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and the legal philosophy of Robert Lecourt

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European University Institute
Department of Law

**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 paper uses writings by French judge Robert Lecourt to show how the legal philosophy that 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.

Keywords

European Court of Justice, direct effect and supremacy, reciprocity and retaliation, the Dairy Products judgment, Robert Lecourt

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Introduction

Today's European legal order, with the European Court of Justice at its center, provides the authoritative settlement of disputes between states, European institutions, firms, and individuals within the European Union ('EU'). Particularly when compared to other treaty-based dispute settlement systems, the EU's legal system is widely recognized as remarkably effective, intrusive, and innovative. The European legal order has, indeed, come a long way since the Treaty of Rome established the then European Economic Community in 1958, and, in Article 164, provided for a Court of Justice "to ensure that in the interpretation and application of this Treaty the law is observed."¹

The particular 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 (Weiler 1991). These doctrines, most prominently the doctrines of the direct effect and the supremacy of European law, but also the comprehensive rejection of self-help enforcement mechanisms 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 by the Court of Justice to a wider range of scenarios, and as they came to be understood and accepted (not without hesitations) by policy-makers, 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 be reminded that these doctrines were not 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 that 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, 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 twenty-eight European states and several hundred million European citizens, in a wide variety of issue-areas. 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 most often 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 European Court of Justice. Leading studies have examined how politicians, courts, and lawyers reacted to the Court's extraordinary new doctrines at a time when the EU was still largely a trade regime (e.g. Weiler 1991; Burley and Mattli 1993; Alter 2001; Phelan 2015). Others have focused on contemporary questions such as the influence of European law in issue-areas as diverse as disability policy and women's rights, and there is a lively debate about the degree to which the Court's decisions vary according to the legal pressures placed on it by the European states (Cichowski 2007; Carrubba et

¹ The author is grateful to Vivien Curran, Nial Fennelly, Stefan Mueller, and Diarmuid Rossa Phelan for advice and feedback on initial drafts of this paper. The assistance of Trinity College's Arts and Social Sciences Benefactions fund is gratefully acknowledged.

al. 2008; Kelemen 2011; Stone Sweet and Brunell 2012; Larsson and Naurin 2016). That special role of law and courts is commonly agreed, however, only to have been very partially set out in the founding Treaty, and instead to have been the creation of 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 the study of a puzzle central to increasing our understanding of the mysterious organizing principles of the EU.

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 the judges in question had assumed prior to their appointment to the courts – as shown, for example, in the various ways that the United States Supreme Court was influenced by the individual background and circumstances of John Marshall, its Chief Justice between 1801 and 1835 (e.g. Hobson 1996; White 2001; for the modern Supreme Court, e.g. Segal and Cover 1989). Here we will use overlooked sources to demonstrate that 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 essential organizing principles of the EU.

(The European institutions have been renamed several times since 1958. This paper 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”, “Community law” and “European Community law” interchangeably to describe the legal system established by the Treaties.)

The fundamental doctrines of the European law

By far the commonest approach to identifying the fundamental doctrines of the European legal order would be to refer to the doctrines of ‘direct effect’ and ‘supremacy’.² The doctrine of direct effect was first set out in the *Van Gend en Loos* judgment, on 5th 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. One year later, on 15th 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 the national legal obligations, including those contained in newly enacted national legislation.

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

² ECJ Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, [1963] ECR I. ECJ Case 6/64, *Flaminio Costa v. ENEL*, [1964] ECR 585.

enforcement mechanisms that had in fact been explicitly set out in the Treaty. 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 fulfill 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 European Court, with all the delays and frustrations involved, whereas the direct effect and supremacy doctrines provided an enforcement mechanism 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?’

