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Deconstructing Doctrinal Struggles through Legal Discourse Analysis: The Example of ‹Discretion› Reasoning in Refugee Law

Janna Wessels

Abstract

In the field of refugee law, ‹discretion› reasoning – that is, the assumption that asylum seekers can be returned to their countries of origin on the basis that they can avoid persecution by behaving ‹discreetly› and thus escaping the attention of the persecutors – is a legal problem where legal analysis seems to get stuck. Once there appears to be a doctrinal solution to settle the problem, it reappears in a different form. This Forumsbeitrag introduces ‹legal discourse analysis› as an approach to tackle such perennial legal problems. Inspired by critical legal and queer scholars, and drawing on elements of deconstruction and discourse analysis, legal discourse analysis does not try to find the solution to the puzzle. Instead, it has the distinct aim of tracing how doctrine is constructed, or how ‹right› answers are created. On that basis, it draws out the underlying tensions that enable these answers. The Forumsbeitrag first retraces the steps developed to address ‹discretion› in refugee law, and then extrapolates and generalises ‹legal discourse analysis› as an approach to explore its usability for other perennial doctrinal problems, both within refugee and migration law, and beyond.

Keywords: refugee law, sexual orientation, discretion reasoning, legal discourse analysis, doctrinal analysis

Dekonstruktion rechtsdogmatischer Kämpfe durch juristische Diskursanalyse: Das Beispiel der ›Diskretionsprognose‹ im Flüchtlingsrecht

Zusammenfassung

Im Bereich des Flüchtlingsrechts ist die ›Diskretionsprognose‹ – d.h. die Annahme, dass Asylbewerber:innen in ihre Herkunftsländer zurückgeschickt werden können, weil sie sich der Verfolgung entziehen können, indem sie sich ›diskret‹ verhalten und so der Aufmerksamkeit der Verfolger:innen entgehen – ein rechtliches Problem, bei dem die rechtliche Analyse stecken zu bleiben scheint: Sobald es eine rechtsdogmatische Lösung für das Problem zu geben scheint, taucht es in anderer Form wieder auf. Dieser Forumsbeitrag stellt die ›juristische Diskursanalyse‹ als einen Ansatz vor, mit dem solche andauernden juristischen Probleme angegangen werden können. Inspiriert von kritischen Rechts- und Queer-Wissenschaften und unter Rückgriff auf Elemente der Dekonstruktion und der Diskursanalyse versucht die juristische Diskursanalyse nicht, die Lösung des rechtlichen Rätsels zu finden. Stattdessen hat sie das Ziel, nachzuvollziehen, wie Rechtsdogmatik konstruiert wird, oder wie durch sie ›richtige‹ Antworten geschaffen werden. Auf dieser Grundlage zeigt sie die zugrundeliegenden Spannungen auf, die diese Antworten ermöglichen. Der Forumsbeitrag zeichnet zunächst die Schritte nach, die entwickelt wurden, um die ›Diskretion‹ im Flüchtlingsrecht zu adressieren, extrapoliert und verallgemeinert dann die ›juristische Diskursanalyse‹ als Ansatz, um ihre Verwendbarkeit für andere andauernden rechtsdogmatischen Probleme zu untersuchen, sowohl innerhalb des Flüchtlings- und Migrationsrechts als auch darüber hinaus.

Schlagworte: Flüchtlingsrecht, sexuelle Orientierung, Diskretionsprognose, juristische Diskursanalyse, rechtsdogmatische Analyse

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The need for orderliness in legal reasoning means that classical legal doctrine is not well prepared to deal with contradictions. The task of legal thought is, in some ways, to pretend that a given problem is a puzzle that can be solved – in spite of the (often acknowledged) fact that there are more ways than one to make the solution seem right. But sometimes, contradiction stubbornly reasserts itself by making all solutions for a given puzzle perpetually unstable.

‹Discretion› reasoning in the field of refugee law is such a phenomenon. The notion refers to the idea that asylum seekers can be returned to their countries of origin on the basis that they can avoid persecution by behaving ‹discreetly› and thus escaping the attention of the persecutors. This sort of reasoning is particularly common in sexuality-based asylum claims, but also appears in cases based on religion or political opinion. It has often been rejected by Courts and scholars on the grounds that it undermines the very reason for refugee law: If claimants are required to hide the characteristic for which they are persecuted, then there is no need for refugee protection. However, though repeatedly discarded, ‹discretion› reasoning has proven to be exceptionally adaptive and tends to resurface every time.

