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# *The Revolutionary Doctrines of European Law and the Legal Philosophy of Robert Lecourt*

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## **Abstract**

*The creation of today's European legal order is usually traced back to a set of remarkable decisions made by the European Court of Justice in 1963 and 1964. Where, however, did the content of those judgments come from? After all, the doctrines advanced by the Court in its Van Gend en Loos, Costa v. ENEL and Dairy Products decisions were not set out in the Treaty of Rome itself. This article uses writings by French judge Robert Lecourt to show how the legal philosophy which Lecourt had developed before his appointment to the Court, in his scholarship on French property law, can be directly related to the fundamental doctrines that the Court created after his appointment, indicating that one of the major objectives of the dominant faction on the Court in 1963 and 1964 was a comprehensive rejection of any form of reciprocal or retaliatory self-help between the European states.*

## **1 Introduction**

Today's European legal order, with the European Court of Justice (ECJ) at its centre, provides the authoritative settlement of disputes between states, European institutions, firms and individuals within the European Union (EU).<sup>1</sup> Particularly when

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<sup>1</sup> The European institutions have been renamed several times since 1958. This article uses the expressions 'European Union' and 'European Community' interchangeably to describe the European treaty organization throughout the period from 1958 to the present day; 'European Court of Justice', 'Court of Justice', 'European Court' and 'ECJ' interchangeably to refer to the Court of Justice first provided for in the 1958 Treaty of Rome and 'European law' and 'Community law' interchangeably to describe the legal system established by the Treaty.

compared to other treaty-based dispute settlement systems, the EU's legal system is recognized as remarkably effective, intrusive and innovative. The European legal order has, indeed, come a long way since Article 164 of the 1958 Treaty of Rome provided for a Court of Justice 'to ensure that in the interpretation and application of this Treaty the law is observed'.<sup>2</sup>

The strength of the European legal order is often understood to derive from a set of 'revolutionary' doctrines first established by the Court of Justice in 1963 and 1964. These doctrines, most prominently the direct effect and supremacy of European law, but also the comprehensive rejection of self-help enforcement by the European states, distinguished the then emerging European legal order from general international law and provided for private individuals and domestic courts to take a direct role in enforcing European obligations within their national legal orders. Over time, as these doctrines were extended to a wider range of scenarios and as they came to be understood and accepted (not without hesitations) by policymakers, courts and private actors within the European states, these early decisions of the Court provided the foundations of European law as we now know it.

Such is the identification of the essential features of the European legal order with the doctrines that the Court of Justice announced in its decisions in 1963 and 1964 that it is frequently necessary to remind new students that these doctrines were not explicitly set out in the Treaty of Rome. Where then did the fundamental doctrines of European law come from? At one level, the simplest answer to this question is that these doctrines were invented by the Court of Justice, interpreting the sparse provisions of the Treaty in the light of the disputes that came before it. At another level, such an answer merely restates the question: where, then, did the contents of these European Court decisions come from? Apart from a variety of facilitating background conditions external to the Court itself, it is at this point that progress has stalled, not least because the Court's judgments are presented as unanimous, its internal deliberations are secret and little information has emerged concerning the contributions of particular individual judges to the judgments produced by the Court as a whole.

There is much at stake here. The EU is one of the most extraordinary treaty organizations in contemporary world politics, providing binding rules for now 28 European states and several hundred million European citizens. Yet the EU itself remains somewhat mysterious and ill-defined, clearly distinct from more common forms of international organization but comprehensively lacking the 'Weberian' monopoly of legitimate violence that is the characteristic definition of a state. Instead, the EU is understood as a 'community of law', a *Rechtsgemeinschaft*, the German word that captures the special role of law and courts in this treaty institution. The study of the EU has therefore often been the study of European law and of the role of the Court of Justice. Leading studies have examined how politicians, courts and lawyers have

<sup>2</sup> These treaty provisions have been renumbered as the European treaties have been amended. Here we use the original numberings of the treaty provisions contained in the founding Treaty of Rome. Treaty Establishing the European Economic Community 1957, 298 UNTS 3.

reacted to the Court's extraordinary new doctrines at a time when the EU was still largely a trade regime.<sup>3</sup> Others have focused on contemporary questions such as the influence of European law in issue areas as diverse as disability policy and cross-border health care, and there is a lively debate about the degree to which the Court's decisions vary according to legal pressures placed on it by the European states.<sup>4</sup> This special role of law and courts is commonly agreed, however, only to have been partially set out in the founding Treaty and, instead, to have been created by the Court of Justice itself, above all in its decisions in 1963 and 1964. The study of the origins of the fundamental doctrines of the European legal order is therefore a study central to our understanding of the organizing principles of the EU itself.

The importance of this research question suggests the need for new investigative strategies. Research on courts at other times and places has frequently found that court decision making can be explained by commitments that judges had assumed prior to their appointment to the courts – as shown, for example, in the various ways that the Supreme Court of the United States was influenced by the individual background of John Marshall, its chief justice between 1801 and 1835.<sup>5</sup> Here we will use overlooked sources to demonstrate that one part of the answer to the question – where did the fundamental doctrines of the European legal order come from? – is that these doctrines as a group, and, above all, the European legal order's comprehensive rejection of any methods of self-help reciprocity or retaliation by the European states, appear to be derived from the legal philosophy that Robert Lecourt, former French politician and one of the most influential judges on the Court in the 1960s and 1970s, developed in his early scholarship on French property disputes. This discovery has significant consequences for our understanding of what the dominant faction on the Court was attempting to achieve in its 'legal revolution' of 1963 and 1964 and, therefore, for our understanding of the EU's essential organizing principles.

<sup>3</sup> See Weiler, 'The Transformation of Europe', 100 *Yale Law Journal* (1991) 2403; Burley and Mattli, 'Europe before the Court: A Political Theory of Legal Integration', 47(1) *International Organization* (IO) (1993) 41; K. Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (2001); P. Lindseth, *Power and Legitimacy: Reconciling Europe and the Nation-State* (2010); A. Vauchez, *Brokering Europe: Euro-Lawyers and the Making of a Transnational Polity* (2015). On the history of European law's relationship with national constitutional rights, see B. Davies, *Resisting the European Court of Justice: West Germany's Confrontation with European Law, 1949–1979* (2012); Phelan, 'The Limited Practical Relevance of National Constitutional Rights as a Constraint on the National Application of European Law in the Early Decades of European Integration', 17(1) *Irish Journal of European Law* (2014) 43.

<sup>4</sup> D. Martinsen, *An Ever More Powerful Court?: The Political Constraints of Legal Integration in the European Union* (2015); Carrubba, Gabel and Hankla, 'Judicial Behavior under Political Constraints: Evidence from the European Court of Justice', 102(4) *American Political Science Review* (APSR) (2008) 435; R. Kelemen, *Eurolegalism: The Transformation of Law and Regulation in the European Union* (2011); Stone Sweet and Brunnel, 'The European Court of Justice, State Non-Compliance, and the Politics of Override', 106(1) *APSR* (2012) 204; Larsson and Naurin, 'The European Court of Justice, State Non-Compliance, and the Politics of Override', 70(2) *IO* (2016) 377.

<sup>5</sup> E.g., C. Hobson, *The Great Chief Justice: John Marshall and the Rule of Law* (1996).