This, however, is not the only way to identify the most fundamental doctrines of the European legal order. A long-standing alternative approach 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’, ‘countermeasures’, or (in trade-related treaty regimes) the ‘suspension of equivalent concessions’, often appear, despite the real economic disruptions and unfortunate diplomatic tensions involved in their use, to be an unavoidable necessity in dispute settlement arrangements (e.g. Zoller 1984). This is particularly true for the scenario where, after any treaty-based dispute resolution procedures have been finally completed, a state persists in defaulting on a treaty obligation. In such a case, its treaty partner states may themselves impose retaliatory penalties by reducing their own fulfillment of treaty obligations towards the defaulting state. Nonfulfillment 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 widely 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’, and indeed a last resort whose presence pervades such trade systems as a whole (e.g. Bown 2009).

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 13th November 1964.³ In the words of the Court,

“In [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.”

or, in oft-repeated words of the 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”, explain Gradoni and Tanzi, and is indeed what makes European law “something new”, claims Weiler (Gradoni and Tanzi 2008; Weiler 1991: 2422; Phelan 2012). “Nothing is more alien to Community law than the idea of a measure of retaliation or *reciprocity* proper to classical public

³ ECJ Cases 90&91/63, *Commission v. Luxembourg & Belgium*, ‘*Dairy Products*’, [1964] ECR 625.

international law”, declared the Court of Justice’s Advocate General Léger in 1995.⁴ 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-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 many other treaty regimes, and in general international law, the emphasis on the fundamental nature of the doctrine announced in the *Dairy Products* decision is well justified. The question ‘where did the fundamental doctrines of the European legal order come from?’ must also include a discussion of the origins of the doctrine announced by the Court in the *Dairy Products* case.

Explaining the origins of the fundamental doctrines of the European legal order

Perhaps the place to start any discussion of the origins of these famous doctrines 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. So 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.” (Lecourt 1976: 237). Lord Mackenzie-Stuart, British judge on the Court from 1973 to 1988 and President of the Court from 1984 to 1988, suggested an even more passive role when he responded to criticism that the Court itself had a policy of expanding the scope of the ‘direct effect’ doctrine, by claiming that “It 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” (Mackenzie-Stuart 1977: 77).

Many outside 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 the 1960s and 1970s, were straightforwardly required by the Treaty of Rome. Instead, it is widely accepted that the Court itself, far from adding ‘nothing’ to the Treaties, 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 highly distinctive way. After all, as many scholars point 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. Even today new students of European law are often startled by the Treaty’s silence on such vital matters. The Treaty of Rome may have provided an important framework, but the Court itself is widely understood as the real ‘creator’ of the European legal order as it later developed (Weiler 1994: 512).

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 origins 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 to this literature instead take the Court’s decisions, and particularly its famous declarations on ‘direct effect’ and ‘supremacy’, not as outcomes that must themselves be explained, but rather as setting the stage 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 Court of Justice’s behavior can be straightforwardly explained by self-interest – the Court’s incentive

⁴ Advocate General’s Opinion in Case C-5/94 *The Queen v Ministry of Agriculture ex parte Hedley Lomas* [1996] ECR I-2553. Emphasis in the original.

to increase its legal authority. As Burley and Mattli write (and many others would agree) “It 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.” (Burley and Mattli 1993: 64). 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 their self-interest in the Court’s new doctrines was rather more ambiguous. After all, European law’s claim to hierarchical superiority (inherent in a ‘supremacy’ doctrine) empowered the Court of Justice, but what interest did other actors have in accepting their resulting hierarchical subordination? To be sure, scholarship has put forward a range of interesting answers to this question, including an emphasis on the 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 states to accept and manage such demanding treaty obligations derived from high levels of interdependence, intra-industry trade, and generous welfare states (Weiler 1991; Phelan 2015). Whatever answer is offered, however, such research agendas do not contribute to answering our particular question here, about the origins of these fundamental doctrines themselves.

