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“The production of law”: Law in action in the everyday and the juridical consequences of juridification

Danielle Chevalier

1. Introduction

Sociologist Vertovec coined the term “superdiversity” to describe the exponential increase in diversity in society in terms of culture, ethnicity and religion.¹ The idea of superdiversity argues that contemporary diversity is an intersectional dynamic, cross-cutting ethnicity, age and gender, as well as legal status, educational attainments, socio-economic mobility, and – most importantly for the discussion here – norms and values positions. The *experience*² of diversity in Dutch everyday life is broadly documented,³ and in sociological literature this experience of diversity is linked to disquieting social processes such as stringent boundary setting, social vertigo and exclusionary culturalization of citizenship.⁴ Overall, the consensus is that traditional anchors are foundering in the face of serious challenges to social order and conviviality.⁵ Against this backdrop, the question is posed of how law affects every day behavior. In the volatile era of late modernity, law is at times argued to be the catalyst of conflict and at times hailed as the viable basis for bridging differences in conviviality. Habermas for one has argued both cases. In his earlier work, Habermas posits that the increasing use of law in social relations subverts conviviality. By contrast, in his later work he attributes to law the capacity to bridge ideological and religious divides. The contemplations behind both positions are briefly expanded on below.

In his endeavor to understand how social order is possible, Habermas distinguishes between two social spheres, namely the lifeworld and the system. According to Habermas, these social spheres exist concurrently and both are conducive to society.⁶ There is, however, an important difference between the two. The lifeworld, in which the cultural and social reproduction of society takes place, is a “self-standing and self-replenishing medium.”⁷ The system, on the other hand, in which the material reproduction of society takes place, is embedded in and

- 1 Vertovec 2007; Meisner & Vertovec 2015; and applied in the Dutch context: Crul et al. 2013.
- 2 Whether ethnic diversity, brought about through diversification of migration, can be unequivocally equated to cultural heterogeneity is a subject of debate; see for example Duyvendak et al. 2016.
- 3 Mepschen 2016; Slootman & Duyvendak 2015; Slootman 2014; Reekum 2014.
- 4 Alba 2006, Duyvendak et al. 2016, Ferrel et al. 2008, Schinkel 2007, Van Houdt et al. 2011, Young, 2007.
- 5 For a counter argument see, for example, Wessendorf 2014.
- 6 Habermas 1987, p. 113.
- 7 Finlayson 2005, p. 56.

dependent on the lifeworld. The point of worry is that though the system is dependent on the lifeworld, it tends to invade and corrupt, to "colonize" as Habermas denotes it, the life world.⁸ In Volume 2 of *The Theory of Communicative Action*, Habermas presents juridification as a poignant example of such an obliterating colonization of the lifeworld by the system. Juridification is understood to be "the tendency toward an increase in formal (or positive, written) law that can be observed in modern society."⁹ Law then is seen as hindering the lifeworld as "the everyday world we share with others", because "as a medium of state administration (it) supplants communicative contexts of action."¹⁰ It is in communicative action that mutual understanding and consensus is secured, and subsequently social integrity and social order is achieved. In short, law codifying social relations disrupts the capacity of the lifeworld to secure social order.

Through time, Habermas's perspective on the dynamics of the juridical systemic shifts. The idea that law subverts the "unregulated spheres of sociality" of the lifeworld in which communicative action comes about,¹¹ changes to the proposition that "under the modern conditions of complex societies (...) the paradoxical situation arises in which unfettered communicative action can neither unload or seriously bear the burden of social integration falling to it."¹² Consequently, in an increasingly diversifying society, law is perhaps the most viable common pillar to bridge deep, religious, cultural and or ideological gaps. In a society that is losing other forms of common ground, law can be the facilitating framework enabling the communication needed for mutual understanding and consensus pivotal to everyday conviviality. The idea then is that law offers a viable bridge across differences, and a framework for deliberation and mutual agreement, if not on outcome, then at least on the process from which the outcome derives. The acceptance of the process leads to acceptance of the outcome, and thus law provides the basis for a deliberative democracy.

In the Dutch context, Schuyt expanded this idea in a 1997 special issue of *Nederlands Juristenblad*. Schuyt considered that juridification can be regarded as a signifier for decline in social cohesion, as a booster of the dissipation of social cohesion, but also as a *substitute* for social cohesion: "When church attendance and political party attendance and other traditional forms of social bonding lose their effectiveness, law replaces these and law fulfills the function of a minimal, most neutral, formal and procedural moral."¹³ Similar to Habermas's writings, Schuyt's contribution is primarily a theoretical contemplation and he expresses the hope that at some later point in time others will reflect on what actually came of these forecasts.¹⁴ It is this invitation to which the research underlying this article responded.

8 For a more elaborate description of Habermas's concepts of lifeworld and system, see Schwitters in this volume.

9 Habermas 1987, p. 357.

10 Ashenden 2007, p. 121.

11 See also Deflem 1996.

12 Habermas 1996, p. 37.

13 Schuyt 1997, p. 93 (translation by DC).

14 The editor of the special issue echoes that wish, Polak 1997.

Danielle Chevalier

The theoretical U-turn Habermas makes on the consequences of juridification translates into the empirical question of whether law acts as a catalyst of conflict or as a moderator bridging differences. In order to understand *how* and *why* law hinders or facilitates conviviality in diversity, it is imperative to investigate and realize how law works in action, i.e. how it is *produced*. In this article, a suggestion is made on how to analyze the production of law by engaging the work of French philosopher Henri Lefebvre and his work on the production of space. The proposed analytical framework is applied to empirical research that has investigated the actual working of codified social norms, implemented in shared spaces of everyday life that reflect the diversity of late modernity. Concretely, the empirical research investigated local bans on the public use of soft drugs, and how those bans affected social interactions in public space. In the empirical data, evidence is found both for law as catalyst of conflict and as facilitating framework for conviviality. The focal point is that understanding the potential that law has for conviviality in a world of diversity requires an understanding of how law is produced and to what effects. The aim here is to offer a way of reaching such empirical understanding.

