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The hidden meanings in the case law of the European Court for Human Rights

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Abstract: In my paper, I will study the case law of the European Court of Human Rights by using discourse analysis as a method. My hypothesis is that the court has changed its line concerning the right to a fair trial (in article 6 of the European Convention for Human Rights) over the last twenty years. Earlier, it always defended the rights of the accused and the authorities’ problems, for instance, in fact gathering, were recessive. The same covered the rights of the witnesses even if the court usually confessed that also the witness has their rights, which should be respected. It also stressed that authorities of course have difficulties with proof – for example – the offences that are connected with the organized crime. Still, the rights of defense were always number one and inviolate. During recent years, the line seems to have changed even if the court has not transparently said so. However, it has given some new precedents by the Grand Chamber where the rights of the defense have been limited more than before; for instance, the cases Jalloh v. Germany (11 July 2006), Gäfgen v. Germany (1 June 2010), and Al-Khawaja and Tahery v. Great Britain (15 December 2011). The expressions used in case law show that the way of thinking has changed as well. Still, the changes are sometimes more hidden than transparent where discourse analysis is the only tool for catching the changes and showing differences in the thinking of the court.

Keywords: case law, discourse analysis, European Court for Human Rights, fair trial, legal dogmatics, court rhetoric, the rights of defense

1 Discourse analysis as legal method

Discourse analysis can be an effective and very fruitful method for research especially case law and therefore it should be used as one instrument in legal research. Even though discourse analysis has not traditionally belonged in a

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legal expert’s tool box, case law has been mostly studied by the means of legal
dogmatics. Still, these two different tools will give answers to two different
questions and therefore they can be seen as complementing each other. Legal
dogmatics is a useful method when the research covers legal interpretations
given by the court. Still, it does not give any information on the questions if
the court has changed its interpretation due to sociological reasons, which
means that there is a change in attitudes and the way of thinking behind the
new interpretation. Neither will it reply to the question if and what
kind of hidden meanings there are in the court rhetoric and what kind of signals
the use of language will give us as addressees. Because the law is not an isolated
area of its surroundings but one bit in that and because laws should be
seen as our common rules to fix our common lives in the society, this type
of research should be more common and used by lawyers more frequently than
it is just now.

As a method, discourse analysis is based on analyzing the relationship
between language and reality in the same theoretical manner as in social
constructionism (Niemi-Kiesiläinen et al. 2006c: 26). Law, legislation, and case
law are one example of institutionalized societal practices that are voiced by the
language expressed in texts and speech acts. Therefore there is always an
interaction between law and society. Even legal identities, which often have
been seen as given and changeless, are just social reconstructions (see Niemi-
Kiesiläinen et al. 2006a: 9–10). Law fundamentally is the product of societal
discourse, or it has even been described as societal discourse itself (Niemi-
Kiesiläinen et al. 2006c: 21). The latter refers especially to changing rules and
changing interpretations. Therefore discourse analysis is one of those most
natural methods to touch it. However, it is not that common in legal research.¹
Court’s speech acts and decisions made by them (texts) have too often been seen
as objective but this is not the whole truth. What is more, courts’ texts or speech
acts reflect the reality around us or the values connected to the reality. Therefore
discourse analysis is an important tool to catch these reflections and therefore
court cases should be seen also as subjects.

¹ Legal theory and procedural law are common methods to research case-law but the linguistic
analysis of court decisions has been overshadowed by this normative analysis. However, the
trial lasts from its very early beginning until the judgment whereas linguistics and language
control the thought. Only in the case where the decision maker makes his decisions based solely
on his authority, rhetoric has no role. Still, when his decisions can always be criticized and
doubts may arise, rhetoric plays a role because in those situations the decision maker has to
convince the audience (Paso 2009: 18).
Texts and speech acts\(^2\) include considered or latent meanings (see Alvesson and Sköldberg 2010: 460–461), which can exist even before the text. (“I like X, therefore I describe his behavior with positive words.”) Therefore discourse analysis can be used to catch the hidden meanings behind the law.\(^3\) This interaction is, however, mutual. Therefore expressions also do change the world. Consider the following example illustrating this: “because I describe him with positive expressions even all others start to like him.” Discourse is namely understood as a form of practice and social action where it organizes our interpretation of society and of what happens in society. Discourse is use of language seen as a form of social practice. Therefore discourse analysis is the analysis on how texts work within sociocultural practice. In addition, the importance of language is perceived not only as a channel of communication but also as a reflection of social reality. Any communicative event carries with it a segment of the world-view of the language users (Way 2012: 14–15 and other resources she has cited).

Discourse analysis has an external perspective and is interested in intertextuality between law and other societal discourses whereas legal theory has internal and normative perspective into the validity of the law and arguments (see Niemi-Kiesiläinen et al. 2006a: 14, 2006c: 27–28). The same covers legal dogmatics. The point of view is very internal and restrictively normative. That's why we should make a difference between other more traditional tools in legal research and discourse analysis and be aware which method should be used and when (all of them have their place in legal research). In discourse analysis, compared with legal dogmatics, instead of talking about problems we are talking about how problems are talked about (Niemi-Kiesiläinen et al. 2006a: 15). Therefore discourse analysis gives us important information that cannot be received with the help of other instruments. As told above, legal dogmatics is based on normative and internal perspective. Instead of that, discourse analysis is more interested in the interaction between law and other societal discourses. The perspective is more sociological than normative (legal) and the point of view is external. The difference can be described with so called *sein und sollen* concepts, where *sein* refers to legal reality whereas *sollen* refers to rules in their normative context. Legal theory warns about interpretations which are based on *sein*, that is into reality but which does not tell anything about their

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\(^2\) Also Alvesson and Sköldberg cover both texts and speech acts by discourse and are of the opinion that discourse covers them both (Alvesson and Sköldberg 2010: 460).

