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The expression of legal argumentation:
Towards a methodology for narrative studies of ‘discourses of subsumption’

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Abstract: This article focuses on methods for studying legal argumentation in civil law case law material, more specifically argumentation as part of a discourse of subsumption as it is performed in civil procedure case law. The discourse of subsumption is described as revolving around a logic where legal norms are separated from non-legal norms and then matched with facts that are separated from non-(relevant)facts. The article describes theoretical and methodological possibilities of rewriting the discourse of subsumption into a discourse that approaches law as a normative and continuous process of ‘becoming’ rather than a discourse that revolves around the ‘existence’ of law. The advantage of such a reconstruction is that the focus on the process of ‘becoming’ provides answers to ‘how-questions’ rather than ‘what-questions’. By studying case law material, not as an argumentation based on the representation of law but as an expression of legal argumentation, it is possible to gain a deeper understanding on how subsumption is performed and what kind of normative transformation it entails. The theoretical framework of the paper builds upon the notion of a flat ontology and discourse- and narratology-terminology. Methodological concepts such as legal enthymemes, narrative dissonance and overdetermined subject positions are presented as concrete tools to understand problematic aspects within the discourses of subsumption, revealing normative aspects of legal argumentation that is not openly legitimated within a discourse that revolves around the ‘existence’ of law.

Keywords: subsumption, legal argumentation, legal discourse, jurisprudence, civil procedure, narratology, flat ontology, law as expression

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1 The contradictions of legal argumentation

In summary, the ‘Law of Actions’ and civil procedure are important elements in a theoretical account of legal power, jurisdiction and judgement. This importance, however, has not been commonly acknowledged within either legal or critical theory. As a consequence, the genres of jurisprudence attending to the procedural domain of law have remained largely technical, while the theoretical critiques of judgement and subjectivity – and critical theory more generally – have become only increasingly metaphysical. [...] a reconciliation of critical theory with its somewhat ‘discontinues’ genres of procedural jurisprudence would call for a renewed attention to the dramas and activities of judgement (Mussawir 2011: 134).

It is possible to regard practical legal argumentation, or practical legal discourse, as an added layer to theoretical legal knowledge. It could be argued that the argumentation itself in this sense is not part of law. This is not what this article is about. Instead of regarding legal argumentation and legal subsumption as an outcome of (the) law, I will here argue that it is more fruitful to reverse the focus and regard law as an outcome of legal argumentation.

Court rulings, and many other legal texts (but not all) that presents legal norms as applied to a concrete situation has to deal with two (at least) paradoxical and challenging tasks. The first is to match the abstract with the concrete, i.e. norms with facts. The second is to be inclusive with regards to the situation at hand that has to be dealt with within the legal discourse, yet the legal discourse in itself has to be exclusive in order to maintain its status as legal. To present an application of a legal norm is therefore inclusive and exclusive at the same time. This article will depart from these paradoxical features of legal argumentation as both abstract and concrete and both inclusive and exclusive. A first glance upon legal argumentation from this viewpoint makes it appear logically impossible. Law seems to be like the bumblebee. It has been said that it is impossible for a bumblebee to fly. It has too large a body mass compared to the size of its wings. Yet, it seems to be perfectly happy flying from flower to flower unbeknownst of the impossibility of the task it is performing. In the same way, legal argumentation seems to have no problem connecting the concrete with the abstract and at the same time being both inclusive and exclusive. What does this mean for our understanding of legal argumentation?

In the following, methodological possibilities of studying law ‘in its flight’ will be presented. It will be done by presenting methodological possibilities of studying the expression of legal reasoning, including its challenges, building on
discourse theory and narratology. The word *expression* will be used as a contrast to the word *representation*.¹ Let us start with the latter. Representation is here used in the meaning as having the ambition of substituting reality. Put differently, this means that a statement about a concrete legal fact or a legal prerequisite is supposed to represent that particular fact’s real counterpart that ‘exists’ in some sense, in reality or as part of the (proverbial) black letter law.² The word *expression* is used in order to move beyond this representative way of explaining law. A legal discourse could instead be regarded as its expression, which means that the argument and reasoning themselves become law. The legal fact will from this perspective not be represented but instead expressed and in that sense the fact and the argument cannot be separated from one another. However, this is something that will be discussed in more detail further on in this article.