In this article, first a brief overview is offered on the two thinkers recruited for this undertaking: Habermas and Lefebvre. It will be argued that despite their ostensible differences, they share fecund common ground. Subsequently the empirical case study is introduced and amplified. Then the main proposition of this paper is expanded on: how the conceptual triad of a spatial thinker can be transferred to the analysis of law in action, and what this yields. Fieldwork data is used to demonstrate how the conceptual triad applies to space, and subsequently how it can be applied to law as well. In the process, it will hopefully become clear that the implementation of legal regulations in the everyday lives of ordinary citizens should be considered beyond the intended effects of legislative forces.

2. Habermas and Lefebvre.

Jürgen Habermas and Henri Lefebvre are both authorities in their respective fields. Though more or less contemporaries, to the best of my knowledge they are not readily paired in academic texts, and at first glance the combination might seem less than self-evident. However, I see their work connect at a very fundamental level, a conclusion I draw from combining their range of ideas to explain the inter-dynamic between two domains central to any society: law and space. In this article, reference is made to specific texts of these two thinkers within their larger oeuvre. To contextualize these works, I briefly introduce here the authors and their academic enterprises.

Jürgen Habermas (1929) is a German liberal social theorist. His lifelong project revolved around understanding how social order is possible in modern times, whilst upholding the tradition of Enlightenment reason and furthering “the unfinished project of modernity.”¹⁵ His experience of World War II as an adoles-

15 Finlayson 2005, p. 65.

cent resounds throughout his work. Originating in the Frankfurter Schule, Habermas embarks on a philosophical and sociological inquiry into the nature of social control. Over time he eventually cuts loose from Hegelian-Marxism and is now considered the "doyen and inspiration" of the democratic left in Germany.¹⁶ He first gained fame through his book of *The structural transformation of the public sphere*, published in 1962 when he was in his early thirties. In this article, reference is made to work written later in his career: *The Theory of Communicative Action*, first published in 1981, and *Between facts and norms*, first published 1992.¹⁷

Henri Lefebvre (1901-1991) was a French neo-Marxist whose lifelong project revolved around explicating and denouncing the dynamics of capitalist abstraction. His life reads as a French history of the 20th century: Lefebvre was an adolescent in World War I, he fought with the resistance in the Pyrenees during World War II in his forties, and in 1968, aged 67, he climbed the Parisian barricades with his students. Described as "a man of action as well as ideas,"¹⁸ Lefebvre authored more than sixty books on a wide range of topics. He is best known though for his work on urbanism and in this article exclusive reference is made to his fifty-seventh book: *The production of space*. Originally published in 1974, when Lefebvre was already well into his seventies, it is the 1991 English translation of this work that caught the attention and imagination of a wider audience.

Whereas Habermas is denoted a *staatsträger*, a proponent of the state, and assents to the given of modernity, Lefebvre remained a radical and revolutionary throughout. Despite their differences in ideological grounding and ideological endeavor, their work corresponds on theorizing on and contributing to a humane society. Habermas focuses on the communicative action in the public sphere, Lefebvre on the organic everyday in social space. Habermas sees the danger of the systemic logic of "bureaucratic and political authoritarianism" corrupting the life-world, thereby destroying the very base that feeds it. Lefebvre distinguishes the danger of the everyday being colonized through commodification, as "modern" capitalism moves beyond the workplace and into the realm of everyday social spaces, destroying the "Rabelaisian" essence of organically formed humanism.¹⁹ Both Habermas and Lefebvre demonstrate as thoroughly critical scholars, taking prominent positions in public debate, in defense of a shared concern that the essence of humanity is being overrun by the contortions of late modernity. Their work connects where the legal and the spatial intersect, and in that connection the combination offers a more than worthwhile synergy for understanding how law and space constitute society.

16 Finlayson 2005, preface.

17 The English translations were written in 1987 and 1996 respectively.

18 Merrifield 2006, p. xxi.

19 Merrifield 2006, p. xxvi.

3. The case study: Law in action in everyday spaces of diversity.

As part of a larger study of the national proliferation of municipal bylaws on the use of soft drugs in public spaces, I conducted ethnographic research in three specific cases in which a ban on soft drugs figured.²⁰ Concretely this meant I spent many hours at physical locations, both observing what went on and talking with whoever wanted to talk to me. These methods were applied to find answers to questions on how the regulations figured in those spaces, how they affected the spaces and the social interactions taking place in those spaces.²¹ The three case studies consisted of a small neighborhood playground in an inner city residential area in Amsterdam, a local shopping square in the social-economic periphery of a provincial city, and the village green of a village situated in the Dutch Bible belt. In two cases, the main drug targeted by a ban was cannabis; in one case the ban primarily revolved around *khat*.²² For the sake of clarity I refer only to the case of the local shopping square in this article, but ask the reader to keep in mind that the analysis reproduced here was triangulated for three concurrent cases. The following field note introduces the researched site and some of the issues at play there.