## 2 The Fundamental Doctrines of European Law

By far the most common approach to identifying the fundamental doctrines of the European legal order is to refer to the doctrines of ‘direct effect’ and ‘supremacy’.<sup>6</sup> The doctrine of direct effect was first set out in the *Van Gend en Loos* judgment, on 5 February 1963, where the Court of Justice proclaimed that the then European Community constituted a ‘new legal order’ (in the original French, ‘*un nouvel ordre juridique*’) and, therefore, that individuals, such as firms and private citizens, could directly vindicate their European law rights through litigation in national courts, which in turn were encouraged to submit questions about the interpretation of those European law rights to the European Court itself through the so-called ‘preliminary reference’ procedure set out in Article 177 of the Treaty of Rome.<sup>7</sup> One year later, on 15 July 1964, the supremacy doctrine was set out in the *Costa v. ENEL* judgment, where the Court of Justice declared that national courts were required to apply directly effective European law obligations even if these were in conflict with national law, including newly enacted national legislation.<sup>8</sup>

The doctrines of direct effect and supremacy, and, therefore, the decisions of the Court in *Van Gend* and *Costa*, are often understood, as a pair, as the essential foundations of the European legal system, developed and extended to be sure in a stream of famous decisions throughout the 1960s and 1970s. By granting rights to individuals before national courts (direct effect), and by protecting those rights against conflicting national legislation (supremacy), the European Court to some extent marginalized the enforcement mechanisms explicitly set out in the Treaty of Rome. Article 169, in particular, had authorized the European Commission (the secretariat or bureaucracy established by the Treaty) to bring a member state before the Court of Justice, to obtain a declaration by the Court finding that the state had failed to fulfil its Treaty obligations. This mechanism, however, required business interests adversely affected by treaty violations to wait for the Commission to bring a member state before the Court, with all of the delays and frustrations involved, whereas the direct effect and supremacy doctrines provided an enforcement mechanism that was much more openly available to firms and individuals themselves and where enforcement was in the hands of a national court. The question ‘Where did the fundamental doctrines of the European legal order come from?’ must therefore offer an answer to the question ‘Where did the European law doctrines of direct effect and supremacy come from?’

However, this is not the only way to identify the most fundamental doctrines of the European legal order. A long-standing alternative stresses European law’s persistent and comprehensive rejection of any form of self-help by the European states as a mechanism for enforcing European obligations. In general international law, the possible use of such self-help activities, whether described as ‘reciprocity’, ‘retaliation’,

<sup>6</sup> Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, [1963] ECR 1; Case 6/64, *Flaminio Costa v. ENEL*, [1964] ECR 585.

<sup>7</sup> *Van Gend*, *supra* note 6.

<sup>8</sup> *Flaminio Costa*, *supra* note 6.

'countermeasures', or (in trade-related treaties) the 'suspension of equivalent concessions', often appears to be an unavoidable necessity in dispute settlement arrangements, despite the economic disruptions and diplomatic tensions involved in their use.<sup>9</sup> This is especially true in the scenario where a state persists in defaulting on a treaty obligation even after all treaty-based dispute resolution procedures have been finally completed. In such a case, its treaty partner states may themselves impose retaliatory penalties by reducing their own fulfilment of treaty obligations towards the defaulting state. Non-fulfilment of treaty obligations is therefore justified as a response to prior failures by other parties, and, after all, such self-help remedies can be imposed by other states even if the defaulting state does not cooperate in the acceptance of a penalty. Certainly, it is accepted that the dispute settlement systems of the World Trade Organization (WTO), and of many other trade treaties, require the ability to authorize such a self-help-based 'tit-for-tat' retaliation mechanism 'as a last resort' – indeed, a last resort whose presence pervades such trade systems as a whole.<sup>10</sup>

Necessary to many forms of international law as such self-help forms of retaliation appear to be, however, such activities were comprehensively ruled out within the European legal order by the Court of Justice in its *Dairy Products* decision of 13 November 1964.<sup>11</sup> In the words of the Court:

[i]n [the defendants'] view, ... international law allows a party, injured by the failure of another party to perform its obligations, to withhold performance of its own. ... However, this relationship between the obligations of parties cannot be recognized under Community law. ... [T]he basic concept of the treaty requires that the Member States not take the law into their own hands.

The final sentence of this famous passage is often reported in the Court's original French: '*[L]’économie du traité comporte interdiction pour les états membres de se faire justice eux-mêmes.*' One of the benefits of the European legal order for the states and firms in the intra-European market, therefore, is that trading relationships are not threatened by the pervasive latent possibility of the authorization of retaliatory sanctions between the various states, as they are within the WTO and many other trade-related treaty systems.

The principle announced in the Court's 1964 *Dairy Products* decision must be considered 'revolutionary', as Lorenzo Gradoni and Attila Tanzi explain, and, indeed, so Joseph Weiler claims, it is what makes European law 'something new'.<sup>12</sup> 'Nothing is more alien to Community law than the idea of a measure of retaliation or *reciprocity* proper to classical public international law', declared the Court of Justice's Advocate

<sup>9</sup> E.g., E. Zoller, *Peacetime Unilateral Remedies: An Analysis of Countermeasures* (1984).

<sup>10</sup> E.g., C. Bown, *Self-Enforcing Trade: Developing Countries and WTO Dispute Settlement* (2009).

<sup>11</sup> Cases 90/63 and 91/63, *Commission of the European Economic Commission v. Grand Duchy of Luxembourg and Kingdom of Belgium (Dairy Products)*, [1964] ECR 625.

<sup>12</sup> Gradoni and Tanzi, 'Diritto comunitario: una lex specialis molto speciale', in L.S. Rossi and G. Di Federico (eds), *L'incidenza del Diritto dell'Unione Europea sullo Studio delle Discipline Giuridiche* (2008) 37, at 50; Weiler, *supra* note 3, at 2422. *Dairy Products*, *supra* note 11.

General Léger in 1995.<sup>13</sup> Léger's double description is an apt one since neither international law nor the practice of states in international relations offers any clear line between reciprocity's principle that I-am-doing-this-because-you-are-doing-that and retaliation's alternative formulation I-am-withholding-my-performance-of-this-to-punish-you-for-not-doing-that. Given the essential role of such forms of self-help by states within other treaty regimes and in general international law, the question 'Where did the fundamental doctrines of the European legal order come from?' must therefore also include a discussion of the origins of the doctrine announced by the Court in the *Dairy Products* case.

### 3 Explaining the Origins of the Fundamental Doctrines of the European Legal Order

Perhaps the place to start this discussion is to note that leading ECJ judges have often maintained that these doctrines were required by the Treaty of Rome, particularly the ringing call for 'an ever-closer union among the peoples of Europe' in the Treaty's preamble, even if the Court itself had taken an active role in drawing these consequences from the Treaty texts. Robert Lecourt, French judge on the Court from 1962 to 1976 and president of the Court between 1967 and 1976, explained in his 1976 book *L'Europe des Juges* (*The Judges' Europe*) that the judge on the Court of Justice 'could add nothing to the treaties, but should give them all their meaning and bring to its provisions all the useful consequences, explicit or implicit, that their letter and the spirit commanded'.<sup>14</sup> Lord Mackenzie-Stuart, British judge on the Court from 1973 to 1988 and president of the Court from 1984 to 1988, similarly responded to criticism that the Court had a policy of expanding the scope of the 'direct effect' doctrine, by claiming that '[i]t is the Treaties and the subordinate legislation [rules produced by the European institutions] which have a policy, and which dictate the ends to be achieved. The Court only takes note of what has already been decided'.<sup>15</sup>

Many observers, however, reject the view that the Court's revolutionary judgments in 1963 and 1964, as well as the larger number of foundational decisions throughout

<sup>13</sup> Case C-5/94, *The Queen v. Ministry of Agriculture ex parte Hedley Lomas*, [1996] ECR I-2553, at para. 27 (emphasis in original). *Dairy Products*, *supra* note 11, is sometimes understood as primarily a response to Art. 55 of the 1958 French Constitution, which provided that treaties prevailed over French legislation subject to their application by the other states. However, this is only one aspect of the story, as Art. 55 should itself be understood as derivative of the broader importance of self-help and reciprocity in treaty enforcement in the history of international law, and Community law would have required a position on the 'retaliation or reciprocity proper to classical public international law' and on the claims made by Belgium and Luxembourg in *Dairy Products*, regardless of the contents of the French Constitution. As we will see, Lecourt's rejection of self-help in law enforcement appears to have predated France's 1958 Constitution, and Lecourt's mention of *Dairy Products* in his 1965 article makes no connection with the reciprocity aspect of the French constitutional provision.

<sup>14</sup> R. Lecourt, *L'Europe des Juges* (1976), at 237.

