Peeking Through the Keyhole: Using Narratives to Explain Legal Reason

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My starting point is institutional theory. Institutions consist both of norms and knowledge. According to economic historian Douglass C. North, beliefs are a key to building a foundation to understand the process of change. Both norms and knowledge can be formal and expressed, and informal and tacit. Informal and tacit norms and knowledge may be known to and recognised by the actors, but there is also a lot of tacit norms and knowledge that the actors follow and use unconsciously, and that form part of what they take for granted, such as beliefs and unrecognised presuppositions for thoughts and actions. The tacit knowledge and dispositions of the actors within the legal institutions can be analysed using rhetorical theory and the concepts of Pierre Bourdieu of doxa and habitus. The doxa in a specific legal culture and the habitus of the actors can be found by analysing the language and narratives of legal decisions. A combination of institutional theory and rhetorical theory can thus give better insight into the operation of law.

To understand law and legal development we need a theory of institutions. But institutional theory is not enough. People are not just role-players, and the judge and other actors of the law not just following the rules when they apply them. People act within institutions, shaping and reshaping them, within a social field that is in practice relatively independent of external dominations and pressures (Bourdieu 1987:816). Within this legal field, juridical authority is produced and exercised.

Institutions consist both of norms and knowledge. According to economic historian Douglass C. North, beliefs are a key to building a foundation to understand the process of change. Both norms and knowledge can be formal and expressed, and informal and tacit. Informal and tacit norms and knowledge may be known to and recognised by the actors, but there are also a lot of tacit norms and knowledge that the actors follow and use unconsciously, which form part of what they take for granted, such as beliefs and unrecognised presuppositions for thoughts and actions. Even though results in law are achieved by the application of legal reasoning, the final results are underdetermined by rules, requirements and legal theories. As pointed out by Amsterdam and Bruner, the legal results are influenced by how people think, categorize, tell stories, deploy rhetoric and make cultural sense when they interpret and apply legal rules.

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1 I am grateful to Helena Whalen-Bridge for insightful comments.
2 See Graver: Judicial Independence.
4 Amsterdam/Bruner: Minding the Law, p. 287.
The juridical field is constituted by formal and informal norms, and these norms create positions, enable and empower actors and form incentives. But the actors also compete about positions and results and about how to interpret and uphold the institutional norms. Their interaction is shaped both by power relations and organisation, and by actors strategically pursuing their interests within relational networks in which the actors participate. In these networks the actors communicate, they argue, persuade and tell stories. By this they determine the law.

A central part of the interaction is performed by actors communicating with each other. To understand institutions, we therefore need to use rhetorical theory to see how interaction between actors take place. The stories they tell and the arguments they use and are persuaded by is partly determined by the institutions within which they operate. But the stories also shape the institutions.

Much of this is based on tacit knowledge that the actors have and share. The tacit knowledge and dispositions of the actors within the legal institutions can be analysed using rhetorical theory and the concepts of Pierre Bourdieu of doxa and habitus. The doxa in a specific legal culture and the habitus of the actors can be found by analysing the language and narratives of legal decisions. A combination of institutional theory and rhetorical theory can thus give better insight into the operation of law and the forming of legal institutions.

In the following I will show how a rhetorical analysis of legal texts can reveal underlying assumptions and values that sustain the normative order which is perceived as self-evident and natural, and that thereby shapes the law and legal development. I start by giving an example of narratives judges make about cases onto which they apply the law. Lawyers normally draw a sharp distinction between facts and law. Facts are a question of evidence, law is decided by analysis of legal sources using the specific legal method. In practice, the division between facts and law is not so straight-forward. Facts are, in the words of Bourdieu, “retranslated” to be instituted as a lawsuit, that is, something that can be argued from the point of law. Although the narrative is seemingly about the facts of the case, the narrative reveals legal assumptions that are made by the judge, and it influences evaluations that are made by the judge in deciding upon issues of law.