“The shopping square, Saturday afternoon around 3 p.m. I am sitting on the curb near the green bench. The sun is out, the square is bustling, and the atmosphere is gregarious bordering on boisterous. The square is vibrant and alive, hot and dirty, ‘summer in the city’ in suburbia. On and around the green bench several, Somalis have gathered, involved in a loud group discussion in a language I do not understand. They occupy the space beyond their physical form through the energy and noise they emit as a group. A boy enters the square from the west side, via the corner where the Somalis and I are situated. I estimate him to be ten or eleven years old. He is carrying an empty plastic bag and headed towards the Aldi supermarket. My guess is he has been sent on an errand, to pick up a forgotten grocery item. Level with the green bench he stops to read the poster in the shop window of the empty store on the corner. The poster originates from the municipality and has been distributed to all the shopkeepers on the square. It is of a bright orange color with prominent black lettering, and it warns of all the bans in effect on the square. I watch the boy standing there and reading the notice. He is standing with his back to me and I cannot see his face, but I hear and I feel the energy of the place and the moment, just as he must. I look on as he reads about the municipal ban on gathering with more than three persons and the ban on using *khat*, whilst within spitting distance a group of eight or nine Somalis is noisily congregating. No one is ostentatiously chewing *khat*, but the ground

20 This article in part builds on, and in part expands on, my doctoral thesis “Playing it by the rules”, defended at the University of Amsterdam in June 2015.

21 With regard to ethnographic research, see also Bryman 2004 and Nader 2011. For contemplations on the validity of case study research see, for example, Flyvbjerg 2006.

22 *Khat* is a twig that emits a minor euphoric rush when chewed on and in the Netherlands is primarily used by Somali diaspora.

is littered with used khat twigs. The scene in which the boy is standing is at complete odds with the message broadcast by the municipal poster. After a while the boy moves on, continuing on his errand, and leaving me to wonder what the experience has done for his perception of the square, as well as for his perception of the municipal message on the poster."

The shopping square is located at the periphery of a mid-sized provincial city, and it is the central public space of a borough that comes last on the municipal lists on socio-economic success rates. It is a space of everyday life, shared by people from ostensible different backgrounds, and it materializes the experience of diversity of contemporary Dutch society. Amongst the many users of the square, approximately three groups²³ can be discerned that stake a claim on the square. The most notable of these is a loosely affiliated group of male adolescents of primarily Moroccan and Antillean descent, but also including Iraqi, Yugoslavs, Ethiopians, native Dutch, and so forth. Another visible and present group consists of Somali men of all ages who use the square to gather and chew khat. The third group comprises of native Dutch residents, most of whom have lived in the neighborhood since it was first set up as a respectable white collar residential area in the 1960s. Aside from the ban on khat, which formed the trigger to research this particular site, multiple restrictive measures are in place on the square, including closed circuit television; a ban on gathering with more than three people; a ban on alcohol; a ban on psycho active substances other than khat; and a ban on parking in the square outside commercial hours. The research questions guiding the ethnographic fieldwork focused on the interaction between the legal regulation and the space in which it figures. To answer the general inquiry into the dynamic between the legal and the spatial, three sub-questions were formulated: how is space produced; why and how is a social norm pertaining to such space codified; and what are the workings of a legal intervention in space? This article is a continuation of these issues: it builds on work done and takes it one step further by arguing the work of a spatial thinker, and his analytical framework to unpack processes of "production," relevant to understanding how law functions in action.

4. Lefebvre's conceptual triad: An interaction of three interconnected dimensions.

The regulations under scrutiny here comprise of bylaws implemented in and aimed at regulating a physical space: a space in which people live their everyday life, sharing that space with others who also spend their daily lives in that space. However, this space is not merely a "setting in which life transpires."²⁴ Space is made, *produced* in the terminology of the neo-Marxist Lefebvre, by the social. At the same time space makes, i.e. produces, the social. In other words, society creates a given space, but that space subsequently also affects the social occurring in

23 For the sake of brevity I do not problematize the concept of groups here; cf. Brubaker 2002, p. 164.

24 Molotch 1993, p. 888.

that space. The inter-dynamic between the social and the spatial entails that understanding how space comes about offers the opportunity to understand the social configuration of a space: the social relations, interactions and power dynamics that transpire and take shape in a given physical setting. As will be argued in the next section, the same argument holds *mutatis mutandis* for law. This section expands on the conceptual triad used to analyze the production of space and closes by briefly stipulating why social entities will try to influence the production of space according to Lefebvre, and how I see law figure in that process.

Lefebvre undertakes to analyze the production of space, and in doing so departs from the established binary approach of space planned versus space lived. Traditionally space is understood to be planned and subsequently determined in use, defined for example as respectively the potential and the effective environment.²⁵ Lefebvre, being the Hegelian thinker he is, denounces the reflex to think in dualisms and argues a third element to play a role in the coming about of space. The production of space, Lefebvre contends, comes about through a continuous and reciprocal dynamic between three different dimensions of space. Besides the planned and lived dimension, there exists a perceived dimension in which space is mentally appropriated. The concepts Lefebvre uses to denote the three dimensions are representations of space, representational spaces and spatial practice. Though the words Lefebvre uses reflect the richness of his argument, in practice they tend to confuse (me). I therefore propose the simplified terminology of respectively planned, lived and perceived.²⁶

