

Approaching Law through Conflicts^{*}

Niels van Dijk

In this article the author presents Latour's negative analysis of modernity and his positive ethnographical studies of the modes of existence of our modern world. I will discuss the merits and disadvantages of his specific approach on law – an institutional ethnography of the French Conseil d'Etat – within this framework. The analysis will be supplemented with the results of a conflict-based approach to a case study in patent law at a law firm.

1 Introduction

What kind of approach is required when we study law from the perspective of modernity? This is the question that has engaged the writing of this text and that it has taken as its address.¹ The question has already provided an indication for the direction we are to take: law is to be studied from the perspective of 'modernity' or 'modernities'.² What however do we mean when we place law within the horizon of modernity? What is the constitution of this evoked common world that allows such perspectives to be assumed?

With Latour we can ask the question: what does it mean to be modern? According to him modernity itself has the form of a constitution (Latour 1993). It is a legal partition of powers and domains: humans belong to the domain of Society and will be represented by politicians; nonhuman entities belong to the domain of Nature and will be studied and represented by scientists. These conceptual oppositions divide things in neat natural and social segments which are assigned to different disciplines. From this partitioned perspective however many of the issues of the 'modern' world like global warming, volcanic eruptions, financial crisis, spread of nuclear technology, oil disasters suddenly seem like strange hybrids of these two domains. These imbroglis seem to mix up qualities that were supposed to be separate and they gather different disciplinary actors together in

* Niels van Dijk LL.M. is researcher at the Center for Law, Science, Technology & Society (LSTS) at the Vrije Universiteit Brussel. The author wishes to thank Joep van der Vliet, Daniel López, Serge Gutwirth and Mireille Hildebrandt for their valuable comments on earlier drafts of this article.

1 The question was posed in the description of the Disciplinarity and Methodology stream at the Critical Legal Conference 2010 in Utrecht.

2 For the notion of 'modernities', see Eisenstadt 2000, p. 1.

common projects.³ When we insist on explaining such issues either by natural or by social causes, we miss out on the ways these modern conceptual distinctions are themselves produced by the network of acting mediators in between. Nature and Society are themselves not explanatory terms for these issues, but the result of the work of purifying these hybrids. Meanwhile everything has already happened in the middle between the divides where networks proliferate that always already connect these distinctions. When we focus only on the pure concepts at the end of the lines we miss out on all the ways in which these distinctions are themselves produced by the network of translations through the mediators in between. These mediators are not neutral, merely transporting intermediaries, but original events with their proper creative capacities. Once it is realized that this median space has always already been primarily filled up by these productive mediating networks, we will discover that *we have never been modern* in the first place: 'The proliferation of hybrids has saturated the constitutional framework of the moderns' (Latour 1993, p. 51).

Latour urges us to study the work by which these hybrids are produced. This is done by following the trajectories through which an issue that has become of concern connects different practices and the ways it is simultaneously transformed by passing through the mediating tools, techniques and concepts that are specific to each practice. In the context of his negative analysis of modernity Latour has thus undertaken the more positive task of writing *An Inquiry into Modes of Existence* of our common world. If we have never been modern, what have we been and what might we become? This project includes a description of the modes of enunciation or regimes of telling the truth (*veridiction*) of different practices like religion, science, technology, ethnopsychiatry, economics, politics and law (Latour 2008). These practices all have their own proper conditions of felicity according to which the success or failure of the actions of their practitioners have to be understood.⁴ None of these practices can be reduced to another practice or to some common conceptual scheme (nature), since each one has its own form of autonomy. In order to follow the circulation of issues through the networks of hybrid mediators and to understand their transformations, we have to become sensitive to the specificities of their practices. These different practices bring into play the different mediating forms through which the issues at stake come to be performed. They have to be approached in such a way that allows their practitioners to fully deploy their differences and peculiarities. These practitioners bring their own tools, techniques and concepts to bear upon what has become an issue for them in a way that will articulate issues differently. Only in this way does a more equal comparison between practices first become negotiable.

3 About this gathering force of issues see Lippmann 2009 and in response Dewey 1957. Lippmann already observed in 1927 that many of the complex issues of life did not fit well into the presuppositions of modern democracy. He remarked that due to the proliferation of these mediated issues 'modern society is not visible to anybody, nor intelligible continuously as a whole' (2009, p. 32). For a recounting of the debate on this point between Lippmann and Dewey, see Marres 2005.

4 Latour borrows this notion of 'conditions of felicity' from Austin 1976.

2 An ethnography of case folders in the French Conseil d'Etat

From this perspective we can turn to legal matters. We need an approach to law, definitely, but in what way is law to be approached? How could the researcher come closer to law in a way that discloses what it requires? How do we address law in the nearness of its peculiarities? Latour has made an attempt in this direction through a study of law in action at the French Conseil D'État (Council of State), the highest court in France in administrative matters (Latour 2010). Through an ethnographic methodology he has mapped the diverse network of actors, things and sites in which law comes to pass and that enable legal practitioners to 'speak the law'.⁵ According to Latour the isolated operation modes within this ancient institution provide ideal access to the legal ways of telling truth (*veridiction*) and the ideal occasion to study 'pure' law.

The force of this approach resides in the way it manages to capture philosophical questions about the nature of law in a way that is informed by the empirical specificities of the legal process and that remain inaccessible to legal theory or legal philosophy.

'This book tries, through the device of ethnography, to capture a philosophical question (and in addition a social theory puzzle) that would be inaccessible philosophically [...]: *the essence of law*. Knowing that an essence does not lie in a definition but in a practice, a situated, material practice that ties a whole range of heterogeneous phenomena in a specific way.' (Latour 2010, p. x)

Latour tries to accomplish this in a series of steps. Firstly, by tracking how a legal file slowly 'ripens' in its logistic circulation through its subsequent stages in the institution: from the moment the 'introductory claim in proceeding' is filed by a lawyer and received in the mailroom of the Council of State, to the moment the claim is adjudicated by the judges and inserted in the archives and the volumes of jurisprudence. On each point of its passage, the file becomes modified and slowly transfigured into different forms. From this perspective, we gain insight in the material dimensions of the file: how it constrains and acts upon the judges and makes them reach their specific decisions. Furthermore, Latour traces the trajectories and pathways by which the members of the Council of State themselves circulate through different functions and roles within the institution, or between the institution and the worlds of politics, law, business or State. In this way he maps the dynamic of the Body of the counselors of State and the accumulation of wisdom that they bring to bear upon files (measured in the currency of person-years of experience).

