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CORE ANALYSIS

Europe's legal revolution and France's Article 49-3: the constitutional audacity of Robert Lecourt

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Abstract

The European Legal order, created by the European Court of Justice [ECJ], is an astonishingly effective treaty enforcement system. Previous explanations of its 'transnational' or 'constitutional' development have focused on the politics of judicial networks, and the wider political and economic context of postwar European democracy. Judicial biography has been almost entirely overlooked, even in the case of Robert Lecourt, widely acknowledged as the leading judge in the Court's revolutionary period. Unknown to research on the ECJ, however, Lecourt had already spearheaded the adoption of the famous Article 49-3 of France's 1958 Constitution. This paper demonstrates that the constitutional doctrines of European law and Article 49-3 were in fact premised on a similar ideology, that the pursuit of 'effectiveness' may require unprecedented restrictions on the traditional law-making role of national parliaments. Those were the constitutional values of the judge that, more than any other, built the foundations of the European legal order.

Keywords: European law; European court of justice; France's 1958 constitution; Judicial biography; Robert Lecourt

1. Introduction

The European Union's legal system – the European legal order – is something momentous and new in international law and politics. The possibility that powerful states routinely would submit to the legal judgments of an international or 'European' tribunal was regularly rejected – or mocked as utopian – by thinkers and politicians both classical and modern, as well as by realist theorists of international relations.[1] The European legal order has nonetheless achieved a hitherto unthinkable supremacy over the legal systems of the now 27 EU member states. It is often described as Europe's transnational constitution.[2]

Researching the origins of Europe's legal revolution is profoundly challenging, however, for reasons which include the anonymity of the European Court of Justice's [ECJ's] judgements and the largely closed nature of the Court's archives. Indeed, none of the most influential works of scholarship in law or political science which provide overviews of the early development of European law engages in any detailed way with the ECJ's individual judges.[3] All derive the development of European law either from a 'legalist' reading of the European treaties themselves,

[1]Eg P Pasture, *Imagining European Unity since 1000 AD* (Palgrave Macmillan, London 2015); E Carr, *The Twenty Years' Crisis 1919–1939: an Introduction to the Study of International Relations* (Macmillan, London 1940).

[2]E Stein, 'Lawyers, Judges and the Making of a Transnational Constitution' 75 (1) (1981) American Journal of International Law 1.

[3]Eg Stein (n 2); GF Mancini, 'The Making of a Constitution for Europe' 26 (1989) Common Market Law Review 595; JHH Weiler, 'The Transformation of Europe' 100 (1991) Yale Law Journal 2403; G Garrett, 'International Cooperation and Institutional Choice: The European Community's Internal Market' 46 (2) (1992) International Organization 533; A-M Burley and W Mattli, 'Europe Before the Court: A Political Theory of Legal Integration' 47 (1) (1993) International Organization 41.

or from a variety of incentives created by the Court's wider context, such as states' need for European market obligations to be enforced and national judges' ability to empower themselves through European law. What these approaches have in common is that they describe an anonymous Court of Justice without identifiable judicial personalities.

This is a remarkable omission, as judicial biography – and particularly the identification of prior political and constitutional values that judges continue to bring to their judicial roles – is often seen as essential to understanding the politics of courts.[4] In the study of the contemporary United States Supreme Court, such continuities are understood to be commonplace. Justice Bader Ginsburg's role on the Supreme Court, for example, has been explained in part by her earlier career as a litigator on behalf of women's rights.[5] Indeed, an expectation that a Justice's legal decisions are highly influenced by their previous affiliations and constitutional values is routine, even inescapable, in political science scholarship on the Supreme Court.[6] This paper will, for the first time, apply a similar approach to the most influential judge on what is widely regarded as 'the most effective supranational judicial body in the history of the world, comparing favourably with the most powerful constitutional courts anywhere',[7] adapted, of course, to focus on the major issues at stake in the early years of European legal integration.[8]

That judge – the 'John Marshall' of the European Union's legal system, as he has been described – was French lawyer, journalist, former wartime resistance leader, and postwar Christian Democratic (MRP) politician Robert Lecourt.[9] Appointed to the Court by the French government in 1962, Lecourt went on to become President of the Court in 1967, serving until his retirement in 1976. Lecourt was influential throughout the period when the Court declared the direct effect and supremacy of European law, prohibited the use of international law-style retaliation between the European member states, and made a host of other major judgements that form the essential early foundations of today's European legal order. Unknown to scholarship on the ECJ, this paper will show that Lecourt was already an experienced constitutionalist before his appointment to the Court. Debates over the reform of France's postwar institutions – particularly

[4]The closest previous scholarship is Fritz's 2018 impressive monograph, 'Judges and Advocates General of the CJEU 1952 to 1972', which offers a short biography of each of the more than twenty judges of the early Court of Justice, V Fritz, *Juges et avocats généraux de la Cour de Justice de l'Union européenne (1952–1972): une approche biographique de l'histoire d'une révolution juridique* (Klostermann, Frankfurt 2018), also V Fritz, 'Judge Biographies as a Methodology to Grasp the Dynamics inside the CJEU and its Relationship with EU Member States' in M Rask Madsen, F Nicola and A Vauchez (eds) *Researching the European Court of Justice: Methodological Shifts and Law's Embeddedness* (Cambridge University Press, Cambridge 2021) 209. Through her detailed outlines of so many judges' lives, Fritz has made a profound and enduring contribution to EU legal history, given that earlier research had tended to avoid any investigation of judicial biography. Fritz's emphasis is more on the politics of appointments and the judges' *curriculum vitae*, however, than on their prior political and constitutional commitments in the manner of US Supreme Court biography. As regards Lecourt in particular, Fritz's brief biography does not engage with, or mention, his role in the design of France's 1958 Constitution (Fritz, *Juges et avocats*, 241).

[5]JS de Hart, *Ruth Bader Ginsburg : A Life* (Knopf, New York 2018).

[6]Eg RA Dahl, 'Decisionmaking in a Democracy: The Supreme Court as National Policymaker' 6 (1957) Journal of Public Law 279; JA Segal and AD Cover, 'Ideological Values and the Votes of U.S. Supreme Court Justices' 83 (2) (1989) The American Political Science Review 557.

[7]A Stone Sweet, *The Judicial Construction of Europe* (Oxford University Press, Oxford 2004) 1.

[8]The European institutions have been renamed several times since 1958. This proposal uses the expressions 'European Union', 'EU', and 'European Economic Community' interchangeably to describe the European treaty organisation throughout the period from 1958 to the present day; 'European Court of Justice', 'Court of Justice' and 'ECJ' refer interchangeably to the Court of Justice first provided for in the 1958 Treaty of Rome and known officially since 2009 as the 'Court of Justice of the European Union'; and the 'European legal order', 'European law', and 'EU law' interchangeably to describe the legal system first established by the Treaty. Given the historical focus of this paper, it uses the numbering of Treaty articles as originally set out in the Treaty of Rome.

[9]Eg H Rasmussen, 'The Court of Justice' *Thirty Years of Community Law* (European Community Information Service, Luxembourg 1983) 160; P Anderson, *Ever Closer Union? Europe in the West* (Verso, London 2021) 148. The judicial careers of John Marshall and Robert Lecourt are of course not identical in all respects, notably Marshall was appointed to the Supreme Court as Chief Justice whereas Lecourt was highly influential as an 'ordinary' judge of the Court of Justice from 1962 before being elected President of the Court of Justice in 1967.

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in the original proposals for what became the famous and still controversial Article 49-3 of France's 1958 Constitution – demonstrate that Lecourt advocated unprecedented restrictions on parliamentary law-making rights in pursuit of the goal of 'effective' governance and the empowerment of the French executive. Those were the constitutional values of the judge that, more than any other, built the foundations of the European legal order. There is indeed a real continuity of ideas and values between the constitutional doctrines of European law and Article 49-3 of France's 1958 constitution, as Lecourt himself appears to have recognised.[10]

This paper therefore establishes unexpected connections between the most controversial elements of two distinct constitutional structures, French and European, and demonstrates the value of judicial biography for the study of legal politics outside the United States context where it is most prominently employed.

2. The constitutional doctrines of European law

The European legal order has come to create a much more binding and intrusive legal system and a more effective cross-border trading environment than the more primitive and often unreliable versions provided by many treaty systems. The obligations of ordinary international treaties, particularly trade agreements, are commonly enforced by the practice of inter-state reciprocity and the use of 'self-help' in the form of 'tit-for-tat' retaliation between trading partners.[11] However the obligations of the Treaty of Rome, as it has come to be interpreted, are enforced instead by the domestic courts of the European states.[12] According to the doctrine of direct effect, sufficiently clear and precise European obligations can be enforced by private parties before the domestic courts of their own states. According to European law's supremacy doctrine, domestic courts must apply directly effective European law in place of conflicting national law. Because of European law's separation from ordinary international law, any recourse to inter-state reciprocity or 'tit-for-tat' retaliatory actions between the European states is completely ruled out. These are the essential doctrines of European law, often referred to as providing a 'constitution' for Europe, reflecting the ways that constitutional laws 'trump' or displace the application of ordinary law in many political systems.[13]

[10]The focus of this paper is on Lecourt's constitutional ideology and its relationship to the foundational doctrines of European law. It does not attempt a full or detailed explanation or appraisal of Lecourt's many other contributions to the early development of European law, such as his management of the Court's internal politics, the procedural reforms at the Court under his influence, or his contributions to the acceptance of European law doctrine in France and elsewhere (for recent research on procedural issues, see eg C Krenn, *The Procedural and Organisational Law of the European Court of Justice – An Incomplete Transformation* (Cambridge University Press, Cambridge 2022). Even the role of the French language as the working language of the Court may have increased Lecourt's influence in the early years of European law, eg K Schiemann, 'La langue de travail de la Cour' in A Tizzano (ed) *La Cour de justice de l'Union européenne sous la présidence de Vassilios Skouris (2003–2015): liber amicorum Vassilios Skouris* (Bruylant, Bruxelles 2015) 563 and E Perillo, 'Alberto Trabucchi, Europeista: Un tratto ancora poco conosciuto de grande civilista patavino' *La formazione del diritto europeo : giornata di studio per Alberto Trabucchi nel centenario della nascita* (CEDAM, Padova 2008) 189 – I am grateful to a Reviewer for *European Law Open* for drawing my attention to this issue.

