Providing the missing link: Law after Latour's passage

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« [On] ne peut parler juridiquement sans être juge. »
Bruno Latour 2002, 273

"Ce qui m'intéresse ce n'est pas la loi ni les lois (l'une est une notion vide, les autres, des notions complaisantes), ni même le droit ou les droits, c'est la jurisprudence. C'est la jurisprudence qui est vraiment créatrice de droit : il faudrait qu'elle ne reste pas confiée au juges. Ce n'est pas le Code civil que les écrivains devraient lire, mais plutôt les recueils de jurisprudence."
Gilles Deleuze 1990, 229-230

"Every time a person interprets some event in terms of legal concepts or terminology – whether to applaud or to criticize, whether to appropriate or to resist- legality is produced."
Patricia Ewick & Susan Silbey 1998, 45

Introduction

There are two ways to speak of the law, which, both for jurists and laypersons, coexist like an optical illusion. Either you see the naked young woman, or you see Freud's profile, and the passage from one view to the other is difficult to grasp or control. You're caught "in" the one or "in" the other. Similarly, law is evoked in two modes referring to two distinct significations. On the one hand law is referred to as an intertwined whole of statutes, rules and regulations, and thus, in one word, as norms (or "normativity"), while, on the other hand, it can as well be understood as decision-making or as a practice that produces solutions. Thus: norms or solutions, that's the question.

While it is not clear how we have been mixing up and shifting from the one register to the other, we surely have. In fact, - and maybe this is clearer in continental legal systems – we have long been confusing the "sources of law" with "law" as such. It is not Latour's least merit that his passage through law and legal studies has made it

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possible to spot and lift this confusion, and to start exploring and learning how to speak well of law. A reboot, as we might say today.

In this chapter, I want to show that this incessant switching between two ways to evoke or invoke the law is blurring our understanding of what the law does, what it produces, what it makes possible and how it is articulated to what is not law, to other practices or modes of existence. As a result, this chapter focuses upon the *role* of law much more than upon the *rule* of law, a shift of interest and sense which is induced not only by Bruno Latour's research on the law, but also by his startling project to anthropologically rethink, almost from scratch, what "we", the moderns, actually have been, now that we have come to understand that we never have been modern. Latour already showed that the same sort of double invocation is not only at work when we speak about law, but he convincingly argued that it is also noticeable when we speak, for example, about science or religion (very clear in Latour 2013). As the Native Americans are supposed to have said about the white cowboys conquering their territories: "Ils ont la langue fourchue" (Latour 2012). The moderns never (seem able to) say what they do.

In the first two paragraphs of this chapter I intend to describe and distinguish the two voices in which we evoke the law, and to put the contrasts in the spotlight. In the third paragraph I undertake to understand a number of consequences of the distinction as regards, firstly, the relation between law as an institution and law as a value (in the sense Latour gives to these words). Secondly, I try to explore what this means for the understanding of law in a democratic constitutional state, arguing that well describing the role of law might be more useful and needed than to continue to affirm its rule. Thirdly, I reconsider the notion of the "force of law" in the light of the former. And fourth, finally and pursuing the same perspective, I address the question of the embodiment of law into technology.

I. Law1: setting and enforcing *norms*; law as normativity

I.1. "What is law?"

In response to this question, very often, not to say always, law is declared to be a whole of rules and norms - commandments, injunctions, permissions, prohibitions, … - which are imposed and sanctioned by a society, typically a State, but indeed supra-, inter-, infra-national law do exist as well. From that perspective law is constituted of binding norms, directives, decrees and/or rules. That is, certainly in continental European legal systems, what introductory courses to law and legal manuals propose as a description or "definition" of the law to their students and readers. Such rules can be deemed to exist in any sort of society or collective, a position that fuels the assumption of many researchers in comparative law, that, although in very different forms and expressions, law exists everywhere, be it in its western, state-bound and written form, or in a different, often more informal, traditional, religious, oral and communal expression. But it is "law" all the same.

I.2. "Formal" and "material" sources of law

Next to this the same handbooks systematically enumerate the different "formal sources" of the law, which are: legislation (or statute law), case law, legal doctrine

(the authoritative writings of jurists), custom, general principles of law and, according to some, contracts. These “formal sources” have a double character: on the one hand they point to the body of obligatory references that allow the emergence or making of law, while on the other hand they also indicate the tangible places where the current operational law formally expresses itself, can be "found" and read. Interestingly, this double sense of the notion of “formal source” is paradoxical *ab initio* because in the first sense the sources aren’t yet law, but rather condition law’s emergence – the sources, here, are the mandatory tools and materials that will make the production of law possible – while in the second sense, the sources are deemed to already express the law and hence, to contain it, to be it. The notion of “formal sources” thus embodies a short-circuit between two fundamentally different temporalities, i.e., those of a law that still has to become, and those of a law that is already there.

According to the legal handbooks, the "formal sources of law" are indeed not levitating in a void, but emanate from what the manuals call the "material sources of law". The latter refer to all the factors and contexts that influence and substantiate the former. Culture, history, economics, agriculture, transports, science, technology, industry, morals, religion and last but not least politics, provide the "contents" that will be translated into the formal sources and will be re-expressed through them. A statute making euthanasia for terminal patients possible under certain conditions, can be considered as the expression of a decision by a competent representative political body, which in turn reflects a very complex compromise involving religious and ethical convictions, scientific knowledge, medical practice, cultural perceptions and technical conceptions of life and death, economic reasoning, etc. An exploration of the ecology of the "material sources" linked to a particular Act of Parliament or to a ruling of a Court, might indeed provide explanations about the alterations of the matter at stake in its trajectory from the "societal" issue to its translation into a formal source, and then again, to its processing by a judge when she decides a pertinent case.

The transformations of contents in the movement from the "material sources" to the "formal sources" – mainly legislation – and, if applicable, further to the rulings of judges and courts, are the object of interest of meta-juridical disciplines, as law-and-economics, legal sociology or philosophy of law. Are the statutes and judicial decisions correctly and fully translating the collective endeavours expressed through the formal sources? Are they meeting their stated goals? Do they produce perverse effects? Undoubtedly, these are interesting questions, but they do not alter the fact that judges deciding cases must restrain the scope of their hermeneutics to the hierarchically organised "formal sources". In fact, judges and courts have to suspend reliance upon the material sources, not to mention their own moral, political, cultural and economic views. This is why I argued elsewhere that the context of law is constituted by its formal sources and not by its material sources (Gutwirth 2013).

I.3. Definitions and formal sources of law: strange loops

Three aspects particularly catch our attention in the preceding descriptions.

First, it appears that the institutionalised definitions of law are very vague and not really distinctive from morals, religious requirements, customs, largely accepted social conventions, political programs and the explicit or implicit regulations and

codes of, for example, sporting, ethnical, professional and/or cultural communities and associations, which also constitute rules and norms that effectively carry a certain degree of coercion and sanction. In fact, the proposed definitions barely contribute to extricate law's singularity.

Second, such accounts of law also encompass each of the enumerated sources of law on its own. Legislation and statute law are indeed "norms", and so are customs and “general principles of law”, but the same is true not only for the whole of pre-existing case-law from which regularities and trends and, thus, norms will be extracted, but also for the systematisations and prescriptions of the legal scholars, which also are - emblematically for the point made here - called “doctrine” and “authorities”. From this perspective, evocation of the law turns into the evocation of its sources.

Third, it remains surprising to see both jurists and profanes spontaneously associate law with legislative norms, while those are, be it on inter-, supra-, infra- or just national level, the result of negotiations and agreements between the members of representative bodies, between diplomats, between representative organizations and so on. Legislative processes are thus political processes, and statutes, treaties, collective compacts, regulations, decrees, etc. are a political and organizational outcome *par excellence*. And yet, still we are inclined to define law with reference to legislation and what the latter does: setting norms and objectives to meet, and organizing things in conformity with these …

I.4. Legislation

Legislation is thus at least two things: on the one hand, it is the final result of a political decision-making process by a legislative body, and on the other, certainly in continental European law, it is also the most important and predominating source of law. That is to say that it is not only the concluding and conclusive expression of a choice of policy, but it is also an obligatory and constraining reference point for the judge, the legal practice and the legal enunciation (see infra). This accounts for a very interesting articulation of politics and law, wherein the laying down and fixture of a decision in a legislative form is instantaneously relayed by its coming into existence as a legal source, which in turn (indeed, only if applicable) will be picked up by the legal practice.

