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Research Report: Statements, Cases, and Criminal Cases. The Ethnographic Discourse Analysis of Legal Discourse Formations

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1. Introduction

> "I reject a uniform model of temporalization, in order to describe, for each discursive practice, its rules of accumulation, exclusion, reactivation, its own forms of derivation, and its specific modes of connexion over various successions." (FOUCAULT 2003, p.221)

How could FOUCAULT contribute to the study of court hearings in the criminal legal process? How could the idea of discourse formation guide the study of testimonies, of expert witnessing, or of the solicitors' file-work practices? In short, how can law-in-action benefit from a discourse analytical take in the tradition of FOUCAULT's archaeology? Commonly, law-in-action research was carried out by using or combining two methods or methodical registers: conversation analysis and/or ethnography. The classical studies by CICOUREL (1968), ATKINSON and DREW (1979), CONLEY and O'BARR (1998), or NADER (2002) may serve as prominent examples. In the following I sketch out a project that combines FOUCAULT's methodical take on discourse formation and the ethnography of legal (discourse) practices. The research question that guides this utilisation of discourse analysis and ethnography can be formulated like this: how do—legally binding, powerful, decisive—cases come about and what does it take in practical terms? [1]

FOUCAULT would reject Conversation Analysis (CA) not because of its commitment to details or its de-centred understanding of social order. He would even support some of its claims: the aversion against the sense-making subject, or the understanding of power as a flow or a dynamic. But still, he would reject CA, and he would do so, because of its "uniform model of temporalization" (FOUCAULT, 2003, p. 221). In the following I set off with the idea of CA, because it is a leading method in the study of the proximate or the event. CA identifies turns as the "smallest units". It gives a primacy to natural conversation under conditions of proximity. It defines structural conditions of possibility for what can be said, wanted, or even intended (see SCHEGLOFF, 1987). Voices are encouraged or discouraged, invited or disinvited due to the local conditions of possibility. [2]

Analogously, but in different spatio-temporal dimensions, criminal proceedings provide certain conditions of possibility of statements and cases. However, the mechanisms to do so can hardly be described by studying conversations only. Conversations, FOUCAULT taught, are just one space-time of unfolding discourse next to others such as administrative cases or academic disciplines. Conversational turns are, moreover, just one mode of existence of a statement-in-becoming next to others such as public declarations, written documents, or archival entries. The modes by which discursive units are made available in a

field of discourse vary largely. They exceed the time-space of their earlier appearance and contribute to other contexts. They characterise the very workings of the discourse as such, its force and power. Like other scholars before, notably FOUCAULT or LUHMANN, this research focus emphasises the multiple temporality of discourse practice and derives at an understanding of the specific modes of participation and the various subjectivities and authorships that are created this way. [3]

Our ethnographic project sets off with ephemeral utterances in face-to-face interactions in order to trace what one might call "discoursivation", meaning the transformations by which these ephemerals are turned into lasting (and often binding) objects. Accordingly, we have undertaken various case-studies showing how statements (such as an accusation, an alibi, an admission), despite their legal fixation, entered new alliances, combinations, and contests. The formation of statements—as the smallest atoms of discourses—must be traced, as FOUCAULT emphasised, both in spatial and in temporal terms. This means, statements enter a discursive field in confrontation and combination with other already existing and upcoming statements.[1] Statements gain their changing weight and relevance in these "current" constellations. Statements are, at times, carefully entered and mobilised as solid and robust in order to endure these confrontations and transformations. For the latter, FOUCAULT imagined in his "archaeology" the distinction of more or less spatio-temporally expanded units and discourses.[2] Law's forceful combination of power and truth may rest largely on the integration of different temporalities of discourse: the proximate and the accumulative, the staged and the archived. A discourse analysis that accounts for this duplicity needs to reveal the various dynamic relations that alter the contexts and meanings of statements "in formation". [4]