After having made visible the several ways of dealing with files, Latour proceeds by focusing more specifically on the review meetings in which the councilors have to adjudicate or 'speak the law'. The observations are directed towards finding the

5 The French word is *dire le droit*, in German it would be *Recht sprechen*.

conditions of felicity that determine the success of legal arguments and enunciations. He extracts a list of ten such conditions for a successful 'passage of law' (Latour 2010, p. 192-195):

1. the authority of the judges at stake;
2. the procedural path of the claim;
3. the logistic organization of cases;
4. the interestingness of the cases;
5. the authoritative weight of texts;
6. the control of the quality of the legal work;
7. the hesitations that provide room for maneuver before producing linkages;
8. the legal means that allow for certain actions;
9. the internal coherence of law;
10. the limits of law with justice and public indignation.

By studying the ways these 'value objects' are transferred in legal reasoning we understand the process by which law comes to pass and how judges arrive at good judgments.⁶

What understanding of law flows from these observations? How can we characterize this regime of legal enunciations? Firstly, law in action can be described as an accumulation of *micro procedures* through which the legal practitioners become increasingly distanced from the specificities of the affaire of their concern and through which an attitude of disinterest and detachment is gradually produced. The micro procedures also oblige the practitioners to proceed step by step, as if in slow motion, ensuring that they do not take a decision hastily, but instead proceed with the proper hesitations and doubts.

Secondly, law can be described as a constructed ('fabriqué') *fabric*. Jurists continuously make law by producing attachments between documents. In this process the documents in the case file become linked to legal texts through the specific legal operation of *qualification* of the facts of a case according to legal concepts. By attaching these two registers together the jurist is allowed to move away from the *facts* and to pass on to the legal questions about the affaire. According to Latour facts play a very specific role in law: they are things that jurists try to get rid of as quickly as possible in order to move on to the particular point of law that is of interest. He thinks this way of dealing with facts contrasts with science where one never gets finally rid of facts at all, but always seeks to anticipate and establish new facts and knowledge by always gathering more data and constructing new chains of reference.⁷ According to Latour, legal qualifications never provide any in-depth information about the essence of the case, but merely attach the

6 Latour juxtaposes the satisfaction of these conditions of felicity, a term from speech act theory, to the successful transfer of 'value objects', a term he borrows from the semiotic theory of A.J Greimas. In this sense the two terms seem to be used more or less interchangeably.

7 Latour 2010, p. 215. Phrased differently: science does not aim at producing 'stops' (*arrêts*) of factual accumulations, but is rather interested in producing their 'please-go-ons' (*continus*).

case to a superficial quality that permits its legal manipulation ('A is an instance of B as it is defined by article C or precedent D'):

'Law produces no new knowledge, and yet it spreads its net over the world, forming a fibrous mantle that extends 'everywhere' without ever producing any information. It has better things to do: it maintains the fabric of imputations' (Latour 2004a, p. 248-49, my translation).

Law is here characterized as a *superficial fabric* of threads of attachment. This superficiality is the proper form of autonomy of the law. Law is able to extend its links everywhere to all persons and all acts because it extracts only a tiny part of the essence of their cases and does not need to go into the depth of things. Law itself is empty, without content, a mere trace on things and only because of this, it can extend its flat grid everywhere and 'let all the world pass'.

3 Critique: unfolding the case file

Latour's ethnography fits into his more encompassing analysis of modernity and the description of the different modern modes of existence. In *The Making of Law* Latour dedicates a chapter to the comparison of the practices of science and law with regard to their central object (heterogeneous phenomenon vs. homogenous case file), the attitude of their practitioners (engaged vs. detached), the way they deal with facts and their chains of transportation (reference vs. bligation).⁸ One of the conclusions that Latour draws from the comparison is that 'law has suffered less from the ravages of modernism; it has kept to itself, in its habits, its slowness, even its techniques and its vocabulary' and as such jurists 'have never really been modern' (Latour 2010, p. 249-250).

These 'macro' statements and conclusions about law are prone to some objections, many of which are due to Latour's choice of the object of study – the case file – and of the site of study – the Council of State. Remember that according to Latour the isolated modes of operation within this ancient institution provided the best opportunity to study the 'pure' mode in which law tells its truth. The Council of State however seems a curious choice of site, especially in the light of his previous remarks about the link between modernity and purification. As has already been discussed in *We Have Never Been Modern*, Latour accused the moderns of purifying the originary processes of translation produced in the networks of mediators, by only focusing on the pure concepts at the end of these trajectories ('Nature' and 'Society'). In this context it seems rather odd to *start* a study of law at the *end* of the legal line in an instance of *last* appeal. This choice of a pure starting point greatly risks rendering a purified account of law.⁹ Latour's

8 For a more thorough discussion of this comparison see: Gutwirth 2008.

9 For these reasons Latour has been accused of being reductionist (De Sutter and Gutwirth 2004).

work is thus subject to the same modern predicament that he analyzed earlier.¹⁰ The circle becomes self-enclosed when the resulting purified account of law is used to arrive at conclusions about its non-modern nature. The purity has been put in by methodological choice and is later claimed to be found as the outcome of the study. In this sense, Latour's approach obscures the impure of hybrid character of law and makes us lose sight of the specific work of legal translation that eventually make judgments possible. To understand these impure processes we have to focus on the ways lawyers are oriented towards their legal object and objective and how they endeavor to make extra-legal matters of disputes progressively pass into matters of law through a manifold of mediating legal actions, tools, techniques and concepts.