That legislative acts exist in at least two different ways is, as a matter of fact, strongly expressed by the existence and role of the Legislation Section of the Belgian Council of State which must advise on legislative and statutory matters: this Section especially analyzes and comments upon bills and proposed legislation from a legal perspective, with a view to anticipating how judges and judicial bodies will take hold of them, how they will legally interpret their terms and conditions. This Section, which also exists in the Dutch and French Council of States, has precisely been called into being in order to worry about the consequences of the entanglement of the political or legislative regime and the legal one.

I.5. Axiomatic law

In the vast majority of cases the image of law is abstract and normative, or "axiomatic"[2]. Cayla is clear when he notes "une appréhension quasi unanime de l'univers juridique sous l'angle de la *norme*" (Cayla 1993, 3, original italics). Law, then, is conceived as a hierarchical whole of pre-existing binding rules, with legislation or statutes as their strongest expression, but nonetheless also including many sorts of other rules. All in all, this means that such a notion of law – Law1 - refers to what the (continental) lawyers understand as the legal sources[3]. In fact, the sources of law do include more norms than one would spontaneously enumerate: next to the acts of legislative assemblies there are indeed also subsidiary legislation and executive acts, but "general principles", the rules distilled from precedents (especially where *stare decisis* applies), the systematisations detected and proposed by legal doctrine, rules in sports, customs, ... turn out to be normative as well.

It is to this whole of norms that a person must turn if she is called to practice law, and such obligatory and hierarchically ordered reference to the pre-existing sources – where the qualifications and ensuing hermeneutics stem from – is indeed peculiar, because it implies that jurists work with means that are *per se* older than the facts[4] and, thus, that for example judges, who *must* decide, must do it with tools that may originate from another century (as is often the case in criminal law). This indeed explains not only the redundant litany that the law is always "too late" and overtaken by the pace of developments in science and technology, in economy, (geo)politics, morals, etc., but also why this critique is so poorly aimed and totally missing the point.

I.6. Why is a constitution legal, after all?

As a totality of norms, Law1 is often, if not always, assumed to embody, convey or carry a world-view, a perspective on humans and their collectives, a project of society for its subjects. Even more, in a *Rechtsstaat*, Law1 seems to be the instance that is ultimately in charge of protecting and carrying such a Big Project on its shoulders, and of imposing and perpetuating it. In this sense, no doubt, the American Constitution is "the supreme law of the land"; the European Convention for Human Rights is a supreme law for the Member-States of the Council of Europe, as are the WTO treaties, and through those, the so-called "laws" of the market for the world. Today, Law1 and especially Constitutional law in this tonality (often as a remnant of colonialism) generally convey the ideal of a fair and just society, namely the liberal constitutional and representative democracy, of which the roots can be historically retraced in the simultaneous development –the *Gleichursprunklichkeit*- of democracy and the rule of law in the ancient Athenian *polis*[5].

Law1 is thus intimately interwoven with government and governance, economy, power balances, geopolitics, ethics, religion, history – it carries, expresses and imposes the content and values of the material sources - but nonetheless, it remains persistently characterised as "law". The latter implies that Law1 must at least possess a "legal dominant", but, remarkably, there are very little convincing arguments explaining where this "legal colour" exactly comes from, or to clarify what then

[2] For the use of the concepts « axiomatic » and « topical » see De Sutter 2009a (with the references to the original work of Gilles Deleuze).
[3] Interestingly called the "capital of law" by Kyle McGee (2012).
[4] That is indeed well expressed by the principle of non-retroactivity of the law.
[5] R. FOQUÉ, *De democratische rechtsstaat: een onrustig bezit ?*, Forum Essayreeks, Utrecht, 2011.

characterises Law1 as law. More bluntly: what is it that makes the American Constitution the supreme "law" of the land, since it is the ultimate result of a long historical, political, religious and economic struggle for independence and it embodies the proclamation of the end of a colonial, arbitrary and absolutist reign and states (a compromise about) the high-level principles of the new organisation of the US? This is indeed not meant to diminish the role of the Constitution and the named principles, but only to raise the question of their "legal" nature as such. Why would a document organising checks and balances between state powers, a division of powers between states and the federation, and recognizing a number of human rights already be "legal"? In Latourian terms, aren't we rather meeting a very high-level script [ORG], issued by a revolutionary collective [POL:ORG] that has the ambition to organise nothing less than the institutional and administrative governance of the USA and its people? Where is the distinctive legal "touch"? Where is [LAW][6] here ?

If, more generally, *norms* are the core of law and thus not its "source", how then to distinguish law from governance, regulation or (state) organisation? What I wrote about the Constitution can be extended to all legislation: a statute or a governmental decree/decision indeed organizes things until a new one will be enacted, altering, superseding or replacing the former. Aren't statutes and decrees typical organizing deeds? Don't they provide for multiple, sometimes overlapping, sometimes even conflicting frames that are meant to steer our actions and decisions? Aren't they influential role distributing scripts (that we are supposed, even obliged and assumed to know), which are again interconnected with another flurry of non-legislative scripts like interpersonal arrangements, labor rules, common projects and so on? In Latourian terms again: legislative processes [POL] produce pieces of legislation assumed to steer our conduct [POL:ORG]. And again: where then is [LAW]?

II. law2 : fabricating links where they are missing, law as an experience

II.1. « Who practices law? »

When it comes to answer this question, the answers given take a completely different turn compared to the "What is law?" entry. Now, they will invariably consist of an enumeration of legal professionals: judges, advocates, attorneys, public prosecutors, paralegals, the jurists in the legal services of enterprises and administrations, bailiffs, registrars and so forth; not the political representatives that populate the representative assemblies, neither the members of bodies with legislative powers, but all those who are involved in the production not of rules, but of decisions, amongst which the judges and the members of courts are the most emblematic examples.

From this perspective, hence, something becomes legal when grasped, seized, caught or subsumed by the singular regime of the legal enunciation, or, in other words, by the distinctive hermeneutics that characterizes the legal approach. That does not necessarily mean that someone has studied law or is a legal professional, no, it is the mere "entering" into the regime of the law that makes the difference: you become a legal practitioner, or literally, a jurist, because you (have to) abide by the constraints of the legal regime.

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[6] In the original French version of the *Enquête sur les modes d'existence* (Latour 2012), the legal mode of existence is notated [DRO] from "*droit*", but I will use it's English equivalent [LAW] for reasons of readability.

II.2. Anticipating what judges would do.

Hence, a thing becomes legal when it is seized in a singular way, which is unmistakably framed or modeled by the constraints of a judge seizing that precise thing. Put differently, a thing becomes legal when it is processed or thought from a position that anticipates how a judge could or should do it. Justice Oliver Wendell Holmes Jr. famously wrote as much in 1897 in the *Harvard Law Review*: "The prophecies of what the judges will do in fact, and nothing more pretentious, are what I mean by the law" (Holmes 1897).

Hence, and this is no longer "Holmesian"[7], a person turns into a jurist when she is constrained to think as a judge: it is not a legal degree that makes the legal practitioner, but the mere fact that one thinks legally, i.e., as a judge. A person with a claim will, with the support of a lawyer or not, anticipate how the judge might cope with her claim, and will try to find the strongest way to make her case considering the constraints - the whole of *obligations* and *exigencies* - that "hold" the judge, and thus the legal practitioner (cf. Stengers 1996,1997 and 2014, see also Gutwirth, Desutter & De Hert 2008)[8]. This is the precise sense of the three mottos I have used to launch this paper: the distinctiveness of law lies in the singular mode in which it seizes cases. In other words: everyone can practice law, everyone (who is called to do so) can become a legal practitioner, and that is, when she is moving or moved forward by the legal regime of enunciation with its many particular constraints and value objects, which have been so well described by Latour (2002) and that we will summarize later. But eventually this way of "moving forward" and "making the law" always, and it can't be said enough, amounts to anticipating how and what a judge or court would decide[9]. Once this happens, to switch to the Latourian idiom, the [LAW] preposition has been set, "legality is produced" and the law starts to pass.

Clearly, *what* the judge will decide is never completely predicable, the only thing that is certain is *that* she will decide, which is precisely what we call "legal certainty": the certainty that a judge will bring closure and stability, even if no one else does it, wants to do it or succeeds in doing it. This omnipresent possibility of law might explain why law paradoxically is both "autochtonous" ("already there") and anticipatory ("not yet stated by a judge") (cf. Latour 2002). In other words: before the intervention of the judge one can anticipate how she will decide this case, and that will often be in the line of what the rules extracted from the sources of law – legislation, executive orders, former decisions, customs, etc … - allow one to expect, but it is never a straightforward and purely deductive "application". In that sense, all cases are "hard", and routine is the main enemy. However, the fact that the instauration, statement, or the "putting down" of the legal bond by a judge or court is *always an open possibility*, generates a sense that, although anticipated, the law is always already there.

