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The trouble with technology regulation from a legal perspective. Why Lessig’s ‘optimal mix’ will not work.

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‘Le droit ne sauve pas, il n’humanise pas, il n’administre pas, il n’économise aucun tracas. *Le droit ne remplace rien d’autre.*’
(Latour 2002: 292, Latour’s italics)²

Abstract

In the present chapter we argue that to try to cope with new technologies with the concept of regulation is problematic from a legal point of view. Lawrence Lessig’s approach of ‘regulation’ as the ‘optimal mix of technology, law, social norms and market mechanisms’ should be complexified, as those modalities have different aims, functions and rationales. In view of a critical discussion of Lessig’s concept of regulation, we introduce Isabelle Stengers’ view of what defines a practice in general and Bruno Latour’s view on what defines the legal practice in particular.

Law, science and politics have different constraints and conditions of success, and are embedded in different ‘*régimes d’énonciation*’. Any articulation or interweaving of law, technology (code), economy and social norms must be sensitive to their differences and particularities, as they render very difficult the reduction of any of these practices to just another modality of regulation. Law, notably, cannot be shrunk to a legislative-regulatory dimension that does not take seriously what lawyers do when making the law, especially in the lower courts. Regulation is too general a concept to recognise the specificity of legal practice, particularly in its confrontation with new technologies. Moreover regulation is too powerful a concept to allow the novelty of emerging technologies to be taken into account by those who, like legal practitioners, have to deal with it at their own pace and with their own tools and responsibilities.

Introduction

There is no doubt that Lawrence Lessig’s work on the regulation of emerging technologies is seminal and imposes itself as a benchmark for any further reflection on the issue. However, the precious paths opened by Lessig might not fully satisfy the legal actors and professionals

¹ The authors would like to thank Isabelle Stengers for her suggestions and comments upon earlier drafts of this contribution, especially as regards the paragraphs on the ‘ecology of practices’, a set of concepts she developed and proposed.

² Quotes of the work of Latour and Stengers will be in French, unless an English translation is available.

who are making and constructing the law. In a famous paper, Judge Frank Easterbrook has even gone so far to state that the answers proposed by Lessig were ones of an amateur (Easterbrook 1996). Notwithstanding this harsh appreciation and Lessig's extensive reaction to it (Lessig 1999a), legal academics have, all around the world, continued to use and expand Lessig's argument to their own field of researches, while refining, enhancing and/or criticising it. From the realm of cyberlaw and cybercriminality where it was first developed, the argument has then been applied to a wide range of topics, from human genetics to car safety devices. Roger Brownsword, for instance, both criticized and enriched Lessig's construction respectively by questioning the reduction of choice and respect implied in the appeal to 'techno-regulation' or regulation through *code*, and by refining the notion of regulation through the conceptualisation of four different dimensions of regulation, e.g. the regulatory 'phasing', 'pitch' 'modes' and 'range' (Brownsword, 2005 & 2007). However, despite their obvious merits, none of these additions to Lawrence Lessig's argument seem to have provided a satisfactory answer to the objections of the legal practitioner. Why? Simply because the trouble with regulation lies in its very core. To enrich and to nuance Lawrence Lessig's concept of regulation does not wipe out the problems related to the fact that it primarily is a concept of a political nature – and not of a legal one.

In the present paper we will argue that the concept of regulation –and specially Lawrence Lessig's interpretation of it– is not relevant for the legal profession that practices the law, and this for two reasons: (1) regulation is too general a concept to recognise the specificity of the legal practice, particularly in its confrontation with new technologies; (2) regulation is too powerful a concept to allow the novelty of emerging technologies to be taken into account by those who, like legal practitioners, have to deal with it at their own pace and with their own tools and responsibilities. The generality and the power of the concept of regulation, however, should not be considered as perversities invisible to those who defend it. On the contrary, we will argue that the arguments in favour of the concept of regulation are precisely based on the assumption of its generality and its power, because, indeed, these features enable the completion of a well-defined political agenda. Those who favour regulation expect it to produce a convergence of legal, political, social and technological practices, which in its turn will contribute to enforce the control and the channelling of emerging technologies.

Our problem rests with the fact that the proposed agenda requires from the different practices involved to tune themselves to a rhythm, a melody and a register dictated by an outside regulating instance. It is of the nature of the concept of regulation that law becomes the servant of politics. We will highlight that we judge this subjugation of the law in action to be contrary to the constraints that characterises law as a specific practice and *regime d'énonciation*. We are also confident that the political agenda defended by the proponents of regulation will not succeed due to the unwillingness of the legal professionals to do something else than that what they are expected to do, viz. to speak or say or produce the law.

Lawrence Lessig's optimal mix

For Lawrence Lessig, regulating new technologies is a difficult task, which demands to look at a diversity of modalities which are concerned by the emergence of new technologies. Which are these modalities? There are four of them: the law, the market, social norms and the technology itself (also coined as the architecture or the 'code'). Hence, there is no regulation in general, but only specific modes of regulation which each 'constrain differently': the legal one, the economical one, the social one and the technological/architectural one (Lessig 1999b: 235-239 and Lessig 2006: 340-345). Regulating new technologies means then to succeed in building some kind of concordance or interaction between these four different modes of

regulation. Such a concordance, however, is not neutral: what is looked for is a good form of concordance – i.e. a form of concordance which satisfies the proper goals of the different practices involved. This good concordance or interaction of regulatory modalities is what he calls the ‘optimal mix’ (Lessig 1999a).

Such optimal mix must be constructed rather than simply described, and its optimality will depend on the object that must be controlled, as well as on the context and the flexibility of the four regulatory modes. Its construction requires the definition of a scale on which to measure its quality. The definition of a scale of that sort, to some extent, could even be considered as the central operation of construction of the optimal regulatory mix in a given case. For, in Lawrence Lessig’s view, to regulate a new technology is not a technocratic operation: it requires the active defence of a positive choice of values between those embedded in the different practices involved in the emergence of this new technology. Regulation, in his view, is a form of activism. ‘My suggestion’, Lessig writes, ‘is that if we (...) understand how the different modalities regulate and how they are subject, in an important sense, to law, then we will see how liberty is constructed not simply through the limits we place on law. Rather, liberty is constructed by structures that preserve a space for individual choice, however that choice may be constrained. We are entering a time when our power to mock about structures that regulate is at an all-time high. It is imperative, then, that we understand just what to do with this power. And more important, what not to do’ (Lessig 1999b: 239 & Lessig 2006: 345).

Is law an activist practice?

To consider the regulation of new technologies from an activist perspective is not self-evident, particularly when it comes to the expectations one can have from the law and the work of the courts. Chapter 15 and 16 of *Code and Other Laws of Cyberspace* or chapter 16 and 17 of its second edition *Code Version 2.0* endorse this hesitation, distinguishing between the role of the framers (politics) and the role of the courts (law). Judges ‘cannot be seen to be creative’ and their hesitancy and prudence should be understood (Lessig 1999b: 218, 222 & Lessig 2006: 319, 325). It is not up to the courts to make political choices when the values related to a case cannot be inferred with clarity and certainty from the legislative framework, as it is often the case with conflicts created by emerging technologies. This, for Lessig, is one of the problems we face when making choices about cyberspace and how to regulate it.

However, Lessig contends as a response to this problem, that in such cases judges, and especially lower court judges, should be ‘stronger’ and ‘kvetch’ about the issues and changes at stake; they should talk, whine and complain (Lessig 1999b: 222-223 & Lessig 2006: 325-326). They should then identify the competing values and resolve issues in a way most likely to induce political consideration or review of the solution. Hence there is no clear-cut ‘judicial activist’ role for courts in Lessig’s view, but a political role nevertheless: ‘While it will never be the job the courts to make final choices on questions of value, by raising these questions the courts may inspire others to decide them. (...) I would rather err on the side of harmless activism than on the side of debilitating passivity. It is a tiny role for courts to play in the much larger conversation we need to have –but to date have not started’ (Lessig 1999b: 223 & Lessig 2006: 327). Hence, Lessig endorses the constraints of the practice of judges and lawyers, nonetheless promoting a form of modest activism directed towards the production of effects in the political sphere.