[11]Eg RM Axelrod, *The Evolution of Cooperation* (Basic Books, New York 1984); RO Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton University Press, Princeton, N.J. 1984); B Simma, 'Reciprocity' in R Bernhardt (ed) *Encyclopedia of Public International Law* (North-Holland, Amsterdam, New York 2000) 29; eg World Trade Organization [WTO] C Davis, *Why Adjudicate? Enforcing Trade Rules in the WTO* (Princeton University Press, Princeton NJ 2012).

[12]The literature is enormous, eg P Craig and G de Búrca (eds), *The Evolution of EU Law* (Oxford University Press, Oxford 2011); MP Maduro and L Azoulai, *The Past and Future of EU Law: the classics of EU law revisited on the 50th anniversary of the Rome Treaty* (Hart, Oxford 2010).

[13]Stein (n 2); Mancini (n 3). The constitutional doctrines of European law supplement the enforcement system for European obligations which had been more explicitly provided for in the Treaty of Rome. Article 169 of the Treaty provided that the European Commission could bring a member state before the Court of Justice with allegations that it had failed to fulfil its treaty obligations, and for the Court of Justice to make a declaratory finding against a non-compliant state. The Article

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In more detail, a person or business may be adversely affected by a member state's non-fulfilment of a European obligation – a treaty provision, or a European rule negotiated by the governments of the European states within the European institutions. (These European obligations originally overwhelmingly related to the construction of the intra-European market and customs union, however over time they have come to cover an ever wider range of non-economic issues, including social and environmental regulations as well as police cooperation.) The person or business can bring a case before a national court demanding that their national judge directly enforce the European law obligation. The national judge may send a so-called 'preliminary reference' to the Court of Justice in Luxembourg, seeking the Court's interpretation of the disputed European law provision. According to the doctrines of direct effect and supremacy, the national judge then directly applies European law in their own court, in line with the ECJ's interpretation, regardless of whether there is a domestic legal provision providing for that outcome, and indeed regardless of whether the European law obligation may conflict with national statutes or constitutional provisions. Ordinary individuals and businesses do not have the right to demand the enforcement of the UN Charter, or the rules of the WTO, through their domestic courts working in organised cooperation with a treaty-based tribunal. By contrast, individuals and businesses in the EU – in Germany, France, and all the other member states – can, and do, use courts in their own states, working with the ECJ, to obtain the domestic enforcement of EU law.

These doctrines, together with a variety of less strictly doctrinal factors, such as the growing availability over time of judges and lawyers with the competence and willingness to make use of these European litigation opportunities, built the European legal order. In the early years, the observance of European law by the national courts was limited indeed and the Court of Justice in Luxembourg only heard only a handful of disputes from the original six member states (France, West Germany, Italy, Belgium, Netherlands, and Luxembourg). These days the Court hears several hundred cases annually, and stands at the peak of many thousands of European law judgements made on a wide range of topics by national courts and tribunals across 27 states, with over 400 million inhabitants.

The constitutional doctrines of European law have always been controversial. The fundamental objection is a democratic one: citizens in the European states should be subject to the laws made (and re-made) by their own national parliaments, their primary forum of involvement in politics and choices over self-government. Indeed, treaty obligations derived from more ordinary treaties are usually only legally applicable in the domestic orders of participating states to the degree that their national parliaments have so provided in domestic law. These parliamentary rights are purposively disrupted by the direct effect and supremacy doctrines of European law which claim that European law imposes obligations 'independently of the legislation of the member states', in the famous words of the ECJ's 1963 *Van Gend en Loos* judgment. As Weiler explained in a celebrated *Yale Law Journal* article:

> Public international law typically allows the internal constitutional order of a state to determine the method and extent to which international obligations may, if at all, produce effects within the legal order of the state. ... In practice direct effect meant that Member States violating their Community obligations could not shift the locus of dispute to the interstate or Community plane. They would be faced with legal actions before their own courts at the suit of individuals within their own legal order. ...
>
> In light of supremacy the full significance of direct effect becomes apparent. Typically ... the normal role of 'later in time' (*lex posteriori derogat lex anteriori)* governs the relationship between the treaty provision and conflicting national legislation. A national legislature

169 procedure did not provide for an internal or domestic application of the Court of Justice's judgments. The constitutional doctrines of European law by contrast involve the internal enforcement of European obligations by domestic courts, with the consequence (and indeed the purpose) that the interstate reciprocity mechanisms of classical international law can be comprehensively renounced.

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> unhappy with an internalised treaty norm simply enacts a conflicting national measure and the transposition will have vanished for all internal practical effects. By contrast, in the Community, because of the doctrine of supremacy, the EC norm, which by virtue of the doctrine of direct effect must be regarded as part of the Law of the Land, will prevail even in these circumstances.[14]

Of course, the constitutional doctrines of European law bind all political institutions in the member states, including national executives. There is a difference however, in that national executives participate directly in the making of European rules through the dominant EU decision-making body, the Council of Ministers, whereas national parliaments have at best an indirect and limited role in trying to control European negotiations by their national governments, often with incomplete information, and cannot prevent the national application of directly effective European rules that national executives have agreed within the European institutions.[15] As Vaubel explained, 'the European Union enables the member governments to evade parliamentary control ... Whoever used to believe that democratic governments are controlled by Parliament must recognise that, in the European Union, the member-governments, assembled in Council, control their parliaments', or, in Weiler's formulation, the governments of the member states 'often act together as a binding legislator outside the decisive control of any parliamentary chamber'.[16] These legal doctrines have therefore directly lead to the *increase in executive power*, and the decrease in national parliamentary control, that is, for many observers, the 'first and foremost' basis for claiming that the European Union suffers from a 'democratic deficit'.[17]

The constitutional doctrines of European law have their defenders, of course. As has been repeatedly observed, given the attenuated form of state consent to EU activities, the role of the European institutions is most commonly justified not by 'input' criteria such as democratic control through elections featuring competing political parties, but rather by 'output' criteria, such as 'effectiveness'.[18] That is definitely true in the case of the European legal order, which primarily justified by pointing to the defects of the obvious alternative – the 'archaic' and unreliable system

[14]Weiler (n 3, 2413, 2414, 2415). For arguments that direct effect and supremacy (or primacy, as it is sometimes termed) are logically connected, see eg B De Witte, 'Direct Effect, Primacy, and the Nature of the Legal Order' in Craig and de Búrca (n 12, 323) and W Phelan, *Great Judgments of the European Court of Justice: Rethinking the Landmark Decisions of the Foundational Period* (Cambridge UP, Cambridge 2019) 72–73, 81.

[15]A Moravcsik Why the European Community Strengthens the State: Domestic Politics and International Cooperation 1994. The European legal system built by the ECJ in the 1960s and 1970s was called 'the European Community's original constitution' by ECJ judge Mancini who also flatly characterised it as 'undemocratic' because the governments of the member states (acting by unanimity) possessed 'a virtual monopoly on legislative power' (GF Mancini and DT Keeling, 'Democracy and the European Court of Justice' 57 (2) (1994) Modern Law Review 175, 175–6). 'Undemocratic' is perhaps not fully convincing given that member state governments had been selected through democratic elections, but European rules were certainly made largely without legislative control either *ex ante* or *ex post* whether by national parliaments or the European Parliament. The decline in the use of unanimous procedures, and the increase in the role of the European Parliament (and EU-related national parliamentary committees), in European policy-making from the 1980s onwards has at least partially (and to a debateable extent) modified this original constitutional arrangement. Full engagement with the scholarship on the 'democratic deficit' and the institutional rules of today's EU, several decades later, is of course beyond the scope of this paper (e.g. C Schneider, *The Responsive Union: National Elections and European Governance* (Cambridge University Press, Cambridge 2018); S Hix and B Høyland, *The Political System of the European Union* (Bloomsbury, London 2022)).

[16]R Vaubel, *The Centralisation of Western Europe: The Common Market, Political Integration, and Democracy* (IEA, London 1995) 42; G Majone, *Dilemmas of European Integration: the ambiguities and pitfalls of integration by stealth* (Oxford University Press, Oxford 2005) 31; Weiler (n 3, 2430).

[17]A Føllesdal and S Hix, 'Why there is a Democratic Deficit in the EU: A Response to Majone and Moravcsik' 44 (3) (2006) Journal of Common Market Studies 533–4.

[18]Majone (n 16); FW Scharpf, *Governing in Europe : effective and democratic?* (Oxford University Press, New York 1999); A Moravcsik, 'In Defence of the 'Democratic Deficit': Reassessing Legitimacy in the European Union' 40 (4) (2002) Journal of Common Market Studies 603; T Isiksel, *Europe's Functional Constitution: A Theory of Constitutionalism Beyond the State* (Oxford University Press, Oxford 2016) 94.