I will here suggest some concepts of a methodological terminology that could be useful in order to rewrite legal discourse from a discourse based on legal representation to a discourse based on expression. This could also be addressed as a shift in focus from the application of law to the making of law or from a perspective that views law as static to a perspective that also considers law as in a constant ‘becoming’. Or put in yet other ways; from law as a field towards law as a trajectory, or from subsumption to transformation. This may also somewhere down the road give us clues as to why the bumblebee really flies. By studying case law material, not as an argumentation on the representation of law but as an expression of legal argumentation, it will hopefully be(come) possible to gain a deeper understanding on how subsumption is performed (the connection of the abstract with the concrete) and what kind of normative transformation (inclusions and exclusions) it entails. This does not by definition mean that new material has to be added to the legal discourse but rather that new connections have to be shown between what is already in the text (Dolphijn and Van Der Tuin 2012: 13). Put in yet other words, a shift in legal discourse from representation to expression is a shift from asking ‘what is law’ towards asking ‘how is law’.

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¹ This shift in emphasis is developed by Mussawir, building upon Deleuze (Mussawir 2011). On theory for describing legal reasoning as representation see e.g. Wahlgren (2000) and Maccomick (1978).
² And this is regardless of the black letter law generally being understood as a positive systematization or a body built upon functional realist considerations.
2 Abstract and concrete

There are a number of theories that treat legal reasoning and argumentation. There are also many ways of understanding the concept of subsumption. In Sweden, the concept is no longer, at least in doctrine, synonymous with deduction in a non-normative, non-evaluative manner. Nonetheless, the concept of subsumption has its origins in a logic-positivist tradition on legal reasoning that can be difficult to ignore simply by stating that subsumption nowadays involves a normative process. Examples of this will be given below.

In a civil case law (and also other legal cases) several steps of subsumption are performed. The word subsumption indicates that it is possible for a concrete fact to be subsumed under an abstract norm in a process of deduction, a logical assessment with a yes or no answer. Either a fact can be sorted under the norm or it cannot be sorted under the norm. Legal reasoning, at least in a Swedish procedural law doctrinal setting, is often described as a series of subsumptions where evidentiary facts can be subsumed under concrete legal facts and concrete legal facts under abstract legal facts, as shown in Figure 1.

![Figure 1: Subsumption – Law as representation.](image)

3 Different “rule”-based models as well as for example hermeneutical, sociological, mathematical and cognitive approaches see Wahlgren (2000). In a theoretical perspective this is not a new discussion, see e.g. Maccormick (1978). However, When dealing with the normative character of legal reasoning it is my impression that theories mainly are interested in the representation of the legal system and not, as in this article, the expression of legal argumentation.

4 Concerning the logic-positivist origins see, Lindell (1987: 377f).

5 This view on norms could be referred to an idea where the norm itself already contains the information necessary for all future applications of the norm, see Björkholm (1997: 189).

Using this vocabulary litigation can be described as a concrete situation that is ‘lifted’ from a conflict to a legal procedure. Or more precisely, some parts of a conflict, those that are legally relevant, are formulated as legal facts and then pleaded by a party in a legal procedure. In the Swedish civil law cases this is formulated in the Code of judicial procedure chapter 17 paragraph 3. In turn, this provision is based on well established legal principles such as *nemo judex sine actore* (no judgement without a plaintiff), *ne eat juces ultra petita partium* (the judge may not rule beyond the request) and *judex judicare debet secundum allegata et probata a partibus et non scundom conscientiam suam* (the court shall not rule on its own knowledge but on what the parties have pleaded and proven) (Ekelöf 2002: 59).

