

## BOOK REVIEW

### THE CONSTRUCTION OF THE LEGAL AND THE NONLEGAL

Barbara Yngvesson, *Virtuous Citizens, Disruptive Subjects; Order and Complaint in a New England Court*. New York: Routledge (1993).

Heleen F.P. Ietswaart

The subject matter of this fine small book may be formulated in different ways, from different angles as it were. The author herself, feeling obliged to give a nutshell description in the Preface, writes: "This book is about the power of law and the capacity of court officials and ordinary citizens to transform it." To my mind, power (rather of people than of the abstraction 'law') is only one theme. Another important theme is disputing and the role of third parties. Another is the relation of ordinary people to low-level courts of law. The book is about the day-to-day problems of people and the day-to-day reactions of legal officials to the attempts to bring these problems into the legal realm.

On the whole, Yngvesson presents a view from the bottom, through the eyes and feelings of the citizens who file complaints. But the view from the court hierarchy downwards toward the lowest level of judicial decision-making is not absent, although it receives less emphasis. It is one of Yngvesson's remarkable achievements that she manages to blend the two views into one coherent story.

The book is based on field research in Western Massachusetts in the early 1980s. Complaint hearings were observed, court officials and parties to disputes were interviewed, and files of complaint applications investigated.

#### **The court clerk**

The story, then, is about lower courts. The central role is played by the court clerk. The court clerk is the lowest ranking official in the court system. Still, his function is crucial: a hearing before the court clerk is required before the

© Copyright 1994 - Heleen F.P. Ietswaart.

## THE CONSTRUCTION OF THE LEGAL AND THE NON-LEGAL

Heleen F.P. Ietswaart

---

issuance of what is called a 'minor' criminal complaint as a formal charge of crime. Therefore, the primary function of the court clerk is to filter cases. It is he who decides which ordinary problems of people will enter the judicial system and which will not. He is properly called the *gatekeeper*, or the *watchdog*. So while the book is about disputing and about power, it is also about access to law. While most students of access-to-law problems focus on financial, procedural and psychological barriers to law, and are frequently concerned about access to lawyers as the first step to formal law, Yngvesson adds a different dimension to the issue. People may have rather easy access to the lower courts, notably if they can go there without a lawyer altogether, but they may still have serious trouble getting inside the court in a real sense. In the Massachusetts setting, everybody may fill out a complaint form, but many complainants will not get past the court clerk to a formal hearing on the merits of the case, let alone obtain a sanction against the other party in the dispute. Yngvesson's purpose is to analyze the interaction between the complainants and the clerk. She stresses the relative power both sides have in this interaction. On the one hand, the clerk has a certain power to define complaints (situations) as 'legal', that is, worthy of the attention of a judge. On the other hand, he is the most powerless official in the court system, considered really outside it altogether. Seen from the court, his office is on the sidewalk, so to speak. Yngvesson calls this *the legal construction of the clerk as nonlegal*. At the same time, citizens have the power to upset the 'system' by insisting on access to the 'real' legal system, but they may also be seen as rather powerless on the whole. So, the book is also about power in and around the legal arena, and, more or less implicitly, about the role of law in social change.

The author observes that this part of the legal system is quite invisible. Complaint hearings are not public. This makes her descriptions of what happens at the doorway of the courthouse all the more important.

### Strategies of court clerks

Yngvesson's book is in the finest tradition of the ethnography of law. Based on the mixture of observation, interviews and file research, it systematically and thoroughly studies *law as process*. It is concerned with the ways in which ordinary citizens come into contact with the courts, without disregarding the ties between the court clerk and the rest of the judicial system. Clerks know that their task is to filter cases and to keep most of them out. Just how do they do that? They use the dichotomy of 'garbage cases' versus 'serious cases', or 'real cases'. Among themselves, in the court environment, and to the researcher they speak openly of garbage cases, and of the people who bring them as 'brainless'. Both have to be kept out of court ('We can't bother the judge with this'; 'I can't send this upstairs'). Yngvesson argues that it is not so much the subject matter

of the complaint as the sort of person that brings it which determines its legal fate.

While poor people are called 'brainless' to their faces ("If you would have more brains, you would know to stay away from her", "you would know how to handle kidstuff"), their cases are not called 'garbage' in the complaint hearing - this qualification not being sufficiently 'legal'. Clerks use legal language to tell people their case is not 'legal'.

