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LAW INTERRUPTED?

LATOUR SNOOPING AROUND LE CONSEIL D'ETAT¹

Review of: Bruno Latour (2010 [2002]) *The Making of Law*. Translated by Marina Brillman and Alain Pottage. Revised by the author. Cambridge: Polity Press, 297 p.

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Lawsuits can be controversial in many ways, but in recent high-profile courtcases the relationship between science and law often takes centre stage. Conflicting scientific evidence, translation problems between judges and scientists, and expert monopolies are some examples of problems that seem to come with the increasing contribution of scientists to legal procedures.² Bruno Latour's book *The Making of Law* (2010), originally published as *La fabrique du droit* (2002), contains an ethnographic study that compares legal practices to scientific practices.³ Not only does Latour scrutinize existing models of law and offer an alternative understanding; his comparison of legal and scientific knowledge production also invites us to think about the way scientists and lawyers are increasingly expected to meet in courts.

Latour enjoyed the rare privilege of silently sitting in the French 'Conseil d'Etat' (Council of State) for a period of fifteen months. The Council of

State, comparable to the Dutch 'Raad van State', advises the government on legislative proposals and as the highest authority makes decisions in administrative matters. Unlike French civil and criminal proceedings, which are based on statutory law, The Council of State produces case law. Latour treats The Council of State as a laboratory which offers the researcher the possibility to study law in a 'purified' form: no overheated courtroom settings with barristers, blood and other distractions, but purely juridical problems, written down and accessible for the anthropologist (253). Latour gives the reader a few warnings in advance about his anthropological journey: you will get confused, bored, and perhaps desperate – the transcripts of legal activities get longer and longer – but you will be rewarded eventually. In the end you will be made familiar with 'the hesitant path', that, as he states 'characterizes the movement of law' (171).

We should situate this book as a part of Latour's broader undertaking of comparative studies of different regimes of truth production in modern Western institutions. Law is understood by Latour as a specific regime of enunciation that 'draws together' loose statements: 'it keeps track of all disengagements, to tirelessly reconnect to their statements to their enunciators, via perilous routes of signatures, archives, texts and files' (276). It has no domain of its own but can relate to all aspects of society; it is a form of 'association' in itself.

The key actors and their steps

In the beginning of the book we are introduced to some of the key actors in the Council of State through a specific legal case, in which the question is discussed of whether the municipality of La Rochefoucauld can be held accountable for the fact that pigeons devastated M. Delavallade's sunflower crops. The judges deliberate during review meetings that are closed off to the general public. We also meet the 'commissioner of law', who, more akin to an independent consultant than a judge, is the only one who speaks in public. Other actors include the reporter who makes a summary note of the case, the reviser, and the president. We get ac-

quainted with the complexity of the important term ‘moyen’ (translated as ‘the means’)⁴ which refers to the legal grounds that should – with some effort – be deduced from the file under review. We also get to understand the subtle differences between various types of judgments. For instance, decisions of lower courts can be ‘annulled’ whilst a claimant’s demands can still be ‘rejected’ when the judges find ‘the means’ for that.

In *How to make a file ripe for use* Latour explains how documents – often produced by (government) agencies – are already prepared (‘profiled’) for legal use. The case of a man trying to get financial compensation because of the death of his son on a ski run shows how documents in the file need to be translated: they must not only refer to the world outside the file, but, in a less direct manner, they already have to ‘transport quasi-legal forms or trust’ (certified copies, witness statements, etc.) before making it into the file (75). Law cannot be understood without these preparations. But the process of translation does not stop here. The files undergo various stages of modification: they are labeled according to urgency, formatted in such a way so as to meet the principle of due process, and prepared for the final stage.

Judges never just simply apply rules, as is repeatedly demonstrated. Take for instance the case of the expulsion of a criminal asylum seeker (144). Does he risk the death penalty if he would be sent back to Iraq? How can judges acquire more information on this issue? The president is not fond of formalism, but an informal request for information (for example at the Ministry of Foreign Affairs) is undoubtedly in conflict with the principle of due process. The judges try to balance this issue by giving the opposing party more leeway to research into certain issues. Common sense is by no means absent, but is a constant reference point as long as the arguments can be translated into a legal form. Most judges have had positions in the government and have sometimes even been involved in crafting the decrees under review of the Council of State. Therefore, ‘fragile connections’ between the judges and the outside world play a role as well. In *A body in a palace* Latour traces and maps out the Council’s members and their positions.