The following points may give a first idea on how we try to account for the formation of statements and cases in various criminal legal processes. We collected empirical data, including legal files, field notes on meetings and conferences, transcripts from recorded procedural events and interviews, by following around defence lawyers. The various natural or procedural sources are dealt with in what we call a "trans-sequential" fashion. How do statements and cases come about in the procedural "relations of event and process" (SCHEFFER, forthcoming)? The data bundles allow us to open the black boxes called legal cases, meaning the discursive units that are generally taken for granted as set beings by legal scholars and that inhabit the alliances of power and truth that FOUCAULT had been interested in throughout. [5]

1 A statement "is linked not only to the situations that provoke it, and to the consequences that it gives rise to, but at the same time, and in accordance with a quite different modality, to the statements that precede and follow it" (FOUCAULT, 2003, p.31).

2 FOUCAULT distinguishes short-term and long-term discourse:

> "In short, I suspect one could find a kind of gradation between different types of discourse within most societies: discourse ‘uttered’ in the course of the day and in casual meetings, and which disappears with the very act which gave rise to it; and those forms of discourse that lie at the origins of a certain number of verbal acts, which are reiterated, transformed or discussed [...]." (FOUCAULT, 2003. p.220)

2. Tracing the Becoming of Statements and the Formation of Cases

How can we grasp what FOUCAULT called a discourse formation? Unlike FOUCAULT's exemplary studies on normalisation or governmentality, the analysis of legal discourses may start off with small-scale formations. This unusual scope, from the perspective of Foucauldian discourse analysis, offers various advantages: (a) It helps understanding the simplest mechanisms of formation, whereas formation is understood in spatial *and* temporal terms. (b) By tracing the micro-formation of the smallest discourse units, the analysis can grasp the dynamic character of discourses. (c) The arrival of one statement can move the entire formation as the overall relation of statements. This measure narrows the gap between statements and the case-formation. Both remain in resonance. [6]

The ethnographic study of micro-formation moves FOUCAULT's programme towards the level of individual criminal cases. It follows FOUCAULT's conviction that discursive powers, in order to trigger their extensive effects, must work on the most basic levels of everyday life. The ethnographic study of micro-formation operates FOUCAULT's deep aversion against structuralist and mono-temporal approaches, e.g. modernist evolutionism or the idealist history of "grand figures". Our study does so by paying attention to both, discursive events and discursive processes that contribute to each other and that, by doing so, define each other. Just as FOUCAULT suggests, we set off with statements as the smallest discursive values. From here, we follow two overlapping and dynamic levels of analysis: the statement becoming *and* the trans-local formation of statements. [7]

What is a statement? FOUCAULT's "archaeology" provides us with various negative definitions. It is *not* a sentence, *not* a linguistic form, *not* a logical unit, and *not* a speech act. They are, moreover, not identical with the legal definition of statement as a written testimony. FOUCAULT provides a definition that is inherent to the discourse: a statement is a statement only in relation to other statements. It is available and at work vis-à-vis other statements re-grouped around it. The statement is effective—meaning: discriminating, supporting, contrasting etc.—only in the regard to other statements in formation. In criminal cases, statements seem to serve as mixes of stories & arguments. Statements are made available as discursive facts by various modes of discoursivation: the staging in court, the repetition in the procedural course, or the meticulous mobilisation in a protected sphere. The discoursivation is unthinkable without various discursive equipments: documents, files, archives, witness stands, courts, etc. In the same manner, FOUCAULT accounted for discourses as assemblages of discursive and non-discursive means of production. By doing so, he went beyond language or grammar. He included discourse practices beyond speaking and writing. [8]

At this point, the project diverges from the qualitative presumption of adjacency and proximity, which is most strongly represented in the sequential analyses of correspondence analysis or hermeneutics. Discourse formation provides such powerful effects, because it places heterogeneous and displaced statements right next to each other. The formation makes them interact, while "originally" they

were uttered under most distinct circumstances. It confronts distant statements as if they existed side by side. No matter the "origin" of a statement, which perhaps was articulated as something more local, more ephemeral (such as an harum-scarum expression or an imprudent answer or just aloud thinking), by entering the discourse formation "it" is moved to different sites, used under different conditions, employed for different purposes, and linked to different references. The analysis of micro-formation traces these diverse appearances and the contexts they contribute to. [9]