In this sense, this is a legal problem where legal analysis seems to get stuck. Once there appears to be a doctrinal solution to the problem such that it would be settled, it reappears in a different form. To confront the doctrinal struggles around the ‹concealment controversy› in refugee law doctrine, I therefore applied an approach that might be labelled ‹discourse analysis of legal doctrine›, or more simply, ‹legal discourse analysis›. Rather than trying to find the solution to the puzzle, this approach has the distinct aim of tracing how doctrine is constructed, or how ‹right› answers are created, and on that basis draws out the tensions that enable these answers. It is inspired by critical legal and queer scholars, and draws on elements of deconstruction (Derrida 1976) and discourse analysis (Foucault 1980).

This approach to analyse ‹discretion› logics proved fruitful to the study of ‹discretion› reasoning, and not only because the identification of the underlying tensions could shed light on the mechanisms that explain its resilience. The recognition of conflicting principles also allows for productive counter-strategies. The full analysis is presented in a book entitled *The*

Concealment Controversy – Sexual Orientation, Discretion Reasoning and the Scope of Refugee Protection (Wessels 2021). Building on this work, the present piece owes its existence to two observations:

Firstly, the concealment controversy is but one example of a legal problem that cannot be put down. There are numerous other legal puzzles, in migration law as well as other fields of law, which seem impossible to solve, and which might benefit from a similar approach. Secondly, other legal scholars have, in a range of different contexts, also identified fundamental contradictions in legal reasoning, most famously Duncan Kennedy (1979), pointing to the tension between freedom and unfreedom to understand the structure of American legal thought[1], and David Kennedy (1987) and Martti Koskenniemi (2006) who drew out fundamental tensions in international law that explain many of its incoherencies. Janet Halley (1993) has identified the act/identity binarism to be at the root of US jurisprudence on homosexuality laws.[2]

Inspired by elements of their work and looking at the approach used to tackle the concealment controversy in light of these, the present *Forumsbeitrag* asks whether what I termed ‹legal discourse analysis› can be abstracted from the concrete issue of ‹discretion› reasoning to be framed as an approach that could be applied elsewhere. Through the means of retracing the steps developed to address the concealment controversy, the article reflects a first attempt to extrapolate and generalise ‹legal discourse analysis›, to explore its usability for other perennial doctrinal problems, both within refugee and migration law, and beyond.

Broadly summarised, then, I will submit that ‹legal discourse analysis› can be characterised as a doctrinal research method suited to address perennial doctrinal problems, which involves the following elements. First, the development of a typology of the doctrinal arguments that are employed in legal reasoning to address the given problem. In a deconstructive move, these doctrinal arguments are then, second, examined to identify any underlying system of tensions,

[1] Note that Duncan Kennedy «recanted» his approach in a published conversation a few years after the publication of this article: see Gabel/Kennedy (1984).
[2] Halley draws on Kosofsky Sedgwick (1990), who identified a series of binarisms at work outside the legal context.

paradoxes or contradictions, and thus make explicit the ‹deep structure› that enables the production of these doctrinal arguments. Finally, in a third step, although laying bare the underlying contradictions does not resolve them, their identification bears critical potential to the extent that it opens up a possibility to develop alternative ways of arguing: resistance through the use of ‹productive instability› in concrete cases.

In the following, I will address each of these steps in some more detail. I will proceed by first describing how I approached the puzzle of ‹discretion› reasoning (part 1), and then extrapolating and generalising each of the steps (part 2).[3]

1. Confronting the concealment controversy in refugee law

1.1 Recognising ‹discretion› reasoning

To understand the resilience of ‹discretion› reasoning, I first developed an overview of the different shapes and variants in which the phenomenon appears. To build this typology of legal arguments, I looked at leading judgments[4], legislation[5] and relevant literature, as well as decision-making practice in sexuality-based claims from three different jurisdictions that had, to date, not been analysed from the perspective of ‹discretion› reasoning to a notable degree: Germany, France, and Spain. I collected an extensive number of judgments for each jurisdiction, and submitted them to a close reading, identifying all instances where ‹discretion› reasoning appeared, even in their subtler or more unexpected variants. France, for

[3] All references to the concealment controversy and the analysis of ‹discretion› reasoning are based on Wessels (2021). Please refer to the book for a much more elaborate and subtle version of the argument only crudely and selectively presented here.