The planned dimension first of all is the realm of “scientists, planners, urbanists, technocratic sub-dividers, and social engineers.” Second, the lived dimension is the “directly lived” and “passively experienced” space. This is space as it is actually encountered and directly lived through bodily senses like smell and touch. It is the space of the “users,” dominated by the other dimensions whilst pivotal to the experience of space. Third, the perceived dimension is where a society “propounds and presupposes” space. Here the meaning of space is identified and understood, and through this space becomes a place.²⁷ In the perceived dimension, space is interpreted and defined. For example, the shopping square was planned as exactly that: a shopping square. The lived experience of the square differs from moment and time, but is still readily shared in the specific junctures: how space is encountered and passively experienced will overlap for concurrent users. It is in the perceived dimension that divergence becomes apparent. I quote two respondents from the square who uttered exactly the same sentence to me: “It’s just like the marketplace in Morocco sometimes.” Though the two respondents had a similar

25 Gans 1991.

26 Lefebvre himself also at times switches to a simpler terminology, though he then abbreviates “representations of space” to conceived space. I opt however for the term “planned” to avoid confusion with perceived. “Representational spaces” refers to space in which representation takes place, thus the lived, “passively experienced” space. The spatial practice is the practice of society to perceive space, and through the act of perceiving both codes and deciphers space (Lefebvre 1991, p. 38-39).

27 Altman & Low 1992, p. 5.

experience of the square full of people, sounds and energy, "like a marketplace in Morocco," the meaning they gave this experience was oppositional. For the one person it described what a wonderful, vibrant, convivial place it was. For the other respondent it conveyed his perception of the absolute depravity of the square. As this example brings to the fore, the three dimensions of planned, lived and perceived law do not necessarily line up in harmony: the equation of the three dimensions can have different outcomes for different players.

In the convergence of the planned, lived and perceived dimension, in "the dialectic relationship which exists within the triad," space is produced.²⁸ This dialectic relationship, however, is not even: the planned dimension, "in thrall to both knowledge and power, leaves only the narrowest leeway to" the lived dimension.²⁹ In other words, the plans of the urbanists and social engineers constrict the passively experienced, lived dimension. Moreover, Lefebvre argues, it is in the perceived dimension that "the reproduction of social relations is predominant."³⁰ The perceived dimension is where space is imagined to be and, as such, it mediates between the lived and planned space, keeping them apart and at the same time linking them to each other. The perceived dimension deciphers a space, reads and decodes it, presupposing and propounding. Here again a dialectic relationship takes place: the spatial codes used to read a space determine how a space is perceived, and at the same time how a space is read induces spatial codes.³¹ Translated to the case study of the shopping square: whether a person codes that square as convivial or dangerous will determine how occurrences are interpreted: is the group of male adolescents, pushing one another and shouting, simply boisterous and mucking about, or are things spiraling out of control and is a fight breaking out? Perceived space structures reality, it determines how space is taken in and vice versa: how space is taken in structures how it is perceived. In other words, mental space structures reality, and also structures action in reality.

An additional point Lefebvre makes with regard to the three dimensions is that any given user of space will try to line up the three dimensions in accordance with one another. Lefebvre comprehensively argues space to be a constitutive factor in social relations and social order. As a consequence any "social entity" using a given space will attempt to produce that space in such a way that it accommodates the urges and needs of that social entity. To run ahead of things: it is similar to the way in which a social entity will attempt to structure the ruling legal system in accordance with its norms and needs. When space is lived differently from how it is perceived, the tendency will be to recalibrate and to attempt to have the dimensions line up with one another. One tactic in achieving harmony of the three dimensions is to seek legal interventions regulating the lived experience of space, such as morally "entrepreneurial"³² a ban on gathering.

28 Lefebvre 1991, p. 38-39.

29 Lefebvre 1991, p. 50.

30 Lefebvre 1991, p. 50.

31 Lefebvre 1991, p. 17-18.

32 Becker 1997, p. 147.

Danielle Chevalier

In conclusion, space is produced and the process of production affords an insight into the society that both produces and is produced by the space under scrutiny. The production can be analyzed through a conceptual triad, distinguishing a planned, lived and perceived dimension. The perceived dimension is where reality is structured, and subsequently action in the reality is structured. In the following I will argue that this spatial analytical framework can likewise serve to investigate and understand the production of law.

5. Space and Law alike.

Like space, law is also constitutive of social relations.³³ Law “does more than reflect or encode what is otherwise normatively constructed (...) law is part of the cultural processes that actively contribute in the composition of social relations.”³⁴ “Law is neither distinct from society nor does it act on society from without,” it is “constructive of social realities, rather than merely reflective of them.”³⁵ In this constitutive relationship with the social, law and space equal each other: just as space produces and is produced by the social, law also produces and is produced by the social. Another analogy between space and law is the tendency to view the dynamic with society as a binary constellation between planned and lived. Law is conceived at an institutional level, and subsequently enacted in the domain of everyday reality. However, parallel to space, a third dimension figures in the production of law. In the next section this third, perceived dimension is highlighted and expanded on.

The emphasis here is to analyze law as a process, not a static given. Tamanaha has expounded how, with the advent of enlightened reason, we understand law nowadays to be *founded*, rather than *found*. In other words, law is understood to be man-made rather than God given.³⁶ The process does not come to a conclusion once law has been founded though. Even after having been founded, codified, legislated and arranged under the rule of law, law is a process, in motion, subject to an internal dialogue between the way this law was planned, how it is lived, and how it is perceived. The title of this article is the production of law and this is an allusion to Lefebvre’s work, *La production de l’espace*. Production of law here does not pertain to the workmanship of drafting law, to the particular act of legislation. Production of law invites one to empirically understand how law comes about, in a never-ending dialectic, as it exists and operates in society.

6. Law in action: Planned, lived and perceived.

The ban on khat under consideration here is the codification of a social norm that holds that congregating to chew khat on a neighborhood shopping square is

³³ Ewick & Silbey 1998; Mautner 2011.