Latour's choice of the Council of State as the site of study thus has consequences for the image of law that he extracts from his observations. His conclusion that, contrary to science, law tries to get rid of facts as soon as possible might also be a byproduct of this choice. The Council of State has the task to decide the legal aspects of a certain affaire. It is formally obliged to abstain from judging the facts of the case, since these have already been exhaustively dealt with by the courts in first and second instance.¹¹ When we zoom in on the passage of case files in these lower courts however we will see that facts actually do play an important role. I will get back to this point in more detail when I discuss the results of a case study at a law firm. This does already indicate, however, that in the chapters on the comparison of the practices of law and science and on the nature of law Latour might have drawn his conclusions hastily or upon an unbalanced basis. A purified image of law is compared with an unpurified image of science. In the exercise of this juxtaposition, law finds itself pushed to the opposite end of the scales with regard to the supposed homogeneity of its object and its negative attitude to facts. Through this comparison several important aspects of the legal process have remained black boxed and still need to be drawn out in the open. On the basis of Latour's empirical observations we should look further back the legal line

10 Latour seems to apply the very strategy to law that he accused the moderns of applying to nature and society: starting from purity at the end of the hybrid lines to explain complex phenomena, thus cutting great part of the hybrid networks that might have produced these purities. To question this point in a rather provocative manner: what prevents us from saying, when following through this methodological approach, that science is still 'purely' occupied with nature, politics with society, and lawyers with law?

11 In practice things are more complex and the very distinction between facts and 'pure' law itself cannot be so strictly maintained. Formally, the Council is not allowed to pass judgment upon the facts of the case, but in practice this is sometimes necessary for an appraisal of the legality of administrative acts. As one councilor puts it: 'The judge of *ultra vires* asserts the authority to appreciate the facts of the case when such appreciation is necessary for the discovery of errors of law [...] he makes this factual inquiry only so far as the facts are the conditions of legality. The powers of the Council of State over questions of fact thus depend on whether the law makes the existence of certain facts the condition for the challenged act' (cited in Schwartz 2006, p. 240). Furthermore, article L821-2 of the French Code of Administrative Justice postulates an exception to the rule of competence. Judges are permitted to substantially decide a case on its merits 'in the interest of a good administration of justice'.

and become immersed in even more empirical details about its practices, instead of theoretically looking forward and jumping to other practices.

This brings us to the objections with regard to Latour's choice of object of study and the corresponding approach. According to Latour the case *file* forms the materiality of law and the unity that allows organizing its whole proceedings. In science there is no such unified homogeneous object, only disparate propositions or claims about new inarticulate entities and phenomena. Latour states that the circulation of a claim through heterogeneous chains of transformation that lead up to a publishable scientific text has nothing to do with the singular circulation of a legal file:

'No claim has the closed, round and polished form of a grey cardboard folder, which is easily transported, in which everything is held and which forms the small world to which the judge has to restrict himself' (Latour 2010, p. 211).

Again the comparison is unbalanced. Latour compares the chains of transformations that gradually lead to the construction of a scientific text to a legal case file in which the work of construction and assemblage has already been done. Again law is taken in its purified form. By focusing mainly on *how* enfolded files logistically circulate throughout the institution, we miss out on an important part of *what* the legal process is about. We miss out on the way disputes *unfold* when lawyers gradually make them proceed to judgment.¹²

4 Towards a conflict-based approach

Latour's ethnography at the Council of State is an institutional study that has mainly focused on following case files and tracing the positions of the counselors in relation to these files. As such, this approach can not benefit from the advantages of his other studies focused on 'circulating objects', which make visible the extended networks of translation through which such objects come to pass

12 This objection could even be mounted more forcefully against Vismann's media-technological studies of law that 'attempt to ground the law in files' (Vismann 2008). She takes files to be the 'variables' of law and explicitly excludes their 'content' from her studies, focusing exclusively on their 'external characteristics' like their materiality and their function as recording devices.

(Latour 1999).¹³ It is true that Latour did study the transfer of value objects. An 'object of value' can nevertheless not be equated with what is called the 'matter in dispute' in legal conflicts.¹⁴ An approach to law that pays close attention to the proceedings of this matter in dispute remains closer to the primordial judicial meaning of a 'thing' or a *res*. A *res* is, before anything else, posited in the interiority of a controversy that opposes and reunites two protagonists within the same relation – *res in controversia posita* – in which it can become a *causa* – a cause for legal action (Thomas 1980). It is this matter in dispute, proposed in the applicant's claim, which, rather than the file, is the unit of legal circulation and merits our main attention. The antagonistic processes through which the matter in dispute legally proceeds, *enable* the possible transfer of some of the value objects in relation to it. It is in terms of this cause that we are allowed to understand *what* is at stake within a conflict for the legal practitioners, what actions they are required to perform and through which legal means.

Contrary to the critique from De Sutter and Gutwirth that Latour paid too much attention to the case file and too little to the decision, I will thus argue that he even paid too little attention to the case-file. The file can only be logistically transported through the institution as long as its contents remain enclosed in paper folders. It can only be the unit of institutional circulation at the expense of black boxing all the documents of the very *conflicts* that clients, advocates and judges occupy themselves with and that make up the body of the case file.¹⁵ The cover photo of the French version of Latour's book depicts this predicament well. We see enfolded files on an unoccupied desk in an empty conference room. How can this be law in action when everything and everyone is either lacking or closed away? How is the case file assembled? Which documents and pieces of evidence are in these folders and how did they end up there? And what are those documents *about*?