However, it may be contested whether it is possible for a concrete legal fact to deductively (from a logical perspective) constitute itself as an abstract legal fact. From a theoretical perspective, which will be discussed in more detail in the next section, it is evident that each concrete legal fact must be evaluated and assessed before it can be decided whether it can be referred to a certain abstract legal fact. This means that the connection between the concrete and the abstract is not logical but normative. The normative steps would be more suitable to describe as category ‘jumps’ rather than subsumption. Since it is a normative category jump it is also a transformation. There will be examples of what is meant by transformation and normative process in more detail later on in this article. At this moment I will just give a brief illustration. Swedish tort law has a provision with the wording, roughly translated, that “Anyone who intentionally or recklessly causes bodily injury or property damage must compensate the damage”.

The provision includes a number of abstract legal facts: ‘anyone’, ‘intentionally’, ‘recklessly’, ‘causes’, ‘bodily injury’, ‘property damage’. In a case that refers to this provision a number of concrete legal facts must be invoked in order to be matched with the abstract legal facts. As an example the plaintiff, Ewa, could argue that the defendant, John, stole her bicycle whereupon he tripped and the bicycle was damaged. It is pretty straightforward to match the concrete legal fact John and the damaged bicycle with the abstract legal facts ‘anyone’ and ‘property damage’. The evaluation of “stole her bicycle whereupon he tripped” is perhaps a bit more complicated to match with “intentionally or recklessly causes”, but with the help of another abstract legal fact, the principle

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7 What I mean here is that it does not follow logically in the same way as something that is deductively analytical like the sentence “If Jack is a bachelor, then he is not married”. See Aarnio et al. (1981).
8 The author’s translation. In Swedish: “Den som uppsåtligen eller av vårdslöshet vållar personskada eller sakskada skall ersätta skadan” Skadeståndslag (1972: 207) 2 kap.1 §.
“casus mixtus cum culpa”, it also seems like a well established linking of concrete and abstract legal facts. Nevertheless this assessment also entails a shift of category from the concrete to the abstract and it is therefore not possible to deductively subsume the concrete under the abstract. Furthermore, the understanding of the abstract legal facts predetermines the arrangements of the concrete legal facts presented in the case. This means that the presentation of facts is an expression of a normative assessment rather than a descriptive exercise. Still, as in this example, and as we shall see in the examples below, the normative process can be more or less openly outspoken within the legal discourse depending on whether the normative aspect is accepted as part of the of the established representations of law or not. As we also shall see, it is when we regard law as an expression that these normative processes make it to the surface of the legal discourse.

The traditional procedural law discourse is in many ways focused on the representation of facts, on different levels of the subsumption process. The discourse does not address the transformative process of connecting the levels or the transformed understanding of the facts that comes with the legal evaluation of the facts. A legal discourse that places emphasis on the transformative parts of legal argumentation would instead focus on how legal arguments were expressed as a fusion of the concrete and the abstract. It would therefore add focus on the levels ‘between’ the facts, on how the matching is performed, as illustrated in Figure 2.

![Figure 2: Law as representation – Law as expression.](image)

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9 See Andersson for a more in depth discussion on the narratological implications of subsumption under the principle “casus mixtus cum culpa.” (Andersson 2006)

10 The possibilities to find coherent conventions of how the category jumps are performed has caused Aarnio, Alexy and Pecenick to regard them as transformation rules or transformation conventions that can be more or less foreseeable (Aarnio et al. 1981). In turn, the ideas behind transformation rules could be examined as part of the legal deep structure, see (Tuori 2002).
The theoretical framework, that the shift in emphasis from representation to expression is built upon, stretches back to social constructivism. Yet, it is a constructivist perspective that does not give ‘the social’ a value on its own. A parallel can be drawn to the manner in which Latour uses the term “social”. For Latour the social, has no value on its own, it is merely the result of a description method that assembles associations made by the actors in a process (Latour 2007: 7–9). If we change “social” into “legal”, legal argumentation is the association and reasoning that is performed, no more and no less. If the actors change their ways of association the construction of legal reasoning will also change; “If a dancer stops dancing, the dance is finished” (Latour 2007: 37). If lawyers start to interpret legislation in relation to its societal function instead of the historical intentions of the legislator, law will change, not because of a change in the body of law but because of a shift in the associations in jurisprudence. A shift in discourse is therefore also a shift of the law.

