Inquiring into Conceptual practices: Legal Controversy at the Court of Justice of the European Union

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This Chapter proposes an inquiry into the surface of EU law, or, to put it differently, a non-formalist study of legal forms. Legal concepts should be seen as a very rich field of inquiry in themselves. As the legal anthropologist Annelise Riles has shown, legal concepts are not mere tools, completely within our control, used to achieve certain ends defined by other terms that are outside the law. They are far more intriguing and fascinating than that. They participate in the constitution of the legal and social realities that they pretend to regulate. They enable and limit what participants in a language-game can do, and they can even influence what they may want to do. Based on this insight, I propose a methodology for the study of conceptual practices in EU law. This implies focusing on law and legal concepts as a set of knowledge practices and inquiring into the transformative power of legal techniques. More specifically, in this Chapter I will focus on the constitutive dimension of the legal controversy surrounding the Court of Justice of the European Union's rulings.

This approach should be distinguished both from classical doctrinal studies on the Court, which mainly deal with interpretation, and from works focusing on power relations between legal actors. Throughout this Chapter, I will use some examples taken from the field of EU citizenship case law. Let's first consider two famous cases dealing with the recognition of surnames. In *Garcia Avello*,[1] the Court decided that EU law precludes Belgium from refusing to register dual nationals with the surnames of both parents. This solution conformed with the Spanish tradition concerning surnames, but contravened a Belgian law that required that children take the surname of their fathers only. This case has often been presented as a very activist case, where the Court strongly promotes European integration. In *Sayn-Wittgenstein*,[2] the Court decided that article 21 Treaty on the Functioning of the European Union (TFEU) does not preclude a Member State from refusing to recognize a name including a nobility title, as is required by the Austrian Constitution. In this case, the Court is often portrayed as showing deference towards Member States' regulatory powers.

[1] Case C-148/02, *Carlos Garcia Avello v Belgian State*, EU:C:2003:539.
[2] Case C-208/09, *Sayn-Wittgenstein*, EU:C:2010:806.

A first kind of studies, which are dominant in EU law literature, are mainly focused on the way the Court ascribes meaning to written provisions, and often on the way it should do so. A second kind of studies tend to be interested in power struggles only. The controversy before the Court is understood as simply reflecting deeper oppositions, defined in other terms. In both cases, the activity of the Court is mainly thought about within the framework activism/deference, which has, to some extent, been absorbed by the debate over European integration. Nevertheless, concluding that the Court has shown strong activism in *Garcia Avello* and has been deferent in *Sayn-Wittgenstein* would only be of limited interest in understanding what is at stake in these cases. Even explaining why the Court could be characterised as such (because it has produced a correct or incorrect interpretation of EU law) or for what reasons it has reached such a solution (for instance, because of the political preferences of the judges) would only reveal one part of the story. Important questions remained unanswered. How does the Court, applying typical formulas in contexts that are always different and reassembling them, contribute to the constitution of legal knowledge? How is the meaning of the concepts of EU law constructed through a controversy implying different participants? What does it imply that this controversy takes place in a specific language or grammar?

Inquiring into conceptual practices is an attempt to answer such questions. In this Chapter, I will focus on public justifications taking place in a controversy in which different participants intervene within a specific intellectual and institutional framework. In the strict sense of the term, controversy occurs before the Court in its capacity of an "authentic" interpreter[3] and the judgment puts an end to it. In the broad sense of the term, controversy includes other actors and does not end with the rulings of the Court. Notably, it also bears on what these ruling imply. Indeed, no one fully controls the meaning of their own statements. As Brandom has put it, in a language-game, "[i]t is up to me whether I play that counter –assert that sentence– rather than another, or not. But it is not up to me what I have thereby done."[4] While this is generally a limit for the Court it can also be a strength, as the Court itself also talks about its previous rulings and occupies a privileged place in relation to their institution as authoritative or to the possibility that they might fall into desuetude.

In the perspective adopted, the institution of legal concepts is viewed as a historical and social process which occurs, at least partially, through their use in concrete cases. The public controversy over legal concepts is studied in itself and for what it produces. Its terms are taken seriously, and the emphasis is put on its constitutive dynamic. This approach should be distinguished both from a Whig history of the case law, where legal change is conceived as a progressive evolution towards a glorious present, and from a purely strategic reading, where legal controversy is perceived only as epiphenomenal. Drawing insights from

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[3] Hans Kelsen, *Pure Theory of Law* (Max Knight tr, Lawbook Exchange 2005) 354.

[4] Robert Brandom, 'From a Critique of Cognitive Internalism to a Conception of Objective Spirit: Reflections on Descombes' Anthropological Holism' (2004) 47 Inquiry 236, 250. In a different tradition, Duncan Kennedy explained that "speech is never fully controlled by the speaker (the speaker is in some sense 'spoken' by his or her language), so that speech 'exceeds' the speaker, propagating meanings independently of 'original intent'". Duncan Kennedy, *A Critique of Adjudication (Fin de Siècle)* (Harvard University Press 1997) 134.

Science and Technology Studies, knowledge anthropology and pragmatic sociology, I will argue that inquiring into the conceptual practices of the Court is one strategy among others that can bring new insights for EU law studies. As this edited volume purports to show, many different ways could also be explored.

I will first introduce what inquiring into conceptual practices means and how such an inquiry can be undertaken in EU law. Then, I will explain how it is possible to pursue this line of inquiry into the public controversy occurring before and outside the Court and distinguish this approach from classic perspectives in EU law literature. Finally, I will underline that this controversy, like every conceptual practice, occurs in a certain language or grammar, which both enables and constrains legal actors.

1. Inquiring into conceptual practices

Inquiring into the surface of EU law

I propose to inquire first and foremost into the particularities of EU law's very own sentences, concepts, and technicalities. This proposal may appear to be a trivial suggestion, but I nevertheless argue that pursuing an in-depth inquiry into legal sentences and concepts is often overlooked both by approaches mainly focusing on what there is behind the law, and by doctrinal approaches to EU law. On the one hand, approaches dealing with EU law from an external point of view, namely from the point of view of other disciplines or in cultural terms, have sometimes neglected the study of legal concepts and techniques. Such studies are sometimes presented as "superficial." Some authors may share the belief that legal concepts and technicalities are neutral. Following this line of thought, their study raises "merely technical," and therefore not important questions. What is going on at a surface level—legal concepts and technicalities—is often overlooked.

