

On the Same Origin of Legal Compulsoriness and the Compulsoriness of Legal Discourse

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It's been about half a decade since Michel Foucault delivered his famous inaugural lecture "Orders of Discourse". Descriptive research into legal discourse, however, still predominates over the exploration of the hidden power relationship. This article aims to apply Foucault's insights into discourse to the field of law and further shed light on the in-depth interactive mechanism of power and discourse. By investigating how legal norms were legitimized from the very beginning, it's found that the legal compulsoriness and the compulsoriness of legal discourse are of the same origin.

Keywords: legal discourse, compulsoriness

Introduction: A Discursive Turn in Research on Legal Language

In some sense, linguistics, which exerted influence on every field of philosophy, has transformed philosophy in the 20th century (Yin, 2003, p. 63). Language is no longer purely deemed as a vehicle for communication, but a priori existence of self-construction, self-reference, and self-shaping. Without language, humans can neither think nor express themselves, let alone understand. One representative of this viewpoint is the Swedish linguist Ferdinand de Saussure (1959, p. 9), who claims that language "is both a social product of the faculty of speech and a collection of necessary conventions that have been adopted by a social body to permit individuals to exercise that faculty". As a semiotic system, language "is the social side of speech, outside the individual who can never create nor modify it by himself; it exists only by virtue of a sort of contract signed by the members of a community" (Saussure, 1959, p. 14). In Saussure's language system, language, as a synchronic concept, transcends individual, history, culture, and life, and exists as forms without subjects, situations, and contents. In this closed and self-governing semiotic system, the meaning of any component lies only in its relations with other signs and its comparative locations and is restrained by the changes and adjustments of relevant factors in the system rather than those outside the system. This research paradigm that concentrates on structural system and relations of elements soon overtakes that of linguistics as a new tool which enables law professionals to reorganize their thoughts and broaden their horizon. Traditional

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propositions of law have been reconstructed and interpreted one by one: Perelman (1984) proposed the new rhetoric by introducing rhetoric into law; MacCormick (2003) initiated the school of legal interpretation that swept Europe and America based on Hans-Georg Gadamer's philosophical hermeneutics. Dissecting legal propositions from the perspective of linguistics not only marks a breakthrough and innovation in the paradigm of research on law, but also drives scholars to further conduct in-depth research on legal language.

As the research paradigm of analysis of abstract structure and analysis of elements' interactive form became highly sophisticated, its flaws also gradually come to light. To investigate the logical structure of science statically from the perspective of the logic of science, morphology and semantics deviates from the history, social structure and cultural background of the development of science and ignores the influence of psychological factors on science, leading to a tendency of extreme science-centralism (Yin, 2003). Saussure ignored the pragmatic use of language and the connection between linguistic signs and their users because his research centered on the pure form of language, which is exactly the logic starting point of a discursive turn in the west. People's language is constrained by societies which they belong to and every remark is bound to be formed within a context. Language should not only possess formal meaning but also contextual meaning. The French linguist Émile Benveniste points out in *Problems in General Linguistics* that discourse is language in action or in use and attempts to reabsorb subjects which Saussure rejected. As a scholar comments, the biggest difference between Benveniste and structuralist linguists is that he introduces humans (subjects) into cold and boring languages and nourishes languages with the warmth of humanity. However, his research object is not a specific person or speech act but the general state of human beings in language (Zhu, 2014). This has highlighted the pragmatic use of language that was ignored by Saussure and language is not deemed purely as logic symbols anymore but has rich ideologies and historical connotations. This anti-Saussure trend of thought, embodied by the change of research focus from static and closed language to dynamic language in use and the emphasis on vivid language and situations in social interaction of individuals, is encapsulated by the British scholar Stuart Hall (2009, p. 6) as a "discursive turn".

The most important inspiration drawn from a turn from legal language to legal discourse is that one should not confine oneself to legal texts but real law practices and recover subject intentions, attitudes, faiths, and knowledge backgrounds which the past language structures could not accommodate, to render legal discourse closer to the real and objective world.