- 13 Latour himself denied that his study was institutional by drawing a distinction between law as 'institution' and law as 'regime of enunciation'. He situated his endeavors in the realm of the latter and proceeded by offering different 'semiotic' characterizations of this legal regime of enunciation (Latour 2004b). Each of these borrowings however imports a separate set of semiotic problems within the domain of law, which will be expanded upon elsewhere (see Van Dijk & De Vries 2011). Relevant here is that the movement of purification is actually doubled (in addition to the methodological/institutional purification discussed). The singularity of the matter in dispute with which the legal practitioners are dealing is now also subjected to the gravitational center of the semiotic regime of enunciation. By analyzing concrete conflicts in terms of transfer of value objects and connotative keys (*clefs*) comprehensively evoking a regime of enunciation, the concrete conflict becomes deductively subsumed away under presupposed semiotic (mu)signifiers (♫) and formulas ($S1 \rightarrow [S2 \cap O1]$). It will then have lost its power of resistance that can oblige one to take its particularity into account. For an example of this 'deductive' semiotic approach to law see Greimas 1976.
- 14 This is a translation of the Dutch term *voorwerp van geschil*. This matter in dispute is comparable to what Latour has called a 'matter of concern' (Latour 2004c).
- 15 In this sense Latour might have focused too much on the formal procedures within the Council and thereby neglected the important legal difference between material or substantial law on the one hand, and formal or procedural law on the other.

We need an approach to law that brings the dynamics of the way legal practitioners deal with conflicts back into full view: a conflict-based approach. For these purposes we need to pay close attention to the matter in dispute and make visible all the things that make a legal decision by lawyers possible in the first place. We need to follow the things that happen between the moment a particular conflict is first brought into contact with advocates and the moment it is decided by the judges. From this perspective we can observe how the case file comes to be assembled in the first place, and, through an antagonistic process, initiated and sustained by the constructive actions of advocates, render the case legally decidable. We then come to see the legal prepositions that precede judgment and make it possible.

5 Introducing and qualifying the matter in dispute

To gain insight in these conflict dynamics, I will turn to a 'case study' at a law firm in the domain of patent law. The methodology used includes a mix of document analysis, ethnographical observations and feedback sessions.¹⁶ By empirically studying all the details of these intellectual rights in action we gain insight in what allows legal practitioners to use legal concepts like 'idea', 'concept' and 'invention'. Such a study visualizes, as it were, the ways these concepts are grounded when a dispute passes through these practices. Things play an important role in this process. As *matters of dispute* they are the occasion for the legal process. These things gradually transform and gather legal quality through the ceaseless operations of proof, disproof, qualification, disqualification, authorization, unauthorization of the advocates and through a host of different procedures, conditions and instruments like office tools, computers, media of communication and documents. In following the circulation of the central matter in dispute we will pass from technological sites of international enterprises, through the offices of law firms and will eventually proceed to court.

The case deals with a conflict between two parties active in the packing industry. The dispute is about a patent application pending at the European Patent Office for a machine for automatically filling boxes. This patent application was filed by the defending party, the Canadian company Gortec Engineering Mechanics. The applying party in this case is the Dutch company The Wool Company (TWC), represented by their advocate Mrs. Blanchard. TWC claims the patent application is illegitimate and has summoned Gortec. TWC claims it is a joint inventor of this machine on basis of the contributions they made to the process in which the machine was invented.

This seems like a straight forward introduction to a conflict however short it may be. Being able to provide such an introductory summary already requires the conflict to have developed to a certain extent. What the conflict is about has already

16 These methods are mentioned in the order of importance that they were given in working out the account of the study.

become stabilized. This however is not the way conflicts start when they first enter a law firm and thus provides a misleading image of the dispute dynamics. We have to get back to the beginning of the process when the conflict was first brought into connection with the law. This is not so easy; origins are always a tricky business shrouded in the mists of time especially if they have not been well documented. In these cases, we have to rely on oral recollection.

Blanchard: 'In the beginning of a case the *points of dispute* are not always immediately clear. The conflict is often situated at some distant moment in the past, *spread out* over memories of different people and depending on their role in the conflict. A process of *reconstruction* starts guided by the lawyers. The central points of dispute are then articulated.'

For the advocate, the conflict is not given as something immediately apparent in the beginning, but merely as a conflict she is confronted with. It is not yet clear what it is exactly about; its very aboutness is still a problem to be worked out. The conflict needs to be carefully reconstructed. Such reconstruction requires intense cooperation with the client TWC in order to retrace all the instable memories and lost documents. These have become distributed throughout a dispersed institutional network of long gone past situations, role-shifting actors and messy informational archives and databases. These elements will all have to be traced and gathered in order to be contracted into a few central singular points that will constitute the centers from which the conflict will unfold.¹⁷ Such contractions into the central claims of the dispute are important since they will already imply and determine the range of the possible paths through which the dispute might become solved. They also make possible the whole tailored weaving of relational threads that come to make up the texture of the conflict's lawsuit.

We can trace the result of these contractions into the central issues in dispute to the summons. A summons is a legal document that performs the legal act of officially summoning a defendant to make his or her presence in court. It is the legal *form* in which the dispute is pursued and that formally initiates the legal proceedings of the conflict.

'In the context of her activities defendant Gortec has developed a machine for automatically filling boxes of raw material. In this context defendant has filed a Canadian patent application on 16 July 2004 for a device for automatically filling boxes.'

Here we have the *matter in dispute*: a patent application on a device for automatically filling boxes. This is what Latour calls the 'circulating object' (Latour 1999)

17 With Deleuze we could call such singular points 'centers of envelopment' or 'centers of implication'. With regard to the relation between the contraction of dispersed elements and claims he remarks the following: 'Every contraction is a presumption, a claim – that is to say, it gives rise to an expectation or a right in regard to that which it contracts, and comes undone once its object escapes' (Deleuze 2004, p. 100).

of the conflict, i.e. the central matter of concern to the legal practitioners in our case that we will follow through its multiple travels and transformations.

‘To hear the applicant’s claim being declared admissible and grounded, *thereby*:

- To hear say before the law that applicant is joint inventor of the invention described in the European patent application with number YE672573 and consequently joint owner of the invention.
- *Consequently*, to hear the rights of joint property to the European patent application number YE672573 be imputed to applicant according to article 9(2) of the Belgian Patent Act in conjunction with article 74 of the European Patent Convention.