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5 Dressel/Sanchez-Urribarri/Stroh: Courts and Informal Networks, p. 575.
6 Bourdieu: Force of Law, p. 832.
A writer and a bookseller

The role of narratives is widely recognised, albeit controversial, as a part of establishing facts in legal proceedings. Equally persuasive, but less renowned, is their role in establishing the law. Narratives persuade, motivate, explain and form a mutual ground for discussion and action. As shown by Amsterdam and Bruner, courts rely on storytelling, and their stories change the ways we understand the law and ourselves. One can add, their stories also reveal the ways we understand the law and ourselves in a given society. The narratives of law are thus a key to the tacit assumptions and values that underlie legal reasoning. One element of a narrative analysis is to bring to light unexamined choices in a judge’s reasoning.

Take for example the case of the well-known book by the Norwegian journalist Åsne Seierstad *The Bookseller of Kabul*. The book is about a bookseller, Shah Mohammad Rais, and his family in Kabul. Seierstad lived with this family for three months just after the September 11 attacks. The book won international acclaim and was translated into more than forty languages.

The book was written as a narrative that gave a close-up of the Afghan family. To readers in the West it gave a fascinating account of the insides of a family in Kabul. To the members of the family it could be perceived differently. According to a review, “by writing a warts-and-all story, it seems unlikely that Seierstad will ever be welcomed back into the bosom of the Khan family, by its men at least, or that this book will ever get on to the shelves of Mr Khan's shop”. As it turned out, one of the wives of Rais sued Seierstad and her publisher at the Oslo City Court for invasion of privacy.

In their action, Rais and his wife claimed that the case should be decided by the Norwegian courts according to Afghan law. Seierstad and the publisher contested this. The first issue that the courts had to decide was therefore the question of the choice of applicable law. This issue went all the way to the Supreme Court, and the decision by the Supreme Court is reported in NRT 2009 p. 1537. The opening sentence in the opinion of Supreme Court justice Sverdrup, who wrote on the behalf of the majority, was:

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7 See for a defence of narratives and stories as part of an explanatory conception of evidence and proof in opposition to a probability model Pardo: Nature and Purpose.
8 Amsterdam/Bruner: Minding the Law, p. 286.
9 [https://www.theguardian.com/books/2003/aug/31/travel.features](https://www.theguardian.com/books/2003/aug/31/travel.features)
Åsne Seierstad, now Åsne Guldahl Seierstad published “The bookseller of Kabul” in Norway 2002 with the publisher J.W. Cappelens forlag, now Cappelen Damm A/S.

This opening sentence represents a narrative choice regarding the court's view of what happened, but it also has implications for the legal issue that is to be decided. According to Norwegian rules for the choice of applicable law, the connection that a dispute has to a country is a key factor in choosing the legal rules of that country. The opening established such a connection to Norway.

The next sentence takes us to Afghanistan:

Seierstad lived with the Rais family in Kabul in Afghanistan in the spring of 2002. Her stay came about when she contacted the bookseller Rais and told him that she wanted to write a book about him and his family.

With these opening sentences the connection both to Norway and Afghanistan are established. But there is also more, a story is presented, and this story comes through as a Norwegian story. This becomes clearer if we make the experiment of changing the order of the two sentences:

Åsne Seierstad, now Åsne Guldahl Seierstad lived with the Rais family in Kabul in Afghanistan in the spring of 2002. Her stay came about when she contacted the bookseller Rais and told him that she wanted to write a book about him and his family. The same year she published “The bookseller of Kabul” in Norway 2002 with the publisher J.W. Cappelens forlag, now Cappelen Damm A/S.

The first narrative is the narrative of a book published in Norway. We are first presented with the book, and then told about its background. The second narrative is about a visit to Kabul. We are then told about what Åsne could bring back from this visit. Whereas the first story is a story that takes place in Norway, the second takes place in Afghanistan, at least in the first instance.