[4] Such as *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department*, [2010] UKSC 31, United Kingdom: Supreme Court, 7 July 2010; *Federal Republic of Germany v. Y and Z*, Joined Cases C-71/11 and C-99/11, Court of Justice of the European Union, 5 September 2012; *X, Y and Z v. Minister voor Immigratie, Integratie en Asiel*, Joined Cases C-199/12, C-200/12 and C-201/12, Court of Justice of the European Union, 7 November 2013.

[5] Such as the Refugee Convention, UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137; and the Qualification Directive: Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), oj L 337/9, 20 December 2011 (*Recast Qualification Directive*), transposition date 21 December 2013.

example, did not require ‹discretion› but on the contrary granted protection only if the claimant had sought to publicly manifest their sexual orientation in the past – a sort of «discretion requirement in reverse»› (Wessels 2021, Ch. 4). In Germany, in contrast, protection was granted only to those whose identity was understood to be «irreversibly and fatefully determined» by their sexual orientation, which would «inescapably» lead to homosexual acts – whereas a «mere inclination» was not considered sufficient, because behaviour could be controlled (Wessels 2021, Ch. 5). Spanish jurisprudence was closer to the French in that protection only extended to those who had been «singled out» for persecution – «mere membership» was not enough (Wessels 2021, Ch. 6). The typology revealed that ‹discretion› reasoning was not limited to any particular jurisdictions (such as the common law countries, where most prior research had been done) or particular doctrinal figures (for example the ‹reasonable *requirement* to be discreet›), but emerged in a multitude of versions from case law. This explains that rejecting particular variants of it – as has repeatedly happened in high-level judgments – cannot put an end to ‹discretion›. It became clear that the issue runs much deeper.

1.2 Identifying the tensions underlying ‹discretion› reasoning

Once I had gained an overview of the range of doctrinal argument, I submitted the instances culled from case law as well as relevant literature to a close analysis. From this analysis, three inter-related tensions emerged that are grounded in the refugee definition: The distinction between the claimant's act and identity; the tension between persecution and Convention ground; and the tension between the persecutor and the claimant perspective.

1.2.1 The act/identity dichotomy

First, it became clear that all versions of ‹discretion› rely on a distinction between the identity and the behaviour of the claimants. ‹Discretion› logic is about hiding or expressing (through behaviour) something about the claimant's self (their identity). This act/identity dichotomy

always refers to the *reason* for persecution, that is, the Convention ground – which can be defined either by a focus on act or identity. France, for example, with its focus on external manifestation, favours the act element, while Germany, with its concern for irreversible determination, prefers the identity element. It thus appeared that ‹discretion› reasoning is effectively a struggle over how to conceive of the Convention grounds, one of the central elements of the refugee definition. This is interesting, because while the persecution element has long been considered the core notion of refugee law, the Convention grounds have often been rather neglected in the analysis.

1.2.2 Persecution vs Convention grounds

Once the Convention grounds are reinserted into the picture, however, another tension is revealed: that between Convention grounds and persecution. The Refugee Convention protects from *persecution*, on account of a *reason*. Both are laid out in the refugee definition provided in the Refugee Convention as necessary conditions, but persecution is relevant only if it is due to the Convention ground and the Convention ground is relevant only if it is met with persecutory harm. When one is not given, the other also becomes irrelevant. Persecution and Convention grounds, two of the central notions of the refugee definition, are in a complicated relationship. It is unclear what the main concern of the refugee definition is: protection from persecution, or protecting the characteristics enshrined in the Convention grounds. Both must be present, but one can be preferred over the other. France, for example, appears to identify the main concern of refugee law as protection from persecution, since it grants protection to those who will easily come to the attention of persecutors. Germany, in turn, appears to slightly favour the protection of the interests covered by Convention grounds, since protection will not be extended to those for whom the protected characteristic does not appear to be of particular importance.