Henceforth, a thing starts to exist legally when it is comprehended in a way that anticipates how a judge could possibly seize and decide it under the given

[7] For Holmes, law is a profession or a "business", rather than a practice or a regime of enunciation.
[8] Cf. also the semiotic notion of "conditions of felicity" applied to the legal enunciation and more particularly the list of ten "value objects" that Latour extracts from his ethnographic observations at the French Conseil d'Etat (Latour 2002, chapter 4, p. 139-206, with an overview table at p. 203) : these value objects are the cornerstones of the step by step progression, "traceable movement", propulsion or "passage" of the law in the interlocutional interaction within the *Conseil d'Etat*.
[9] I think it is worth noting that this is a description of law that avoids the tautology (cf. Latour 2012, 359)

circumstances and claims. As Latour (2004) rightly observes: nothing that refers to the legal *institution* (cf. infra) – a *codex*, togas or robes, official charges, authentic documents, court houses, registrars, lawyers and judges … – must already be present for the law come to life or into existence.[10] No, law's singularity is tied to its "regime of enunciation" that we – Westerners - spontaneously recognize as such, much like we instantaneously recognize a sense or feeling of "if" or "but, "blue" or "cold": it is prepositional (Latour, especially 2004 and 2012, also McGee 2014, 124, both with references to the work of William James). It is, put differently (and in the sense that Isabelle Stengers gives to these concept) constituted by the "constraints" of the legal "practice" (Stengers 1996 & 1997). Law is a particular "mode of existence"[11]; it is another world: it gives a legal existence to the things it seizes (Hermitte 1998). A car, a chair, words or a human become legal beings when, for a reason or another, they are "seized" by the juridical forms and processed by the "moulds" and ways of legal hermeneutics, or, to use an expression of Kyle McGee, when they get "jurimorphed" (McGee 2014b) by *whoever* – a legal specialist or professional, or a lay person – is brought to do it. Or, in the words of Cayla "le signe auquel on reconnait immanquablement le juriste reside avant tout dans sa façon de discourir sur le monde en assurant sa *traduction* (…) dans la grille conceptuelle des categories juridiques" (Cayla 1993, 4).

Every issue – the property of a good, the harm caused by paroles, the treatment of a mentally ill person, the love of an animal, the foul play in soccer, the use of public transports, human rights[12] … - can remain untouched by law and hence stay non-legal forever, but when the need develops (e.g. when harm is not processed satisfactorily without a legal intervention), our civilization provides for the legal mode, and that has been the case since the Roman age (Schiavone 2008, Latour 2002 & 2012). At a certain point, earlier or later depending on those concerned, but always knowing that eventually there is no other way to obtain a stabilized bond[13], the protagonists might start being embraced by (or will embrace) the clef of the law, and start to think and act in anticipation of how a judge would cope with their issue and which hermeneutical and material steps should or should not be set in order to have the anticipated judge doing what comes the closest possible to their interests. Lawyers or advocates do indeed play a very important role here, since they will try to pre-

[10] This is clear in the example quoted in the former footnote: "You don't have the right to steal my marbles !" invokes or announces the particular legal "tune", "twitch" or "clef" in which the situation might, if this is pursued, be taken forth (Latour 2004, 38)

[11] About these concepts see Latour 2002, 2004 & 2012, Stengers 1996, 1997 & 2004 and Stengers & Latour, 2009. For a summary in English see Gutwirth, De Hert & De Sutter 2008 and in French see Gutwirth 2010.

[12] This example might surprise, because it is commonplace to conceive human rights as being *a fortiori* legal. But human rights, fundamental rights or natural rights, are much more than legal, and in the first place, their signification is political and organizational. They were conceptually built up by liberal political philosophers, mobilized by the Western revolutionary movements of the 17th and 18th centuries, written in the Constitutions that expressed both the rupture with the former arbitrary and absolutist forms of government, and the installation of a new – liberal – organisation or economy of power relations and finally, exported worldwide as political mantras through processes of decolonisation and universalization steered by Occidental power and politics: human rights as shields against the power of the state, as higher principles to be respected and enforced even by the states. For sure, as being a crucial aspect of Western and other Constitutions, human rights *are* a supreme source of national law, and can even – except for States as such China and the USA – be consecrated in individual cases by international or supranational Courts, turning them into a legal thing. But again, it is only when human rights are thought of in anticipation or as an element of a judicial process, and ensnared in the regime of enunciation of the law, that they become legal. What the Luxemburg Court would do with my claim that the NSA has been blatantly violating my rights to privacy and data protection for more than ten years, is in this sense a question that will yield "legality".

[13] The alternative is violence, but violence brings the opposite of stability and "legal certainty": it destabilises even more.

structure and prepare the claims, means and files in order to build a *dispositif* and to set the scene in anticipation of the hermeneutical trajectories they wish the judge to take (and indeed the other parties will do the same[14]). But the “entry” into the legal mode - its "launching" ("l'envoi", Latour 2004) - definitely precedes their intervention: the mobilization of lawyers by parties is already a consequence of this “entry”; it is a next step in a possible trajectory. Indeed, a judge might be convinced by and confirm the qualificatory pretensions of one of the parties, implicitly disqualifying the other pretensions, but she might well also impose her own qualification (Cayla, 1993, 12).

II.3. Topical law

Law2, then, provides for decisions/solutions under the form of judgements, where no other way or mode succeeded in making and respectively finding those. This is the pragmatism of the Roman *casus* rather than the Athenian political philosophy[15]: law as a practice, which again and again, case by case, is reactivated to produce, state or “draw” the *vinculum iuris*. From this perspective, law2 is “topical”[16]: it produces solutions to cases through its regime of enunciation, its proper *conditions de félicité* and more concretely its “10 value objects”, as they have been extracted and described by Bruno Latour in particular in the fourth chapter of *La fabrique du droit* (Latour 2002, and, further in McGee 2014a and 2014b, Audren & Moreau de Bellaing 2013 and Van Dijk 2011). The legal approach then is characterised as well by distinctive operations such as the testing of “legal means”, the “qualification” (infra), “distinguishing”, “subsumption”, “imputation”[17] and, finally, the “assignation”. Other aspects of law's singularity are also manifest, such as the “detachment” of jurists coping with facts, their singular obligation to *hesitate*, to de-bind and re-bind, to reassemble and disassemble, to redo the hermeneutical loop again and again, until the issue is ripe for a decision, and thus, for the law to be "solemnly" stated or put down, for a *dictum,* a ver*dict*.

Typical for law2 is that the facts of a case will be read and interpreted in view of their *qualification* (Cayla 1993; Rigaux 1997, Latour 2002), an operation that is constrained by the tools the jurist has to turn to and to use. Jurists must seize (or "subsumate" in Frenglish) the facts at stake with "containers" or "forms" they have to derive from the sources of law which are well known, at least as their enumeration goes[18]: the applicable legislation(s), the pre-existing case law, possibly with its

[14] On the crucial work done by the lawyers see the beautiful pages in Kyle McGee 2014

[15] “En simplifiant quelque peu, mais sans trop nous éloigner de la vérité, nous pouvons dire en effet que, si nous devons au Grecs la naissance du ‘politique’, nous devons au Romains celle du ‘juridique’” (Schiavone 2008, p. 9)

[16] Cf. footnote 3

[17] “Imputation” is important, because the lawyer still needs to consider the whole of the law : she needs to link the decision to make, the legal attachment to sew to the wholeness of the law: « When a lawyer considers a case, what he hesitates about is the way that he will make this case stick to the wholeness of law – and the only way to build such a relationship between a case and the wholeness of law is to branch the individuals at stake with the case to a legal reality such as, for instance, accountability or guiltiness. To declare somebody legally accountable for something is not to impute him a moral quality: it is to impute him a quality which requires the wholeness of law to be applicable to him – and not only the local provision that he may have infringed. This is why the choice of a type of legal imputation is, for a lawyer, a matter of hesitation: to branch somebody on the wholeness of law cannot be realised at will. If the lawyer has not well hesitated, the legal imputation through which he made the case stick to the wholeness of law can be declared legally void: hesitation is a very delicate matter. Since it is not only a local provision which is at stake with a given case, but the wholeness of law, to hesitate is for a lawyer a trial through which he will have to show his ability to manipulate this wholeness, so that the imputation he realises can be declared compatible with it. » (Gutwirth, De Hert & Desutter 2008, 200)

