

The Making of Law
An Ethnography of the Conseil d'Etat

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Preface to the English edition

It's not my fault if this book is a little hard to read: it's about *law*; it's about *French* law; it's about French *administrative* law! English-speaking readers will forgive an ethnographer for telling them about the rituals of New Guinea or the folklore of the Scottish Highlands; they will absorb without difficulty the many concepts often retained in native languages, but certainly not if they are asked to make the same effort with regard to the legal niceties of the French State. Exoticism has its limits. You might be willing to cross the Channel to hear charming stories about Provence or Burgundy wine, but not to sit, for 300 pages, inside the Palais-Royal in Paris to hear exceedingly boring people discuss exceedingly subtle points of law. But the same readers will accept, with a certain degree of open-mindedness, an ethnography of a scientific laboratory or of a technical project that might be just as difficult. Ah, yes, but science and technology are supposed to be universal and the arguments might ring a bell in Cambridge as well as in Toulouse or Houston. But law? Law is so provincial, so stubbornly local. How could anyone pretend to interest them in French administrative law?

The reasons I insisted on writing this study, and then on having it translated, is, first, that this branch of legal reasoning is not a Code-based law but a precedent-based legal corpus entirely fabricated, over two centuries, by the judges themselves (who are not judges, by the way, but members of the executive, a queer feature about which we will learn more in due course). So, my meek retort is that, of all the

branches of Continental law, it is the one that most resembles Common Law in the way it is elaborated and arrayed in reasoning.

Okay, but not a good enough reason.

The second reason is that administrative law, and especially what happens in the Council of State which plays the role of Supreme Court for this branch of law (yes, this is complicated: in France, administrative law is a completely autonomous and separate system from the judiciary, which has its own Supreme Court, called the Cassation), is almost totally unknown by the French people themselves. In other words, in the book that follows, everything is just as exotic to most French-speaking readers as it is to English-speaking readers. If it is strange to the latter, it is just as strange to the eyes of the former.

This is why, instead of bombarding the reader with technical terms in the local tongue – which can be done without any qualms when reconstructing the cosmology of the Iroquois or the assembly of gods in a Brazilian *candomblé* – I have chosen, for each function, words that have no common meaning in English. But they have no meaning in French either, except for the lawyers who work directly in contact with the Council of State. ‘*Commissaires du gouvernement*’ in italics and quotation marks would have meant nothing to the English reader, nor does ‘commissioner of the law’ (the term I have chosen); but in French, ‘*commissaires du gouvernement*’ means so little that every single time a decision of the Council of State is mentioned in the press, you need a long paraphrase to explain what it means. Especially because, in the same palace, there are other people, also named ‘*commissaires du gouvernement*’, who are really sent and commissioned by the government, whose function is utterly different from that of commissioners of the law (who are sent and commissioned by Law only, as it is interpreted by their own conscience – and that of their colleagues). Too complicated? Who has said that the central institutions on which contemporary civilization are based should be simple and fully opened to the gaze of the ordinary citizen? Anthropology of modern cultures is just as hard in Paris as it is in Beijing or Tierra del Fuego.

But here is the real reason why I think it is worth taking the trouble to read such an ethnography about French administrative law: forget that it’s in France, forget that it is only about administrative law (by contrast to the judiciary that deals with private and criminal law), and just consider the chance I had: for about four years – not continuously – I had privileged access (it took a long time to sneak in) to the private conversations of about six or seven counsellors who had to come to a conclusion about the cases that

were coming to them. I was sitting not only in the tribunal room where the public audiences were given (not much happened there anyway since the lawyers for the plaintiffs say nothing and only the commissioner of the law stands up and reads his ‘conclusions’ and then sits down and that’s all . . . no drama whatsoever), but also behind the closed door where the cases were discussed, or, as they say, ‘reviewed’. A unique site for a unique access to the collective interlocution where I could observe in great detail (okay, too many details, I agree, but isn’t that what ethnography is about?) the close knitting of legal reasoning.

