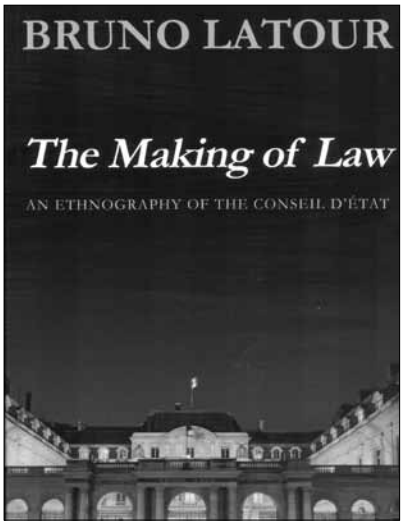
The Making of Law: An Ethnography of the Conseil D'Etat

Bruno Latour | Polity Press | 2010 (English edition)



This is a fascinating work of practical philosophy examining the decision-making process within the Council of State, a quasi-judicial body that applies administrative law at the highest level in France. In his good-humoured preface to the English edition the author provides at least two good reasons why an English-speaking common lawyer ought to read this book.

The first is that despite being born at the same time as the Napoleonic code, the Council of State has developed a body of precedent-based law which is unique on the Continent. It is therefore more closely related to the common law in the manner of its reasoning than the code-based systems of civil and criminal law that operate alongside it.

The second reason is that the Council of State and the body of law it applies is (apparently) as unfamiliar to the average French citizen as to anybody else:

> in the average French person's eyes it seems as distant as the rules of Bantu marriage or Earth of Fire initiation ceremonies.

As a consequence, Latour adopts the position of an interlocutor tasked with explaining French administrative law to an extra-terrestrial visitor, not taking into account any assumed knowledge (of philosophy, French, or law) whilst at the same time admirably avoiding the adoption of a patronising tone.

Broadly speaking Latour is a philosopher (he prefers 'ethnographer') whose work critiques the concept of the 'social' as a meaning-producing paradigm, preferring instead to analyse the 'associations' between 'connectors' – semantic, religious, political, technological, economic or legal. He takes an approach to the subject matter of his studies that has been labelled Actor Network Theory or ANT, yet the book is refreshingly free of jargon which makes the concepts discussed far more easily assimilated by the uninitiated.

For fifteen months over a period of four years Latour observed the deliberations of the *Commissaires du gouvernement*, who despite their title perform a function which is sufficiently removed from the influence of the Executive to justify them being referred to as judges and their decisions as judgments. In contradistinction to the formation of judgments in this country which is essentially the solitary task of a single judge, within the Council of State the act of judging is mediated through a series of collective but closed deliberations between counsellors and various other officers, each with a defined role to play in the review of the administrative decision at hand.

Latour declares rather ambitiously and yet unashamedly that his aim in analysing these deliberations is to capture the 'essence of law' in the practice of judicial decision-making, not in a definition. A judgment is not 'handed down' as the commandments were to Moses but is the result of a long and complex process involving the interplay of litigants and lawyers, oral and documentary evidence, arguments and texts, interests and opinions, which in the ANT taxonomy are all 'actors' with a role to play in producing the final judgment.

Although Latour follows closely the deliberations in individual cases, to preserve the anonymity of the judges they are not expressly identified, which might also distract from the aim of capturing the essence of the law. He does however note the importance of parties' names in ordering the body of case law on which precedent is based, contrasted with the practice in science whereby important theories are directly attributable to the scientist responsible, which serves to illustrate the detachment of lawyers from the subject matter of disputes compared to scientists who are deeply involved in the subject matter of their investigations.

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The bones of the book are Latour's hand written notes, fleshed out and placed in the context of the facts of each case, with the words dissected and then analysed as specimens of legal reasoning. Latour's hypothesis is that the quality of legal reasoning engaged in through interlocution is no less than that which is found in a written judgment. In that regard, Latour goes a long way to filling what appears to be an immense gap in French administrative law, which is the absence of written reasons for judgment. A short form of judgment

is published – resembling a head-note – which includes the orders made, but it is left to a cohort of chroniclers to explicate the reasoning that links the facts with the law for publication in the official reports. The decision to reproduce tracts of conversation within the body of the text – rather than place them in appendices – causes moments of reading tedium (in the same way that any transcript will do), but these passages are admirably brief and rightfully occupy a central place in a work devoted to understanding the law as it is enunciated by actors tasked with 'declaring the law'.

Latour's insights into the judicial process make a rousing contribution to the near soporific state of debate as to whether judges make or declare the law. In fact, the debate is shifted to another dimension. Having noted that judges define their role in terms of their capacity to 'say the law', he analyses the modification of ten 'value objects' through 'the ordeal' of judicial decision-making, specifically:

1. The *authority* of the agents participating in the judgment

2. The *progress* of the claim as it moves through obstacles

3. The *organisation* of the cases, which enables the logistics of claims to be respected

4. The *interest* of cases, which is a measure of their difficulty

5. The *weight* of the texts, which makes for an increasingly contrasted landscape and history

6. The process of *quality control* by means of which the conditions of felicity of the process as a whole are verified reflexively

7. *Hesitation*, which produces freedom of judgment by unlinking things before they are linked up again

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8. The *means* of arguments which compel the linking of texts to cases

9. The *coherence* of law itself as it modifies its internal structure and quality

10. The *limits* of law, which are defined by regulating the right to launch or suspend a legal action

The word 'moyen' which is translated as 'means' of argument has a stronger connotation for English-speaking lawyers when given its alternative translation of a 'ground' of argument.