Through such examples Latour leads the reader through the various sections of the Council of State while describing how the council members are seated (at the same desks full of papers), what their offices look like (non-hierarchical), and by sharing his thoughts with us while secretly mimicking the walk of the counselors on the grand staircases of the Palais-Royal.

Case-law and scientific objects

The challenge for legal practice lies ultimately in how the particular case and the law weave into each other (the ‘dispositif’). Latour gets to the heart of that matter in *The passage of law*. Here he wants to devise a method of defining the process of translation between the case and the law, which allows the judges to qualify their own practices; or, borrowed from speech act theory, he wants to investigate the ‘conditions of felicity or infelicity’ of their statements (129). Through a close listening/reading of their practice he tries to grasp their subject matter. What sort of things do they refer to? What causes them to reposition themselves in particular cases and to bring them to a close? In this way Latour traces ten ‘value objects’ against which judges assess their work, and which, by being subtly modified throughout the whole process, help the law to move on.⁵ Some examples of such value objects are the ‘means’ and ‘hesitation’.⁶ But he also mentions less familiar things as for instance the ‘interest of cases’, which is a measure of difficulty, and ‘the organization of cases’ which refers to the logistics of claims (194).

Latour gathers pace in chapter five, *Scientific objects and legal objectivity*, when he compares the Council of State with another laboratory, a scientific laboratory at the Paris School of Physics. The buildings themselves are already different in their spatial arrangement: Contrary to the Palais Royal, the rooms in the Paris School of Physics are differentiated according to the scientific instruments required. There are also different requirements with regards to the knowledge the two types of lab workers should have in advance, produced by different kinds of ‘micro-procedures’. Judges should know as little as possible about the case they

judge, which gives their verdicts an air of impartiality and makes them relatively easy to replace. Scientific researchers, on the other hand, should be as close as possible to their research objects. In the scientific lab there is no ritual where texts are carefully read out loud, but there are passionate cries and energetic body language. While interruptions are exceptional in the Palais-Royal, they seem to be part of everyday life at the science lab. Latour's own presence is also approached differently in the two places. In the Palais-Royal he is a silent witness, but in the Paris School of Physics he is part of the impatient crowd standing around the phenomena under investigation.

Differences are also noticed in the laboratories' productions: Scientific articles contain claims, not decisions, and they are directed at different addressees. Whereas judges produce the final chapter for the participants in the case and as an affirmation of the slowly evolving practice of legal doctrine, researchers write for other scientists that potentially can develop, criticize or open up their claims in future:

'[S]cientific articles [...] are quite unlike a legal decision, which the French, remember, call 'arrêts', that is, 'stops'. Rather than 'stops', researchers write, if we may say, 'please-go-ons'; in fact, it is they, to borrow a legal term, who produce *claims* in which the scientific author figures more as a claimant than as a judge. That is, each scientific article functions as a judgment on claims made by colleagues, or as a 'plaint' made to those colleagues on behalf of a phenomenon whose existence is claimed by an article' (204-5).

Science and law work with different regimes of enunciation and different truth criteria: whereas science operates through numerous referential chains through which statements can be traced back and forth producing new knowledge, law's movement is 'one-way only' (235); knowledge is tied to existing articles and decisions, a linking practice that re-attaches the world to the body of law.

Towards the end of the book, in *Talking of Law*, Latour takes issue with various models of law. In the same way as he opposed the reduction of science to a method or a set of concepts in previous work of 'science in

action' (1987), he opposes the reduction of law to the application of rules. He also opposes a reading of law in terms of 'invisible' power structures. Latour rather prefers to describe the references that he *can* trace. In a similar manner, Latour opposes a (Luhmannian) conception of law as a subsystem of society with its own domain (263). On the contrary, he argues, the law is a form of 'association' in itself. Hence, contrary to seeking definitions and explanations for law somewhere *else* – in social contexts, systems, power structures, political interests, or morality – he sticks to law practices themselves. As he states: 'There is no stronger metalanguage to explain law than the language of law itself. Or, more precisely, law is *itself its own metalanguage*' (260). Latour understands law as a specific way of making connections and it is by offering this relational understanding that he adds to existing meta-juridical scholarship.