³⁴ Silbey 1992, p. 41.

³⁵ Geertz 1983, p. 232.

³⁶ Tamanaha 2006, p. 496.

undesirable and causes nuisance. The square is a space of everyday life for many of the people who use it, and is correspondingly important for these users. It is shared space used by very different people and in the sharing diversity is experienced. The experience of shared use brings to the fore that the norms and values held regarding that space diverge, at times considerably. Viewed by most of its users as a natural and prime place to socialize and meet with peers, views on the manner in which this socializing ought to take place are at times oppositional. The field note of the boy reading an official notice of implemented regulations in a setting that negates those regulations illustrate a basic point in this article: law is conceived with a purpose in mind, in its implementation it is lived in certain way and, through the dynamic between how it was planned and how it is lived, law is moreover perceived in a certain way. In the following, the municipal ban on the use of khat on the square will be analyzed for each of the three dimensions, with a focus on the lived and perceived dimension. The aim is to first clarify how the law is produced. In the next section, this insight is subsequently used to discuss how the working of the ban reflects on the constellation that brings it forth, and how this ties in with juridification being a catalyst for conflict or a lever for conviviality.

The planned dimension

The municipal ban of the public consumption of and trade in khat was implemented in the entire district in which the shopping square is located.³⁷ The ban on khat is part of a larger set of restrictive regulations set on the square, including a ban on other psycho-active substances, a ban on alcohol, and a ban on gathering. The regulation is grounded in municipal authority on public order, and the motive for implementing the ban was the nuisance experienced in the shopping square. Upon implementation, the municipality states in the free local paper that it "expects the bylaw will contribute to the improvement of the climate" of the square.³⁸

The lived dimension

The ban figures in the lived dimension of the square through two mechanisms: awareness of the ban and compliance with the ban. Awareness of the ban is broadly present. In the shopping square, physical representations of the bans figure prominently in the daily experience of the square. The bans are announced via official municipal signs arranged at the entrance of the square, but also for example via the bright orange posters in the various shop windows. The youth in the extensive anecdote cited above was looking one of these posters. These posters easily catch the eye, including the eye of an unsuspecting passerby. The optical cues, however, range beyond such official notifications. At one point I inter-

37 Note that, at the time the ethnographic research was carried out, khat was not a forbidden substance in the Netherlands. The fieldwork on the shopping square took place from 2009 to 2012. Khat was added as forbidden substance to (List II of) the Opium Act effective 5 January 2013.

38 <http://epaper.tilburgsekoerier.nl/tbk/data/epaper/tilburgsekoerier/epaperarchive/2007/11-15/epaper/page9.htm>, last accessed 14/07/2016.

viewed a Somali man who comes to the square often when visiting family but lives elsewhere. When I ask him if he knows of things forbidden on the square he says: "I am a Muslim, I am not drinking, but people here cover their can of beer, so I think that is forbidden."³⁹ This man does not get his information from the posters and signs set up in Dutch, he gathers his information through his experience in the lived dimension, noticing how people wrap napkins around cold condensed beer cans.⁴⁰ He deduces from the behavior of people on the square what is apparently forbidden in that place. He undoubtedly also gets his information from his peers. He is well aware of the ban on khat, and confides in me: "If they catch you, they do not arrest you and you do not get a fine. They take your wares, however, and that costs a lot of money."

This leads to the second mechanism that affects the lived experience of the ban, namely the compliance with the ban. Compliance can be regarded from the perspective of those instigating the ban and from the perspective of those targeted by the ban. With regard to the latter, compliance with the ban is limited and can be sufficiently explained by the conventional instrumentalist approach,⁴¹ that is to say that in the face of enforcement the regulations are duly adhered to. The chances of getting caught, however, are limited, in part due to the attentiveness of the transgressors, and in part due to limited enforcement. The scene of the youth reading the municipal notice, whilst around him people are congregating and khat has evidently been used, demonstrates that the bans are not comprehensively adhered to. The limited enforcement is also experienced on the other side of the spectrum, by those who champion the ban:

"It's Tuesday morning and I have entered the Dutch bakery on the square. An employee is in the front helping customers, but the proprietress appears quickly from the back when she hears my voice. She's upset. On Saturday morning there had been a whole gang of youths, congregating at the entrance of the bakery. The entire façade of the bakery is glass, from ceiling to floor, bathing the shop in light and providing a wide overview of the square. And a front-row view of what occurs on the square and even more so in front of the bakery. The youths had been jostling and making loud noises and impolite gestures at them. It had been very aggravating to them and, even worse, intimidating for their customers. They had called the police, more than once. They did not have a direct number and had to go through the national operating system and explain their story every time. Eventually a patrol car showed up on the square early in the afternoon. It circled the square and came to a halt level with the youths. The police did not come out of their car. The proprietress repeats this several times, with exasperated unbelief. Instead they rolled down their window, called over to the youths and spoke a while, still

39 Note that this particular interview took place in English, these quotes are not translations.

40 One of my key informants on the square explained: "Well, we know it is not allowed, but you know, I want to sit here and enjoy my beer. So I wrap a napkin around the can, and nobody has to take note that what I am drinking is beer."

41 Bantema 2012.

“The production of law”: Law in action in the everyday and the juridical consequences of juridification

seated in their car, with the youth who had ambled over to the patrol car. Quickly enough, they finished their conversation, appeared to exchange amicable goodbyes, and drove off again. The youths of course continued for a while in front of their shop, until they apparently got bored with it and moved on. She had been so unbelievably hopping mad. The youths should have been fined for congregating in a group; their behavior was really off limits. And the police, she had no words for it, not even getting out of the car. She was so completely fed up with it all. That same afternoon they pulled down the municipal poster that had been in their shop front.”

