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Inquiring into the technicalities of EU law

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I will argue that the technicalities of EU law are a very rich field of inquiry in themselves. By technicalities, I refer to the most technical aspects of EU legal knowledge: legal concepts such as “the scope of application of EU law”, legal doctrines such as “*effet utile*”, and structures of reasoning such as “proportionality analysis”. What I propose then, is to look at the very surface of EU law. It may sound trivial, but I argue that the technicalities of EU law have been neglected and that an in-depth inquiry is lacking. To see why such an inquiry might be interesting, we must go beyond the traditional understanding of legal technicalities and see them as protagonists in their own right. We need to focus on lawyers’ knowledge practices and to inquire into the transformative power of legal technicalities.

Technicalities as a blind-spot in EU legal studies. Roughly speaking, research on EU law has been divided into two camps, two groups of scholars. A first group – including political scientists, sociologists, cultural approaches, critical theory – share a lack of interest in technicalities. They often call for going under the surface, beyond the merely technical dimension of law. Law is mainly seen as an epiphenomenon. What is important lies elsewhere. A second group is composed by doctrinal scholars, i.e. lawyers who are mainly concerned with interpreting legal material or providing solutions to specific cases. They are so immersed in the use of technicalities that they no longer see them, they tend to naturalise them and do not put them into question. In the words of [Lévi-Strauss](#), lawyers are often stuck between “journalism” and “theology.” Or, put it in [Pierre Schlag](#)’s terms, between “case-law journalism” and “normative legal thought”.

Thinking the agency of legal technicalities. Paradoxically, research in disciplines other than law can be useful to view legal technicalities as a very rich field of inquiry in their own right. The anthropologist and lawyer [Annelise Riles](#), drawing on science, technology and society studies (STS) and the anthropology of knowledge, has urged scholars from cultural studies, including anthropology, legal history and critical theory, “to take on the technicalities.” Likewise, [Mariana Valverde](#) argues that it may be a mistake to neglect what is going on at the surface in favour of searching for what should lie behind. Legal formulas, concepts and techniques can be a very rich field of inquiry in themselves, provided they are not viewed 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 participate in the institution of the legal and social realities they pretend to regulate. Embedded within a cultural practice, they enable and at the same time limit what participants in a language-game can do, but also what they may want to do.

Law as politics by other means. I do not deny that law is an instrument of power and that the study of the power dynamics behind the use of legal techniques and concepts can be interesting. However, I propose to focus on the instrument itself, i.e. on legal technicalities. To transpose a motto from STS, law is “[politics by other means](#).” With this in mind, I propose to focus on law and legal technicalities as a set of knowledge practices and to inquire into their transformative power. This study differs from classical doctrinal studies that aim

to interpret legal material or provide solutions to specific cases—often fetishizing legal concepts. It should also be distinguished from approaches that view legal concepts as mere reflections of deeper social forces—and so “[fetishizing society](#).” The proposed study is inspired by a longstanding concern to avoid both “[internalist reductivism](#)” and “[externalist reductivism](#)” (for two classic but different expressions of this concern see [Yan Thomas](#) or [Pierre Bourdieu](#)).

Possible inquiries. The practices under consideration could be referred to as “knowledge work”, which encompasses the various “[forms of knowing, theorizing, judging, analysing and reflecting that constitute the practices of legal actors](#).” This work can be performed by a range of actors, for instance from the superintendent registrar of the city council, to an ECJ judge or Advocate General, and may even include men and women on the street. Studying such practices could lead to very different research strategies. The inquiry could focus on all the different actors involved in the production of EU legal knowledge. It could involve different research programs, such as text analysis, interviews, ethnographic observations, or prosopography. What is crucial is to adopt a particular perspective towards these materials by taking knowledge practices seriously. This means understanding these practices on their own terms and investigating the agency of the legal technicalities involved

Two family name cases. I will not engage in ethnographic fieldwork but will illustrate how these insights could be used to investigate legal controversies through “traditional” legal materials such as judicial decisions and academic writings. To do this, I will examine two well-known cases from the ECJ case-law that deal with European citizenship and the recognition of surnames. In [Garcia Arellano](#), 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](#), the Court decided that [article 21 of the 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.

