3. Judicial Activism - Myth or Reality?

Van Gend en Loos, Costa v ENEL and the Van Duyn family revisited

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3.1 Introduction

When Jack Mackenzie-Stuart went to Luxembourg as the first British judge, the Court of Justice could still be described as "tucked away in the fairyland Duchy of Luxembourg and blessed with benign neglect by the powers that be and the mass media". So benign was the neglect that the Court and its activities were virtually a closed book to one of those happy juniors at the Scots Bar who had had the privilege of having Jack as their Senior and of enjoying his rich companionship and hospitality.

Twenty two years later, the third British judge can only sigh, "Oh, for an hour of benign neglect". To say nothing of the mass media, no less a person than the Warden of All Souls College, Oxford, has attacked the Court in his Case Study of Judicial Activism.

The views expressed are those of the author, but special thanks are due to Joerramon Bengoetxea, Christopher Bellamy, Mark Hoskins, Francis Jacobs, Robert Lane and Nicolas Lockhart, both for ideas and for perceptive criticism.

2. It is irresistible to mention Coca Cola v Struthers, 1967 SLT (Notes) 63, where Mackenzie-Stuart QC, Jauncey QC and Edward appeared (successfully) against Keith QC, Mackay QC and Grossart.
The charge that the Court of Justice is guilty of "judicial activism" proves as much or as little as to say that it is creative or that it is interventionist or that it practises self-restraint.

"Judicial activism" is a slogan dear to those who have studied in the United States and it is essentially a subjective expression. It takes no account of the context of every judicial decision the purpose of which, ex hypothesi, is to settle a dispute between opposing points of view. 'Activism' means something fundamentally different depending on whether one puts oneself in the position of the strong or of the weak; of power or of the individual; of the general interest or of particular advantage; of the producer or of the consumer; of the polluter or of the environment; of dirigisme or of liberty; and so on. What is described by one as activism is seen by another as a just and necessary safeguard. 1

To say that a Court is activist tells us only about the speaker's view of the nature of law and the role of judges, what courts are to do and how they are to do it. He assumes that his subjective view is to be the norm by which the Court will be assessed by others as well as himself. But the substance of the charge must depend on the evidence and the criteria by which it is tested.

The Case Study is based, as its writer admits, on "only a tiny proportion" of the Court's case-law. To be precise, it examines in any detail 0.28 per cent of the Court's total output, spread over 30 years.

On this evidence, the Case Study concludes 2 that the Court of Justice is "a dangerous court". It does not "play straight". Its decisions are "logically flawed or skewed by doctrinal or idiosyncratic policy considerations". The Court pursues its own agenda as "an elite cadre entrusted with a special mission". 3 The Court's motive is "to take more power into its own hands and to reduce the power of the national courts".

What do these allegations really mean? The Court cannot have an agenda unless all the judges, 4 or at least a consistent majority of them,

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2. HL p245; EPF p47, 48.
   "Whenever required in the interests of judicial protection, the Court is prepared to correct or complete rules which limit its powers in the name of the principle which defines its mission".
   But the Opinion was written in Italian. Missionone (like the French mission) means "assignment" or "task", the latter being used in the English translation of Article 2 of the EC Treaty.
4. The Case Study is equivocal as to the role of the advocates-general. Advocate General Mancini holds a high place in its demonology. But Advocate General Roemer was right in Van Gend & Loos because he supported the Member State. Advocate General Mischo was right in proposing limitation of the retrospective effect of Francovich, although limitation of retrospective effect in Defrenne II was a "confiscation of
are party to it - presumably in violation of the judicial oath. At the very least, they are guilty of intellectual dishonesty. Even if their decisions are right, they commit "the greatest treason: to do the right deed for the wrong reason."

3.2 The probabilities

Those who have been trained by the Common Law in weighing the balance of probabilities may care to consider the following conundrum.

For more than 40 years, the governments of the Member States have been responsible - alone and by common accord - for appointing the members of the Court of Justice. Including the present members, 72 persons have been so appointed - 45 judges, 21 advocates-general and six who have held both offices - each of them:

"chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognised competence".

Yet it seems to be suggested that each of the persons so appointed and, in most cases, re-appointed has successively been enveigled (but by whom?) into the web of an on-going conspiracy - a conspiracy so transparent that it can be exposed by a study of less than half of one per cent of the Court's case-law.

The probabilities are tenuous. But the activist theory seems to have achieved some degree of credibility in Britain. The Case Study affords a benchmark against which the theory can be tested.

3.3 The evidence

The cases that are said to prove the activist theory fall into the following groups:

- Before UK Accession:
  - Van Gend en Loos, Costa v ENEL and Internationale Handelsgesellschaft

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"rights" and a "breach of elementary principles of natural justice". The role of the advocate general in the many cases where the Court followed him in pursuit of its activist agenda is hardly noticed.

1. "Before taking up his duties each judge shall, in open court, take an oath to perform his duties impartially and conscientiously...": Article 2 of the Statute of the Court.
Post-Accession:
- The case-law on the direct effect of directives and the sanctions for failure to implement them (notably Van Duyn,\(^1\) Marshall,\(^2\) Foster,\(^3\) Francovich\(^4\) and Faccini Dori\(^5\));
- The case-law on retroactive effect of judgments (notably Defrenne\(^6\) and Barber\(^7\));
- Case-law showing that "the Court of Justice extends its own jurisdiction" (Les Verts\(^8\), Chernobyl\(^9\), Zwartveld\(^10\) and Sevince\(^11\));
- Opinion 1/91\(^12\) on the EEA Agreement; and
- Case-law "limiting the powers of national courts" (Foto-Frost\(^13\) and Marleasing\(^14\)).

Certain of the "evidence" appears to proceed on a plain misreading of the text. For example, Opinion 1/91 is said to have held that the Member States cannot amend the EC Treaty so as to diminish the Court of Justice's own role.\(^15\) Opinion 1/91 said no such thing: it said that the Member States could not, by amending Article 238 (that being the sole question in issue), alter the role assigned to the Court by the Treaty as a whole, notably Article 164.

Other points seem to be inconsistent. The Court was wrong to limit the retroactive effect of its judgment in Defrenne II,\(^16\) but was wrong not to limit the retroactive effect of Francovich.\(^17\) The Court was wrong to heed the pleadings of the Member States in Defrenne II,\(^18\) but was wrong not to do so in Van Gend en Loos\(^19\) and Francovich.\(^20\)

Les Verts and Chernobyl are said to be examples of the Court's activism in extending its own jurisdiction beyond that intended by the Member States. Yet the effect of those judgments was expressly

15. HL p237; EPF p34ff.
17. HL p230; EPF p22.
18. HL p228; EPF p22.
19. HL p221; EPF p6.
20. HL p233; EPF p27ff.
affirmed by the Member States in the new (Maastricht) version of Articles 173 and 175.