The claim is based upon the contract between parties, the motives mentioned, the laws en decisions concerning the subject matter, as well as any other factual or legal means made to apply in due time during the course of the proceedings.’

Here, we can see how the preliminary undelineated dispute has been contracted into a few central claims. The advocates have gathered all the dispersed memories and documents about the conflict in the cooperation with their client and have qualified it according to the legal vocabulary regime of patent law in the following grammatical form: X is the (co-)invention of Y. The conflict has been condensed in claims of co-ownership of a patent on a device for automatically filling boxes. This stating what is legally the case, or rather, what the case legally is, is a decisive act in the practice of law. It is an example of an important legal operation called *qualification*. Qualification is an act of translation in which an extra-legal matter in dispute is put into a legal form (*mise-en-forme*). The claim is the most contracted and simplified form of the conflict that brings together many heterogeneous elements in one single formula. In this way it gives a primary orientation to the dispute by assigning it a belonging in a certain legal regime: patent law. Only when this translation into legal vocabulary has occurred can one talk about the applicability of certain legal rules.

Not yet has the legal process been initiated, or a proposal for its possible termination is already put forward in the summons. The company Gortec has now changed capacity, it has become a party in a legal dispute. What was supposed to be a *matter of business* for Gortec – filing a patent application for a machine, has been duly halted and has turned into a *matter in dispute* officially initiated within the legal arena. The last paragraph of the summons contains the many buds for the unfolding of the legal process. It declares that the claim is firmly stated within a fabric of threads that connect and ground it into contracts, facts, laws, judicial decisions, and legal procedures and tools. In the subsequent paragraphs, I will follow these specific weaving acts by the lawyers throughout the case.

6 Proceeding through the forms of the lawsuit

The claim proposed in the summons is the first formal legal qualification of the matter in dispute. This action transforms the conflict into a legal case and initiates the legal proceedings that will eventually lead to judgment. This proposition is a preparation for the mutual articulation of the factual and legal positions on the dispute throughout the interchange of documents called 'conclusions'. These conclusions are important documents. The parties are, to an important extent, procedurally obliged to organize the dynamics of their dispute through the exchange of these documents. Most of the dynamics through which the dispute is developed will proceed through them and I will therefore study them closely in order to understand the way advocates organize their arguments and how they perform their specific operations.

Gortec, as the summoned party, is granted the opportunity to respond to TWC's accusations by formulating a reply in defense. A first glance at the way this document is structured already provides us some insight. The reply is divided in three sections called 'In fact', 'The matter of the claims', 'In law' and has an appendix with an 'inventory of pieces'. Here we have the three main layers of proceeding of the dispute condensed in a table of contents: the legal propositions for conceptual qualification and disqualification of the matter in dispute in the claims, the stitching and cutting of pieces of evidence to the matter in dispute to ground it in the facts, the aligning and realigning of legal authorities behind the governing conditions that ground the matter in dispute in the law. The indexed order shows the central position of the matter of the claims that we already have become familiar with in the summons. The matter of claim is situated between the facts and the law and constantly connects and mediates these two. We will see how the *matter of claim* of the dispute stated in the summons will have to be transformed in a *matter of fact* before proceeding to become a *legal object* of patent law.

6.1 The legal mode of proof

In both conclusions of Gortec and TWC there is a section with the title: 'The Facts that provided the Occasion for the Present Dispute'. In order to understand the specific notion of the legal fact and the way it works in the dispute dynamics, a closer look at this text is required. In this section the central matter of the claim – the machine for automatically filling boxes as described in the patent application – is further *articulated* through the legal procedures of proof.¹⁸

18 When we speak about what the case is in fact, we have to become familiar with the workings of this very specific legal concept of evidence. Lawyers are bound to specific constraints for providing valid proof, which are for instance not to be confused with the way proof operates in scientific practices. Concepts like 'burden of proof', 'evidential value' and 'evidential force' are very characteristic for the legal mode of proof. The same goes for the means of proof allowed in general civil proceedings: documents, witnesses, experts, presumptions, oaths, confessions and invoices.

An important condition of proceeding is that who claims something will have to prove it.¹⁹ If TWC claims it is joint owner of the device, it will, so to say, have to demonstrate how it is joint up with the machine. In the summons TWC tried to this by arguing that the machine incorporates elements of know-how that originate from its engineers and that have been developed in mutual cooperation with Gortec. TWC will have to prove that these elements come from its engineers by *stitching* pieces of evidence to them. It turns out that the facts inscribed in this section relate to contacts, meetings, negotiations, correspondence, cooperation, contracts and conflicts between Gortec and The Wool Company. The majority of these pieces are documents like e-mails, letters and contracts that inscribe a variety of events, sites, actors, meetings, agreements, inventions and designs. An ongoing part of the work of advocates consists in obtaining such documents, putting them in both paper and digital folders and attaching them to the matter in dispute by inscribing sections of them in the body text of the conclusion. The digital nature of these documents facilitates the inscription of quotes or pictures. An 'Inventory of Pieces' is always attached to every 'conclusion' in which the pieces of evidence are ordered in categories and given a number. This inventory mediates the connection between quotes or bracketed document titles inscribed in the body text of the conclusion and the documents contained in the 'Pieces' folders. Through all these textual operations legal reference is established to the facts.

The lawyers of Gortec will endeavor to cut as many of those stitches as possible and to do some weaving of their own in their subsequent reply in defense. In legal texts these *cutting* actions can often be identified by the use of negating grammatical markers like 'no', 'not'. The primary targets are TWC's statements about mutual cooperation in designing a new machine. Gortec claims that:

'In contrast to what TWC asserts, not a single form of cooperation can be deduced from the correspondence of mid 2004 that aims at the mutual development of an improved machine. What can be deduced however, is a mere relation between a manufacturer/salesperson and a potential customer in which the manufacturer adapts the machine to the needs and specifications of the latter.'