“Authentic and legally valid meaning” vs “real drivers”. One scholarly strategy for analyzing these cases, corresponding to the first group of scholars mentioned above, is to look for the reasons that led the Court to decide as it did (for example, because of the political preferences of the judges). The controversy before the Court as to the interpretation and application of EU law is seen as epiphenomenon, reflecting deeper oppositions defined in other terms. Another strategy, corresponding to the second group of scholars, is to explain why the Court could be characterized as activist or deferent, based on an assessment of the correctness or coherence of its interpretation of EU law. This implies direct participation in the legal controversy over the meaning of EU law. These two ways of approaching EU law correspond to the two agendas that have long dominated studies of the Court : “[a legal concern with the authentic and legally valid meaning of EU jurisprudence, and a political scientific concern with the alleged real drivers of the Court of Justice and its legal and political consequences](#)”.

Understanding legal controversy in its own terms. Inquiring into knowledge practices and focusing on the technicalities of EU law raises other kinds of questions. How does the Court contribute to the institution of legal knowledge by applying typical formulas in different contexts, and thus reassembling these contexts into seemingly coherent concepts and categories? How are the meanings of concepts, forms and techniques of EU law constructed through controversy involving different participants? What are the implications of the fact that this controversy takes place within a particular language or grammar? To investigate these questions, I adopt an understanding of legal controversy inspired by science, technology and society studies and the pragmatic sociology developed in France following the work of [Luc Boltanski and Laurent Thévenot](#). This approach could be called institutive, the controversy is studied in itself and for what it produces, its terms are taken seriously, the emphasis is put on its constitutive dynamic (on this, see [Cyril Lemieux](#)). It helps us to avoid the pitfalls both of a Whig History of the case law, and of the reduction of legal controversy to the mere reflection of more fundamental oppositions. Returning to *Garcia Avello* and *Sayn-Wittgenstein*, this approach can for instance help us, for example, to understand what is at stake in the process of justifying national measures restricting free movement before the ECJ.

Justification as a translation process. This justification, which is very common in internal market cases, requires framing national reasons, or the lack thereof, in specific terms. It can thus be analyzed as a subversive process of translation, since it requires the adoption of a conception of law that is specific to EU law and it necessitates a (re)definition of the objectives of the national measures at stake in the terms of EU law. Belgium presents the principle of the immutability of surnames, written in the Civil Code, as “a founding principle of social order, of which it continues to be an essential element”. In Germany, the partial prohibition on bearing titles of nobility is a constitutional norm, dating back to the Weimar Constitution. In principle, Belgian and German judges do not have to go beyond the normative value of these rules to apply them (they can, of course, rely on a broader system of justification such as the idea that their national constitution is a compromise on which the social order is based). Before the ECJ, the situation is radically different: these rules must be presented as a means to social ends, such as preventing “risks of confusion as to identity or parentage of persons” (*Garcia Avello*, para 42) or implementing “the more general principle of equality before the law of all Austrian citizens” (*Sayn-Wittgenstein*, para 84 and 88). The State representative must provide reasons justifying the rule *hic et nunc*, on the occasion of the case and within the intellectual framework of the proportionality analysis, as practiced by the Court.

Thinking the ends through the means. This implies adopting an instrumental conception of the law, in the sense that national rules are not conceived as such but must be presented as a means to an end. This instrumental conception could be seen as a form that is specific to free movement law. The above cases demonstrate that the ends mentioned by Member States governments are not defined independently of the means or outside the law. I am not suggesting that there were no reasons behind the adoption of such measures. However, the ends they are supposed to serve are (re)thought by the States’ agents in the process of justification before the ECJ and in the language of EU law. Although these ends may appear to be unrelated to Union law, they are actually constructed within it. As [Annelise Riles](#) demonstrated in a very different context, “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”. This is illustrative of a situation where the ends are thought through the means: it is the controversy about the means—national measures concerning surnames—that leads to the enunciation of the ends—avoid risks of confusion as to identity or parentage or equality.

Conclusion. The conclusion that the Court was highly activist in *Garcia Avello* and deferential in *Sayn-Wittgenstein* is of limited interest for understanding what is at stake in these cases. Even explaining why the Court could be characterized 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 example, because of the political preferences of the judges) would only tell part of the story. Focusing on the technicalities of EU law allows us to see something else: justification implies a process of translation, which requires the adoption of a conception of law specific to EU law and a (re)definition of the objectives of the national measures at stake in the terms of EU law. Based on a very limited field of investigation, I argued that legal knowledge is far from being a simple means, making it possible to achieve ends defined elsewhere. I have also tried to show that certain positions cannot be defended outside the framework of a particular language and that what is presented as external to the law is sometimes already constructed within a legal framework. More generally, I hope this suggests that the technicalities of EU law should be seen as a rich field of inquiry in themselves, and that their agency should be taken seriously (for a more detailed defence, see [here](#) and [here](#)).