> one of the first steps is to pay attention to how the students learn to recognize a legal problem.<sup>16</sup> All law teachers are likely to recognize a situation in which a student frames a problem in an unexpected way, for example, confusing civil law and criminal law remedies.

In courts, the relevant legal problem can change on the way up from the district court to the Supreme Court and to the international Courts. The impact of legal disciplines and levels of law are evident in the interaction between the European law and national laws. Thomas Wilhelmsson's metaphor Jack-in-the-box illustrates the difficulty of national lawyers to recognize the European law dimensions of a legal issue.<sup>17</sup>

For example, the case of Ulf Kazimierz Radziejewski C-461/11 on consumer debt was seen as a complicated issue of international insolvency law by the Swedish authorities to whom R had turned to get relief of his overwhelming debt burden. Since he already lived and worked in

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<sup>14</sup> The term "framing" is borrowed here from social policy studies meaning "a way of selecting, organizing interpreting, and making sense of a complex reality to provide guideposts for knowing, analyzing, persuading, and acting." Martin Rein & Donald Schön, Framing Policy Discourse in Frank Fischer & John Forester (eds), *The Argumentative Turn in Policy Analysis* (Durham: Duke University Press, 1993) pp. 145-166, 146.

<sup>15</sup> All law teachers use a lot of cases, but in Problem Based Learning (PBL), the student's skills in the identification of the different legal aspects of a case are the first step in the learning process. About PBL in law school, see Marit Wijnen, Sofie M. M. Loyens, Guus Smeets, Maarten J. Kroeze & Henk T. Van der Molen, "Students' and Teachers' Experiences With the Implementation of Problem-Based Learning at a University Law School", *The Interdisciplinary Journal of Problem-Based Learning* 11(2) (2017).

<sup>16</sup> In the Socratic method, the framing of the problem is discussed between the teacher and the students. Jamie R. Abrams, "Reframing the Socratic Method", *Journal of Legal Education* 64(4) (2015): pp. 562-585.

<sup>17</sup> Thomas Wilhelmsson, "Jack-in-the-box theory of European Community law" in Ludwig Krämer, Hans-W. Micklitz & Klaus Tonner (eds), *Law and diffuse interests in the European legal order: liber amicorum Norbert Reich* (Baden-Baden: Nomos 1997) pp. 177-194.

Belgium, the application was dismissed in Sweden on the basis of lack of jurisdiction.<sup>18</sup> Thus, it looked like a case for international insolvency law on jurisdiction. The ECJ looked at the matter differently and saw the denial of the debt adjustment as an obstacle to free movement of labor.

Even in European Union, different legal instruments and institutions can frame an issue in different ways. Olivier de Schutter has pointed out that the famous Laval case by the ECJ<sup>19</sup> was followed by decision of the European Social Committee.<sup>20</sup> While the ECJ framed the issue as one of freedom to provide services and whether the collective action against a foreign employer could be justified as a matter of right to such action and as one of social policy, the European Social Committee framed the issue as one of discrimination on the ground of nationality.<sup>21</sup> As de Schutter concludes, “It would be incorrect to write that the European Committee of Social Rights was thus contradicting the European Court of Justice: it was, after all, assessing the situation on the basis of different set of norms.”<sup>22</sup>

Legal theory seems to have paid relatively scant attention to the process of framing and recognizing a legal problem. Aulis Aarnio’s version of hermeneutics is one of such attempts. He explains the recognition as a hermeneutic circle in which the judge or lawyer’s gaze is directed at the facts and at the norms in turns, finally arriving at the correct identification of the problem.<sup>23</sup> The hermeneutic circle suggests that a judge or a lawyer works with several possible norms or legal framings of a problem, arriving at the correct one. What are the social conditions of finding one or another way of framing a problem as the correct one?

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<sup>18</sup> Insolvency Regulation 1346/2000/EU, now replaced by Insolvency Regulation 848/2015/EU, and Brussel Regulation 44/2001/EU, now replaced by Recast Brussel Regulation 1215/2012/EU on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, allocated jurisdiction to the forum domicile or to the COMI Center of main interests. Neither of these regulations was applicable in the case concerning a private person. The Brussels I Regulation excludes insolvency. Insolvency Regulation did not cover Swedish debt adjustment. See Johanna Niemi, “Consumer Insolvency in the European Legal Context”, *Journal of Consumer Policy* 35(4) (2012): pp. 443–459.

<sup>19</sup> Case C-341/05 *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*, judgment of 18 December 2007, Reports of Cases 2007, p. I-11767.

<sup>20</sup> *Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden*, Complaint No. 85/2012 (2013).

<sup>21</sup> Olivier de Schutter, *The European Social Charter in the Context of Implementation of the EU Charter of Fundamental Rights* (European Union, European Parliament, 2016), pp. 26–32.

<sup>22</sup> *Ibid.*, p. 32.

<sup>23</sup> Aulis Aarnio, *The Rational as Reasonable: A Treatise on Legal Justification* (Dordrecht: D. Reidel, 1987) p. 68-70.