The term discourse has already been used several times in this text. It is used in the sense of the process of fixating meaning within a certain domain. However, the discoursive process with an aim on fixating the meaning of the elements in the discourse will never entirely succeed, there will always be a

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11 Social constructivism is used in a great variety of ways. My onsets here, based on Latour and new materialism, in many ways involve a critique towards well-established constructivism based on e.g. Searle (1995) and Hacking (1999).

12 My theoretical framework shares many onsets with the sociological movement Actor-Network-Theory. The expression of legal argumentation could, in that context, be described as the possibility “[t]o mobilize a certain form of totality with regard to an individual case, irrespective of how tiny it may be – and this is precisely why we call some reasoning ‘legal’” (Latour 2010: 256–257).

13 Or put in other words because of a shift in jurisprudence. Compare Deleuze, L’abécédaire de Gilles Deleuze, avec Claire Parnet (Paris: DVD editions Montparnase, 2004), transcribed in Mussawir (2011: 86): “I remember the time when it was forbidden to smoke in taxis. The first taxi driver who forbade smoking in their taxis – that made a lot of noise, because there were smokers. And among them was a lawyer … There was this guy who didn’t want to be forbidden from smoking in a taxi. So he took the taxi driver to court. I remember it very well: the taxi driver was ruled guilty. If the trial were to take place today, the taxi driver wouldn’t be guilty, it would be the passenger who’d be the guilty party. But back then, the taxi driver was found guilty. Under what pretext? That, then someone took a taxi, he was the tenant. So the taxi passenger was likened to a tenant; the tenant is allowed to smoke in his own home. So the taxi was made out to be a sort of mobile apartment in which the passenger was the tenant. Ten years later, it’s become almost universal: there is almost no taxi in which one can smoke, period. The taxi is no longer made out to be like renting an apartment, it’s a public service. In a public service, forbidding smoking is permitted. All that is jurisprudence.”

possibility for the elements of the discourse to mean something else (Winther Jørgensen and Philips 2000: 36). A discourse is therefore never complete or without openings. Every new expression within the discourse bears the potential of new directions.

Furthermore, the idea of a legal argumentation as constructed in a continuous process, is connected to a theory of language, advocated by e. g. Wittgenstein (later period), where the relationship between sign and meaning is based on conventions rather than linked in an objective one-to-one relationship. There is no ‘natural’ way in which the meaning of words relate to ‘reality’, no natural reason “why a particular [signifier] and [signified] should be linked. Instead, words rely on other words in order to bear meaning (Binder and Weisberg 2000: 120–121). It follows that since legal argumentation is mediated by language there can be no theory free or convention free description of legal facts (Binder and Weisberg 2000: 113). Wittgenstein would also argue that the conventions of sign systems are instable, they are constantly changing within “language games”. Different discourses do not have hard boundaries. Therefore the rules for what lies within the legal sphere can never be exhaustively specified. They depend on the participants in the game, in the field of law, the lawyers and the concepts available to them (Wittgenstein 1968: 67). So, neither abstract legal facts nor concrete legal facts can be objectively described and related to each other in a way where the latter can be deductively subsumed under the first. With this theoretical approach one could assume that subsumption are processes within language conventions rather than statements about the representation of law or the representation of things/facts. This approach therefore puts the idea of law as representation in great theoretical difficulties. Moreover, it follows from this approach that law as representation is connected to blind spots as it fails to acknowledge the transformative trajectory of the legal expression.