At times scholarship does suggest that a variety of background conditions may have facilitated the Court’s ground-breaking decisions. These include 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, some would point to partial precursors in international law, including a 1928 opinion of the Permanent Court of International Justice discussing the direct effect of treaty obligations on the rights and duties of individuals⁵, and as well as the more widespread contemporary state practice allowing that treaty obligations could at times be enforced directly before national courts (Waelbroeck 1969: 161-188; Weiler 1991: 2424-2425; Davies 2012: 111). The Court of Justice’s famous decisions can even be viewed as partially passive creations, with the Court reaching its judgments under the encouragement of the European Commission and in the light of the solutions suggested by the disputes brought to it by national courts through the preliminary reference procedure (Rasmussen 2014: 154). Such legal precursors are certainly interesting, but neither 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, with a treaty-based tribunal itself deciding on the (continuously expanding) scope of direct effect, and on the explicit supremacy of treaty obligations over conflicting national legislation regardless of the principles of national constitutional law. It must also be true that the Court was encouraged along its way by the European Commission and various litigants, although not every judge would have accepted the most 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.

Closest to addressing our specific question are the contributions to the “new history” of European law, whose leading scholars – Davies, Lindseth, Vauchez, and particularly Rasmussen on the Court itself – have made discovery after discovery about the early years of the European legal order (e.g. Davies 2012; Lindseth 2010; Rasmussen 2010b; Vauchez 2015; also e.g. Phelan 2014 putting the question of conflicts between EU treaty obligations and national constitutional rights (the '*So-Lange*' debate) within the context of conflicts between the obligations of other treaties and constitutional rights in postwar Germany and Italy). One particular strand of this scholarship has attempted to uncover the varying roles of the Court’s judges themselves during these years, with some impressive results. Via information obtained from the long-retired ‘legal attachés’ (similar to the ‘clerks’ of US court judges), we know now that the famous *Van Gend en Loos* decision which established European law’s ‘direct effect’ doctrine was the occasion of a behind-the-scenes struggle, between the ambitious decision supported by Italian judge Antonio Trabucchi and the then 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

⁵ “Jurisdiction of the Courts of Danzig” Advisory Opinion, PCIJ, 1928, Series B, No. 15, at 17.

decision, on the other (Rasmussen 2008: 94-95). 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 its *Van Gend* judgment in 1963 (Rasmussen 2008: 98). 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 disputes put before it, 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 (Edward 2001: 181). Another prominent judge, Pierre Pescatore, who joined the Court of Justice in 1967, even talked of the ‘Lecourt years’ of the Court of Justice, from 1962 onwards, as a ‘jurisprudential miracle’ (Pescatore 2005: 595).

With the important exception of the identification of the judicial ‘winners’ and ‘losers’ in the struggle over *Van Gend en Loos*, and the long-term influence of Lecourt on the Court, however, little progress has been made on our particular question. To be sure, there are strong reasons why such a research agenda is a difficult one. Above all, the Court of Justice (unlike, in this respect, the United States Supreme Court) produces only a single judgment presented as produced by the Court as a whole, with no individually signed dissenting or concurring opinions. Thus the individuality of the judges’ participation in the Court’s decisions remains hidden. The judges themselves are sworn to secrecy about their internal deliberations, and both judges and their assistants remain discrete about the internal functioning of the Court.⁶

In the case of Robert Lecourt in particular, apparently the leading judge on the Court throughout this period, the difficulties 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 addressed issues of French civil law – he wrote a dissertation on litigation seeking to reestablish possession of real estate, for example (Lecourt 1931). His 1976 book on European law, *L’Europe des Juges* is mostly bland, largely 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 (Lecourt 1976; as noted in contemporary reviews, e.g. Schermers 1977). As for his private papers, Lecourt apparently destroyed them prior to his death (Rasmussen 2010a: 654 ft 58).

On the crucial issue of Lecourt’s detailed opinions about ‘Community law’ *before* the Court’s legal revolution, previous scholarship has uncovered 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 of Justice in December 1962, whose wording (so fellow ECJ judge Pescatore conjectured in hindsight) Lecourt may perhaps have influenced (Rasmussen 2010b: 77 ft 124).⁷ 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 an ‘academic’, ‘civil servant’, or ‘national judge’ background (Chalmers 2015: 58). Lecourt had indeed been Minister of Justice several times in Fourth Republic France, as well as Minister of State under de Gaulle, and was a long-time Christian Democratic politician and campaigner for European unity.⁸

There is, therefore, considerable research attempting to explain the origins of the remarkable legal and, frankly, political authority of today’s Court of Justice. That authority is usually traced back to a set of revolutionary decisions that the Court made in 1963 and 1964. That raises the question of where, in turn, the contents of those decisions came from? They were not required by the European Treaties themselves.