As a mean of regulation among the three others, the role of law in the composition of an optimal regulatory mix is thus both a selfish and an altruist one. It is a selfish role since it is

indexed upon law's own program: the contribution of law to the composition of the optimal mix cannot be contradictory to law's specific ends, Lessig suggests. But it is also an altruist role since what is asked from law is to contribute to something that exceeds its own realm: the regulatory activity of law produces important echoes within the regulatory activities of other practices – and the other way round. However, as these two aspects are intrinsically incompatible, it is necessary to subject them to a third one in order to be able to make them serve together the regulatory purpose of law. And precisely, this third aspect of the regulatory role of law seems to be this regulatory purpose of law itself. That is: the assumption that law's regulatory contribution to the composition of the optimal mix also belongs to the same realm of activism than the one to which regulation in general belongs.

In order to consider the regulation of new technologies as an activist task, it is thus necessary to consider law itself – but also markets, technology and social norms – as oriented towards regulation. But this makes for a weird picture. At the end of the day, doesn't that mean that law's own ends begin to fade into what law is contributing to? Isn't it then regulation in general that begins to constitute law's own regulatory ends? Regulating new technologies indeed implies to be able to count on the different practices which contribute to the composition of the optimal regulatory mix. And to count on these practices then implies that their own ends were, from the very beginning, to reach this optimal mix. Law, economy, technology and social norms must be assumed to be regulatory practices.

The problem with Lawrence Lessig's view of law's contribution to the composition of an optimal regulatory mix is twofold: (1) it reduces law to a regulation-oriented practice; (2) it makes law an activist practice. To a certain extent, this can be considered as only one problem, i.e. the problem of the political dimension of law. To consider law as a regulation-oriented activist practice means that law is expected to give up something in favour of something more important. For Lessig, what is more important than law's own ends is obvious: it is the good regulation itself. But what happens if there is nothing more important than law's own ends? To ask a legal practitioner to contribute to something which importance could only be judged by somebody else is rather awkward. Although prudent and using the relativising Yiddish notion of 'kvetching', he nevertheless ends up expecting legal practitioners to be part of an optimal mix whose optimality cannot, by definition, be measured in legal terms. The optimality of the mix can only be measured politically: in terms of success and failure of the application of a given political agenda to a given new technology. This then means that the representative of law at the table where the optimal mix is discussed cannot remain a lawyer. It is somebody else who, when the time comes to decide upon the optimality of such a mix, speaks for the lawyers. This somebody is, of course: Lessig himself. Despite the enormous respect that one might have for his political stances, it is unlikely that lawyers will accept him as leading the definition of the legal perspective on the emergence of new technologies.³ Their indignation when confronted with their denunciation as ignorant instruments of ... politics, morals, sciences or whatever should be taken serious. There is a set of constraints (settings, procedures, hesitations, that form the specific legal *régime d'énonciation*) that must be respected in order to make law or 'to practice law'.

Understanding the ecology of practices

The trouble with regulation, from a legal practitioner's perspective, lies with the fact that regulation assumes that law should serve other aims than legal ones. When constructing and

³ To try to convince them to consider law as regulation-oriented could even prove counter-productive: if they accept Lessig's picture, lawyers could very easily become very happy with the fact that they have a so huge power to orient the development of new technologies. If lawyers are right to behave like activists, they could as well be activists of *de*-regulation.

producing the law, however, a legal practitioner is much more tied to what makes him a lawyer than to a political and regulatory agenda she is deemed to fulfil and by which she is mobilised. A good lawyer is compelled by what defines the legal practice. Nevertheless, what defines this practice? What opposes it to other practices (such as politics, the practice of those that design technology or the work of scientists in laboratories)? In her seminal work in the field of philosophy of sciences, Isabelle Stengers has tried to give some generic clues that may lead us to hazard a first answer to this question (Stengers, 1996). In Stengers' concepts a practice can only be grasped by looking at its 'requirements' (*exigences*) and its 'obligations' (*obligations*), which together form the 'constraints' (*contraintes*) of the practice. For Isabelle Stengers a practice (e.g. a profession) can only be understood by taking seriously the constraints that one has acted upon to belong and continue to belong to it.

A constraint, in Stengers' view, is radically different from a 'condition' which is deemed to provide an *ex post* explanation, legitimization or 'grounding' of what happened. Neither is it an external limit or imperative. Constraints, to her, do not explain, validate or legitimise the practitioner's action. Instead, they compel the practitioner to act. Constraints leave no alternative than to act, although they do not imply or indicate how the practitioner must act. In other words, constraints call for fulfilment 'as a matter of life and death', but they remain open as to the ways to be fulfilled. 'Une contrainte impose sa prise en compte mais ne dit pas comment elle doit être prise en compte' (Stengers 1996: 74). Hence, constraints yield their signification as they emerge, during the process of their coming into existence. Indeed, in times of stability, the accomplishment of constraints by practitioners will resemble to the mere compliance with a pre-existing norm, but this is only an impression: it is essential not to boil down constraints to such mere compliance, because that would close the door for any transformation of what, in fact, only looked or was presented like a norm to comply with.

The requirements of a practice address its exterior and concern issues related to the articulation of that practice and its environment and other practices. They can be seen as claims from the practitioner towards everything her practice depends from in a certain situation: they can be demands and statements directed toward the outside world, but also they may also express needs. Requirements have to do with the sense and reach its practitioners want their practice to have for others. In this sense requirements can be coined as being conventional, insofar that this convention is steadily subject to reinvention pending new changes, opportunities and threats of its environment. Most clearly requirements aim at the preservation of the practice's means of reproduction and to the recognition of what brings and holds its practitioners together, namely the practice's 'obligations'.

While the requirements of a practice are addressed to the outside, the obligations are turned inwards.⁴ If the requirements relate to the stability of the products and creations of a practice in the outside world, the obligations refer to its internal and irreducible register of creativity (Stengers 1996: 91). Obligations are what permit a practice's internal sense of validity: they spell out the regime of success of the practitioner's action. Similarly, Latour would speak of the '*régime the véridiction*' of law, science or politics (*infra*). For a practitioner, in other words, the obligations are the constraints through which she may *hesitate* towards its requirements. If, as said above, requirements evoke a conventional dimension of a practice, the obligations might call to mind its identity, but again not in a petrified or given form. Obligations do not guarantee the fixed identity of a practice, but instead they define the

⁴ 'Il est clair (...) que « exigence » et « obligation », comme l'indiquent leur préfixes respectifs, dessinent une forme de topologie. « *Ex* » implique l'adresse à un « dehors », une relation d'extériorité, alors que « *ob* » implique une forme de face à face. On exige quelque chose de quelqu'un. On est obligé par, ou on est l'obligé de, avec, le cas échéant, la dimension de gratitude que la langue portugaise met en avant', Stengers 1996: 89.

peculiar mode of hesitation of its practitioners. These hesitations may yield changes and evolutions of the practice concerned.

Obligations are what practitioners consider to be compelling in the way they interact with others (with their environment, when their practice is networked) or when it is at grips with mobilisations by its environment. Obligations encompass what they cannot betray without losing their belonging to the practice. In the context of an 'ecology of practices' practitioners are thus always pulled away from the network in which they are knitted, but simultaneously, as practitioners, they remain 'obliged'. A practitioner must answer to mobilisations, but not to the point of betrayal of her obligations. Hence, a practice can never be reduced to a mere function or expression of its environment, or to its role in the network. Law cannot be reduced to politics or economics, science cannot be accounted for merely by 'social explanations'.