[18] They are much lesser known, however, from the point of view of their subtle interplay and entanglements, beyond the simplistic ideal of a straightforward hierarchy: see e.g. Rigaux 1997 and Ost & Vandekerchove 2002

different tendencies, the systematisations of the matter at hand by the legal doctrine (very often, the first step taken by professional jurists in continental legal practice), and more occasionally customary rules, the general principles of the law and “equity”. Contrary to scientists, jurists do not want to learn from the facts, neither do they want to produce knowledge about or put those to the test, no, the person called to practice law will first operate an intensive and repeated to-and-fro between the facts (generally the files in which they have been stated or archived, “frozen”, often in required forms) and the named “formal sources of law” (also texts, of statutes and of cases, and books) wherefrom the optimal or best-fitting qualification for this case must be extracted (Latour 2004, Gutwirth 2010, Cayla 1993). Indeed, such a *demarche* cannot and can never be deemed to be plainly straightforward or to be done routinely, since all cases, all sets of facts, are an appeal to the creativity (not in an artistic sense, but literally: the constraint to produce and thus “create” a legal bond where it is disturbingly lacking) of the judges and their interpretive tools and techniques. As a consequence, the "optimal fit" is never a given that should be found, unveiled or discovered, but it has to be fabricated or constructed through the process of hesitation, pondering and tinkering (so well described by the ethnography undertaken by Latour, and later, in commercial courts, by Niels Van Dijk 2013).

II.4. The sources of law, and the law, again : law2 as proof of the pudding

Strikingly, amongst the sources of the law, only the case-law meets the generally accepted representation of law wherein law is derived, extracted or produced from "the sources of the law". The judicial bodies are effectively obliged to produce law by mobilising all the pertinent sources of law, there where it had not been posited yet formerly by another judicial instance. And eventually *only* a judicial instance will be able to say or speak the law, to *assign* the legal bond and to make it exist in the void where it wasn’t explicitly stated yet. It is the judgment – in French the double signification of "arrêt" is emblematic here: it refers both to a decision and a "stopping" (cf. McGee 2012[19]) – that creates and decrees the stabilizing bond, the attachment that will once and for all (*ne bis in idem*) be taken as the legal truth (*res iudicata pro veritate habetur*), even if that decision is not the one you expected as a party to the dispute, even if a majority disagrees from a moral or economical perspective, even if scientific knowledge points in another direction.

It is thus only from the perspective of law2 that an unequivocal and consistent understanding of the relation between the “sources of the law” and the law itself, that “springs” from them, can be built. Consequently, only legal practice – the coping with things in anticipation of what a judge can do or does – extracts or derives law from its sources. On the contrary, from the perspective of Law1, as we said, this crucial relation between the sources of and the law itself appears to be blurred and ambiguous.

In other words, the widespread, if not generally accepted, doctrine of the sources of law, can only be underpinned and evidenced through the taking into account of law2, since it is only through the seizure of things by the particular hermeneutics of the law, that the model is at work. Only then do we see law being fabricated from the sources of law. Legislators are not bound by these hermeneutics when they make laws, they

[19] Kyle McGee however refers to this feature of the judgement with another rationale: to him the decision brings an end to the process of judicial interlocution, but in his view the law still passes : *"the enunciation of the judgement does not complete the enunciation of the law*" (McGee 2012, 9, original italics). Cf. *infra*

are driven by other motives and objectives, and will in fact "only" give law2 new meat to process.

If, as it is generally agreed upon, the Romans did already have law such as we know it today, it is indeed not because of the contents of its rules and decisions, as is clear from the position of slaves and women in Ancient Rome, but because today we still judge and produce legal bonds in the same way, through the same regime, through the same *operations*: those of law2. To say it with a jest of Latour's: « Cicéron prendrait place au Conseil d'Etat ou à la Cour de Luxembourg sans avoir d'autre effort à faire que d'apprendre le français ! »[20]. Consequently, there can indeed be "law" (law2, as a matter of fact) in other institutional designs as that of the democratic constitutional state, with its specific articulation of the principles of people's sovereignty by representative democracy, the respect of human rights and of the rule of law (limiting the power of government)[21]. That is the case for non-democratic regimes as those of Hitler, Staline, Ceausescu and Pinochet, that could not afford to bluntly do without law and had to maintain at least (or very meticulously!) an appearance of a judiciary in order to permit the production of stabilising bonds, the assignation of responsibilities both in civil and criminal matters, the positing of the attachments of things or words to people, and the settling of disputes that would otherwise never end, except in violence and force.

II.5. Law2: a factory of stabilizing bonds, of assignations

In *La fabrique du droit* (2002) and chapter 13 of the *Enquête sur les modes d'existence* (2013) Latour has convincingly grasped law in its singularity, i.e., in what distinguishes it from everything else. After all, even if law (just as politics, religion, organisation or science) is intimately intermingled with everything else, something must also distinguish it from all the rest, otherwise law would not exist as such, but have vanished in its contexts. Something must bring the distinctive "colour" of law. And it is indeed only through law2 that we can understand and describe what law does *exclusively*, what law alone does.

Law, then, is a practice that provides decisions and installs "truces" (Rigaux 1998), that weaves stabilising bonds, that assigns responsibilities, acts, words and objects to legal subjects (or legal *personae*), that produces the proverbial "legal certainty" and so forth. During its passage[22] law thus "attaches", "states", "connects" or "links" by the production of a "passage"[23], what for one or another reason has fallen apart or finds itself in disturbing uncertainty, and was not solved in another way. To use the words of Latour: "(…) l'ensemble des fonctions permettant de relier, retracer, tenir ensemble, rattacher, suturer, recoudre ce qui par la nature même de l'énonciation ne cesse de se distinguer, fait partie de cet attachement, que notre tradition occidentale a célébré sous le nom de Droit" (Latour, 2004, 34-35). Law, in that sense, provides the links that are missing and missed: it is the mode that attaches where a connection cannot be made, breaks, is contested or unsuccessful. Law, in that sense, is the *residual connection*, the always-present possibility of a connection, be it "only" a

[20] See Latour 2012, 366. The contemporary value of Roman Law has been strikingly described in the work of the late Yan Thomas, see e.g. Thomas 1980 & 1998. See also: Schiavone 2008 and De Sutter 2009b.
[21] The literature on that subject is enormous, see however De Hert & Gutwirth (2006, in particular the first part of the chapter) and Foqué (2011).
[22] "Passage" in the sense of a movement, a trajectory
[23] "Passage" in the sense of a link, connection, bond or even a "bridge" or a "chain"

legal one, and very sharply: a connection for the sake of the stability it brings. It is, literally, the last recourse to obtain certainty about a problematic relation. From this point of view the legal bond only starts to exist in a hard and permanent form *after* the decision stating it in the last instance. From then on it will be "frozen" as a *res iudicata*. Nevertheless, the law "passes" every time such a decision is anticipated (and hence might influence the course of things) without reaching the stage of the judicial decision.

If the legal bond is residual, does that mean that it can be arbitrary as long as it is stated? No, on the contrary. If the legal solution is formal, abstract, detached and superficial, it is therefore not arbitrary, precisely because it is fabricated through fine-tuned procedures, a very demanding hermeneutics and many, a maximum of hesitations. It is not arbitrary, in other words, precisely because it is legal. Or could it be said that, despite the former, the content or non-legal consequences of the decision will be arbitrary? No, because the content conveyed is itself the result of an issue-triggered meeting of the (not yet legal) formal sources of the law with a set of calibrated legal operations of which the outcome is neither arbitrary nor predictable, but indeed constrained.

The former shines an explicative light on two other features of law2. Firstly, on law's superficiality, as Latour has so subtly described (Latour 2002) : law can bind and connect everything, only because its operations barely touch the essence of the deeds, persons, situations and words it attaches. Such *superficiality* is part of the *grandeur* of the law. In more radical terms, this implies that law2 has no proper content: it links, stabilizes and assigns, but it does not produce justice, morals or knowledge. When judges practice law, they do and have to care about the legal operations that the issue, claims and legal means require them to carry out. The second feature follows from the first, and is the *detachment* so characteristic for legal practitioners. When triggered, a jurist is obliged to remain distant and to keep external mobilizations at bay, a feature that actually mirrors the crucial operation of qualification. The facts must be "seized" by the optimally fitting pre-existing concepts derived from the formal sources, as a result of which the legal practitioner will "leap" from the factual aspects into the "real" legal work and its hermeneutics. Such a detachment should not be denounced or crushed as being the proof of a generalized and selfish alienation of the legal caste, but calls for respect: the detachment is an obligation of the legal practice, that contributes to its capacity to generate stabilizing bonds everywhere they are required (cf. Gutwirth De Sutter & De Hert, 2008).