### What's the problem -approach

Social scientist Carol Bacchi has developed the most systematic theoretical approach in analyzing the construction of social problems. Bacchi claims that instead of only analyzing how a social problem should be solved, much more attention should be focused on how social problems are defined.<sup>24</sup> Social (or legal) problems are not natural or God-given entities but they are always framed, constituted or represented in specific ways.<sup>25</sup>

Based on a Foucauldian understanding of knowledge being produced in social interaction and social processes,<sup>26</sup> Bacchi states that the representation of a social problem has effects on how it is talked about (discursive effects), on how the subjects that are related to the problem are represented and defined (subjectivication effects) and on how material resources are allocated (lived effects).<sup>27</sup> Thus, the representation of a social problem delimits the possible solutions. Also, Bacchi claims that often the proposed or chosen solution determines how the problem is represented. Consequently, the definition and the solution of a problem are intertwined. For example, a problem can be framed at the level of individuals and the solutions are directed at how to change their behavior (such as eating habits) or at the social structural level leading to different solutions (such as organizing school meals).

Bacchi's theoretical approach does not end here. The core of the What's the problem approach are the social conditions for the problem representation.<sup>28</sup> Not any formulation is possible but there are always social restrictions to what is possible and an analysis should proceed to recognizing these.

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<sup>24</sup> Carol Lee Bacchi, *Women, Policy and Politics: The Construction of Policy Problems* (London: SAGE Publications Ltd., 1999).

<sup>25</sup> Carol Lee Bacchi, *Analysing Policy: What's the Problem Represented to Be?* (Frenchs Forest: Pearson, 2009), 262.

Likewise, a related approach, Narrative Policy Analysis, emphasizes that social problems are narrated and encourages critical analysis of alternative narratives. Michael D. Jones, "A Narrative Policy Framework: Clear Enough to Be Wrong?", *Policy Studies Journal* 38(2) (2010): p. 335.

Elizabeth A. Shanahan, Michael D Jones, Mark K McBeth, Ross R Lane, "An Angel on the Wind: How Heroic Policy Narratives Shape Policy Realities", *Policy Studies Journal* 41 (3) (2013): pp. 453–83.

<sup>26</sup> This theme permeates Foucault's work and is explicated for example in Michel Foucault, "Truth and Juridial Forms", in James Faubion (ed.), *Power. Essential Works of Michel Foucault 1954-1984* (New York: Penguin Books, 1994), p. 14.

<sup>27</sup> Bacchi, *Women, Policy and Politics*, p. 40.

<sup>28</sup> Bacchi, *Women, Policy and Politics*; Bacchi, *Analysing Policy*, p. 5. Here the Foucauldian influence is obvious. Foucault was interested in the social and historical conditions that made certain discourses possible. Michel Foucault, *The Archaeology of Knowledge* (London: Tavistock, 1972).

Bacchi' systematic approach proceeds in six steps starting with the recognition of the problem: 1. What is the problem representation? 2. What presuppositions underlie this representation (archeology)? 3. How has this representation come about (genealogy)? 4. What are the unproblematic aspects and silences? 5. What are the effects of the problem representation? 6. How this problem representation is produced and defended and how it could be questioned?<sup>29</sup>

In somewhat analogous manner in legal theory, Kaarlo Tuori has paid attention to “the hidden social theory of a legal institution”; the idea that each legal institution is based on or reflects a view (theory) about how social relations are constituted.<sup>30</sup> For example, theories of contract reflect theories of market economy and exchange. It is possible, however, that the hidden social theory can be framed in different ways or that there are several hidden theories underlying a legal institution. Michelle Oberman has written a fascinating article about one single case, *Buck v. Bell* (1927) on sterilization,<sup>31</sup> showing that there are at least 13 different ways of putting the case into legal and social policy context.

As a lawyer, I have found these approaches methodologically difficult: How to find and recognize the social theory behind or related to legal institutions and problems? The legal discipline seems to be relevant but are we as lawyers and scholars who specialized in specific legal disciplines blind to our presuppositions? How to make them visible? A methodological approach that I have found helpful has been discourse analysis, which is also relevant in Bacchi's toolbox.<sup>32</sup> The possibility of other problem formulations is present at all steps of Bacchi's approach. Looking at the silence and effects are also elements in a discourse analysis but less familiar to a lawyer. They also help to reflect on different ways of looking at a legal problem.

### 3 How to find the conditions: Discourse analysis

#### Modernity and postmodernity in law

Discourse analysis is a method that relies on ontological theories of social constructionism, that is, on the idea that reality is constructed socially, in social interaction and social practices. Furthermore, both discourse analysis and social constructionism belong to the post-modern theorizing. Social constructionism as a broad theoretical approach underlines that reality is

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<sup>29</sup> Bacchi, *Analysing Policy: What's the Problem Represented to Be?*, 48.

<sup>30</sup> Kaarlo Tuori, *Critical Legal Positivism* (Aldershot: Ashgate, 2002).

<sup>31</sup> *Buck v. Bell*, 274 U.S. 200, 207 (1927). Michelle Oberman, “Thirteen Ways of Looking at *Buck v. Bell*: Thoughts Occasioned by Paul Lombardo's Three Generations, No Imbeciles”, *Journal of Legal Education* 59(3) (2010): pp. 357–92.