Once made available, legal statements turn out to be of changing value. The transformations complicated our methodical efforts to identify and trace these "smallest" units of discourse analysis. This is, because not much remains identical in the course of becoming. Not much of its "original" appearance is retained. This is why the speaker lacks control of the implications of "her" statement. This is why it takes extra skills to actually "address" the legal discourse, to impress future audiences, to argue against statements that do not even exist yet. Lawyers develop some mastery here, but never full control. Ethnography comes into play when these skills, this expertise, and—more generally—these modes of participation become an issue. "What does it take" to speak out in court? What is at risk to be exposed to the discourse? The micro-formation, opposite to the illusions of pure sequentiality and local proximity, explains how discourses initiate "risky" modes of authoring. The mechanisms of formation, what is more, explain how FOUCAULT (2003) in "The discourse of language" hesitated when being asked "to begin". What then is a legal statement? In short, it is what it does: (a) it circulates in one or even more cases; (b) it gains or looses relevancy in the procedural course such as the plea bargaining session, the client-lawyer-conferences, or the witness examinations; (c) it invites, binds, or blocks future statements; (d) it dissociates from the initial context of production and the author's first ambitions. [10]

In terms of method, this loose definition carries various consequences: firstly, like FOUCAULT we traced statements in various material forms, genres, and contexts. We encountered a "play of repetition and difference" (DELEUZE, 1994). Secondly, we listed the appearances in a time line and tried to identify the general mechanisms of transformation from one appearance to the next. Thirdly, we grouped and re-grouped the statements that related to the focal statement. We identified changing nexus of statements depending on the stage of the procedure. Fourthly, we assessed the relevance or weight of the statement for the case and for the party that invests into, hopes for, and utilises the case. [11]

Statements refer to other statements (exchange) for somebody (accountability) and can be referred to by others (availability) in the future (durability) and elsewhere (circulation). Defining statements as the integrating and driving items of legal discourse includes an important differentiation. Not everything turns into a statement for the proceeding. Some utterances are just statements (of value) for the client-lawyer ensemble. Some utterances remain undisclosed and unavailable, but are of value for the prosecution to proceed with (internal) inquiries. Mono-sequential studies regularly fail to account for these variable

scopes and intransparent spheres within legal discourses. Proceedings/procedures (*Verfahren* in German) are integrated by statements-in-circulation. Statements circulate in various scopes, are referred to or not, are remembered or forgotten, gain or loose impact. Statements constrain their authors. [12]

Only recently, we balanced this past-in-presence orientation (memory, binding) by analysing phenomena such as anticipation or positionality. The latter build on expectancy that is enabled by legal rituals and standards. In other words, we focussed on a value object that is, for most of the unfolding proceeding, partial, unstable, and multifaceted. We focussed on something that does not yet fully exist for the legal discourse—and had for quite some time problems naming it. In this view, a statement in the lawyer-client relationship is not yet a statement that operates on the scale of the public legal discourse. From the point of view of the proceeding many statements are not available, remain unnoticed, and do not trigger any binding force. [13]

3. Concept Development and Findings

The project established the *Verfahren* as the discourse analytical unit of analysis. In other words, the case is the unit of micro-formation. The Foucauldian idea of discourse as ordered and dynamic, as singular and plural, as contingent and systematic fits well to the notion of *Verfahren*. *Verfahren* are twofold and comprise aspects of process and order, of actuality and potentiality. While the procedure highlights norms and standards of *the* legal process, the proceeding emphasises the concrete trajectory and outcome in single cases. Our case studies recover both dimensions that clearly do not fit the canonical disciplinary units such as action, interaction, situation, organisation, institution, practice, system, or culture. We suggest that proceedings—as discourse formations—deserve an independent analytical status. [14]