The Case Study says \(^1\) that "it is impossible within the confines of this paper to examine the way in which the Court's interpretation of Treaty provisions has impacted on particular areas of activity within the Community". So Cassis de Dijon\(^2\) rates only a walk-on part as an alleged example of the Court being "forced to retreat to a narrower position [from] a broad rule formulated with a view to facilitating the development of a single market".\(^3\)

Those who are prepared "to examine the way in which the Court's interpretation has impacted on particular areas of activity" will find that Cassis de Dijon is generally regarded, not as an enforced retreat, but as a decisive step forward which laid the foundation for the 1992 programme. It was decisive precisely because, in the Warden's terms, it was "activist" in two important respects.

First, the Court formulated the principle of equivalence: in principle, goods lawfully produced and marketed in a Member State must be freely marketable in all other Member States. Second, the Court balanced that extensive interpretation of Article 30 by the doctrine of the so-called "mandatory requirements": legislative obstacles to free movement of goods must be accepted in so far as they are necessary to ensure effective fiscal supervision, public health, fair dealing, consumer protection, etc.

Both of these ideas are mentioned in the Case Study to prove the novel theory of the enforced retreat. What is not mentioned is that neither figures explicitly in the text of the Treaty. One operates against Member State competence, the other in favour of it. Which was right? Or were both wrong? It would have been interesting to be told.

Again, in a throw-away parenthesis, the Case Study suggests that the absence of dissenting opinions is one of the aspects of the Court's working methods which have "tended to create the impression, that the Court consists of an elite cadre entrusted with a special mission".\(^4\) There is no recognition of the fact that the principle of collegiality, excluding dissenting opinions, is the norm in the majority of Member States: still less that the same principle applied to the "advice" (judgments) of the Privy Council in the days when it was the constitutional court of the British Empire.

At the cost of forgoing many forensic opportunities of the kind that Scottish advocates used to enjoy when Jack Mackenzie-Stuart and the present writer were young, this essay will concentrate on two chapters of the allegedly "activist" case-law which have been particularly influential in developing Community law and which have given rise to much press and political comment since publication of the Case Study. These are: the pre-accession case-law (Van Gend en Loos and Costa v ENEL) and the post-accession case-law on directives (Van Duyn and its successors).

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1. HL p243; EPF p44.
3. HL p243; EPF pp44-45.
4. HL p245; EPF p47.
Before coming to the cases, it is necessary to see what criteria are to be applied.

3.4 The criteria to be applied

Although the Case Study is, as a Scottish pleader would say, lacking in specification, the criteria it applies can be inferred from the following passages:

"The Court has interpreted Treaty provisions so as to take more power into its own hands and to reduce the power of national courts. It has felt itself entitled to fill gaps in the Treaty and generally to interpret legal provisions so as to further its own vision of a harmonising and fully effective Community legal system operating throughout the Member States. In the process the ECJ has been driven to adopt strained interpretations of the texts actually agreed by Member States and it has introduced doctrines and rights of action which cannot be found in the texts. ..." 1

"The methods of interpretation adopted by the ECJ appear to have liberated the Court from the customarily accepted discipline of endeavouring by textual analysis to ascertain the meaning of the language of the relevant provision. ..." 2

"Accepted methods of interpretation can no longer be relied on. The lawyer must try to forecast what result the ECJ will consider desirable in the particular case and the result most likely to advance the role of the Court and its view of the coherence of the Community legal system ..." 3

In short, the criterion for assessment is that the Court's task begins, and ought to end, with "endeavouring by textual analysis to ascertain the meaning of the language of the relevant provision". Judges ought not to engage in "judicial legislation".

That was not the view of A.V. Dicey - surely an authority acceptable to the Warden of All Souls and to Euro-sceptics generally. In 1898, he delivered a series of lectures at Harvard Law School which were later published as Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century. Lecture XI, entitled "Judicial Legislation", put forward Dicey's (sympathetic) view of judge-made law. The Appendix to the second edition deals with a series of objections to his approach, in particular the objection that "the Courts, though they certainly do legislate, never ought to legislate at all". Dicey replied:

1. HL p219; EPF p2.
2. HL p244; EPF p47.
3. Ibid.
4. 1st edn (1905), 2nd edn (1914).
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"This is an idea constantly put forward by persons who, rightly or wrongly, object to some principle established by judicial decisions. Such critics urge not only that the rule which they condemn is a bad one, on which point they may perfectly well be in the right, but also that the rule, whether wise or unwise, whether right or wrong, ought never to have been laid down at all by the Courts, and this on the ground that it is the business of the Courts to decide cases and not to make laws.

"The answer to this line of criticism is that the person who pursues it has in no case a right to blame the judges. His argument may mean that the whole English judicial system, with its respect for precedent, is a bad one. So be it. But, even if this be so, English judges cannot be blamed for acting in accordance with a system which they are appointed to administer. Our objector's argument, on the other hand, may mean that, the English system being what it is, judges can, if they choose to do so, always avoid judicial legislation. But, if this be the critic's meaning, he distinctly ascribes to judges a liberty of choice which they do not in fact possess.

"To simplify the matter, let us confine our attention to the House of Lords. A case comes before the House which can only be decided by either affirming or denying the application or validity of some principle. But either affirmation or denial will equally establish a precedent, or in other words, a legally binding rule of law. How, under this state of things, can the House by any possibility avoid judicial legislation? ...

"A critic who objects to the rule, or in reality the law established by a judgment of the House of Lords may maintain that the House committed an error. He may maintain that the rule which the Lords established was not a logical deduction from the principles they intended to follow, or that the rule, though logical, was inexpedient, or, if he pleases, that the rule was both illogical and inexpedient. But if he has mastered the nature of judge-made law he will hardly commit himself to the contention that the House of Lords was to blame simply because its judgment established a fixed rule of law. This was a result over which the House had no control, and for which, therefore, it deserved neither praise nor blame."!

The test of a judicial decision is whether it is legally and intellectually credible as an answer to the problem the judge has been called upon to resolve. For the judge not to take a decision when called upon to do so is both legally and intellectually indefensible, since it is a denial of his judicial function. On that point, Dicey is at one with the authors of the Code Napoléon, Article 4 of which provides:

The question raised by the Case Study is not whether the Court's judgments were right, but whether they are legally and intellectually defensible. Are they decisions which a reasonable judge could have reached in the context in which he was called upon to decide? Or, to put the question in a typically Common Law way, are they decisions which no reasonable judge could have reached?

8.5 The Pre-Accession Cases

The student of Community law tends to begin his studies with Van Gend en Loos and Costa v ENEL, decided in 1963 and 1964 respectively. Unquestionably these are key judgments for the subsequent development of Community law. Both admirers and critics of the Court tend to treat them as oracular pronouncements - as if the principles of direct effect and primacy sprang fully armed from the head of Zeus. The Case Study says that the Court (ignoring the pleas of the Member States and the advocate general) "clearly thought that an innovatory decision was called for".1

The Court had already been in existence for a decade when Van Gend en Loos and Costa v ENEL were decided. To put those two judgments in context and see how "innovatory" they were, we must go back to the judgments reported in the first volume of European Court Reports. These are judgments of the original ECSC Court interpreting the Coal and Steel Treaty.