Putting the focus upon law as a regime of enunciation with its own veridiction; recognizing the constraints of jurists and what induce their hesitations; taking seriously the register of their creativity in order to grasp what is a success or a failure and "speak before" the legal practitioners[24]; all together contribute to determine what makes law irreducibly law, to what only law does, to what only law can do. For many of us, jurists and proponents of the democratic constitutional *Rechtsstaat*, such an approach is certainly an exercise in humility, but it is ultimately a necessary and rewarding exercise – because what the law effectively does is as quintessential for what we are, as are such other modes as politics, science, habit and technology. It

[24] That is why Latour writes the following: "Bien parler sur l'agora avec les praticiens, c'est espérer qu'ils hocheront la tête avec approbation quand on leur proposera de leur pratique une version, peut-être totalement différente, mais au moins adéquate à leur expérience et si possible partageable" (Latour, 2013, p. 264-265)

may look small, but it is huge: law can always bring certainty and closure. It attaches what otherwise might dissolve, explode, get lost or disintegrate. It ties together, what harshly resists all other forms of less formal and less abstract connection.

To put law2 in the spotlight, therefore, is also an antidote against the strong tendency to overcharge and overburden law with a long series of expectations for which it is not shaped nor equipped to meet, such as carrying civilization, democracy and human rights, decide what is true and false in history or in sciences, to protect health and morals, to foster reconciliation after a crime or provide "good" punishments, to organize the economy, to replace religion as with a secular alternative, … (cf. Latour 2012, 363). This tendency to overburden law is in fact a category error, a mixing up of registers: "En droit, croire que le jugement console, fait le deuil, c'est typiquement une erreur de catégorie. Car le droit ne fait pas le deuil, il ne transporte pas quelque chose qui s'appelle de la thérapeutique, ou du salut. (…) C'est comme téléphoner à quelqu'un qui doit vous livrer une pizza, et dire : « Faxez-la moi. » Erreur de catégorie typique. Il n'a pas compris que le mode de transport qui fait la commande n'est pas le mode de transport de la livraison. Eh bien, demander au droit de transporter vos peines, la fin du deuil, c'est la même chose." (Latour 2008, no page numbers, see also Latour 2012, 66)

III. Exploring the consequences of the distinction between Law1 and law2

1. Values and institutions

At first sight Law1 and law2 do not seem to have much in common. This impression is certainly further fed by the often delicate and thorny relationship between on the one hand the legal practitioners, positivists or "internalists", and on the other the meta-jurists or "externalists". Indeed, legal philosophers and sociologists of law are often sharply critical of the constricting and "alienated" approaches of legal practitioners, while the latter often indifferently shrug away "metajuridical" analyses that they experience as alien or denigrating. From this perspective a political or philosophical approach to the law as a whole of norms (Law1) would be radically different from, and even antagonistic to, the legal practice that provides decisions and solutions (cf. de Sutter 2009b, building on the work of Schiavone 2008[25]). However, such oppositional representation misses the point that *both* the internalist and the

[25] "Un jour, De Sutter writes, les juristes ont commencé à accepter que le droit pouvait tirer sa grandeur d'autre chose que lui même. L'intervention progressive de la philosophie dans la pensée du droit est à l'origine de la grande bifurcation doctrinale moderne, bifurcation dont nous portons encore les conséquences. Cette bifurcation peut-être formulée en peu de mots : ou bien les normes (droit), ou bien les concepts (philosophie). Qu'il puisse exister une pensée propre au droit, une dimension spéculative propre au droit, est que la doctrine de ces derniers siècles s'est escrimée à rendre impossible. Il est difficile de l'en blâmer : la mainmise de la philosophie sur le droit avait à la fin du XIXe siècle, entraîné une confusion complète de l'une et de l'autre. Parce que le langage de la justice était devenu celui du droit, la spécificité de celui-ci se trouvait anéantie par la force de conviction de celle là. Qui aurait pu prétendre que le droit ne possède aucun rapport avec la justice, qu'elle soit naturelle ou divine? Dans *Ius*, Schiavone fait remonter le moment d'émergence de la tentation philosophique du droit à Cicéron. Cette tentation, pourtant, ne c'est pas imposée sans résistances. Les grands juristes romains connaissaient mieux que quiconque la spécificité de la pensée du droit. Il savaient aussi ce que celle-ci avait à perdre à tout céder à celle-là : elle avait à perdre jusqu'à sa plus élémentaire pertinence. Rien n'a moins de sens que le droit, une fois la détermination de ce sens réservé à la philosophie – ou bien, de nos jours, à la sociologie (Bourdieu), l'économie (Posner), la psychanalyse (Legendre)" (de Sutter, 2009b, 794). For De Sutter legal theory and philosophy, just as politics, ethics, economy, science and technology, represent a threat for the autonomy and singularity of the law. The law can do without external legitimation, it is its own legitimation. In the words of Latour : "Le droit ne remplace rien d'autre" (Latour 2002, 292)

externalist perspective mix up the two ways of evoking law, Law1 and law2. Both meta-lawyers and positivists, legal scientists and practitioners, lawyers and laypeople, smoothly and unconsciously switch from one register to the other without faltering. From Freud's profile to the naked women, from Law1 to law2, and back, and forth, you've switched without thinking.

Latour opens a path that might help us to better understand the articulation between Law1 and law2, namely by insisting upon the distinction between "institutions" and "values" (Latour 2004 en 2012). On the one hand, Latour endeavours to single out a (not yet limited) series of singular experiences that "we", the Moderns (Westerners, "whites", …) know well and recognise easily. It is these *experiences* that make us what we are, and that we would not be able – as a matter of life and death - to relinquish in a diplomatic encounter or negotiation with non-modern others. He calls these experiences *values*, a notion that covers our distinctive experience of, for example, science, technology, religion, politics, economy, art, religion, morals and law. From this perspective, legal judgements and truths obviously differ from scientific judgements and truths and we know that they are respectively produced according to two different modes (regimes or practices), and that they are singular and irreducible to each other. In the *Enquête* Latour links each of these values to a singular mode of existence, which he notates, as we already picked up, with three capital letters between brackets ([LAW], [REF], [REL] …) in order focus precisely on their singularity, on their contrasts, on their irreducibility.

On the other hand, these values never stand alone or move on their own; water and gas need infrastructure - not made of water or gas! - to be conveyed, to circulate in a network and to be brought where needed. In the same vein, the identified values (and the singular mode through which they can exist) need to be *institutionalised* not only in order to be sheltered and to subsist, but also to circulate and move in landscapes where they might be triggered. The institutions of Science, Religion and Law are however intermingled and entangled ("à la façon des marbres veinés de San Marco dans lesquels aucune figure n'est clairement reconnaissable", Latour 2004, 35). They all are hybrid. Thus, the legal institution is indeed a mixture of politics, religion, organisation, technique and so on.[26]

For McGee, concerning law, the difference between values and institutions amounts to a distinction between law in an "ordinary sense", and law as a singular mode or regime "with its own singular *key* (in something approaching the musical sense of the term)" (McGee, 2012, fn. 3, original italics). From this perspective, the instituted form law takes is related to the way it is generally or trivially given sense to, while the value encompasses what the law does when it is practiced within its specific constraints, or enunciated within its peculiar regime. Generally, the institution of a

[26] This metaphor very nicely expresses the point made : "Imaginez un jeu de Lego qui au lieu de la seule accroche par les quatre plots traditionnels en aurait plusieurs. Imaginez ensuite que chaque attache rende plus facile ou plus difficile les autres attaches. Admettez maintenant que certains blocs de ce jeu de Lego un peu particulier s'attachent par la connexion DRO et d 'autres par la connexion POL. Les blocs eux mêmes sont de formes multiples (…). Maintenant lâchez des gamins dans ce jeu. Ils vont produire des formes –des institutions –dont des segments plus ou moins longs seront dits DRO parce que l'attache est de type DRO alors même qu'un bloc donné peut être repris, selon un autre segment, par l'attache POL. Dans l'ensemble bigarré produit, on pourra dire, selon l'intensité des liens, « là c'est plutôt quand même en gros du droit», « là c'est plutôt quand même du politique ». Ce sera toujours faux bien sûr puisque les blocs sont divers, hétérogènes etc. de couleurs variés, et pourtant ce ne sera jamais tout à fait faux car la « dominante », pour parler musique, sera bien donnée par un type particulier d'attachement ou d'ébranlement ou de contamination. » (Latour 2004, 39-40)

mode of existence can be said to be closely linked to the account that a collectivity makes of it.