<sup>32</sup> Bacchi, *Analysing Policy*, p. 16.

constructed in interpersonal interaction, social practices and discourses.<sup>33</sup> Discourse analysis is a loose cluster of methods for identifying discourses and analyzing how they work and what effects they have.<sup>34</sup>

One way of formulating what a discourse analyst does is to say that they analyze the underlying assumptions behind a text.<sup>35</sup> While I acknowledge that this formulation is illustrative, it nevertheless gives a somewhat skew description of discourse analysis. Tuija Pulkkinen has formulated the difference between modernity and post-modernity in a way that points out why the “revealing of underlying assumptions” explanation of discourse analysis misses the point. According to Pulkkinen, modernity is engaged with the relationship between the surface and the basis, always looking for and trying to reveal the basis. As Pierre Legendre states, “The occidental world has never ceased to rely upon radical discourses of foundation, of which the history of legislation and of jurisprudence are the *necessary* echo.”<sup>36</sup> Post-modern, to the contrary, is not working with this relationship.<sup>37</sup> Post-modern does not necessarily deny the existence of a basis and a surface but that is not what it is interested in, nor the formulation of a post-modern research question.<sup>38</sup>

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<sup>33</sup> Peter L Berger and Thomas Luckmann, *The Social Construction of Reality: A Treatise in the Sociology of Knowledge*, A Pelican Book, (Harmondsworth : Penguin, 1966); Ian Hacking, *The Social Construction of What?* (Cambridge, Mass.: Harvard U.P, 1999).

<sup>34</sup> About discourse analysis and law see Johanna Niemi-Kiesiläinen, Päivi Honkatukia & Minna Ruuskanen, “Legal Texts as Discourses”, in Eva-Maria Svensson, Åsa Gunnarsson & Margaret Davies (eds.), *Exploiting the Limits of Law* (Dartmouth: Ashgate, 2007), pp. 69–88. Generally, there is a plethora of textbooks on discourse analysis. One of the most useful for a beginner is Vivien Burr, *An Introduction to Social Constructionism* (London: Routledge, 1995). Burr (pp. 19–20) makes a distinction between constructivism, which is related to the author’s intention to constitute a meaning or a work of art, for example, and social constructionism which is interested meanings constructed in social interaction and practices, irrespective of the intentions of the participants.

<sup>35</sup> For example, Carol Bacchi uses this kind of formulations. Bacchi, *Analysing Policy*, p. 58.

<sup>36</sup> Pierre Legendre, “The Judge Amongst the Interpreters: Psychoanalysis and Legal Judgement”, in Peter Goodrich (ed.), *Law and the Unconscious: A Legendre Reader* (New York: St Martin’s Press, 1997), p. 167.

<sup>37</sup> Tuija Pulkkinen, *The Postmodern and Political Agency* (Jyväskylä: University of Jyväskylä, 2000). Also Foucault makes the argument that there is no origin (the basis) in many ways, for example using the concept of innovation (instead of origin). See.g. Foucault, “Truth and Juridial Forms”, p. 8.

<sup>38</sup> The relationship between the surface and the basis is, of course, only one way of characterizing the shift from modernity to post-modernity. Also the plurality in the place of a shared culture or common values can be underlined, from universal truths to fragmentation. About the difference in law, see Gary Minda, *Postmodern Legal Movements: Law and Jurisprudence at Century’s End* (New York: New York UP, 1995), p. 3. Emphasizing the change in the modes of production, a shift from production to services or from factories to networks is emphasized in by Manuel Castells, “The Rise of the Network Society”, in *The Information Age: Economy, Society and Culture Vol. 1* (Cambridge (Mass.): Blackwell, 1996). Within architecture and design, modernity is connected to functional forms, ripped of unnecessary decorations. In the organization of the international community, the basis of national states has been challenged by the globalization and by the raise of regions.

Looking at legal theory, the most important contemporary theories of law are modernist by basis/surface -criterion. Well-known is Kelsen's variant of positivism that operates with the relationship between the Grundnorm (as the basis) and the derivative norms as the surface.<sup>39</sup> Equally apparent, Kaarlo Tuori's critical legal positivism is based on the differentiation between the deep structure of the legal system (as the basis) and the surface as the levels of legal system, mediated by the middle cultural level.<sup>40</sup> The deep structure includes modes of governmentality, human and fundamental rights and the legal subject, all theoretical concepts that are not immediately visible and require a revealing analysis. The surface of the legal system, that is, the laws, cases and legislative materials are, to the contrary, open to observation and volatile.<sup>41</sup>

Rationality is the most typical strait of modern science. The modern project in legal science is the rational quest for the correct legal interpretation,<sup>42</sup> a profoundly modern project to reveal the correct norm.<sup>43</sup> This pursuit has taken somewhat different roads.<sup>44</sup> While Anglo-Saxon writers, such as Ronald Dworkin and Neil MacCormick<sup>45</sup> emphasize legal principles in the pursuit of the correct interpretation, the European continental legal dogmatic scholarship is more systematical and less case oriented.<sup>46</sup> Different opinions are expressed on the idea of the

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<sup>39</sup> Hans Kelsen, *Reine Rechtslehre* (Wien: Verlag Österreich, 1934). Similarly, Hart's system of rules of recognition and the ultimate rule of recognition H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961).

<sup>40</sup> Tuori, *Critical Legal Positivism*.