However, the idea of rewriting the discourses of subsumption from representation into its expression involves yet another theoretical layer, namely the concept of a flat ontology. A flat ontology contributes to the methodology of legal expression by deconstructing the dichotomy of fact – norm. Instead of focusing on how knowledge is constructed by negative relations between terms, a flat ontology entails that knowledge can be understood as a conception of difference. Processes that produce a difference (or affirmative relations)

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15 Concerning this concept, see e. g. Wennström (1996: 85f).
are therefore the focal point of knowledge in a flat ontology (Dolphijn and Van Der Tuin 2011: 384). This has already been emphasized by e.g. Bruncevic (2014). She uses a Deleuzeian approach to show how “l]aw becomes something that acts, does, creates, fosters, produces rather than something that forbids, restricts, encloses and raises fences” (Bruncevic 2014: 359–360). Legal argumentation is in this regard a communicative tool that connects and creates rather than a language for description. For legal research this means that statements about concrete legal facts and statements about legal facts are part of the affirmative process of doing law, of the ‘becoming’ of law. Legal expressions produces law, regardless whether they involve new directions or arguments or not, since they at least preclude the possibilities of other possible expressions. With these theoretical perspectives in mind one could say that legal argumentation, or more preferably legal discourse, is law and that the becoming of law in this way moves away from or beyond the dichotomy norm – fact. Law becomes both abstract and concrete.

3 Inclusive and exclusive

One could get the impression that law as a process of ‘becoming’ within a flat ontology means that everything is potentially legal since it only has to be constructed as an argument in a legal setting. But that is not what this article is trying to advocate, not everything will pass as a legal argument. This leads into the second contradictory feature of legal discourse, that it has to be inclusive and exclusive at the same time. Legal discourse as it is performed in courts means that a distinction between legal and non-legal, between facts and non(relevant) facts, and the connection between these to categories (subsumption) has to continue to be produced as text, as shown in Figure 3.

16 The theory behind a flat ontology is developed by among others Deleuze & Guattari, Latour, Braidotti, Harraway, Barad och DeLanda and could be said to be part of the theoretical movement new materialism. However, the theory is not uncontested. For relevant criticism see e.g. Philippoulos-Mihalopoulou (2014: 11).
17 For Bruncevic this entails a potentiality rather than a crisis for legal research (2014: 362).
18 This kind of “anything-goes”-critique towards a flat ontology has also been forwarded by Philippoulos-Mihalopoulou (2014: 3, 11).
19 It should be noted that a flat ontology is not opposed to the here presented theory of language in the sense that it is opposed to all dichotomies. For “flat ontology”-theorists like DeLanda, dichotomies are still a part of understanding reality but not a prerequisite for it. See Dolphijn and Van Der Tuin (2012: 43).
Aspects on the inclusive and exclusive effects of legal argumentation have thoroughly been studied as a concept described as *juridification*. The concept has its origins within the discipline of Law and Sociology. It has been used to describe various legal phenomena; most common is perhaps concepts such as ‘flood of norms’ on a macro level and ‘conflicts as property’ on a micro level.\(^\text{20}\) *Juridification* has also been used as one of the key ingredients to describe the autopoietic character of legal reasoning and thereby contributed to understanding of legal discourse (Teubner 1993). However, although it has been an established concept for several decades, and has contributed to the understanding of legal argumentation, it has yet to become an integral part of legal practice.

Different aspects of juridification could be understood as mechanisms that affect the approximation towards a legal discourse.\(^\text{21}\) This includes discoursive genres for presenting legally relevant facts in a conflict between parties, as well as methods for describing the application of law on the identified situation. Understanding the process of juridification takes us closer to understanding the inclusive and exclusive aspects of legal discourse as a discourse of expression.

Legal argumentation has to be inclusive in the sense that law has to be able to deal with everything. Regardless of the situation, the court has to make a decision of some kind. The court cannot respond to the parties that a new kind of phenomena is outside the scope of legal comprehension and that the court therefore refuses to give a ruling or decision. But the new challenges to the court (connected to e. g. internet or globalization) will also give rise to new legal expressions and therefore change the trajectory of legal argumentation. In this

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\(^{20}\) See e. g. Brännström (2009), Blichner & Molander (2008), Christie (1977) and Teubner (1987).