At which point you might object that I observed not ‘legal reasoning’ but the ways French administrative law judges (and they are not even judges but political appointees, former ministers, heads of public companies, journalists, etc.) think legally. That’s where I somewhat disagree. Anthropology of law has this interesting feature in that – contrary to, let’s say, anthropology of science, my original field – there was never any question that all cultures *have* law. It might differ in content; the conclusion might horrify the ethnographer – or the plaintiff; the circuitous route of reasoning might look incredibly far-fetched; there might be blood all along; but it is always recognizable as tracing the path of something – quite elusive I agree – that we all call ‘legal’. So, yes, a case study will always be just a case study, and it should not be generalized too much, but the whole book that you, hopefully, are going to accept to read is based on the assumption that the English-speaker does not need to learn about ‘French administrative law’ (unless they wish to) but about the *passage* or the *transit* of law, a question that, naturally, can be highlighted only thanks to a detailed case study but that may become, in the end, rather independent from it.

The true reason why I invested so much energy in this field work (I found, on the whole, law much more technical and difficult to follow than science or technology) is that it was precisely to compare the passage of law with the other types of enunciation regimes I had studied up till then (or have studied since). I belong to a small group of social theorists who believe that we have been pretty wrong in providing a ‘social’ explanation of anything – science, religion, politics, technology, economics, law and so on. Far from being what should provide the *source* of explanation of those phenomena, what we loosely call ‘the social’ is rather the *result* of what has been produced by types of connection (‘associations’ in my terminology) that are established by scientific, religious, political, technological, economical or legal connectors. If this theory (now called ‘Actor Network Theory’ or ‘ANT’) is even vaguely right, there is a paramount interest

in defining, as precisely as possible, what it means to connect some association, let's say, religiously, or scientifically, or politically, etc. The use of the adverbial form is crucial to the argument, since there may be a great gap between speaking *about* politics or religion and speaking *politically* or *religiously*. It's much easier to understand, and it will become even clearer in what follows, that there is similarly an immense difference, very easy to grasp, between speaking *about* law and speaking *legally*.

In the last thirty years, I have done much field work to define the scientific way of establishing connections: what I called 'reference'. The book you are about to read is the *Laboratory Life*, not for the construction of facts, but for the construction of legal arguments ('moyens de droit'). In the same way that I had been able to extract, from one admittedly limited set of case studies, a plausible definition of what it was to speak scientifically of some state of affairs, I have tried here, through another carefully devised set of ethnographic devices, to extract, to educe, to highlight a plausible definition of what it is to speak legally of a tort. My overall point, my general contention, is that we can't possibly provide a positive anthropology of the Moderns (who, I remind you, have never been modern, but that is only a negative definition: what have they been, then?) as long as we don't have a clear comparative study of the various ways in which the central institutions of our cultures produce truth. And clearly there are several types of felicity conditions for the various kinds of truth production (scientific, legal, religious, etc.) that define the former Moderns. There exists an inner pluralism in the way truth production is defined among the Moderns – which does not mean that they are indifferent to truth, quite the opposite. It is actually what makes law so interesting.

I have to confess that, until I had carried out this field work, I was not too convinced that my overall project had any chance of succeeding. Having tried to compare scientific felicity conditions to, for instance, those of religion or politics, I knew it was feasible, but there was always the nagging feeling that it was a lost cause, so powerfully had the ideology of science squashed those other contrasts beyond recognition. Whatever I tried to do, religious and political enunciations seemed always to lament and repent for *not* being scientific enough. The immense advantage of law – talk to a lawyer or a legist for five minutes and you will understand what I mean – is that they never have any doubt (a) that their way of arguing is entirely specific; (b) that there is a clear distinction, inside this way of arguing, between what is true and what is false (the felicity and infelicity conditions are clearly recognized even though they might be agonizingly difficult

to put on paper); and (c) that this difference between true and false is totally different from what might be taken to be scientifically true or false. In other words, only law has maintained, throughout the modernist parenthesis, a sturdy confidence in the validity of its own felicity conditions quite independently of what has happened to science (even though there have been many attempts, and just as many failures, at founding a 'science of law'). It is this unique feature that allowed me to have confidence in the project of systematically comparing the felicity and infelicity conditions of the different regimes of truth production that define the hard core of our cultures. And there cannot be much doubt that the rule of law is one of the ways in which Western societies have defined themselves. And yet it is extremely difficult for outsiders to characterize what is legal in a legal reasoning . . .