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of classical international law as well as reciprocity-based forms of international trade law, which effectively facilitate states in evasions of legal obligations, unilateral opt-outs and non-compliance.[19] Against this background, the distinctive focus of Europe's 'transnational constitution' is therefore neither the organisation of popular sovereignty nor the protection of marginalised minorities, as theorists normally understand the function of constitutions, but improving governmental effectiveness in matters of common European interest.[20]

Where then did the constitutional doctrines of European law come from?

3. The origins of the constitutional doctrines of European law

One might assume that the major doctrines of European law, the ones that distinguish it most clearly from other international treaty systems, would have been explicitly set out in the Treaty of Rome that established the European Economic Community in 1958. This is not the case, however, as the Treaty did not provide for the direct effect of European obligations, for their supremacy in the national legal orders, or prohibited inter-state retaliation between the European states. To be sure, the Treaty did provide for the Court of Justice itself (Articles 4 and 164), for the preliminary reference procedure by which national courts could submit questions to the Court of Justice (Article 177), for the direct application in the domestic legal orders of Regulations made by the European institutions (Article 189), and that any safeguard measures (in effect, derogations from the Treaty) adopted by the member states were required to be authorised, in advance, by the independent European Commission (Article 226).[21] All these provisions pointed towards an ambitious institutional framework, including limited elements of direct application of European obligations in the domestic legal orders, but they did not set out the constitutional doctrines of European law.

The European Court of Justice itself declared these doctrines in a series of major judgements in 1963 and 1964, often against the opposition of lawyers representing the member states.[22] In *Van Gend en Loos* in February 1963, the ECJ declared that private parties could enforce European obligations before national courts in their own member states.[23] In *Costa v. ENEL* in July 1964, the ECJ declared that European law must be applied by national courts in the place of conflicting national legislation.[24] In *Dairy Products* in November 1964, the ECJ declared that member states in the European Economic Community were prohibited from making any use of the 'self-help' retaliation and reciprocity behaviours which are so central to the functioning of more ordinary forms of international law.[25] Through these three decisions, and the many others that confirmed

[19]GW Downs and DM Rocke, *Optimal Imperfection? Domestic Uncertainty and Institutions in International Relations* (Princeton University Press, Princeton, NJ 1995); BP Rosendorff and HV Milner, 'The Optimal Design of International Trade Institutions: Uncertainty and Escape' 55 (4) (2001) International Organization 829; V Constantinesco, 'La Justice dans L'Union européenne' 9 (1998) Philosophe Politique 99; JHH Weiler, 'Deciphering the Political and Legal DNA of European Integration: An Exploratory Essay' in J Dickson and P Eleftheriadis. (eds) *Philosophical Foundations of European Union Law* (Oxford University Press, Oxford 2012) 137.

[20]Isiksel (n 18).

[21]Article 226, prohibiting unilateral safeguard measures, although frequently overlooked in European law scholarship, had a significant impact on the early development of the European legal order. The Court of Justice relied on Article 226, for example, as one of its main justifications for the supremacy doctrine of European law in *Costa v. ENEL,* see Phelan (n 14, 58ff and throughout). The distinctive safeguards mechanisms of the Treaty of Rome were in fact directly relevant both to the fundamental doctrines of European law, and to the origins of distinctive independence and authority of the European Commission as an international bureaucracy, see Phelan (n 14, 22 including ft 14).

[22]Stein (n 2).

[23]ECJ Case 26/62 *Van Gend en Loos v. Nederlandse Administratie der Belastingen* ECLI:EU:C:1963:1.

[24]ECJ Case 6/64 *Costa v. ENEL* ECLI:EU:C:1964:66.

[25]ECJ Cases 90&91/63 *Commission v. Luxembourg & Belgium (Dairy Products)* ECLI:EU:C:1964:80, cf W Phelan, 'What is *Sui Generis* about the European Union? Costly International Cooperation in a Self-Contained Regime' 14 (2012) International Studies Review 367, also Weiler (n 3, 2422), arguing that European law's rejection of inter-state retaliation constitutes its 'most

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and expanded on them throughout the 1960s and 1970s, the ECJ was itself the author of the constitutional doctrines of European law. To be sure, in each case, the Court was responding to the cases that came before it, and often to the urging of the Legal Service of the European Commission, and a variety of pro-European litigants, to make ambitious judgements.[26] It was however the Court itself that declared the major doctrines that laid the foundations of today's mighty European legal order.

It is therefore critical to understand the reasons behind the judges' decisions. Attempts to peel the onion one stage further, however, run into a formidable set of obstacles. Unlike the United States Supreme Court, the ECJ publishes no dissenting or concurring opinions to supplement the Court's aggregate judgment always signed by all judges. ECJ judges are sworn to secrecy and the Court's archives recording its internal deliberations remain largely closed, even in relation to judgements made more than fifty years ago. The Court of Justice does not facilitate the study of the contributions of individual judges to its internal decision-making.

Recently, however, there has been a little progress. Aspects of the Court's internal debate in the 1963 *Van Gend en Loos* case were first revealed by former judge's assistant Paolo Gori.[27] Gori's documentation demonstrates that Andreas Donner, Dutch judge and from 1958 to 1964 President of the Court of Justice, opposed the declaration of the direct effect doctrine. Donner's opposition was however overcome by Italian judge Alberto Trabucchi and French judge Robert Lecourt, both new appointees, who mustered a majority of judges' votes in favour of the direct effect doctrine and the *Van Gend en Loos* judgement as history now knows it (Donner himself resigned as President of the Court the day after the 1964 supremacy judgment, noting that he had lost the support of his colleagues).[28] Gori's revelations, by disclosing the priority influence of some judges more than others, enabled a much greater engagement with the intersection of judicial biography and the Court's output.

It is therefore to Trabucchi and Lecourt, rather than to Donner, that the primary influence on the Court of Justice's major judgements in 1963 and 1964 must be attributed. And it is Lecourt in particular who became the dominant influence on the Court for many years, eventually serving as President of the Court from 1967 to 1976. Lecourt is indeed the only ECJ judge (apart from Donner) who served throughout the crucial 1962 to 1976 period. Lecourt's contemporary writings outlined important doctrinal developments well in advance of the Court's actual judgements,[29] and publicly advocated for the Court's role as a 'motor' of European integration as early as 1963.[30] Another prominent judge of the European Court, Pescatore, talked of the 'jurisprudential miracle' of the Court's 'Lecourt years' [*années Lecourt*], when so many of the Court's 'revolutionary' decisions were made.[31] It is Lecourt who travelled Europe tirelessly propagandising the ECJ's new

profound difference' compared with classical international law. For the argument that the European legal order's rejection of inter-state retaliation was directly and logically connected to the direct effect and supremacy doctrines, see Phelan (n 14, 84ff and throughout); and W Phelan, *In Place of Inter-State Retaliation: The European Union's Rejection of WTO-style Trade Sanctions and Trade Remedies* (Oxford University Press, Oxford 2015). See also W Phelan, 'Enforcement and Escape in the Andean Community: Why the Andean Community of Nations is not a Replica of the European Union' 53 (4) (2015) Journal of Common Market Studies 840.

[26]A Boerger and M Rasmussen, 'The Making of European Law: Exploring the Life and Work of Michel Gaudet' 57 (2017) American Journal of Legal History 51; A Arena, 'From an Unpaid Electricity Bill to the Primacy of EU Law: Gian Galeazzo Stendardi and the Making of Costa v. ENEL' 30 (3) (2020) European Journal of International Law 1017.

[27]P Gori, 'Quindici anni insieme ad Alberto Trabucchi alla Corte di giustizia delle C.E.' *La formazione del diritto europeo : giornata di studio per Alberto Trabucchi nel centenario della nascita* (2008) 71 ; M Rasmussen, 'The Origins of a Legal Revolution – The Early History of the European Court of Justice' 14 (2) (2008) Journal of European Integration History 77; A Vauchez, 'The Transnational Politics of Judicialization, *Van Gend en Loos* and the Making of EU Polity' 16 (1) (2010) European Law Journal 1.

[28]Fritz, *Juges et avocats généraux* (n 4, 116).

[29]The 'direct effect of Directives', for example, declared by the Court in 1974 (ECJ Case 41/74 *Van Duyn* ECLI:EU:C:1974:133), is foreshadowed in R Lecourt and RM Chevallier, 'Chances et Malchances de l'harmonisation des législations européennes' (1963) Recueil Dalloz 273, see also Phelan (n 14, 152ff).

[30]Lecourt and Chevallier (n 29, 275).