3.5.1 France v High Authority2

The structure of the Coal and Steel Treaty (the Treaty of Paris) is not the same as that of the later EC and Euratom Treaties (the Treaties of Rome). But, like them, it starts with a series of general statements, which the EC Treaty calls "Principles" or Ground Rules (Grundsätze). In particular, Article 4 of the ECSC Treaty contains a general prohibition of unfair competitive practices and discriminatory practices. Article 60(1) empowers the High Authority, by decision, to define the practices covered by this prohibition. Article 60(2) then lays down more specific provisions "for these purposes".

In France v High Authority, the first case to come before the Court, the question was whether the High Authority could use its powers under Article 60(2) to relax the general rules it had laid down under Article 60(1). Advocate General Lagrange approached the problem of interpretation in three stages. First, he considered the literal interpretation of Article 60(2). Next, he looked at Article 60(2) in the light of Article 60 as a whole. Having found that neither approach produced a decisive argument, he concluded:

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1. HL p220; EPF p4.
There it is necessary to go further; the question in dispute must be examined in relation to the Treaty in its entirety. Such an approach is always legitimate; it is particularly necessary in the case of this Treaty ... because all its parts are interconnected. In particular, all the provisions of Title III [including Article 60] represent only the implementation of the principles laid down in Title I, from which Title III must never be dissociated. ...

What then is the Treaty's immediate purpose (I am not speaking of its ultimate aim, which is to begin to unite Europe)? To create a common market in coal and steel, to define the rules for the functioning of that market, and finally to organise an institutional system suitable to ensure that functioning.

It is possible to discuss indefinitely the meaning of the expressions 'Common Market' or simply 'market' or 'market economy'. Of course, I have no intention, and make no claim, to enter into theoretical discussions on these subjects, which moreover would seem to me quite futile. On the contrary, faced with the duty of applying this Treaty, I consider that I have quite simply to look at what it contains. ... ¹

The Court did not wholly follow the advocate general as to the result, but agreed with him on the approach to interpretation:

"Articles 2, 3 and 4 of the Treaty, referred to at the beginning of Article 60(1) constitute fundamental provisions establishing the Common Market and the common objectives of the Community. Their importance is clear from Article 95. In authorising the High Authority to define prohibited practices, the Treaty obliges it to take into account all the aims laid down in Articles 2, 3 and 4. "²

3.5.2 Industries Sidérurgiques Luxembourgeoises³

In Industries Sidérurgiques Luxembourgeoises, decided three months after France v High Authority, the question arose whether Article 4 of the ECSC Treaty "constituted directly and independently applicable law". Like many subsequent articles of the Treaties, Article 4 of the ECSC Treaty contains the qualifying words "as provided in this Treaty":

"The following are recognised as incompatible with the common market for coal and steel and shall accordingly be abolished and prohibited within the Community, as provided in this Treaty."

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The question for the Court was whether direct applicability was excluded by the qualifying words.

Advocate General Roemer held that the qualifying words did not exclude direct applicability, since their purpose was solely to take account of the transitional period for entry into force of the Treaty provisions. He concluded:

"In the absence of any special [implementing] provisions the provisions of Article 4 are directly applicable." 1

The Court followed the advocate general. Picking up the words of its judgment in *France v High Authority*, the Court held that:

".... the provisions of Article 4 are sufficient of themselves and are directly applicable when they are not restated in any part of the Treaty. Where, however, the provisions of Article 4 are referred to, restated or elaborated on in other parts of the Treaty, the texts relating to one and the same provision must be considered as a whole and applied simultaneously." 2

8.6.8 Fédéchar 3

Three months later again, in *Fédéchar*, the Court had to interpret the words "The price list so fixed shall not be changed without the agreement of the High Authority". 4 The High Authority had itself fixed prices at a reduced level. This was challenged on the grounds of misuse of power. The contention was that the Authority had no power under the Treaty to fix prices itself.

On interpretation, it was argued by the applicants (no governments intervened) that:

"According to the practice followed before international courts such as the Court at The Hague the principle of strict interpretation is that which must always prevail in the case of international treaties". 5

This is, in essence, the "anti-activist" argument, and it is important to see in detail how Advocate General Lagrange dealt with it:

"One could, no doubt, make the point that our Court is not an international court but the Court of a Community created by six States on a model which is more closely...

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3. Case 8/55 *Fédération Charbonnière de Belgique (Fédéchar) v High Authority* [1954-56] ECR 245.
5. Case 8/55 *Fédération Charbonnière de Belgique (Fédéchar) v High Authority* [1954-56] ECR 245 in the advocate general's Opinion at p. 277. The original French text, unlike the English translation, makes it clear (by use of the conditional *serait*) that the advocate general is here summarizing the argument rather than stating his own opinion.
6. The official translation in ECR. "Of course, it could be objected .... " does not reflect the original "On pourrait sans doute rappeler que..."
related to a federal than to an international organisation, and that although the Treaty which the Court has the task of applying was concluded in the form of an international treaty and although it unquestionably is one, it is nevertheless, from a material point of view, the charter of the Community, since the rules of law which derive from it constitute the internal law of that Community.

As regards the sources of that law, there is obviously nothing to prevent them being sought, where appropriate, in international law, but normally and in most cases they will be found rather in the internal law of the various Member States....

I consider it unnecessary to begin an academic discussion on that point since, whether in relation to international treaties or to internal law, there is a commonly accepted principle... that it is necessary to interpret and seek the presumed intention of the authors of a text only when the latter is obscure or ambiguous and that when the letter of the law is clear it must always prevail....

I am, therefore, in full agreement as to the method of interpretation.

The essential question is, however, whether the text is clear and requires no interpretation. In that respect, the very existence of the present action and the ramifications to which it has given rise are sufficient to show that it is not.

'The price list so fixed shall not be changed without the agreement of the High Authority'. The text lays down a procedural requirement as a precondition for any modification of the price list, but it fails to state by whom the price list shall be drawn up and the bases for it established. It is therefore necessary to interpret the text in order to fill that lacuna. Even though the Code Napoléon is not applicable here I cannot refrain from recalling Article 4, under the terms of which 'the judge who refuses to judge on pretext of the silence, obscurity or insufficiency of the law, may be prosecuted as guilty of a denial of justice'... 1

The Court dealt with the argument in a sentence:

"The Court considers that, without having recourse to a wide interpretation, it is possible to apply a rule of interpretation generally accepted in both international and national law, according to which the rules laid down by an international treaty or a law presuppose the rules

without which that treaty or law would have no meaning or could not be reasonably and usefully applied.**

3.8 Inferences from the ECSC Cases

Three broad points emerge from the early ECSC cases and it is not difficult to identify in them the seeds of *Van Gend en Loos*, *Costa v ENEL* and a great deal more of the subsequent case-law of the Court:

1. The Treaty is *both* an international contract and the charter of the Community, establishing rules of law which constitute the internal law of the Community.