The constraints of a practice, its obligations and requirements, do confront every practitioner with the question of how to change without betraying. In other words, both requirements and obligations are part of what makes a good practitioner, because their interplay guarantees both change and innovation of a practice against its dogmatic refuge and immobilism, and consistency and continuity against its evaporation or colonisation. A good practitioner can only innovate in her practice by taking its constraints seriously. However, neither the obligations nor the requirements of a practice can be determined entirely in advance, and the practice emerges from their interplay.

The advantage of this analysis lays in its ability to designate an important kind of closed contextuality present in the idea of obligations. When producing practice, practitioners will ask themselves: will my produced practice be recognized by my peers as a legitimate part of the practice to which we belong? Requirements and obligations give us an important insight in the materiality of practices. This brings us to a second advantage of the ecology approach, which denotes the intellectual obligation to respect the diversity of practices and the preliminary duty to investigate the specificity of each practice.⁵ In order to understand how practices produce their outcome, is not as much the question of intentions or motives of the professional to act in that way or another that counts, but rather how professionals produce. This internal analysis needs to be made for the four practices involved in Lessig's optimal mix perspective, but that would take us too far. Having said that we note in passing that the practice of politics could turn out to be far different from the instrumental, goal-oriented image that could be derived from reading *Code and Other Laws of Cyberspace*.⁶

Understanding the legal practice

Having introduced this general picture, having described the set of tools that allow us to understand the twofold constraints of each practice, we shall now turn to law. What are the constraints of legal practice? What makes a lawyer a legal practitioner? Pursuing his own program of a systematic description of the contemporary forms of *véridiction*, in his ethnography of the French *Conseil d'Etat*,⁷ Bruno Latour provided important clues to answer these questions (Latour 2002 and 2004a). First, there are the requirements of the legal

⁵ For a similar plea and a description of the (internal) method to be followed, see Latour 2002: 278-279.

⁶ For an account of the constraints of politicians, especially of the requirement of a 'sense of reality' and the necessity to understand that politics is about events, not science or policy programs, see Ignatieff, 2007.

⁷ This study of the French supreme court in administrative law, the *Conseil d'Etat* is based on observations pursued between 1994 and 1999. The book represents a sort of 'laboratory life' of judges at work and tries to compare the type of objectivity reached in science laboratories with a very different but highly specific type of objectivity in the law. It is also an effort to characterize the juridical enunciation and thus a contribution to the long-term enquiry into the comparison of regimes of enunciation.

practice, viz. to decide on a case within a reasonable time period, to qualify facts in order to move to a legal register, to decide on the basis of the file and claims formulated, to provide legal certainty or predictability, to build up precedents, to scrupulously respect procedures, to look at the legal past, to question the whole law while only saying the law in one case. Legal practitioners are confronted with these ‘exigences’ and will respond to this by acting on basis of their ‘obligations’: interested in what makes them lawyers by hesitating in the way legal practice demands about the decision to take and the arguments to use. Latour highlights in extenso the accumulation of micro-procedures at work in the French Conseil d’Etat that manage to produce detachment and distance from the flesh and blood facts of the cases and to keep doubt and hesitation at bay (rapporteur/reviseur/commissaire du gouvernement/section or court). What makes a legal practitioner, Latour states, is the way he answers the question: ‘Have I hesitated well, meaning according to the legal practice?’ Or with his own words: ‘La justice n’écrit droit que par des voies courbes. Autrement dit, si elle refusait d’errer, si elle appliquait une règle, on ne saurait la qualifier ni de juste, ni même de juridique. *Pour qu’elle parle juste, il faut qu’elle ait hésité*’ (Latour 2002: 162-163, Latour’s italics). But it is indeed not enough to hesitate in a given case: everybody does so. What is important is the specific quality of this hesitation.

In the case of law, Bruno Latour writes, this quality is designated by the operation about which a lawyer hesitates, namely the operation of ‘imputation’. When a lawyer considers a case, what he hesitates about is the way that he will make this case stick to the wholeness of law – and the only way to build such a relationship between a case and the wholeness of law is to branch the individuals at stake with the case to a legal reality such as, for instance, accountability or guiltiness. To declare somebody legally accountable for something is not to impute him a moral quality: it is to impute him a quality which requires the wholeness of law to be applicable to him – and not only the local provision that he may have infringed. This is why the choice of a type of legal imputation is, for a lawyer, a matter of hesitation: to branch somebody on the wholeness of law cannot be realised at will. If the lawyer has not well hesitated, the legal imputation through which he made the case stick to the wholeness of law can be declared legally void: hesitation is a very delicate matter. Since it is not only a local provision which is at stake with a given case, but the wholeness of law, to hesitate is for a lawyer a trial through which he will have to show his ability to manipulate this wholeness, so that the imputation he realises can be declared compatible with it.⁸

Law, from this perspective, is an operation that tends to hold persons and things together within a web of relations that makes possible the imputation of acts, words and things to persons. It holds our societies together, via tiny and shallow, but *crucial* bonds (Latour 2004b: 35-36). Without the law’s quiet music, Latour lyrically writes ‘*on aurait perdu la trace de ce que l’on a dit*. Les énoncés flotteraient sans jamais pouvoir retrouver leurs énonciateurs. Rien ne lierait ensemble l’espace-temps en un continuum. On ne retrouverait pas la trace de nos actions. On n’imputerait pas de responsabilité’ (Latour 2002: 299, Latour’s italics). In the West, indeed, such legal bonds can truly be coined as quintessential, since they characterize the western societies since the Roman civilisation, and have survived in a plethora of different - and sometimes opposite - political regimes. If the law in practice can be rightly said, with Latour, to be a particular way to construct bonds and a practice of attribution of responsibilities, indeed, it must be deemed to be able to respect its constraints in many different political frameworks.

⁸ One then could say that the wholeness of law is the ‘requirement’ that defines the identity of the legal practice (it is a practice that involves the wholeness of law in every case); while the hesitation about the imputation is the ‘obligation’ that designates the field of creativity of the legal practitioner (it is a practice that challenges the wholeness of law in every case).

As said above, the constraints of a practice do not make change impossible. Both requirements and obligations of a practice evolve during their interplay. That is why the outcome of a legal exercise might well lead to a reversal of case law which remarkably still responds to the same obligations: reversals of case law are the result of the same operations, the same hesitations and the same endeavour to preserve the integrity of the maze of legal bonds. Revolutions are unthinkable in the law, they may happen elsewhere impacting upon the political framework of the law, the legislation, but not upon the law in its operation. In the French Conseil d'Etat, for instance, the *conseillers* and the other actors meticulously avoid to fall back upon thoughtless certainties and easy reasoning: the procedures precisely aim at obliging all the participants to the construction of the decision, to foster and produce hesitation. So, the Conseil d'Etat provides for a subtle procedural organisation of moments of hesitation: there is a first *rapporteur*, who is then judged by his colleagues, before the final draft is written (often by somebody else than the *rapporteur*). Having one eye on the case, and the other at the existing corpus of law, the *rapporteur* might propose some rearrangements of that corpus of (case)law. However, if accepted, these redistributions will always be presented as the outcome of a valid combination of principles already in place, and *not* as a radical change. Aware that what they produce should be recognized by the legal community as falling within the law, this fix on the law in its totality that is at stake with every new decision is the proper characteristic of the legal practice. In a marvellous chapter Latour convincingly describes that this precise stance sharply differentiates the legal practice from e.g. the practice of lab scientists who have other, less 'total' methods of verifying their output.⁹ Legal certainty is one of the requirements of the legal practice, contrary to science where the idea of scientific certainty is absent and would be considered as horrifying.¹⁰ Whereas scientists can problematise, attack and impact upon the present state of their science, and even revolutionise the existing 'paradigms', legal practitioners have to be prudent and guarantee the continuity of law that should always be and be deemed to be there (Latour 2002: 258).¹¹

⁹ 'Le Droit avec un grand « D » est le *destinateur* incontesté de tous leur actes de langage. Tandis que la question de la méthode scientifique intervient rarement dans la discussion des chercheurs (où elle a un rôle décoratif, polémique, pédagogique), faire le droit, dire le droit, rester dans les limites du droit, apparaît comme l'une des caractéristiques de l'animal même' (Latour, 2002: 273).