For doctrinal scholars, on the other hand, the challenge is not to take on legal technicalities, but to take on the inquiry, i.e. to start investigating the tools they use every day. Lawyers are so immersed in the use of these concepts and technicalities that they often lack a salutary astonishment that could be directed towards their own devices. Some concepts or doctrines, such as the "integration through law" approach, the "restriction to move" or the "purely internal situation", are so obvious to EU lawyers that they are no longer seen. They are naturalized. That may explain the fact that whenever lawyers develop a reflection about law, they often feel that they should go "beyond" legal technicalities or "behind" law to do something interesting.[5] A traditional search for "Grand-theory" can also be found in law, and a classical affinity with "normative political

[5] For instance, in the field of EU law, Rob van Gestel and Hans-Wolfgang Micklitz write that lawyers should go "beyond" legal techniques or "behind" law in order for legal scholarship to have "added-value". See Rob van Gestel and Hans-Wolfgang Micklitz, 'Why Methods Matter in European Legal Scholarship' (2014) 20 European Law Journal 292, 310 and 314.

philosophy." In the words of Lévi-Strauss, lawyers are often stuck between "journalism" and "theology."[6]

Quite paradoxically, works developed in other disciplines could be useful to efforts to view legal concepts and theories as a very rich field of inquiry in and of themselves. Using science, technology and society studies (STS) and anthropology of knowledge, the anthropologist and lawyer, Annelise Riles, urged scholars from cultural studies—meaning anthropology, legal history or critical theory—"to take on the technicalities."[7] Likewise, Mariana Valverde argues that it could be a mistake to neglect what is going on at the surface to search for what should lie behind.[8] Legal sentences, concepts and techniques can be a very rich field of inquiry in and of themselves on the condition that we do not see them as mere tools, totally controlled by legal actors, and used to achieve certain ends defined in extra-legal terms. As these authors have shown, they are far more intriguing and fascinating. They participate in the constitution of the legal and social realities they pretend to regulate. Inscribed in a cultural practice, they enable and at the same time limit what participants to a language-game can do, but also what they may want to do.

Even though one can fully accept that legal concepts and technicalities are politics, they are, to take a motto from STS, "politics by other means."[9] Adopting such a view should be distinguished from both a traditional formalist account of law ("law is science") and from a purely political or strategic reading of law ("law is only politics"). Therefore, legal argumentation is not reduced to policy arguments or other form of argumentation.[10] With this in mind, I propose to focus on law and legal concepts as a set of knowledge practices and to inquire into their transformative power. This kind of study is different from classical doctrinal studies that aim to interpret legal material or give solutions to specific cases—often fetishizing legal concepts. It should also be distinguished from approaches that see legal concepts as mere reflections of deeper social forces—and so "fetishizing society."[11] In the field of EU studies, this approach could be understood to make common cause with recent work in history and social sciences that has already started to "take on the technicalities" of EU law.[12]

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[6] Claude Lévi-Strauss, *Tristes Tropiques* (Plon 1984) 55–56. See also Pierre Schlag's critics of "case-law journalism" and "normative legal thought", Pierre Schlag, 'Spam Jurisprudence, Air Law, and the Rank Anxiety of Nothing Happening (A Report on the State of the Art)' (2009) 97 Georgetown Law Journal 803.

[7] Annelise Riles, 'New Agenda for the Cultural Study of Law : Taking on the Technicalities' (2005) 53 Buffalo Law Review 973.

[8] Mariana Valverde, *Law's Dream of a Common Knowledge* (Princeton University Press 2003) 11 f. Mariana Valverde, 'The Sociology of Law as a "Means against Struggle Itself"' (2006) 15 Social & Legal Studies 591.

[9] Bruno Latour, *The Pasteurization of France* (Harvard University Press 1993) 228–229.

[10] On this self-conscious use of standard legal forms and arguments, see, for instance, Kennedy (n 4).

[11] Valverde, *Law's Dream of a Common Knowledge* (n 8) 10.

[12] In political science, see, for instance, Antoine Vauchez, *Brokering Europe : Euro-Lawyers and the Making of a Transnational Polity* (CUP 2015). In history, see, for instance, Bill Davies and Morten Rasmussen, 'Towards a New History of European Law' (2012) 21 Contemporary European History 305. In sociology, see, for instance, Rebecca Adler-Nissen and Kristoffer Kropp, 'A Sociology of Knowledge Approach to European Integration : Four Analytical Principles' (2015) 37 Journal of European Integration 155.

Taking conceptual practices seriously

The approach I defend in this paper is different from most classical external approaches to law. Rather than assessing legal doctrine from the outside, I propose to take its meaning for the participants in legal practice seriously, or to say it differently, to understand EU law on its own terms. Classical doctrinal work is sometimes misunderstood by authors that assess it with external standards, which often claim to correct its mistakes. If it can sometimes amount to the straw man fallacy—a caricatured vision of doctrine being an easy target—there is something deeper. Transposing Wittgenstein's critique of Frazer's *Golden Bough*,[13] one can wonder if in the same way that anthropologists have long neglected to wonder if the "savages" they described actually believed in their magical practices, external approaches to law have forgotten to wonder if lawyers actually believe in the existence of the entities that can be found in their discourses. This is what Annelise Riles notes. Discussing the universality of the rule of law, she explains that we should ask "Could anyone really believe this?".[14]

It would certainly be excessively naïve to think that lawyers believe that courts have no discretion, that language is fully determinate or that legal concepts exist in nature or in a heaven of concepts, simply because they sometimes argue as if this was the case. For instance, when authors write that the Court is "putting flesh on the bones"[15] or is "unfolding"[16] EU citizenship, their writings should not simply be dismissed as implying an extremely naïve view of legal concepts. Instead, we should investigate the role of such statements in the particular discursive practice in which they take part. We should see them as part of the phenomena to be accounted for and not as a description of EU law that should be confronted with "a reality." This is what was the French legal historian Yan Thomas has argued in another context. Concerning the "fiction of unity" in traditional Roman law doctrine, he observed that, "to reject it as false is to miss its role in the legal representation of a law conceived as perfect; it is to forget that such artifices guarantee the efficiency of a doctrinal discourse that cannot do without such fictions."[17]

To get rid of legal artefacts because of their artificiality would amount to neglecting a crucial part of legal knowledge practices. The critique of essentialism or formalist legal thought is now widely accepted. I am not contesting the soundness of such a critique. Rather, I am merely pointing out that it should not entail neglecting the role of formalist or essentialist argumentation in legal practices. Instead of portraying such arguments as false or ridiculous, I argue that we should consider them seriously because they play a crucial role in legal practices. Instead of simply denouncing legal forms and artefacts as unstable and changing we should inquire into the work deployed by

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[13] Ludwig Wittgenstein, *Remarks on Frazer's 'Golden Bough'* (Brynmill 1991).