The order of things is not immaterial. And the order is obviously the product of a narrative choice. In this case the judge has chosen to construct her narrative by departing from the temporal order in which the events took place.
There are also other choices. The story is a third person narrative, but with a clear perspective from the part of Åsne Seierstad. The story is about Åsne and her book. Let us make another experiment and change the perspective to the perspective of the bookseller. The narrative could go somewhat like this:

*Shah Mohammed Rais, a bookseller in Kabul, Afghanistan, was approached by the journalist Åsne Seierstad, who asked if she could stay with his family and write a book about them. She lived with him and his family for the spring of 2002. Later that year, the visitor published “The bookseller of Kabul” in Norway with the publisher J.W. Cappelens forlag, now Cappelen Damm A/S.*

This is now a different story. It is about the bookseller Rais and his experiences with Seierstad, and not a story about the journalist Seierstad and her writings as in the original narrative. The nationality of the journalist is incidental to the plot, and so is the connection to Norway. Subtle differences made to the text gives us totally different stories. These differences also change the way we think about the legal issue. If the issue is liability arising out of the publication of a book, Norwegian law is a natural starting point. If the issue on the other hand is invasion of privacy in Afghanistan, the matter could be seen differently. A trained lawyer knows that both these questions are aspects of the same legal issue, so the way the story is told does not decide the matter. But the narrative embeds the legal reasoning and shows the inclinations and habitus of the judge.

**Constructing a narrative**

There may be several explanations for why a judge constructs the narrative in a certain way. The legal rhetoric is constrained by the impersonal and neutral legal language. Within such constraints, the construction may be the result of a rhetorical choice. The judge has reached a certain result in law and constructs the narrative in a way that will help make his legal arguments more convincing. Lawyers arguing a case before a judge will often think in this way. But also judges need to convince; their colleagues, judges in higher courts, the legal community and the public more at large. Masking choices and presuppositions make arguments look more compelling than they really are.

Causality may, however, also go the other way. Because the judge perceives the story in a certain way, she feels that the one legal result is more convincing than the other. In the case of Bookseller of Kabul there are grounds to believe that this was the case. The story of Åsne’s
book was a collective narrative widely presented in the media at the time. It was so embedded in the what everyone took for granted that it was difficult to recognize the story in any other way. The opening two sentences of the ruling reveal the prevailing doxa of Norway at the time of the judgment. The book was highly acclaimed and well known before the lawsuit, and the lawsuit itself received wide publicity. Even Rais’ lawyer did not think of attempting to tell another story than the story of Åsne’s book.

The story of Seierstad and Rais reveals something about the Norwegian outlook when people from a distinct and culturally different society claim justice in Norwegian courts. The threshold for Norwegian Courts to apply Afghan law is particularly high. Afghanistan is perceived as backward and uncivilised, probably with a much less developed legal system than our own. To this comes the perception of Afghanistan as Islamic, and the relationship between an Islamic state and fundamental Western values such as freedom of speech.

But the story also reveals something more structural when it comes to Norwegian law on the invasion of privacy. There have been many discussions in Norway recently on this topic following widely acclaimed books by for example the authors Karl Ove Knausgård and Vigdis Hjorth, who both have modelled their works of fiction on recognizable actual persons and events. As we see from the case on The Bookseller of Kabul, privacy invasion in these situations is seen as something that results from the publication of texts. It is therefore in legal terms a question of the freedom of speech and its limitations. An alternative approach could be to see invasion of privacy from the perspective of the betrayal of trust.

Betrayal of trust is very clear from the relationship between Seierstad and the Rais family. They invited her to live with her, and she enjoyed the hospitality of the family, while at the same time nurturing thoughts about them that would have found highly offensive had she revealed them at the time. From one perspective, this falseness could in itself be seen as the main injury. In many of the other cases too, authors can be held to betray the trust necessary close relationships in families or among friends.

**Narratives and institutions**

The construction of a normative regulation around the betrayal of trust would involve different norms and different evaluations than the normative regulation around freedom of speech. This is not to say that the results necessarily would have been different, it is enough to say that this very well could have been the case. My point is that we from this example see how tacit assumptions and habitus are formed by choices that have been made in the past, and
that this also structures the way such issues are addressed and the norms that are created. The norms are created as solutions to problems, and the norms in their turn structure knowledge and perceptions and transfer values.