<sup>15</sup> A. Mackenzie-Stuart, *The European Communities and the Rule of Law* (1977), at 77.

the 1960s and 1970s, were straightforwardly required by the Treaty of Rome. Instead, it is accepted that the Court itself, far from adding 'nothing' to the Treaty, did indeed have a 'policy' during these years and that this policy represented a choice by decision makers on the Court to interpret the Treaty in a distinctive way. After all, as many scholars have pointed out, the Treaty of Rome said nothing about the direct effect of Treaty provisions, nothing about the supremacy of European obligations within the national legal orders and nothing about the Treaty's rejection of classical international law-style retaliation or reciprocity between states. The Treaty of Rome may have provided an important framework, but the Court itself is understood as the real 'creator' of the European legal order as it later developed.<sup>16</sup>

While scholarship on the creation of the European legal order frequently acknowledges the remarkable initiatives taken by the Court in 1963 and 1964, however, for the most part this scholarship makes little attempt to offer a specific explanation of the Court's creation of these new doctrines themselves. Perhaps inhibitions about inquiring too closely into officially secret judicial deliberations may have played a role here. In any event, many leading contributions instead take the Court's famous declarations on 'direct effect' and 'supremacy', not as outcomes that must themselves be explained but, rather, as starting points for other research projects, most commonly the puzzle of why other actors came to accept the Court's new doctrines.

In political science explanations of European legal integration, for example, it is often understood that the ECJ's behaviour can be straightforwardly explained by self-interest – the Court's incentive to increase its legal authority. As Anne-Marie Burley and Walter Mattli write, '[i]t is obvious that any measures that succeed in raising the visibility, effectiveness, and scope of [European] law also enhance the prestige and power of the Court and its members'.<sup>17</sup> The more challenging question, then, is why the European states, the national courts, firms, private lawyers and legal academia came to accept these new doctrines when the compatibility of these with their own self-interests appears to be rather more ambiguous. After all, European law's claim to hierarchical superiority, which is inherent in a 'supremacy' doctrine, empowered the Court of Justice, but what interest did other actors have in accepting their resulting hierarchical subordination? Scholarship has put forward a range of interesting answers to this question, including a persistent emphasis on the apparent interest of 'lower' national courts in cooperating with the Court of Justice to gain powers over both politicians and 'higher' courts within their national jurisdictions as well as the incentives for the European states to accept and manage such demanding mechanisms of treaty enforcement arising from high levels of interdependence, growing intra-industry trade, generous welfare states and post-war forms of parliamentary

<sup>16</sup> Weiler, 'A Quiet Revolution: The European Court of Justice and Its Interlocutors', 26(4) *Comparative Political Studies* (1994) 510.

<sup>17</sup> Burley and Mattli, *supra* note 3, at 64.

governance.<sup>18</sup> Whatever answer is offered, however, such research agendas do not contribute to answering the particular question addressed here about the origins of these doctrines themselves.

Such scholarship as has focused on explaining the origins of the new doctrines of European law has indicated that a variety of background conditions, external to the Court itself, facilitated the Court's groundbreaking decisions. Some would point to the possibility that the judges wished to produce concrete advances for 'Europe' at a time (the early 1960s) when French President Charles de Gaulle had loudly criticized the European institutions and, on the more strictly legal side, to a 1928 opinion of the Permanent Court of International Justice discussing the direct effect of treaty obligations on the rights and duties of individuals<sup>19</sup> as well as the more widespread contemporary state practice in which treaty obligations could at times be enforced directly before national courts.<sup>20</sup> More specifically, Dutch constitutional revisions in the 1950s had provided for directly effective treaty obligations to be applied by the Dutch courts, prompting the Dutch court's preliminary reference to the ECJ in *Van Gend*,<sup>21</sup> and the legal services of the European Commission, under the energetic leadership of Michel Gaudet, had pressed the Court to make far-reaching rulings, as did litigants in disputes brought to the Court by national courts through the preliminary reference procedure.<sup>22</sup> Such legal precursors are certainly interesting, but they do not provide clear analogies to the European legal order as it came to be developed with a much broader scope for 'direct effect' than was accepted in mainstream approaches to international law and with a treaty-based tribunal itself deciding on the (continuously expanding) scope of direct effect and on the explicit supremacy of treaty obligations within national legal orders regardless of the principles of national constitutional law. It must also be true that the Court was encouraged along its way by the legal services of the European Commission and by various litigants and national courts, although not every judge would have accepted the ambitious arguments put before the Court, and, indeed, the principles announced in the Court's decisions often went beyond those required to address the disputes in front of it.

<sup>18</sup> Weiler, *supra* note 3; W. Phelan, *In Place of Inter-State Retaliation: The European Union's Rejection of WTO-style Trade Sanctions and Trade Remedies* (2015), particularly at 135–151; see, however, at 46, n. 31, for scepticism as to the empirical evidence that 'lower' national courts were motivated by opportunities for 'judicial empowerment'.

<sup>19</sup> *Jurisdiction of the Courts of Danzig*, Advisory Opinion, 1928 PCIJ Series B, No. 15, at 17.

<sup>20</sup> M. Waelbroeck, *Traité internationaux et juridictions internes dans les pays du Marché commun* (1969), at 161–188; Weiler, *supra* note 3, at 2424–2425; Davies, *supra* note 3, at 111.

<sup>21</sup> Van Leeuwen, 'On Democratic Concerns and Legal Traditions: The Dutch 1953 and 1956 Constitutional Reforms "Towards" Europe', 21(3) *Contemporary European History* (2012) 357.

<sup>22</sup> E.g., Rasmussen, 'Revolutionizing European Law: A History of the *Van Gend en Loos* judgment', 12(1) *International Journal of Constitutional Law* (2014) 136, at 154; Rasmussen, 'Establishing a Constitutional Practice of European Law: The History of the Legal Service of the European Executive, 1952–65', 21(3) *Contemporary European History* (2012) 375; Bailleux, 'Michel Gaudet, a Law Entrepreneur: The Role of the Legal Service of the European Executives in the Invention of EC Law and the Birth of the Common Market Law Review', 50 *Common Market Law Review (CMLR)* (2013) 359.



One strand of historical scholarship has attempted to uncover the varying roles of the Court's judges themselves during these years, with some impressive results. Via interviews with long-retired 'legal attachés' (similar to the 'clerks' of US judges), we know now that the famous *Van Gend* decision was the occasion of a behind-the-scenes struggle between the far-reaching decision supported by Italian judge Alberto Trabucchi and newly appointed French judge Robert Lecourt, on the one hand, and the then president of the Court, Dutch judge Andreas Donner, who initially supported a more limited decision, on the other.<sup>23</sup> Without the nomination of Lecourt as judge in 1962, therefore, the Court would likely have refused to declare the direct effect of European law in *Van Gend* in 1963.<sup>24</sup> As well as demonstrating that judges on the Court of Justice did indeed disagree among themselves about the meaning of the Treaty and how best to respond to the arguments put before it by litigants and the European Commission, this research has therefore revealed the identity of those judges who were, more than others, closely associated with these revolutionary new doctrines. We also know that Lecourt, in particular, seems to have become highly influential on the Court as time went on, culminating with his own election to the presidency of the Court from 1967 to 1976.<sup>25</sup> Another prominent judge, Pierre Pescatore, who joined the Court of Justice in 1967, even talked of the 'jurisprudential miracle' of the Court's 'Lecourt years' from 1962 onwards.<sup>26</sup>

With the important exception of the identification of the judicial 'winners' and 'losers' in the struggle over *Van Gend* and the long-term influence of Lecourt on the Court, however, little progress has been made on identifying the influence of particular judges on the revolutionary doctrines of European law. To be sure, there are clear reasons why such research is difficult to undertake. Above all, the Court of Justice (unlike, in this respect, the Supreme Court of the United States) produces only a single judgment presented by the Court as a whole, with no individually signed dissenting or concurring opinions. The individuality of the judges' participation in the Court's decisions thus remains hidden. The judges themselves are sworn to secrecy about their internal deliberations, and both the judges and their assistants have remained discrete about the internal functioning of the Court.

In the case of Robert Lecourt, who was, apparently, the leading judge on the Court throughout this period, the difficulties in researching this topic are further multiplied. Lecourt published no memoirs of his time on the Court. Historians have not written his biography, in long form or short. Lecourt's own legal scholarship, prior to his appointment to the Court, did not focus on international law or 'European federalism' but, rather, addressed issues of French civil law – he wrote a dissertation on litigation

<sup>23</sup> Rasmussen, 'The Origins of a Legal Revolution: The Early History of the European Court of Justice', 14(2) *Journal of European Integration History* (2008) 77, at 94–95.

<sup>24</sup> *Ibid.*, at 98.