All the pieces of evidence that TWC lawyers had collected from the correspondence between Gortec and TWC and stitched to the matter in dispute are cut by the advocates of Gortec. If TWC has not developed any improvements to the machine, they will be in no legal position to claim joint ownership. Gortec also brings forth a new proposition in which all the relations of mutual invention that TWC had deduced from their mutual correspondence are now reduced to mere relations of purchase. TWC purported contributions cannot be qualified as inno-

19 This condition for the burden of proof is expressed in article 870 of the Belgian Code of Procedural Law. 'Each party has to provide the proof for the facts that it brings forward'. This text however gives the misleading impression that all proposed facts have to be proved, whereas only those facts that have been disputed have to be proved.

vative, but rather as specifications regularly made by a customer for a custom made product. Gortec here transposes the cause at stake from the specific regime of intellectual rights (patents) for inventions to the general legal regime of sales relations. This is another example of the legal operation of qualification. TWC proposed translation to the legal vocabulary of patent law. Gortec *disqualifies* this proposition and proposes a *counterqualification* according to the vocabulary of sales. In law each qualification is a disqualification of other legal categories that have been either explicitly proposed or which would have been possible. This constant antagonistic process of qualification/disqualification (counterqualification) is very characteristic for the legal process of dispute resolution (Cayla 1993).

TWC will have to respond to Gortec's challenges and prove its inventiveness in its next statement of claim. It will have to show that the elements of know-how they claimed to have contributed to the machine's development really come from its engineers. In order to do so the lawyers will have to further articulate the machine by stitching new pieces of evidence to it. The etymology of the verb 'to articulate' has a double meaning: 'to separate into joints' and 'to attach by the joints'. This is exactly the task the lawyers have to face. They will have to use their skills to 'open' the machine, differentiate the functional elements, highlight those that are appropriable and stitch them to a host of different events inscribed in several documents like e-mails, letters and contracts. When we talk about opening the machine we are not referring to the work an engineer has to do when a machine has broken down and he has to look for the problem in order to fix it. This opening up of machines is a specific operation of lawyers in the field of patent law. True, these operations do involve machines, breakdowns and the work of engineers, but in a different meaning and within different mutual relations. We could say that what has broken down is not the reliable way a machine functions for people in practice, but the indisputable way it belongs to certain practices in which people make use of them. It is around this breakdown of the machine's belonging, raised as a cause in patent law, that the constructive work of its engineers becomes an issue. What the advocates of TWC have to reopen and reconstruct is the network of relations in which the claimed machine came about.

In order to do so they will have to collect a host of documents by communicating closely with the engineers at TWC either by face to face visits, e-mail or teleconferences. These communications provide fascinating encounters between practitioners of very different practices. The questions they pose, the concepts they use, the interests and concerns they have, the things they work with make the advocates and the engineers articulate the conflict that gathered them very differently. The engineers have been implicated in the whole process that eventually led to the legal dispute. They were involved in the contacts and contracts with Gortec, the modifications of the automatic box-filling machine and the conflicts that resulted. The advocates however are concerned with the dynamics of this whole process only to the extent that it addresses a legal claim for joint property of a patent on this machine. They thus require a different kind of involvement from the engineer. Successfully resolving the dispute in their advantage requires a mode of

thought different from the technological one. The advocates thus have the task to keep their client interested throughout the legal proceedings of the dispute which can last for years. They also have to direct and divert the attention of the engineers in such a way that their efforts and know-how are not directed to achieving their regular technical goals, but to the legal goals at stake in the conflict.

6.2 *The legal conditions for proceeding*

We have treated the work of qualification and evidential stitching that the advocates performed and will now turn to the legal section in their conclusions. Gortec's advocates have disqualified the claims of TWC and have raised their own legal (counter)claims. After having grounded these two movements 'in fact', they now proceed by grounding them 'in law'. After the factual work of stitching and cutting the grounding threads for the matter of claim, we can now become acquainted with the legal work of making explicit the *conditions of proceeding* for these very claims themselves.²⁰ Let us return to our case.

In the law firm two advocates have been assigned on our dispute and the kind of work has been distributed between two advocates. Mr. Zomers writes the factual part of the conclusion and 'is really into the case'. He is familiar with all the pieces in the inventory, is in contact with TWC's engineers about the technical details, and writes most of the draft texts. Mr. Zomers' work consists in letting the empirical evidence speak for TWC's propositions through turning the matter in dispute into a matter of fact. Mrs. Blanchard writes the legal part of the conclusion. Her exigencies are different. She will have to let the law and its authorities successfully speak for TWC's propositions, by establishing the conditions that they have to satisfy in order to legally succeed. Her task is to look at the dispute from a distance by abstracting from the details of the way the dispute empirically occurred. This distance is not something one can just 'take'. Just as there are several media (cars, e-mail, telephone and the other techniques of implication) that allow Mr. Zomers to bridge the empirical distance between him and his client's engineers, there are several things that allow Mrs. Blanchard to create legal distance from a case. These things are texts with or by legal authorities, which are inscribed in the books, journals and print-outs that we find in piles on her desk and in her bookcase.

In order to understand these activities I will focus on a specific point in the dispute. I will go back to the endeavors of Gortec's lawyers to disqualify TWC's second claim of the summons, in which they want to be imputed the rights of

20 The fact that making explicit the felicity conditions is such an important integral part of the practical proceedings is definitely a curiosity of legal practice. In science these debates arise most clearly in those situations in which scientists are engaged in controversies and conflict. According to Kuhn such conflicts arise mostly in periods of crisis and revolutionary science, i.e. periods in which the 'normal' practice of scientific activity has broken down (Kuhn 1996). In law this kind of situation is at the heart of its ongoing activity because law is a practice that deals with problems, conflicts and breakdowns.

joint property to the European patent application for the automatic box-filling machine.