⁶ The revelations, decades after the events, about internal maneuvering on the Court in relation to the 1963 *Van Gend en Loos* decision remain an isolated exception.

⁷ ECJ Case 2&3/62, *Commission v. Luxembourg & Belgium*, ‘*Pain d’épices*’, [1962] ECR 425.

⁸ *Le Figaro*, 14th August 2004, p. 12 “Robert Lecourt, ancien ministre.”

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 judge Lecourt. But – whether in law, political science, or in historical studies – that is where the trail runs cold. Citing 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 self-interested motivations of the Court itself in aggrandizing its position.

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, as current scholarship rests on very 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 en Loos* 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 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, states, and the ways which European law would distinguish itself from ordinary forms of international law, which demonstrates a considerable coherence over many years. It thus seems highly likely 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 Robert 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 will therefore be to turn to various of Lecourt’s less well-known publications to attempt 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 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.

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 an aspect of French law, a specific instrument of litigation in disputes over real property, completed at the University of Caen in 1931 (Lecourt 1931).⁹ The underlying disputes in question, unsurprisingly, covered a full range of mischiefs that can occur between neighbors, 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 neighbor inserting a channel in a bank without authorization, the prevention of use of allegedly communal lands by a local mayor, and even the occupation of an island by agents of the French state itself (Lecourt 1931: 196, 216,

⁹ The only previous discussion, in European law scholarship, of Lecourt’s dissertation is a brief comment by Lindseth, who accurately describes its subject as the “reestablishment of possession of property after violent dispossession” and reflecting the “strongly functional spirit of the interwar period” (Lindseth 2010: 140).

191, 193). Each of these incidents had led to litigation, of course, and court decisions on these disputes provided the essential empirical content of Lecourt's study.

The specific legal instrument that Lecourt chose as his subject was the so-called *l'action en réintégrant*, or *réintégrant*, 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 *réintégrant* can be decided in a fast and simple procedure, and the property ordered 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 (Lecourt 1931: 11, 20).

Disaggregated into its various parts, the *réintégrant* 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 the property (the "act of dispossession"). As is commonly the case for a doctoral dissertation, this topic allowed for a degree of theoretical debate, as different approaches to understanding the meaning of the *réintégrant* put varying emphases on the two essential elements that made up the conditions for its use.

The 'classic theory' of the *réintégrant* as Lecourt described it placed considerable emphasis on the qualifying condition of the 'possessor' as such. Seeing the foundation of the *réintégrant* as a legal instrument in the protection of possession itself, such scholarly discussions saw the *réintégrant* 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 (Lecourt 1931: 14). Such approaches tended to see the *réintégrant* as belonging essentially to a family of *actions possessoires*, 'legal actions related to possession' often used in property disputes.

This understanding of the *réintégrant* Lecourt rejected. Empirically, he claimed that discussions of the *réintégrant* in leading scholarship found little support in the jurisprudence of the modern French courts (Lecourt 1931: 17, 279). The decisions of the courts were all-important here since the *réintégrant* was not itself well-defined in any legislative text. Viewed in the light of the decisions of the courts rather than scholarship then, then, so Lecourt argued, the foundation of the *réintégrant* was as a right held by any possessor against any party who had violently usurped it, connecting it with the *réintégrant*'s canon law origins as a mechanism for remedying property seizures in the disorder and private wars of France in the Middle Ages prior to the effective development of the French state (Lecourt 1931: 11, similarly 241-242, 279-280) as well as more contemporary problems such as 'private justice' employed by landlords whose interests had been adversely affected by wartime restrictions on property rights (Lecourt 1931: 20). Thus Lecourt set out to provide a theoretical understanding of the *réintégrant* that both matched, and could be used to further extend, contemporary practice.