<sup>25</sup> Edward, 'Lord Mackenzie-Stuart of Dean LLB, LLD', *Yearbook of the Royal Society of Edinburgh* (2001) 180.

<sup>26</sup> Pescatore, 'Robert Lecourt (1908–2004): Eloge funèbre prononcé par Pierre Pescatore ancien Juge de la Cour, à l'audience solennelle du 7 mars 2005', *Revue trimestrielle de droit européen* (2005/3) 589, at 595.

seeking to re-establish possession of real estate, for example.<sup>27</sup> His 1976 book on European law, *L'Europe des Juges*, is mostly bland, avoids theoretical debate and was aimed squarely at popularizing European law with 'legal practitioners' – that is to say, with national lawyers and judges who might apply European law in national litigation.<sup>28</sup> As for his private papers, Lecourt apparently had them destroyed prior to his death.<sup>29</sup>

On the crucial issue of Lecourt's detailed opinions about 'Community law' before the Court's legal revolution, previous scholarship by Morten Rasmussen has identified only 'two important traces' of 'Lecourt's legal thinking before *Van Gend en Loos*', one a 1962 article by Lecourt in *Le Monde* and the other a decision by the Court in December 1962, whose wording Lecourt may perhaps have influenced (so Judge Pescatore conjectured in hindsight).<sup>30</sup> We might add that studies of appointments to the Court sometimes use Lecourt as an example of a judge with a 'political career' background, rather than a background as an academic or national judge.<sup>31</sup> Lecourt had indeed been minister of justice several times in Fourth Republic France as well as minister of state under Charles de Gaulle and was a long-time Christian Democratic politician and campaigner for European unity.<sup>32</sup>

There is, therefore, considerable research attempting to explain the origins of the remarkable legal, and, frankly, political, authority of today's ECJ. This authority is usually traced back to a set of revolutionary decisions that the Court made in 1963 and 1964, which raises the question of where, in turn, the contents of those decisions came from? They were not required by the European treaties themselves, and our knowledge of legal precursors and legal manoeuvring outside the Court is much stronger than our understanding of the contributions of the judges on the Court itself. We do know a little about the struggle within the Court to produce those decisions, a struggle won over the long term, most obviously, by Robert Lecourt. However, whether in law, political science or in historical studies, this is where the trail runs cold. Citing a comprehensive lack of any available sources that can identify the prior and relevant legal or political commitments held by Lecourt (beyond his being a 'pro-European') or of any other of the leading judges, the Court's trail-blazing decisions appear to come from 'the law' or perhaps from the self-interested motivations of the Court itself in aggrandizing its position.

<sup>27</sup> R. Lecourt, *Nature juridique de l'action en réintégration: étude de la jurisprudence française* (1931).

<sup>28</sup> Lecourt, *supra* note 14; cf., Schermers, 'L'Europe des Juges by Robert Lecourt', 14 *CMLR* (1977) 261.

<sup>29</sup> Rasmussen, 'Constructing and Deconstructing "Constitutional" European Law: Some Reflections on How to Study the History of European Law', in Koch *et al.* (eds), *Europe: The New Legal Realism: Essays in Honour of Hjalte Rasmussen* (2010) 639, at 654, n. 58.

<sup>30</sup> Rasmussen, 'From *Costa v. ENEL* to the Treaties of Rome: A Brief History of a Legal Revolution', in M. Maduro and L. Azoulay (eds), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (2010) 69, at 77, n. 124. Cases 2/62 and 3/62, *Commission v. Luxembourg & Belgium*, 'Pain d'épices', [1962] ECR 425.

<sup>31</sup> Chalmers, 'Judicial Performance, Membership, and Design at the Court of Justice', in M. Bobek (ed.), *Selecting Europe's Judges: A Critical Review of the Appointment Procedures to the European Court* (2015) 51, at 58.

<sup>32</sup> *Le Figaro* (14 August 2004), at 12.

This impasse is profoundly unsatisfactory. First and foremost, we remain ignorant of the specific objectives of the dominant faction on the Court during the all-important founding years of what is now perhaps the world's most significant and innovative international organization since current scholarship rests on limited information about the legal goals and principles that these judges brought to the Court. Furthermore, even if we allow that the judges taking control of the Court in 1963 were indeed 'pro-Europeans', a considerable gap remains between possessing a 'pro-European' perspective, no matter how strongly felt, and creating an effective treaty-based legal system from the laconic provisions of the Treaty of Rome. The *Van Gend* decision of 1963 was not just 'pro-European' or even a mere derivative of the question posed to the European Court by the Dutch national court in the case. Rather, it was informed by a distinctive understanding of how a 'new legal order' could be established.

The same applies to all of the great ECJ decisions of the founding period – the texts of these decisions advance a perspective on the role of individuals, the European Court, national courts and states and on the ways in which European law would distinguish itself from ordinary forms of international law, which demonstrates a considerable coherence over many years. It thus seems likely that the principles and legal doctrines made use of by the Court in its revolutionary decisions derived, at least in important part, from legal principles and doctrines with which the most influential figures on the Court during these years were already familiar and therefore able to turn productively to the European task at hand as the opportunity arose.

This apparent impasse, however, suggests its own solution. By identifying the especially influential role of Lecourt on the Court from 1962 to 1976, there is reason now to focus our attention on Lecourt, in particular, as we attempt to investigate the origins of the European Court's major doctrines. Our approach, therefore, will be to turn to various of Lecourt's less well-known publications to identify distinctive aspects of his legal philosophy, both after and, crucially, before his appointment to the Court of Justice. These publications sometimes address legal topics that are apparently far from the concerns of the Court of Justice or describe the meaning of the foundational doctrines of European law in unfamiliar ways. We will be relying on examples of both of these types to demonstrate an important aspect of Lecourt's legal philosophy over a period of several decades.

#### 4 Lecourt's Legal Philosophy before the Court of Justice

The essential source for any understanding of Lecourt's legal philosophy before he joined the Court of Justice must be his dissertation on litigation in disputes over real property, which was completed at the University of Caen in 1931.<sup>33</sup> The underlying

<sup>33</sup> Lecourt, *supra* note 27. The only previous discussion, in European law scholarship, of Lecourt's dissertation is a brief comment by Lindseth, *supra* note 3 at 140, n. 26, who accurately describes its subject as the 'reestablishment of possession of property after violent dispossession', reflecting the 'strongly functionalist spirit of the interwar period', and notes Lecourt's emphasis on the *réintégrant* as an example of a 'purely jurisprudential construction necessitated by equity and circumstances when texts are silent or imprecise'.

disputes in question, unsurprisingly, covered a full range of mischiefs that can occur between neighbours, between occupiers of a property and the property's owners and between those in possession of real estate and governmental authorities. The examples that Lecourt discussed included the construction of barriers to block access to a road leading to a property, the flooding of lands by a neighbour inserting a channel in a bank, the prevention of the use of allegedly communal lands by a local mayor and even the occupation of an island by agents of the French state itself.<sup>34</sup> Each of these incidents led to litigation, of course, and court decisions on these disputes provided the empirical content of Lecourt's study.

The legal instrument that Lecourt chose as his subject was the so-called *l'action en réintégrande* – or *réintégrande* – a legal action to secure recovery of property. It was, and, indeed, is, a legal instrument by which a person who has been violently dispossessed of real property can ask a court to require that the property be reinstated to them. The fact that the *réintégrande* can be decided in a fast and simple procedure, and the property restored to the dispossessed party, prior to any litigation on the merits makes it a powerful instrument in determining the status quo of possession before any more fundamental litigation.<sup>35</sup> Disaggregated into its various parts, the *réintégrande* required a person to be in possession of a property ('the fact of possession') and an act by another party that has violently dispossessed them of it (the 'act of dispossession'). As is commonly the case in a doctoral dissertation, this topic allowed for a degree of theoretical debate since different approaches to understanding the *réintégrande* put varying emphases on the two elements that made up the conditions for its use.

The 'classic theory' of the *réintégrande*, as Lecourt described it, placed considerable emphasis on the qualifying condition of the 'possessor' as such. Seeing the foundation of the *réintégrande* as a legal instrument in the protection of possession itself, such scholarly discussions saw the *réintégrande* as only to be made available to a 'true possessor' ('*le vrai possesseur*') of a property – for example, those who had been in uninterrupted possession for at least a year.<sup>36</sup> Such approaches tended to see the *réintégrande* as belonging essentially to a family of *actions possessoires*, 'legal actions related to possession' often used in property disputes.