‘For the *conditions of applicability* of article 9(§2) we have to refer to article 9(§1) dealing with the claim of recovery for a patent application. The principles mentioned hereafter are thus integrally applicable to the claim to joint property of TWC.

To *succeed* in her claim for recovery, TWC is *required* according to article 9 BPA §2 in conjunction with §1, to demonstrate that two cumulative *conditions* have been *satisfied*:

- First, she has to prove that she has effectively developed a part of the invention.
When there are several people who have contributed to the invention, only those who made a *substantial contribution* can claim the quality of inventor. (M-C. Janssens, *Uitvindingen in dienstverband met bijzondere aandacht voor uitvindingen aan universiteiten*, Brussel, Bruylant, 1996, pp. 24-25)
[....]
- Second, she has to prove that Gortec has unlawfully taken this developed part of the invention.’

We see here that apart from earlier having disputed the *pieces* of proof proposed by TWC, Gortec’s advocates also dispute the ‘proof *obligations*’.²¹ They want to prescribe the *scope* of proof that TWC is required to provide. Their work aims at making explicit the conditions that TWC’s claim has to satisfy in order to legally succeed and at proposing authoritative sources that govern the articulation of these conditions. Gortec’s advocates have inscribed a host of texts from legislation, legal doctrine, jurisprudence and dictionaries and have attached them to the legal articles upon which TWC has grounded its claim of recovery of the patent application. Gortec’s advocates have even cited a book by Mrs. Blanchard, TWC’s advocate, which is supposed to support their interpretation! If even the advocate of the other party is aligned, how can their proposal fail?

Gortec’s advocates proposed two conditions for the proceeding of TWC’s claim for recovery (the ‘substantial contribution’ condition and the ‘lack of good faith’ condition). Both conditions will be the issue of intense debate in the subsequent development of the case. I will here focus on the first condition: does one have to demonstrate having provided a ‘substantial’ contribution to an invention in order to classify as its co-owner or is it enough to have ‘merely’ contributed to its development? The advocates of TWC, in their statement of claim, try to cut off the lines that would make such a stringent condition of substantiality govern the dispute. In order to have proven that one has effectively developed a part of the invention one does not necessarily need to have provided a substantial contribution. TWC’s advocates claim that the condition of substantiality does not occur in

21 The Dutch word is *bewijsplicht*.

any legal text of law, doctrine or jurisprudence. Without even so much as a grafting point no attachment can be made and no legal authorities can be mobilized and aligned. Gortec has thus ‘added an additional condition that is not valid’. The judges must remain unconvinced, their convictions legally unauthorized to be moved by Gortec’s proposals. In this proposed weft of conditions TWC has made its scope of proof shrink and thus raised its chances for evidential passage. The advocates have worked out the conditions for co-ownership, aligned the legal authorities behind these and established the facts about TWC’s contributions that these conditions obliged them to proof. By having established and satisfied the legal requirements, TWC would have acquired the legal quality of co-owner and would have gained the title to file the claim for recovery and to see it proceed to judgment.

7 Conclusion

The case I have described has not yet been decided by the court, so I will refrain from passing any judgments about its merits myself. My description serves different purposes. I started this article by treating Latour’s institutional ethnography of the French Council of State and discussed its advantages and disadvantages, most notably its approach to facts and the case file. I proposed a conflict based approach for the study of law that unfolds the case file. Instead of focusing on the circulation of a case file enclosed in a paper folder throughout the highest court, I have focused on how such a case file becomes assembled in the first place, by studying the dynamics of a patent dispute in its proceedings through and between law firms. I have followed how the matter in dispute circulated throughout different stages and, in doing so, displayed the way in which different legal operations like qualification, disqualification, proof, disproof, authorization, and unauthorization gradually transformed the matter in dispute. When the company TWC first contacted its lawyers, the dispute was vague, complex and without a clear object. Later in the summons the dispute became contracted in a few central claims and qualified as an intellectual rights dispute of joint ownership of a European patent application on an automatic box-filling device. Throughout the ‘conclusions’ in the statements of claims and the replies in defense, pieces of evidence were gathered and attached to the matter in dispute transforming it into a matter of fact. Simultaneously, legal authorities from doctrine, jurisprudence and legislation were aligned with the conditions for proceeding that will govern the matter in dispute and will transform it into a *legal object* of patent law: an invention. Through these series of transformations the advocates have gradually rendered the dispute legally decidable.

From this perspective we have gotten a different view on the role of the facts in law. They can certainly not be so easily discarded when talking about the nature of law. The facts have their own legal standing and *modus operandi* within the very specific and elaborate legal concept of evidence. Contrary to Latour, qualification is not necessarily a device for getting rid of the facts by passing to the legal con-

cepts and questions of interest. Quite the contrary, new proposals for (counter)qualification can forcefully open wholly new paths into the facts through which the dispute will simultaneously come to be developed. Neither have we gotten rid of the facts when we have passed to the legal questions. We have seen how the work of articulating and authorizing the legal conditions of proceeding for the claim can alter the proof obligations and the scope of proof. As a result of this work the matter in dispute can thus also be lead back into the facts under the form of a new legal quality. In turn, the attachment of new evidence to the matter in dispute can give rise to the proposition of new legal qualifications.