Some hesitations

Latour's chapter on the two laboratories of science and law turns around some of the notions that we tend to attribute to either the scientific or legal domain, which can in a refreshing way add to contemporary debates about how to assess science as 'good science' in courts. In fact, Latour claims that some of the things we associate with objectivity, such as the ethos of disinterest, stems from legal practices having no object: Law is 'object-less' (236). Differing from Foucault (1975), who described how experts (psychologists, etcetera) and disciplinary practices infiltrated deeper and deeper into the legal domain, Latour seems to suggest there is a change of features in the scientist who engages with legal practice. Those moments when scientists take on the role of experts in courts and in fact 'testify' about specific evidence or about the state of affairs in their field, bear the imprint of the law rather than that of the sciences. Latour seems to be alarmed about these confusing intermediate positions: scientists produce new knowledge and open up discussions; they don't 'judge' on the facts (237).

The contribution of expertise in courts – at least in The Netherlands – is being more and more codified by rules and qualitative norms; take for

instance the Dutch code of behavior for expert witnesses (Coster van Voorhout 2010)⁷. However, following Latour, we can state that science doesn't qualify itself through standards. This invites us to explore alternative proposals for organizing scientific expertise in courts. For example, Nico Kwakman (2008) argued that, in complex cases, scientific debate itself should be formalized in the legal procedure. Thus, instead of establishing norms for science, courts should always critically assess scientific practices that produced the evidence, thereby taking the risk that science will bring up new questions – and not be of 'help' to close the case.⁸

Although Latour's findings add to such issues, critical remarks can be made as well. The study is considered to be valuable for its understanding of legal practices in general, however, commentators have also indicated that in the comparison between the two laboratories Latour sometimes presents unfortunate generalizations that might not hold up when scrutinized by legal scholars (Levi & Valverde 2008: 821). Science scholars might be slightly surprised as well. Latour seems to associate controversy with science and the 'stability of established connections' with the practice of law (Latour 2010: 235), but aren't there examples of expert systems and institutions in science in which stability is carefully balanced out and confirmed? And what about the implicit and explicit techniques of closure in everyday scientific practice, to which Latour devoted so much attention in earlier works?

Some readers might feel as if something is missing too. Instead of looking at the intermingling of science and law, as many of his colleagues in the field of Science and Technology Studies have done (Jasanoff 1995; Lynch 1998; Toom 2009), Latour's approach considers legal practice on its own, compared to scientific practice. The role of expert witnesses and public expert hearings are excluded from Latour's analysis. In fact, he refers to them as 'those many hybrids of science and law' (213, note 19). Whereas these other studies often stress the different procedural formats related to legal cultures, and how these aspects interact with scientific evidence, Latour's attempt is to actually grasp the essence of Law itself. Latour understands 'essence' not as a (stable) definition, but as drawn out by situated material practices: the specific way heterogeneous phenomena are 'tied together' (x).

Despite this nuanced understanding, Latour did choose a very specific site of research, the Council of State, because it presents law in a purified form, dealing with specific juridical problems. However, American or Dutch laboratories of criminal law have to deal with other problems, and with specific objects that oscillate back and forth between law and science – for instance, camera images, bloodstains, and brain scans. How should we understand these objects in relation to the two regimes of enunciation? Taking them in account could arguably reopen Latour's differentiation between law and science.

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² Famous cases in The Netherlands that drew attention to the role of expertise in law are 'The Schiedammer Parkmoord' (Schiedam Park Murder) and 'Lucia de B.' Recently, the 'Deventer Moordzaak' (Deventer Murder Case), being controversial for years, was prob-

lematized again by philosopher of science Ton Derksen in *Leugens over Louwes. Deventer Moordzaak* (2011).

³ For those that are familiar with Latour's work: *The Making of Law is Laboratory Life* (Latour & Woolgar 1979) in the legal lab.

⁴ 'Mean' is not a word in English, but the translators preferred to use this translation because it keeps its association with 'middle', contrary to the term 'legal ground' which suggest a more foundational understanding (10).

⁵ Latour attributes the notion of a 'value object' to the work of Greimas and Courtès (129).

⁶ in Latour's understanding hesitation 'produces the freedom of judgment by unlinking things before they are linked up again' (195).

⁷ The requirements are formulated in 'het Nederlands Gerechtelijk Deskundigen Register' (NGDR) and require for instance that the scientist has published in scientific journals relevant for his field in order to be able to be called an expert in this field.

⁸ For a more extended discussion of this argument see Van der Velden (2011).