2. Strict (literal) interpretation is appropriate where the text is clear, so that the text requires no "interpretation". But:
   - (i) the Treaty is to be interpreted as a whole, with particular reference to its objectives, all subsequent provisions being interpreted in that context;
   - (ii) the national law of the Member States is a source of law and guide to interpretation;
   - (iii) it is the function of the Court, by interpretation, to fill the gaps where the Treaty is silent or unclear, and
   - (iv) gaps are to be filled by reference to the criteria of consistency, coherence and useful effect (effet utile).

3. The objectives of the Treaty, by reference to which it is to be interpreted, are:
   - to create the Common Market;
   - to define the rules for its functioning; and
   - to organise an institutional framework to ensure its functioning.

All three ECSC cases cited above predate the EC and Euratom Treaties. If the Member States had been unwilling to accept the Court's approach to treaty interpretation, it is reasonable to suppose that those later Treaties would have been worded in such a way as to make this clear. There can be no doubt that the negotiators were aware of the need to mark the difference between the new Treaties and the old.

1. Case 8/55 Fédération Charbonnière de Belgique (Fédéchar) v High Authority [1954-56] ECR 245 at p299 (emphasis added). The original French text (French was the sole official language of the ECSC Treaty) reads: "De l'aviser de la Cour, il est permis, sans se livrer à une interprétation extensive, d'appliquer une règle d'interprétation généralement admise tant en droit international qu'en droit national et selon laquelle les normes établies par un traité international ou par une loi impliquent les normes sans lesquelles elles n'auraient pas de sens ou ne permettraient pas une application raisonnable et utile" (Recueil, at p305).

2. The second volume of ECR shows a rapid increase in references to national law as a source of Community law.
Robert Marjolin, the chief French negotiator of the EC Treaty, writes in his Memoirs:

"It was essential to give the new Treaty a purely economic character, ignoring the grand principles and political goals which in the years from 1950 to 1954 had fired the enthusiasm of the 'Europeans', but which in 1956 were arousing hostile reactions in large segments of public opinion."  

Nevertheless, Articles 164 of the EC Treaty and 136 of the Euratom Treaty repeat the very general wording of Article 31 of the ECSC Treaty in which the function of the Court of Justice within the Community system is defined:

"The Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed."  

Neither the EC Treaty nor the Euratom Treaty contains any provision which states, or even hints, that the Court's approach to interpretation should be different from the approach adopted under the ECSC Treaty. Under a Convention signed at the same time as the Treaties of Rome, a single Court of Justice was established for the three Communities. The composition of the new Court was substantially the same as that of the ECSC Court. Without seeking to divine the "intention" of the treaty-makers, it is at least fair to infer that they did not feel it necessary to instruct the Court to modify its approach to interpretation.

That is not to say that the substantive provisions of the Treaties of Rome were necessarily to be interpreted in exactly the same way as the Treaty of Paris.

Four early decisions of the new Court should be mentioned, in the first of which the difference between the ECSC and EEC Treaties came up for consideration.

3.8.1  Hauts Fourneaux de Givors v High Authority  

In Hauts Fourneaux de Givors, the question was whether the High Authority of the Coal and Steel Community, when fixing transport tariffs, could and should have taken into account considerations of regional policy. The applicants invoked Article 80 of the EEC Treaty, which required the Commission of the EEC to take into account "the requirements of an appropriate regional economic policy" and "the

2. ECSC Treaty, art 31 reads: "The Court shall ensure that in the interpretation and application of this Treaty, and of rules laid down for the implementation thereof, the law is observed."
3. Three judges of the ECSC Court retired.
5. The High Authority and the Commissions of the EEC and Euratom were not merged until 1957.
needs of under-developed areas". Rejecting this contention, Advocate General Roemer observed:

"There is a basic difference between the ECSC Treaty, which brings about partial integration, and the EEC Treaty. As the objective of the latter is full integration of the whole of the economic life of the Member States, it must inevitably take into account the requirements of regional policy which are a component of the economic policy of each Member State. With regard to the Coal and Steel Community it was possible to disregard that aspect because it was feasible for the States to pursue a regional policy in the sector of the economy which was not integrated." 1

The Court agreed with this approach.2 Interpretation by reference to the objectives of the Treaties was thus set to continue.

3.8.2 Humblet

Mr Humblet was an official of the Coal and Steel Community, domiciled in Belgium. The Belgian tax authorities sought to take his Community salary into account along with his wife's income in determining the rate of tax payable. Mr Humblet challenged this as a violation of the Protocol on the Privileges and Immunities of the Community and, inter alia, asked the Court to annul the contested assessment.

The Court of Justice held that it had no power to do so, but said:

"... if the Court rules in a judgment that a legislative or administrative measure adopted by the authorities of a Member State is contrary to Community law, that Member State is obliged, by virtue of Article 86 of the ECSC Treaty [the counterpart of Article 5 of the EC Treaty], to rescind the measure in question and to make reparation for any unlawful consequences which may have ensued. This obligation is evident from the Treaty and from the Protocol which have the force of law in the Member States following their ratification and which take precedence over national law." 4

3.8.3 De Geus v Bosch

De Geus v Bosch, the first case referred to the Court under Article 177 of the EC Treaty, was also the first case to raise the question whether the provisions of the EC Treaty were "directly applicable". Specifically,

the question was whether the sanction of nullity of restrictive agreements, provided for by Article 85(2) of the EC Treaty, applied to "prior agreements" - agreements entered into before the Treaty came into force.

Advocate General Lagrange seems to have had no doubt that Articles 85 and 86 were directly applicable but thought the point unimportant because Regulation 17/62 dealt definitively with the problem. The Court did not take up the point.

3.8.4 Gingerbread

In the Gingerbread case, the first case brought by the Commission under Article 169 of the EC Treaty, the Court adopted the same contextual approach as it had adopted under the ECSC Treaty. On Articles 9 and 12 (customs duties) and 95 (internal taxation), the Court said:

"The position of [Articles 9 and 12] towards the beginning of that Part of the Treaty dealing with the 'Foundations of the Community' ... is sufficient to emphasise the essential nature of the prohibitions which they impose. ... Article 95, which is to be found both in that Part of the Treaty dealing with the 'Policy of the Community' and in the Chapter relating to 'Tax Provisions', seeks to fill in any loop-hole which certain taxation procedures might find in the prescribed prohibitions. ..."

It follows, then, from the clarity, certainty and unrestricted scope of Articles 9 and 12, from the general scheme of their provisions and of the Treaty as a whole, that the prohibition of new customs duties, linked with the principles of the free movement of products, constitutes an essential rule."

Against that background, one can see what was, and what was not, in dispute in Van Gend en Loos and Costa v ENEL.