\(^{21}\) The process of approximation towards a legal discourse is not seen as a “on or off”-relationship. There seems to be many ways in which a legal discourse can be constructed around a conflict between parties. For other ‘discourse-based’ definitions of juridification see Brännström (2009: 36), and Torpman (2002: 16).
regard law is inclusive. But on the other hand, juridification also constantly excludes potential directions of the legal discourse in the sense that the court (and the parties) always has to separate the legally relevant from the non-relevant. In order for an argument to be defined as legal it has to differ from the non-legal. According to Teubner the possibilities for creating legal discourse in the realm of the court is limited by three characteristics:

1. “Constraints of decision: the conflict cannot possibly be suspended, one party has to be right, the other wrong.”
2. “Constraint of rational justification: the decision must be founded on reasons which pretend to combine consistency and responsiveness.”
3. “Constraint of rule-making: the decision reduces the complexity of the conflict to an over-simplified rule.” (Teubner 1983: 21)

Building on Teubner (2009) and Zartaloudis (2011) it could be argued that theories about legal argumentation that do not consider these limitations would be missing important aspects of the exclusive function of law, these limitation are an inevitable part of a legal expression within the realm of a court ruling.

However, if law is in a process of constant ‘becoming’, the separation between legal and illegal, and relevant facts and non-relevant facts, is not static but rather a constant negotiation where different actors give suggestions as to how to proceed and continue the legal discourse. A process of juridification takes place every time a case is brought before the court. New expressions of legal argumentation will always be presented. The process of juridification creates a legal discourse that can be said to be a “body without organs”, a body that is constantly changing, unfinished, in an endless stage of becoming (Bruncevic 2014: 365).

But, let us now return to the more concrete matter at hand namely finding a methodology for studying legal argumentation in court as part of a discourse that revolves around the idea of law as expression. The legal discourse, regardless of its changing character, seems to create inclusions and exclusions. But how? How does the legal discourse distinguish a legal expression from a non-legal expression. What kind of concepts could help us understand how legal trajectories are started? Why does the legal incarnation of the bumblebee sometimes fly but sometimes not? The next part of this article will discuss methodological concepts for studying and understanding law as expression.

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22 Which could be compared with Dworkin’s ‘chain-novel’-metaphor (Dworkin 1986).
23 “Body without organs” is a concept developed by Deleuze and Guattari (2004).
4 Narrative studies of ‘discourses of subsumption’

In this normative world, law and narrative are inseparably related. Every prescription is insisted in its demand to be located in discourse – to be supplied with history and destiny, beginning and end, explanation and purpose. And every narrative is insistent in its demand for its prescriptive point, its moral. History and literature cannot escape their location in a normative universe, nor can prescription, even when embodied in a legal text, escape its origin and its end in experience, in the narratives that are the trajectories plotted upon material reality by our imaginations (Cover 1983: 4).

In this section I will try to show how legal rulings can be studied as a legal expression using narrative tools. But first a few words on narratology as a method for legal research. Narratology has not entirely been welcomed into legal research with open arms. According to Sherwin law as narrative has been received with scepticism since it is not in accordance with the “logoscientific” genre of law. “The world according to this genre is one in which logic makes its demands and reality complies” (Sherwin 2009: 95). This, of course, is quite different from the theoretical framework presented above.

Narrative studies of law are focused on understanding the story, plot and narration in which legal argumentation is situated. The story consists of a number of sequences, which can be compared to building blocks. The outer limits of what is regarded as a story (the totality of text) can vary depending on the interest of study. It can consist of a presentation of the legal basis for a case, an assessment of evidence, an assessment of concrete legal facts in relation to abstract legal facts, etc. In a presentation of the legal basis the presentation of each concrete legal fact can be regarded as one sequence. The plot can be described as the order in which the sequences are placed. The plot creates causality between the different sequences and depending on the way the sequences are ordered, and emphasised, different narratives are constructed, each with different potential for upgrading or downgrading sequences as important in relation to the totality of the story. In other words, the narrative is the overall scheme deciding how to present the story, by ordering sequences into a plot (Andersson 2006). In case studies of Swedish civil law cases that I have conducted, the findings have been categorized into three themes; Legal enthymemes, narrative dissonance and overdetermined subject positions. These themes will now be briefly presented.