This understanding of the *réintégrande* Lecourt rejected. Empirically, he claimed that discussions of the *réintégrande* in leading scholarship found little support in the jurisprudence of the modern French courts.<sup>37</sup> The decisions of the courts were all-important here since the *réintégrande* was not itself well defined in any legislative text. Viewed in the light of the decisions of the courts, then, rather than as it was described by scholarship, Lecourt argued that the foundation of the *réintégrande* was as a right held by any possessor against any party who had violently usurped it, connecting it with the *réintégrande's* canon law origins as a mechanism for remedying property

<sup>34</sup> Lecourt, *supra* note 27, at 196, 216, 191, 193.

<sup>35</sup> *Ibid.*, at 11, 20.

<sup>36</sup> *Ibid.*, at 15.

<sup>37</sup> *Ibid.*, at 17, 279.

seizures in the disorder and private wars of France in the Middle Ages prior to the effective development of the French state<sup>38</sup> as well as to more contemporary problems such as ‘private justice’ employed by landlords whose interests had been adversely affected by wartime restrictions on property rights.<sup>39</sup> Thus, Lecourt set out to provide a theoretical understanding of the *réintégrande* that both matched, and could be used to extend, contemporary practice.

Addressing the various conditions for the exercise of the *réintégrande*, Lecourt first discussed decisions of the French courts on who could be considered a ‘possessor’. He demonstrated that the courts found that the *réintégrande* could be used by almost any person in possession of a property, even a ‘precarious possessor’.<sup>40</sup> Lecourt’s analysis then turned to the act of dispossession. Here he demonstrated that decisions of the courts allowed that the *réintégrande* be used against any act of dispossession involving, in the common expression, ‘*violences et voies de faits*’ (‘violence and assault’). Thus, the *réintégrande* could be employed against the property’s owner, against the property’s ‘true possessor’, against third parties, against local mayors and communes and even against the French state.<sup>41</sup> It was thus a personal action (*action personnelle*) against the individual, whatsoever their quality, who had violently deprived the actual possessor of the enjoyment of the property.<sup>42</sup>

Lecourt was careful to note that the frequent statements by the French courts that the *réintégrande* was applicable where dispossession had occurred by *violences et voies de faits* did not in fact require any violence as such to have occurred.<sup>43</sup> There was no need for ‘blood to be spilled’.<sup>44</sup> The essential issue was rather that the dispossession had occurred arbitrarily and that the author of the usurpation ‘wanted to take justice into their own hands’ or, in Lecourt’s original French, ‘*qu’il ait voulu se faire justice à lui-même*’.<sup>45</sup> Lecourt felt that this expression (used by the courts but contained in no legislative text) best captured the logic of the *réintégrande* as the courts actually practised it.<sup>46</sup> The rejection of such self-help in these property disputes was not just a moral principle but also the principle underlying all public order, as, indeed, many courts insisted in their *réintégrande*-related judgments.<sup>47</sup>

At the end of the dissertation, Lecourt forthrightly advanced his own new conception of the *réintégrande*, comparing and contrasting it with a variety of other instruments of French law. As he explained, this legal action was not an *action possessoire*, except indirectly.<sup>48</sup> In fact, the essential, and indeed only, basis of the *réintégrande* was

<sup>38</sup> *Ibid.*, at 11, similarly 241–242, 279–280.

<sup>39</sup> *Ibid.*, at 20.

<sup>40</sup> *Ibid.*, at 15.

<sup>41</sup> *Ibid.*, at 16, 18, 222–223.

<sup>42</sup> *Ibid.*, at 19.

<sup>43</sup> *Ibid.*, at 207.

<sup>44</sup> *Ibid.*, at 212.

<sup>45</sup> *Ibid.*, at 214.

<sup>46</sup> *Ibid.*, at 236.

<sup>47</sup> *Ibid.*, at 241.

<sup>48</sup> *Ibid.*, at 244.

that individuals should not have the right to use arbitrary self-help to dispossess others in property disputes. Lecourt concludes this discussion of French law by admiring the way in which the *réintégrande* had been developed by the French courts themselves, relying on no authoritative legislative texts – ‘a remarkable purely jurisprudential construction necessitated by equity and circumstances when texts are silent or imprecise’, as he put it, even though, as he acknowledged, the French legal system only envisaged the courts as ‘interpreters of law’ and not as ‘elaborators of rules’.<sup>49</sup>

Lecourt’s contribution to scholarship on the *réintégrande*, therefore, was to contest the scholarly consensus that it should be understood as a mechanism to protect the true possessors of a property and to declare instead that it was a creation of the courts to prevent public order being undermined by those who would take the law into their own hands. This contribution was acknowledged in later French legal scholarship, with Élisabeth Michelet in 1973, for example, attributing to Lecourt the view that ‘*la réintégrande est fondée sur le principe qu’il est interdit de se faire justice à soi-même*’.<sup>50</sup>

Our interest, of course, is not in legal scholarship on property disputes in early twentieth-century France but, rather, in the sources of the fundamental doctrines of the European legal order. We have defined those three doctrines as the direct effect of European law in the national legal orders, the supremacy of European law over conflicting national law and the absolute rejection of any form of self-help behaviours – retaliatory or reciprocal – by the European member states. As should now be evident, the latter doctrine, the comprehensive rejection of any form of self-help in European law is directly foreshadowed by Lecourt’s insistence that the essential foundation of the *réintégrande* was a comprehensive rejection of any form of self-help in property disputes.

This link is reinforced by a striking passage on the last two pages of Lecourt’s dissertation. Like many doctoral students, Lecourt, having completed nearly 300 pages of technical discussion, felt himself entitled to conclude with a flourish on a wider vision:

The repression of violence is therefore the basis of Law. So much for domestic Law.

This principle is so essential to the life of society – it is so much the foundation of all law – that it is the object today of a considerable expansion in international law. It has been unanimously recognized that violence between peoples has even more disastrous consequences than violence between individuals. International law is virtually in its origins, starting at the point where domestic law began.

States have agreed to outlaw violence now and put the ‘war outside the law’. And these ideas are progressing every day. Already international organizations have been created to limit, and, if possible, prevent, violent conflicts between peoples and to substitute violence with law. The very principle that once stopped private wars is used today to prevent world wars. This is the prohibition for anyone – individuals or nations – to resort to violence and the obligation of all to present themselves before a judge instead of taking the law into their own hands. This principle has always developed in parallel with the Law. Where the Law extends to a new area, this principle appears as a foundation. Its extension is so great and so visible that, although once limited to conflicts between private interests, it now constantly tends to apply to disputes between

<sup>49</sup> *Ibid.*, at 236, 282.

<sup>50</sup> É. Michelet, *La règle du non-cumul du possesseur et du pétitoire* (1973), at 180.

peoples. This has been reflected in international law especially during the last decade through the creation of international organizations: the League of Nations, international conferences (disarmament conferences), international tribunals that play an important role in the relations between States. These organizations are called upon to prohibit violence among peoples and nations just as it has long been forbidden to individuals to take the law into their own hands. Finally, they tend to replace the use of violence with international arbitration. This is the singular vitality of the great legal principle of which the '*réintégrand*' is the sharpest application and to which the principle of protection of possession on the classic understanding appears of only minor importance.<sup>51</sup>

Lecourt had therefore managed to work his way from a discussion of property disputes between country neighbours to a perspective on some of the greatest challenges of international law. Not for Lecourt the commonplace discussions of international lawyers that self-help countermeasures are a necessary 'fact of life' that serve a vital function in encouraging treaty partners to fulfil their legal obligations or, indeed, any recognition that self-help, even of a tempered and regulated variety, must of necessity continue to play a larger role in international than domestic society.<sup>52</sup> Lecourt declared simply that states in international organizations must give up the use of violence and self-help just as individuals are forced to do before the law within a state, mirroring the ability of developing nation-states to put an end to self-help behaviours within their own territories.