The Compulsoriness of Legal Discourse

In a speech community, that the orator and the audience must share a set of linguistic norms is a prerequisite for communication. Even if different law professionals convey messages in varied situations and different languages, they must ensure that their thoughts are certain and can be recognized repeatedly and understood by the public. If any individual attempts to deviate from the recognized linguistic norms, his/her communication will be limited, which then compels him/her to bear these norms in mind. From the perspective of semantics, only if all discourses are integrated can language comprehension be achieved because the integration not only makes communication possible but also imposes restrictions on it, which is encapsulated in "the compulsoriness of discourse". Whoever converses with his/her interlocutor by virtue of natural languages must presuppose certain stances regarded as axiomatic and be compelled to acknowledge some premises. Therefore, it can be concluded that all discourses are compulsory from the angle of semantics.

It holds true for the legal discourse. Nonetheless, the compulsoriness of legal discourse is far more

complicated than that of daily discourse. We live in a world glutted with legal discourses, which influence, determine, and control everyone's thoughts, remarks, and actions at all times. They represent not only linguistic norms but also behavioral rules, not only texts of communication but also institutionalized behavioral system. Legal discourse must transcend different individual experience to stably and universally provide behavioral guidance for the society, which would otherwise damage the basic principle of rule of law—all people are equal under the law. Compared with daily discourse, legal discourse requires subjects to reach a consensus over not only linguistic norms, but also values at a higher level, namely that every social subject, despite different values and experiences, will be compulsorily restrained by legal discourse from violating legal norms when he/she takes actions. In other words, legal discourse has removed uncertainties such as the subjects' motives, attitudes, moral principles and conscience, and compulsorily replaced criteria of "justice", "morality", and "rationality" all with "legality/illegality" by way of legislatures, the judicature and legal education. Legal discourse has in essence assumed that there is bound to be a restraint on discourse subjects' thoughts at any time or place under a given context, which is the premise of verbal communication. To put it differently, no subject can freely express him/herself because whatever he/she says, thinks, or does has been limited in a legal/illegal framework. In this article, the domination, suppression, and contortion of the subjects of legal discourse's willing to express themselves by given contexts is referred to as "the compulsoriness of legal discourse".

Take rights for example. Legal discourse has generated a whole set of discourse system concerning rights, which includes legal maxims such as "pursuing rights is justifiable", "basic rights are inviolable", and "where there is a right, there is a remedy", which every legal professional would take for granted. If anyone do not agree with these and believe that there is no need to either pursue or safeguard rights, then he/she will be excluded from the legal community due to his/her inconceivable opinions. But why would law professionals deny them without a second thought? It is exactly the hidden compulsoriness of legal discourse that is playing a role. Any discourse system must abide by this compulsoriness, which quietly restricts discourse subjects' thoughts and those subjects probably do not realize it.

The Historical Origin of the Compulsoriness of Legal Discourse

Undoubtedly, compulsoriness as a function of the legal discourse did not come into being until modern times. The premise of converting language as a tool of self-expression into discourse is to substitute general meanings of words with cultural ones. By comparing legal compulsoriness with the compulsoriness of legal discourse (Table 1 below), the latter can be delineated. In light of the research on legal discourse, it's argued that the compulsoriness of legal discourse and legal compulsoriness are of the same origin and complement each other.

It's generally acknowledged by scholars that legal compulsoriness is backed up by the threat of sanctions. To ensure that the public all conform strictly to the law, the repressive state apparatus operates by means of violence to back up compulsoriness and the state has specially established a standing army to serve as an ultimate guarantee of legal compulsoriness. This viewpoint can be traced back to the social contract theory. All parties who have signed the contract consent to give up the freedom of exercising compulsoriness based on physical strength and surrender unlimited freedom of action to an apparatus which operates by means of violence. They entitle the apparatus to monopolize all the dispersed potential freedom of operating by way of violence and further reconstitute it as a state. Ultimately, it monopolizes the use of legal compulsoriness. Since then compulsoriness is not enforced by individuals any more but by the authority through legal ways.