\(^3\) It has been used – for instance – to catch the hidden suppositions in legal order in the case of domestic violence (Niemi-Kiesiläinen et al. 2006b: 5).
normative truth. However, this distinction has recently become smoother and it has been acknowledged that there is an interaction between *sein und sollen*. There is a link between *sein und sollen* because legal reality in the society affects new legislation as amendments and changes in case law and interpretations (Ervo 2005: 83; Niemi 1996: 128). That’s why law is not only renewed, but it is also amended, as the result of this interaction (Niemi-Kiesiläinen et al. 2006c: 27–28).

Should we then use legal dogmatics or discourse analysis to research case law? As far as I am concerned, there is a difference between precedents and the other type of case law. Precedents are already one type of norms and they are meant to be followed. Therefore they can be researched by legal dogmatics whereas discourse analysis can be used as an extra tool even then to tell us more about the attitudes and the way of thinking of the court. However, in the case of precedents, diction, for instance, is more conscious because the interpretation is meant to be followed even in the future.

How about regular cases then? This type of case law cannot be analyzed only with the help of legal dogmatics but regular cases can tell us many sociological facts if they are researched by discourse analysis⁴ when the attitudes, the way of thinking, and the world view of the court can be touched. By doing so, it is possible to see which direction the way of legal thinking is following already before precedents are given and before the legislator reacts. In other words, with the help of discourse analysis we can see and catch the tendencies.

Another very useful possibility that discourse analysis can offer is causing counter discourses (to be aware). It can also be used to show that there are no counter discourses at all, not even in court rhetoric. For instance, in case law covering drunk driving courts seem to repeat the same general disapproval as other societal discourses when touching drunk driving. There is no counter discourse in the society on this crime and courts seem to follow the same trend avoiding the counter discourse in their case law (Ruuskanen 2006: 54). Therefore it can be used as a critical tool in legal research. It also raises the actors to see their responsibility for how to use language. The questions to be asked are then: can we trust the message, and was the message really meant to be a signal? In any case, it (the speech act or text) affects like this. Every message the court gives changes the world.⁵ However, the phenomenon is

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⁴ In discursive methods, it is typical that even one single case can be very important (Paso 2009: 341).
⁵ Cf. Paso (2009: 384) where she notes that single court cases do not rearrange or reorganize the society.
mutual and it works like a mirror. What is more, changing society changes laws and interpretations.

Because discourse analysis reveals incoherent discourses and describes more *sein* – distinction instead of *sollen*, it does not help as such in legal interpretation in its normative meaning. However, by analyzing hidden and latent assumptions, it is possible to analyze even generally accepted interpretations and find criteria for re-evaluating them (Niemi-Kiesiläinen et al. 2006c: 35).

Language and the way of using it, written or oral expressions, are not value neutral (see Way 2012: 14–15 and other resources she has referred to). Not even court rhetoric is. For instance, interviews can be described instead of speech or information machines as interaction on their own terms and conditions. In real discourses, there are not often such ideal speech acts that are peeled from misunderstandings and self-deception, for instance. Therefore private and public speech acts, for instance, usually vary (Alvesson and Sköldberg 2010: 460–461, 465).

2 Background

In this section I will describe an experiment to check if discourse analysis can give us some extra information when researching case law compared with legal dogmatics. Therefore I will select three recent precedents from the European Court of Human Rights (ECHR) and carry out first research with the help of legal dogmatics, on the novelties in the precedent. After that I will continue by using discourse analysis to check if the same cases tell us even more when using this doublecheck and multimethod. I stressed above that discourse analysis can be used even better for regular case law instead of precedents but my experiment here will cover only precedents because I want to compare the results when using these different methods in case law research. Because precedents include new interpretations made intentionally they should be researched with the help of legal dogmatics. Still, the same cases may include hidden meanings and this type of background information on the way of thinking and current attitudes at the court can be touched only by discourse analysis.

My hypothesis is that ECHR has changed its attitude in the last twenty years when balancing the right to fair trial in criminal cases and the public interest to investigate crimes. In “olden, golden times” the protection of the defendant and his right to participate in criminal proceedings was always the main core
I will now present three precedents from the Grand Chamber where the court has more understanding towards authorities and the public interest in the fight against serious and organized criminality and solving crimes. The precedents cover the admissibility of illegal evidence, torture and inhuman treatment as well as the right to cross-examination of the witness.

The referenced cases are:
- Jalloh v. Germany (11 July 2006, Grand Chamber.)
- Gäfgen v. Germany (1 June 2010, Grand Chamber.)
- Al-Khawaja and Tahery v. UK (15 December 2011, Grand Chamber.)

I will, however, begin with one example from the earlier case law that describes very well the earlier way of thinking when the rights of the defense were always clearly number one and the main core of Art. 6(3) even when colliding with the rights of other actors or public interest. Unfortunately, I cannot present earlier case law in a more comprehensive way in this context. There is not enough space to do all of that in one article but I have researched very widely the case law of ECHR in two earlier monographs and in many articles (see, for instance, Ervo 2005, Ervo 2008). Here I will depict only one representative case to compare. The case is Van Mechelen v. The Netherlands (23 April 1997) and it covers the problems of using anonymous witnesses.