[14] Annelise Riles, 'An Ethnography of Abstractions ?' (2000) 41 Anthropology News 100, 100.

[15] Síofra O'Leary, 'Putting Flesh on the Bones of European Union Citizenship' (1999) 24 European law review 68.

[16] Armin Von Bogdandy and others, 'Reverse Solange—Protecting the Essence of Fundamental Rights against EU Member States' (2012) 49 Common Market Law Review 489, 491. My emphasis.

[17] Yan Thomas, 'La Romanistique et La Notion de Jurisprudence' [1986] Droits 149, 153.

legal actors to essentialize them. As Annelise Riles has put it, we should "understand legal knowledge on its own terms, including its significance and appeal from various legal actors' own point of view."[18]

Possible inquiries and adopted strategy

The practices at stake are "knowledge work," meaning "forms of knowing, theorizing, judging, analysing and reflecting that constitute the practices of legal actors."[19] This work could be performed by very different actors, for instance from the superintendent registrar of the city council, to a national court or lawyer, and could even include men and women on the street. Studying such practices could lead to very different research strategies—knowledge practices could be studied in many ways and at many sites. The inquiry could bear on all the different actors involved in the constitution of EU legal knowledge. It could involve different research programs, from text analysis to interviews, ethnographic observations, or prosopography.

What is crucial to the approach I propose is the adoption of a certain perspective in relation to these materials—to take conceptual practices seriously—rather than the selected material in itself. The inquiry presented in this paper is rather modest. I did not engage in ethnographic field work, as can be found in some of the works of Riles or Valverde, but merely used some of their insights to inquire into "traditional" legal materials like judicial decisions and academic writings.[20] Following Alain Pottage, we can see in "law's own archeological remains the resources for a reflection on legal technique" that could work as a counterpart to ethnographic approaches.[21] This choice is explained by the fact that public controversy over EU law concepts is crucial for the constitution of legal knowledge. The proposed inquiry is not interested in understanding "why" the Court has decided a case in one way or another, but in how, by justifying a solution in a certain way, it effects "a coup" in a language-game that will influence the institution of legal knowledge.

This choice has some practical advantages. Public controversy over legal concepts could be seen as a ground where exchanges between different perspectives can build cumulative understandings and cross-fertilize each other. Academic writings and legal decisions are the most accessible legal material, with which lawyers are accustomed to dealing. Nonetheless, familiarity with the material chosen should not be misleading for them. The approach proposed in

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[18] Annelise Riles, 'Legal Knowledge' in David S Clarke (ed), *International Encyclopedia of Law and Society* (2007) 885.

[19] ibid 885.

[20] See, for an important field inquiry in Japanese banks, Annelise Riles, *Collateral Knowledge : Legal Reasoning in the Global Financial Markets* (University of Chicago Press 2011). See also the different cases studied by Marina Valverde, in a wide range of "legal arenas", Valverde, *Law's Dream of a Common Knowledge* (n 8).

[21] Alain Pottage, 'Law after Anthropology : Object and Technique in Roman Law' (2014) 31 Theory, Culture & Society 147, 4. Pottage develops his proposal using the work of Yan Thomas, who is known far beyond the history of Roman law for his "artificialist" approach to law and for his work on "legal operations" and technicalities. On this aspect of Thomas' work, see the collected articles in Yan Thomas, *Les opérations du droit* (EHESS - Gallimard - Seuil 2011).

this paper implies an important shift in perspective: this material should be taken as an object of inquiry in itself, and not discussed in doctrinal terms. Taking conceptual practices seriously also implies a change in perspective for most researchers coming from other disciplines: they are urged to focus on materials that have sometimes been neglected, and to treat this material as a source and not as bibliographic material.[22] I will now explain how it is possible to inquire in this way into the public controversy occurring before and outside the Court, and to distinguish this approach from classic perspectives in EU law literature.

2. The institutive dimension of legal controversy

Beyond a Whig history of case-law

Concerning the CJEU, there is a considerable literature focused on methods of interpretation and legal reasoning, be it the seminal works of Anna Bredimas, Hjalte Rasmussen, or Joxerramon Bengoetxea,[23] or in more recent books, like the ones by Gerard Conway, Gunnar Beck, Suvi Sankari, or Elina Paunio.[24] Looking at the conceptual practices of the Court shifts the focus of the inquiry. The question is neither to grasp how the Court ascribes meaning to Treaty articles nor to prescribe how it should do so. My aim is to inquire into the institution of legal concepts, refusing to either reduce them to their social context or to deny their historical and contingent character. To do so, I will essentially focus on public justifications taking place in a controversy in which different participants intervene within a specific intellectual and institutional framework.

Though at the heart of cases, controversy is often neglected in the discourse of courts or treated in an ancillary way in traditions dominated by the "ideology of bounded decision-making."[25] The indeterminacy of previous decisions is often erased in succeeding ones. Formulas or justifications, initially used by the Court and then abandoned, are usually ignored in subsequent cases. The Court generally presents its own case law as a natural evolution. This tendency could also be found in commentaries and arguments presented before the Court. While the historical dimension of the Court's case law is sometimes acknowledged, the description of this case law generally takes the form of a "Whig history:" the history of cases is conceived of as a progressive evolution

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[22] Identifying this risk for social scientists, see Claire Lemercier, 'Que faire du matériau juridique en sciences sociales ?' (*Droit et sciences sociales*) <https://droitscisoc.hypotheses.org/509> accessed 11 September 2018.

[23] Anna E Bredimas, *Methods of Interpretation and Community Law* (North-Holland Publishing Company 1978); Hjalte Rasmussen, *On Law and Policy in the European Court of Justice : A Comparative Study in Judicial Policymaking* (M Nijhoff 1986); Joxerramon Bengoetxea, *The Legal Reasoning of the European Court of Justice : Towards a European Jurisprudence* (Clarendon Press - OUP 1993).