The European legal order's doctrine rejecting any form of self-help between the European states, which was first announced in the *Dairy Products* case, therefore seems likely to find a significant part of its origins in the prior legal philosophy of Robert Lecourt.<sup>53</sup> Frankly put, the doctrine advanced by the Court in the *Dairy Products* case was not contained in the Treaty of Rome but was set out in Lecourt's own early legal scholarship – above all in the uncompromising rejection of self-help demonstrated throughout his dissertation on French property law but also in its brief discussion of international law in conclusion. We can even see strong similarities in the language employed here by Lecourt in 1931 and by the Court of Justice in the *Dairy Products* case in 1964. In *Dairy Products*, the European Court said of the Treaty of Rome that '*l'économie du traité comporte interdiction pour les états membres de se faire justice eux-mêmes*' ['the logic of the treaty requires a prohibition on the member states taking the law into their own hands']. And, in his dissertation, Lecourt had written that international organizations were called upon '*à interdire aux nations, comme il est depuis longtemps défendu aux particuliers, de se faire justice à soi-même*' ['to prohibit to nations, just as it has long been prohibited to individuals, to take the law into their own hands']. We will now turn to discuss how Lecourt's legal philosophy may also have contributed to the other doctrines announced by the Court in 1963 and 1964.

<sup>51</sup> Lecourt, *supra* note 27, at 284–285.

<sup>52</sup> Simma, 'Counter-Measures and Dispute Settlement: A Place for a Different Balance', 5 *European Journal of International Law* (1994) 102.

<sup>53</sup> *Dairy Products*, *supra* note 11.

## 5 Lecourt's Understanding of the Relationship between Direct Effect, Supremacy and the Rejection of Self-Help by the European States

If the connection between the *Dairy Products* case and the legal philosophy that Lecourt had developed in his early scholarship largely speaks for itself, the connection between Lecourt's legal philosophy and the doctrines announced in *Van Gend* and *Costa* will require a little more elaboration. The starting point for our discussion must be that, in the current scholarship on the European legal order, it is common for the direct effect and supremacy doctrines to be described as instruments completely separate from any inter-state relationship within the EU.<sup>54</sup> The direct role that these doctrines give to private individuals and national courts in the enforcement of European law is therefore understood as empowering those actors in themselves as well as, of course, increasing the binding power of European law itself. As Lecourt wrote in *L'Europe des Juges*, '[w]hen the individual applies to a judge to ensure that their treaty rights are recognized, they are not acting in their own interest alone, but by this behaviour the individual becomes a type of auxiliary agent of the Community'.<sup>55</sup> This role of the national courts remains distinct from, and understood as having little relevance for, the relationship between, say, France and Germany within the EU. In as much as direct effect and supremacy are understood to involve a direct relationship with a state authority, it is understood to be the individual's relationship with their own state – a Dutch firm suing the Dutch state in the Dutch courts, for example, to ensure the proper implementation of a European obligation – that is most obviously implicated, rather than any cross-border relationship between the European states.

Now if scholarship on the direct effect and supremacy of European law tends to view these doctrines as empowering individuals and national courts without any direct link to inter-state politics, scholarship discussing the possible role of national court enforcement in other treaty systems tends by contrast to add a further observation – namely, that granting a direct role for domestic courts in the enforcement of treaty obligations is recognized as a mechanism to allow a treaty system to do without enforcement by inter-state retaliation and reciprocity. To see why this is so, recall the situation in which self-help retaliatory measures can be authorized within the WTO as a prominent example of a well-developed trade-related treaty regime. The essential scenario is one where a state persists with treaty-inconsistent policies even after the WTO's dispute settlement processes have, finally and authoritatively, found it in default. Trade retaliation by other states may then be justified as a 'last resort' because the outcomes of the WTO's dispute settlement processes remain 'declaratory', with no automatic effect on the internal policymaking of the defaulting state. However, if a direct enforcement role is taken on by national courts within a treaty state, particularly if those courts have a direct means of communication with treaty-based

<sup>54</sup> E.g., Burley and Mattli, *supra* note 3; B. Rudden and D. Phelan, *Basic Community Cases* (1997).

<sup>55</sup> Lecourt, *supra* note 14, at 260.



dispute settlement institutions (as national courts within the EU have with the ECJ through the 'preliminary reference' mechanism), then the outcomes of treaty-based dispute settlement processes are no longer merely 'declaratory', external to the legal and policymaking systems of the treaty state but are instead automatically applied and embedded within the system of making and enforcing domestic law. Domestic court enforcement of treaty obligations therefore remedies the key weakness of international law, and international tribunals, at exactly the point at which reciprocal or retaliatory measures between states might otherwise become justified.<sup>56</sup>

The role of domestic court enforcement of treaty obligations – or direct effect, for short – as a mechanism for removing the use of inter-state retaliation as a method of enforcing treaties is widely recognized in scholarship. In the environmental 'side agreement' of the North American Free Trade Agreement, treaty obligations are enforced against the USA by Canada through threats of trade retaliation, but against Canada by the USA through the use of the Canadian domestic courts, explicitly as a substitute for such retaliation.<sup>57</sup> In debates about reforming the General Agreement on Tariffs and Trade, the predecessor to today's WTO, Jan Tumlir was one of the first to argue that, although many claimed that international trade law 'can only be enforced as international law has always been enforced, by threats of retaliation', 'individual rights' and 'the courts' should be recognized as an alternative way to 'bring the internationally-agreed rules to bear on' national policymaking.<sup>58</sup>

<sup>56</sup> When European law's rejection of any form of inter-state reciprocity and retaliation is explained by the enforcement role that European law gave to national courts, debate will at times suggest, as an alternative, that this was a result of the ability of the European Commission itself – the European Union's 'independent' secretariat – to pursue complaints against the member states, rather than other member states themselves being required to do so, as is the case with dispute settlement in the World Trade Organization and many other trade regimes. It is true that this arrangement did reduce the apparent 'bilateralism' of such complaints, which may perhaps tend to lessen the logical connection with the possibility of enforcing any resulting dispute settlement outcomes with retaliation between various European states. It is clear, however, that the domestic court enforcement of treaty obligations offers something that goes significantly further, by embedding the outcome of treaty-based dispute settlement directly within the legal and political systems of the member states themselves, which is why scholarly discussion of removing the use of reciprocity and retaliation in other trade-related treaty regimes has focused on domestic court enforcement, not dispute initiation by independent secretariats (e.g., F. Mayer, *Interpreting NAFTA: The Science and Art of Political Analysis* (1998), at 166). Note that Lecourt himself rejected the idea that the Commission-initiated Art. 169 procedure would by itself have prevented reciprocity-style behaviours between the various member states, if states went on to ignore the Court's declaratory judgments. Lecourt, 'Quel eut été le droit des Communautés sans les arrêts de 1963 et 1964?', in *Mélanges Jean Boulois: l'Europe et le droit* (1991) 349. To be sure, ECJ judgments today are no longer merely declaratory, as the Court has, since 1994, the power to impose fines on the European states. However, this power to fine, which was granted in 1994, is not a plausible explanation for the ECJ's ability to comprehensively reject any form of retaliation between the European states 30 years earlier in 1964. By contrast, the timing is plausible for a connection with the European Court's 1963 and 1964 decisions on direct effect and supremacy.

<sup>57</sup> Mayer, *supra* note 56, at 166. North American Agreement on Environmental Cooperation 1993, 32 ILM 1480 (1993).

<sup>58</sup> Tumlir, 'Need for an Open Multilateral Trading System', 6(4) *World Economy* (1983) 393, at 400–401, 407. General Agreement on Tariffs and Trade 1994, 55 UNTS 194.

Perhaps most compellingly, in the debate over whether the outcomes of WTO dispute settlement processes should receive ‘direct effect’, and, therefore, domestic court enforcement, within the EU itself (in the EU’s capacity as a unitary trade actor *vis-à-vis* the world outside Europe) members of the European Court have straightforwardly discussed the possibility of direct effect of WTO obligations as an alternative to enforcement through WTO-authorized retaliation. Advocate General Póitares Maduro argued against granting ‘direct effect’ to WTO obligations within the EU because, he said, the EU ‘remains free to make the political choice to lay itself open ... to retaliatory measures authorized by’ the WTO.<sup>59</sup> Domestic court enforcement of treaty obligations therefore has a specific cross-border impact.<sup>60</sup> And, in this way, the direct effect and supremacy doctrines are also revealed as being related to the legal philosophy that Lecourt developed in his analysis of the *réintégrande* because their function appears directly allied to Lecourt’s interest in the suppression of self-help.