The local police concur that they do not unwaveringly enforce the bans. The bans are considered instruments in upholding public order, and in each separate instance an assessment is made as to whether enforcing a regulation will benefit public order:

“We use the bans to keep the situation a bit under control. The shopping square is not a good place to control, if you enter the square everyone immediately disappears. You have to avoid getting caught up in a cat and mouse game, you really don’t want that kind of situation. I prefer having them on the square and not branching out into the neighborhood, into the residential areas. There they will really cause nuisance, much more than in the square.”

Thus in the lived dimension the ban is experienced quite similarly by the various actors on the square, as a bylaw widely broadcast but hardly enforced and complied with. This shared lived experience, however, works out differently in different mind-sets. The perceived dimension of the bylaw takes widely diverging routings.

The perceived dimension

Those living their everyday lives assess the bans and their working in the everyday situation on normative grounds. At a judicial level, municipal bans on the public use of soft drugs have given rise to substantial legal deliberations,⁴² but in the everyday experience in the square the legal intricacies surrounding the bans do not play a role in how the bans are assessed.⁴³ In the square the bans are not assessed on whether they are grounded in correct wording or jurisdiction, but they are assessed in connection to the institutional power that they derive from. Additionally, the fact that the ban does not deter the contested behavior from taking place does not mean it is therefore without effect. The mere fact that the ban exists and one is aware of it influences the perceived realm.

42 Most notably: ECLI:NL:RVS:2011:BR1425 in which the Council of State declares all municipal bans on the public use of soft drugs nugatory. The motivation for the ruling was, however, controversial and triggered several test cases, such as ECLI:NL:RBROT:2013:BZ0314 and ECLI:NL:GHDHA:2014:205. For further reading on this issue see Blom and Buller 2011, Brouwer and Schilder 2011 and Chevalier 2015.

43 Note that at the time of the fieldwork the bans had not yet been ruled nugatory by the Council of State, with corresponding media attention.

Danielle Chevalier

I will now explore the perceived realm⁴⁴ of two groups in the square: those who champion the ban and those targeted by the ban. Both the non-compliance with the bans and frustration over such noncompliance is explained through normative arguments, with a focus on the content as well as the origin of the bans. For those in favor of the bans, the substantive norm of the ban has been validated through its codification. Together, the content and its validation by a legislative body provide a double reason why the bans should be adhered to. Subsequently the non-compliance not only reflects non-adherence to a particular norm, but also connotes not adhering to the system that brought forward and substantiated that norm. The non-enforcement additionally undermines the appraisal of the larger constellation that introduced the ban. The anecdote of the baker's wife's frustration illustrates this clearly: in the end she literally removes the representation of that constellation by tearing down the municipal notification of the ban. Whereas the police perceive the ban as an instrument to wield at discretion, to the woman the non-compliance and non-enforcement reflect a failing of the institutional set-up that issued the ban.

Non-compliance likewise is argued through contesting the content of the ban, as well as the authority that issued the ban. A youth in the shopping square pointedly argues his perspective on the authority promulgating the ban that controls his presence on the square:

"Well, if he were to get fined, no way he'll be paying the fine with his own money, or his parents' money. If they give him a fine, he'll go get the money to pay for the fine from them as well."

Though who exactly "they" are is not explained, it is clear that the bans and their sanctions are viewed as emanating from an opposing and unfriendly force. Should that force interfere with him, the youth will in turn take it out on that adversary to settle the score. The youths on the shopping square do not discern the bans to be about maintaining public order; they regard the bans as being directed against their presence.

"About those bans, this is our place, we are not leaving. We are fighting back, even if they barricade the square. [...] Why is this bench here? To sit on! Exactly, yeah. [...] This is our place, the spot where we come every day."

The following anecdote demonstrates how rules are understood to emanate from a social authority, how the insult of openly transgressing the rule is understood, and how action is structured accordingly. In this case, however, the social authority my collocutor recognizes as governing his behavior on the square is not the municipal jurisdiction:

44 Note that the perceived realm is populated by the widest possible range of people, including the enforcers of the ban and anyone reading a media article in the square.

“The production of law”: Law in action in the everyday and the juridical consequences of juridification

“A warm, autumn afternoon. I have been in the square for a couple of hours, hanging out with whoever comes by. I’ve just had a relaxed conversation with a Moroccan-Dutch male in his early twenties and a regular on the square. He has explained why he would not drink alcohol in the public space of the square, but has no qualms about enjoying the joint he is smoking whilst we converse. Both the consumption of alcohol and the use of other intoxicating substances is banned from the public space of the square by municipal bylaw, and these bans are duly stated on large street signs on the square, as well as on municipal posters that almost all the shopkeepers have put up for display on their shop windows. The formal prohibition, however, does not figure in his considerations of whether the one action is acceptable and the other is not. His argument runs that if he is accosted on the square by an acquaintance who knows his family, the smell of the joint—of course readily chucked away—could be reckoned to come from any other person. Alcohol, on the other hand, even if you get rid of the substance itself, can still be smelled on your breath.”

The respondent above complies in part with the formal regulations on the square, but his reasons for doing so are not linked to compliance with the legal frame. His motivations derive from informal social control based on a normative framework that happens to overlap with the codified normative frame.