When norms operate together to structure human action and interaction we speak about institutions. An influential theory on institutions and the role of law is the theory presented by the economic historian and winner of the Nobel memorial prize Douglass C. North. North defines institutions as “humanly devised constraints that structure political, economic and social interaction”.\(^\text{10}\)

Several theoretical perspectives are possible when explaining human action. Action can be norm driven and conventional, strategic and governed by the interests of those acting, or determined by relations of power and dependence. An institutional approach combines all these, as institutions provide both opportunities, constrains and incentives, and form the basis for establishing and maintaining power relations. Institutions shape human actions by providing constraints, opportunities and incentives. Institutions are much more than formal rules, and include informal practices and values, mind-sets and accumulated experienced and knowledge. To understand the legal institutions, we need a “thick” institutionalism that includes all these aspects of institutions.

Institutions form a normative and cognitive structure into which people act and organise. It is fruitful to distinguish between institutions and organisations. Institutions are normative structures. It is important that institutions are structure, not action. Institutions do not act or react in any way. Agency and action is performed by humans operating within structure. Institutions define roles, relations and powers. People fill these positions and thereby form organisations. In this way, North draws a distinction between institution and organization that is to a certain extent unfamiliar to ordinary usage, some would even say confusing.\(^\text{11}\) Many would speak about the “legal institutions” of a given society, meaning the norms and the actual persons filling the positions and performing their functions. Speaking about the “judicial organisation” when meaning the judiciary and their rules seems awkward.\(^\text{12}\)

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\(^{10}\) North: Institutions, p. 97.

\(^{11}\) Cole: Varieties of Comparative, p. 395, Faundez: North’s Theory, p. 401.

\(^{12}\) Prado/Trebilcock: Path Dependence, p. 349.
This is more than semantics, organisations also provide structure for human action and create norms. Faundez finds that North’s failure to address organisations is a major shortcoming in his theory from a socio-legal perspective, because it has no room for conflicting interpretations over meaning of rules or of the behaviour of organisations. In my view, this criticism is misplaced. The answer is not to confuse institutions with organisations, but to supplement institutional theory with rhetorical theory.

North is explicit on that humans through their actions create scaffolds consisting both of tools, techniques and artefacts to control the environment, and these are both of a mental and physical kind. When analysing institutions, it is also important to acknowledge that institutions form an elaborate structure, an institutional matrix that determine economic and political performance. There is no need to interpret his institutional theory as entailing a distinction between institutions as rule makers, and individuals and organisations as rule followers. Individuals create and recreate institutions and form organisations, individually and organised, in harmony or in struggle. The advantage of North’s distinction is that it gives us the tools to distinguish sharply between structure and agency, between normative structure, action situation and action. As I see it, this is a major advantage to this theoretical approach compared to many others. Organisations can in this picture be seen from a dual approach, both as structure constraining action, and thus as institutions, and as concerted action of individuals. In this way organisations can be incorporated into the theoretical framework.

It is essential that institutions consist both of norms and knowledge. According to North, beliefs are a key to building a foundation to understand the process of change. Both norms and knowledge can be formal and expressed, and informal and tacit. Informal and tacit norms and knowledge may be known to and recognised by the actors, but there is also a lot of tacit norms and knowledge that the actors follow and use unconsciously, and that form part of what they take for granted, such as beliefs and unrecognised presuppositions for thoughts and actions. The emphasis on what is tacit and taken for granted is an important characteristic of the thick concept of institution.

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13 Faundez: North’s Theory, p. 401.
15 North: Understanding the Process, p. 49.
18 North: Understanding the Process, p. 83.
Humans construct beliefs about the nature of the reality that surrounds them and based on these beliefs seek to create and modify institutions in order to improve their positions. Institutions are thus the result of intentional action by those powerful enough to drive their views through. Institutions form part of the structure that shapes human action and consist of “formal rules, informal rules and their enforcement characteristics”. So, institutions consist both of informal constraints such as sanctions, taboos, customs, traditions, and codes of conduct, and formal constraint of the legal kind. By this, they shape the choices humans make by providing incentives.\textsuperscript{19} The constraints are a mix of the formal constraints and informal constraints, embedded in language, physical artefacts and beliefs.\textsuperscript{20} There is an intimate relationship between beliefs humans hold and institutions. Rules and informal norms, and thus institutions, are derived from the beliefs humans have.\textsuperscript{21} The institutional structure reflects therefore the beliefs of those in position to make the rules of the game.\textsuperscript{22} At the same time, the institutions and norms shape human values and beliefs. The thoughts of the dominant become the dominant thoughts. We can hear the echo of Marxist thinkers such as Gramsci and Althusser in the approach of North.