[31]P Pescatore, 'Robert Lecourt (1908-2004)' (3) (2005) Revue trimestrielle de droit européen 589. For recent research on Pescatore himself, see e.g. L Azoulai, 'Solitude, community, and critique. Motives for a reshaping of EU Legal Studies'

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doctrines and it is Lecourt's 1976 book, *L'Europe des Juges*, alone of the publications of the *Van Gend en Loos* judges, that can still be found on the shelves of European law professors across the continent.[32] The Court of Justice in the 1960s and 1970s has come to be recognised as the 'Lecourt Court' in much the same way that legal historians in the United States might refer to the 'Warren Court'.[33] Lecourt appears to have occupied, for the ECJ, the role of the dominant judge during the period of its most fundamental judgements. The same role that was played by Chief Justice John Marshall on the early United States Supreme Court.[34] As Gragl writes, 'all decisions of the Union's foundational period can be attributed ... to the arrival of Robert Lecourt' at the ECJ one year before the *Van Gend en Loos* judgement.[35]

To be sure, the mere declaration of these doctrines by the ECJ does not explain their eventual success within the law and politics of the European member states. Early responses to this question revolved around competing 'big picture' sketches that supplemented discussion of legal texts and an anonymous court with various aspects of the wider context, either the incentives of 'lower' national courts to empower themselves by applying European law domestically, or the incentives of the European states to obtain a treaty enforcement institution that would be responsive to the demands of the major member states but which states could nonetheless 'ignore' when necessary.[36] Recent historical and political science research however has made great progress on more specific and empirically-grounded answers to this question. On the strictly legal side, national courts (frequently appeals or other 'higher' courts, in fact, but not national constitutional courts) proved increasingly willing over time to directly apply European law and submit preliminary references to the Court of Justice, often initially at the instigation of a small number of ideologically committed Euro-lawyers.[37] The Legal Service of the European Commission, under its director Michel Gaudet, propagandised in favour of the new European law doctrines by networking with national judges and private sector Euro-lawyers.[38] When judgements of the Italian and German Constitutional Courts in 1965 and 1967 raised the possibility that European law would not be applied domestically because of fundamental rights concerns, the ECJ moved to defuse the issue by itself taking on a role reviewing European law on fundamental rights grounds.[39]

On the political side, the famous judgements of 1963 and 1964 had in fact been supported by senior German policy-makers, despite contrary arguments advanced by Germany's lawyers before the Court itself.[40] The wider political and economic conditions of post-war Europe were also

50 (2015) Politique européenne 82; V Fritz, 'Activism on and off the Bench: Pierre Pescatore and the Law of Integration' 57 (2020) Common Market Law Review 475.

[32]R Lecourt, *L'Europe des juges* (Bruylant, Bruxelles 1976).

[33]B Davies, 'The Court of Justice of the European Union and Integration Through Law' in B Leucht, K Seidel and L Warlouzet (eds) *Reinventing Europe : The History of the European Union, 1945 to the Present* (Bloomsbury Academic, London 2023) 107–22, with comparison to the 'Warren Court'.

[34]Rasmussen (n 9, 160).

[35]P Gragl, 'The Faceless Court? The Role of Individual CJEU Members' 30 (1) (2023) Maastricht Journal of European and Comparative Law 15–18.

[36]Weiler (n 3); Garrett (n 3); Burley & Mattli (n 3).

[37]T Pavone, *The Ghostwriters: Lawyers and the Politics behind the Judicial Construction of Europe* (Cambridge University Press, Cambridge 2022); W Phelan, 'Review of *The Ghostwriters: Lawyers and the Politics behind the Judicial Construction of Europe* by T. Pavone' 47 (2022) European Law Review 723.

[38]On Gaudet, see e.g. Boerger and Rasmussen (n 26).

[39]Eg B Davies, *Resisting the European Court of Justice: West Germany's Confrontation with European law, 1949-1979* (Cambridge University Press, Cambridge 2012); W 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) (2014) Irish Journal of European Law 43; W Phelan, 'The Role of the German and Italian Constitutional Courts in the Rise of EU Human Rights Jurisprudence: A Response to Delledonne & Fabbrini' (2) (2021) European Law Review 175; compare G Delledonne and F Fabbrini, 'The Founding Myth of European Human Rights Law: Revisiting the Role of National Courts in the Rise of EU Human Rights Jurisprudence' 44 (2) (2019) European Law Review 178.

[40]Davies (n 39).

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conducive to an intrusive and binding dispute settlement system, much harder for states to ignore than ordinary international law, because high levels of economic interdependence combined with generous welfare states and intra-industry trade that facilitated the necessary adjustments by adversely affected industries and groups.[41] The fact that governments were firmly in control of the ECJ's judicial appointments, but did not attempt to use them to influence the Court, suggests that the European governments were willing to accept unprecedented constraints on state policy.[42] Wider trends in European political development favouring administrative delegation and decree-powers domestically also facilitated the international delegation of powers to the European institutions.[43] Newer political science research on the ECJ, frequently quantitative, often focusses on contemporary issues, such as the Court's responsiveness to the legal arguments of the member states, changing regulatory and litigation practices, and the impact of the latest (post-2008) judicial appointments procedure.[44]

The focus of this paper however is on understanding the constitutional thinking of the ECJ's leading judge during Europe's legal revolution in the 1960s and 1970s. We know the output of the Court of Justice in its 'Lecourt years', but we know little of Lecourt himself. Why did he support and promote the Court's famous judgements? Here again the obstacles can appear forbidding. Lecourt wrote no detailed account of his time at the Court and his private papers were apparently destroyed at his own insistence prior to his death.[45] As a judge at the birth of a new legal order, Lecourt's situation precludes examining earlier service in an appeals court (or as a prominent litigator) to inform our understanding of later judicial behaviour after a supreme court appointment. Lecourt had not even been a judge in France. As Morten Rasmussen writes, 'Lecourt's legal thinking is difficult to trace, because as a politician, he did not publish regularly on legal matters'.[46] Lecourt is often described as a Christian Democrat, and also as a 'conviction European',[47] because of his long association with 'pro-European' activism in France and across Europe.[48] An emphasis on the latter factor fails however to sufficiently distinguish Lecourt from say Donner whose speeches as President of the Court were often themselves distinctly 'pro-European', but who nonetheless failed to support the doctrine of direct effect when it came to the Court in 1962.[49] Moreover, it is only in hindsight, given the way that European law developed, that 'Europe' came to be understood as so clearly bound up with these particular legal doctrines.

[41]For the application to the European legal order, see Phelan (n 25, 135ff and throughout). For more general arguments, eg B Balassa, 'Tariff Reductions and Trade in Manufacturers among the Industrial Countries' 56 (3) (1966) American Economic Review 466; J Ruggie, 'International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order' 36 (2) (1982) International Organization 379.

[42]Fritz, *Juges et avocats généraux* (n 4, 191).

[43]P Lindseth, *Power and Legitimacy: Reconciling Europe and the Nation-State* (Oxford University Press, Oxford 2010).

[44]Eg CJ Carrubba, M Gabel and C Hankla, 'Judicial Behavior Under Political Constraints: Evidence from the European Court of Justice' 102 (4) (2008) American Political Science Review 435; RD Kelemen, *Eurolegalism: The Transformation of Law and Regulation in the European Union* (Harvard University Press, Cambridge MA 2011); O Larsson and D Naurin, 'Judicial Independence and Political Uncertainty. How the Risk of Override Impacts on the Court of Justice of the EU.' (2016) 70 (2) International Organization 377; MdS-O-LE Lasser, *Judicial Dis-Appointments: Judicial Appointments Reform and the Rise of European Judicial Independence* (Oxford University Press, Oxford 2020).

[45]M Rasmussen, 'Constructing and Deconstructing 'Constitutional' European Law: Some reflections on how to study the history of European Law' in H Koch and others (eds) *Europe: The New Legal Realism: Essays in Honour of Hjalte Rasmussen* (Djøf Publishing, Copenhagen 2010) 639–4 ft 59.

[46]M Rasmussen, 'Agents of Constitutionalism: The Quest for a Constitutional Breakthrough in European Law, 1945-1964' in MM Payk and KC Priemel (eds) *Crafting the International Order: Practitioners and Practices of International Law Since C1800* (Oxford University Press, Oxford 2021) 249–1.

[47]*Le Monde*, 15 April 2004. Also eg *L'Humanité*, 10 July 1957, including Lecourt in a list of European 'fanatics' [*fanatiques*] in the French parliament.

[48]Fritz, *Juges et avocats généraux* (n 4, 244).

[49]Eg Donner's speech 16 September 1959, noting possible similarities between the new European Communities and earlier periods of state history where unity was formed out of many regional and local communities (CJEU Archives DONNER Andreas Matthias, Fonds CJUE-2556 1958–1992, 196–9).

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Rather than looking to Lecourt's support for 'Europe' in the abstract, what is needed is evidence for why Lecourt would have supported, more specifically, the doctrines of direct effect and supremacy, as well as European law's rejection of inter-state retaliation.

There is in fact evidence that Lecourt was personally committed to the rejection of inter-state retaliation prior to his appointment to the Court. Lecourt's doctoral dissertation in law, published in 1931, was a persistent and unswerving critique of the use of 'self-help' in French property disputes, which then turns in its final pages into a full-throated call for international organisations to likewise prohibit the use of 'self-help' in international politics, in wording similar to that later used in the ECJ's 1964 *Dairy Products* judgement.[50] This is an issue-area where a clear continuity can be traced between a judicial appointee's earlier legal commitments and the doctrines that a court advanced after their appointment.[51]

What about Lecourt's support for European law's direct effect and supremacy doctrines? At least three aspects can be identified which would incline against, or in favour of, these new doctrines.

First, as scholarship rightly emphasises, the direct effect and supremacy doctrines were 'revolutionary' declarations by the Court, involving a decisive break with long-standing approaches to international law and treaty politics.[52] Common forms of legal conservativism – in the sense of attachment to and boundedness by inherited procedures and institutions – would caution against such a leap into the unknown.