<sup>41</sup> *Ibid.*

<sup>42</sup> As the validity of a legal opinion cannot be assess as a truth-claim, the aim is to reach correctness: "... the discourse is *founded* on a tacit claim of *correctness*." Italics JN. Aulis Aarnio, *Essays on the Doctrinal Study of Law* (Dordrecht: Springer, 2011), p. 143.

<sup>43</sup> Minda, *Postmodern Legal Movements*, p. 5.

<sup>44</sup> I do not comment here the difference between the analytical school of legal dogmatics and realist schools, which also pursue the correct interpretation even if the realists refrain from taking normative stands but comment on the prognosis of the Court's interpretation. As a modernist project, the realist program equally strive for revealing the correct interpretation of a norm. Johanna Niemi-Kiesiläinen, "Comparing Finland and Sweden: The Structure of Legal Argument", in Jaakko Husa, Kimmo Nuotio & Heikki Pihlajamäki (eds.), *Nordic Law – Between Tradition and Dynamism* (Antwerp: Intersentia, 2007): pp. 89–108.

<sup>45</sup> Neil MacCormick, *Legal Reasoning and Legal Theory* (Oxford: Clarendon Press, 1978), pp. 4–7; Ronald Dworkin, *Taking Rights Seriously* (Boston: Harvard University Press, 1977).

<sup>46</sup> Aleksander Peczenik, *The Basis of Legal Justification* (Lund: Infotryck, 1983), p. 118. Bankowski, MacCormick, Summers and Wróblewski summarize: "Hence the task of producing a rationally coherent view of the system is one that calls for imaginative insights into the possibility of a principled and structured ordering of material which is potentially chaotic despite being itself, in each fragmentary part, the output of intrinsically rational activity." in Neil MacCormick & Robert Summers (eds), *Interpreting Statutes. A Comparative Study* (Aldershot: Dartmouth 1991) p 20.

one and only correct interpretation of a norm but the search for it is nevertheless essential. As Peczenik stated in 1983 “We all have the regulative idea that one shall search for the right answer to legal questions, but it is difficult to interpret this idea precisely or to assume that the right answer always ‘exists’.”<sup>47</sup>

Thus, the rational process of searching for the correct interpretation is central.<sup>48</sup> In the text books on legal theory we find lists and hierarchies of legal sources and rules on how to use them. Influenced by Habermas’ theory of rational communication<sup>49</sup> and Ronald Dworkin’s omnipotent, rational Judge Hercules<sup>50</sup> since the 1980s, legal theorists have been interested in rules for rational argumentation. Robert Alexy developed principles for rational legal analysis.<sup>51</sup> Besides rationality, these theories emphasize the final consensus that would be reached among the rational participants to the communication.<sup>52</sup> Consensus was emphasized as a central criterion for a correct outcome in the 1970s legal philosophy and social theory by Habermas. Also John Rawls’ rational, universal decision makers behind the veil would end with a consensus.<sup>53</sup>

The rational pursuit of a consensual solution appears quite idealistic in the 2010s, when we are in need of rules of decent and rational communication more than ever. The ideal of a rational participant and decision maker, has been challenged as a white, middleclass, well-educated

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<sup>47</sup> *Ibid.*, p. 111.

<sup>48</sup> Aulis Aarnio, *On Legal Reasoning* (Turku: University of Turku, 1977); Aulis Aarnio, *The Rational as Reasonable: A Treatise on Legal Justification* (Dordrecht: D. Reidel, 1987).

<sup>49</sup> Juergen Habermas, *Theorie Des Kommunikativen Handelns, Band 2: Zur Kritik Der Funktionalistischen Vernunft* (Frankfurt am Main: Suhrkamp Verlag, 1982).

<sup>50</sup> Dworkin, *Taking Rights Seriously*.

<sup>51</sup> Robert Alexy, *Theorie der juristischen Argumentation: Die Theorie des rationalen Diskurses als Theorie der juristischen Begründung* (Frankfurt am Main: Suhrkamp, 1978). The authors that I have chosen as representatives of the analytical school of legal dogmatics rely on and refer to Alexy’s (and Habermas) work.

<sup>52</sup> For example, according to Aarnio the consensus on correct interpretation is reached within the legal community or auditorium. Aarnio, *Essays on the Doctrinal Study of Law* p. 146.

<sup>53</sup> John Rawls, *A Theory of Justice* (London: Oxford University Press, 1973).

male.<sup>54</sup> There is a need analyze the use of power in communication, underlined by Michel Foucault,<sup>55</sup> and many others.

Since 1990s, we have seen a paradigmatic change in legal argumentation. New natural law flavored theories influenced by the human and fundamental rights have gained ground. The balancing of opposing principles or different human rights as a central legal methodology has become popular.<sup>56</sup> Also here we can see the structure of basis (human and fundamental rights) and surface (other norm material) and the search for the correct interpretation. However, this kind of balancing should give more space for multiple subjects and plurality of values than the rational legal dogmatic analysis.

The analysis of interpretation is part of legal scholarship but acknowledging the plurality of the people and values, it is equally important to study *how* interpretations and legal problems are constructed.