**Path Dependence**

A main feature of institutional theory is the idea of path dependence. Path dependence is, according to North, “the way by which institutions and beliefs derived in the past influence present choices”.\textsuperscript{23} “We inherit the artefactual structure – the institutions, beliefs, tools, techniques, external symbol storage systems – from the past”.\textsuperscript{24} From a legal perspective, it is illustrating to point to the way the existing conceptual structure and set of practices influence the approach to novel issues that are often tackled by way of analogy.\textsuperscript{25} The combination of such beliefs, institutions and artefactual structure inherited from the past limits the choices actors have and imposes severe constraints on the ability to effectuate change. An important part of part dependence is an “intimate relationship between belief systems and the institutional framework”.\textsuperscript{26} This relationship constrains and empowers social actors, who in turn act to uphold their positions. Addressing the structure of a market, North accentuates that

\textsuperscript{19} North: Understanding the Process, p. 48.  
\textsuperscript{20} North: Understanding the Process, p. 1.  
\textsuperscript{21} North: Understanding the Process, p. 48  
\textsuperscript{22} North: Understanding the Process, p. 1.  
\textsuperscript{23} North: Understanding the Process, p. 48  
\textsuperscript{24} North: Understanding the Process, p. 21.  
\textsuperscript{25} Bell: Path Dependence, 792.  
\textsuperscript{26} North: Understanding the Process, p. 49.
the structure reflects the beliefs of those in a position to make the rules of the game and those who enact the rules that will produce the outcomes. The relationship is evident in the formal rules, but “is most clearly articulated in the informal institutions – norm, conventions, and internally held codes of conduct”.²⁷ Path dependence is the heritage of institutions accumulated from the past, but it is also a result of organisations built on the institutions, that will devote resources to prevent any alteration that threatens their survival. Path dependence is thus a function of norms, ideas and power.

Path dependence is more than just the “history matters”. This is, of course, part of it. Choices that have been made in building institutions influence the future scope of action. A choice that has been embedded in a norm becomes the regular course of action. There is, however, another side of path dependence, path dependence in a “narrower” sense, the fact that it is difficult to exit from a path once laid.²⁸ There may be sunk costs in the current pattern of action, or the establishment of a new path may be costly. The difficulty of reversing a course may be even more difficult in politics than in economics.²⁹ Finally, we have the constraint of ideas and beliefs; other ways of doing things are simply unthinkable, or the time and effort thinking out new ways of doing things is discouraging.

Path dependence is not an “inner dynamic” of institutions, it is about people making choices and acting. People make choices to protect and pursue their interests. People and organizations are brought into an institutional matrix and to resist changes that affect their position and interests. The belief system underlying an institutional matrix also deters radical change. Institutions give shape beliefs, values and the development of knowledge. According to North, “the whole structure that makes up the foundation of human interaction is a construct of the human mind and has evolved over time in an incremental process; the culture of a society is the cumulative aggregate of the surviving beliefs and institutions”.³⁰ Since paths are formed by people’s choices, people can also change the path of development thorough choices they make.

If legal institutions have their own path dependence, there must be discernible legal traditions where legal orders of different traditions can be traced back to differences in origins and legal orders of the same tradition to a common origin.³¹ This is an evolutionary approach to legal

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²⁷ North: Understanding the Process, p. 49.
²⁸ Pierson: Increasing Returns, p. 252.
²⁹ Pierson: Increasing Returns, p. 257.
³¹ Graver: Judges Against Justice.
development, which also suggests that the legal institutions have their own path of
development distinct from developments in political and social institutions of a given society.
A consequence of this is that the legal institutions have a measure of resistance to pressure
from social and political forces. Institutional theory therefore suggests that law has an extent
of autonomy in its development, and that this development is not simply an effect of social
and economic forces operating from the outside.\textsuperscript{32} This is, of course, a claim that has been
made from many other theoretical perspectives. Applying institutional theory may, however,
contribute to our knowledge of how the legal order resists outside pressures, and under what
conditions this resistance breaks down. Gaining more insight into this is important under
current circumstances when the legal institutions are under pressure and attack in many
countries, even in the Western world.