Second, the direct effect and supremacy doctrines of European law had the obvious potential to displace ordinary forms of law-making in the national parliaments of the member states. Weiler's account of the direct effect and supremacy doctrines, above, describes them straightforwardly as a mechanisms for removing the ability of national parliaments to vote legislation. A common attachment to the authority of national legislatures to vote on the laws affecting their citizens' lives would therefore have inclined against the direct effect and supremacy doctrines.

Third, and on the other hand, the value that might encourage support for the new doctrines of European law would be an uncommon emphasis on 'effectiveness'. 'Output effectiveness' is, after all, the central justification for activities of the European institutions. A strong predisposition to the argument that public institutional structures must first and foremost provide workable solutions to the practical challenges facing them, with other values sidelined if necessary, would likely incline towards the support of these doctrines.

It is no surprise that many have balked at the direct effect and supremacy of European law. The puzzle is rather, why did judge Lecourt support them? What was there in his own background to make him open to accepting, developing, and promoting the ambitious, 'constitutionalising' doctrines put forward by the Legal Service of the European Commission and a variety of pro-European private litigants? What, in short, was Lecourt's constitutional ideology? To answer this question, we turn to the turbulent politics of postwar France, where, half-hidden and half-forgotten, Lecourt as a politician had already played a key role in designing constitutional structures.

4. Article 49-3 of the French constitution

France's current constitution – the 'Fifth Republic' – was put to the French people for approval by referendum in September 1958 by the government of Charles de Gaulle, coming into force on 4 October 1958. There were many changes compared with the previous constitution of Fourth

[50]R Lecourt, *Nature juridique de l'action en réintégrande : étude de la jurisprudence française* (A.-D., Paris 1931), esp 284–5.

[51]Lecourt also published an argument rejecting the use of inter-state retaliation between the European states in 1963, that is after his appointment to the Court in 1962 but before the Court's *Dairy Products* judgment in 1964, see Lecourt and Chevallier (n 29, 275).

[52]Eg M Rasmussen, 'Revolutionizing European Law: A history of the *Van Gend en Loos* judgment' 12 (1) (2014) International Journal of Constitutional Law 136.

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Republic France (1946–1958), however some were more important than others. Professor Georges Vedel liked to say that the Fifth Republic consisted of three essential elements : the direct election of the President by universal suffrage, the creation of the Constitutional Council, and Article 49-3.[53] The direct election of the President by universal suffrage – not actually provided for in the 1958 Constitution but approved by a subsequent referendum in 1962 – gave the President a democratic mandate separate from, and perhaps superior to, the National Assembly. The Constitutional Council was in effect a constitutional court, a novelty in republican France which had long refused to allow judicial control of legislation.[54] It is however the last of Vedel's three essential elements of the Fifth Republic – Article 49-3 – to which we will now turn.

Article 49-3 of the French Constitution as enacted in 1958 stated as follows:

> The Prime Minister can, after deliberation of the Council of Ministers, engage the responsibility of the Government before the National Assembly on the vote of a text. In this case, this text is considered adopted, unless a motion of censure, tabled within the following twenty-four hours, is voted [by a majority of the members making up the Assembly].

At first sight, this provision might look like the bland constitutionalisation of a 'confidence vote' procedure, common in many parliamentary systems, whereby the government seeks a confidence vote on an item of parliamentary legislation, with the implied threat of government resignation and/or new elections if the government loses the vote. The confidence vote organised by the British Conservative government on 23 July 1993 to ensure the ratification of the Maastricht treaty would be one prominent, and Europe-related, example. Article 49-3 however contains distinguishing features which can only be understood by setting out some French political history.

Under the pre-1940 'Third Republic' constitutional system, the government could be removed from office by losing a simple, or relative, majority vote in the Chamber of Deputies. Aiming to reinforce the stability of governments, the new, post-war, 1946 Constitution provided that the government could only be overthrown when an absolute majority of deputies had opposed the government. Repeated overthrows of governments by absolute majorities could then prompt a dissolution and new elections. This arrangement however opened up a particular scenario whereby the government called a vote of confidence on an item of legislation, and the parliamentary vote by the deputies actually voting went against the government – but not by the required absolute majority of deputies that would constitutionally oblige the government to resign.[55] As a result, the government was constitutionally entitled to remain in office, however, the proposed legislation on which the government had staked its responsibility was not adopted into law. So the government appeared powerless and often felt politically obliged to resign despite not being constitutionally obliged to do so, and without the constitutional requirement for a dissolution and new elections being reached. Many of the ministerial crises of the Fourth Republic system were the result of this sort of parliamentary manoeuvring, whereby deputies belonging to government parties would abstain in confidence votes on difficult issues, allowing the government to 'survive' (at least according to the constitutional rules) but without controversial legislation being adopted.[56] This scenario was widely understood to be a central cause of the persistent ministerial instability in the Fourth Republic, which had indeed 21 governments over its short 12 year life.

[53]J Gicquel, 'Sauvegarder L'Article 49, Alinea 3!' in J-P Camby, P Fraisseix and J Gicquel (eds) *La revision de 2008 : une nouvelle Constitution ?* (LGDJ, Paris 2011) 287.

[54]On the Council's increase in powers over time, eg A Stone Sweet, *The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective*. (Oxford University Press, Oxford 1992).

[55]P Avril and J Gicquel, *Droit Parlementaire* (Montchrestien, Paris 1996) 226 refer to this scenario as a 'blind spot' [*angle mort*], where the government was defeated by a 'relative majority', rather than an 'absolute majority'.

[56]Avril and Gicquel (n 55, 226).

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Article 49-3 was designed to address this difficulty. Under this procedure, the government engages its responsibility on a legislative text, after which it is for the opposition to respond and a variety of scenarios may occur. If no vote of censure is tabled by opposition deputies, the text is considered adopted without any vote at all. If a vote of censure is tabled, only the votes in favour of the censure are tallied, so that abstention favours the government and therefore can no longer be meaningfully carried out. If the votes in favour of censure reach the necessary absolute majority against the government, then the government must resign and the text, of course, is not adopted. If the votes in favour of censure fail to reach an absolute majority against the government, then the government survives and the text is at the same time considered adopted. There is no longer any scenario whereby the government constitutionally survives but the text on which the government has engaged its responsibility is not adopted – the government and the text now stand or fall together. As commentary on the new 1958 constitution was quick to point out, the logic of Article 49-3 was that rejection of the government's proposed legislation must be explicit, while acceptance need only be implicit.[57]

The vote of confidence procedure set out in Article 49-3 continued to be relevant after 1958, despite the increase in the independent constitutional powers of the President, because under the Fifth Republic the French government (and its Prime Minister) can still be forced to offer their resignation by an absolute majority of deputies, and continues to need the approval of the National Assembly to pass laws in many important issue areas. So just as under the Fourth Republic, Fifth Republic governments need a mechanism for ensuring that legislation can be passed. As Michel Debré, principal drafter of the new constitution, explained in his elaboration of the text before the *Conseil d'Etat*: 'Experience has led, moreover, to provide a somewhat unusual disposition to ensure, despite manoeuvres, passage of an essential piece of legislation'.[58]

The purpose of this 'somewhat unusual disposition' – Article 49-3 – was to prevent ministerial crises resulting from the inability of the French government to pass legislation that it considers indispensable to its continuance in office. On this score Article 49-3 has been a remarkable success, as the short-lived and crisis-ridden governments characteristic of the Fourth Republic, with 21 governments over 12 years, from Ramadier to De Gaulle – have been replaced by the greater stability of governments characteristic of the Fifth Republic, with 26 governments over 65 years, from Debré to Attal. To be sure, other institutional changes have contributed to this greater governmental stability, above all the election of the President by universal suffrage, whose party often goes on to considerable success at subsequent legislative elections. However the French parliament – like French society – remains divided and fractious, with many ideologically conflicting political parties whose deputies in turn may demonstrate less than fully reliable obedience to party leaders.[59] In these circumstances, Article 49-3 has been used 113 times since 1958 to successfully ensure the adoption of legislation by the National Assembly, with usage varying of course according to political conditions.[60]

Article 49-3 has from the first been a controversial aspect of the 1958 Constitution. As noted above, it is unusual among the various confidence vote processes in parliamentary systems, in permitting a law to be adopted without a normal parliamentary vote, or in the context of a vote where a majority of recorded votes are against the government and its legislative text. In the United Kingdom's 1993 Maastricht vote, for example, the Conservative government needed to ensure that its own party MPs voted in favour of its confidence motion approving the

[57]M Prélot, *Pour comprendre la nouvelle Constitution : études et documents* (Centurion, Paris 1958) 45.

[58]*Documents pour servir à l'histoire de l'élaboration de la Constitution du 4 octobre 1958* (Documentation Française, Paris 1987–2001) [Hereafter, *DSP*] III, p 261.

[59]A Cole, S Meunier and V Tiberj, *Developments in French politics 5* (Palgrave Macmillan, Basingstoke 2013); A Cole and others (eds), *Developments in French politics 6* (Bloomsbury London 2020).

[60]J Huber, *Rationalizing Parliament: Legislative Institutions and Party Politics in France* (Cambridge University Press, Cambridge 1996). As of 21 February 2024, https://www.assemblee-nationale.fr/dyn/decouvrir-l-assemblee/engagements-de-responsabilite-du-gouvernement-et-motions-de-censure-depuis-1958.