3 The analysis of earlier case law: Van Mechelen v. The Netherlands (23 April 1997)

3.1 The analysis by legal dogmatics

The case covered is especially reliant on the evidence of anonymous police officers and the court decided that there had been a violation when police officers had been heard anonymously. The court wrote in its assessment that the balancing of the interests of the defense against arguments in favor of maintaining the anonymity of witnesses raises special problems if the witnesses in question are members of the police force of the State, who owe a
general duty of obedience to the State’s executive authorities and usually have links with the prosecution – for these reasons alone their use as anonymous witnesses should be resorted to only in exceptional circumstances – in addition, it is in the nature of things that their duties, particularly in the case of arresting officers, may involve giving evidence in open court.

On the other hand, the Court had recognized in principle that, provided that the rights of the defense are respected, it may be legitimate for the police authorities to wish to preserve the anonymity of an agent deployed in undercover activities, for his own or his family’s protection and so as not to impair his usefulness for future operations.

Having regard to the place that the right to a fair administration of justice holds in a democratic society, any measures restricting the rights of the defense should be strictly necessary – if a less restrictive measure can suffice then that measure should be applied.

In the present case, the defense was not only unaware of the identity of the police witnesses but was also prevented from observing their demeanor under direct questioning, and thus from testing their reliability – it has not been explained to the Court’s satisfaction why it was necessary to resort to such extreme limitations on the right of the accused to have the evidence against them given in their presence, or why less far-reaching measures were not considered – it cannot be said that the handicaps under which the defense labored were counterbalanced by the procedures followed.

Moreover, the only evidence relied on by the Court of Appeal that provided positive identification of the applicants as the perpetrators of the crimes were the statements of the anonymous police officers – that being so the conviction of the applicants was based “to a decisive extent” on these anonymous statements.

From a legal point of view, the message was therefore that the right to full cross-examination in the way that the reliability of witnesses can be tested by knowing their identity is the main starting point and belongs to the defense’s rights. There can be some counter reasons, for instance, the rights of the witness, when the anonymous hearing is justified. The named restriction into the defense’s rights, however, has to be counterbalanced by other means. In addition, this type of untested evidence could not be the sole or decisive proof. However, when the witnesses were police officers the anonymous hearing was not at all possible due to the reasons described above, and there was a violation of Art. 6(3d)(Ervo 2005: 317–341 and 2008: 226–249).

Otherwise, all that is in balance with the court’s earlier case law. The only “news” in this case was that police officers cannot usually be heard anonymously.
3.2 The analysis by discourse analysis

In its assessment the Court noted the following:

*It is true that Article 6 does not explicitly require the interests of witnesses in general, and those of victims called upon to testify in particular, to be taken into consideration. However, their life, liberty or security of person may be at stake, as may interests coming generally within the ambit of Article 8 of the Convention. Such interests of witnesses and victims are in principle protected by other, substantive provisions of the Convention, which imply that Contracting States should organize their criminal proceedings in such a way that those interests are not unjustifiably imperiled. Against this background, principles of fair trial also require that in appropriate cases the interests of the defense are balanced against those of witnesses or victims called upon to testify.*

It continued in the assessment (points 54 and 55):

*however, if the anonymity of prosecution witnesses is maintained, the defense will be faced with difficulties which criminal proceedings should not normally involve. Accordingly, the Court has recognized that in such cases article 6 requires that the handicaps under which the defense labors be sufficiently counterbalanced by the procedures followed by the judicial authorities. Finally, it should be recalled that a conviction should not be based either solely or to a decisive extent on anonymous statements.*

In the Court’s opinion (points 56 and 57), the balancing of the interests of the defense against arguments in favor of maintaining the anonymity of witnesses raises special problems if the witnesses in question are members of the police force of the State. *Although their interests – and indeed those of their families – also deserve protection* under the Convention, it must be recognized that their position is to some extent different from that of a disinterested witness or a victim. They owe a general duty of obedience to the State’s executive authorities and usually have links with the prosecution; for these reasons alone their use as anonymous witnesses should be resorted to only in exceptional circumstances. *In addition, it is in the nature of things* [sic!] that their duties, particularly in the case of arresting officers, may involve giving evidence in open court. On the other hand, the Court has recognised in principle that, provided that the rights of the defense are respected, it may be legitimate for the police authorities to wish to preserve the anonymity of an agent deployed in undercover activities, for his own or his family’s protection and so as not to impair his usefulness for future operations.

The Court continues (points 58 and 62):

*having regard to the place that the right to a fair administration of justice holds in a democratic society, any measures restricting the rights of the defense should be strictly necessary. If a less restrictive measure can suffice then that measure should be applied. However these measures cannot be considered a proper substitute for the possibility of the defense to question the witnesses in their presence and make their own judgment as to their*
demeanor and reliability. It thus cannot be said that the handicaps under which the defense labored were counterbalanced by the above procedures.