¹⁰ 'But unlike scientists, who dream of overturning a paradigm, of putting their names to a radical change, a scientific revolution, or a major discovery, *conseillers du gouvernement* invariably present their innovations as the expression of a principle that was already in existence, so that even when it is transformed completely the corpus of administrative law is 'even more' the same than it was before. This prowess is required by the essential notion of legal predictability [*sécurité juridique*], which would seem quite out of place to a researcher. Just imagine the effect of a notion of scientific certainty on research: what was discovered would have to be expressed as a simpler and more coherent reformulation of an established principle, so that no one could ever be surprised by the emergence of a new fact or a new theory.' (Latour 2004: 93)

¹¹ 'In science, the role of the *conseiller du gouvernement* could be replicated only by entrusting a scientist with the overwhelming task of reviewing his entire discipline from the beginning, in order to test its coherence and to ensure its relation to the facts, before proposing the existence or non-existence of a given phenomenon in a formal deposition, although the final decision would not be his, and although he would have to work alone, guided only by his own knowledge and his own conscience, being content to publish his conclusions quite independently. Although something like this role can be found in the form of scientific review articles, which are commissioned from experienced scientists in mid-career, who are expected to summarise the state of the art for their peers, review articles don't have this peculiar mixture of authority and absence of authority. Either the *conseiller du gouvernement* is like a scientific expert, in which case his greater authority should relieve his peers of their obligation to doubt - he knows more about the issue than they do - or he is simply not laying the role of the expert, in which case why place on his shoulders the crushing burden of having to review the whole case in order to enlighten the process of judgment? The role of the *conseiller du gouvernement* resembles that of a scientist only to the extent that he speaks and publishes in his own name; similarly, there is something of the *conseiller du gouvernement* in all scientists, who see themselves as enlightening the world. The *conseiller du gouvernement* is, then, a strange and complex hybrid, which has something of the sovereignty of *lex animata*, law embodied in a man, but whose pronouncements bind no-one but himself, whereas in the old world sovereigns always had the last word. In that case, what does he do? What is his function? He gives the whole team the occasion to doubt properly, thereby avoiding any precipitously-reached solution, or any cheaply-bought consensus' (Latour 2004: 91-92).

Latour's description of the judges in the French *Conseil d'Etat* can be contrasted to Mitchell Lasser's description of the judges in the French *Cour de Cassation* (Lasser 1995, 2003 & 2004). The decisions of the latter, Lasser writes, are very short and framed into collegial and impersonal single-sentence syllogisms without concurrences or dissents. They contain few factual presentations and references to precedents, and leave policy consideration out of scope. From this perspective, indeed, the French judge can be depicted as a passive intermediary who mechanically applies age-old legislation. 'In short, the *Cour de cassation* decision is indeed a remarkably formalist-looking document, one that goes to great pains to convey that the French civil judge is nothing more than the passive agent of the statutory law. Needless to say, it is quite hard to imagine how any legal system could function if its judiciary actually behaved in accordance with the official French portrait of the judicial role. The list of potential problems is simply insurmountable' (Lasser 2003: 8).

Lasser's analysis describes the co-existence of two distinct 'discursive spheres' of which only one, namely 'the single-sentence syllogism premised on code-based textual grounds', is made public through systematic official publication of the judgements, producing 'an image of formalist and magisterial judicial decision-making produced by syllogistically deductive means' (Lasser 2003: 3, 5). Behind this formal mode, however, Lasser detects a second, informal mode. French judges, like their colleagues abroad, must decide cases, adapt to times and requirements and judge well. The institutional design allows for this in an effective way, Lasser argues. Firstly, there is the notion of the 'sources of the law' with its hierarchic structure, which at first sight seems to restrict the law-making status and authority to the legislature, but in reality opens the door for flexibility in judicial decision-making. 'In effect, Lasser writes, French civil judges are empowered to change their interpretations as needed – in the name of 'equity' in particular cases or in the name of 'legal adaptation or modernization' in classes of cases over time – precisely because these interpretations do not and cannot constitute 'law' (Lasser, 2003:3). Secondly, the different professional players within the *Cour de cassation* develop a more informal decision-making process based on the construction and deployment of what Lasser calls a 'socially responsive hermeneutics' resulting into debates and discussions that produce meaningful solutions that make good sense. In this search for solutions that make good sense, the influence and inspiration of the legal *doctrine* - the legal academic writings - is an important factor, following from its close articulation on the French legal system especially through the particular *genre* of the *note* (a doctrinal comment published together with the judgment) (Lasser 2003 : 9-11).

The organisation of the deliberation process in the *Cour de cassation* is similar to the one Latour sees in the *Conseil d'Etat*. The *Cour de Cassation* judges only take a decision after having taken into account the arguments of the *conclusions* of the advocate general and the *rapport* of reporting judge, who belong to the same category of highly skilled and rigidly trained French *magistrats*. For every case, Lasser writes, these two institutional players have the job 'to research the state of the law and of prior decisions; to canvass the extensive academic literature; and to lay out the social as well as the legal pros and cons of potential judicial solutions, including the one that they eventually propose to their brethren' (Lasser 2003: 15).¹²

¹² 'What is so distinctive about the French judicial system, however, is not only that it possesses two such radically different modes of judicial argument, but that one of them is kept more or less entirely hidden from public view. Only a tiny handful of conclusions and reports are published in any given year, despite the fact that they are produced in every French *Cour de cassation* case; and even on those extremely rare occasions when they do see the light of day in the court reporters, they tend to be very severely edited. In short, it turns out that the French civil judicial system maintains two radically different modes of argument at the same time: the rigidly syllogistic deductions that are published in the Court's official judicial decisions, and the stunningly frank and wide-open equity debates over social needs that are hidden within the walls of the Court's closed chambers' (Lasser, 2003: 13-14).

Lasser's perspective differs from Latour's, since the latter strongly emphasises the distinctive *legal* features of the deliberation process of the *Conseil d'Etat*. Latour observes the sayings and doings of the players in the *Conseil d'Etat* precisely to inform the particular mode of existence of the law, its peculiar *régime d'énonciation*, or what Stengers would call the obligations of the legal practitioners. Here, the focus is laid upon the particular mode of hesitation of the judges and the way they take distance from the facts of each case, extracting its legal substance through the operation of qualification. Differently, Lasser concentrates his attention upon another aspect of the legal practice of judges in the *Cour de cassation*, namely upon the discrete ways through which they let enter other than legal considerations in the deliberation, notwithstanding its purely legally framed outcome. Lasser, one could say, addresses the issue of the articulation of the law on the one hand, and of moral, social, economical and other concerns, on the other. How have those concerns, invisible in the public decision of the *Cour de cassation*, been knitted in the production of the legal decision? How do the judges of the *Cour de cassation* deal with these mobilisations? The point where the two authors meet is relevant to us: they both describe a process that deliberately organizes and imposes the peculiar legal regime of decision-making. In both courts the judges are constrained to follow a slow, pre-formatted and temporising route of induced moments of hesitation about the qualification of the facts, its consequences and the need to preserve the continuity and wholeness of the law.