Although there is no clear description for what I am doing, the closest is that of an empirical (not an empiricist) philosopher. This book tries, through the device of ethnography, to capture a philosophical question (and in addition a social theory puzzle) that would be inaccessible philosophically (provided the adverb had a real meaning, which I doubt very much): *the essence of law*. Knowing that an essence does not lie in a definition but in a practice, a situated, material practice that ties a whole range of heterogeneous phenomena in a certain specific *way*. And it is on the search for this specific way that this book is entirely focused. Now, once again, what is marvellous in law is that, to designate this apparently abstract question, it has a very explicit term, at least in French: the word 'moyen', for which the translators and I had a lot of trouble trying to find an equivalent. It is uttered ten times a minute by lawyers and judges, and yet this key term has no definition in law dictionaries. That's what this book tries to redress: to provide a description, understandable from the outside, for the word '*moyen*' – legal argument, legal ground, legal reason, this little vehicle on which is transported the rule of law, this value that we cherish so much – and with good reason.

To assuage the difficulties of the chase, the book is constructed in such a way that the reader learns about the site, the precedent, the cases, the functions, morsel by morsel, just when it is needed. So don't expect a presentation of the French legal system, a description of the overall institution, a summary of the cases. This is a completely zoom-free, context-free ethnographic description, which means it is, or it should be, a good ANT's view of law. Context is doled out when necessary to give you just enough to move to the next step.

A word to finish, on anonymity: the counsellors I had the patience to study were at the outset very wary about my publishing a book about the practice they had let me observe for so long. First, because the discussions about the cases should not be available to the plaintiffs, and, second, because they did not want their decision to appear as the result of a complex and humble situation of interlocution. The first problem was easily solved by a complex montage of cases where the names of the judges and the number of the cases were reshuffled enough to erase all the traces without losing the argument (impossible naturally to record on tapes – I had to scribble fast and inevitably I lost a lot). To the second objection, I could not submit: it would have meant abandoning the project entirely. For the few who read my manuscript in detail before publication, Law, at least in France, seemed to have no possible individual or personalized site: it had to speak from nowhere as the Voice of the Law. ‘Since Napoleon’s foundation of the Council’, one of the counsellors wrote to me, ‘never has the Voice of Law been downgraded to the level of a mere interlocution among individual judges’.

For a moment I thought that I was going to enter into the same dispute with judges I had been forced to enter with some scientists in the past: a realistic description of their practice was seen by them as mere debunking. Fortunately, judges seemed to be more open-minded than scientists to the ethnographic gaze (or, in the case of the *Council of State*, more thoroughly indifferent to what the social sciences can say of the type of truth they generate). To my great surprise, the book was a small success in French, to the point of getting me a few reviews, and I am told it is a required reading for every apprentice in administrative law. If I was accused of something, it was this time by the social critics of law who found my portrait of the Council too favourable – not to say complacent. And it’s quite true, not only is this book context-free, it is also critique-free. To stand any chance of grasping the elusive passage of law required, it seemed to me, this breach in the usual methods of inquiry. Each study demands a different writing strategy in order to reach that most elusive of all the goals I have pursued in my career, following Harold Garfinkel’s dictate: the ‘unique adequacy’ of the text to the matter at hand.

I would have lost courage in bringing this book from French to English if Alain Pottage had not constantly pushed for it, translating a chapter, revising others and convincing the publisher that a book on French administrative law was of no less interest than any other more exotic and sexy topic . . . I have since revised the translation quite extensively. I was encouraged in translating the result of this

field work by the warm welcome of several jurists, especially Noah Feldmann in the United States, and Frédéric Audren in France. In Belgium, Serge Gutwirth and Laurent de Sutter were kind enough to comment at length on the French version of the book and to make this enterprise part of their own research project on ‘Les loyautés du savoir’.