The highlighted expressions of the Court show us clearly the way of thinking and values when optimizing the colliding rights of different actors and aims. The rights of defense are in the core anyway and for instance the rights of police officers and even their families are recessive in this collision. The Court confesses that those rights exist but they cannot be fulfilled in the way which means restrictions for the defense. In this collision the public interest is recessive as well. This type of thinking is so clear that it has been described with the expression “in the nature of things” and “any measures restricting – should be strictly necessary.” Those colliding interests are protected only “in principle” (not in practice?). Many expressions the court uses show rather clearly how they underestimate the rights of the police officers and their families and how much they do respect the rights of the defense. There are expressions like the defense will be “faced” with “difficulties” and there will be “handicaps” in the procedure. “Although” their interests – and indeed those of their families – “also deserve” protection – “their position is to some extent different” from that of a disinterested witness or a victim. “For these reasons alone” their use as anonymous witnesses should be “resorted” to only in “exceptional” circumstances. Provided that the rights of the defense are respected, it “may be legitimate.” In the case this type of ranking values corresponds with the official and intentional line of the court, the expressions and the diction are – of course – outside all the critics. However, it also tells us how strong this valuation between the highly respected rights of the defense and not that important rights of police officers and their families. Still, the language seems to correspondent with the legal message researched by legal dogmatics. The extra information we obtained in this case is that this type of value ranking seems to be based on quite strong attitudes and ways of thinking. The court seems to be aware of what they are doing and they are purposeful in their line.

4 The analysis of recent precedents

4.1 Jalloh v. Germany (11 July 2006, Grand Chamber)

4.1.1 The analysis by legal dogmatics

The applicant claimed that he had been subjected to inhuman and degrading treatment as a result of having been forcibly administered emetics. He relied on Article 3 of the Convention, which provides: “No one shall be subjected to
torture or to inhuman or degrading treatment or punishment.” The court decided that there was a violation of Article 3 of the Convention in respect of the applicant’s complaint concerning the forcible administration of emetics to him.

What was new in this case is that illegally obtained evidence may be used even as sole or decisive evidence when the evidence is strong and there is no risk of it being unreliable. In those cases the need for supporting evidence is correspondingly weaker. Earlier it had been more obvious that illegally obtained evidence could not be the main or the only evidence in the case.

The court further said that the public interest cannot justify measures that extinguish the very essence of the applicant’s defense rights, including the privilege against self-incrimination guaranteed by Article 6 of the Convention. However, on the contrary, the public interest seems to justify some minor exceptions from the rights guaranteed in Article 6.

In addition, the court said that the use of evidence obtained against Article 3 (in the situations of inhuman and degrading treatment but not torture) not automatically renders a trial unfair. According to the earlier case law, a piece of evidence which had been obtained against Article 8 (the protection of private and family life) did not cause the violation of Article 6.7 The news is then that even the piece of evidence that is obtained against Article 3 may have been used legally in the fair trial according to the special requirements mentioned in the Jalloh case. The news was also that the illegally obtained piece of evidence can be used even as sole or decisive evidence (not only as additional evidence like earlier) under the specific circumstances mentioned in the Jalloh case. Summa summarum, two steps towards the public interest were taken.

4.1.2 The analysis by discourse analysis

In the court’s assessment covering the prohibition of torture and inhuman treatment, the court wrote (the chapter “relevant principles”):

1. The assessment of this minimum level of severity is relative... Allegations of ill-treatment must be supported by appropriate evidence. To assess this evidence, the Court adopts the standard of proof “beyond reasonable doubt” but adds that such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact.
2. Treatment has been held by the Court to be “inhuman” [sic quotes!] because...
3. In determining whether the proceedings as a whole were fair, regard must also be had to whether the rights of the defense have been respected. While no problem of fairness necessarily arises where the evidence obtained was unsupported by other material, it may

7 Khan v. Yhdistynyt Kuningaskunta (12.5.2000).
be noted that where the evidence is very strong and there is no risk of it being unreliable, the need for supporting evidence is correspondingly weaker.

4. The general requirements of fairness contained in Article 6 apply to all criminal proceedings, irrespective of the type of offence in issue. Nevertheless, when determining whether the proceedings as a whole have been fair the weight of the public interest in the investigation and punishment of the particular offence in issue may be taken into consideration and be weighed against the individual interest that the evidence against him be gathered lawfully. However, public interest concerns cannot justify measures which extinguish the very essence of the applicant’s defense rights...

5. Moreover, the public interest in securing the applicant’s conviction cannot be considered to have been of such weight as to warrant allowing that evidence to be used at the trial.

The quotes around the word “inhuman” show negative attitudes. It is strange to use quotes because the court decided that it was a violation and therefore it was inhuman. The quotes show that despite their final decision, they seem to have thought that it was quite ok anyway to give emetics to get evidence in drug trafficking. The hidden attitudes seem to be there even if they have not affected the judgment. Similar, but not that clear indication on hidden attitudes is that severity is called to be “relative.” That type of underestimating expression when it concerns a serious thing shows hidden meanings in their attitudes. In addition, it has been repeated twice (points 1 and 8) that a proof may follow from the coexistence of sufficiently strong, clear, and concordant inferences or of similar unrebuted presumptions of fact, which means that actually no separate proof is needed. The expression factually denies its original meaning by turning its content to the opposite. In the end the court considers many times the meaning of public interest. It has been weighed from different points of view and in the end the violation was found in the case. However, the public interest is very clearly taken up in the court rhetoric, which shows that this is an important value in the court’s way of thinking and when weighing up different interests. I would like to say that the court rhetoric shows in this case that the public interest seems to be a strongly coming concept. However, the court has not been partial in its rhetoric but there are many examples of the expressions where the court shows empathy to the applicant. Here are some of the most representative expressions of that type:

6.... which shows that force verging on brutality was used against him... This must have caused him pain and anxiety. He was subjected to a further bodily intrusion... must have been humiliating for him.