In observing the deliberations of the judges as they sift and weigh these value objects Latour comments, 'judges do not reason: they grapple'. Law with a capital 'L' is not a monolithic edifice but is situated within a landscape of contingencies.

Latour describes the Law as a lacework of tissue that connects everything within the social body and yet remains superficial. In other words, it does not seek to resolve that which is not necessary to resolve for the disposal of proceedings. He consciously deflates the 'excessive' claims that have been made for and on behalf of jurists, including the claims to enunciate the truth and deliver justice. The law holds 'referential chains' – plans, maps, testimonies, fingerprints, various experts' reports – without being able to prove with scientific certainty the veracity of the information referred to. His example is a case concerning an illustrator's status as a journalist for the purpose of membership of a professional association. While the journalist was able to prove as against her opponent that her work was within the definition of a journalist in the relevant statute ('in the sense of Article R-126'), Latour contends the result says nothing of her essence as a journalist.

An example closer to home might be the decision in *Johansen v Art Gallery of NSW Trust* [2006] NSWSC 577 in which it was held that it was within the discretion of the board of trustees to decide whether or not the portrait of actor David Gulpilil was a painting within the express terms of the grant of trust, which says nothing profound about the elements of a work of art that will constitute it as either a painting or drawing (despite lengthy submissions on the point). It was not necessary to decide what those elements were in order to dispose of the proceedings. Another example might be the decision of the High Court of Australia in *R v Lavender* (2005) 222 CLR 67 in which it was held that there is no element of subjective intention to be taken

into account when assessing whether conduct departs so far from the standard of a reasonable person that in the circumstances it amounts to gross negligence, which says nothing about the content of the conduct by which to measure the degree of departure, leaving it instead to the tribunal of fact to decide what is reasonable on a case by case basis. There is no shortage of examples to support Latour's conclusion that while the law is a powerful force of social cohesion it is lacking in depth of information about the subject matter it traverses. The Law produces no new knowledge, and yet:

> It has better things to do than to know: it maintains the fabric of imputations and obligations.

Latour undertakes an extensive comparison of scientific and legal practices. Surprisingly, he finds practitioners of the law to have a better claim to objectivity and detachment in relation to the facts of a matter than scientists, whose research is passionately concerned with the nature of the facts under investigation. A judgment is made, 'within the limits defined by the adversarial logic of the case'. A determination of the facts in issue does not stray beyond evidence adduced at the hearing. A research scientist is not so constrained in the scope of enquiry (but is not required to pass final judgment either). Latour also asserts that classifying cases according to legal rules is a system of ordering which lacks predictive power and is therefore not the same as a scientific system of classification.

Scientists and lawyers both inhabit a textual universe, in that their work is bound up with the manipulation and interpretation of texts. The proliferation of texts results in a task of exegesis of Sisyphean proportions. To assist in this task values are assigned to heterogenous texts, so that a lawyer will attribute more weight to a reported as opposed to an unreported judgment, and a scientist have greater regard for an article in *Nature* or *Science* rather than one posted on the Internet. Both also rely on coded systems of citation and reference, and engage in a collective effort of interpretation:

> In both domains, everything may already have been written, but still nothing has yet been written, so that it is necessary to begin again, collectively, with a new effort of interpretation.

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In the final chapter of the book Latour goes back on his earlier promise not to attempt to define the essence of the Law. He conscripts Wittgenstein in rejecting a definition of the law based on rules and sanctions, and adopts the proposition that human action cannot follow rules, only refer to them. The closest that Latour comes to formulating a singular, self-contained definition of the law is the statement that, 'all law can be grasped as an obsessive effort to make enunciation assignable'. His prime example of this effort of assignation is appropriately the humble signature.

Overall the beauty and originality of Latour's approach is the manner by which he has managed to humanise the Law without diminishing its force, exemplified in him asking:

> What is the origin of the kind of defeatism that compels us to believe that if a human speaks he inevitably and quite pitifully lapses into error and illusion, and a thundering voice must always emerge from nowhere – the voice of nature or the voice of Law – to dictate his behaviour and his convictions? Are we poor earthlings really so impoverished? The way in which unquestionable truths are gradually constructed through human interactions has always seemed to me to be more interesting, more enduring and more dignified.

Inevitably the practice of law is too heterogenous for Latour to entirely succeed in capturing its essence. For instance, Latour would have to concede that the publication of reasons for judgment as distinct from a chronicler's second-hand report is a crucial measure of difference between the practice of administrative law in France and law in Australia. Neither is it any revelation that scientific and legal reasoning are two different things. Otherwise judges could be replaced by experts. The characteristic of a judgment is that it is final, unlike the opinion of an expert, which may be contested. Nevertheless, one can hear clear echoes within the bounds of our system of precedent-based law, such as the careful 'hesitation' in reaching a final judgment which gives litigants confidence that their interests have been weighed fairly, the general tendency of the law toward homeostasis and stability, and the textual universe of the law in particular. That said, the most refreshing aspect of this book is the humanising of the law as seen through the eyes of a well-informed and acutely observant outsider.

Reviewed by Sean O'Brien