A principled legal detachment (first consequence)

With reference to Lessig's concept of regulation, one can draw two conclusions from this short presentation of Isabelle Stengers' generic concept of a practice and Bruno Latour's descriptions of the legal practice in particular. The first conclusion concerns law's exterior. Contrarily to what Lessig suggests, legal practitioners must in some respect remain indifferent to external calls. A good legal practitioner has an ability to focus on the legal issues at stake. Latour observes that by 'qualifying' the facts, the judges actually get rid of the particularities of each case. The real legal work, the legal hermeneutics starts when the facts of the case have been 'subsumed' into legal concepts that can trigger the reflexive legal process. The serious questions emerge only after the case at stake is transformed into *legal matter* that can be the object of the legal operation. It is not the facts as such that interest the judges, but the way they can legally apprehend or 'catch' them.

However, to be indifferent to what is not law does not mean that lawyers generally contempt what lies out there: it simply means that, *when law is concerned*, they try not to care for law's exterior and rather build up the legal distance so essential for the legal operation. Latour observes with what ease first and subsequent drafts are rejected in the production process of the French *Conseil d'Etat*. The whole process is designed to distance the individual members and collaborators from the interests at stake in a given case. Whereas scientists tend to approach their object of attention as close as possible and remain strictly bound by what it allows them to think, in law everything is done to construct a solution as far as possible from the particularities and passions of the case. In science it is always possible to go back to the facts, as it produces robust and reliable knowledge about these facts. In contrast, law does not produce knowledge (but it spins bonds), which explains why qualifications do never tell us more or generate knowledge about the facts at hand.¹³

¹³ 'Lawyers and scientists are each scandalized by the other's forms of enunciation. They both speak truth, but each according to a quite different criterion of truth. (...) Scientists (...) don't understand how judges can be content with what is wrapped in their files, or how they can apply the term 'incontrovertible fact' to a submission that has been contradicted by a counter-submission. Scientists, by contrast, measure the quality of their referential grip in terms of the mediate character of their instruments and their theories. Without making this long detour, they would have nothing to say other than whatever fell

Latour underlines that the interests at stake in the cases, such as the realities of government and the measure of injustice done to the claimant, are far from being unknown by the judges. He amply describes in his third chapter how most judges of the French *Conseil d'Etat* have had years of experience in societal and political life (Latour 2002:119-138). The judges' indifference should therefore not be considered as a form of general autism, but a principled form of legal detachment. The case of constitutional lawyers, in this perspective, makes a perfectly good example of this indifference. It has often been said that constitutional lawyers, especially in the United States, should be considered as a sort of interface between the realm of law and the realm of politics. However, even in their most activist period – i.e. the Brown period of the Warren Court – the judges in the Supreme Court of the United States were well aware of what respectively constitutes law and politics. They were very concerned with avoiding any political interference with their legal work. What made them good lawyers was not the fact that they acted in conformity with the most progressive political views of their time, but the fact that they acted as lawyers who considered their 'obligations' of creativity with as much respect as they did for the 'requirements' that they felt they had, as lawyers, to obey to. The decisions of the Supreme Court Justices during this period were not induced by moral or political ethics: it was legal ethics. This also is why they must be considered as legal geniuses. If they merely had obeyed to a political or moral agenda, their legal creations would have vanished already a long time ago. If those creations lasted, it is only because the judges who followed them were unable to change the legal stream that the former had initiated without betraying themselves as lawyers.¹⁴

The foregoing shows that Latour's analysis of the legal practice of the French *Conseil d'Etat* can be brought on a larger scale of analysis. In many respects French judges from outside the *Conseil d'Etat* and judges from other legal systems will recognize themselves in the interplay between requirements and obligations of their colleagues. All legal practitioners will recognize the peculiar processes of detachment and hesitation described and will demonstrate some kind of legal indifference to the non-legal aspects of the case.¹⁵

The law's shallowness (second consequence)

The second conclusion that one can draw from Isabelle Stengers' and Bruno Latour's work relating to the definition of the legal practice concerns the 'interior' of the law. As an activist practice, law is assumed by Lawrence Lessig to adopt the political content of the general regulatory agenda to which it is supposed to comply. Without going as far as to state that law has no content or that judges are merely automats applying legal texts, it is nevertheless closer

immediately before the senses, which would be of no interest, and would have no value as information. Judges, for their part, hold that the quality of their judgments is closely dependent on their ability to avoid the two hazards of *ultra petita* and *infra petita*: that is, issuing a judgment that either goes beyond or falls short of that which the parties have asked for. What seems to judges to be a major failing is considered by scientists to be their greatest strength; yes, they can only attain precision by progressively distancing themselves from direct contact. And that which scientists regard as the greatest defect of law is taken as a compliment by the conseillers: they do indeed stick to what can be elicited from the file, without addition or subtraction. Here, we have two distinct conceptions of exactitude and talent, or of faithfulness and professionalism' (Latour 2004a:101).

¹⁴ Lessig, describing the American legal system, is in many ways sensible to the obligations of the legal profession, as was shown *above* when we discussed his 'harmless activism'. He refutes the popular vision of the Supreme Court of Chief Justice Earl Warren (the 'Warren Court') as a wildly activist court, that made up constitutional law and imposed its own values onto the political and legal system, but acknowledges the duty of courts to respect the principle of interpretive fidelity and refrain from making, not finding, constitutional law (Lessig 1999b: 223 & Lessig 2006: 315).

¹⁵ This does not mean that the way a particular law may not be a concern for the legal practitioners. The way this concern is spelled out depends on the respective legal institution. For instance, the US Supreme Court, when interpreting the US Constitution, which is not a law but a commitment bounding all US citizens, calls to US citizens to recognize themselves as bounded by their interpretation. Call, but has no power to impose. But this call constrains them (the judges), as the concern for the continuity of administrative law constrains the French *Conseil d'Etat*. Those are what we would call specific obligations characterizing those institutions, producing a distinct touch in the ecology of practice.

to reality to accept and celebrate that lawyers are mostly interested in the *operations* of law. Imputation, but also qualification, distinction, definition, etc., are such operations. These operations have not much to do with content: their purpose is to articulate content from which they are as distant as possible, if not indifferent to. To be a good lawyer, then, is to hesitate in a way that could produce a legally relevant articulation of that kind. That is: to give a legally relevant answer to the question: ‘Does this case stick well with the wholeness of law?’

When a person working as the illustrator-reporter for a gardening journal requests a press card alleging her status of a professional journalist and the card is refused by the *Commission supérieure de la carte d'identité des journalistes*, the judges will consider whether she is to a sufficient degree to be considered a professional journalist *in the sense of the French law on press cards*. We will not learn from the judgment what a ‘journalist’ really is or what ‘sufficient’ stands for (Latour 2002: 245). In the same way, criminal judges qualify facts as crimes (and by this act of qualification ‘catch’ the real facts into the paper reality of the Criminal Code) and then sanction the culprit with a reference to a scale of sanctions that hardly has some internal coherence.¹⁶ As said before, the law does not produce any information or novelty in the sense of scientific knowledge, but it arranges things as to ensure that the particular facts are just the external occasion for a change which alters only the law itself, and not the facts about which eventually one can learn nothing more than the name of the claimant (Latour 2002: 248).

A second account for this characteristic of the legal practice –superficiality, indifference towards facts and disregard of content- is to understand that law is constructivist and performative (Latour, 2002: 253). Granted that the majority of cases brought before the administrative judge consider disagreement about facts and granted that judges, contrary to scientist in a lab, *must* decide a case, judges are endowed with the power to have a last say on facts, to freeze them, to call the dispute to an end (by an ‘arrêt’) and to decide what they mean or imply under the law. From Latour’s perspective the law’s importance, its particular mode of existence, has not to do with any ‘essence of law’, its ‘fundamental values’ or its ‘underlying foundations’, but with its operation and the way it is performed. This is why law is a *fabrique*, in the two French senses of the word, a ‘fabric’ and a factory: a delicately woven fabric the binds us together and a production of those bonds (Latour 2002: 280). If the law is able as it should be to intermingle everywhere, it can only be *shallow* or *superficial*: it can only connect everything - persons, things, acts, words - because it nearly touches what it binds. The law’s shallowness is thus one of its peculiar features that adds up to its *grandeur*.