7. Since the applicant violently resisted the administration of the emetics and spoke no German and only broken English, the assumption must be that he was either unable or unwilling to answer...

8.... the impugned measure attained the minimum level of severity...

8 It is possible to use Pathos-argumentum by using, for instance, quotes (Paso 2009: 309).
The court does not avoid a wide discussion based on an evaluation of where to put the limits of brutality and inhuman treatment. Despite their decision, their attitudes seem to vary and there are hidden meanings that refer to the sympathy for public interest and authorities. Time will show which direction the way of thinking will take and if more precedents will be given where the public interest and the difficulties of authorities are taken more and more into consideration.

4.2 Gäfgen v. Germany (1 June 2010, Grand Chamber)

4.2.1 The analysis by legal dogmatics

In this case, the applicant submitted that his right to a fair trial had been violated, in particular by the admission and use of evidence that had been obtained only as a result of the confession extracted from him in breach of Article 3. In the case, a policeman threatened to cause physical pain to the applicant if he denies co-operating. The policeman tried to get to know where the applicant keeps the child who was in serious danger.

The European Court found out that the pieces of evidence that had been obtained with the help of the illegally obtained confession were used at the trial only to check if the confession made later was correct and trustworthy or not. In addition, the applicant had voluntarily confessed to the crime later during the trial and that confession was no longer linked with the inhuman treatment during the police investigation. Therefore the latter confession was admissible and the trial as a whole was fair.

In this case, the European Court considered carefully the meaning carried by the pieces of evidence, which were fruits of the poisonous tree, and how they had been used. The Court decided that the fruits of the poisonous tree are not absolutely inadmissible even in the case where the illegality was the threat of physical pain during the police investigation.

However, that kind of inhuman treatment, which includes the policeman’s threat to cause physical pain in the case the suspect denies co-operating with, is a very serious and unwanted situation that should be avoided by all possible means. Therefore the Court decision is susceptible to criticism. The admissibility of the fruits of the poisonous tree should be very limited if not totally prohibited in the situations where the illegality in obtaining evidence has been that serious and concerned the authorities. Therefore the final decision made by the ECHR was not very strict even if they considered all circumstances carefully. Still, they
seem to have avoided the interpretation where the fruits of the poisonous tree were automatically inadmissible.

4.2.2 The analysis by discourse analysis

First, the court makes comparisons with the national law of the Member State trying to find the European standard from local laws (point 9). However, the case is not solved by those means and the Court notes that there is no clear consensus among the Contracting States to the Convention, the courts of other States and other human-rights monitoring institutions about the exact scope of application of the exclusionary rule.

10. The Court is further aware of the different competing rights and interests at stake. On the one hand, the exclusion of — often reliable and compelling — real evidence at a criminal trial will hamper the effective prosecution of crime. There is no doubt that the victims of crime and their families as well as the public have an interest in the prosecution and punishment of criminals, and in the present case that interest was of high importance. Moreover, the instant case is particular also in that the impugned real evidence was derived from an illegal method of interrogation which was not in itself aimed at furthering a criminal investigation, but was applied for preventive purposes, namely in order to save a child’s life, and thus in order to safeguard another core right guaranteed by the Convention, namely Article 2.

11. The Court accepts that the State agents in this case acted in a difficult and stressful situation and were attempting to save a life. This does not, however, alter the fact that they obtained real evidence by a breach of Article 3. Moreover, it is in the face of the heaviest penalties that respect for the right to a fair trial is to be ensured to the highest possible degree by democratic societies.

12. However, contrary to Article 3, Article 6 does not enshrine an absolute right.

13. It can thus be said that there was a break in the causal chain leading from the prohibited methods of investigation to the applicant’s conviction and sentence in respect of the impugned real evidence.

14. The Court observes in the first place that prior to his confession on the second day of the trial; the applicant had been instructed about his right to remain silent and about the fact that none of the statements he had previously made on the charges could be used as evidence against him.

15. Moreover, the applicant, who was represented by defense counsel, stressed in his statements on the second day and at the end of the trial that he was confessing freely out of remorse and in order to take responsibility for his offence despite the events of 1 October 2002.

16. As regards the rights of the defense, the Court further observes that the applicant was given, and availed himself of, the opportunity to challenge the admission of the impugned real evidence at his trial and that the Regional Court had discretion to exclude that evidence.

17. The Court concludes that in the particular circumstances of the applicant’s case, the failure to exclude the impugned real evidence, secured following a statement extracted by
means of inhuman treatment, did not have a bearing on the applicant’s conviction and sentence. As the applicant’s defense rights and his right not to incriminate himself have likewise been respected, his trial as a whole must be considered to have been fair.

The rhetoric quoted above seems mostly to be quite comprehensive and neutral. However, the most serious example of hidden meanings is the example where the court indirectly refers to the interest of revenge in the form of prosecution and punishment when saying “There is no doubt that the victims of crime and their families as well as the public have an interest in the prosecution and punishment of criminals, and in the present case that interest was of high importance.” It is rare when things like that are clearly written out in court decisions. Usually, dramatic impressions are avoided and the court text is written in a boring way even if the facts in the case can be tragic. Therefore it is somehow strange and rare that the court stresses the interest to prosecute and punish and it is even said that in this case that interest was of high importance. How can the court know that? Has this type of attitudes of victims and their families as well as the general audience been researched by the court or is it just assumed? For sure, it is just assumed and therefore the expression shows us the attitudes of the court itself instead of the attitudes of the general audience, victims, family members, etc. Here the court expresses its own emotions very clearly and in a way that is not typical in court rhetoric. The court seems to be angry with the offender and wants to get revenge! Here the formulations in the judgment are extremely vulnerable to criticism.