#### Law as a social construction

That law and legal systems are social constructs is in many ways obvious; they are products of social processes, mainly the legislative processes and legal practices. John Austin and John Searle paid attention to the power of legal actions to constitute new statuses, such as marriage.<sup>57</sup> Searle and Austin analyze the intended effects of the speech act or a legal text. Legal theorists have paid attention to law's power to constitute or construct relations beyond the legal definitions and regulations.<sup>58</sup> In feminist legal theory the constructionist understanding of law

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<sup>54</sup> There are several critiques, not least feminist, of which I want to refer to Sandra Harding's critique in theory of sciences: Sandra G. Harding, *Sciences from below: Feminisms, Postcolonialities, and Modernities* (Durham N.C.: Duke University Press, 2008). Psychoanalysis of law goes further and argues that law is not only authoritarian but paternalist in nature. See Pierre Legendre, *Law and the Unconscious: A Legendre Reader*, ed. Peter Goodrich (London: MacMillan, 1997), p. 118. From the post-colonial perspective see Gayatri Chakravorty Spivak, *Can the Subaltern Speak? Reflections on the History of an Idea* (New York: Columbia University Press, 2010).

<sup>55</sup> The discussion on power goes throughout Foucault's scholarship. See e.g. Michel Foucault, *Power* (New York: New Press, 1994) p. 338.

<sup>56</sup> Robert Alexy, *Theorie der Grundrechte, Studien und Materialien zur Verfassungsgerichtsbarkeit* (Baden-Baden: Nomos Verlagsgesellschaft, 1985).

<sup>57</sup> John Langshaw Austin, *How to Do Things with Words: The William James Lectures Delivered at Harvard University in 1955* (Oxford : Oxford University Press, 1986); John R. Searle, *Speech Acts: An Essay in the Philosophy of Language* (Cambridge: Cambridge University Press, 1969).

<sup>58</sup> Menachem Mautner, 'Three Approaches to Law and Culture', *Cornell Law Review* 96, no. 4 (2011): 861, doi:10.1093/acprof:oso/9780199600564.001.0001; Robert M Cover, *Narrative, Violence, and the Law : The Essays of Robert Cover*, ed. Austin Minow, Martha; Ryan, Michael; Sarat (Ann Arbor: University of Michigan Press, 1992); Clifford. Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (Basic Books, 1983), 167, <https://utu.finna.fi/Record/volter.249906>.

is today well established, due to the influence of gender studies where gender, sex and sexuality are understood as socially constructed as opposed to biologically determined.<sup>59</sup>

As a theoretical orientation social constructionism is a platform for many methodological approaches. For a scholar working in a specific field of law, discourse analysis is a possibility to examine the presuppositions of her discipline. Besides explicit general principles and doctrines each legal discipline is based on implicit understandings of its object of regulation, the hidden social theory in Tuori's terminology.<sup>60</sup> Discourse analysis offers systematic methods for studying how these underpinnings are constructed. Unlike standard legal analysis the focus is on the construction of meaning which take place irrespective of the intentions of the creators of the text. Text and discourses are seen as productive and dynamic. The analysis may focus on the construction of legal or factual concepts.

In addition to traditional legal categories of law and facts, I add a third category, semi-legal concepts, which refers to factual concepts that are relevant for the legal assessment but seldom explicitly defined. One example is the concept of violence, which is not defined in law as a crime (as opposed to assault or battery) but is part of the legal definition of violent crime. In several feminist analyses the construction of violence in a domestic setting has had relevant consequences on how the situations have been legally framed. Legal texts constructed domestic violence as part and culmination of a verbal dispute, as opposed to violence or control over another person,<sup>61</sup> leading to underestimation of the seriousness of violence and risk and framing the problem as domestic dispute instead of assault.

One example of semi-legal concepts is sex/gender. There are very few examples of even implicit definitions of sex or gender in law, yet many laws and practices include discourses that construct roles for, assumptions about and identities of men and women and assume all persons as men or women.

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<sup>59</sup> Carol Smart, 'The Woman of Legal Discourse', *Social & Legal Studies*, 1992, 29–44; Nicola Lacey, *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (Oxford: Hart, 1998); Ngaire Naffine and Rosemary J Owens, *Sexing the Subject of Law* (North Ryde (NSW) : Routledge, 1997); Åsa Gunnarsson and Eva-Maria Svensson, *Genusrättsvetenskap* (Lund: Studentlitteratur, 2009); Niemi-Kiesiläinen, Honkatukia, and Ruuskanen, 'Legal Texts as Discourses'.

<sup>60</sup> Tuori, *Critical Legal Positivism*.

<sup>61</sup> Ruuskanen, "The Good Battered Woman: A Silenced Defendant"; Johanna Niemi-Kiesiläinen, "Rikosoikeuspolitiikka Ja Sukupuoli", *Oikeus* 34(3) (2005): pp. 225–240. (Available in English as Gender and Criminal Law Policy:

[https://www.utu.fi/fi/yksikot/law/tiedekunta/henkilosto/Sivut/niemi\\_johanna.aspx](https://www.utu.fi/fi/yksikot/law/tiedekunta/henkilosto/Sivut/niemi_johanna.aspx)).

Unlike legal dogmatic research, discourse analysis is not normative and cannot make claims about right and wrong or correctness of interpretations. Nor is it bound to the hierarchy of legal sources, even if cases of higher courts may be more interesting than those of lower instances. Yet discourse analysis can be of utmost interest to lawyers because it helps to analyze constructions in the ways a legal text speaks about subjects, actions and processes. These constructions influence the ways in which the “correct” legal problems are framed and ultimately resolved.