The clerk's problem resides in the fact that two interpretations co-exist about where the boundaries of the court are exactly. To the mind of the ordinary people bringing complaints, their case is 'in' when a complaint form has been filled. To the clerk's mind all cases are outside the court so long as he has not let them in. He must therefore negotiate the legal status of complaints, in other words, the legal status of disputes. To this end, he applies an intricate repertoire of terms, phrases and concepts. Frequently he opposes the language of morality to the language of law, especially in the courts where many poor people come with complaints related to family and neighborhood problems. In the language of morality, the people themselves are held responsible for finding solutions to their problems. They are told they should not let 'ordinary trouble' get out of hand, and if it does, they should handle it in a 'proper manner', so as to get things back on track. Two important categories of cases are distinguished here. On the one hand, there is relational trouble, such as men harassing women after an intimate relationship has come to an end; on the other, there is what is called 'kidstuff', the whole area of problems around the interaction of children.

There are many examples of relational trouble about which people, frequently women, bring complaints to the court, in the hope of finding some external authority to compensate for their own lack of power, as they feel it.

In another complaint of harassment ... a young woman described the 'violent actions' of her former boyfriend, and her fear 'that he will kill or hurt me in some way when I'm not expecting it'. The defendant did not appear for the hearing, but the clerk dismissed her complaint, again on grounds that there is 'no such crime' as harassment. He counselled her, however, that 'if he bothers you again, file the right complaint and we'll issue it quick'; and he suggested that she might bring a complaint of trespassing, if the defendant was on her property. Appalled, the woman exclaimed, 'You mean, because I used the wrong word? ... He did not show up and nothing happens? Next time he sees me, he's going to laugh. I just wanted him to know that if he bothers me any

## THE CONSTRUCTION OF THE LEGAL AND THE NON-LEGAL

Heleen F.P. Ietswaart

---

more he'll be in trouble. I couldn't tell him that, his father couldn't tell him that - so I hoped the courthouse people could!'.... Her boyfriend successfully challenged the authority of the court by ignoring, without penalty, a summons. In this way the hearing reproduced the gender inequality within which the conflict was structured, intensifying, rather than diminishing, the complainant's sense of disempowerment. (Pp. 57-58)

This example is representative of a great many others. Besides relational trouble there is neighborhood trouble. People from different ethnic backgrounds, with different lifestyles, suffering from all the consequences of poverty and social stigma, get into fights about many different forms of nuisance. The forum they choose in order to have an audience is the courthouse. Many of the complaints are defined by the clerk as 'kidstuff' although in quite a few cases the behavior of the adults involved is just as important as that of the children.

### **Kidstuff**

The examples Yngvesson provides about how clerks handle 'kidstuff' are among the most telling in the book.

In most of these complaints, the clerk transformed charges of assault or threats into problems of self-discipline and parental control. Parents who were behaving like children had failed to control their children; children's fights, in turn, were defined as everyday troubles that should be 'held' at the show cause level, rather than formally issued. In one of the early assault complaints in this series, a 10-year-old girl was accused of pushing another child into a tree and threatening to 'slice ... [another's] head off.'... After hearing the accounts of the children and their mothers, the clerk said: 'Technically, I can issue it. Would you be satisfied if we issued it technically but hold it at the show cause level? It's not a real vicious thing, it doesn't appear. We won't have another hearing but we'd issue it if there was more trouble. Kids push kids....' Here the clerk used familiar imagery -Kids push kids- suggesting that the root of the problem lay in the quality of parenting and thus that the complaint should not go to court. What complainants describe as violence was redefined as 'normal trouble', while adults were portrayed as *not* 'normal', but in need of self-control.... What went without saying for all participants in these hearings

was that in 'bad' neighborhoods, 'vicious' behavior is not 'vicious' but 'normal' exchange. (Pp. 88-89)

It is clear that in a number of complaints directly concerning children, the relations between adults around the children are strained. Yngvesson points to series of related complaints, some ostensibly only concerning adults, some rather concerning children. If at all possible, the clerk will use the involvement of children in the problem situation to call the trouble 'kidstuff', which seems to him a sufficient reason to dismiss the complaint.

### **Ways and means**

The concept of 'technical issuance' is used by the clerk as one of the means to establish and reproduce the boundaries of the legal realm. 'Technical issuance' is not explained to the reader in an abstract, general way. (The non-American reader is slightly puzzled at first.) Rather, it is shown how clerks use the term in their negotiations with complainants, through the examples provided. 'Technical issuance', Yngvesson states, recognizes the legitimacy of a complaint as a legal or criminal matter, but 'holds' the complaint 'at the show cause level'. Thus, the complaint remains a 'private disturbance', but is available for issuance if there is 'more trouble'. While legally non-existing, the complaint may still be used as a threat.