[24] Gerard Conway, *The Limits of Legal Reasoning and the European Court of Justice* (CUP 2012); Gunnar Beck, *The Legal Reasoning of the Court of Justice of the EU* (Hart 2012); Suvi Sankari, *European Court of Justice Legal Reasoning in Context* (Europa Law Publishing 2013); Elina Paunio, *Legal Certainty in Multilingual EU Law: Language, Discourse, and Reasoning at the European Court of Justice* (Ashgate Publishing Limited 2013).

[25] I took the expression from Wróblewski, it could refer both to Civil and Common Law traditions Jerzy Wróblewski, *The Judicial Application of Law* (Springer Netherlands 1992) 272f.

towards a glorious present.[26] This kind of approach, common in the discourse of the Court, is also found in most textbooks, which aim to provide a systematic description of the law at a given time. The history of cases is reduced to the linear description of important steps leading to the current situation. Unsuccessful arguments are not taken seriously, and most of the time, are not even mentioned.

Reconstructing the past as a linear progression or presenting the future as a natural path to be followed is typical in the argumentation of many participants in controversies before the CJEU. For instance, the development of the concept of EU citizen is often presented by scholars as naturally resulting from the concept itself: "history teaches that citizenship is by nature a dynamic institution;"[27] "the concept is a dynamic one, capable of being added to or strengthened, but not diminished."[28] Citizenship is even commonly personified. For instance, celebrating the "21st birthday" of citizenship, Alina Tryfonidou argues that it "has come—or perhaps, more accurately, is very close to coming—of age" from the angle of the substance that has been given to the status.[29] She then presents the CJEU case-law in four phases: "infancy," "growth," "turbulent (early) adolescence," and "coming of age."[30]

Understanding the controversy in its own terms

Adopting a different approach, other scholars usually focus on disagreements to underline the contingent and political character of judicial decision-making. This is typical in the strategic reading of judicial decision-making, which emphasises the different values and policy preferences of different legal actors or institutional arrangements. This reading underpins classical works in law or political science focusing on the role of the CJEU in European integration, such as the famous critiques of Hjalte Rasmussen,[31] or the more recent works of Alec Stone Sweet[32] or Karen J. Alter.[33] Even though these approaches see the controversial character of judicial decision-making, they tend to view controversy as an epiphenomenon. This corresponds to the classical vision of the controversy, as explained by Cyril Lemieux: "the contentious process is [. . .] used as a developer in the photographic meaning of power struggles, institutional positions, or social networks that would otherwise be difficult to

[26] Even though its name comes from the British political party, the Whigs, this expression is now used more widely in science, technology and society studies (STS). It was initially popularized by the historian Herbert Butterfield, who used it to criticize a certain type of historiography: Herbert Butterfield, *The Whig Interpretation of History* (Norton 1965).

[27] Paul Magnette, *La Citoyenneté Européenne : Droits, Politiques, Institutions* (Editions de l'Université de Bruxelles 1999) 183.

[28] David O'Keeffe, 'Reflections on European Union Citizenship' (1996) 49 Current Legal Problems 347, 114.

[29] Alina Tryfonidou, *The Impact of Union Citizenship on the EU's Market Freedoms* (Hart Publishing 2016) 23.

[30] Tryfonidou (n 29), chapter 2.

[31] Rasmussen (n 23).

[32] Alec Stone Sweet, *The Judicial Construction of Europe* (OUP 2004).

[33] Karen J Alter, *The European Court's Political Power : Selected Essays* (OUP 2009).

see."[34] The terms of the controversy are not worth considering in themselves, only more fundamental oppositions are important, such as the Court's desire to develop its institutional power or the Member States' desire to preserve their competences.

I propose to adopt another vision of controversy, inspired by STS and the pragmatic school of French sociology, which focuses on its constitutive dimension.[35] Lemieux explains that "[t]he researcher adopting this perspective insists on the performative or, better said, *constitutive* dimension of the contentious processes that he is studying, he is finally less preoccupied by what they can reveal of a pre-existing structure assumed to be their cause than by what they produce, which did not exist before them, and how they produce it."[36] The controversy is studied in itself and for what it produces, its terms are taken seriously, the emphasis is put on its constitutive dynamic. As Luc Boltanski and Laurent Thévenot argued in *On justification: economies of worth*, we should pay attention to the way individuals justify their actions to others, not reducing one worth to some form of interest or strategy.[37] This does not imply the denial of power struggles, but simply states that controversy is not limited to them, and that they are not independent from the terms in which the controversy takes place.

This opposition between two ways of seeing controversy is reminiscent of some debates between lawyers and historians. Yan Thomas warned against reducing legal history to the history of social facts of which law would only be the formal expression.[38] Similarly, Michel Troper, in his study of the debates of French constitutional assemblies, argued against reducing legal controversy to an epiphenomenon.[39] The necessity of taking legal controversy seriously is now underlined more widely in history and social sciences by the work around the "*forme affaire*."[40] The book recently published on *EU law stories* could also be seen as partly going in that direction.[41] The texts gathered by Bill Davies and Fernanda Nicola are rich and numerous. While they are sometimes permeated by the desire to unveil what is behind law, the editors, taking into account critiques made of

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[34] Cyril Lemieux, 'À Quoi Sert l'analyse Des Controverses ?' (2007) 25 Mil neuf cent. Revue d'histoire intellectuelle 191, 191.

[35] That refers, respectively, authors in STS like David Bloor, Michel Callon and Bruno Latour, and authors in pragmatic sociology like Luc Boltanski and Laurent Thévenot. ibid 190.

[36] ibid 192.

[37] Luc Boltanski and Laurent Thévenot, *On Justification: Economies of Worth* (Catherine Porter tr, Princeton University Press 2006).

[38] See Yan Thomas, 'Causa: sens et fonction d'un concept dans le langage du droit romain' (thèse, Paris II 1976) 2–3; Yan Thomas, *Mommsen et 'L'Isolierung' du droit (Rome, l'Allemagne et l'Etat)* (Diffusion de Boccard 1984); Yan Thomas, 'Droit' in André Burguière (ed), *Dictionnaire des sciences historiques* (1st edn, PUF 1986).

[39] See the debate with François Furet: Michel Troper, 'Sur l'usage des concepts juridiques en histoire' (1992) 47 Annales. Économies, Sociétés, Civilisations 1171; François Furet, 'Concepts juridiques et conjoncture révolutionnaire' (1992) 47 Annales. Économies, Sociétés, Civilisations 1185.