As we can now see, pathos-rhetoric is not only something that belongs to the advocates in the courts but the judges use the same to get the audience to react in the way they want to. The aim of this pathos-rhetoric is that the audience accepts the decision and the reasons that led to it and will act according to this legal advice in the future (Paso 2009: 250). It is also the question of ethical arguments when the court tries to give reasons for the change. Ethical reasoning is very typical in such a situation (Paso 2009: 273). It is not only the law and the legislator that are political agents but the same aim to promote certain values or certain type of behavior can be realized in the case

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9 Pathos arguments have usually been found unsuitable for the court rhetoric because their nature is impassioned. Therefore it is very typical to ask if they do exist in the court rhetoric, or could the same issue be expressed more neutrally (Paso 2009: 152). However, the language is never neutral, not even at the court (Paso 2009: 153).

10 Pathos-arguments affect emotions of the audience. When these types of arguments are used, the applied legislation can already include pathos-criteria. However, this is not always the reason for courts to use pathos arguments. The court may, namely, use pathos-arguments even just as a rhetoric tool (Paso 2009: 248).
law as well where the court is such a political agent (Paso 2009: 299). In EU law this phenomenon has been described by the concept of “political integration by jurisprudence” (Paso 2009: 331). By affecting emotions the court can uniform its citizens and in that type of integration pathos-arguments are the most effective (Paso 2009: 383).

Still, there is even counter-discourse in the case. Below I provide some examples:

On the other hand, a defendant in criminal proceedings has the right to a fair trial, which may be called into question if domestic courts use evidence obtained as a result of a violation of the prohibition of inhuman treatment under Article 3, one of the core and absolute rights guaranteed by the Convention. Indeed, there is also a vital public interest in preserving the integrity of the judicial process and thus the values of civilized societies founded upon the rule of law.

While having regard to the above interests at stake in the context of Article 6, the Court cannot but take note of the fact that Article 3 of the Convention enshrines an absolute right. Being absolute, there can be no weighing of other interests against it, such as the seriousness of the offence under investigation or the public interest in effective criminal prosecution, for to do so would undermine its absolute nature. In the Court’s view, neither the protection of human life nor the securing of a criminal conviction may be obtained at the cost of compromising the protection of the absolute right not to be subjected to ill-treatment proscribed by Article 3, as this would sacrifice those values and discredit the administration of justice.

This does not, however, alter the fact that they obtained real evidence by a breach of Article 3. Moreover, it is in the face of the heaviest penalties that respect for the right to a fair trial is to be ensured to the highest possible degree by democratic societies.

Even the counter discourse includes emotions. The court talks about values of civilized societies, the rule of law, core and absolute rights, it even uses the verb sacrifice and summarizes the discussion by referring to a democratic state. The court seems to be alive! It has emotions and it even shows them! This case

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11 See also Ervo (2013: 129, 131–132), where the author discusses the question how trials can be seen as forums for moral and political discussions. On that discussion see especially Wilhelmsson (2002).

12 Paso continues that, for instance, the argument technic of House of Lords in United Kingdom varies between routine cases and hard cases. In the latter situations, the court uses persuasive storytelling whereas in routine cases there is no need to convince and therefore the court rhetoric in those situations is very limited (Paso 2009: 383).

13 Usually courts try to avoid detailed dissonance that can show the weakness of the judgment. Therefore they used to try to find information that supports the decision made by the court (Paso 2009: 290).
has raised them and yet it is extremely rare to see emotional court rhetoric in Europe.

4.3 Al-Khawaja and Tahery v. the United Kingdom, 
(15 December 2011, Grand Chamber)

4.3.1 The analysis by legal dogmatics

The cases concerned the applicants’ complaint that their convictions had been based on statements from witnesses who could not be cross examined in court and that they had therefore been denied a fair trial. The Court agreed with the domestic courts and found that a conviction based solely or decisively on the statement of an absent witness would not automatically result in a breach of Article 6 § 1. However, counterbalancing factors had to be in place, including strong procedural safeguards, to compensate for the difficulties caused to the defense.

As a rule, it has been required that the accused should be given an adequate and proper opportunity to challenge and question a witness against him, either when that witness made his statement or at a later stage of the proceedings.

Therefore, there had to be a good reason for admitting the evidence of an absent witness. A good reason existed, inter alia, where a witness had died or was absent owing to fear attributable to the defendant or those acting on his behalf as, in this latter case, the defendant had to be taken to have waived his rights under Article 6 § 3 (d).

Second, a conviction based solely or to a decisive degree on the statement of an absent witness whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, would generally be considered incompatible with the requirements of fairness under Article 6 ("sole or decisive rule").

This was not, however, an absolute rule and was not to be applied in an inflexible way, ignoring the specificities of the particular legal system concerned, as that would transform the rule into a blunt and indiscriminate instrument that ran counter to the traditional way in which the Court approached the issue of the overall fairness of the proceedings, namely to weigh in the balance the competing interests of the defense, the victim, and witnesses, and the public interest in the effective administration of justice. Accordingly, even where a hearsay statement was the sole or decisive evidence against a defendant, its admission as evidence would not automatically result in a breach of Article 6 § 1.