\textbf{Language and disposition}

Action within legal institutions and legal development is predominately a language activity. It
is about legal actors, lawyers and judges, reading and producing texts. The institutions form
the values and perceptions of the actors, who act by communicating with each other. Their
communications are based on their values and knowledge, are shaped within this, and
reinforce and develop it. In rhetorical terms, the actors enact their habitus within a shared
doxa. Although both habitus and doxa are shaped by the institutions, in a legal context they
must be studied as communication i.e. by means of rhetorical theory, not institutional theory.
The combined perspectives of institutional theory and rhetorical theory are necessary to
understand the development of law and legal institutions.

The habitus of different judges may be discovered by studying the language they use.
Sometimes subtle differences reveal significant differences in approach. Consider the case in
NRT 2006 p. 833 between a divorced couple on the right to the value of the house they had
lived in during their marriage.

The couple moved in together in 1981 and married in 1986. They moved in to the house that
was the object of their conflict in 1985. Three days before their marriage they concluded a
marriage settlement that stated that the house should be the separate property of the husband.
When they divorced, the wife regretted this, and she went to the courts to have the marriage
settlement set a side. The Norwegian marriage act provides for the possibility of setting aside

\textsuperscript{32} Bell: Path Dependence, p. 787.
a marriage settlement that “would have unreasonable effects on one of the parties” (ekteskapsloven § 46.2). It was the application of this rule that was before the Supreme Court.

The story of the couple and the house was narrated in the following way by justice Skoghøy speaking on behalf of the majority:

> B (the husband) was afforded a property by the municipality of Stavanger by letter of 19 December 1984.

The story continues:

> A house was erected on the property. From what has been disclosed, the price was NOK 536,584 including the cost of the property. The price of the property was 58,579 NOK. The lodging was financed by a loan in the Norwegian State Housing Bank of NOK 366,000, a loan in Stavanger Savings Bank of NOK 90,000, in cash 60,584 and own efforts by B at a value of approximately 20,000 NOK.

We note use of passive form: B was afforded a property, a house was erected and the lodging was financed. Who the actor was, is not made explicit. Even the own efforts that B had put in are described in the passive. In this narrative, the house is something that befalls B. Contrast this with the narrative of the dissenting judge Bruselius:

> The parties agree that the property was obtained by him in December 1984. B paid the cash sum, and contributed with the presupposed own efforts, and it was he alone who obtained the loans that were needed to finance the house-building project. The couple has moved into the house before they entered into marriage. They agree that he alone has paid the interest and the deductions on the loans.

This is a story of B crafting the house where the couple were to establish their home. He obtained the property, provided the necessary cash, procured the loans and contributed to the building with his own efforts. The house was his doing, whereas the wife was a passive benefactor.

Subtle differences in grammatical form gives two quite different stories. These differences are crucial to what we find reasonable when it comes to dividing the property. If the house was something that befell the husband it is more reasonable that he should share it, than if he
acquired the property and built the house with his own effort and at his own financial risk. The truth might be somewhere in the middle, as a young couple establishing a relationship they might have talked about the house-building project. The differences in approaches to the story of the couple may reveal differences in the disposition of the judges to the question of dividing property between breaking-up couples. Where one might see that property as a rule should be divided, another might hold the view that marriage and living together should not as a rule influence on the rights and assets that individuals hold. Likewise, one person may hold the view in general that acquiring wealth and property is mostly about luck and circumstances where the other may hold that each is one’s own creator of fortune.

It is difficult of course to infer such more general outlooks from some fragments of a judge’s ruling. On the other hand, it seems reasonable that such more general ingrained views and approaches to life creates dispositions that influence what a judge may find reasonable or unreasonable in the actual circumstances. Just as such outlooks may influence law-givers when they enact new laws, they may influence judges when interpreting and applying them. Their narratives can tell us what their dispositions are.