In other words, law as an institution is interwoven, linked up and entangled with all other institutions and it hosts law as a singular mode of existence. The legal institution then is the whole of arrangements that makes the circulation and triggering of the legal regime possible (on all these points see also De Vries & Van Dijk 2013). The same is indeed valid for the other institutions and the values they host. But institutions, as well as the relations between institutions, are highly variable, which means that the way they host, shield and represent a singular and sustained mode of existence is often problematic and always complex. Latour even suggests that the many tensions between the Church as an institution and religion as mode of existence, as an experience, are emblematic for the generic complexity of the articulation between institutions and values in the West (Latour 2012).

The former distinction between institutions and values shines a light upon the distinction between Law1 and law2. It is clear that law2 is the "value" at stake: the always existing possibility of the making of a stabilizing bond, of the assignation of responsibility, or of an attachment where it is missed, … [LAW] is the guarantee of continuity and connection, against disintegration and endless uncertainty. Law1, then, it seems to me, is the legal institution, especially since all the formal sources are also part of different institutions but simultaneously find themselves associated in a unique way as formal sources, as unavoidable references for the anticipation or production of legal bonds by law2. A parliamentary statute in that sense weaves together different institutions: politics (since it expresses collective decisions), organization (since provides high level scripts), law (since it is a legal source), and might touch and alter religious or scientific institutions, and so forth.

The interplay between values and their institution, transposed upon the relations between law2 and Law1, shines a light on different aspects of law. First, it explains the complex conjunction between the age old and rather stable regime of enunciation of law2 (or [LAW]) that subsisted and persisted since the Romans, and the always changing (sometimes even volatile) normativity and rules of Law1 which are dependent of a lot heterogeneous factors and their common history. Political, economical and ethical institutions change, as do technologies and sciences, and hence, Law1 as well, while law2 stays at work in same continuous way. We thus obviously succeeded in staying Greek and staying Roman at the same time. Second, it shows how an important discrepancy can develop between what law2 really does, and the expectancies, objectives and responsibilities brought by Law1. And third, it invites us, now from a renewed perspective, to reflect upon the role (rather than the rule) of "law" in the democratic constitutional state – the democratic *Rechtsstaat* or *Etat de droit* - hence a role that is deemed to be quintessential and characteristic.

III.2. The role of law: towards a more realistic description of the *trias politica*?

The last point raises the question whether the law (Law1, law as an institution) weighs more upon the characterization of the democratic constitutional state than the other institutions, and in particular, politics, economics and religion. Inversely, and more interestingly, one may wonder how to understand the role of law (as law2) in the design of the democratic constitutional state, beyond the broad and

underdetermined institutional representation wherein the law is supposed to warrant, protect and carry the whole edifice.[27] Such an inquiry might lead to a more modest, but no less crucial framing of the law's role in the *Rechtstaat*, and particularly with regards to the *mise en oeuvre* of the *trias politica* or, concretely, the role of the *judiciary* (rather than the rule of Law1) in the architecture of "checks and balances".

Even if legislation and executive orders are important formal sources of the law, their specific articulation to the judiciary necessarily implies that at least a bit of uncertainty remains: if triggered, how will the judiciary interpret those? There always remains some interpretative leeway. Next to this, the facts and claims submitted will give rise to new legally pertinent issues that the rulings of the judges will have to accommodate or adjust to the formal sources. Judicial decisions, although formally constrained by law's regime of enunciation, are after all still to be fabricated and taken, and thus created. Hence, what the judiciary will decide can only be anticipated, and that with more or less certainty, but never absolutely. Retrospectively, it will become clear if the rulings of the judges followed a probable/plausible/foreseeable path, or if they turned out to have embraced a new and possible path, or to have been creative. The judge is not the *bouche de la loi*, neither can there be a *gouvernement des juges*. If the judges and courts stick to their obligations and constraints when they put down a stabilizing legal bond in a case, it can only be wrong to consider that their decision is either the mere predictable extension of a rule, or an arbitrary expression of the judges' personal preferences.

In fact, this provides for a very subtle framing of the role of the judiciary in the *trias politica*. The force of legislation then appears to be co-produced by case law and to depend on how the judges will interpret, concretize and give consequences to the piece of legislation at stake amongst the other pertinent sources of the law in the light of the particular setting of facts. As I have already suggested, application is never straightforward: there is always a moment of hesitation, each case being triggered by other facts, other requirements and thus other hermeneutical possibilities. That is indeed why artificially intelligent systems that aim at replacing judges are doomed to fail, or even worse, they bear the danger to turn law into something else wherein the proper legal moment (qualification, interpretation, hesitation, imputation …) has disappeared in favor of routine, automatism and leveling down (Gutwirth 2010).

III.3. The force of law: a subtle articulation of Law1 and law2

The former paragraphs account for a surprising "loop" whereby the authority of *legislation* is co-produced by the way the judiciary will receive and interpret it as one, perhaps *the* major, source of law. The force and reach of general legislation are thus ultimately dependent on the case law that will substantiate it, but only on a case by case basis. The temporal gap is interesting: the actual force of legislation depends on its future interpretation by a judicial body. Again, the anticipation of what the judiciary will do is crucial, because it excludes any representation of the force of Law1 as a direct and straightforward steering power; there always remains latitude for creation.

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[27] Which it does not in any case: "Ne faisons pas porter au droit – énonciation et institution - des formes de regroupement et de composition qu'ils son sûrs de ne pas pouvoir porter. Impossible par exemple de résister au totalitarisme en s'appuyant *seulement* sur la fragile barrière du droit (sous Vichy, le Conseil d'Etat encaisse sans sourciller les lois sur les juifs faisant pourtant le même «excellent travail» avant et après" (Latour 2004, 39)

Indeed, we ourselves – private and public persons – have to prospectively and anticipatorily weigh our choices and act as if we are judges, and more concretely when for a reason or another the need for legal stability pops up as an issue. Such a stance is actually as pertinent for the police officer making a decision about the organization of the control of a demonstration or a visit of officials, as for the neighbors getting still more involved in a quarrel over the shadows and roots of trees crossing the disputed limits of their gardens. Once the legal regime of enunciation is set in motion, one finds herself at the point of articulation of Law1 and law2, i.e., between the pre-existing normative sources of law, and the law that will be drawn from them; between the general norms of yesterday, the concrete issues and uncertainties of today, and the legal bond of tomorrow. In other words, one is at the precise spot where the judges intervene when mobilized to decide.[28]

If the "force of law" is used as a concept to explain why we obey the norms and rules that emanate from the formal sources of the law (thus, from Law1 and primarily from legislation), such force is a child of what is not yet there, namely law2 (cf. supra, concerning "autochtony" and anticipation). Such a state of things considerably complexifies the question of our relationship to legislation and other norms, and makes concepts such as compliance and transgression sound like impudent simplifications, because they rule out the anticipative stance and the possibilities it conveys. How to act according to the law in a conflict with your neighbor before the judge states how the law will materialize in this case? How can you comply with a piece of legislation if the final decision about your compliance still has to be taken by a judge? How to bring in the anticipative dimension of compliance and transgression into our understanding of compliance with Law1 without already knowing law2?

Does the former mean that our compliance with the rules of Law1 is the result of a sort of permanent individual legal practice that installs a fictive judge ([FIC]?) in our heads trying to anticipate for every step we set what real judges would do if confronted with what we have eventually done? Certainly not, because this would be a paralyzing and unbearable burden. Just as it would be unbearable for us go through the whole range of "folds" that have been designed in order to propel a car forward every time we push our feet on the gas pedal [TEC]. Or redo the same experiment every time we want to evoke gravitation in an article on physics [REF]. No, in most of our doings we conveniently – and luckily - omit the prepositions, render them implicit and "black boxed". The different modes, in other words, are "veiled" but not forgotten, as has been admirably described by Latour (cf. Latour 2012 266 *et seq*.). We just do as we did before, but we know that a "return to the manual" can be triggered by a difference, a problem, an obstacle, a swerve or, why not, a *clinamen*.[29]

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[28] The difference between the judges and the (private and public) persons doing law in anticipation is indeed that the former act from a position that is detached as much as possible from the case, while the parties are passionately committed and interested (Latour 2002).