No great call or mission, no transcendent discourse, but a multitude of small works: that is the law the anthropologist describes. The law, Latour writes, is not a saviour, it does not humanise, it does not administer, it doesn’t make things easier, no, the law just does not replace anything else (Latour 2002: 292, Latour’s italics). While producing bonds between humans, between humans and things, between the past and the future, between statutes and a case, the law does not execute directives, but it constructs and reconstructs itself steadily in relation to the legislative framework, the cases at stake and the prescribed procedures. Next to its superficiality the law has its own temporality: judges and lawyers can only proceed slowly, meticulously, along repetitive and coded processes. How to change without betrayal? How

¹⁶ ‘En droit pénal, on le sait, l’opération tient en deux temps: la qualification d’un fait permet de l’appréhender en le réduisant à sa définition légale (en ramenant l’originalité du fait de sa catégorie). Ce qui permet ensuite de le sanctionner par référence à une échelle de peines dont la cohérence est purement interne au système (les peines ne se justifiant en effet que l’une par rapport à l’autre et jamais, bien sûr, en elles-mêmes). (...) Le Code crée donc une sorte de monde parallèle au monde réel et pouvant en tenir lieu, de sorte que ses habitués se meuvent continuellement dans une abstraction dont ils ne s’avisent même plus qu’elle ne coïncide pas au réel’ (Dayez, 2007).

to incorporate without contamination? The legal practice always temporises, slows down. Against political urgency it installs its own particular slow, compelling and capillary procedures.

Latour's jurists and the Dworkinian legal author writing successive chapters

Latour's description of legal practice has been compared by one author to Dworkin's famous characterisation of the legal practice as a 'chain enterprise' (Weller 2008). In this image of law, interpretation is seen as an extension of an institution and history made up of 'innumerable decisions, structures, conventions, and practices' (Dworkin 1982: 193). For Dworkin judges can be compared to authors who would consecutively be writing the different chapters of a collective novel, each of them obliged both to take into account what the others already wrote, and to pursue their effort seeking the highest possible quality of the collective product. From this perspective, judges are subject to a double bind: they must take into account the pre-existing law, but they must also see to its continuity, advance and creativity. Dworkin's metaphor indeed expresses that the legal practice is neither completely free, unbound and merely dependent from the judges' preferences, nor already determined or set into the 'already given' or existing law. For Dworkin, judges are constrained by the law 'already there', but not to the point that they may not be creative. In hard cases, they are like the new novelist picking up the thread of what has been already collectively written, but obliged to individually pursue the novel as a collective endeavour, making it as beautiful or challenging as possible. While this metaphor of authors collectively writing successive chapters in a book grasps some of the richness of the analyses of Stengers and Latour, we think one has to be careful while using the Dworkinian apparatus to understand the descriptive work of Latour.

Firstly, we see a problem with Dworkin's contention that the first author has complete freedom to create, a freedom that indeed appears to be more limited for the successive authors of the legal novel. This contention strongly suggests that law has content, whereas for Latour law is to be understood as an autonomous, shallow system that stretches out all over society and time, that is capable of linking people, events and rules. Law, then, rather than being formal, creates formality and form ('*met en forme*') (Latour 2002: 288). Perhaps Stanley Fish is closer to Latour when he stresses that all legal practitioners are tied (or not tied) to the same constraints, including the first author who is responding to some prefixed idea of what law demands him to do (Fish 2002). Latour criticises the 'iusnaturalistic' and 'positivistic' schools of legal thought when he speaks about law's 'autochthony'. There is, Latour holds, no outside foundation of the law. Law is and must always be 'already there' (be it respectively in nature or in the positive legal norms). If the law always brings a case in relation to a whole web of legal relations, it must always be deemed to be already born (Latour 2002: 274-275). This is why the very idea of the first author must lack pertinence from the point of view of any legal practitioner.

Secondly, Dworkin's *right answer thesis* does not match neither the Stengersian ecology of practices approach, nor Latour's observation of the law's particular mode of existence. With Stengers we saw that constraints comply practitioners to act, but they do not indicate how they must do so. That is why practitioners who are at grips with the tension between their constraints and the mobilisations from the outside (especially in non-routine situations) are materially faced with the question how to act without betraying. Indeed, there is no right underlying, no implied or superior answers to be 'found', as all answers need to be invented and constructed. In Latour's terminology a *right answer* would be the answer that results from a production process in which the legal practitioners have hesitated well. Here too, the

importance of the materiality of the legal practice is quintessential: the singularity of the legal profession derives from the way legal truths are produced. They are not, as Dworkin suggests, a question of legitimate interpretative methods used in law.¹⁷

A quick ‘comparative’ excursion

Undoubtedly, the description of a detachment of judges from facts and contents feeds the idea of the shallowness of the law, will further feed the already horrified American comparative fascination about the French judicial practice. In recent years, however, authors such as Mitchell Lasser and Michel Rosenfeld have successfully challenged this traditional portrait in their works on the European Court of Justice, the *Cour de cassation* and the United States Supreme Court, taking seriously differences in institutional design, style, and rhetoric. We already discussed Lasser’s analysis of the French *Cour de cassation* and the identification of what he calls its two ‘distinct discursive spheres’. In the American model of judicial discourse, the two modes of argument seem integrated in the same public space, namely, in the judicial decision itself with its long and often very expressive, political, literary and even speculative digressions and, of course, with its individually signed opinions, being it majority, dissenting or concurring opinions (Lasser, 2003, 2004; Rosenfeld, 2006). Both Lasser and Rosenfeld use the French Courts and the American Courts as extreme ends in a scale that successfully allows for comparison of other courts.¹⁸ At the one hand there is the Cartesian, deductive syllogistic French style, on the other hand there is the much more dialogical, conversational, analogical, and argumentative style of the Supreme Court. At the one hand French judges ‘speak with one institutional voice and no dissents, whereas the Supreme Court speaks with a multiplicity of individual voices, dissenting opinions, concurring opinions, and, at times, in important constitutional cases, with only a plurality agreeing on the reasons why the winning party is entitled to judgment in her favour’ (Rosenfeld, 2006:635). Indeed the authors invoke political and historical factors that account for differences in style, rhetoric and institutional settings of the different Courts (including the European Court of Justice we did not discuss here).

Naturally, the identified differences can be relativised and contextualised to the point of significantly blurring the stated contrasts between the courts in France and in the United States. Both Lasser and Rosenfeld brilliantly do so. It is however not our aim to engage in a discussion about the importance of policy and ethical considerations in American, European and French courts. Neither is it our goal to demonstrate that the traditional portrait of French automates as opposed to American adepts to principle-based theory is probably in need of reconsideration. The question we are exploring is different: why is it so self-evident to accept that what ‘happens’ in all these courts is ‘law’? Why can we say that what happens there belongs to the register of law? What is so peculiar to it that we spontaneously recognise it as law?

Of course, the law participates in other enunciative regimes and/or practices such as politics, science and religion. Therefore, it is certainly a legitimate question to wonder and inquire how this happens and to which extent. But the mere fact that law is intertwined with e.g. politics cannot contribute to the description of the law’s own regime, because such interlacement is a

¹⁷ The same can in many respects be concluded about Neil MacCormick’s work on legal reasoning, who hold that a convincing legal judgement must be consistent and coherent with existing law rules and principles and have acceptable legal consequences (MacCormick 2005). Although MacCormick rejects the *right answer thesis* claiming that in every case more good answers are possible, he nevertheless, like Dworkin, sees it as the task of the courts to identify the underlying values and principles of law through an interpretative activity.