The news in this case was that even the non-adversarial evidence can be the main or the only evidence against the accused if the specific circumstances
occur. Earlier this kind of non-adversarial evidence has been admissible only if it has not been the sole or decisive evidence. Therefore, one very important step from the rights of defense towards efficiency and public interest was again taken even if in this single case it was taken because of the witness protection mostly.

4.3.2 The analysis by discourse analysis

In its assessment the Grand Chamber first depicts general principles, which are as follows:

18. In making this assessment the Court will look at the proceedings as a whole having regard to the rights of the defense but also to the interests of the public and the victims that crime is properly prosecuted and, where necessary, to the rights of witnesses.

19. Absence owing to fear of calls for closer examination. A distinction must be drawn between two types of fear: fear which is attributable to threats or other actions of the defendant or those acting on his or her behalf and fear which is attributable to a more general fear of what will happen if the witness gives evidence at trial.

20. When a witness’s fear is attributable to the defendant or those acting on his behalf, it is appropriate to allow the evidence of that witness to be introduced at trial without the need for the witness to give live evidence or be examined by the defendant or his representatives – even if such evidence was the sole or decisive evidence against the defendant. To allow the defendant to benefit from the fear he has engendered in witnesses would be incompatible with the rights of victims and witnesses. No court could be expected to allow the integrity of its proceedings to be subverted in this way. [Sic!] Consequently, a defendant who has acted in this manner must be taken to have waived his rights to question such witnesses under Article 6 § 3(d). The same conclusion must apply when the threats or actions which lead to the witness being afraid to testify come from those who act on behalf of the defendant or with his knowledge and approval.

... observed that it was notoriously difficult for any court to be certain that a defendant had threatened a witness. The Court does not underestimate the difficulties which may arise in determining whether, in a particular case, a defendant or his associates have been responsible for threatening or directly inducing fear in a witness. However, the case Tahery itself shows that, with the benefit of an effective inquiry, such difficulties are not insuperable.

21. The Court accepts that it might be difficult for a trial judge in advance of a trial to determine whether evidence would be decisive without having the advantage of examining and weighing in the balance the totality of evidence that has been adduced in the course of the trial.

22. Also, in cases concerning the withholding of evidence from the defense in order to protect police sources, the Court has left it to the domestic courts to decide whether the rights of the defense should cede to the public interest and has confined itself to verifying whether the procedures followed by the judicial authorities sufficiently counterbalance the limitations on the defense with appropriate safeguards... Similarly... the Court reiterated that the right to legal assistance, set out in Article 6 § 3 (c) was one element, among others, of the concept of a fair trial in criminal proceedings contained in Article 6 § 1.
23. The Court is of the view that the sole or decisive rule should also be applied in a similar manner. *It would not be correct, when reviewing questions of fairness, to apply this rule in an inflexible manner.* Nor would it be correct for the Court to ignore entirely the specificities of the particular legal system concerned and, in particular its rules of evidence, notwithstanding judicial dicta that may have suggested otherwise. To do so would transform the rule into a blunt and indiscriminate instrument that runs counter to the traditional way in which the Court approaches the issue of the overall fairness of the proceedings, namely to weigh in the balance *the competing interests* of the defense, the victim, and witnesses, and the public interest in the effective administration of justice.

24. The Court therefore concludes that, where a hearsay statement is the sole or decisive evidence against a defendant, its admission as evidence will not automatically result in a breach of Article 6 § 1.

Here the court gives almost a manifesto to protect witnesses when it uses expressions such as: "*No court could be expected to allow the integrity of its proceedings to be subverted in this way.*" "*No court*" expresses indignation and anger when actually generalizing globally and without right for this type of jurisdiction. "*To allow the integrity of its proceedings to be subverted in this way*" includes stress to underline the integrity and authority of courts which may not be touched by outsiders. The court is an authority and this is something which may not be questioned.

The court’s impression “The same conclusion must apply when the threats or actions which lead to the witness being afraid to testify come from those who act on behalf of the defendant or with his knowledge and approval” is legally interesting because here the court accepts very wide responsibility for the accused. It is already close to objective responsibility because the accused will lose his rights even when other people who act on behalf of him have caused the fear and he knows that and approves of their action. The court leaves the contents of this type of responsibility open and it is not told, for instance, what the “approval” means, what type of action is enough in this connection, or is it just a question of allowing an opinion in his head. It is rather risky and far away from legality principle if this expression is evaluated with the help of legal dogmatics as well. Therefore it seems to be very clear that the court will not accept any kind of action which tries to affect other actors in the same case. By these wide and hard expressions the court seems to want to put the fundamental stop to this kind of operation.

The Court seems to understand the difficulties of the authorities when saying that “it might be difficult for a trial judge in advance of a trial to determine whether evidence would be decisive” and because of that problem the court was ready to change its earlier interpretation and found the piece of evidence admissible.
The most interesting statement is this case was, however, this: “In making this assessment the Court will look at the proceedings as a whole, having regard to the rights of the defense but also to the interests of the public and the victim(s) that crime is properly prosecuted...” The court has always looked at the proceedings as a whole to decide if it has been fair or not. However, this has not earlier meant that “as a whole” includes not only the proceedings from the beginning until the end but also all actors and their rights in an equal way, which seems to be the contents now.

However, there still exists the counter discourse in the court’s assessment. Here are some examples of that:

25. Moreover, fear of death or injury of another person or of financial loss are all relevant considerations in determining whether a witness should not be required to give oral evidence. This does not mean, however, that any subjective fear of the witness will suffice. The trial court must conduct appropriate enquiries to determine first, whether or not there are objective grounds for that fear, and, second, whether those objective grounds are supported by evidence.