In order to fit this analytical frame of analysis, the project developed a trans-sequential analysis of the couplings, the continuities and ruptures (SPURK, 2004), and the "process *and* event relations" (SCHEFFER, forthcoming). Our multi-temporal fields resulted in a number of concepts that might also be useful for other studies in legal ethnography, socio-legal studies, criminal justice, or the sociology of law. Amongst the most pertinent of these concepts are:

- "*Micro-histories*" are reconstructed in order to account for the details of the statement's becoming together with other statements and the co-evolving case (SCHEFFER, 2004). Micro-histories are available and constructed by the participants in order to manage the enfolding and complex proceeding.
- "*Careers*" explicate the rising and falling relevancy of statements on their way to court (or alternative conclusive investments). The relevancy of a statement can be measured in terms of its changing scopes, the internal and public references to it, and the ensemble's own assessments (SCHEFFER, 2003).

- "*Micro-formation*" puts an emphasis on the multi-modal nature of casework. Micro-formation comprises both acts of writing and speaking. It bridges the duality of reading and writing by introducing ephemeral objects (underscores, notes, or drafts) that crowd the process of putting together a case.
- "*Trans-sequentiality*" puts an emphasis on the relations of event and process and the performance of duplicity (SCHEFFER, 2007a). It couples various time-spaces and rhythms of becoming. Tracing trans-sequentiality requires ethnographic insights, i.e. a multitude of sources and an intimate knowledge on the temporal formation of these sources.
- The "*legal materialities*" exceed the direct interaction (e.g. the court hearing), which renders them co-productive of the very interaction (SCHEFFER, 2005). Value objects exist in various material forms such as on paper, in talk, or as circulating stories. Legal materialities link the single proceeding to the legal system.
- The "*modes of discoursivation*" (SCHEFFER, 2007b) point towards the ways by which local utterances are turned into statements. We identified *mobilisation*, *reiteration*, and *staging* as three basic modes. Utterances become available to the legal discourse by means of: the internal case work; the multi-modal repetition of statements; the standardised speech in open court. [15]

All tools are at the same time properties of the self-observing and self-regulating fields and perspectives by which we render legal processes observable. The remaining time of the project will be used to confront these perspectives with official versions in reforms and political programmes. There is indication that law and society studies show rising interest in "distributed decisions" (BUETOW, 2005) in order to understand the range of decisions on the single case level up to the criminal law statistics put together in the "centres of calculation" (LATOUR, 1999). Here, artefacts such as the "justice gap" or "innovations" to reconcile "efficiency and justice" (see AULD, 2001) are of special interest. What, we ask, are their effects on case making and discoursivation? [16]

4. Towards the Comparison of Discourse Formation

The project is demanding and challenging not just in terms of the multi-sited and multi-temporal character of fieldwork and in terms of the analytical innovations. It is demanding as well due to its comparative nature. How could one compare *Verfahren* in such diverse jurisdictions such as Germany, Italy, the UK, and the US? The second phase meant a new quality in the research project that had been initiated two years before in Northern England. The English pilot study defined a number of standards—situating in a small law firm, the open framing, the focus on becomings—but was far from foregrounding the process of fieldwork and the subsequent task of comparison. In fact, the methods prescribed by the pilot study (such as the study of file notes, or the focus on trial preparation) needed some adjustment in light of the encountered diversity. [17]

Using ethnography to compare legal cultures is by no means a novel endeavour in legal anthropology (BOHANNAN, 1969). Especially in legal anthropology scholars presented a number of contrastive studies on legal consciousness, disputes, rituals, logics, processes, etc. Most of the studies that are commonly presented under the rubric of comparative legal anthropology are either colonial (contrasting primitive law and modern law), critical (contrasting hegemonies), or evaluative (contrasting good and bad practice). They show a preference for legal or ceremonial rules in contrast to the ethnomethodological law-in-action approach (TRAVERS & MANZO, 1997). Most studies avoid the "small questions" of case-making. As scholars frequently suggest, there are indeed good reasons to stay away from comparative ethnography. [18]