[29] "Suivre un cours d'action parce que l'on a compris dans quelle éthologie on se trouvait, ce n'est pas du tout la même chose que ne plus suivre aucune indication sur ce qu'il convient de faire la prochaine fois. Harold Garfinkel, l'un des rares analystes de l'habitude, a proposé cette admirable définition d'un cours d'action : « for another first next time » (« pour une autre prochaine première fois »). Voilà une belle condition de félicité : on fera la prochaine fois comme la précédente, oui, mais ce sera aussi la première fois. Tout est pareil, lisse et bien connu, mais la différence veille, prêt à « reprendre en manuel ». Paradoxalement, il n'y a pas d'inertie dans l'habitude — sauf quand elle bascule dans son contraire, l'automatisme ou la routine. Mais là, aucun doute, l'habitude sera perdue." (Latour 2010, 271)

This mode of omission, which Latour calls habit [HAB], covers 99% of our existence (Latour 2012, chapter 10). Without this habit, we would go mad, confronted by endless and numerous recalls of the prepositions, the on/offs of the modes of existence. Thanks to this mode, you just know what to do next, without thinking and searching the right key; [HAB] warrants a sense of continuity spanning over multiple discontinuities. Pursuant to this, when we abide by the norms of Law1, e.g., by the scripts provided by legislation [ORG:POL], in 99% of the cases, we do it in the [HAB] mode and it is only in case of a hitch that [LAW] might get launched and that we'll start to anticipate how a judge might evaluate our choices, and indeed possibly adapt our behavior.

Rather than a consequence of the "force of law", our compliance with norms shows our obedience to scripts [ORG], generally in the mode of habit [HAB]. We spontaneously drive on the right side without need to remember the traffic regulations [ORG:POL], but if we cross the Channel, our habit will be disturbed, the veil will be lifted, and, because we know that the English judge will not take seriously our excuse that we drive on the right hand in Belgium [LAW], we'll conform to a new script, which will (quickly or slowly, depending on our aptitudes) turn into a new habit (Latour 2012, 269). When abiding by rules, the anticipation of what a judge will decide, is the final benchmark. This is quintessential since it precisely warrants the choice and liberty one enjoys, even if the legislative formulation is meant to be unambiguous and precise; such is the tangible role of the judiciary in a system of checks and balances. Who hasn't wondered about how to interpret a legislative norm, whether to comply with it or to circumvent its consequences? Which engineer hasn't wondered if her invention is patentable, or more worryingly, whether her patent will ultimately be endorsed by a judge? And is the partner of a consenting masochist infringing criminal law when giving the latter pleasure through the administration of pains by what looks like "assault and battery"? Such questions engage law2, trigger it and set it in motion, but a definitive answer in that precise case will only be provided if a judge produces a verdict, the *arrêt*. For sure, law2 or [LAW] is an abstract and lively mode of existence. Even when the judge cuts short and closes the issue at stake, by replacing the many stippled bonds by a steady bold one (*res iudicata*, the closure), the abstraction remains primal.

III.4. A material life of law? The embodiment of law in technology.

In his writings on Latour's presentation of law, Kyle McGee devotes a lot of attention to what he calls the "modes of expression of law". According to him, the force of law passes through a wide variety of media, "into objects, techno-scientific constructs, artifacts of all varieties" that each impact upon the quality of the named force itself, turning it into a plural force or different forces of law (McGee 2014, 127 and McGee 2012). There is indeed a lot of literature exploring the embodiment of law in technology, especially in the field of information technology where "privacy by design" and "legal protection by design" receive full interest (a.o. Hildebrandt 2011), but I focus only on McGee's contribution, because he explicitly builds further upon Latour's work, which is the object of the present book and chapter.

As a great reader of Latour, McGee is well aware of the distinction between law as an institution and law as a practical regime of enunciation, between Law1 and law2, and that the latter may not be reduced to the utterance or decision itself, but on the

contrary that "(t)he whole process of enunciation composes the beating heart, systole-diastole, of legality" (McGee 2012, 6). In other words, "*the enunciation of the judgement does not complete the enunciation of the law*" (McGee 2014, 148, original italics); law2 is more than the pronouncement of judgements. When McGee writes that "law's passage extends beyond the verbal exchanges of counsellors, lawyers, judges and administrators" (with reference to *La fabrique du droit*) in order to focus upon its role in collective live, it at first sight meets the idea that the legal key or preposition can always be triggered, by whomever whenever about whatever, in order to give direction to the articulation of our behaviour to organisational, political and administrative norms. Then, law as a regime of enunciation is indeed much broader than the interlocutory process that takes place in courts.

Though I fully join him on these points, I am not sure we interpret these statements in the same way, since I tend to stick to my understanding of law2 as an abstract mode, while McGee argues that law passes, amongst others, into objects and technologies and hence, that it materializes. McGee unambiguously sets a further step by arguing that "dire le droit" also occurs through material objects and technological artefacts (McGee 2014, 127). For him the "force of law" also passes through all kinds of mediators whereby law "juridifies" other modes of existence, such as [TEC]. Fences, pedestrian barriers, painted lines on the street, traffic lights, speed bumps, anti-parking bollards, weaponised city benches or disciplinary architecture ("spikes" to discourage beggars and homeless people to sit or sleep), surveillance cameras, electronic eyes for the operations of doors or the detection of burglars and other technological beings then develop (through a succession of "folds"[30]) into place holders or "lieu-tenants" of law. They "materialize legal statements (…) make us act in specific ways (…) and so exercise a certain kind of normativity" (McGee 2014, 165). "The pedestrian barrier, for instance, is performing the law by enfolding a space-time that is entirely distinct from the law's own" (McGee 2014, 167). Technicity prolongs law: "This is a *delegative* legality" (McGee 2014, 169).

I would indeed agree if McGee was evoking Law1 and the formal *sources* of law, or, in other words, if he was speaking of law as an institution. As I argued at the beginning of this chapter, the formal sources of law are all normative, but at the same time, they are an obligatory referential component of the making of law2. Stated more radically, however, these sources are not singularly or definitively legal, not even legal *per se*. They are at best very weakly or possibly legally-prepositioned if that preposition indicates, as we argued based on Latour's study, a specific way of hermeneutically coping with issues through a trajectory steered by legal operations and value objects: legislation is certainly dominantly coloured by [POL:ORG], customs are literally [HAB:ORG], doctrine is [REF:LAW], and pre-existing case-law is difficult to coin but probably mainly [ORG:DRO] when it comes to the rules/scripts derived from legal decisions and [DRO:ORG] (or [DRO:REP], or [ORG:REP]) regarding legal bonds they have already put down in prior cases.

Undoubtedly, technical artefacts can embody rules or norms, and the examples are self-explanatory. A fence translates a rule into barbed wire, "you shall not trespass" in the one sense, and "you're 'at home'" in the other. The bleeping of your car or its refusal to ignite, impose the norm that you have to wear a seatbelt. The

[30] "Folds" are the main characteristic of the [TEC] mode see Latour 2012, chapter 8, and Gutwirth 2010, chapter 4, with more references

Amsterdammeke makes parking impossible where the rule prohibits it. The list of illustrations could be extended *ad infinitum*: rules and regulations can indeed be materialized in technical artefacts. That should not surprise, because it is precisely what technology [TEC] is about: about delegation – folding in – a succession of tasks into a durable and discrete device (not necessarily a material device, such as the techniques of plastering walls, serving in tennis, or legal reasoning).

So, are we talking law here? Yes, certainly if we evoke Law1, the sources of law and the set of rules they spawn. But as we have shown already, Law1 and the "normativity" it conveys through the formal sources of law (which are political, organisational, scientific, ethical, cultural etc.) are far from marked by the singularity of law2, which is that it binds, assigns, holds together, retraces and stabilises, when triggered to do that.[31] But, the argument doesn't hold water if it is meant to also (or only) apply to law as a regime of enunciation. As regards law2, the technical materialisation of the norms and the normativity which are its "sources", do rather seem to have "repulsive" or "repellent" consequences. If the interpretations of norms, the possibilities that they leave open and the liberty we have not to abide by them, are limited by hard devices that impose a particular kind of conduct, the legal momentum, the triggering of law2, is "pushed further" or even rendered superfluous. The room for the uncertainty that may trigger the legal mode is then narrowed down: no bond or connection can even be missed, because there *is* a connection, but it is simply not legal (e.g., an [ORG:TEC]-connection). As such, for example, there will be no discussion about the justifying or excusing elements a legal practitioner would consider for a medical doctor receiving a parking ticket while urgently intervening, if due to a concrete pole, she just couldn't have done it (and the patient might have suffered more).