Moreover, the experience of the regulations simply being in place can already shift the perception of the space in which those regulations are implemented, and the constellation that brings forth those regulations. The following fragment dates from the same day as above:

“I’ve been talking to some youths I know, but they have moved on. Close by a man I haven’t seen before on the square has been standing in a relaxed pose and taking in the scene. When I am on my own again he accosts me. He asks me who I am and what I am doing. His manner is easy and conversational, he’s clearly up for a chat. He hasn’t been on the square for ages, but he used to work close by and come often. Today he was in the neighborhood and decided to drop by. He really likes the square, it’s a place where one feels comfortable, feels at home. To emphasize his point he points out to how I am sitting, and I have indeed reclined into a rather leisurely position. ‘I like it when it is lively, and the square is alive, the people here don’t hide away. Too many people stay inside and hide, messed up with their own personality and afraid to come outside. That’s a shame, because here is where you get your energy, from being here, outside.’ When I ask him if there are any bans on the square he — somewhat to my surprise — says no: ‘If there were bans on the square I’d see cameras, and I don’t see any. If there were cameras it would be unsafe here, weapons, drugs, you know.’ In response I point out the various cameras in position on the square, and subsequently the signs stating the bans. Perhaps I shouldn’t have, their presence seriously disillusioned him. His response though is very illustrative. ‘Oh yeah. Now I see them, I hadn’t noticed. I didn’t know it’s like that here. Now that I know I look at the place differently. You

Danielle Chevalier

don't feel free in your movements. You know, when you go to a playground with your kids and you see a sign not to disturb the neighbors, you no longer move freely.' The realization of the cameras and the bans moreover instigates my respondent to continue on an 'us and them' narrative as he reacts against 'the Dutch':⁴⁵ "The Netherlands has no identity. If you've been somewhere else and you come here, you really don't get happy. The Dutch don't know who they are. The Netherlands is disrupted by rules."

To summarize, the perceived dimension is pivotal because it is where meaning is given to what has been planned and what is lived. Analogous to the planned and lived dimension, the perceived dimension reflects the social dynamics in which a regulation figures. It moreover mediates between the planned and lived dimension, and it structures action and reaction. Importantly, the perceived dimension of a regulation can and easily does differ widely for all those involved by the ban, and the perception loops back to the planned dimension. The bans are perceived not only in their own right, but also as representative of the institutional constellation that brought it forth. The working of the regulation in the everyday centers on the normative legitimacy, it stretches further than how the ban was planned by the legislator and how it is lived in the everyday. What the regulation is considered to represent matters as much as what it contains.

7. Conclusion and discussion

The focus here was to understand how law is produced, and how the working of law in the everyday has consequences for the overall constellation of rule of law. In response to Habermas's theoretical exploration of the consequences of juridification, the conceptual triad of Lefebvre is employed to analyze what happens when law comes into action in a shared space of everyday life. By using Lefebvre's conceptual triad the pivotal importance of the perceived dimension is exemplified.

The dominant discourse on juridification still states it is "an ugly word – as ugly as the reality it describes."⁴⁶ To be sure, the argument of the lifeworld becoming colonized by the system, of rules existing for the rules' sake and not with the primary objective of serving the lifeworld strikes an evocative chord. Unfortunately examples abound where indeed systemic procedures sideline the human factor, with dire consequences.⁴⁷ And there is an additional worry. It is not enough to plan for rules to facilitate the lifeworld, i.e. "the everyday world we share with others," in which we secure the understanding and consensus that underlies our

45 Earlier he had identified himself as a Hindu from Surinam who came to the Netherlands when Surinam became independent in 1975. Moreover, he stated that he is forty-two years old, thus about six years old when he came to the Netherlands. Nevertheless, in this context he clearly does not identify with "the Dutch".

46 Teubner 1998, p. 389.

47 The Institute of the National Ombudsman for one has multiple reports on the ramifications of the lifeworld becoming overruled by the system, for example, see Nationale Ombudsman 2015.

social order. Indeed, law can and does create a mutual ground on which the understanding and consensus can be negotiated. As the case study of the local shopping square demonstrates, however, an express condition is that the process during which consensus is reached is acknowledged in itself.

I would like to recall the adolescent in the shopping square who states that, if fined, he will not try to work to earn the money, nor ask his parents for the money, but instead will steal or rob someone he considers to be part of the enemy system: "If they give him a fine, he'll go get the money to pay for the fine from them as well." The restrictive regulations on the square are planned, lived and perceived. How they are perceived varies from one person to the next, and for some they are seen as measures to get them out of the square. They contend they have a right to be there: "This is our place, we are not leaving. We are fighting back." The "fighting back," however, is not done through institutionalized procedures of contesting the implemented regulations. Instead of negotiating within the legal framework available, the position is chosen outside the framework of "The Dutch," who "don't know who they are" in a country "disrupted by rules." The rule of law is not a given to be taken for granted, ever more so in an increasingly diversifying setting. Whilst one faction on the square regards the bans as derivatives of an external and hostile force, another faction regards the non-compliance with and non-enforcement of the bans as a reflection of a failing legislative authority. The case study of the shopping square demonstrates that rules contrived and implemented without follow up, without understanding how they are perceived, can do great damage, far greater than the short-term symbolic impact they impart. Law implemented in action is only the starting point of how law is produced.