¹⁸ On this scale, the European Court of Justice can be understood as bifurcated French discursive model, but one that is softened it by adopting a systemic, ‘meta’ teleological form of argumentation that it deploys publicly in both its judicial decisions and its AG Opinions (Lasser, 2003, 2004; Rosenfeld, 2006).

characteristic of *all* the *régimes d'énonciation* or practices in an ecology of practices.¹⁹ Hence, yes, the law is caught in a web of interactions in which all kind of other practices and practitioners must find mutually fertile forms of articulation. It belongs to Latour's and Stengers explicit endeavours to explore how these different 'modes of existence' (as Latour calls them in a still unpublished work) enter into 'diplomacy' as to construct a common world, in a newly conceptualised - unKantian - 'cosmopolitical proposal' (see also Latour 2003, Stengers 1997 & 2005, Gutwirth 2004). Their attempt is to revive who we -Westerners- are (beyond generalist categorisations and easy dualisms) by rediscovering the distinct modes of existence and practices that lie at the heart of our societies, such as the sciences, the market, politics, religion and, of course, law (Latour 2002: 265, Latour 2005: 232-241). This will undoubtedly slow down the pace of our reasoning and 'create an opportunity to arouse a slightly different awareness of the situations and problems mobilizing us' (Stengers 2005: 994).

One can still raise the question whether it is possible to extract the distinctive mode of existence (or the constraints) of the law from an ethnographic study of the French *Conseil d'Etat* or, in other words, if the descriptions of Latour can be considered to be generically valid. Is the mode of legal hesitation relevant to 'Western law' as a whole? We believe it is and we hope we have already started to show why. The idea might be hard to accept given the many differences in form and substance that that comparative lawyers have already been identifying amongst the many Western legal systems. But the fact that there is not really a debate or controversy about what must be studied under the denominator of 'law' in comparative law, just as the fact we already evoked that no one questions that it is law that happens in courts in Germany, France, Belgium, England and the United States. Indeed, if we look at the peculiar traits of the law as described by Latour, it is hard to contest their existence at a more generic scale.²⁰ Undoubtedly, Latour has been one of the first to try to extract the law's irreducible spinal marrow through an ethnographic study, next to his parallel undertakings to identify the other irreducible modes of existence such as the sciences, politics and religion. Taking seriously these irreducible characteristics of the law makes it difficult to mobilise the law in a vast program of regulation.

The modesty of the legal profession in the Microsoft case

Let us return to Latour's observations about the role of the facts and the particularities in the legal practice: the facts of a case are what the judges want to get rid of in order pass to the legal work and its operations (qualification, distinction, definition, imputation, ...). Legal practitioners are humble, in a certain sense: if they are not particularly drawn to content issues, it is because their interest lays and must lay in the legal operations, which in its turn is a consequence of their responsibility for maintaining the continuity of law or 'legal certainty'. And to produce legal certainty, one doesn't need a definition of law, or a content to law; one only needs the means to insure that the show will go on. Indeed, there is something of a theatre technician in every good lawyer. To criticise or to praise the show is not of his business; neither is the task to produce it or to direct it.

¹⁹ 'Que les institutions comme la Science, la Religion, le Droit soient indéfiniment mêlées, à la façon des marbres veinés de San Marco dans lesquels aucune figure n'est clairement reconnaissable, c'est entendu (...) Mais la question de leur vérité et de leurs conditions de félicité n'en est pas résolue pour autant, car il y a toujours un régime particulier qui joue le rôle de dominante et qui m'autorise à dire que au Conseil d'Etat (l'exemple que j'avais choisi, il se décide *juridiquement* du vrai et du faux d'une façon qui n'est clairement pas religieuse ou scientifique ou technique ou politique' (Latour 2004b).

²⁰ 'La notion même de procédure, l'assignation, la signature et son 'tremblé' si particulier puisqu'elle saute justement par dessus la division des plans d'énonciation, l'imputation, le lien entre texte et cas ('journaliste au sens de l'article 123 du code'), et même des éléments très classiques en droit comme la responsabilité ('celui ci est l'auteur de cet acte'), l'autorité ('ce personnage est bien habilité à signer les actes'), la propriété ('cette personne a bien titre à tenir cette terre')' (Latour 2004b: 36).

However, the lawyers' lack of interest in what is not law does not imply that they express contempt in front of it. It only means that when they are practising law they do not have to care for anything else than their practice. Of course, as everybody knows, lawyers are often called upon when political or economical problems are at stake. But in such cases they are not called upon to solve these political or economical problems as such. What they are called upon for is to give their opinion of legal specialists concerning the way political or economical solutions to political or economical problems can fit into the picture of law. The question that lawyers are asked to answer to is always the same: 'Will it fit?' And if the answer is 'No', it is not their job to make it fit. However, of course, they may answer: 'We can try' and then use their legal creativity to make it fit. In this case, it is necessary for them to have the intuition that such a solution could fit: this solution should have wet their legal appetite; that is: it should have made them begin to hesitate.

When Lessig evokes the regulatory power of law, what his argument is lacking is precisely this wetting of lawyers' appetite. How could a lawyer hesitate if somebody has already decided which answer he will give to questions that he doesn't know about? How could lawyers contribute to the construction of an optimal mix when they don't have any case at hand? For lawyers to hesitate, it would be first necessary to define a regulatory problem – and then to check whether this problem has legal consequences. How could lawyers know about it in advance? Isn't it clear that, on the contrary, lawyers only arrive when it is too late? One cannot hesitate in advance: in advance one can only hazard. It is already difficult enough to defend a hazardous political program; imagine how difficult it should be for people who do not have any program to defend, but only a practice to cherish! For them, to regulate is something way too heavy for their shoulders.

A good example of the modesty of lawyers can be found in the recent court trials that opposed Microsoft to the United States, and then to Europe. In both cases, the reason why Microsoft was prosecuted was the same: the attempt to build upon the dominant position of its operating system in the computer world to also impose Windows Media Player. In the United States, however, Microsoft was not so much put into trouble. After a harsh decision taken in First Instance by a District court, the Court of appeal rejected most of the accusations directed towards Microsoft, with the exception of minor points. In Europe, the situation of Microsoft seems to be more delicate. When the European Commission decided to take action against Microsoft, this action was presented as grounded on the infringement of article 82 of the EC treaty, that is, on the fact that Microsoft was building a problematic monopoly, but was rendering competition concerning media players in the computer market almost impossible. For analysts, this case featured the same problem as the American one: the problem of interoperability between computer systems (First 2006). This problem, according to them, was at the core of the possibility to implement information society. Without interoperability, information will not be able to travel as easily as it should in order to reach a true information society. Indeed, this is a political problem. But, for the lawyers in the different US courts as for the lawyers in the European Commission and the judges of the Grand Chamber of the European Court of First Instance (17 September 2007, *Microsoft v. Commission*, Case T-201/04), interoperability was not the major problem, neither did it seem a particular issue for the judges. What interested the lawyers and judges in this case, what triggered their legal work, was the point of law respectively concerning the U.S. anti-trust legislation, the European competition law or other requirements such as coherence (Bertea 2005).²¹ In other

²¹ 'The ECJ's interpretive technique is therefore oriented primarily towards developing a proper legal order, namely, one that would be sufficiently certain, uniform and effective' (Lasser, 2003:54). For an account of the specific obligations and

words, although the decision of the European Court has important political and economic drawbacks, the judges actually did not do anything else than apply their legal skills to a number of articles of the EC treaty dealing with competition issues and the abuse of dominant position. The hot economic and political debate about interoperability was not present in the judgment: their question was ‘How to qualify the case in terms of the pre-existing law on competition?’