[40] See Luc Boltanski and Elisabeth Claverie, 'Du monde social en tant que scène d'un procès' in Nicolas Offenstadt and others (eds), *Affaires, scandales et grandes causes : De Socrate à Pinochet* (Stock 2007).

[41] Fernanda Nicola and Bill Davies (eds), *EU Law Stories Contextual and Critical Histories of European Jurisprudence* (CUP 2017).

part of the Law and Society literature, nevertheless take care to affirm that law can have a relative autonomy, that the CJEU's legal reasoning has its own internal logic, and that it "constitutes the consciousness of the judicial, legal and scholarly elites in Europe."[42]

The constitution of legal concepts as a social and historical process

Solutions and patterns of reasoning that have been progressively determined over time, like the connection of EU citizenship to non-discrimination and free movement, are now presented as natural, in the sense that they are no longer contested. A historic survey of textbooks, legal commentaries and controversies before the Court nonetheless shows that such solutions were far from obvious in the beginning and that many actors seriously considered other options—for instance, arguing that articles referring to EU citizenship were symbolic or that EU citizenship should entail the protection of fundamental rights or a general clause of non-discrimination. The principle of symmetry, as developed by Barry Barnes and David Bloor in STS, is a methodological directive that aims to guard against a Whig view of history: all arguments should be taken seriously, be they considered correct or false subsequently.[43]For instance, one may wonder why a proposal that was seriously defended at a certain time has not succeeded, or why a formula once used by the Court has subsequently been abandoned.

What is a landmark ruling? For instance, why has *Martínez Sala*[44] become a landmark ruling in EU citizenship case law and not *Kaba I*[45] and *Kaba II*?[46] And what the rulings imply can only be determined *a posteriori*. As Antoine Vauchez has put it, a landmark case "does not mean anything in itself, unless we consider the lengthy, continuous and multilayered process of interpretation that takes place on both sides of the 'event.' In other words, jurisprudence is not just a natural and ahistorical outcome: it is rather the product of collective and concurrent attempts to define their true meaning and extent."[47] Textbooks and commentaries stating what a concept should imply or developing a Whig History of its development are contributing to its institution. The Court itself also talks about its previous rulings and occupies a privileged place in their institution or their deseutude. In this regard, recent works like the ones of Jan Komárek, Urška Šadl, and Marc Jacob, dealing with the way the CJEU reasons with its previous decisions, are very insightful.[48]

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[42] ibid 11.

[43] See David Bloor, *Knowledge and Social Imagery* (2nd edn, University of Chicago Press 1991); Barry Barnes, *Interests and the Growth of Knowledge* (Routledge - KPaul 1977).

[44] Case C-85/96, *María Martínez Sala v Freistaat Bayern*, EU:C:1998:217.

[45] *Kaba I*

[46] *Kaba II*

[47] Vauchez (n 12) 118.

[48] See, for instance, Jan Komárek, 'Reasoning with Previous Decisions : Beyond the Doctrine of Precedent' (2013) 61 American Journal of Comparative Law 149; Urška Šadl, 'Case – Case-Law – Law: Ruiz Zambrano as an Illustration of How the Court of Justice of the European Union Constructs Its Legal Arguments' (2013) 9 European Constitutional Law Review 205; Marc A Jacob, *Precedents and Case-Based Reasoning in the European Court of Justice : Unfinished Business* (CUP 2014).

I argue that conceiving controversy as constitutive allows us to avoid the pitfalls both of a Whig History of the case law, and the reduction of legal controversy to the mere reflection of more fundamental oppositions. Such an approach gives place to the controversy and preserves it against *a posteriori* naturalization of case law that is pervasive in the discourse of the Court, in textbooks, and in studies on legal reasoning. It also allows us to inquire into the agency of legal forms and to reflect upon these forms' constitutive dimension. Indeed, adopting the approach outlined above, it takes the conceptual practices seriously. Instead of trying to "correct" Whig history narratives, I argue that we should include them in the field of inquiry and investigate their role in the constitution of legal concepts. We should not simply denaturalize the concepts of EU law, but investigate the naturalizing activity of different actors, how do they essentialize legal concepts and what role does it play in the constitution of legal knowledge?

The institution of legal concepts should be viewed as a historical and social process, which occurs, at least partially, through their use in concrete cases. As Mariana Valverde puts it, "the parties to a legal case can be said to *constitute* knowledge in the process of evaluating evidence and drawing conclusions from it."[49] There is no clear distinction between the production of knowledge and the use and circulation of this knowledge.[50] Arguments exchanged in the controversy participate in the institution of legal knowledge. What has long been noted in legal controversy is that participants should sometimes recognize norms to make an effective argument, and that this act of recognition participates in the institution of these norms.[51] The evolution of the controversy before courts in a specific field is not the mere reflection of an agreement reached in other terms. It participates in the naturalization of patterns of reasoning that are reproduced in case after case, and which will also influence how some questions can be thought of outside the legal forum.

3. The embeddedness of conceptual practices in legal knowledge

"Work in a medium"

Controversy does not occur in a vacuum. Argumentation is governed by a certain grammar—in the meaning of pragmatic sociology—within a specific cultural system.[52] To articulate their arguments or to communicate a decision, academics, lawyers, and courts have to speak the language of EU law. As Duncan Kennedy puts it, judges—but this is also true of other legal actors—"work in a

[49] Valverde, *Law's Dream of a Common Knowledge* (n 8) 5.

[50] As Robert Brandom puts it, "[t]he practice of using language must be intelligible as not only the *application* of concepts by using linguistic expressions, but equally and at the same time as the *institution* of the conceptual norms that determine what would count as correct and incorrect uses of linguistic expressions." Robert B Brandom, *Tales of the mighty dead : historical essays in the metaphysics of intentionality* (Harvard University Press 2002) 214–215.

[51] See Marcel Willard, *La Défense accuse* (Éditions sociales 1955); Jacques Vergès, *De la stratégie judiciaire* (Éditions de Minuit 1968).