Addressing the various conditions for the exercise of the *réintégrant*, Lecourt first discussed decisions of the French courts on who could be considered a 'possessor'. He demonstrated that the courts found that the *réintégrant* could be used by almost any person in possession of a property, even a 'precarious possessor' (Lecourt 1931: 15). Lecourt's analysis then turned to the act of dispossession. Here he demonstrated that decisions of the courts allowed that the *réintégrant* be used against any act of dispossession involving, in the common expression, '*violences et voies de faits*' ('violence and assault'). Thus the *réintégrant* could be employed against the property's owner, against the property's 'true possessor', against third parties, against local mayors and communes, even against the French state (Lecourt 1931: 18, 16, 222-223). 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 (Lecourt 1931: 19).

Lecourt was careful to note that the frequent statements by the French courts that the *réintégrant* was applicable where dispossession had occurred by *violences et voies de faits* did not in fact require any violence as such to have occurred (Lecourt 1931: 207). There was no need for "blood to be spilled" (Lecourt 1931: 212). 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*” (Lecourt 1931: 214). 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 practiced it (Lecourt 1931: 236). 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 (Lecourt 1931: 241).

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. This legal action was, he said, not an *action possessoire*, except indirectly (Lecourt 1931: 244). In fact, the essential, and indeed only, basis of the *réintégrande* was 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’ (Lecourt 1931: 236, 282).

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 has been acknowledged in later French legal scholarship, with 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*” (Michelet 1973: 180).

Our particular interest of course, is not in legal scholarship about approaches to property disputes in early twentieth century France, but 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 behaviors, 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 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, having completed nearly three hundred pages of technical discussion, Lecourt felt himself entitled to conclude, with a flourish, on a wider vision:¹⁰

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 the right to substitute violence with law. The very principle that once stopped private wars we use 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

¹⁰ For this purposes of this paper, it is important for the reader to be able to read Lecourt’s texts, rather than just have their contents described and summarized. All translations of Lecourt’s writings are by the author of this paper.

constantly tends to apply to disputes between 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. (Lecourt 1931: 284-285)

Lecourt had therefore managed to work his way from a discussion of property disputes between country neighbours to a perspective on 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 (e.g. Simma 1994: 102). Lecourt declares 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 within their own territories.

The European legal order's doctrine rejecting any form of self-help between the European states, first announced in the *Dairy Products* case, therefore seems likely to find a significant part of its origins in the legal philosophy of Robert Lecourt. Frankly put, the essential legal principle advanced by the Court in the *Dairy Products* case was *not* contained in the Treaty of Rome, but *was* set out extensively in Lecourt's own early legal scholarship, above all in its approach to French property law but also in its brief discussion of international law. 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 the *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.

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 en Loos* and *Costa v. ENEL* will require a little more elaboration.

The starting point for our discussion must be that, in 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 (e.g. Burley and Mattli 1993; Rudden and Phelan 1997). 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 himself wrote in *L'Europe des Juges*, "When 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 behavior the individual becomes an auxiliary agent

of the Community” (Lecourt 1976: 260). This role of national courts often 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 often 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: 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, recall the situation in which 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. 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 policy-making 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 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 policy-making 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 obligation 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.¹¹

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 NAFTA environmental ‘side agreement’, treaty obligations are enforced against the US by Canada by threats of trade retaliation, but against Canada by the US through use of the Canadian domestic courts, explicitly as a substitute for such retaliation (Mayer 1998: 166). In debates about