1.2.3 Persecutor vs claimant perspective

A third underlying tension further compounds the situation: that between the persecutor and the claimant. Persecution is carried out by perpetrators, for a reason that is located with the claimant. And both the claimant and the persecutor play a role in establishing the link between Convention ground and persecution. On the one hand, the claimant has some control over the Convention ground, and is thus in a position to reduce the prospects of persecution precisely by exercising control over the reason that triggers this harm, for example by seeking to hide it entirely (‹discretion›) or by manifestly asserting it in external behaviour (which has sometimes been characterised as ‹inviting persecution›). But at the same time, the claimant is never in *full* control. Because persecution must be for a reason, the persecutor will only submit the claimant to harm relevant under the Refugee Convention if they identify and take them to possess that characteristic. But it remains the persecutor who determines the parameters of what (and therefore who) is persecuted. It is by no means clear that the persecutor will correctly identify the ‹right› persons as gay, for example. Nor is it clear which signifiers they will use for that assessment. The problem is that while both approaches appear necessary, they do not lead to the same protected group. And those who fall outside of the protected group in a given case are forced to return to ‹discretion›. Here again, one perspective might be preferred, and the other submerged in any given constellation. France, for example, appears to favour the persecutor perspective, since it extends protection to those claimants who will likely be identified by the persecutors, regardless of how strongly the claimants identify with the characteristic. Germany, in turn, appears to prefer the claimant perspective, since it grants protection to those who self-identify with the characteristic, regardless of whether they have ever shown it in any external behaviour that might be perceived by the persecutor.

1.3 Resisting ‹discretion› reasoning by flipping the discourses

Taking the three inter-related tensions together, it thus transpired that ‹discretion› reasoning, expressed through the act/identity dichotomy, functions as a patch for the tensions that arise from the clash between the protection of the Convention grounds and the protection from persecution. It covers the space beyond the boundaries of protection that are drawn up in each

particular case.[6] But this web of contradictions – act vs identity, Convention ground vs persecution, persecutor vs persecuted – that underlies ‹discretion› reasoning provides a malleability that may also harbour emancipatory potential. Each doctrinal solution prioritises either, for example, persecution and the claimant, or the Convention ground and the persecutor, submerging the corresponding elements. A conscious strategy to counter this in order to adapt the scope of protection to the needs of a particular claimant may consist in matching each element with its counterpart. To resist ‹discretion› reasoning, then, involves working on the dyads *act-identity*, *persecution-Convention ground* and *persecutor-claimant* to attempt flipping the discourses in every given situation. Where in a particular case, or jurisdiction, or doctrinal figure, the primary focus is on persecution, reference to the Convention ground may open up new space for manoeuvre in legal argumentation. This could be a suitable strategy for a claimant who has not sought to manifestly assert their sexual orientation in France. Likewise, if the focus is on the claimant, reintegrating the persecutor into the picture may unsettle an exclusive interpretation and turn it into an inclusive one. This could be a promising approach for a claimant for whom a fateful determination of the identity might be difficult to establish in Germany. Whereas it is possible to harness the submerged elements to counter a predominant approach in a given situation that may enable broader protection for each individual claimant. This is not a safe strategy, however, as the preferences can always be tipped back. But the better the underlying tensions in a given case are understood, the better they can be harnessed in the sense of a ‹productive instability›, producing the formalistic or pragmatic argument necessary to counter any given predominant approach.

Overall, then, although it was not possible to entirely get rid of ‹discretion› reasoning in refugee law, legal discourse analysis has enabled the recognition of is variants, the discovery of the underlying structures in the refugee definition that enable them, as well as indicated space for possible counter-strategies in concrete cases.

2. Extrapolating ‹legal discourse analysis› to address other legal puzzles

Having thus revisited the approach developed to address the concealment controversy in refugee law, the following section aims to extrapolate from the concrete case of ‹discretion›

[6] For a more extensive version of this argument see Wessels (2021), in particular Ch. 10.

reasoning to conceive of ‹legal discourse analysis› as an approach more broadly. Drawing from the above, it can be said that legal discourse analysis starts from the premise that legal doctrine is an ongoing discourse about the meaning of law. It has the distinct aim of tracing how doctrine is constructed, or in other words, how ‹right› answers are created. It does so by developing a typology of the various doctrinal shapes the issue takes (step 1). On that basis, it draws out the tensions that enable these answers (step 2) and on that basis identifies ways to resist the problem in individual cases (step 3). In the section below, I aim to reflect on the function of each step of the analysis to enable application to other instances of persistent legal problems.

2.1 Developing a typology of doctrinal arguments (Step 1)

To address a persistent legal problem or puzzle with legal discourse analysis, the first step is to gain an overview of the various different ways in which it is dealt with in legal doctrine; in other words, to develop a typology of legal arguments and their doctrinal framing.