**Doxa and habitus**

Sometimes dispositions are shared among many or most members of society. In such a case a certain habitus becomes part of doxa and may even have normative aspects and become institutionalised. Narratives are a key also here, but also in particular the use of metaphors in the narrative. The famous case of mulla Krekar illustrates the power of the metaphor that ‘closeness is strength of effect’, a part of our normal conceptual system.³³

Mulla Krekar, or Najmaddin Faraj Ahmad, came to Norway in 1992 together with his wife and three children on a UN quota for refugees from Iraqi Kurdistan. After nine-eleven 2001, Norwegian authorities received information from US authorities that mulla Krekar was on their list of international terrorists. His refugee status was revoked in 20002 by Norwegian authorities while he was visiting Iraq. The reason was that he had made repeated visits to his homeland.

The authorities initiated proceedings against mulla Krekar to have him expelled from Norway on the grounds of national security interests. The case reached the Supreme Court in 2007, reported in NRT 2007 p. 1573. The court defined the criteria for expulsion on these grounds

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³³ Lakoff/Johnson: Metaphors We Live by, p. 132.
by stating that expulsion requires that there is a “real risk” of terrorist attacks. It is not enough that such acts connected with the person are thinkable or that they cannot be excluded. There must be a real risk of attack.

The actual reasoning of the court, and the evidence that it reviewed did not pertain directly to this risk. Instead, the court examined evidence as to whether mulla Krekar had maintained connections with the terrorist group Ansar al-Islam after he left Iraq in 1992, and whether there were connections between Ansar al-Islam and al-Qaida. Both these questions were answered in the affirmative. In its narrative of the mulla, he was portrayed by the Supreme Court as a violent leader of a militant movement. An alternative narrative could have been of a marginal freedom fighter struggling for the liberation of his country, also in opposition to the leading political Kurd fraction. His most noted attacks had been against the Kurdistan Democratic Party.

The Supreme Court did not address the issue of risk of terrorist attacks against Norway or Norwegian interests abroad due to the presence of mulla Krekar in Norway. They established the presence of an infamous terrorist with current ties to his terrorist group and with connections to al-Qaida. Although no one had heard about Ansar al-Islam, al-Qaida was known and feared over the entire world as a violent and unpredictable terrorist group, prone to violent and spectacular attacks on Western interests anywhere, as attacks in New York, London and Madrid already clearly demonstrated. By the presence of mulla Krekar in Norway, al-Qaida already had a foot in the door to Norway, something obviously very dangerous and threatening to national security.

The power of this narrative, with the use of the metaphor that closeness is strength of effect, a further evaluation of risk became superfluous (Graver 2008:189). Nobody, not even rational judges, wants a known terrorist with ties to the world’s most notorious terrorist group wandering round the streets of Oslo. Even though the court itself expressly stated that an expulsion can only take place when there is an actual risk, it makes no explicit argument towards assessing or establishing such a risk in the case of mulla Krekar. This is an illustrating example of Lakoff’s and Johnson’s claim that metaphors can create realities and be a guide for future action.

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34 Graver: Juridisk overtalelseskunst, p. 189.
35 Lakoff/Johnson: Metaphors We Live by, p. 156.
This story of mulla Krekar was, like the story of Åsne Sejerstad, a national narrative, part of
doxa. Both these examples illustrate the way also judges take part in the prevailing doxa, and
the way this influences their legal judgements. Doxa is, according to Bordieu, a product of the
naturalisation of the arbitrariness that constitutes any order. This forms the sense of reality,
that is the correspondence between objective classes and internalized classes. What in reality
is the product of specific circumstances, becomes natural and inevitable to everyone. These
mental structures produce ethical dispositions as well as consensus about the sense of the
world- things go without saying because they come without saying. We see this perfectly
illustrated in the fact that it goes without saying that the presence of mulla Krekar represents a
risk of terrorist attacks.