¹¹ 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, at times debate will suggest, as an alternative, that this was a result of the ability of the European Commission, as the EU’s ‘independent’ secretariat, itself to pursue complaints against the member states, rather than other member states themselves being required so to do, as is the case with dispute settlement in the WTO 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. Whether or not the ability of the European Commission itself to initiate complaints against the European states directly before the ECJ has an affinity with the removal of inter-state retaliation between the European states, however, it is clear that 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 so much on domestic court enforcement, not dispute initiation by independent secretariats (e.g. Mayer 1998: 166). Note that Lecourt himself rejected the idea that the Commission-initiated Article 169 procedure would by itself have prevented reciprocity-style behaviors between the various member states, if states went on to ignore the Court’s declaratory judgments (see discussion of Lecourt 1991 below). (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, granted in 1994, is not a plausible explanation for the ECJ’s ability to comprehensively reject any form of retaliation between the European states thirty years earlier, in 1964. By contrast, the timing is plausible for a connection with the European Court’s famous 1963 and 1964 decisions granting national courts a direct role in enforcing European law).

reforming the General Agreement on Tariffs and Trade, the predecessor to today's WTO, Tumlrir 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 policy-making (Tumlrir 1983: 400-401, 407). 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. The Court of Justice's Advocate General 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.¹² Domestic court enforcement of treaty obligations therefore has a specific *cross-border* impact (Phelan 2016). And in that way, the direct effect and supremacy doctrines are *also* revealed as related to the legal philosophy that Lecourt developed in his analysis of the *réintégrandes*, 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. That assessment would, however, 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 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 which 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. Where before we looked at Lecourt's legal scholarship written before the Second World War, we will now examine examples of Lecourt's writings from the 1960s and later, after his appointment to the Court.

The most important example comes from early 1965, when Lecourt published a short paper on "The Judicial Dynamic in the Building of Europe" (Lecourt 1965). After referring to the role of law and courts in the unification of states in France and Germany (Lecourt 1965: 20), Lecourt offered an explanation and assessment of the development of the European legal order including its most famous cases. As we read, remember that the 'decision of 5 February 1963' is *Van Gend en Loos*, the 'decision of 15 July 1964' is *Costa v. ENEL*, 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 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 analyze 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

¹² Case C-120&121/06 *FIAMM and Fedon* [2008] ECR I-6513, Opinion of Maduro AG, para 47.

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). [underline added]¹³

In this passage, written right at the time of the Court of Justice’s legal revolution, Lecourt drew 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 en Loos* and *Costa v. ENEL* were required because of the rejection of self-help in the Court’s *Dairy Products* judgment, or, as we now know, they were required by the legal philosophy that Lecourt had developed in his early scholarship on the *réintégrand*e.

The second example is contained in the final paragraph of Lecourt’s speech, in 1968, marking the 10th anniversary of the Treaty of Rome. There Lecourt talked 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 summarized 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”¹⁴, and concluded 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” (Lecourt 1968: 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. There Lecourt offered very distinctive answer to the question, what would European law have become without *Van Gend en Loos* and *Costa v. ENEL* (Lecourt 1991)? He focused 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 explained 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 (Lecourt 1991: 358-359). Lecourt highlighted 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.¹⁵ 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”.¹⁶ 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

¹³ Lecourt’s words in French are “*des 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*”.

¹⁴ In the original French: “*que 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*” [underline added].

¹⁵ It was exactly for failing to address this scenario that the *Dairy Products* judgment had sometimes been criticised: Däubler 1968: 331 ft 54 claimed that Court had “not really thought it through” when it had ruled out the possibility that member states could reply to treaty violations with treaty violations of their own, because a ban on self-help would allow violations to continue and violating states to benefit.

¹⁶ Lecourt also states that without *Van Gend* and *Costa* the Treaty would have become a simple convention organizing ‘reciprocal cooperation between states’ (Lecourt 1991: 360).

justified, Lecourt's 1991 paper connects *Van Gend* and *Costa* with the European legal order's rejection of all threat 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, because 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, in the writings of Robert Lecourt himself.¹⁷

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 European Commission encouraged the Court to 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 scholarship on French law 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, on the Court itself, a judge whose early scholarship on the *réintégrand*e had developed goals and principles which, when combined with other elements in 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. Finally, we cannot overlook the fact that Lecourt's scholarship on French law revealed him to be an open admirer of the development of ambitious legal principles by courts themselves, when legislative texts were "silent or ambiguous", and in response to economic and social needs, an approach which the European Court embraced whole-heartedly in its "Lecourt years".