[52] For a presentation of this notion, see Cyril Lemieux, *La sociologie pragmatique* (La Découverte 2018) 58.

medium."[53] The existence of this medium explains why in a given context there are good and bad arguments, even if the result of a controversy is not determined and what is taken as a good or bad argument can change. For instance, one can say that in EU law the argument of the literal interpretation of a text is a good one, even if it is not decisive, since, first, finding the literal meaning of a provision can be problematic, and second, other good arguments can be opposed to literal interpretation. Respecting linguistic norms at the same time constrains and enables legal actors. While it implies the adoption of a certain vocabulary, at the same time it also "confers unparalleled positive freedom—that is, freedom *to* do things one could not only not do before but could not even *want* to do."[54]

A specific language is far more than a simple means that allows for the attainment of ends defined in other terms. It enables legal actors to formulate, to think, and even to desire other ends. To take one example from Robert Brandom, "no ancient Roman governor, however well-intentioned, could resolve to respect the human rights of the individuals over whom he held sway."[55] To think EU law in its own terms implies that EU law can be seen as a language or as a cultural system on its own. In this sense, EU law can be viewed as a framework that shapes and limits its participants' perception, understanding, and imagination. This assumes that there is such a thing as a discourse of EU law and that it is expressive of a specific way of understanding law. It goes against a vision whereby EU law is only an instrument at the service of ends defined in other terms—the common image of law at the service of regulatory purposes—contrary to the laws of Member States, which, following this line of thought, are expressive of their national culture.

To understand what the Court does, it is necessary to consider the different ways in which the Court itself and other legal actors conceptualize what the Court does. Just as markets are embedded in economics, legal practices are embedded in legal knowledge, be it produced by academics or by legal actors.[56] Antoine Vauchez has underlined that the novelty of EU law has led "in house" theories to play a major role in the building of EU legal concepts—think, for instance, of primacy, direct effect or the effectiveness of EU law.[57] The study of these theories and their modes of production is an important concern of inquiry into the constitution of EU law. The embeddedness of law in legal knowledge—which is specific to a specific legal culture—may imply a phenomenon of

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[53] Kennedy (n 4) 158.

[54] Robert Brandom, 'Vocabularies of Pragmatism : Synthetizing Naturalism and Historicism' in Robert Brandom (ed), *Rorty and his critics* (Blackwell 2000) 177–178.

[55] ibid 169.

[56] On the embeddedness of markets, see Michel Callon (ed), *The laws of the markets* (Blackwell 1998); Donald A MacKenzie, Fabian Muniesa and Lucia Siu (eds), *Do economists make markets ? on the performativity of economics* (Princeton University Press 2007). From that perspective, some authors have proposed inquiring into "the co-production of theories and practices of European integration", see Adler-Nissen and Kropp (n 12). Dealing more specifically with law, see Antoine Vauchez, 'Methodological Europeanism at the Cradle : Eur-Lex, the Acquis and the Making of Europe's Cognitive Equipment' (2015) 37 Journal of European Integration 193; Marija Bartl, 'Internal Market Rationality, Private Law and the Direction of the Union : Resuscitating the Market as the Object of the Political' (2015) 21 European Law Journal 572.

[57] Vauchez (n 12) 22f.

disembeddedness. If EU law is a way of seeing, it is also a way of not seeing. Acknowledging this sheds light on conceptual translation that until now has remained underexplored. From one perspective, EU law loses much of its original meaning in its application in national contexts. From another perspective, it appropriates and distorts legal concepts and theories taken from national contexts or other legal fields and inscribes them in a whole set of theories specific to the European sphere.

The strength of the conceptual framework

When the Court attaches the right not to be discriminated against on the ground of nationality to the status of citizen of the Union in *Martínez Sala,*[58] or decides that the freedom of the citizen to move and reside is one of the fundamental freedoms guaranteed by the Treaty in *D'Hoop*,[59] it introduces the status of EU citizen in a particular conceptual structure and in a specific style of argumentation. In case after case, the whole technical apparatus of "restrictions to move" and their possible "justifications" as developed in the internal market framework has been used and reinterpreted in citizenship case law. The dynamic of the development of the EU status of citizen is not only to be found in an overarching "idea of citizenship," but also, and perhaps mainly, in the sentences, techniques and concepts of EU law. Conceptual change does not necessarily occur through the introduction of new concepts or techniques but also through the rearticulation of pre-existing ones. The two cases mentioned in the introduction offer good illustration of the strength of EU law's conceptual framework. They also show how it can subvert national understandings of the law to impose a certain way of talking and thinking.

First, regarding the applicability of EU law provisions, in *Sayn-Wittgenstein*, the Court states that even though "the rules governing a person's surname and the use of titles of nobility are matters coming within the competence of the Member States, the latter must none the less, when exercising that competence, comply with European Union law."[60] Loïc Azoulai identified this "retained power formula" and explained how it changes the way it is possible to think about distribution of powers.[61] Combined with the "*effet utile*" of free movement rights, the formula entails that every national measure affecting freedom of movement could be subjected to the review of the CJEU. This reasoning relies on the introduction of two crucial distinctions that depart from the traditional approach in terms of vertical constitutional division of competences: the distinction between the exercise and the existence of a competence and the distinction between the competence of the Union and the scope of application of EU law. When the situation affected by the contested national measures falls within the scope of EU law, the Member State should comply with EU law in exercising its competence.

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[58] Case C-85/96, *Martínez Sala*.

[59] Case C-224/98, *Marie-Nathalie D'Hoop v Office national de l'emploi*, EU:C:2002:432.

[60] Case C-208/09, *Sayn-Wittgenstein*, para 38.

[61] For a genealogy of this formula and a reflection on its use, see Loic Azoulai, 'The "Retained Powers" Formula in the Case Law of the European Court of Justice : EU Law as Total Law ?' (2011) 4 European Journal of Legal Studies 192.

The change described above implies a completely different pattern of reasoning and allows for the saying and doing of things that were not thinkable, doable, or speakable under a traditional approach in terms of a vertical distribution of competences. The Court can decide that States' measures are subjected to EU law without denying that States hold the competence and the EU does not. This entails a shift in the questions that are relevant, and those that are not to deciding a case. In that context, to determine whether a national measure can be subjected to the review of the Court, what is crucial is not so much who holds the competence but whether the effectiveness of free movement rights is affected. This has a huge practical impact. On the one hand, speaking the language of the Court may be a condition of winning a case, while on the contrary, strongly affirming who holds the competence may be of little use in that context.[62] On the other hand, speaking the language of the Court acknowledges this distribution of powers and participates in its institution. When the Court or other actors use the retained power formula, they are not merely describing a distribution of powers; they are contributing to its constitution.