Individuals' freedom of using cohesion in the state of nature is replaced with that of filing lawsuits according to the law. Ultimately, backed up by the law, "natural compulsoriness" evolves into "legal compulsoriness". Based on the human instinct of obtaining advantages and avoiding disadvantages, it's believed that people will always abide by the law for fear of penalties. But one apparent exception is that some people would always choose to risk their lives to violate the law no matter how severe the punishment is in their society, suggesting that people are not always self-interest oriented. Moreover, noble deeds such as sacrificing one's life for justice also cannot be explained by utilitarianism. All these will suffice to prove that there are legal norms to which people conform voluntarily. For example, the public may comply with the law out of moral motivations, values, and sense of justice; otherwise the society will descend into a place where only the law of jungle applies. Just as legal compulsoriness requires to be guaranteed by a standing army which can be dispatched at all times, these legal norms are also in need of a guarantee which is different from the fear of compulsoriness but as secure as it and this task is fulfilled by the compulsoriness of legal discourse.

The theory of legal discourse has it that compulsoriness is neither a gun nor a knife but a relationship and a social institution. Before clans merged to form nation-states, compulsoriness arises from the subjugation of the weak by the strong by means of military force; but the weight of anthropological data also attests to the fact that there is compulsoriness based on religious and mediumistic discourse as well at that time. The pontifices and chiefs were believed to be able to hear oracles and make authoritative interpretations of the common values that sustained clans; therefore although they did not have the advantage of armed forces, they were still at the top of the social class hierarchy and could destroy any other people's will with their own in the clans. Obviously, this kind of compulsoriness was rooted in the god instead of conquest. The right to rule is inherently expansive. Therefore, to centralize the power of compulsoriness of more clans, rulers must go beyond local norms based on religions and resort to legal norms that were more universal and could be applied to clan members of different positions. Nonetheless, these legal norms which were still in their infancy could not gain the recognition of all alien clans of different surnames; they still needed to justify themselves by learning from traditional authoritative norms such as religions, customs, and social ethics. These two synchronous processes were mutually reinforcing: conquest safeguarded legal norms by way of violence while god worship endowed law norms with inherent authority, which was consistent with the general expectations of social members about order. In this way, legal norms were underpinned by inherent reasonability and the threat of sanctions backed up by violence, the combination of which helped the law thrive when it was still in its infancy. As legal norms continued to develop, the religious authority that supported its inherent reasonability was gradually disenchanted with, and the legislators attempted to substitute it with "reason". Nevertheless, compared with religious discourse which provided universal beliefs and ethics that are binding in real practices, reason was still unable to justify all the legal norms, nonobligatory norms pertinent to authorization in particular, because it was a double-edged sword that both enabled social members to think independently and make sensible decisions and empowered them to question orders and challenge the authority. To put it differently, reason could not only consolidate but also shake the legitimacy.

To make up for its defects, countries all opted to "tame reason", namely, to compensate the legitimacy of legal compulsoriness with the compulsoriness of legal discourse and to make use of the inherent acceptability of legal norms to rationalize legal compulsoriness. Carefully devised by Jean-Jacques Rousseau, John Locke and Immanuel Kant, legal discourses such as the God-given human rights, the separation of powers, executive power, constitutional state, the protection of rights, public interests, etc., had been constructed quietly.

Well-known legal maxims such as “conforming to laws equates to following one’s own will”, “freedom is the right to do everything allowed by law”, and “discipline equals freedom” had been embedded into the public’s general thinking model. Abiding by the law as almost the basis of all ethics and the legal discourse compelled everyone to believe that abiding by the law did everyone good; hence the citizens had an obligation to tolerate the inconveniences brought about by it. These core legal discourses came into being in as short as the past 400 years, which could be easily proved, but had been acknowledged as the foundation of a civilized society and the precondition for a society. Every social member is compelled to think and act under the framework of legal discourse and required to take legality/illegality as the only prerequisite for his/her actions no matter if he/she accepts it or not. By comparison, the religious discourse which has sustained societies characterized by clans for thousands of years has been dismissed as absurdity and nonsense.