3.8.5 Van Gend en Loos

In Van Gend en Loos, the referring Dutch court put two questions to the Court of Justice. The first was:

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1. Case 13/61 De Geus v Bosch (otherwise Bosch v Van Rijn) [1962] ECR 45 at p. 64.
3. "... 'il résulte donc de la netteté, de la fermeté et de l'étendue sans réserve des articles 9 et 12, de la logique de leurs dispositions et de l'ensemble du traité ..."
"whether Article 12 of the EEC Treaty has direct application \[interne werking]\ within the territory of a Member State, in other words, whether nationals of such a State can, on the basis of the Article in question, lay claim to rights which the courts must protect".

The second question was whether, in the instant case, there was a breach of Article 12.

The first point to note is that the question of what is now called "direct effect" - whether Article 12 could be invoked by a private party before a national court - was raised, not by the Court of Justice, but by the referring court. The idea that Article 12 might have direct effect was already there: it was not an invention of the Court of Justice.

Next, the referring court's first question was quite specific and called for an unequivocal answer. The Court could have avoided answering it only if it had accepted the arguments on admissibility put forward by the Dutch and Belgian governments - a solution which Advocate General Roemer did not recommend. If the question had to be answered, there were only two possible answers: either Article 12 had direct effect or it did not.

Further, as is apparent from the Arguments and Observations of the parties and from the Opinion of Advocate General Roemer, there was never any suggestion that no part of the Treaty could have direct effect. 2 (Advocate General Lagrange, like Jane Austen, thought the truth to be universally acknowledged. 3)

The sole question in Van Gend en Loos was therefore whether Article 12 had direct effect. That is certainly how Advocate General Roemer saw the question:

"Anybody familiar with Community law knows that in fact it does not just consist of contractual relations between a number of States considered as subjects of the law of nations. The Community has its own institutions, independent of the Member States, endowed with the power to take administrative measures and to make rules of law which directly create rights in favour of and impose duties on Member States as well as their authorities and citizens. This can be clearly deduced from Articles 187, 189, 191 and 192 of the Treaty.

The now generally accepted distinction between "direct applicability" and "direct effect" had not yet been established; hence, a degree of linguistic uncertainty in the Court's early judgments. Thus, the Dutch court's question spoke of \[interne werking\], while the Court's reply used the expression \[direkte werking\]. The Dutch courts would, however, have had no doubt what this meant as regards applying Treaty law within the national legal system. See the advocate general at [1963] ECR p20.

See his Opinion in Costa v ENEL [1964] ECR at p603: "... it is universally conceded that the EEC Treaty, although to a lesser extent than the ECSC Treaty, contains a certain number of provisions which by virtue both of their nature and their object, are directly applicable in a domestic legal system, where they have been 'received' as a result of ratification (a phenomenon which after all is not peculiar to the European Treaties). ... [They] are, to use a hallowed expression, 'self-executing'."

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"The EEC Treaty contains in addition provisions which are clearly intended to be incorporated in national law and to modify or supplement it. ... [Other provisions] are designed to produce direct effects at a later stage. ..."¹

It seems to me beyond doubt that the form of words chosen [in Article 12] ... no more precludes the assumption of a legal obligation than does the similar wording of other Articles of the Treaty. To give Article 12 a lower legal status would not be in keeping with its importance in the framework of the Treaty. Further, I consider that the implementation of this obligation does not depend on other legal measures of the Community institutions, which allows us in a certain sense to speak of the direct legal effect of Article 12.

However, the crucial question according to the question raised by the Tariefcommissie is whether this direct effect stops at the Governments of the Member States, or whether it should penetrate into the national legal field and lead to its direct application by the administrative authorities and courts of the Member States. It is here that the real difficulties of interpretation begin."²

The advocate general came to the conclusion that Article 12 did not have direct effect. The Court did not follow him. The Case Study makes more of that fact than a straightforward - and far from uncommon - difference of judicial opinion. It says:³

"In studying his Opinion it is impossible not to be struck by the fact that Advocate General Roemer never suggested that by agreeing to the EEC Treaty all the Member States had accepted that the Treaty provisions had a special status and a status superior to all prior and to all subsequently enacted national laws. Obviously he had never encountered any such principle in the earlier decisions of the ECJ. It is also clear from what he says about the authors of the Treaty that he did not consider that they had contemplated such a principle."

But the issue in Van Gend en Loos was not whether "the Treaty provisions had a special status ... superior to all prior and to all subsequently enacted national laws". That was the issue a year later in Costa v ENEL. So it is not surprising that Advocate General Roemer did not refer to it. Had he thought it relevant, he would no doubt have mentioned the judgment in Humblet.

Undeterred, the Case Study pulls another activist rabbit out of the hat:⁴

"The ECJ's characteristic method of interpreting Treaty provisions is already manifest in its statement that an international treaty has to be interpreted by reference

1. At p20.
2. At pp21-22 (emphasis added).
4. HL p221; EPF p6.
not merely to the wording of the relevant provisions, but also by reference to its 'spirit' and its 'general scheme'.

It is true that the Court began the relevant part of its judgment with the words:

"To ascertain whether the provisions of an international treaty extend so far in their effects it is necessary to consider the spirit, the general scheme and the wording of those provisions".

But, as we have seen, the test so applied was the test adopted in interpreting the ECSC Treaty and subsequently, in Gingerbread, the EC Treaty. It was, moreover, the test adopted by Advocate General Roemer in Van Gend en Loos itself:

That test was not materially different from the interpretative test provided by Article 31 of the Vienna Convention on the Law of Treaties of 1969:

"1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

The insinuation that the Court, in Van Gend en Loos, "invented" a new approach to treaty interpretation is false.

As regards the reasoning of the judgment, the English translation of the Court's judgment does not, and perhaps could not, fully reflect the subtleties of the original French. The Court, in 1963, was still using the classical syllogistic style of the Conseil d'Etat:

Attendu que ..., que ..., que ...  
Attendu que ..., que ..., que ...  
Par ces motifs ...  
LA COUR dit pour droit ...

Each "attendu" introduces a new point, broken into a series of sub-points. The structure of the judgment is important to an understanding of the reasoning.

1. See, in particular, [1963] ECR at pp21 (col.1) and 24 (col.1).
2. Emphasis added. Cf. Brownlie, Principles of Public International Law, (4th edn, Oxford, 1990), p629: "A corollary of the principle of ordinary meaning is the principle of integration: the meaning must emerge in the context of the treaty as a whole and in the light of its objects and purposes". Professor Brownlie's view of the Court of Justice and its approach to interpretation is also interesting: "The teleological approach has many pitfalls. However, in a small specialized organization, with supranational elements and efficient procedure for amendment of constituent treaties and rules and regulations, the teleological approach, with its aspect of judicial legislation, may be thought to have a constructive role to play. Yet the practice of the Court of the European Communities has not shown any special attraction to this approach, and it would seem that the delicate treaty structure with its supranational element dictates a generally textual and relatively conservative approach to texts." (p632).
Having announced the intention to examine successively the spirit, the scheme and the wording of the Treaty, the Court did so, in that order. On the spirit of the Treaty, the Court identified five points and drew conclusions from them:

- The objective of the Treaty is to establish a Common Market whose functioning is of direct concern to the citizens (les justiciables)\(^1\) of the Community;
- The Preamble refers to "peoples" as well as "governments";
- The Treaty creates institutions with independent powers affecting both the States and their citizens;
- Community nationals are involved in the working of the Community through the European Parliament and the Economic and Social Committee;
- The procedure provided for by Article 177 necessarily implies that Community law is to be applied - and applied uniformly - by the national courts.