What becomes crucial then, is reviewing whether Member States' competences are exercised consistently with EU law, and in particular, with fundamental freedoms. When a national measure is *prima facie* discriminatory or restricts free movement, like the measures contested in *Garcia Avello* and *Sayn-Wittgenstein*, it can still be compatible with EU law if it is considered justified, that is, if it "is based on objective considerations and is proportionate to the legitimate objective of the national provisions."[63] While the possibility of justifying a measure that would otherwise be contrary to EU law appears at first glance to be a preservation of Member States' regulatory autonomy, I argue that it entails a translation process that is deeply subversive: national reasons—or sometimes the absence of reasons—should be framed in specific terms.[64] This reframing of national reasons amounts to their translation into the EU conceptual framework.

This is striking in *Garcia Avello* and *Sayn-Wittgenstein*. In the first case, the principle of the immutability of surnames is written in the Civil Code and presented as a founding principle of social order in Belgium, dating from a Decree of 6 Fructidor Year II. In the second, the Law on the abolition of the nobility is presented as having a constitutional status according to the Austrian Constitutional Court and to be part of the fundamental values of the Austrian legal order. While all this is sufficient for a national court to apply these principles as such, it is not sufficient to justify a national measure impeding free movement. As the Court puts it in *Garcia Avello*, the principle of the immutability of surnames is considered "*as a means* designed to prevent risks of confusion as

[62] This could also explain why the articles introduced in the Lisbon Treaty regarding this question may have a limited impact on Member States' regulation autonomy in free movement law context.

[63] Case C-208/09, *Sayn-Wittgenstein*, para 81.

[64] Showing the dynamic aspect of proportionality in EU law, see Antonio Marzal Yetano, *La dynamique du Principe de proportionnalité : essai Dans le contexte des libertés de circulation cu croit de l'Union européenne* (Institut universitaire Varenne 2013). Putting the emphasis on its different meanings in different contexts, see Afroditi Marketou, 'Local Meanings of Proportionality : Judicial Review in France, England and Greece' (Thesis, Institut Universitaire Européen 2018).

to identity or parentage of persons."[65] In *Sayn-Wittgenstein* the constitutional prohibition is seen to rely on "objective considerations relating to public policy," and more specifically to implement "the more general principle of equality before the law of all Austrian citizens."[66] In both cases, the Court accepts that the Member Sate is pursuing a legitimate objective. However, while the measures are not proportionate in *Garcia Avello*, they are in *Sayn-Wittgenstein*.

What I would like to point out is that in both cases, and even in *Sayn-Wittgenstein* (where the Court is often presented as showing deference), national measures need to be thought of differently. The principle of the immutability of surnames or the abolition of the nobility are not considered in themselves in terms of their legal value in the national legal system, instead they are conceived as means necessary to achieve certain objectives. It is not enough that the abolition of the nobility is a constitutional norm, it should be appropriate and necessary to protect the principle of equality, here and now. The subversive impact of this way of thinking is striking. The Austrian norm cannot simply be defended as expressing the will of the constituent or as being a founding principle of the Austrian Republic, the government must demonstrate that it is necessary to favor equality, in 2010.

First, this approach to national measures could be thought of as implying an instrumental conception of the law—the law would be a means to an ends defined beyond the law. Nonetheless, as Annelise Riles has explained in a very different context, this reading would be premature.[67] What the above cases instead show is that the ends mentioned by Member States governments are defined neither independently of the means, nor outside the law. I do not mean that no reasons commanded the adoption of such measures, but that the ends they are supposed to serve are (re)defined by the State's agents in the process of justification before the CJEU and in the language of EU law. Hence, these two cases show precisely how the mentioned ends are ultimately not independent from the means. "Legal knowledge"—here EU law's conceptual framework—"defines its own outside from the point of view of the inside even as it is presented as 'function' of other interests."[68]

The limits of the conceptual framework

A major difference between the method that I adopt and many works in EU legal scholarship is that it does not speculate about how legal concepts should be. Indeed, it is very common for EU legal doctrine to make direct proposals to the legislator or to the Court, or indirectly, to consider EU legal constructions as "a failed form of something." As Kahn puts it, "[s]uch judgments of normative ends partially fulfilled—or unfulfilled—are made from within the legal culture; they are predicates of reform."[69] This tendency is striking in EU citizenship literature. Most of the time, EU citizenship is seen as an imperfect

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[65] Case C-148/02, *Garcia Avello*, para 42, emphasis added.

[66] Case C-208/09, *Sayn-Wittgenstein*, para. 84 and 88.

[67] See Riles, 'New Agenda for the Cultural Study of Law' (n 7) 1020.

[68] ibid.

[69] Paul W Kahn, *The Cultural Study of Law : Reconstructing Legal Scholarship* (University of Chicago Press 1999) 92.

form waiting to be developed. For instance, it is common to read that EU citizenship would be "naturally" an "evolving" or a "dynamic" concept. Such assertions are often further concretised through specific proposals for the development of the concept, such as the recognition of "reverse discrimination." Sometimes legal actors even construct new theories and concepts, like "welfare tourism," and introduce them in different EU law discourses with the objective of reaching the Court. At this level, the "expectations" raised by the representations traditionally assigned to citizenship play an important role in the development of EU citizenship.

A famous example of argumentation based on a certain idea of what EU citizenship should be is von Bogdandy *et al.*'s proposal of a new mechanism to protect fundamental rights against violations by Member States. It is presented as a "feasible next step in the unfolding of both Union citizenship and fundamental rights protection."[70] The development of the concept of Union citizenship is presented as if it were there, or at least could be rationally and objectively constructed from some underlying principles lying somewhere in EU law, waiting to be "unfolded." As I have explained above, this kind of argumentation should be taken as part of the phenomena to be accounted for and not as an external description of EU law, to be confronted with "a reality." Under the approach proposed here, the question is not to know whether von Bogdandy *et al.* have produced a "good" interpretation of EU Treaties, nor to dismiss it as resting on false beliefs, but to investigate the reasons for its success or failure before the Court, to question its formation and its consequences. The claim to merely "unfold" something already there in the concept of EU citizenship or in the fundamental principles of EU law could be of crucial importance for the success of the discourse in a certain argumentative framework.