26. Finally, given the extent to which the absence of a witness adversely affects the rights of the defense, the Court would emphasize that, when a witness has not been examined at any prior stage of the proceedings, allowing the admission of a witness statement in lieu of live evidence at trial must be a measure of last resort. Before a witness can be excused from testifying on grounds of fear, the trial court must be satisfied that all available alternatives, such as witness anonymity and other special measures, would be inappropriate or impracticable.

Here the court still repeats the traditional main rule:

27.... The underlying principle is that the defendant in a criminal trial should have an effective opportunity to challenge the evidence against him. This principle requires not merely that a defendant should know the identity of his accusers so that he is in a position to challenge their probity and credibility but that he should be able to test the truthfulness and reliability of their evidence, by having them orally examined in his presence, either at the time the witness was making the statement or at some later stage of the proceedings.

28. Against this background, while it is important for the Court to have regard to substantial differences in legal systems and procedures, including different approaches to the admissibility of evidence in criminal trials, ultimately it must apply the same standard of review under Article 6 §§1 and 3(d), irrespective of the legal system from which a case emanates.

29. Trial proceedings must ensure that a defendant’s Article 6 rights are not unacceptably restricted and that he or she remains able to participate effectively in the proceedings.

The court seems to accept all actors, also victims and witnesses now as equal participants who are having the same rights while earlier they were recessive to the rights of the defense. In addition, the public interest, the difficulties of authorities and proper prosecution are new terms in court’s rhetoric and they are getting more attention than earlier.
5 Conclusions

The expressions used in the case law show that the way of thinking has changed. It does not only involve comprising victims and witnesses, understanding the difficulties of authorities and stressing the proper prosecution and public interest in the name of equality, it is also the question of changed attitudes. However, the change is natural because the society is changing and its needs are changing. At the same time our general values in the society are changing. The courts and their personnel are one part in this change.

The change is even more natural in the case of the European Convention on Human Rights and the European Court of Human Rights because the convention has a common law background and the text is not amended but the Court interprets the Convention articles in the evolutionary-dynamic way and the contents of the Convention are developed by using the case law as a tool (Hirvelä and Heikkilä 2013: 27–28). Still, the changes can sometimes be more hidden than transparent, especially when the way of thinking is changing as well and not only legal interpretations. In those cases, discourse analysis is the only tool to catch the change.

Because the goal is to amend the contents with the help of case law, it is important to be aware of all changes in rhetoric. This awareness covers not only the general audience as a reader but especially the court itself. It is risky if we are just flowing and the interpretations and the way of thinking are changing unconsciously or without having an overall view. Therefore the results achieved by discourse analysis can be useful even for the actor himself to maximize and guarantee the best possible awareness.

At the beginning of this article I said that this development is a dialog between the society and legal actors which is working like a mirror. But how is the mirror working? Is the court affecting the surrounding world with its decisions and interpretations? Or are the society and societal changes affecting the court? Who is that actor who looks at the mirror first? Or are we just flowing without knowing who is taking care of whom?

To me, the cases analyzed above show harder attitudes (proper prosecution, public interest, the stress to punish evenly) compared with the case law the court gave in the beginning of the 1990s. The development has been slow, just the recent cases show quite clear understanding for the public interest in investigating and form of punishing. The final question is if the court itself has made this change consciously to fight against serious crimes and organized criminality, or if it has just

14 The court decision is at the same time the contribution to the societal discussion and the decision which must be enforceable (Paso 2009: 144).
happened? In the case of Jalloh, the crime itself was not extremely serious. It was a drug offence but covering just a small amount of street trafficking. In the latter case, torture was used to save a child to stay alive and torture in this context can be seen as an ultimate tool. In the third case the suspected crimes were a sexual offence and stabbing. The court has not underlined the seriousness of those crimes or their organized nature, the situation from this point of view has mostly been the opposite (Jalloh case). In the case of Al-Khawaja and Tahery, the court did not pay any attention to that issue. The exception from this perspective is the case of Gäfgen where the court underlined that it was the question of saving a life of the child. Despite that fact, the court decided that the torture was against Art. 3. Summa summarum, the seriousness of the crime or the fight against the organized criminality are not – as such – behind this change.

If the change has been made consciously, it should have been reported more clearly to the reader with the help of legal rhetoric and legal terms and the conscious novelities in the case should have been caught by legal dogmatics. Although there is much hidden information which refers to this change, the court has not expressed their will to change the line and reasons behind that every time they could have done so. Sometimes the court has changed its interpretation and told that to the reader but in many other situations the change is more hidden and it can only be found in the court rhetoric. In this case, discourse analysis is the only tool to show how the court is affected by the societal change and how harder, neo-liberal attitudes (see Autio 2014: 309 where she is wondering if neo-liberalism has affected alternative dispute resolution in the form of privatization) in the society have affected the court’s interpretations and use of its discretionary powers.

References


15 What is more, national court cases have often been criticized because the court does not reply to the question “why.” Instead of doing so, it usually just describes norms and facts but leaves it open or unclear why it has interpreted and applied those norms in that case in the way it has done (see, for instance, Paso 2009: 133–134). It is typical of courts to only repeat legal references and refer them to laws, chapters, sections and paragraphs without reflecting on the process that has led to the named conclusions. This kind of argumentum is pure ethos-rhetoric type “because it is said in the paragraph... or according to the earlier case-law...” (Paso 2009: 233–234).