This sheds a new light on what it means to apply legal rules to empirical cases. Etymologically 'to apply' means to 'attach to' or to 'fold to' in order to bring something in contact with something else. Advocates bring heterogeneous elements together when they connect an extralegal thing to law in order to initiate its proceeding as a matter of legal dispute. During the legal process two different fabrics – the factual patchwork and the legal weft – have to be constantly folded to each other in such a way that they join together and something can proceed. 'Application' does not have the hierarchical or vertical connotation of 'subsumption' in which a factual matter is transformed by being syllogistically placed under a form that itself remains unaltered. Instead the term application keeps open the possibilities for the mutual change of both case and rule that might result from a connection between the two. What the case is and what a rule requires is never something given. In a lawsuit both have to be constantly worked out by being connected to each other in a way that is legally tailored to the matter in dispute. Finally, we have to come back to our discussion on modernity. On the basis of his observations of the Council of State, Latour concluded that law has never really been modern. Elsewhere he stated that

'contrary to religion, technology, fiction, and politics, law has suffered much less from the ravages from the modernist invention of matters of fact. In a way, law has never been modern, always insisting on its original type of truth condition and its completely specific key.' (Latour 2008, p.9)

Throughout our observations we have seen however that law does 'suffer' from matters of fact, but that these facts have their own properly legal conditions of truth within the specific key of legal evidence. Furthermore, in Latour's original analysis modernity was traced back to its legal constitution, which divided the world into two separate domains of power: society and nature, human and non-human. When Latour speaks about the non-modern nature of law however he seems to draw his conclusions on institutional rather than these 'constitutional' observations. The Council of State has an isolated and formal mode of functioning and 'has kept to itself, in its habits, its slowness, even its techniques and its vocabulary' (Latour 2010, p. 250). It might be that the logistics, habits and procedures of life inside the ancient walls of the Council of State have not changed that much. Many domains of substantive law however, with vocabularies that can easily be described as modern, have since changed or seen the light. A clear exam-

ple would be the whole discourse on human rights rooted in natural law, which can hardly be said to have kept to itself with its universal pretentions. More to the point are the very vocabularies of intellectual rights at stake in our case. These vocabularies are grounded upon the very kind of modernist distinctions Latour had analyzed earlier. Copyright is based on a crucial distinction between the creativity of human authors and the domain of natural materials. These materials can be used in creation but by themselves do not merit any legal protection. The same goes for patent law which is based upon the crucial distinction between inventions made by man that deserve patent protection, and discoveries of natural facts that fall outside the scope of legal protection.²²

This does not mean our analysis should stop at these static modernist vocabularies and their conceptual macro-oppositions. We have to closely approach how these concepts are practiced in action when we want to understand their meaning. Only in this way can we fully grasp the manners in which seemingly opposed conceptual pairs are, over and over again, constituted in the dynamics of dealing with concrete matters of legal dispute with its prolonged chains of micro-transformations. In this sense the task of ethnographically mapping our own legal practices has only just started. We have yet to study the many different conflicts in the various legal domains and institutions and their various matters, techniques, actions, conditions and constraints, for arriving at an understanding of the concepts of law.

References

Austin 1976

J.L. Austin, *How To Do Things with Words*, Oxford: Oxford University Press 1976.

Burk 2007

D. Burk, 'Feminism and Dualism in Intellectual Property', *Journal of Gender, Social Policy & The Law* 2007-2, p. 183-206.

Cayla 1993

O. Cayla, 'La Qualification ou la vérité du droit', *Droits* 1993, p. 3-18.

De Sutter & Gutwirth 2004

L. De Sutter & S. Gutwirth, 'Droit et cosmopolitique. Notes sur la contribution de Bruno Latour à la pensée du droit', *Droit et Société* 2004, p. 259-289.

Deleuze 2004

G. Deleuze, *Difference and Repetition*, London: Continuum 2004.

Dewey 1957

J. Dewey, *The public & its problems*, Athens: Swallow Press 1957.

Eisenstadt 2000

S.N. Eisenstadt, 'Multiple Modernities', *Daedalus* 2000-1, p. 1-29.

Greimas 1976

A.J. Greimas, *Analyse sémiotique d'un discours juridique. Sémiotique et sciences sociales*, Paris: Le Seuil 1976.

22 See also Burk 2007 on this distinction in patent law.

Gutwirth 2008

S. Gutwirth, *Composer avec du droit, des sciences et le mode technique: une exploration*, Grenoble: Inria 2008.

Kuhn 1996

T.S. Kuhn, *The Structure of Scientific Revolutions*, Chicago: University of Chicago Press 1996.

Latour 1993

B. Latour, *We Have Never Been Modern*, Cambridge: Harvard University Press 1993.

Latour 1999

B. Latour, *Pandora's Hope. Essays on the Reality of the Science Studies*, Cambridge: Harvard University Press 1999.

Latour 2004a

B. Latour, *La Fabrique du Droit. Une ethnographie du Conseil d'État*, Paris: La Découverte 2004.

Latour 2004b

B. Latour, Note brève sur l'écologie du droit saisie comme énonciation, in: F. Audren & L. De Sutter (eds.), *Pratiques cosmopolitiques du droit* (Cosmopolitiques: Cahiers théoriques pour l'écologie politique, no. 8), Paris: L'Aube, p. 34-40.

Latour 2004c

B. Latour, 'Why Has Critique Run out of Steam? From Matters of Fact to Matters of Concern', *Critical Enquiry* 2004, p. 225-248.

Latour 2008

B. Latour, *Coming Out as a Philosopher* (acceptance speech for the third Siegfried Unseld Prize), Frankfurt 2008.

Latour 2010

B. Latour, *The Making of Law. An Ethnography of the Conseil d'État*, Cambridge: Polity 2010.

Lippmann 2009

W. Lippmann, *The Phantom Public*, New Brunswick: Transaction Publishers 2009.

Marres 2005

N. Marres, 'Issues Spark a Public into Being. Making Things Public', in: B. Latour & P. Weibel (eds.), *Making Things Public*, Cambridge: MIT Press 2005.

Schwartz 2006

B. Schwartz, *French Administrative Law and the Common-law World*, New Jersey: The Lawbook Exchange 2006.

Thomas 1980

Y. Thomas, 'Res, chose et patrimoine', *Archives de philosophie du droit* 1980, p. 413-426.

Vismann 2008

C. Vismann, *Files: Law and Media Technology*. Stanford: Stanford University Press 2008.

Van Dijk & De Vries 2011

N. van Dijk & K. de Vries, *The Hydra of Legal Practice* (conference paper presented at IVR, Frankfurt), to be offered for publication.