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 that objective was directly connected to the European 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 common to omit any discussion of *Dairy Products* case or the principle that the Court set out in it, and even among such scholarship that does mention the *Dairy Products* decision, seldom is this principle granted any particular prominence or connected to the direct effect doctrine in the way that Lecourt at times described it.¹⁸ It may be time to reconsider these approaches in light of our new information. On the other hand, the evidence presented here must reinforce the claims of that strand of literature that has asserted, even in advance of our improved knowledge of Lecourt's own legal philosophy, that the principle announced in the *Dairy Products* case – the comprehensive

¹⁷ Lecourt's references to the interaction between the development of French law and the disorders of the Middle Ages in his analysis of the *réintégrand*e 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 1931: 11-12, similarly 241-242, 279-280, 284, Lecourt 1965: 20, Lecourt 1968: 23).

¹⁸ The *Dairy Products* case is unmentioned in many otherwise excellent introductions to European law e.g. Rudden and Phelan 1997, Craig and de Búrca 2011, Chalmers et al. 2014 as well as in many prominent political science accounts of European legal integration.

rejection of self-help reciprocity and retaliation – was at the heart of the Court’s ambitions in its creation of the European legal order (e.g. in political science: Phelan 2015; in law: Gradoni and Tanzi 2008; and for the seminal paper on *Dairy Products*, Simma 1985).

The match between Lecourt’s legal philosophy and the revolutionary decisions of the Court under his influence also contributes an alternative perspective to the many discussions of the role of self-interest during the development of the European legal order. On the one hand, the behaviors of the Court of Justice may perhaps appear somewhat *less* self-interested, as its major decisions appear to 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, the behaviors 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 and their businesses 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 may well explain some of the hesitations of state policy-makers and others, 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 policy-makers 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 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, and pioneering individual litigators in accepting, resisting, promoting, and employing European law doctrines and litigation. The Court’s decision-making process continues to hide the specific contributions, or objections, of individual judges to ground-breaking decisions, and former judges often remain reticent about discussing the internal politics of the Court. If here we have taken a large step forward in identifying connections between the content of the Court’s decisions and the early legal scholarship of one of its most prominent judges, the same research approach (a focus on their early writings, even when not directly addressing European law) can also be applied to other ECJ judges, as well as the wider range of influential lawyers associated with the Court, and indeed to research on courts and judges in other contexts. We would also still like to know more about the life and career of Lecourt himself, and how this may have influenced his activity on the Court.¹⁹ It is unfortunate that leading European judges, including Lecourt himself, have destroyed large quantities of private papers. This remains a challenging environment to progress research, where even partial steps forward are to be welcomed.

We can perhaps now however speculate about a more specific reason, other than a concern for the secrecy of judicial deliberations, why Lecourt destroyed his private papers and indeed why, after his 1965 *France-Forum* 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 defenses of the Court’s behavior, 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 very 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 relationship between, the European legal order’s fundamental doctrines that has persisted to the current day.

¹⁹ This paper is part of a continuing project focusing on Lecourt.

Finally, this discussion offers something new to our understanding of the essential organizing principles of perhaps the contemporary world's most innovative international organization, the European Union. The centrality of law and courts in the functioning of the EU is accurately recognized in its common classification as a *Rechtsgemeinschaft*, or '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 theoretical discussions on the 'balance of power' and on tit-for-tat cooperation, and in the flourishing empirical literatures on military actions and on retaliation-based dispute settlement within trade regimes (e.g. Waltz 1979; Axelrod 1984; Biddle 2004; Bown 2009). So a characterization of the EU as 'a demanding treaty organization that prohibits any form of self-help behavior 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 wider debates, and draws directly on the words that Robert Lecourt (Lecourt 1931: 284), leading judge of the European Court, used to describe the purpose of international organizations when he first set out his legal philosophy.

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