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Government's policy on the Treaty's 'Social Chapter', and was successful with 339 votes in favour and 299 against. However Article 49-3 purposefully makes no such requirement. In the case of the legislation initiating the French nuclear programme (the '*force de frappe*') in 1960, where Debré's government had engaged the responsibility of the government in line with Article 49-3, *Le Monde* reports the opposition vote of censure required a majority of 277, and obtained only 207 votes, with the result that the law was considered adopted.[61] There were no recorded votes 'in favour'. Article 49-3 has regularly been called upon by governments to obtain the adoption of legislation in sensitive areas such as social security and the age of retirement, including recently in 2023 by a government appointed by President Macron, prompting hundreds of thousands of protestors to take to the streets, sometimes violently.[62]

Paul Reynaud, former Prime Minister and a persistent detractor, described Article 49-3 as 'degrading to the National Assembly'.[63] It is widely characterised as 'undemocratic' and contrary to the principle that the National Assembly, chosen by the people, must vote to approve new laws.[64] Socialist politician François Hollande called it 'a brutality, a denial of democracy'[65], and critics describe it as a means of 'disciplining the parliamentary majority without trying to persuade it'.[66] Article 49-3 is controversial outside the political elite as well, with 2016 polls highly critical of its use for contentious employment legislation.[67] Is there any article of the 1958 constitution which is as roundly criticised as Article 49-3? asks Aromatario.[68]

Article 49-3 has its ardent defenders, however. These do not tend to vindicate the supposed democratic credentials of Article 49-3, but argue instead that the practical results of getting rid of it would be disastrous. Public justifications of Article 49-3 emerged in force during a constitutional revision project in 2008, which limited the use of 49-3 to budgetary and social security matters, as well as (after much debate) one additional project per parliamentary session. 'How did the constitutional reform committee come to have the absurd idea of practically annihilating the centrepiece [*la pièce maîtresse*] of our constitution?' wrote Ameller.[69] 'What is at risk is nothing more or less than ... the survival of the Fifth Republic', wrote Jan, 'Looked at correctly, the new provision contains the extraordinary potential to destroy the principal accomplishment of Michel Debré : governmental stability. ... Without 49-3, the legislature would be a nightmare for the executive'.[70]

Given its profound impact, there has long been interest in the origins of this procedure. As one of the early polemics against the 1958 Constitution put it, 'which eccentric came up with that idea?' (*quel est le farfelu qui a inventé* [*ça*]*?*)[71] Where then did '*Le 49-3*' come from?

5. The origins of Article 49-3

France's current 'Fifth Republic' Constitution was adopted on 4 October 1958, replacing the 'Fourth Republic' Constitution that been adopted in 1946. It was initiated by De Gaulle who had

[61]*Le Monde,* 26 October 1960.

[62]https://www.france24.com/en/france/20230311-french-protesters-take-to-the-streets-to-rally-against-macron-s-pension-plan

[63]R Elgie, 'From the Exception to the Rule: The Use of Article 49-3 of the Constitution since 1958' 1 (1) (1993) Modern & Contemporary France 17–20.

[64]M Ameller, 'Vive Le 49 Alinea 3' in J-P Camby, P Fraisseix and J Gicquel (eds) *La revision de 2008: une nouvelle Constitution ?* (LGDJ, Paris 2011) 277–8.

[65]*Le Figaro*, 15 December 2015.

[66]A Montebourg and B François, *La Constitution de la 6e République: réconcilier les Français avec la démocratie* (O. Jacob, Paris 2005) 134.

[67]https://fr.yougov.com/topics/consumer/articles-reports/2016/05/25/493-quen-pensent-les-francais

[68]S Aromatario, 'La Genèse du 49 al. 3' (2019) (43719) Revue Generale du droit *on line* 1 1 [printed].

[69]Ameller (n 64, 288).

[70]P Jan, 'Une Réforme Dangereuse' in J-P Camby, P Fraisseix and J Gicquel (eds) *La revision de 2008 : une nouvelle Constitution ?* (LGDJ, Paris 2011) 281.

[71]P Reynaud, *Et après?* (Plon, Paris 1964) 81.

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returned to power in May 1958, initially as Prime Minister within the existing Fourth Republic framework, to address the crisis in Algeria and the threat of a military coup, only on condition that the political parties supported a constitutional revision to install a more Presidential form of government. De Gaulle is therefore popularly recognised as the creator of the 1958 Constitution. As the website of the French National Assembly announces, 'the institutions of the Fifth Republic, set up in 1958, correspond to the ideas of General de Gaulle, as he had set them out in 1946'.[72] De Gaulle had indeed outlined his constitutional ideas in a speech in Bayeux on 16 June 1946,[73] where he had advocated for a Head of State, chosen outside parliament by a wider constituency, with the power to name government ministers and act as an 'arbiter' in national politics. This would leave parliament to vote laws and the budget, without however the parliamentary domination of the executive that had, in De Gaulle's view, contributed mightily to the weakness of the French state.

The lead drafter of the 1958 Constitution was Debré, a long-time associate of De Gaulle, who became Minister of Justice in De Gaulle's government in June 1958. Debré had served as a Senator for many years, from which position he heatedly castigated the workings of the Fourth Republic, and advocated for a strong Prime Minister and a 'rationalised parliament' inspired in part by the British model.[74] De Gaulle himself presided over the interministerial committee where draft provisions of the new Constitution were proposed, rejected, or agreed, and then Debré (with a few collaborators) produced a complete draft text, which after further consultation with a committee of parliamentarians and the *Conseil D'Etat* (but little substantive change) became the final text put to the voters on 28 September 1958.

Since Article 49-3 is such a conspicuous part of the Fifth Republic Constitution, not surprisingly it is often publicly associated with the persons of both De Gaulle and Debré. In debates over 2008 constitutional amendments that eventually came to revise the original 1958 wording of Article 49-3, commentators frequently associated possible limits on Article 49-3 as an attack on Debré's major achievements, or as a rejection of De Gaulle's Fifth Republic itself. Similarly, Prime Minister Borne declared during the March 2023 use of the 49-3 mechanism to obtain the approval of a raise in the French age of retirement, 'The 49-3 mechanism is not the invention of a dictator, but the profoundly democratic choice made by General de Gaulle and approved by the people of France'.[75]

Article 49-3 was not initially advocated by either De Gaulle or Debré, however.[76] There is no mention of any such mechanism in De Gaulle's 1946 Bayeux speech, and René Cassin, another long-time ally of De Gaulle, told the *Conseil d'Etat* on 17 August 1958 that draft article 45 [later 49] 'unfortunately' had a 'parliamentary' origin and that de Gaulle had gone to 'all the trouble in the world' to keep it out of the constitution.[77] As for Debré, he was opposed to Article 49-3, and

[72]https://www2.assemblee-nationale.fr/decouvrir-l-assemblee/histoire/histoire-de-l-assemblee-nationale [downloaded 13 May 2024].

[73]*DSP* I, p 3-7.

[74]S Aromatario, *La pensée politique et constitutionnelle de Michel Debré* (LGDJ, Paris 2006).

[75]*Le Figaro* 20 March 2023, https://video.lefigaro.fr/figaro/video/le-49-3-nest-pas-linvention-dun-dictateur-defend-elisabeth-borne/.

[76]This discussion of the prehistory of Article 49-3 draws substantially on the formidable scholarship in Aromatario (n 68) and, in more detail, J-F de Bujadoux, *Rationalisations du Parlementarisme en France (XIXe–XXIe siècles)* (Thèse de doctorat, Université Paris II 2019), noting however that both focus on demonstrating *non-Gaullist* sources of 49-3 without any particular interest in Lecourt (let alone his later judicial career). Lecourt has largely disappeared from contemporary political discourse in France, with the electronic archives of *Le Monde* recording only two mentions of 'Robert Lecourt' since 1 January 2005 (as of 9 August 2023), despite many controversies over Article 49-3, and indeed over European law.

[77]*DSP*, II, p 356. By 'parliamentary', Cassin refers to the politicians of the existing 4th Republic parliament. See also *DSP*, II, p 304 for De Gaulle's scepticism on the role of specific procedures in maintaining the relationship between government and parliament, indicating that straightforward threats of government resignation should be sufficient, see de Bujadoux (n 76, 599).

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attempted to have the mechanism removed from the agreed draft.[78] It is from the initiative of other members of the interministerial committee that what became Article 49-3 was introduced into the draft constitution of the Fifth Republic.[79]

The interministerial committee was attended by powerful parliamentarians of the Fourth Republic regime, including Pierre Pflimlin (MRP – Christian Democrat) and Guy Mollet (Socialist), who now served as Ministers of State in De Gaulle's constitution-writing government. Among historians of the 1958 Constitution it is widely accepted that it was at the insistence of these two former Prime Ministers of France, with rather more experience in executive–parliamentary management than Debré and De Gaulle, that Article 49-3 appears in the 1958 Constitution.[80] In doing so, they drew on proposals to reform the Fourth Republic constitution that had been advanced in early 1958 by the administrations of Félix Gaillard and then again by Pflimlin himself (Gaillard's successor), and which had been approved (as the first stage of the process) in a vote of the National Assembly in March 1958.[81] Article 49-3 is therefore neither especially 'Gaullist' nor particularly 'Fifth Republican' in its origins, as it was a constitutional reform already being considered separately from De Gaulle's return to power and France's turn to a more Presidential form of government.[82]

The origins of Article 49-3 therefore lie in the reforms proposed by the Gaillard government in early 1958. The primary author of these proposals was not Gaillard, however, but Robert Lecourt, leader of the MRP [*Mouvement Républicain Populaire*] Christian Democratic parliamentary group, and Minister of Justice in Gaillard's government.[83]