Legal discourse managed or attempted to justify the law during a short period of time in history just like what the religious discourse had done by employing educational facilities such as systematic law education on a large scale, research institutes and news media which were able to shape discursive scenes. It seems that they are not as compulsory as jails, courts, and police stations; they have in fact constantly and secretly exerted compulsoriness on every subject who participates in legal discourse practices. It can be concluded that the threat of sanctions and education serve the same purpose. The plain view of justice, namely the law of retaliation and “a tooth for a tooth”, has been replaced by constructed legal discourse, such as social order and public interest. Criminals who have committed serious offenses are not subjected to physical pain anymore but required to repent of their crimes from their heart and devote themselves to the legal order constructed by the legal discourse, which exemplifies the hidden compulsoriness of legal discourse. The purpose of the legal discourse is all about helping criminals become “qualified citizens”.

In this way, the modern legal system, whose emphasis was on the action of being law-abiding instead of the motivation for observing the law, has gained a whole new layer of meaning: the justification for ends. The compulsory legal system, which was defended only by the threat of national sanctions, has surprisingly become ethically legitimate for the first time. Laws were no longer legal texts that purely stipulate behavioral norms, but attest to the legitimacy of institutionalized behavioral norms; societies were no longer loose aggregation of individual atoms, but cultural communities where members hold fast to the same values or views on law. If anyone attempts to escape the legal system that has been compulsorily integrated by the discourse, he/she will not be able to maintain his/her own existence. Every social member, on whom laws exert great influence, has been systemically deprived of his/her independent will of making legitimacy judgements, namely that government institutions which ensure compulsory law enforcement, well-devised legislative procedures, and institutionalized educational facilities have exempted individuals from cognitive burdens; therefore, they “willingly” comply with the compulsoriness of legal discourse. In this case, legal compulsoriness, the compulsoriness of legal discourse, and self-identity are tactfully but obscurely linked. Without legal compulsoriness, the compulsoriness of legal discourse will degenerate into water without a source; without the compulsoriness of legal discourse, legal compulsoriness will descend into pure violence. In the modern society, educated by the compulsoriness of legal discourse, it has become a natural obligation for every member to abide by the law as if this concept has been deeply ingrained in people the moment they were born. Those who are subject to legal compulsoriness are no longer the public but a tiny number of people deviant from the orthodoxy, thus ensuring the legal governance of the minority over the majority.

Table 1

A Comparison Between Legal Compulsoriness and the Compulsoriness of Legal Discourse

	Legal compulsoriness	The compulsoriness of legal discourse
Enforcement body	The judiciary	Educational institutions
Measure	Imposing sanctions by means of violence	Forcing change on people's will
Feature	Explicit	Implicit
Point of application	Physical violence	Spiritual compulsoriness

Conclusion: The Archaeology of Knowledge of Legal Discourse

The comparison of legal compulsoriness and the compulsoriness of legal discourse is in essence in conformity with the “Archaeology of Knowledge” proposed by Michel Foucault. This kind of archaeological research is not aimed at improving the current legal system with past materials, neither is it for the purpose of testifying the superiority of today's legal system over that of the past, but rather for overthrowing and reconstructing the “compulsoriness” of legal discourse and revealing the possibility of not behaving and thinking like what we do now from its origin in addition to the current mode of thinking. Certainly, it goes without saying that there are several laws that apply in any place and at any time in the long history of legal thought, but what legal discourse theory opposes is to claim that there is a continuity in the development of every type of law, which is nothing but a falsehood, to compulsorily date every kind of phenomenon back to the ultimate truth, and to forcibly contend that every concept is universally applicable; what should be dissected are subjective wishes of later generations, which were mingled with the objective law, occasional events that happened suddenly and were masked by inevitability, abnormal and capricious scattered discourses that were excluded from glorious words such as justice and fairness; what should be studied are how emergencies that deviated from the right path of history, rebellious behaviors that were against norm reviews, and events which went against historical standards and were classified as wrong deeds managed to survive the compulsoriness of legal discourse in history and exert profound influence on legal discourses nowadays.

The research methodology of legal discourse is neither a priori, like assuming discursive scenes such as social contract, state of nature, and veil of ignorance that are not falsifiable, nor transcendent, which attributes the development of legal discourse to subjective legal fictions that do not exist such as “the objective spirit”, “eternal justice”, and “transcendental idealism”, but fact-based—that is, it should seek truth from facts and keep abreast of the times: The production and reproduction of any legal discourse will vary with time and context. In summary, history can be summarized though it cannot be postulated.

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