To do so, legal discourse analysis makes use of the ordering and systematizing capacities of legal doctrinal analysis of the law to show how similar issues take different discursive and doctrinal shape, whether or not they become accepted as doctrine. Although this process does not search for the ‹best› legal answer, as classical legal doctrinal analysis would usually do, it is based on a thorough understanding of the functioning of legal doctrine and the logics of doctrinal legal research as the most accepted methodology in the field of law (Hutchinson/Duncan 2012; Bhat 2019, Ch. 5). The canon of established methods of interpretation is widely consented within the discipline (Reimer 2020).

This exercise can be characterised as essentially doctrinal in nature. However, one important characteristic of this typology is that its aim is not to identify an interpretation as the one that best upholds or restores orderliness in legal discourse. While legal discourse analysis uses the same critical techniques as classical doctrinal analysis to recognise arguments and understand their doctrinal framing, its goal is neither an alternative rationale nor a criticism of the outcome. It does not seek to make authoritative statements about the law (Boulanger 2020).

Fully endorsing the fact that two or more answers are possible, it is to discover not what should have been done, but to identify the doctrinal solution to the problem that is offered by each particular argument.[7]

Through this lens, then, legal discourse analysis starts by developing a typology of the various doctrinal arguments that are proposed on a given problem. The material used for this exercise can include legal texts, literature, and leading judgments. It can also extend to case law that may have been overturned or modified by subsequent judgments, as well as minority or dissenting opinions, and arguments advanced by parties to the proceedings or third-party interveners, or legal analyses of international or non-governmental organisations. In that sense, legal discourse analysis can be characterised as based on a special form of content analysis. It involves the collection of a set of documents, reading these systematically, identifying relevant sections or arguments, and then drawing ‹inferences and meaning› from the set (Hall/Wright 2008). It seeks broad patterns across a wide range of legal arguments. The body of instances collected for examination (the typology), therefore, includes borderline cases and vaguely related sections. Diversity and different lines of argumentation are sought, with rare outliers also being of interest. In this way, the doctrinal struggles in the conception of legal doctrine on a given problem can be identified, and the arguments for different approaches can be explored.[8]

2.2 Deconstructing the underlying system of tensions (Step 2)

In a next step, once the lines of reasoning on the given legal problem are collected through this process, they are subjected to a deconstructive analysis. This serves to see if any tensions, paradoxes, and contradictions emerge that may underlie the doctrinal arguments to draw out and make explicit the ‹deep structure› that enables and controls their production –, and can explain their instability. The rationale is that, in general, legal thought depends on complex

[7] Note that Bhat characterises a range of legal research methods as doctrinal in nature in Part II, as opposed to non-doctrinal and integrated methods; see Bhat (2019).

[8] Other legal studies often employ content analysis to make quantitative statements, such as classifying entire judgments or separate opinions with a code in order to be able to quantify global trends in jurisprudence over time; see, e.g. Yildiz (2020); Helfer and Voeten (2020).

categorical reasoning. In other words, legal problems become comprehensible within the law through the categorical schemes of doctrinal reasoning. Categories respond to the need for abstraction of a system of legal rules and principles that can generalise and apply to a multitude of situations.[9] They provide a semblance of orderliness and stability. It could be argued that those doctrinal approaches that subscribe to the notion of proposing the ‹best› doctrinal solution, seek to uphold that semblance of orderliness, or to achieve it through minor adjustments, or sometimes even through remedying some serious flaws in the system. But if these categories turn out to be unstable, doctrinal solutions will also be unstable. Where one particular solution succumbs to contradiction, another will take its place, but the central contradiction will not disappear. Seen in this light, it appears that the very aim of such approaches is to minimize or conceal the elements of paradox or stalemate in legal argumentation. It offers modes of mediation which hide them, or allow for denial (see Kennedy 1979).

Legal discourse analysis, in turn, rather than mediate, specifically seeks to recognise and respond to contradictions that generate incoherence and instability. It directly confronts paradoxes by seeking out conceptual oppositions that may lie behind the forms of legal reasoning and categorization that are used to address the given legal problem. The tensions that guide choices among patterns of rationalization are both less conscious and less particular than, for example, the biases of judges.[10] This is not to say that the latter kind of biases do not exist; – it is their very obviousness that may distract from the deeper patterns that legal discourse analysis elucidates. Legal discourse analysis examines the logic of mediating contradiction, rather than the conflicting interests that give it energy. This logic has to do with maintaining and legitimating the general ground rules of legal discourse rather than with specific outcomes. It makes the framework itself visible. The kinds of oppositions or tensions that may be at the source of doctrinal struggles vary and are specific to the particular problem under study. By the very nature of this approach, they will only emerge through the close analysis of the various ways in which the legal problem has been dealt with in doctrinal terms.

