II. FRAMING LAW-IN-ACTION

This chapter is a plea for a novel kind of framing: one that allows us to observe law-in-action across various mediations; one that allows us to grasp the complexities of cases in becoming; one that reflects on its limitations and that accounts for its partiality. This multifaceted framing results in a trans-sequential method: a method that follows case-making over a longer period of time and that participates in a series of more or less contingent events. As a result, we obtain an eventful process and processed events of case-making.¹

Observing lawyers doing their casework is not new. We find studies in sociology of law, in legal anthropology, in discourse analysis, and in organization studies that deal in one way or another with what lawyers do and why they do it. The most radical microscopy of how they do it is provided by ethnomethodological studies of law-in-action. Scholars like Harvey Sacks, Harold Garfinkel, or Paul Drew, amongst many others, ask for “the methods by which legal settings and situations such as a call to the police, police interrogations and courts and trials are socially organised” (Hester and Eglin 1992:17). They conduct so called “studies of work” (Garfinkel 1967) and attempt to render observable the very details of this work. As Ethnomethodologist, Lynch argued that “when they investigate activities in the legal professions, sociologists tend to describe various ‘social’ influences on the growth and development of legal institutions while taking for granted that lawyers write briefs, present cases, interrogate witnesses, and engage in legal reasoning.” (Lynch 1993:114) In this chapter, I focus on a key point of this book’s methodology: that in order to understand case-making down to its very details, the ethnography needs to frame these details according to the case-makers’ practical orientations and involvements.

Originally, the law-in-action approach developed in opposition to the law-of-the-books orientation towards doctrines (Pound 1910). Pound did not aim at denying the force of written law, but at turning it into an empirical question. Law-in-action was supposed to evaluate law in light of its implementation and application to real cases: its

¹ An earlier version of this chapter was published in Human Studies (Scheffer 2007a).
imperfect reality, the limited impact of legislation, and the ideologically coloured interpretations of it all. Until now, law-in-action scholars have studied with enthusiasm the official sites at which law is applied: the police office, the courtroom, the law firm, the public administration, etc. My own perspective on case-making originates in these studies of law-in-action, but it adds new complications and new perspectives to it. Law-in-action, I argue, is not identical with what goes on in court, what is said by lawyers or clients, or how disputes are carried out. Rather, criminal law-in-action operates in a complex field of discourse practices. The critical task for law-in-action research is to demarcate this field and to capture the practical status of those practices in terms of real cases.

What was the practical status, for instance, of Linda’s alibi? In the first case study, I gathered file material and related communications and put them in a chronological order, a succession, a series of events. By following the alibi through its various appearances, I did not just account for various sites and moments; I also explored a process of mobilization that turned the alibi into a discursive, legally relevant object. Case-making, thus, draws on various settings, participants, objects, and media. It takes place in and responds to a dynamic (legal) discourse formation, a heterogeneous field of signification.

**Where and when is the field?**

“Where is the field?” is a question hardly ever asked by ethnographers who ‘just’ approach institutions, cultures or regions.² Often, ethnography is carried out without problematising where and when one should conduct participant observation; it is carried out as if it was self-evident that the ethnographer was already in the field. I argue that such presuppositions are shaken once the ethnographer allows for alternative versions of where/what the field is, in which, for instance, law-in-action operates. Those basic concerns with framing ‘what is done and what this doing does’ (Dreyfus/Rabinow 1987:219) turn ethnography into a “theory-oriented research practice” (Hirschauer 2005), an analytic project.

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