I end this article with a contemplation concerning legal research. I have argued that understanding how law works in action entails understanding how law is perceived by different players in the field. The case study I have described here demonstrates how a regulation affects a space and the people who spend time in that space. A point I would like to make is that a considerable section of the people affected by the regulation do not have a voice heard through the institutional channels of the municipality, the media or otherwise. They do, however, constitute a substantial part of society, and understanding how law works for them and how they perceive law is pivotal. Empirical qualitative research offers a grounded method of investigating these aspects of law.⁴⁸ In this article I have put forward a framework for researching how law works in action, and I would like to conclude with advocating actually doing such research using qualitative, ethnographic methods. Understanding the magical dynamic between law and society has much to gain from empirical legal research.

48 cf. Glaser & Strauss 1967.

Danielle Chevalier

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SUMMARIES

Autonomy of law in Indonesia

Adriaan Bedner

This article seeks to answer how useful the theoretical approaches developed in Europe and the United States are for explaining or understanding the autonomy of law in Indonesia – a nation that is on the verge of becoming a lower-middle-income country and whose legal system presents many of the features found in other developing countries' legal systems. The article first sketches three lines of theoretical thought that have dominated the inquiry into autonomy of law in (Western) sociology and then assesses to what extent they are represented in the socio-legal studies of Indonesian law. The conclusion is that although socio-legal scholars studying developing countries need supplementary concepts and theories, they can use the Western ones as their point of departure in understanding the functioning of law in a setting that is very different from the one in which these theories were developed.

Opinio juris as epistème: A constructivist approach to the use of contested concepts in legal doctrine

Olaf Tans

Seeing that the role of *opinio juris* in the identification of customary international law is essentially contested, this contribution seeks to explain how this concept plays a fruitful role in legal doctrine despite of, or perhaps even due to, this essential contestedness. To that effect the paper adopts a constructivist perspective, primarily drawing from Bourdieu's theory of practice and Berger & Luckmann's ideas about institutionalization. In this perspective, contested concepts such as *opinio juris* are conceived of as multifaceted tools of knowledge production in the hands of members of epistemic communities.

Social theory and the significance of free will in our system of criminal justice

Rob Schwitters

Free will is a key assumption of our system of criminal justice. However, the assumption of a free will is questioned by the rapidly growing empirical findings of the neuro and the brain sciences. These indicate that human behavior is driven by subconscious forces beyond the free will. In this text I aim to indicate how social theory might contribute to this debate. This text is an attempt to demonstrate that social theory does not automatically side with the deterministic attacks on free will. The denial of the free will is to a great extent based on a flawed interpretation of free will, in which it is seen as a capacity of separate individuals. I will suggest that it is the sociological realization that free will is embedded in intersubjective relations that helps to clarify which value is at stake when we deny free will. Free will presumes social practices and social relations that facilitate moral and political discourse. As long as we see human actors as capable to evaluate these practices and contexts in moral and political terms, we cannot deny them a free will. My argumentation will build on the theories of Peter Strawson, Anthony Giddens and Jürgen Habermas.

'Framing Labour Contracts: Contract versus Network Theories'

Robert Knegt

Since the 18th century the 'contractual model' has become both a paradigm of social theories (f.i. 'rational choice') and a dominant model of structuring labour relations. Its presupposition of the subjectivity of individual actors as a given is criticized with reference to network-based theories (Latour, Callon) and to analyses of Foucault. The current contract model of labour relations is analyzed from a historical perspective on normative regimes of labour relations, that imply different conceptions of 'subjectivity'. Research into the regula-

tion of labour relations requires an analysis in terms of an entanglement of human beings, technologies and legal discourse.

The precaution controversy: an analysis through the lens of Ulrich Beck and Michel Foucault

Tobias Arnoldussen

According to the precautionary principle lack of scientific evidence for the existence of a certain (environmental) risk should not be a reason not to take preventative policy measures. The precautionary principle had a stormy career in International environmental law and made its mark on many treaties, including the Treaty on the Functioning of the European Union (TFEU). However it remains controversial. Proponents see it as the necessary legal curb to keep the dangerous tendencies of industrial production and technology in check. Opponents regard it with suspicion. They fear it will lead to a decrease in freedom and fear the powers to intervene that it grants the state. In this article the principle is reviewed from the perspectives of Ulrich Beck's 'reflexive modernisation' and Michel Foucault's notion of governmentality. It is argued that from Beck's perspective the precautionary principle is the result of a learning process in which mankind gradually comes to adopt a reflexive attitude to the risks modernity has given rise to. It represents the wish to devise more inclusive and democratic policies on risks and environmental hazards. From the perspective of Michel Foucault however, the principle is part and parcel of neo-liberal tendencies of responsabilisation. Risk management and prudence are devolved to the public in an attempt to minimise risk taking, while at the same time optimising production. Moreover, it grants legitimacy to state intervention if the public does not live up to the responsibilities foisted on it. Both perspectives are at odds, but represent different sides of the same coin and might learn from each other concerns.

"The production of law": Law in action in the everyday and the juridical consequences of juridification

Danielle Chevalier

In an increasingly diversifying society, public space is the quintessential social realm¹ where members of that diverse society meet each other. Thus space is shared, whilst norms regarding that space are not always shared. Of rivalling norms, some are codified into formal law, in a process Habermas called juridification. Early Habermas regarded juridification a negative process, 'colonizing the lifeworld'. Later Habermas argued juridification a viable pillar for conviviality in diversity. The shift in Habermas' perspective invites the question how law works in action. In this article a frame is offered to scrutinize the working of law in action in public space, by applying the conceptual triad of spatial thinker Lefebvre to understand how law is "produced". It argues that how law is perceived in action is pivotal to understanding how law works in action. Moreover, it discusses the possible ramifications of the perception of law in action for how the legal system as a whole is perceived.

1 Lofland 1998.

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