Another way to keep complaints away from the judge is the use of the phrase: "there is no such crime". People come with a complaint about threats, about late-night phone calls by former lovers, or by neighbors, and somehow, with the help of secretarial personnel, the problem becomes labelled on the complaint form as "threat" or "harassment". At the complaint hearing ...

[The clerk] typically asks complainants to begin reading their own applications. Drawing then on the words used by complainants to frame a charge, he shapes a response in terms that emphasize technicalities of procedure and definition.... [C]omplainants who had filed for harassment were told 'There's no such crime'. (P. 66)

### **Mediation**

After dismissing the complaint, the clerk frequently offers (or simply imposes) some crude form of mediation, in the short time allotted to each hearing. Frequently he does this 'off the record', stopping the tape recorder to mark the unofficial space of law. On the whole, he limits himself to two sorts of advice, both based on middle class values. First of all, he imparts the idea that people

## THE CONSTRUCTION OF THE LEGAL AND THE NON-LEGAL

Heleen F.P. Ietswaart

---

are responsible for their own lives and should not expect other people, including judges, to solve their problems. Second, he repeats again and again the specific values of self-control and of respect for the other as an individual. "Now here is a good rule: when you get mad, put your hands in your pockets and count to ten," says the clerk to a man. And to the rejected lover of a young woman: "You're a full grown man. You don't want someone who does not love you.... Stay away from her." In his discourse he points to a typical aspect of the development of modern society: the increased need for the internalization of norms, and self-control as the proper alternative for violent expressive behavior, such as striking out when one is angry.

### Legal culture

What the numerous case stories show, among other things, is that when courts open their doors to any category of 'citizen complaint', they will be flooded by them. As a European I am struck by the cultural differences involved. I do not know of a court in Europe that would entertain a criminal complaint about a toy car being broken by a 14-year old boy. At most there might be a civil suit for damages. And the police might be involved, but not the criminal court. Yngvesson implies it is regrettable, and an infringement of the rule of law, that complainants in neighborhood disturbance cases, or relational trouble, cannot get access to the criminal court. But nowhere does she explain why it is desirable for individuals to be in the criminal court with such complaints, or what criminal law would have to contribute in cases such as those cited above, or the one described at p. 60: Karen and her half-brother Robert have for years been fighting for the love and attention of Nina, who was at one time Robert's girlfriend. Every once in a while this rivalry leads to some form of violence (in the case observed throwing a pumpkin), and some form of court involvement. What exactly is to be expected from law in such complex human relationships? In such cases, Yngvesson quotes the clerk saying: "I understand you are looking for a third party" - and he is right: the parties want an audience for their story, people want to talk about their problems (which is fortunate for researchers, in particular those interested in disputing). The clerk is also right, it would seem to me, in suggesting that the criminal court is not a good third party for them, as it has so little to offer.

Procedures like 'citizen complaints' create new expectations of the courts, especially on the part of the powerless. It is also true that such expectations are frequently disappointed, as the power of courts is less than powerless citizens think, and of a different nature. The mediation literature of the last decade or two has made it overwhelmingly clear that, for interpersonal conflict of a relational or neighborhood nature, neither the courts, nor most modalities of mediation have much to offer by way of 'solutions'. In France, as in

---

Switzerland, judges will go out of their way to avoid making concrete decisions about children in contested divorce cases; they know this is both painful and rather useless, as such cases will most likely be back in court within a year. Even so, parties, at least one of them, may prefer to have a forum with quite limited possibilities (in a functional sense) which at least provides an audience, to having no forum at all.

### **Audiences and Transformations**

The ideas of audiences and their importance in the transformation of disputes is a theme with some history in Yngvesson's work (see Mather and Yngvesson 1981). She could have put more emphasis on the clerk's office as a forum, a more or less legal arena, with specific potential for the transformation of disputes. Admittedly, there is little variation in the features of cases that may be related to variation in transformation, and the main focus of her research is not on the dispute process as such. Still, the nature of the dispute transformations observed in the clerk's office might have been elaborated a little. It would seem to me that many of the complaints brought are (in part) transformed from rather private disputes to disputes between citizens and the state. In quite a few cases one might say that the dispute brought to the courthouse gives rise to another dispute, about entry into the legal realm, or the definition of the dispute as 'real', or 'worthy of legal attention'.