From this perspective a "speed bump" is not per se a legal device. It is organizational because it imposes the script that you shall not drive more than 30 km/h in an urban agglomeration [ORG]. It is political as well since it is the choice or "emanation" of a collective not to have people driving too fast where children are playing [POL]. It is technical, for it incorporates or "folds in" a number actions to obtain a result, into a steady device [ORG:TEC], namely forcing people to drive slower. It is scientific [REF] because the material it is made of is experimentally known to be resistant to a billion bumps by cars and other vehicles of a certain weight. But it is *not* legal as it stands. Of course, *it can become legal* [LAW] if, e.g., it has been defectively built and the public authorities start considering launching a liability action against the private builder, or if an ambulance breaks its chassis while speeding to the hospital with a mother giving birth, and both the owner of the ambulance and the mother start thinking about taking legal action against the administration for their damages.

In other words, in the examples given by McGee the embodiment of law in technology actually should be read as the embodiment of norms, rules, and regulation in technology. As a consequence, the evoked technological devices are in fact the "lieu-tenants" of political, economical and moral governance. Designing public benches so that the homeless cannot use them to sleep or rest, has nothing to do with the law, but everything with the moral, organisational, political or whatever-al idea that

[31] Self-evidently, but nevertheless interestingly here is that the rules embodied by technological devices, do not even have to be legal at all, it works for any kind of rule, even a rule that no one would consider legal, even from a very loose perspective: that is for example the case for a thermostat which implements your personal "rule" that your living room should not be heated up to more than 19 degrees Celsius.

sleeping on benches should be impeached for one reason or another. Such devices rather postpone or remove the setting of the [LAW]-preposition, the coming into motion of the particular regime of enunciation that characterizes the law. In that sense they are anti-law. Designing rules and norms into technology is an act of governance, even if it is "well-meant", e.g., to warrant individual rights such as in the case of "data protection by design". Such acts can be both public (speed bumps) and private (fencing, spiking), but remain acts of power in the finest Foucauldian sense: they are *conduites des conduites*, they steer the conduct of others (Foucault 1984, 313-314). Nothing legal – in the sense of law2 – under the sun.[32]

Conclusion: the residual conection

If we want to understand what singularizes law, we cannot be satisfied with an evocation of a body of more and less binding rules. On the contrary, such norms do actually express a mix of many sorts of concerns, stakes and hopes, and therefore simply do not permit us to isolate what properly distinguishes law. After Latour's passage, this appears still more clearly: approached as a practice or regime of enunciation, law – law2 – cannot be singled out by a focus upon normativity and rules. It is the opposite: the legal practice must carefully and steadily avoid falling in the trap of a normative stance. How things *should* be from a political, moral, cultural or economic perspective, is not law2's concern. It does something else.

Such statements should not come as a surprise, since the tenet of the sources of law has confirmed this for ages, although it apparently went unnoticed, as clear as the message is: the material sources of law are not the same as its formal sources; and the formal sources of law differ from the law itself. By associating law and normativity, we confuse non-legal sources and law, legislation (*loi*) and law (*droit*). Indeed, in a first step the material sources of law, with their moral, political, economical, cultural and other contents, are translated and transformed into formal sources of law, which may happen through legislation and executive measures, but also through precedent analysis, deduction, legal science and custom. In a second step, the formal sources will, if it occurs, be taken as obligatory reference points by legal practitioners and judges in order to respectively anticipate or state the legal bonds in a case. So, indeed, a legal practitioner will consider a person of 19 years as a minor if a statute sets 21 years of age as a threshold. And yes, she will recognize the possibility or consequences of a same-sex marriage if the conditions are met as foreseen by the legislation. But if the legislation changes, their decisions will be different *inasmuch* as they will have different consequences for those concerned. Generically speaking, however, the jurists will have done the same work and proceeded along the same constraints of the same practice. If we want to single out what is immanent to law, the point is precisely what remains unchanged, i.e., *how* the judges and jurists cope with the things they seize.

In other words, law's singularity is to be located in law2 and is not determined by *what* legal practitioners convey as non-legal contents and consequences, but by *how* legal practitioners work, how they reason and decide, how they seize the things of the

[32] One may wonder if law2 could be embodied in technology, which would imply that the legal practice would be "folded into" technological devices. That, in turn, would mean that devices be built that would anticipate decisions of judges in a case, and carry out all the operations of the law taking into account the different value objects of the law's regime of enunciation. I am extremely skeptical about this endeavour (cf. Gutwirth 2010)

world they are triggered to comprehend. When one practices law, one is not and should not primarily be concerned with content, but rather with the opposite, with the legal operations and value objects of law, with taking and holding distance and building the detachment that makes legal coping with things so characteristic of legal activity. Indeed, the result in terms of content and interest will drive lawyers through the switches of the possible anticipations of the future decision of the judge, but in principle it is the most appropriate *legal trajectory* that will prevail.

Additionally, it is precisely because of the fact that legal practice takes no, or better, is not supposed to take a political, moral, cultural, or economical position, that it may touch or seize absolutely every thinkable thing and that we can accept it as the rightful and ultimate provider of stability and security, where these are missing and missed. If judges and jurists really had to cope with all the non-legal consequences of their decisions and anticipations, they obviously would have to be categorically distrusted, since nobody can be expected to master everything and nobody speaks a definite and unique truth. That is also why no one would agree to see the judges supersede politics, morals, economics, science and whatever else. They practice law and that is what we expect them to do.

The contrasts between Law1 and law2 turn out to be strong. If Law1 bears the whole edifice of the democratic constitutional state (its rules and principles) on its shoulders, law2's role appears very modest, but is nonetheless vital, since it must produce stabilising decisions and solutions, everywhere and whenever those are missing and missed, where no other stabilising solution has emerged. In the vast web of diverse connections that make our collectivities, the legal bond is the residual form of connection. With too much temerity, I would suggest that it is actually *the connection for the connection*: the imputation of the one connection into the whole of connections. The peculiar constraints of the legal practice (in a Stengersian sense) and its regime of enunciation (so well described by Latour) are a mirror of this role. Being the residual connection, the legal bond must just hold and stabilise, and hence, should be the result of a process with as much detachment from the passions and interests at stake as possible, with a superficiality that makes it as disengaged as possible. No wonder that the legal mode of existence is *utterly abstract*.

Does this mean that there is no articulation between Law1 and law2, between the institution and the regime of enunciation, between normativity and the making of stabilising bonds, the construction of legal security? Is the residual connection completely un-tuned, arbitrary and alienated from politics, morals, economy, etc, or in other words, from the material sources of the law? Certainly not, indeed, but the two step *dispositif*, from material to formal sources, and then to the legal decision, combined with the operations of law, that further produce distance and "objectivity" (Latour 2002, chapter 5), together amount to a complex and subtle articulation between extra-legal norms and rules, cases, legal practice and case law wherein contents are conveyed, transformed, formalised and, yes, why not, "jurimorphed". When judges make decisions that displease, content-wise, the representatives of the legislative and executive powers are free to intervene with the tools at their disposal, to try to steer the judges to make decisions with other consequences. Although in principle not a straightforward relation, since the impact of changes in the formal sources must still be linked to the peculiar facts of a case and interpreted by the legal practitioners, this may have immediate effects. Slow adjustments are possible as well, and can be the result, on the one hand, of the influence of legal doctrine or science

upon the legal practitioners, or, on the other, of judicial creativity, spawned by new issues or new hermeneutical openings. Moreover, as we saw, the legislation sections of the State Councils in Belgium, the Netherlands and France, are particularly interesting interfaces between legislation as a formal source of law and legal practice, since they try to anticipate the way legal practitioners will receive legislative or executive measures in order to make possible an assessment of consequences in terms of content. Constitutional courts are also a fascinating meeting point of law with politics, economy, culture, organisational and so on, since they legally settle issues, sometimes quite loaded issues, that question the basic organisation of states from political, economical, moral, religious and other perspectives.

Many years ago, when I was writing my PhD, Latour's passage obliged me to reconsider what I was doing as a scientist. His work helped me to recognise myself in the scientific practice (even as a legal scientist!), beyond the then very trendy critique of the scientific institution. With his work on the law, he actually realised a similar thing: by unburdening the shoulders of the law of many non-legal callings, he made it possible for me to reconcile myself with a practice too often denigrated and reduced to alienated hair-cutting by critique. It is not a reduction or minimisation of the law's importance to shift the focus from the rule (of Law1) to the role of law2, because producing stabilising bonds and security [LAW], is as singular and characteristic of what we are as constructing robust and reliable knowledge [REF], or constituting the collective [POL]. Quite the contrary in fact: when the responsibilities attributed to practitioners meet the possibilities of their constraints, the joy of practicing is warranted.

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