There are different ways of doing discourse analysis. A legal scholar is interested in the constructed meanings. To place this kind of discourse analysis in a broader scientific context, I have found Jaana Vuori’s distinction between three levels of discourses, Big D, Middle D and Little D, as useful.<sup>62</sup> While Big D refers to large historical analysis, such as Foucault’s historical analyses of scientific disciplines,<sup>63</sup> and Little D to analyses of interaction at the level of utterances, silences, speaking turns and so on,<sup>64</sup> Middle D is interested in the construction of meanings. Middle D is the level at which the analysis of legal documents usually takes place.

A more structural analysis of legal discourses is often formulated as an analysis of the underlying principles<sup>65</sup> or as of discursive patterns.<sup>66</sup> Such an analysis might often fall somewhere between Big D and Middle D in Vuori’s classification. For a more detailed analysis the theorists have used different terminologies of repeated textual units, such as, Foucault’s “discursive formations”<sup>67</sup>, which include an understanding of the relations of the

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<sup>62</sup> Jaana Vuori, *Ädit, Isät Ja Ammatilaiset: Sukupuoli, Toisto Ja Muunnelmat Asiantuntijoiden Kirjoituksissa* (Tampere: Tampere University Press, 2001).

<sup>63</sup> Michel Foucault, *Discipline and Punish: The Birth of the Prison, Discipline and Punish* (London: Penguin Books, 1977); Michel Foucault, *The Birth of the Clinic: An Archaeology of Medical Perception* (London: Routledge, 2003); Michel Foucault, *The History of Sexuality*, Vol. 1–3 (originally published in French in 1979, 1985 and 1988.)

<sup>64</sup> This kind of conversational analysis can be extremely useful in the legal context as well, especially in the forensic analysis when the authenticity of a conversation or the validity of its content have to be assessed. See for example Muffy Siegel, “Finding Conversational Facts: A Role for Linguistics in Court”, *Speech, Language & Law* 12(2) (2005): pp. 255–78; Roger Shuy, “Discourse Analysis in the Legal Context”, in Deborah Schiffrin, Deborah Tannen & Heidi Hamilton (eds.), *The Handbook of Discourse Analysis* (Oxford: Blackwell, 2001), pp. 437–452; John M. Conley & William M. O’Barr, *Just Words: Law, Language, and Power* (Chicago: University of Chicago Press, 1998).

<sup>65</sup> Magnus. Ulväng, *Påföljds konkurrens: Problem Och Principer*, Skrifter Från Juridiska Fakulteten i Uppsala, ISSN 0282-2040 ; 99. (Uppsala : Iustus, 2005), 68.

<sup>66</sup> Joel Samuelsson, *Tolkning Och Utfyllning: Undersökningar Kring Ett Förmögenhetsrättsteoretiskt Tema*, Skrifter Från Juridiska Fakulteten i Uppsala (Iustus Förl, 2008), 179.

<sup>67</sup> Foucault, *The Archaeology of Knowledge*.

subject and object of the discourse, and Chantal Mouffe & Ernesto Laclau's "nodal points"<sup>68</sup>, which are related to the hegemonic use of the language by the powerful. These theoretical concepts share the idea that there is strategic use of language included in the construction of meanings.<sup>69</sup>

Ruuskanen and Bladini's dissertations represent detailed, linguistically oriented discourse analysis. Ruuskanen analyzed the construction of the concept of self-defense in legal scholarship, appeal court cases (in want of Supreme Court practice) and crime investigation protocols. She found that the concept was constructed around a model, in which two about equally strong and qualified males confront each other in a combat-like situation. It did not fit into situations, in which a battered woman tries to protect herself against an abusive and much stronger male partner. These women's claims were not even formulated as self-defense and were ignored already at the investigation stage.<sup>70</sup>

### Objectivity of the judge

The objectivity and neutrality of law are essential principles of legal thinking. Objectivity and the possibility of observation without a point from which the observation is made have been challenged in feminist theory. Sandra Harding has analyzed objectivity in science, claiming that the objectivity has been mostly that of dominant groups. Her improved version of objectivity means including the oppressed groups into the production of knowledge.<sup>71</sup> Critical discourse analysis sees discourses as use of power to naturalize relations and issues. For Norman Fairclough the task of critical discourse analysis is to unpack these naturalizing processes.<sup>72</sup> In this view, a dominant strategy in legal texts is objectivization, that is, to underline that law is

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<sup>68</sup> Ernesto Laclau & Chantal Mouffe, *Hegemony and Socialist Strategy: Towards a Radical Democratic Politics* (London: Verso, 2001).

<sup>69</sup> Many practitioners of discourse analysis get along without these complex theoretical terms simply by explaining how they have proceeded in their analysis of meanings.

<sup>70</sup> Minna Ruuskanen, "The Good Battered Woman: A Silenced Defendant", in Kevät Nousiainen, Åsa Gunnarsson, Johanna Niemi-Kiesiläinen & Karin Lundström (eds.), *The Responsible Selves. Women in the Nordic Legal Culture* (Chippenham: Ashgate, 2001), pp. 311–330.