From these considerations, the Court concluded that:

- Community law is a new system of law, which entails a limitation of the rights the Member States would otherwise enjoy as sovereign States;
- The subjects of Community law are both the States and their citizens;
- Community law imposes obligations on individual citizens and confers correlative rights which arise, not only from express grant, but also as a result of clearly defined obligations imposed on other individuals, on the States and on the institutions.

It is important to note that, up to this point, the Court was concerned only with the question whether the EEC Treaty was capable of creating rights for private parties which national courts could be called upon to enforce against the Member States. Having concluded that this was so in principle, the Court turned to Article 12 and its place in the Treaty.

As to the place of Article 12 in the scheme of the Treaty, the Court noted that:

- Article 9, which appears at the beginning of the part of the Treaty entitled "The Foundations of the

1. The French les justiciables meaning, collectively, all those who are subject to the justice of a state, has no precise equivalent in English. "Citizen" is inexact since les justiciables include foreign nationals but there seems to be no better translation.
Community", treats the prohibition of customs duties and charges of equivalent effect as an essential element in the creation of the Customs Union;

- Article 12 is a specific application of the principle set forth in Article 9.

As to the wording of Article 12:

- The prohibition in Article 12 is clear and unconditional;
- It imposes both a positive and a negative obligation on the Member States;
- Performance of the obligation is not made conditional on the enactment of national legislation;
- The terms of the prohibition in Article 12 ("Member States shall refrain...") are just such as to produce direct legal effects in the legal relationship between the Member States and their individual citizens (leurs justiciables).

Finally, the Court dealt with the counter-arguments advanced by the intervening Member States, some of which had been upheld by the advocate general:

- The fact that the prohibition is addressed to Member States ("Member States shall refrain...") does not mean that their nationals cannot derive legal rights from it;
- The fact that, under Articles 169 and 170, the Commission and Member States can bring Member States before the Court of Justice for breach of Treaty obligations does not mean that individuals cannot plead such breach in the national courts;
- If enforcement of Treaty obligations were left to Articles 169 and 170, private parties would have no means of enforcing them;
- An ex post facto finding of breach under Article 169 or 170 would not provide effective protection against national measures taken in breach of the Treaty;
- The concern of individuals to vindicate their rights is a means of ensuring compliance with the Treaty which complements that of the Commission and the other Member States.

The Court's conclusion from examination of the spirit, the scheme and the wording of the Treaty was that Article 12 did have direct effect: in
imposing clear and unconditional obligations on the Member States, it created rights for individuals which the national courts must protect.

Going back to Dicey’s test, one may take the view that the result of *Van Gend en Loos* was illogical or inexpedient or both. But it is surely far-fetched to suggest that the process of reasoning by which the result was reached was legally or intellectually disreputable, or that it was a result that no reasonable judge, knowing the previous case-law, could have reached.

Lawyers brought up on the doctrine of privity of contract may possibly find it difficult to accept the idea that third parties can derive a right of action from a contract between others. But the civil law admits the *jus quaesitum tertio* and the continuing good health of the doctrine of privity is hardly to be taken for granted in the Common Law world.¹

### 3.6.6  Costa v ENEL

*Costa v ENEL* arose out of the refusal of a Milan advocate, who was a shareholder in Edison Volta, to pay an electricity bill of Lit.1925 to the recently nationalised Italian electricity undertaking, ENEL. His argument was that the nationalisation was illegal under Community law, in particular Articles 37 and 53 of the EEC Treaty.

The case was referred to the Court of Justice by the Giudice Conciliatore (small claims conciliator) from whom no appeal lay. He was therefore bound by Article 177(3) to make the reference if, but only if, a question of Community law arose for decision.

The Italian government argued *in limine* that no question of Community law arose and that, consequently, the reference was “absolutely inadmissible”. The Italian legislation establishing ENEL, adopted in 1962, was subsequent in date to the Treaty; therefore, it was said, the Italian judge was bound to apply the law of 1962 in accordance with the principle *lex posterior derogat priori*. Moreover, the Italian Constitutional Court had held that, since the only possible conflict was between the Italian law establishing ENEL and the Italian law ratifying the Treaty, both being laws of equal status, the principle *lex posterior* must apply.

The practical conundrum with which the Court of Justice was faced is well explained by the Advocate General (Lagrange).² If the courts of a Member State could hold the Treaty to be inapplicable within that State because of subsequent national legislation, the consequence would be that the Treaty could not be applied in other States, such as France, where performance of Treaty obligations depends on reciprocal performance.³ Non-performance by Italy would thus relieve France of the obligation of performance.

The Court had to deal, in one way or another, with the problem thus presented to it.

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¹ See the recent (activist?) judgment of the House of Lords in *White v Jones* [1995] 2 WLR 187, albeit liability was based on negligence rather than contract.

² See [1964] ECR at p606.

³ See Article 55 of the French Constitution.
The solution proposed by the advocate general was to sidestep the problem. His view was that, while some references under Article 177 might prove to be "manifestly inadmissible", the reference in Costa was not. The reference being admissible, the argument of the Italian government fell and did not call for reply. The Court could therefore proceed directly to the questions of interpretation put by the Giudice Conciliatore.

The Court preferred to deal with the Italian government's argument and it is difficult to see how it can have been "activist" to do so.

The Court began with the point first made by Advocate General Lagrange in Fédéchar, and made by the Court in Van Gend en Loos, that the Treaties create their own self-standing legal order, integrated into the legal systems of the Member States, by which their courts are bound. The Court drew attention, in particular, to the following special features of the EC Treaty:

- The Treaty is concluded for an unlimited period (Article 240);
- The Community has its own institutions (Part Five);
- The Community has legal personality (Article 210);
- The Community has legal capacity (Article 211);
- The Community can act internationally (e.g. Article 238);
- The Community has real power stemming either, negatively, from limitation of the Member States' own competences or, positively, from transfer of competences from the Member States to the Community.

The Court concluded that "the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law applicable both to their nationals and to themselves". It should be noted that this is truly a conclusion from what goes before as well as from the previous case-law. It is not an apothegm dreamt up from nowhere.