In *Virtuous Citizens, Disruptive Subjects* Yngvesson focuses on the power of legal definition by the court clerk, and on the struggle to challenge that power. The central thesis of the book is that entrance to the legal realm is not determined by the law, and thus indirectly by democratic law-making, but by the discretion of the clerk. Like so many other gatekeepers in other parts of the bureaucracy, he has been given the power of defining complaints as 'legal' or 'nonlegal'. With great sensitivity to detail, she describes the dynamics of the process of labelling, frequently referred to as the social construction of reality (Berger and Luckmann 1966; Becker 1966). Occurrences, situations, relationships are not legal in themselves, rather for certain purposes, on certain occasions, under certain conditions they are called legal. Frequently, not always, rather important legal, social and/or financial consequences are attached to the label 'legal'. Depending on the perceived interests of citizens and officials, a battle may ensue over the application of the label. The theoretical frame of the social construction of reality is perfectly sufficient and adequate for what the author wants to get across. That the determination of the way in which reality will be constructed is a form (and a source) of power seems rather obvious. It is logical that Yngvesson has been looking for helpful reflections on social power, to strengthen her own reflections and analysis. However, currently fashionable definitions of power such as those proposed by Giddens and Bourdieu (from

# THE CONSTRUCTION OF THE LEGAL AND THE NON-LEGAL

Heleen F.P. Ietswaart

---

whom Yngvesson seeks inspiration) do not really add much to more classical formulations and approaches such as Weber's, as reflected in Berger and Luckmann. What is interesting in Yngvesson's account of the social processes going on in the clerk's office is the idea of disputes (or complaints) as attempts to challenge power relations, as battles for the space in which 'emergent culture' is to be found. She writes, for example:

Complaints defining violence in poor and transitional neighborhoods as crime, and interpreting safety as a 'right', challenge the hierarchies and interests that are imbedded in official definitions of trouble. (P. 6)

Disputing is one important way in which informal and implicit norms may be questioned and challenged. In the dispute process, norms and their interpretations must be formulated and made explicit because they must serve as arguments. The very process of making them explicit provides the opportunity to challenge them. These counter-norms compete more strongly for (legal) recognition in dispute processes than outside them. As a consequence, disputing has a potential for cultural innovation, just like deviant behavior.

## Conclusion

Yngvesson's book is worthwhile reading. It has insights to offer in different fields. First of all, the field of disputing. As Yngvesson herself points out, her interest in the study of dispute processes goes back to days of the Berkeley Village Law Project. In this study of disputes in lower courts, the emphasis is on the process of giving meaning to private occurrences in the public realm. Being faithful to a field of study for many years has the distinct advantage of making it possible to make contributions to the field that have been thoroughly reflected upon.

Second, there is the analysis of the use of power in the legal construction of reality. This aspect of the book may usefully be seen as within the tradition of the study of power and resistance. This latter perspective is nicely tied in with the study of disputing as a social process, because in that view of disputing the idea of 'emergent culture' is important. Where people struggle over the (legal) definition of their problems and the structural situation they find themselves in, there is potentially room for a re-definition of the normative order, in particular a redefinition of what is 'normal' and what deserves attention in the public realm.

And that brings me to a third perspective which is not explicitly stated in the book but which is, to my mind, quite present in it: that of law and social



change. The disputes that develop between citizens and the court clerk about the definition of their problems as 'legal' are struggles about bringing to bear (the power of) law on these problems. By not discussing the issue explicitly, Yngvesson imparts the idea that legalization of such problems is positive, indeed desirable. I believe the empirical material presented in the book can be brought to bear on discussions on empowerment, and on women and the law. This empirical material concerns low-level, not readily apparent struggles over entry into the legal realm, but the issues the analysis raises apply at all levels of legal definition. Is women's work legal? What are the consequences of calling it legal? Are these consequences desirable, in so far as we can foresee them? What is the hidden power in law, who can use it, under what circumstances?

The different perspectives Yngvesson offers make the book valuable for teaching. Quite a few issues may be brought up and treated on the basis of her material and analyses. It is clearly written and the many examples make for good reading. It is true that not all issues are equally elaborated upon, and that some are more clearly presented than others, but this leaves room for elaboration by the instructor.

Readers who are interested in Yngvesson's ideas but who cannot immediately lay hands on the book (even a review copy was not easy to obtain) may start with the author's 1988 article on the same topic (Yngvesson 1988). The emphasis has shifted a little with time but important constants mark the analysis in both the article and the book.

## References

BECKER, H.S.

1963 *Outsiders; Studies in the Sociology of Deviance*. New York: Free Press.

BERGER, P.L. and T. LUCKMAN

1966 *The Social Construction of Reality; A Treatise in the Sociology of Knowledge*. New York: Doubleday.

MATHER, L. and B. YNGVESSON

1981 'Language, audience and the transformation of disputes.' *Law & Society Review* 15: 755.

YNGVESSON, B.

1988 'Making law at the doorway: the clerk, the court and the community in a New England town.' *Law & Society Review* 22: 409.