This might be enough to demonstrate that the legal philosophy of Robert Lecourt is likely to have been an important source behind all three of the major doctrines declared by the Court of Justice in 1963 and 1964. This assessment, however, would be further reinforced if we can show that Lecourt himself understood that there was a logical and causal connection between these three doctrines. After all, much of the European law scholarship tends to avoid drawing such a connection, and Lecourt himself does not make any such link in his best-known book, *L’Europe des Juges*, or in many of his other discussions of European law over the years. Despite this, it turns out that on at least three occasions Lecourt offered accounts of European law’s most fundamental doctrines that linked the supremacy and direct effect doctrines, on the one hand, with the European legal order’s rejection of international law-style self-help reciprocity and retaliation, on the other. While earlier we looked at Lecourt’s legal scholarship written before World War II, we will now examine some of Lecourt’s writings penned after his appointment to the Court.

The most important example comes from early 1965, when Lecourt published a short article entitled ‘The Judicial Dynamic in the Building of Europe’.<sup>61</sup> After referring to the role of law and courts in the unification of states in France and Germany, Lecourt offers an explanation and assessment of the development of the European legal order, including its most famous cases.<sup>62</sup> When reading these passages of Lecourt’s article, remember that the ‘decision of 5 February 1963’ is *Van Gend*, the ‘decision of 15 July 1964’ is *Costa* and the ‘decision of 13 November 1964’ is the *Dairy Products* case:

Therefore the Court was led to conduct a sort of x-ray analysis of the Treaties to discover the solution to certain legal cases. ... The result of this is that individuals can invoke a direct right to ensure the respect of the directly applicable provisions of the treaties. This right was disputed. But the Court finally observed that in instituting certain obligations in relation to individuals

<sup>59</sup> Cases 120/06 and 121/06, *Opinion of Maduro AG, FIAMM and Fedon*, [2008] ECR I-6513, para. 47.

<sup>60</sup> Phelan, *Diagonal Enforcement in International Trade Politics*, EUI SPS Working Paper 2016/1 (2016).

<sup>61</sup> Lecourt, ‘La Dynamique Judiciaire dans l’Édification de l’Europe’, 64 *France Forum* (1965) 20.

<sup>62</sup> *Ibid.*, at 20.

the Common Market should also inevitably confer on them 'rights that enter into their judicial patrimony' (decision of 5 February 1963) and which should be protected by national courts.

But a delicate problem emerged ... what is then the authority of the common law in the face of national law? ... The future of Europe would depend on the Court's solution to this serious problem.

... To decide such a finding in respect of the Treaty, it was necessary to analyse its terms and spirit. That is what the Court did, in judging that the texts 'make it impossible for the states, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity'. Otherwise the law derived from the Treaty would not be able to 'vary from one state to another' without provoking prohibited discriminations or even putting the goals of the Treaty itself in danger'. The law common to six states 'could not be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question'. No unilateral legal act of a state 'can prevail against the Treaties' (decision of 15 July 1964) because the States 'have renounced the ability to take the law into their own hands' (decision of 13 November 1964).<sup>63</sup>

In this passage, written right at the time of the Court of Justice's legal revolution, Lecourt draws a direct connection, bolstered by explicit citations to the Court's judgments, between direct effect, supremacy and the European legal order's rejection of self-help methods of enforcement. *Van Gend* and *Costa* were required because of the rejection of self-help in the Court's *Dairy Products* judgment,<sup>64</sup> or, as we now know, they were required by the legal principle so emphasized in Lecourt's early scholarship on the *réintégrande*.

The second example is contained in the final paragraph of Lecourt's speech in 1968, marking the tenth anniversary of the Treaty of Rome. In this speech, Lecourt talks about 'the reappearance, at a new level, of the unifying role of a court with jurisdiction to ensure a uniform rule of law that has so often been seen in the history of nations'. Lecourt summarizes the progress of European law as Europe's 'peoples making substantial progress in civilization between themselves by renouncing self-help methods of obtaining justice through obedience to a law that is agreed in common'<sup>65</sup> and concludes with the declaration that 'European Community law ... does not present itself merely as the "rules of the game" for the relationships between state powers, but as an authentic law, applied judicially, to which the individual person can himself have access'.<sup>66</sup>

<sup>63</sup> *Ibid.*, at 22 (emphasis added). Lecourt's words in French are 'dès lors que les États "ont renoncé à se faire justice eux-mêmes" (arrêt 13 Novembre 1964)'. The expression in the ECJ judgment is in fact 'l'économie du traité comporte interdiction pour les états membres de se faire justice eux-mêmes'.

<sup>64</sup> Thus, according to Lecourt in 1965, *Van Gend* and *Costa* were logically required by the principle established in *Dairy Products*, rather than vice versa.

<sup>65</sup> In the original French: '[Q]ue des peuples réalisent entre eux un substantiel progrès de civilisation en renonçant à se faire justice à eux-mêmes pour se plier à une loi arrêtée en commun' (emphasis added).

<sup>66</sup> Lecourt, 'Allocution prononcée par le président de la Cour' in *Cour de Justice des Communautés Européennes: Dixième anniversaire 1958-1968* (1968) 15, at 22-23.

The third example is in a book chapter that Lecourt published in 1991, in retirement and at the age of eighty-three, perhaps his last academic publication on European law. In this text, Lecourt offers a distinctive answer to the question, what would European law have become without *Van Gend* and *Costa*?<sup>67</sup> He focuses on the weaknesses of the Article 169 procedure – the procedure originally laid out in the Treaty allowing the Commission to take the member states to the Court of Justice to obtain a declaratory judgment finding a state in default. Lecourt explains that the weakness of this procedure was something ‘legally more serious’ than the much discussed ‘delays’ in waiting for the Commission to bring a member state before the Court.<sup>68</sup> Lecourt highlights the scenario where, ‘despite an ECJ decision finding that it had failed to fulfill its obligation, the State does not take any effort to take measures to execute the judgment of the Court ... nothing would prevent a defaulting State from continuing to enjoy all the advantages of the Treaty’, since the Treaty provided for no coercive measures for addressing such a situation.<sup>69</sup> This scenario would have put at risk ‘the principle of reciprocity between the member States’ and the principle that the European states could not ‘hide behind the failure of another State to justify its own irregularities’. The reason why this situation did not become alarming, Lecourt wrote, is that the principles of direct effect and supremacy allowed economic actors direct access to means of ensuring respect for the Treaty. Read with an awareness of the enforcement mechanisms of other trade regimes, where this is just the scenario where a retaliatory ‘suspension of concessions’ between states on reciprocity grounds would often be justified, Lecourt’s 1991 chapter connects *Van Gend* and *Costa* with the European legal order’s rejection of all threats or use of ‘self-help’ reciprocity or retaliation mechanisms and, indeed, demonstrates that Lecourt’s thinking about international law shows a certain consistency of approach all the way from 1931 to 1991.

If the last section showed that the doctrine declared by the Court in *Dairy Products* can be straightforwardly connected with Lecourt’s rejection of any form of self-help enforcement in domestic or international law, this section has demonstrated that the doctrines declared by the Court in *Van Gend* and *Costa* can also be connected with Lecourt’s rejection of any form of self-help enforcement in domestic and international law since granting direct effect to treaty obligations in domestic courts (and protecting them from conflicting national law) is an instrument by which such self-help enforcement mechanisms can be removed from a treaty system, as shown both by contemporary scholarly debates and, indeed, repeatedly by the writings of Lecourt himself.<sup>70</sup>

<sup>67</sup> Lecourt, *supra* note 56.

<sup>68</sup> *Ibid.*, at 358–359.

<sup>69</sup> It was exactly for failing to address this scenario that the *Dairy Products* judgment has sometimes been criticized. See Däubler, ‘Die Klage der EWG-Kommission gegen einen Mitgliedstaat’, *Neue Juristische Wochenschrift* (1968) 325, at 331, n. 54, which claimed that the Court in *Dairy Products* had ‘not seen the problem in full clarity’ because a ban on self-help reprisals would allow violating states to profit from their behaviours.