The next question was whether, having established this self-standing legal order, the Member States were nonetheless free to override the Treaty by subsequent national legislation. The Court drew attention to the following points:

- Acceptance by all the Member States of the Community legal order on a basis of reciprocity is logically inconsistent with a unilateral power, on the part of the individual Member States,

1. See, currently, the Court's Rules of Procedure, art 92.
2. [1964] ECR at p593 (substituting "applicable to" for "which binds" as a translation of "applicable à").
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subsequently to pass incompatible national legislation;

- Article 5(2) (the obligation to abstain from measures liable to jeopardise attainment of the objectives of the Treaty) and Article 7 (the rule against discrimination on grounds of nationality) would be unenforceable if Member States could derogate unilaterally;

- The unconditional contractual obligations undertaken under the Treaty would be merely contingent obligations if Member States were free to pass incompatible legislation;

- Whenever the Treaty recognises the Member States' right of unilateral action, it does so explicitly (e.g. Articles 15, 93(3), 223, 224 and 225);

- If Member States were free to derogate from Treaty obligations by ordinary national legislation, there would have been no point in providing special procedures to authorise derogations (e.g. Articles 8(4), 17(4), 25, 26, 73, 93(2) and 226).

In this passage, the Court really did no more than make explicit, in relation to the EC Treaty, the logic underlying Articles 26 and 27 of the Vienna Convention:

**Article 26**
Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

**Article 27**
A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

The Court then pointed to the definition of "regulation" in Article 189 ("A regulation shall be binding in its entirety and directly applicable in all Member States"). Article 189 would be meaningless if Member States could nullify the effect of a regulation by national legislation. Article 189 therefore implies that Community law will take precedence over national law.

Finally, the Court emphasised the idea of "Community" in the original Treaty languages: what people do or have in common. Community law is something the Member States have created in common. They have transferred from the field of national law to the field of their new "common law" those rights and obligations which correspond to rights and obligations created by the Treaty. It follows, logically, that Community law cannot be overridden by national law without ceasing to be "Community" law.

The style of the judgment may be unfamiliar, as a judicial style, to the Common Law reader. Its brevity (one and a half pages of English text) is deceptive since several points are made in the same paragraph, or even in the same sentence. Perhaps it would be easier
to understand if it had been expressed in the more expansive style of the Common Law judge. But if care is taken to analyse the reasoning of the Court, it can be seen to proceed from a close examination of the text of the Treaty as a whole, as well as the practical consequences of the arguments put forward.

If, on close analysis, one accepts that the reasoning of *Van Gend en Loos* and *Costa v ENEL* was legally and intellectually credible (albeit one may disagree with the result), the balloon of the activist theory is already punctured. At any rate, it becomes short of lift, for most of the later "activist" judgments follow in the same logical line. Indeed, the *Case Study* accepts that the next judgment to which it takes exception - *Intemationale Handelsgesellschaft* - only "made explicit what was already implicit". The same is true of *Simmenthal*² and *Factortame.*³

As Lord Bridge said when *Factortame* returned to the House of Lords:

"If the supremacy within the European Community of Community law over the national law of Member States was not always inherent in the EEC Treaty, it was certainly well established in the jurisprudence of the European Court of Justice long before the United Kingdom joined the Community. Thus, whatever limitation on its sovereignty Parliament accepted when it enacted the European Communities Act, was entirely voluntary. ... There is nothing in any way novel in according supremacy to rules of Community law in those areas to which they apply, and to insist that, in the protection of rights under Community law, national courts must not be inhibited by rules of national law from granting interim relief in appropriate cases is no more than a logical recognition of that supremacy."

8.7 Direct effect of Directives (*Van Duyn*)

The *Case Study*'s criticism of the Court's case-law on directives begins with *Van Duyn.*⁴ The basis of the criticism, although it is never explicit, appears to be that the terms of Article 189 of the Treaty exclude any question of directives having direct effect. Consequently, in holding that a provision of a directive had direct effect, the Court went against the expressed intention of the treaty makers.

It is as well to begin by reminding ourselves of what Article 189 does and does not say about directives:

"A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the

1. HL p223; EPF p10.
4. R v Secretary of State for Transport, ex parte Factortame (No.2) [1991] 1 AC 603 at 658-659.
choice of form and methods (la compétence quant à la forme et aux moyens)."

Unlike regulations, directives are not "directly applicable". Regulations enter into force on the date specified or on the twentieth day following publication in the Official Journal. "Direct applicability" means that regulations are, in the ordinary sense of the word, "legislation", taking full effect when passed. Directives, by contrast, leave to the national authorities the competence to choose form and methods.

Directives are, nonetheless, "binding as to the result to be achieved". What is left to the national authorities is, on any view, a limited competence. The problem is, and has always been, to define the legal interface between the Community competence to impose a binding obligation on the Member States (the first limb of the definition), and the Member States' competence as to form and methods (the second limb of the definition). Put another way, the definition in Article 189 calls for interpretation: its meaning and effect are not self-evident, not least because the different language texts of the Treaty formulate the two limbs of the definition in slightly different ways.

What is clear, however, from the text of Article 189 is that the binding obligation of result is not made conditional on the passage of implementing legislation (as opposed to other possible ways of achieving the result). Nor is competence as to form and method reserved exclusively to the Parliaments of the Member States.

The intention of the Treaty-makers was that Member States should give effect to directives and achieve the results they prescribe. The problem of direct effect arises only where a Member State, contrary to that intention, has failed to give effect to a specific provision of a directive which imposes a clear, complete, precise and unconditional obligation, leaving no margin of discretion as to its implementation. The question is whether, in those special and limited circumstances, the intended beneficiaries of the directive can rely upon that specific provision as a direct source of legal rights.

The Treaty is silent on that point, presumably because the Treaty-makers did not think of it or did not expect it to arise. To say that their intention is clear from the terms of Article 189 is not simply to beg the question but to misunderstand what the question is and how it arises.

Van Duyn was not the first case to raise the question whether directives could have direct effect. Twice before, in 1970 (before British accession), the Court had held particular provisions of directives to be directly binding as to result. In Van Duyn the United Kingdom argued that these precedents were not in point because the directives in question merely fixed the date for implementation of obligations prescribed by the Treaty or a Decision made under the Treaty.

1. EC Treaty, art 191.
The United Kingdom was entitled to distinguish the pre-Accession precedents on that ground. Nevertheless, those precedents excluded the argument that directives could never under any circumstances be directly binding as to result, or that the United Kingdom had been wrongly induced, when signing the Accession Treaty, to believe that to be so.

The provision in issue in Van Duyn was Article 3(1) of Directive 64/221. The Treaty provisions on free movement of persons accept the right of Member States to limit the right of free movement "on grounds of public policy, public security or public health". The purpose of Directive 64/221 was to co-ordinate the basis on which such national measures could be taken. Article 3(1) provided:

"Measures taken on grounds of public policy or of public security shall be based exclusively on the personal conduct of the individual concerned."