Expectations raised by the term "citizenship" can lead to legal change. As I have already mentioned, the Court has used the conceptual apparatus developed for the internal market to craft the concept of EU citizen. In that context, a transnational element is necessary to trigger the application of EU law. This has been presented by numerous participants in the controversy as incompatible with a "real citizenship:" it would reveal "an ill-conceived approach to the essence of EU citizenship."[71] In that respect, the *Ruiz Zambrano* ruling appeared to be a revolution in the jurisprudence of the Court and may be seen as an answer to the previous situation that was constructed as unsatisfying. Indeed, in *Ruiz Zambrano* the Court did not require any kind of movement—the Belgian citizens concerned lived in Belgium, from where they had never left—and famously decided that: "Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union."[72] So, in the situations targeted by the formula, the status of EU citizen

[70] Von Bogdandy and others (n 16) 491. Emphasis added.

[71] Dimitry Kochenov, 'A Real European Citizenship: A New Jurisdiction Test: A Novel Chapter in the Development of the Union in Europe' (2012) 18 Columbia Journal of European Law 55, 71.

[72] Case C-34/09, *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)*, EU:C:2011:124, para 42.

allows the protection of EU law to be triggered without previously establishing any relation to the freedom of movement.

In this case and its successors, the Court has developed a new concept that could be named the "Zambrano criterion," expressed in the formula quoted above. In *Ruiz Zambrano*, the Court stated the formula as mentioned below and applied it. In the second case using the formula, *MacCarthy,* it clarified that the Zambrano criterion was independent from freedom of movement. [73] Furthermore, the Court differentiated the situation from the one in *Ruiz Zambrano* and specified that it was because the measure at stake did "not have the effect of obliging Mrs McCarthy to leave the territory of the European Union."[74] In the later cases, the Court limited the concept and added a new justification to its development. Indeed, in *Dereci*, the Court interpreted its own criterion, explaining that it "refers to situations in which the Union citizen has, in fact, to leave not only the territory of the Member State of which he is a national but also the territory of the Union as a whole."[75]

One can wonder what incentives the Court has to produce a new concept. As Dewey put it, "[i]t is practically economical to use a concept ready at hand rather than to take time and trouble and effort to change it or to devise a new one."[76] One way to see how this framework would have constrained the Court is to read Advocate General Sharpston's opinion in *Ruiz Zambrano*. She contemplated three possibilities that could lead to a similar conclusion to the case. Firstly, she proposed recognizing "that Articles 20 and 21 TFEU are to be interpreted as conferring a right of residence in the territory of the Member States, based on citizenship of the Union, which is independent of the right to move between Member States."[77] Secondly, had the Court refused this option, she proposed changing the Court's jurisprudence on reverse discrimination in the field of citizenship.[78] Finally, if the Court refused the two first solutions, she contemplated the possibility of relying on the EU fundamental right to family life independently of any other provisions of EU law.[79] So, the Advocate General Sharpston's opinion could be understood to ask for different "revolutionary" solutions, which would have changed the jurisprudence of the Court on some key points, to reach the solution that the Court reached in *Ruiz Zambrano* by other means. Nevertheless, Sharpston mainly formulated her proposals within the existing conceptual framework of EU law.

The creation of a new concept also allows the Court to have a wider freedom in designing its jurisprudence for two reasons. Firstly, it empowers the Court to confine the solution. The concepts used by the Court are used in different contexts, and a change in one context may have consequences in these other contexts. The use of a new concept allows the Court to isolate its *Ruiz Zambrano*

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[73] Case C-434/09, *Shirley McCarthy v Secretary of State for the Home Department*, EU:C:2011:277*,* para 49.

[74] Case C-434/09, *McCarthy,* para 50.

[75] Case C-256/11, *Murat Dereci and Others v Bundesministerium für Inneres*, EU:C:2011:734, para 66.

[76] John Dewey, 'Logical Method and Law' (1924) 33 The Philosophical Review 560, 564.

[77] Opinion of A.G. Sharpston in Case C-34/09, *Ruiz Zambrano*, EU:C:2010:560, para 122. For the reasoning, see specifically para 90f.

[78] Ibid, para 144. For the whole reasoning, see para 123 to 150.

[79] Ibid, see para 15 to 177.

jurisprudence from its case-law in the field of freedom of movement of persons. Secondly, the creation of a new concept through a formula used neither in the legal system nor anywhere else, gives leeway to the Court to determine its content. Talking of the Zambrano criterion as a concept does not imply that this concept would be precisely defined when the formula first appeared and that everyone shared the same vision of it. Indeed, as there is no clear prior understanding of the formula, it is easier for the Court to reach an agreement on it (internally and externally) and to specify its meaning in subsequent case law. Concerning the *Ruiz Zambrano* criterion, in subsequent case-law the Court considerably limited the far-reaching potential of the first formula and confined its scope to situations very close to the one in which it was used in the first case. To do this, the Court had to produce and specify, in case after case, different "satellite concepts"[80] that progressively determined the correct use of the Zambrano criterion. For instance, to trigger the criterion of the Union citizen, an individual has to leave the territory of the Union as a whole, it should be specified in which cases it is correct to say that he is in such a situation.

Therefore, through the study of concrete cases, I have begun to develop an analytical framework to inquire into the conceptual practices of the Court, in the sense of questioning its role in the institution—but also in the desuetude—of legal knowledge. It arguably offers a reading of judicial-making which differs both from the traditional Whig history of the jurisprudence and from approaches that reduce legal controversy to a mere reflection of more fundamental oppositions. Taking insights from science and technology studies, anthropology of knowledge, and pragmatic sociology, the purpose of the study has not been to uncover what is behind legal forms. I have focused on law and legal concepts instead, as a set of knowledge practices and inquired into the transformative power of legal techniques. The inquiry outlined in this paper could be developed in different directions. First, while I focused on the CJEU cases and the debate surrounding them, investigations into the circulation of this knowledge and the work of other legal actors should be undertaken more broadly. Beyond that, to fully deal with the constitutive dimension of legal controversy, we should also investigate its role in framing debates outside the legal forum. Finally, taking the practices of legal actors seriously may not be seen as an end in itself, but as a way to develop a better understanding of the case law that allows a more informed critique of the Court's activity.

[80] I take the expression from Levi, Edward H Levi, 'An Introduction to Legal Reasoning' (1948) 15 The University of Chicago Law Review 501.