<sup>71</sup> Sandra G. Harding, *The Science Question in Feminism* (Ithaca and London: Cornell University Press, 1986). For a post-colonial perspective see Spivak, *Can the Subaltern Speak?*; Connell, "The Northern Theory of Globalisation".

<sup>72</sup> Fairclough, *Critical Discourse Analysis*; Teun van Dijk, "Critical Discourse Analysis", in Deborah Schiffrin, Deborah Tannen & Heidi Hamilton (eds.), *The Handbook of Discourse Analysis* (Oxford: Blackwell, 2001), pp. 363—415. Critical Discourse Analysis is a term associated with DA that focuses on the use of power and in particular with Fairclough's method. However, most discourse analysts include power in their analysis more or less explicitly.

neutral, objective and detached from its subjects and objects.<sup>73</sup> Discourse analysis, to the contrary, assumes that it matters from which perspective a text is written. There may be a difference between the author of the text and the interests that it represents.<sup>74</sup> However, it is important to recognize that everyone is speaking and writing from some position and the position has an impact on how a lawyer or a judge identifies a legal problem and interprets the law and the facts.

How objectivity is constructed in legal documents and scholarship is concretely analyzed by Moa Bladini. She analyzed the linguistic technics that were used to distance the author from the facts, parties and the texts, constructing “objectivity.” Her data was appeal court cases and procedural law scholarship represented by the texts of the grand old man of Scandinavian procedural law, Professor P.O. Ekelöf.<sup>75</sup> The courts and law professors represent the powerful groups, with the power to decide on formulations of legal problems. While Harding draws attention to the looking at the knowledge from the suppressed groups’ point of view, Bladini’s research shows that there are methods to analyze the construction of the positions of power.

#### Discursive construction of identity

Identity has become a central issue in the post-modern world. In contrast to earlier generations, individuals are not born, raised and live all their lives according to a pre-given identity or role. Social mobility has increased, bringing with it new identities and changes in identity. Individuals want to choose their life styles, opinions, group affiliations and identities. Identity is an individual experience but it also connects an individual to the community.<sup>76</sup> Identity is always related to the social sphere and there are different ideas about to what degree an individual can choose her identity. Obviously, the experience of identity is a product of social interaction.<sup>77</sup>

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<sup>73</sup> Moa Bladini, *I Objektivitetens Sken. En Kritisk Granskning Av Objektivitetsideal, Objektivitetsanspråk Og Legitimeringsstrategier i Diskurser Om Dömande i Brottmål* (Makadam, 2013).

<sup>74</sup> In literature studies, the differentiation between the author and the text is attributed to Ronald Barthes’ essay, *The Death of the Author*, 1967. Michel Foucault continued the discussion with an essay *What is an Author* in 1969. Both short essays are possible to find on internet. I thank Toni Selkälä to drawing my attention to this literary discussion.

<sup>75</sup> Moa Bladini, *I Objektivitetens Sken - En Kritisk Granskning Av Objektivitetsideal, Objektivitetsanspråk Og Legitimeringsstrategier I Diskurser Om Dömande I Brottmål* (Göteborg: Makadam förlag, 2013).

<sup>76</sup> Stuart Hall & Paul du Gay, *Questions of Cultural Identity* (London: Sage, 1998).

<sup>77</sup> Especially in psychoanalytical theorizing the identification process in early childhood has been much discussed. In feminist psychoanalysis the sex/gender identification has been confirmed and critiqued. See Julia Kristeva, *Strangers to Ourselves* (New York: Columbia University Press, 1991). Shulamith

There is reason to reflect upon how law contributes to the identity constituting discourses.<sup>78</sup> Instead of assuming a universal and unified (legal) subject, we can see legal discourse as constitutive in relation to subjectivity and identity. Thus, there is not just one fixed subject but there may be different identities and subjectivities constructed in different texts.<sup>79</sup> There are historical examples of robust legal definitions of subjects,<sup>80</sup> such as systems of racial classification.<sup>81</sup> The sex difference has been an identity marker, backed by legal regulation,<sup>82</sup> but discourse analysis can be useful in analyzing all legal identities.<sup>83</sup>

Now that laws are generally gender neutral but reality is still gendered, discourse analysis is a way to make the gender constructing processes visible. For example, Ulrika Andersson and Monica Burman have analyzed the construction of female victims of rape<sup>84</sup> and domestic violence,<sup>85</sup> as either too weak (no resistance) or too strong (resistance, sometimes by force) to fit into the image of a trustworthy female victim. As Carol Smart has stated, “Law is seen as bringing into being both gendered subject positions as well as (more controversially?) subjectivities or identities to which the individual becomes tied or associated.”<sup>86</sup>

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Firestone, *The Dialectic of Sex: The Case for Feminist Revolution* (New York: Farrar, Straus and Giroux, 1970.).

<sup>78</sup> Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (Oxford University Press, 2013); Margaret Davies, *Are Persons Property? Legal Debates about Property and Personality*, Applied Legal Philosophy (Aldershot, Hants, England : Burlington, VT, : Ashgate/Dartmouth, 2001); Lacey, *Unspeakable Subjects: Feminist Essays in Legal and Social Theory*.