Ethnography requires radical contextualisation of the researcher's involvement and data analysis. Our fieldwork showed that one cannot be sure of a shared platform in terms of data (from legal files, to courtroom observation, or audio/video recording), professional roles (advocates or judges), legal artefacts (such as courts, files, or law books), or pre-trial and trial sequences. The pilot study could not, as was still implied at the end of the first phase, dictate the comparative criteria for all four case studies. The reason is straightforward: the relevancy of legal artefacts and activities is highly contextual. Any one-to-one opposition shows confusing and ungrounded differences. In other words, comparison requires an additional (e.g. functionalist or discourse analytical) level of analysis in order to construct the tertium comparationis, such as the following:

- *Field access*: Here we compared our trajectories into the multi-sited fields. Access presents itself as an ongoing, recurring, and open-ended task. The various ethnographic fields are explored and co-constructed by our guided movements, by the shared and individual research interests, and by the abilities/limitations to collect and process natural data.
- The *binding* mechanism: The proceedings evolve "binding and unbinding effects" (SCHEFFER, HANNKEN-ILLJES & KOZIN, 2007). Here, we followed early defences through their procedural courses. The analysis shows different mixtures of binding and unbinding forces due to documentary economies on the one hand and the (partly protective) fragmentation of legal discourses on the other. Not everything that occurs in the course of the proceedings can actually enter the procedural history, not everything is available later on.
- The enactment of *failing* in the procedural course: We compared when, where, and how topoi did not reappear (HANNKEN-ILLJES, HOLDEN, KOZIN & SCHEFFER, 2007). Some are clearly left behind, dropped, no longer invested in, or altered beyond identity. The points of disappearance did vary drastically and carried different consequences for the overall case-making. We distinguished a gradation from public disasters in the front region to trial-and-error episodes in the back region.
- The *positionality* of the charged before the law: Positionality varies drastically in different proceedings and carries vast consequences for the cases to be prepared. Case-work reflects and channels the subsequent placement of the client as a witness before the jury (UK cases), as a defendant before the

judges (German cases), or as somebody absent who is represented in negotiation (US cases). Positionality anticipates the place before the law and, by doing so, shapes what the case is going to look like.

- *Courtrooms* as epistemic sites: The variation becomes apparent once courts are accessed as de-centred occasions that work in a personal, temporal, and spatial division of labour (SCHEFFER & HANNKEN-ILLJES, forthcoming). Court hearings are standardised in various degrees and directions, in order to configure procedure-specific areas of contingency. [19]

By this construction of the *tertium comparationis* we overcame the hermetic separation of ethnographic research. Moreover, the comparison renewed our perspective on as well as our employment and analysis of field notes, legal documents, files, interviews, etc. In turn, the comparison re-specified what seemed to be general findings—on the nature of the file, the court, or the lawyer-client relationship—in the single ethnography. [20]

As a result, the forceful discourse formation integrates into a culture of truth and power that creates its own modes of participation. The participation is organised around voices, around presentees and absentees, around a range of knowledges, and around various materialities that assure some kind of regularity in all this. The case to decide results from discursive events and processes: from complex staged performances, from organised repetition, and from various material transformations. [21]

As a result, we did not deliver what is commonly understood as "hard comparisons". We rather generated new grounds for comparative studies. We developed, in other words, some comparability in the field of law-in-action. Our comparative articles reached out into degrees of more or less comparability: some resulted in comparisons of procedurally regimented devices such as the courtroom as a more or less de-centred epistemic space; others resulted in spectra of phenomenon such as various kinds of failing spread over the early and late phases of all four procedures. In this line, the analysis of micro-formation does not simply provide new grounds for comparison, but is itself informed and sharpened by ranges of comparability. [22]

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