The Microsoft case can be presented as a good illustration of the distance of the legal practice from technology policy. Moreover, it can also be presented as a good illustration of our trouble with Lawrence Lessig’s argument concerning the regulatory role of law. For lawyers in the various U.S. courts and the European Court of First Instance, the Microsoft case was business as usual. The question then is: why would we need to regulate something that seems to be ‘regulated’ very well by already existing legal provisions? If the political problem of interoperability can be legally tackled by very traditional legal operations, how then legal practitioners should find themselves constrained to be creative as a result of external objectives of governance (or ‘regulation’)? The only way we see such ‘turn’ to occur is through a change of the legislative framework, which indeed takes place in the *political* mode, far from the particular constraints of legal practitioners.

The former is nicely illustrated by the following story. In 1998, a report from the French *Conseil d’Etat* regarding the challenging of law by ‘Internet and Digital Networks’ concluded that no change should be made to the actual legislation in order to deal with this challenge: ‘The whole legislation is applicable to the Internet [...] There is no need for a specific regulation for the Internet and digital networks’ (F. Coudert, A. Debet & P. De Hert 2007). Is not this conclusion significant? When lawyers are directly asked to answer a political question – i.e. the necessity to change the legislation – they will never reply with a political answer; they will reply with a legal answer. ‘No, they will say, it is not necessary to change the legislation; if a problem occurs, we will apply what already exists. If you, politicians, want to transform the legislation, this is your problem’. And indeed it was a bit stupid to ask lawyers what was their opinion about the emergence of a new technology that had caused no problem yet. How could they imagine any problems to happen? The only problems that lawyers can foresee concern law: they can foresee legal contradictions or legal inconsistencies. But they cannot foresee facts. When the professionals of the law are invited to sit down at the table of the regulators, one may be sure they will either be very recalcitrant and of little help, or that they will turn into something else than legal practitioners in order to be helpful.

Why insisting on the need for regulation?

Why then does Lessig insist on the regulatory role of law? When he asks lawyers to behave like activists, would he maybe like them to act as spokesmen of his own activism? In other words, is not the concept of regulation essentially a political concept, in the sense that it is a tool used in order to achieve a certain end? Surely, when Lessig presents a picture of regulation involving an optimal mix of law, technology, economy and social norms, he intends to embed this regulation upon a more solid and encompassing foundation making it the product of a kind of ‘holding’ of practices and modes of existence. Unfortunately, and at least from the point of view of the law, such foundational exercise is problematic, if not impossible, because it demands from the law to come and help in the realisation of the political ends fixed to the idea of regulation, which cannot but clash with the constraints and

requirements of the European Court of Justice, its systematic and purposive character of interpretative techniques, and its use in particular of the principle of effectiveness, see also Jacobs, 2004. For an account of the specific obligations and requirements of EU policymaking re. anti-terrorism, constraints that cloud every straightforward instrumental analysis, see Levi & Wall, 2004:217.

thus the resistance of legal professionals. If, unlikely, Lessig's proposal would not imply the former, but only consist in saying that technology, economy, law and social norms should produce some effects rather than some others, it would indeed be a rather banal proposal.

Lessig expects some *specific* effects from the concept of regulation itself – and hence not from law, economy, technology and social norms as such. He expects his regulation to organise the resistance against both technological libertarianism and technological totalitarianism. As such his argument is a very noble one: on one hand he wants to defend new technologies against their outer enemies; and on the other hand he wants to defend them against their inner enemies. What he wants is a balanced world of technology. The problem, however, is that in trying to help building a balanced world of technology, Lessig gives too big an importance to the control – both inner and outer – of his world. He does not give a chance to the unexpected possibilities that can emerge from the development of the new technologies that he wants to regulate. Neither does he give a chance to the unexpected creativity of the other practices that will come at grips with these technologies

Conclusions

By definition regulation comes from above, or at least from somewhere else. It imposes itself from the outside. It aims at conducting and constraining behaviour, and according to Lessig's perspective, the behaviour of the actors that make cyberspace exist. As a consequence, the notion of regulation makes it impossible to think the relationships between the regulatory system and what it regulates in other terms than compliance or 'application'. Conducting and guiding behaviour through regulation also implies that there is an end or an objective to realize, regulation of behaviour without an aim being pointless. Lessig sees four tools or modalities of regulation: law, social norms, markets and technology (architecture or code). To him, optimal regulation can be obtained by an optimal articulation of these modalities or by their optimal tuning to realise the ends to be reached. From that perspective the four named modalities are to be considered as instruments of the regulation and they have to accept to be instrumental to it and its objectives. For sure, this will not be self-evident but Lessig, seeing some possible problems, also sees possible responses. Nevertheless, to him the problems lie with the modalities and not with the regulation itself.

In this contribution we have tried to show that those problems are important and persistent as regards the law, especially if we do the effort to take seriously the constraints of legal practitioners (Stengers) and the particular *régime d'énonciation* or mode of existence of the law (Latour). When mobilised or appealed to by the 'outside world', judges and other legal practitioners are not free to do what they want if they take their job seriously. Neither will they be disposed to betray what makes them legal practitioners. Their 'internal' constraints do heavily impact upon the way they can deal with 'external' mobilisations. This is not to say that change and innovation are unthinkable in the law, but instead, that innovation and change within the law are only thinkable if the constraints of the legal practice are fulfilled in the eyes of the legal practitioners. The process of renewal in the law is per definition slow and temporising because, in our societies, the law must pursue its meticulous and precious task of weaving legal bonds between the past and the future, between people, things and words, and, between the case at hand and the totality of the existing law. Constrained by their procedures, the processes of hesitation and the generation of 'objectivity' through distance, legal practitioners must remain indifferent to the outside storms and urgencies. They must construct the law in the interplay between their internal obligations and requirements and the external mobilisations they are confronted with. The law has its own pace, and that is why the West celebrates it since its earliest times, regardless of the many different political regimes it has

gone through. Expecting the legal practitioners to merely behave like tools or modalities of an external regulation can be insulting for them. Regulatory aims and regulation can only be proposed to them, not imposed. One must take into account the own dynamics, the own *devenir* of the law.

The trouble with regulation is certainly not only legal. As a matter of fact, the mere idea of regulation implies a form of top down government, which raises the question of who is sitting at the top. Obviously, governments and legislators are - and thus *politics*. Although this was not the main point of our contribution, we are convinced that the difficulties with regulation extend much further than to law. We are convinced that regulation does not give more chances to technology, social norms or markets than it does to law, because in Lessig's argument the four of them are considered as rather passive forces at the service of politics and governance.

As everybody knows, the road to hell is paved with good intentions. Regulation is one of those good intentions. However, by criticising Lessig's concept of regulation, we wouldn't want to give the impression that his argument is a threat that we should all fight against. Instead, what we wanted to express was a disappointment towards a position that now dominates the legal discussions around new technologies – while at the same time rendering it impossible to go further. We do not consider that regulation is a terminus. On the contrary, we rather see it as a point where to start in order to build a more interesting legal appreciation of the emergence of new technologies. At the end of the present paper, it is not a mystery that we would see this legal appreciation formulated in the terms of the legal practice itself, rather than in the terms of what, for lack of better words, we are forced to qualify as political science. We trust that to ask the lawyers themselves how they deal with new technologies would always be more interesting and more enlightening than to define some very sophisticated program, however balanced and nuanced it might be, in order to avoid their escape. Shouldn't it have been obvious from the start that lawyers do not like programs, but prefer cases? To concentrate on cases rather than on programs is, in our opinion, the only way to recall that it is only if we let new technologies develop themselves to the point where they become actually problematic that lawyers could intervene and add their own appreciation to the picture. Is it more risky to wait than to regulate? Of course! But a risk is always worth to take. To be afraid is never a solution: it can only lead to defiance, tension or contempt. We believe that it is not what Lawrence Lessig really wants.

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