<sup>79</sup> Susanna Lindroos-Hovinheimo, ‘There Is No Europe-On Subjectivity and Community in the EU’, *German Law Journal* 18, no. 5 (2017): 1229.

<sup>80</sup> About the historical constructions of legal person and contemporary challenges see Toni Selkala and Mikko Rajavuori, ‘Traditions, Myths, and Utopias of Personhood: An Introduction’, *German Law Journal* 18, no. 5 (2017): 1017–68. and other article in this special issue.

<sup>81</sup> Colored race has been defined by the number of black or colored ancestors, jewishness has been defined according to the mother. There are contemporary definitions even in Finland regarding ethnic Finns or Same according to the ancestor’s ethnicity or language.

<sup>82</sup> Ngaire Naffine & Rosemary J. Owens, *Sexing the Subject of Law* (North Ryde (NSW): Routledge, 1997).

<sup>83</sup> One example is the construction of debtors and creditors in personal insolvency law, either as market actors or as individuals who have been hit by social risks, such as unemployment. Johanna Niemi-Kiesiläinen, “Collective or Individual? Constructions of Debtors and Creditors in Consumer Bankruptcy”, in Johanna Niemi-Kiesiläinen, Iain Ramsay & William C. Whitford (eds.), *Consumer Bankruptcy in Global Perspective* (Oxford: Hart Publishing, 2003), pp. 41–60.

<sup>84</sup> Ulrika Andersson, *Hans (Ord) Eller Hennes? En Könsteoretisk Analys Av Straffrättsligt Skydd Mot Sexuella Övergrepp* (Lund: Bokbox, 2004).

<sup>85</sup> Monica Burman, “The Ability of Criminal Law to Produce Gender Equality: Judicial Discourses in the Swedish Criminal Legal System”, *Violence against Women* 16(2) (2010): pp. 173–188.

<sup>86</sup> Carol Smart, “The Woman of Legal Discourse”, *Social & Legal Studies* (1992): p. 34.

The potential of discourse analysis in analyzing identity construction is related to the understanding that identity is often constructed by defining what it is not. We bolster our identity by defining the “other” or others and while doing so, power is used. Especially critical discourse analysis is interested in the margins, the marginal social groups and the use of power in Foucauldian sense in discourses to marginalize.<sup>87</sup> Power reproduces itself in interaction but it is often veiled and needs an analytical approach to become visible.

Therefore, working with students, I usually start a discourse analytical reading by identifying the voices in a case or other legal text. From voices we then proceed into analyzing how the subjects that have a voice are constructed and which voices are silenced. In the contemporary crisis talk the framing of the migrant crisis has been done from the Western perspective of the European Union countries.

Another illuminating example is the contemporary credit society. Repeatedly, financial policy makers and financial institutions express their worry about the increasing debt loads of individual debtors and households. Several discussants have proposed that a positive credit register, that is, a register including all credits of individual debtors should be set up for the credit institutions to use before forwarding a credit. The underlying problem formulation is that debtors are irresponsibly taking on too much credit and that should be prevented. The voice in the discussion is that of credit institutions.

An alternative formulation of the problem, which we never see, would be to ask why credit institutions forward credit to persons who are not able to repay. This problem formulation would yield different answers and measures. First, it is profitable, even very profitable, to give credits to people in need. Even if losses are notable, the interests and costs that these debtors pay are high.<sup>88</sup> Secondly, why credit institutions do not use the available means, such as asking the debtors about their ability to pay and about their due credits? The answer could be that it would be too expensive to wait for a debtor to fill in a detailed questionnaire and to actually read it when debtors are asking for an instant loan with an extremely high interest. The voice and the framing of the issue is one of the creditors, even if the formulation is to protect debtors.

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<sup>87</sup> Michel. Foucault, ‘Truth and Judicial Forms’, in *Power. Essential Works of Michel Foucault 1954-1984* (London: Penguin, 1994), 1–91.

<sup>88</sup> This was the main finding in the classic David Caplovitz, *The Poor Pay More* (New York: Free Press, 1967). It is still true in the world of instant loans today. Udo Reifner & Michael Schröder, *Usury Laws: A Legal and Economic Evaluation of Interest Rate Restrictions in the European Union* (Norderstedt: Books on Demand, 2012).

#### 4 Conclusion

This article starts with an analogy between the construction of a crisis and a legal problem arguing that the framing of a legal problem has not received enough attention in legal theory. The argument of the article is that the modernist legal methods are not helpful enough to analyze how legal problems and alternative interpretations are constructed, especially not in a multicultural world. Carol Bacchi's theory of construction of social problems is seen as helpful in this respect. As she argues, there are social conditions that guide the way problems are constructed and solved, and the solution and the framing of the problem are tied together.

The article continues to the constructionist theory and more specifically to discourse analysis as a method that can be used to analyze the problem formulation, underlying assumptions and concepts in legal discourses, taking up examples from legal research.

Law is a powerful social discourse that shapes the lived reality through the normative force of its texts and practices. Thus, we as lawyers should be conscious of the discursive nature of law. Discourse analysis can make visible the assumptions that are implicitly present and constructed in legal discourses and practices. The interest is not only academic. An awareness of the constructive power of law and the methods to analyze it could help us to reflect on alternative problem formulations, different possible interpretations and effects of legal reforms and judicial decisions. Simply, we could become better lawyers.