[9] This is not to say that there is no scepticism, see e.g., the work on ‹postcategorical› approaches in non-discrimination law by Susanne Baer (2010, 2014); or that by Lauren Sudeall Lucas (2015). For an introduction and discussion of both approaches in comparison, see Lee (2017).

[10] A separate body of research addresses the biases of judges, see amongst many others: Guthrie et al. (2001); Spamann et al. (2020).

2.3 Wielding discursive power: productive instability (Step 3)

Once the underlying system of tensions has been identified, the question becomes: Where does this lead us? The answer is twofold. First, it is important to recognise that such deconstructive analysis does not *undo* definitional knots. It would be a delusion to think that the study of contradictions can resolve them. Rather, it is the very nature of these oppositions that they are inherently unstable. But it is also true that to accept them uncritically as part of the nature of things is to embrace, generalize, and intensify them. The task of deconstruction is to demystify legal thinking around the problem under study by confronting the fact that contradictions are at work. It thus has explanatory force for the dynamics underlying the doctrinal struggle. To use the words of Duncan Kennedy, understanding this is «not salvation, but it is a help» when faced with a stalemate situation in legal argumentation (Kennedy 1979: 221).

Second, although a deconstructive analysis of definitional knots, however necessary, cannot disable them, it provides an understanding of the discursive authority that comes with them. This is because the two stacked discourses can be flipped: the one that was submerged and denied in a given situation can become express, and it in turn can be covertly supported by the one that was preferred. The contradictions inherent in legal categorizations and definitions are not necessarily immanently self-corrosive, but are «peculiarly densely charged with lasting potentials for powerful manipulation – through precisely the mechanisms of self-contradictory definition» (Kosofsky Sedwick 1990: 10). Discursive power can be specified as competitions for the material or rhetorical leverage required to set the terms of, and to profit in some way from, the operations of such an incoherence of definition. Although this is not explicit, the irresolvable instability continually lends discursive authority (Halley 1993). It is the unstable relationship between the terms – not the preference of one to the other – that allows to exploit confusion about the legal problem in ways that creates opportunities for the exercise of power.

In this way, the denied and submerged element in a definitional knot can provide a point for resistance. A conscious strategy to counter a dominant interpretation in a given case may consist in harnessing the instability in the sense of ‹productive instability› by matching the

preferred element with its counterpart. Where, in a particular situation, or jurisdiction, or doctrinal figure, the primary focus is on term A, reference to term B may unsettle the dominant interpretation and open up new space for manoeuvre in legal argumentation. A principled attempt to control the legal argument in each particular case reintegrates the submerged element into the picture. Matching the prioritised elements with their counterparts may help shift the perspective and flip the discourses. As a result, there are more levers to shift. To be sure, such resistance can be made futile at any moment if the system is flipped (back). Due to the paired dynamics of contradiction, the danger of such destabilization is perpetually present. But an understanding of their mechanism opens up a range of strategic options in which fluidity will always be at least potentially valuable (Halley 1993: 1749).

3. Conclusion: Embracing instability to confront doctrinal struggles

‹Discretion› reasoning is a legal problem that has often been rejected in both high-level judgments and academic literature, but nonetheless continues to resurge in both jurisprudence and legal writing. Every doctrinal solution appears to succumb to internal contradiction. Using this legal problem as a starting point, this *Forumsbeitrag* has explored ‹legal discourse analysis› as an approach to address similar doctrinal stalemate situations. Accepting that it may not be possible to ‹get rid› of the problem in general terms, this approach seeks an understanding of the underlying dynamics that lead to the instability of doctrinal solutions. This is achieved through first, developing a typology of the different doctrinal shapes the problem takes, and, second, a deconstruction of its deeper conceptual patterns and tensions, an understanding of which can, third, be used to frame arguments in the individual case. Rather than seeking general guidance on how to conciliate the dispute, legal discourse analysis can uncover some of the variables, paradoxes, and conundrums that shape the discursive struggles. Acknowledging these may open up an understanding of alternative approaches, and of the levers that can be shifted in each particular case. It thus not only accepts but endorses or even positively embraces instability in legal discourse for the benefit of the individual case.

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Legislation

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