<sup>70</sup> Lecourt’s references to the interaction between the development of French law and the disorders of the Middle Ages in his analysis of the *réintégrande* in 1931 are also matched by Lecourt’s discussions in 1965 and 1968 of the new doctrines of the European legal order, including the prohibition on self-help in the context of the role of the law in the earlier development and unification of the French and German nation-states. Lecourt, *supra* note 27, at 11–12, similarly 241–242, 279–280, 284; Lecourt, *supra* note 61, at 20; Lecourt, *supra* note 66, at 23.

## 6 Conclusion

Where did the fundamental doctrines of European law come from? To accounts that emphasize that certain intrepid national courts were willing to make preliminary references to the European Court, that the Commission's legal services under Gaudet encouraged the Court to make ambitious decisions and that a bold pro-European faction that included Robert Lecourt was able to seize control of the Court's decision making in 1963, we can now add that the legal philosophy that Lecourt had developed at length in his early scholarship included a profound rejection of any form of self-help, a principle relevant to all three of the Court's great decisions in 1963 and 1964. Moving beyond the faint traces of Lecourt's 'legal thinking' identified in previous scholarship, we have found a judge whose writings on the *réintégrande* had developed goals and principles that, when combined with other elements in the Court's environment, could be used to declare and develop a coherent legal order that rejected any use of inter-state retaliation and instead enforced its obligations through the domestic courts of the participating states.

We also cannot overlook the fact that Lecourt's scholarship on French law showed him to be an open admirer of the development of ambitious legal principles by the courts themselves in response to economic and social needs when legislative texts were 'silent or ambiguous', an approach that the European Court embraced wholeheartedly in its 'Lecourt years'. Indeed, both the *réintégrande* in French law and the European legal order as a whole can be described as legal developments largely initiated by courts that had the rejection of self-help behaviours as one of their central objectives. Our understanding of Lecourt himself may also be altered since he emerges not only as the Court's figurehead and popularizer but also as a legal thinker whose early scholarship can be connected both with the Court's role as an elaborator of rules and with its most important doctrinal innovations.

It therefore appears that one of the major objectives of the dominant faction on the Court in 1963 and 1964 was a comprehensive rejection of any form of reciprocal or retaliatory self-help between the European states and that this objective was connected to the Court's doctrines of direct effect and supremacy. It is fair to say that such an understanding of the fundamental principles of European law is rare indeed in both legal and political science scholarship on the creation of the European legal order, where it is not unusual to omit any discussion of the principle that the Court set out in the *Dairy Products* case. Even among such scholarship that does mention the *Dairy Products* decision, this principle is seldom granted any particular prominence or connected to the direct effect doctrine in the way that Lecourt at times described it.<sup>71</sup> The evidence presented here must rather reinforce the claims of that strand of literature that has asserted, even in advance of our improved knowledge of Lecourt's

<sup>71</sup> The *Dairy Products* case is unmentioned in many otherwise excellent introductions to European law (e.g., Rudden and Phelan, *supra* note 54; D. Chalmers, G. Davies and G. Monti, *European Union Law: Text and Materials* (2014)) as well as in many prominent political science accounts of European legal integration.

own legal philosophy, that the principle announced in the *Dairy Products* case lies at the heart of the European legal order.<sup>72</sup>

The match between Lecourt's legal philosophy and the revolutionary decisions of the Court under his influence also contributes an alternative perspective to the discussions of the role of self-interest during the development of the European legal order. On the one hand, the behaviour of the Court of Justice may perhaps appear somewhat less self-interested as its major decisions may have been guided by a philosophy of law that had developed far in advance of the opportunity that arose for Lecourt to apply it to the Court's decision making. On the other hand, the behaviour of the European states and other actors in accepting the Court's 'new legal order' may appear somewhat more compatible with their self-interest since they benefitted enormously from the establishment of a European market that operated without the self-help reciprocity and retaliation mechanisms so common in other trade treaties. To be sure, the European legal order did imply elements of hierarchy benefitting the Court itself, and elements of subordination affecting the European states and national courts, so the traditional interest analysis continues to be relevant, but it needs to be combined with an understanding of the concrete outcome that the Court was in the process of achieving. Much more than the lawyers and courts, European state policymakers and their business interests are the real beneficiaries of the end of self-help retaliation between the European states, just as, in the example that Lecourt liked to invoke over the decades, the people of France, and not just French courts and lawyers, were the real beneficiaries of the development of the French state in ways that put an end to disorders associated with private feuds and the arbitrary use of self-help during the Middle Ages.

Of course, compared to what we would like to know about the origins of the European legal order, we still have much to learn. Outside the Court itself, we still need to know more about the role of states, national courts, legal networks, academia, the European Commission and pioneering individual litigators in accepting, resisting, promoting and employing European law doctrines and litigation. Pre-war and early post-war debates on the role of self-help and its alternatives in treaty enforcement should also be examined for their possible influence on the distinctive approach that European law came to adopt. As for the Court itself, the decision-making process continues to hide the specific contributions, or objections, of individual judges to groundbreaking decisions, and former judges remain reticent about discussing the internal decision making of the Court. If we have taken a step forward in this article in identifying connections between the content of the Court's decisions and the early scholarship of one of its most prominent judges, the same research approach (a focus on early writings, even when not directly addressing European law) can be applied to other ECJ judges as well as to other influential lawyers associated with the Court. We would also still like to know more about the life and career of Lecourt himself, including his time in French

<sup>72</sup> In law, see particularly Simma, 'Self-Contained Regimes', 16 *Netherlands Yearbook of International Law* (1985) 111; Gradoni and Tanzi, *supra* note 12; in political science, see particularly Phelan, *supra* note 18.

politics and at the Ministry of Justice, since the evidence presented here on Lecourt's legal thinking is, while striking, far from full and complete.<sup>73</sup> It is unfortunate that leading European judges, including Lecourt himself, appear to have destroyed large quantities of their private papers. Research in this environment remains challenging, and even partial steps forward are to be welcomed.<sup>74</sup>

We can perhaps now, however, speculate about a more specific reason, other than a concern for the secrecy of judicial deliberations, why Lecourt may have destroyed his private papers and indeed why, after his 1965 article, Lecourt never again (so far as we are aware) drew such special attention to the *Dairy Products* decision or so explicitly connected European law's direct effect and supremacy doctrines to the *Dairy Products* case. After all, Lecourt's public defences of the Court's behaviour, particularly in *L'Europe des Juges*, rested heavily on the claim that the Court's new doctrines were merely the correct interpretation of the Treaty. Such a posture might have appeared less plausible, to some at least, if direct connections between the Court's revolutionary doctrines and the doctoral dissertation of its then most influential judge had come to wider attention. The cost of Lecourt's discretion on this point may have been a confusion about the purposes of, and the relationship between, the European legal order's fundamental doctrines that has persisted to the current day.

Finally, this discussion offers something new for our understanding of the EU's essential organizing principles. The centrality of law and the courts in the functioning of the EU is accurately recognized in its common classification as a *Rechtsgemeinschaft* or a 'community of law'. There is, however, a particular advantage to an understanding of the EU's organizing principles that is framed in terms of the EU's approach to self-help by the states that have joined it. After all, self-help by states is recognized as an essential feature of many leading approaches to international politics, both in the theoretical discussions on the 'balance of power' and on tit-for-tat cooperation as well as in the flourishing empirical literatures on military actions and on retaliation-based dispute settlement within trade regimes. Thus, a characterization of the EU as 'a demanding treaty organization that prohibits any form of self-help behaviour between its member states in the same way that self-help has long been prohibited to private individuals within well-developed nation states' both correctly identifies the ambition of the European legal order within the context of these important debates and draws directly on the words that Robert Lecourt, leading judge of the European Court, used to describe the purpose of international organizations when he first set out his legal philosophy.<sup>75</sup>

<sup>73</sup> This article is part of a continuing project focusing on Lecourt.

<sup>74</sup> A further challenge is how best to combine our growing knowledge of the diverse elements – leading judges on the Court itself such as Lecourt, influential individuals outside the Court such as Gaudet, the role of judges and legal networks within the various states as well as aspects of the wider environment such as the growing interdependence of the European economies, intra-industry trade, generous welfare states, post-war forms of parliamentary governance and so on – that may have contributed to the creation and development of the European legal order.

<sup>75</sup> Lecourt, *supra* note 27, at 284.