The treatment of the Jews in German courts during the Nazi time represents an extreme
illustration on the effects of doxa on the law. The judges accepted the sense of reality that
prevailed at the time that the Jews were exogenous to the German community, and thus not
included in the legal order based on the German people. Based on this view, the courts
reinterpreted the law so that Jews were deprived of their status as legal subjects, which meant
that they were deprived of their legal rights in such different fields of law such as family law,
labour law, landlord and tenant law and contract law. This did not contradict their self-
understanding that they were upholding the rule of law and legal certainty.

When doxa is challenged

A central part of Bourdieu’s theory on social field are the concepts of doxa and orthodoxy,
and the distinction between them. Doxa is what appears self-evident and transparently normal,
whereas orthodoxy is defined as the correct, socially legitimized belief to which everyone
must conform. Orthodoxy is regulated and sanctioned. This is not necessary with the doxa
which appears so normal that coercion ceases to exist. Doxa sustains the normative order
which is perceived as self-evident and natural. By framing the actors’ outlook on the world, it
influences both what they perceive as problems, and how they go about solving them. New
experiences are interpreted considering doxa, and knowledge accumulates in a path dependent
way. This may be challenged of course, but only by challenging the institutions.

36 Bordieu: Outline of a Theory, p.164.
37 Bordieu: Outline of a Theory, p 167.
38 Graver: Judges Against Justice, p. 60-68.
The institutions themselves create and shape the content of doxa. Institutions emphasise shared meanings in two distinct varieties. The first is about values, perspectives and worldviews. The second variety is as collections of interrelated practices and routines that may substitute deeper levels of agreement. There are complex relations between these two varieties of shared meanings.

When doxa is challenged, the institutions respond. People may shift to “the work of conscious systematization and express rationalization which marks the passage from doxa to orthodoxy”. An interesting example of this is the challenge to the legal institutions of the United States represented by president Trump. This has led to a group of conservative lawyers issuing a statement in defence of the rule of law and its underlying values. In their mission statement entitled “Checks and Balances” they state:

\[\text{We are a group of attorneys who would traditionally be considered conservative or libertarian. We believe in the rule of law, the power of truth, the independence of the criminal justice system, the imperative of individual rights, and the necessity of civil discourse. We believe these principles apply regardless of the party or the persons in power. We believe in “a government of laws, not of men”.}\]

In explaining their motivation, a member of the group told The New York Times, “There’s a perception out there that conservative lawyers have essentially sold their souls for judges and regulatory reform,” Mr. Conway said. “We just want to be a voice speaking out, and to encourage others to speak out.”

This illustrates the way institutions are upheld by people actively rising to protect them against change that goes against fundamental values and beliefs. It also illustrates how people who fill roles within an institution, in this case read “lawyers” share in its doxa, which is not necessarily shared by people outside of the institution, in this case read “Donald Trump”. The controversy is not about the president acting against the law or illegally, that is against the
formal rules of the legal institution. It is about Trump’s lack of reverence for basic values and assumptions of the institution.

The struggle over institutions is of course about more than communication. It is about power and interests and the formal and informal relationships between people. Values, knowledge, assumptions and disposition play a role to all of these, because they determine what people perceive as problems and challenges and what they see as responses and solutions. As pointed out by Hannah Arendt in her grand study of totalitarianism, the true goal of propaganda in a totalitarian society is not persuasion but organisation. This underlines the importance of rhetoric not only to communication, but also to norms, networks and structure.

The formal rules of an institution can be changed more easily than people’s minds. If institutions are sought changed in a way that challenges what people take for granted, what is taken for granted may be made explicit. People’s minds can also be changed, but to understand and do this, one needs an understanding of rhetoric and how people are persuaded and influenced. Institutional design and change are therefore not only about interests and power to change, but also about persuasion and influence, even in such supposedly rational fields as the law.

When doxa is not challenged, or when it is successfully manipulated, its contents are more difficult to reveal. In the communicative field of law, actors operate within a structure of formal and informal rules and norms. The rules and norms empower and constrain them but are also changed by the actors. Power and constraints are not only about norms of conduct and sanctions, but also to a large degree about values, knowledge and inclinations, in other words doxa and habitus. Doxa and habitus is often revealed by the stories people tell, the way they shape their narratives of facts and events. Narratives are therefore keyholes in through which we can peek to make what is tacitly taken for granted explicit.

References


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