25 For other examples of research within the field of law and narrative see e.g. Amsterdam & Bruner (2000), and Brooks & Gewirtz (1996).
4.1 Legal enthymeme

The concept legal enthymem highlights the underlying premises that are necessary in order to perform a subsumption. In one of the cases of the case study\textsuperscript{26} the concrete legal fact motprestation (compensation or contribution) was subsumed under the abstract legal fact nyttighet (a good).\textsuperscript{27} In order to do so the court needed to rely on an unspoken premise (an enthymeme) that presumes that the legal subject is able to make autonomous decisions about exchanging resources. Since this premise has no discoursive element to be connected to, in a legal discourse based on representation, it will not be part of the judgement text even though it plays an essential part in the narrative plot that enables the subsumption. On the other hand, a methodology that focuses on the trajectory of the legal argument, its expression, will spot the enthymem as a necessary building block for the argumentation as part of the plot leading towards the subsumption of the case.

4.2 Narrative dissonance

A narrative dissonance emerges when the parties and the court communicate regarding the same set of legal facts (abstract and/or concrete) but differ in the narrative construction of the facts. Within civil procedure contradiction is an important principle, and legitimacy of the procedure depends on the ability for the parties to respond to the observations of the other party.\textsuperscript{28} However, when parties discuss the same representation of law, but not the same expression of law, one could question whether the principle of contradiction is upheld. In one of the cases in the case study the same sequences were used (but in different narrative settings) by different actors in the court, in order to narrate different types of situations. The plaintiff’s narrative indicated an oral contract of fixed price, the defendant’s narrative indicated an oral contract of current account, and finally the court’s narrative indicated a declaration of approximate price given from the plaintiff to the defendant.\textsuperscript{29} Since the parties did not address the differences this meant for each of their representations of the facts that it could

\textsuperscript{26} The themes are results of a case study that is part of the author's phd-project and will be discussed in greater detail there (forthcoming 2017).
\textsuperscript{27} NJA 2013 s. 700, The Swedish Supreme Court, case T 1390–12.
\textsuperscript{28} Which follows from European Convention on Human Rights article 6.
\textsuperscript{29} NJA 2005 s. 205, The Swedish Supreme Court, case T 2362–01.
be described as a narrative dissonance leading to miscommunication between the parties of the process.

4.3 Overdetermined subject positions

The third theme deals with different subject positions of the parties in a civil procedure. A party of a court proceeding could in a case hold several different positions (consumer, private person, party in the case etc.). Each of these positions can be connected to different rule-systems, such as consumer law, general private law and procedural law. A discourse based on representation that focuses on a cohesive legal subject will have difficulties spotting these different positions. In the example given above the legal subject was presumed to make autonomous decisions as a step to access the consumer protection legislation. In order to be protected as a not-so-autonomous subject, namely a consumer, a narrative that presumed the party to be just that, autonomous, was applied. This non-focus on the subject position risks undermining the norms that the court aims to uphold and would have been more straightforward to spot within a legal discourse that revolves around law as expression.

5 Conclusion

This article has presented the theoretical and methodological onsets for rewriting legal argumentation from a discourse revolving around *representation* into a discourse revolving around *expression*. It sketches certain outlines towards a methodology for narrative studies of discourses of subsumption. This has been done within a theoretical approach that sees law as a process, a constant ‘becoming’. Development towards a discourse that focuses on law as expression could be a way of making important normative aspects of legal reasoning visible and operational. Narratology has been presented as a suitable method for identifying legal trajectories, the legal storytelling. Methodological concepts, that have been briefly presented here, such as *narrative dissonance*, *legal enthymemes* and *overdetermined subject positions* have been presented as concrete tools to understand problematic aspects of subsumption and as revealing normative aspects of legal argumentation that is not openly legitimated within legal argumentation that revolves around the ‘existence’ of law. This also entails a larger understanding of legal ‘application’ ('becoming’ being more suitable) and the concept of subsumption. The discourse of subsumption is in this article
presented as wider and including many more aspects of reality (in a flat ontological sense) compared to the traditional idea of subsumption as a deductive practise. It is a discourse of subsumption that includes not only ‘what is law’ but also ‘how is law’.

References