It was Lecourt who had advocated similar constitutional changes, to allow legislative texts to be adopted where a confidence vote failed to achieve an absolute majority against the government, over the years prior to the formation of the Gaillard government.[84] It was Lecourt who conducted the 'round table' consultations on constitutional reforms with party leaders. It was Lecourt who led the defence of the reform in the public arena, in the press, and on the radio. It was Lecourt who advocated the constitutional proposal in a series of tumultuous parliamentary debates throughout the early months of 1958. Lecourt's leadership on the constitutional reform package (and particularly on the confidence vote procedure) was widely acknowledged at the time, with the plans referred to as 'Gaillard–Lecourt reforms' or even just the 'Lecourt reforms'.[85] Lecourt was the 'theoretician' [*doctrinaire*] of the reforms, according to the *Gazette de Lausanne*,[86] and is described by scholar de Bujadoux as the 'true animator' [*véritable inspirateur*] of the government's proposals.[87] More than Pflimlin, Mollet, or Gaillard, and certainly more than either De Gaulle or Debré, Lecourt was the main actor behind the restructured relationship between the French

[78]Eg Goguel's and Debré's letters, both of 11 August 1958, in *DSP* II pp 709 and 699–700. Note Debré's reference to raising this issue 'once again'. Debré also sympathised with Reynaud's criticisms of the proposed mechanism in the consultative committee, admitting that if it were overused it would lead to the 'destruction not only of the system but of the government's authority' *DSP*, II, pp 505–506, also de Bujadoux (n 76, 600). In early 1958 Debré had denounced the Gaillard administration's (indeed, Lecourt's) proposed reform of the confidence vote procedure as 'tricks and trickery' [*trucs et trucages*] (M Debré, 'Trucs et Truquages' (1958) (7 February) Courrier de la colère).

[79]M Debré, *Trois républiques pour une France. Mémoires, t. II, 1946–1958* (Albin Michel, Paris 1988) 380.

[80]Debré (n 79, 380); Avril and Gicquel (n 55, 227); P Pflimlin, *Mémoires d'un Européen: de la IVe à la Ve République* (Fayard, Paris 1991) 152; on Socialist party recognition of the need to reinforce executive power, eg D Maus, 'Renforcer l'exécutif: les propositions de Jérôme Solal-Céligny. Des propositions de 1956 à la Constitution de 1958' *La Constitution et les valeurs: Melanges en l'honneur de Dmitri Georges Lavroff* (Dalloz, Paris 2005) 471.

[81]Aromatario (n 68, 10ff).

[82]P Avril and J Gicquel, 'La IVe entre deux Républiques' 76 (27–43) (1996) Pouvoirs 36–37.

[83]De Bujadoux (n 76, 574); R Lecourt, 'L'Origine Mouvementée de L'Article 49-3' (1990) 258–9 France Forum 25.

[84]Eg the MRP proposals of January 1957, *Le Figaro*, 11 January 1957.

[85]Eg *Combat*, 6 January 1958; *Le Monde*, 15 January 1958; *Combat*, 13 February, 1958.

[86]*Gazette de Lausanne*, 11 March 1958.

[87]De Bujadoux (n 76, 574, also 617).

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government and the National Assembly that was eventually ratified into the 1958 Constitution.[88] As *La Croix*'s correspondent on the constitutional process noted late in the summer of 1958, 'The proposed system [for the vote of confidence] is, in fact, close to that advocated by M. Lecourt, when he tried to reform the previous Constitution, a system aimed at preventing governments from being overthrown by a minority, with abstentions counting against it. This will undoubtedly be one of the best provisions of the institutions of the Fifth Republic.'[89]

The parliamentary sessions of early 1958 debating Lecourt's proposals had in fact many similarities with later public discussions of Article 49-3, with critics alleging that the proposed constitutional reforms were 'undemocratic' while their defenders, above all Lecourt, emphasised the need for constitutional structures to ensure effective government institutions.

Lecourt's plenary speech began by insisting on the permanent instability caused by the then current constitutional rules:

> It is in examination of the proposed legislation that 4th Republic governments often collapse. ... We live in a permanent state of crisis, to such an extent that we can say that the main institution of our country is 'the fall of the government', this phenomenon resulting from certain deformations brought by practice to the constitutional texts which provide that thanks to absences or abstentions, governments can one time out of two be dismissed by a relative [not an absolute] majority.
>
> The essential problem is not in [forming a government based on a majority]: rather, once the majority is constituted, too many incentives are given to its disaggregation, leaving our constitutional system itself at risk of a mortal blow.
>
> If you allow me to define a 'parliamentary majority' such as it appears from the functioning of our institutions, ... in actual practical fact, I would say that a 'parliamentary majority' is a de facto association, provisional, without legal existence, put together by a haphazard grouping out of weariness with a long period out of power, without commitment of any sort, comprised of the votes of deputies who are in the process of making their way over to the opposition. [*laughter in the chamber*][90]

Opponents of the reform by contrast claimed that the proposed reforms were undemocratic and overly emphasised an unprincipled form of effectiveness. Paul Reynaud gave an early rehearsal of his long-standing opposition to what would become Article 49-3 with his critique of Lecourt's proposals:

> If the text is adopted, the Assembly will no longer vote to enact laws except to the degree that the government is willing to let it vote them. ... All this is achieved by oblique, convoluted methods, but perfectly effective ... [A]s soon as the question of confidence is raised, [the government] is the legislator, no longer you [the parliamentary deputies] ... With the new regime, it [the National Assembly] will be the only parliamentary assembly that will not vote to enact the law [*c'est la seule Assemblée qui ne vote pas la loi*] ...[91]

Reynaud contrasted the proposal with German constitutional arrangements which did indeed put limitations on a purely 'negative' vote of confidence, however the German *Bundestag*

[88]De Bujadoux (n 76, 579). Other major contributors would include Lecourt's MRP colleagues, Moisan and Coste-Floret (Lecourt (n 83)).

[89]*La Croix*, 16 August 1958. See also *Journal Officiel*, Débats, 27 November 1959, p 3060, where, during the first use of the new procedure in 1959, deputy Leenhardt started the debate by noting that the procedure had not been invented by Michel Debré when the new constitution was being drawn up, but rather had first been put forward by Gaillard and Lecourt and their colleagues in January 1958.

[90]*Journal Officiel*, Débats, 14 February 1958, p 787–8.

[91]*Journal Officiel*, Débats, 13 February 1958, p 735–6.

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continued to vote to enact legislation in the normal way. Agreeing with Reynaud, Raymond Triboulet, deputy and later Gaullist minister, said that the proposals were 'at first sight incredible', demonstrating a 'certain contempt of parliamentarism ... how could republicans possibly support them?', while leftwinger Pierre Cot described the proposed reform as 'shocking' [*choquantes*].[92]

Paul Anxionnaz, a Radical party deputy, characterised the proposals as 'pure pragmatism', without regard to democratic theory:

> Finally, I look in vain for a doctrine, a theory of public law, in this governmental text. It is concerned about effectiveness, no doubt, it is pure pragmatism [*il a le souci de l'efficacité, sans doute, c'est du pur pragmatisme*] and I would like someone to explain to us how this text is compatible with the source of power in a parliamentary democracy like ours.[93]

These criticisms Lecourt deflected more than denied, justifying the proposals as not too different from other aspects of French law-making with limited direct parliamentary involvement, and emphasising again and again the overriding need for stability and effectiveness:

> Another objection has been made to me: with your completely anti-parliamentary system, the Assembly will no longer pass the law; it is an abdication of power; passing the law is a privilege of Parliament... All these criticisms in fact already apply directly to current practice ...[94]

Lecourt's speech ended with a flourish:

> In this hard half-century, everything now depends on the continuity and effectiveness of long-term goals. We have the most unstable governments in the world. Will we wait for the miracle of a long-lasting government? Consider that to find a French government which lasted two years, we must go back a third of a century. At a time when France is facing so many challenging problems, can we reject with despair a proposal that believes in the reconciliation of democracy and effectiveness [*la conciliation entre la démocratie et l'efficacité*]?[95]

Lecourt's proposal, in modified form, won the support of the National Assembly in March 1958, and, modified once again, became Article 49-3 of the 1958 Constitution. The differences between the various proposals were consequential, as they sought to prevent abstentions in a variety of ways, and also supplemented the 'engagement of responsibility'/'vote of censure' mechanism with a variety of additional requirements, for example for the motion of censure to suggest an alternative prime minister.[96] Nonetheless the essential mechanism contained in the 1958 Constitution (not these complicating additions) was always the central focus of the early 1958 proposals reforming the confidence vote system. Indeed in a radio interview on 12 January 1958 Lecourt defends exactly the mechanism as it later came to be set out in Article 49-3 : the government could engage the responsibility of the Government before the National Assembly on the vote of a text, and if no vote of censure was tabled, or if a vote of censure failed to be adopted by

[92]*Journal Officiel*, Débats, 18 February 1958, p 843, 848.

[93]*Journal Officiel*, Débats, 12 February 1958, p 716.

[94]*Journal Officiel*, Débats, 14 February 1958, p 792. Lecourt gives the examples of government decree powers, and of new laws made without a vote just by government depositing them before the National Assembly.

[95]*Journal Officiel*, Débats, 14 February 1958, p 793.

[96]Gaillard's 16 January 1958 proposal is at *DSP*, I, pp 215–19, the text adopted by the National Assembly in March 1958 is at *DSP*, I, pp 221–3.

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an absolute majority of deputies, the text would be considered adopted.[97] That is the direct thread from Lecourt's January 1958 proposals to the famous provision of the 1958 Constitution.

6. Effectiveness, parliamentary democracy, and European law

The European legal order is a world historical novelty, a momentous transformation and legalisation of international politics that began in postwar Western Europe and now includes 27 European states. The essential organising principles of this new legal system had not been negotiated into the Treaty of Rome by the European states however, but were declared instead by the European Court of Justice itself throughout the 1960s and 1970s, above all in the Court's 'revolutionary moment' in 1963 and 1964. Previous research has come to recognise French politician Robert Lecourt as the leading judge on the Court throughout this extraordinary period. At that point however progress has stalled, given the closure of the Court's archives on its internal decision-making, Lecourt's failure to publish regularly on legal matters, and the apparent destruction of Lecourt's own private papers. Thus the European legal order is frequently explained as the creation of an anonymous and personality-less 'court', even though it is widely acknowledged by lawyers, legal historians, and political scientists alike that courts are in fact controlled by judges, powerful individuals whose judicial decisions often demonstrate considerable continuities with their earlier political and constitutional commitments.

This paper has shown, first, that judge Lecourt's prior political and constitutional values can indeed be identified, through his involvement in French politics. Far from a conventional French deputy, Lecourt was a specialist in institutional and constitutional design, open to radical changes in the way votes were counted, and in the allocation of agenda-setting rights and legislative powers, as required to achieve his desired results. More specifically, he was a veteran campaigner for the reduction or removal of the French parliament's role in national law-making, to promote the stability and effectiveness of the French executive. While certainly a committed republican and democrat, as demonstrated by his background in the anti-Vichy resistance, Lecourt was moreover willing to go further than many contemporary critics of France's parliamentary system. Consider that Debré, a determined critic of the French legislature if ever there was one, initially found that the proposals for Article 49-3 'offended his sense of parliamentarism'.[98]

So it turns out that the half-hidden, half-forgotten leading judge behind Europe's legal revolution was also the half-hidden, half-forgotten leading instigator of perhaps the most controversial provision of France's 1958 Constitution.

Second, for explanations of the birth of the European legal order, this paper has revealed continuities between Lecourt's approach to reforming France's constitution and the jurisprudence of the Court of Justice after his appointment. For Article 49-3 and the constitutional doctrines of European law share elements of a common ideology. Both were revolutionary novelties, with little background in French constitutional practice or classical international law. Both were rule-making procedures commonly justified by claims of 'effectiveness', as a pragmatic improvement on sub-optimal previous arrangements (the instability and paralysis of French governments, the weaknesses of ordinary international law).[99] Both were also frontal assaults on widely prevailing understandings of French (and, in the European case, other nations') democratic procedures, that law could only be made by majority votes of parliamentarians to approve texts in the ordinary way. Indeed, recalling Paul Reynaud's claim that if Lecourt's confidence vote procedure was accepted, the French National Assembly would be the only parliament that would not vote to

[97]*RTF*, 9 January 1958.

[98]Debré (n 79, 380).

[99]As ECJ judge Lecourt explained in one of his early justifications of the European legal order, 'effectiveness required the Community to go beyond the ordinary international framework' [*L'efficacité commandait donc de s'évader du cadre international classique*] (R Lecourt, 'Allocution de M. Robert Lecourt' *XXe anniversaire de la déclaration de Robert Schuman Mai 1950–Mai 1970* (European Communities, Brussels 1970) 9).

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enact the law, it is equally true that, as a result of the constitutional doctrines of Lecourt's Court of Justice, the other national parliaments in Europe no longer vote to enact the law either.

The broad continuities between Article 49-3 and the constitutional doctrines of European law appear to have been acknowledged late in life by Lecourt himself. In an 1990 article in *France-Forum* offering a retrospective on the origins of Article 49-3, including his own role, Lecourt asked whether its contribution to the effectiveness of French institutions may have come at an excessive price in terms of 'democratic decline'.[100] Lecourt answered that this question required deeper reflection, not only on Article 49-3 but on all texts whose legislative value derives from the implicit consent [*assentiment implicite*] of national representatives, and still more fundamentally on the legitimacy of all provisions which do not emanate from the nation itself [*toute disposition qui n'émanerait pas de la nation elle-même*]. Given the poor fit of traditional forms of parliamentary procedures to the volume and technical nature of problems facing modern legislatures, it was only under the benefit of a certain number of constitutional fictions that the law could be considered as an expression of the general will. So, Lecourt continued, under the pressure of events over the decades the practice had emerged covering all shades of consent, formal, implicit, spontaneous, resigned, silent or critical, in a 'multifaceted form of acquiescence'.

Lecourt's *France-Forum* article should be understood as linking his French and his European constitutional achievements. Although not explicitly referred to by name, European law must obviously be prominently included in any discussion – particularly with Lecourt as author – of 'provisions which do not emanate from the nation itself', and which obtain their national legislative value in France (and elsewhere) by implicit or silent consent (because of the direct effect doctrine). As we have seen, this movement of legislative outputs away from traditional procedures towards mechanisms that have only attenuated claims to national parliamentary consent, is the shared logic both of Article 49-3 and of the constitutional doctrines of European law. As Lindseth has convincingly argued, the legal development of the early European Economic Community cannot be separated from trends in postwar national constitutional development, in particular the explicit reinforcement of executive power at the expense of parliamentary factionalism.[101] In the person of Lecourt, indeed, the connection between constitutional developments at both European and national level is at its most obvious. Equipped already with the perspective that traditional parliamentary democracy as a means of rule-making was being increasingly overtaken by events, the 'theoretician' of Article 49-3 was well placed to become the great judge of the European Court of Justice.

To be sure, Lecourt was not in any sense the lone inventor or sole actor behind either of these constitutional developments. In the case of Article 49-3, the concept was nursed over the years by a group of MRP deputies, including Moisan, Coste-Floret and Lecourt, and its actual progress from the January 1958 proposal into Article 49-3 of the October 1958 Constitution depended on the support of, particularly, Gaillard, Pflimlin, Mollet, Debré, General de Gaulle, the majority of the National Assembly that voted to accept a version of Lecourt's proposals, and, not least, the votes of the French people in the September 1958 referendum. As for the constitutional doctrines of European law, these had been nursed over the years by the Legal Service of the European Commission, under its director Gaudet, as well as by a variety of pro-European litigants and legal scholars, including Advocate General Lagrange, and their progress from ambitious legal claims to ECJ judgments depended on the support of, particularly, judges Lecourt and Trabucchi, the other ECJ judges and advocates general who supported the principles of *Van Gend en Loos*, influential judges' assistants such as Gori, and, of course, after the Court's own judgments, on the willingness of national judges, legal scholars, litigating lawyers, and state policy-makers to accept and make

[100]Lecourt (n 83, 29).

[101]Lindseth (n 43). On 'discplined' postwar democracy, eg J-W Muller, *Contesting Democracy: Political Ideas in Twentieth-Century Europe* (Yale University Press, New Haven 2011); M Conway, *Western Europe's Democratic Age: 1945–1968* (Princeton University Press, Princeton NJ 2020).

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use of the new principles of European law over the 1960s and 1970s, and after.[102] In both cases, however, Lecourt played a key, perhaps irreplaceable, role in developing and promoting the ideas behind the new constitutional structures, and in spearheading their transformation into a practical reality.[103]

In short, the characterisation of the early ECJ by so much political science and legal scholarship as an anonymous and personality-less institution must at this stage be abandoned. To the major explanations of the development of the European legal order, which emphasise legal networking and judicial politics on the one hand, and facilitating economic and political conditions on the other, must now be added the fact that the Court of Justice at the time of its momentous legalisation of Europe's international politics was driven by a dedicated 'European' who was also already one of postwar France's boldest specialists in institutional reform and the entrenchment of executive power.

Finally, and on a wider methodological note, Lecourt's background in constitutional design has been obscured only by the neglect of biographical study of ECJ judges.[104] Even when obstacles appear daunting, however, the detailed study of judges' prior political and constitutional commitments remains an unavoidable necessity, particularly for apex courts at times of radical novelty or disjuncture. It is judges that turn open-ended texts – national constitutions and treaties alike – into specific legal judgments. The example given by the study of the politics of the United States Supreme Court through judicial biography may therefore have much to contribute to the study of other powerful courts and tribunals, domestic and international, in Europe and around the world.

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[102]There are several recent historical publications on the advocates general, eg G Butler and A Lazowski, 'Introduction' in G Butler and A Lazowski (eds) *Shaping EU Law the British Way – UK Advocates General at the Court of Justice of the European Union* (Hart, Oxford 2022); F Nicola and others (eds), *The Italian Influence on European Law: Judges and Advocates General, 1952–2000* (Hart Oxford 2024). On Advocate General Lagrange in particular, see eg M Mangenot, 'Un légiste de Vichy à la Communauté européenne. Maurice Lagrange: une biographie professionnelle: dossier' (2024) 50 Civitas Europa; MO Baruch, *Servir l'Etat français. L'administration en France de 1940 à 1944* (Fayard, Paris 1997).

[103]The focus of this paper on demonstrating Lecourt's constitutional ideology via his contributions to the design of France's 1958 Constitution does not permit a full assessment of Lecourt's contributions in comparison with the other leading actors of European law's early years, including most obviously Michel Gaudet, Alberto Trabucchi, and Maurice Lagrange.

[104]The sole notable exception is of course Fritz, *Juges et avocats généraux* (n 4).

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