Miss van Duyn, a Dutch national, was excluded from entry to the United Kingdom on the stated ground that "the Secretary of State considers it undesirable to give anyone leave to enter the United Kingdom on the business of or in the employment of [The Church of Scientology]". Miss van Duyn claimed that her exclusion was not "based exclusively on the personal conduct of the person concerned", and that the decision was therefore unlawful as being contrary to the result prescribed by the Directive.

The question referred by the Vice-Chancellor (Sir John Pennycuick) to the Court of Justice was:

"2. Whether Directive 64/221 ... is directly applicable so as to confer on individuals rights enforceable by them in the Courts of a Member State. ..."

Once again, therefore, it was the referring court - in this case, the English High Court - which raised the question of direct effect. The task of the Court of Justice was to answer the question.

Before the Court, the argument of the United Kingdom (no other government intervened) was essentially twofold:

- first, in choosing to legislate by way of directive rather than regulation, the Council must be presumed to have intended an effect different from that of a regulation and therefore to have intended to exclude direct effect. (That argument overlooked the fact that the Council, acting under Articles 56 and 66 (establishment and services), could only legislate by way of directive, although a choice was available under Article 49 (for workers).)

- second, the terms of the Directive expressly contemplated that the Member States would take

1. EC Treaty, arts 48(3), 56(1) and 66.
measures to implement it. "Indeed, the very terms of Article 3(1) itself contemplate the taking of measures."¹

The issue ultimately presented to the Court for decision was whether the Court should (1) limit the scope of its previous case-law and hold that, except where it fixes time limits, a directive cannot have direct effect, or (2) hold that the particular provision in issue (Article 3(1)) prescribed a "result to be achieved" on which Miss van Duyn was entitled to rely. Essentially, the first solution gives greater weight to the second limb of the definition in Article 189 ("choice of form and methods") while the second solution gives greater weight to the first limb ("the result to be achieved").

The Vice-Chancellor had himself seen the problem in terms of the dichotomy between the two limbs of the definition. In referring the case, he said:

"Article 3, paragraphs 1 and 2, in that directive clearly I think go to the 'result to be achieved' within the meaning of Article 189 of the Treaty, and not to the 'form and methods', which are left to the national authorities."²

In essence, the Court's decision confirmed the impression already formed by the Vice-Chancellor. The Court started from the United Kingdom's argument based on the distinction in Article 189 between regulations and directives, and addressed the question whether directives, as a class of Community act, can ever have direct effect. The steps in the Court's reasoning were:

- The fact that, in terms of Article 189, regulations are directly applicable and can therefore have direct effect does not entail that directives can never have direct effect;
- Article 189 provides that directives are "binding" on the Member States to whom they are addressed; it would be inconsistent with that to hold, as a matter of principle, that directives can never have direct effect;
- A Community act requiring the Member States to adopt a particular course of conduct would be less effective [the effet utile would be weakened] if individuals could not rely on it and national courts were debarred from taking account of it;
- Article 177 allows national courts to ask for rulings on the validity and interpretation of all Community acts without distinguishing between different types of acts: this implies that national courts may be faced with litigation in which such acts are invoked.

¹. See [1974] ECR at p1343, top of col. 2.
The Case Study asserts that the Court’s reference to *effet utile* is “a pure statement of policy”. As we have seen, however, the argument from *effet utile* had already a long history as a canon of interpretation - see, for example, the Court’s judgment in *Fédéchar* cited above. As a canon of interpretation, the common lawyer would find it easier to recognise if it were formulated as:

"an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as [they] must have intended that at all events it should have".2

Or, for those of a classical bent, *argumentum ab inconvenienti plurimum valet in lege*.3 Even for a common lawyer, the question is not whether, as a matter of principle, a Court may look at the practical effects of one interpretation rather than another, but rather how far this test should be taken.

Having concluded that directives may, as a class, have direct effect, the Court then looked at the terms of the provision in question to see whether it had direct effect:

- The effect of Article 3(1) is to limit the discretionary power normally given to immigration authorities;
- Article 3(1) stipulates an unreserved and unconditional obligation requiring no further action on the part of the Community institutions or the Member States;
- Article 3(1) applies in the context of a derogation from a basic principle of the Treaty in favour of individuals,4 consequently, even if Directive 64/221 does not, as a whole, have direct effect, effective protection of the legal rights of individuals requires that they be able to invoke the provisions of Article 3(1);
- If there are difficulties as to the interpretation of Article 3(1), these can be resolved by the courts, if necessary through recourse to Article 177.

The Court concluded that Article 3(1) had direct effect. One may not agree with the result, but it is important to be precise as to the point of disagreement. Does one disagree with the specific finding that Article 3(1) had direct effect or with the general finding that provisions of directives may, in certain circumstances, have direct effect?

On the general point, we have seen, first, that the Court had already held, before British accession, that directives could be directly

1. HL p226; EPF p14.
2. The Moorcock, (1869) 14 P.D. 64, per Bowen LJ, at p68.
4. The possibility of excluding of Community nationals on grounds of public policy derogates from the right of free movement.
binding as to result and, second, that Article 189 does not, as the Case Study assumes, make the binding force of directives dependent on national implementing legislation. There was a genuine problem of interpretation of Article 189 which the Court had to resolve.

On the specific point, it would be difficult to find a better example of a legislative provision which imposes a clear, precise and unconditional obligation: "Measures taken ... shall be based ...". Those who, like Jack Mackenzie-Stuart and the present writer, were nurtured on the strong interpretative brew of the Factories Act 1937¹ and the Coal Mines Act 1911,² would have no difficulty in detecting what Common Lawyers call an absolute duty.³

The obligation of reciprocal performance of Treaty obligations, implicit in the contractual nature of the Treaty and stressed in Costa v. ENEL, is no less important in relation to Community legislation, whether regulations or directives, which has been agreed by the representatives of the Member States in the Council of Ministers.⁴ The British media (and sometimes the British government too) complain that other Member States are less conscientious than the United Kingdom in implementing directives. To have held that directives cannot, as a matter of principle, have direct effect would have made the effect of directives wholly dependent on the readiness of Member States to take implementing measures and the speed with which they do so.⁵ Individuals would have been deprived of rights which the Member States had agreed to give them. In what respect, and according to whose lights, was it "activist" to reject that solution?

It is important to stress that the Court has never held, or even suggested, that all provisions of all directives have direct effect. The Court's case-law has always concentrated - as, it is submitted, it ought to have done - on the question whether the particular provision in issue has direct effect. Thus, quite soon after Van Duyn, in a case on the interpretation of the Second VAT Directive (Nederlandse Ondernemingen⁶), the Court carefully distinguished between provisions which clearly prescribe a result to be achieved and provisions which leave to the Member States a "margin of discretion" in their choice of form and methods.

3.8 Vertical and Horizontal Direct Effect of Directives

The Court has been faced, since Van Duyn, with a series of problems which have come to be categorised as the problem of "vertical" and

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1. Factories Act 1937, s14: "Every dangerous part of any machinery ... shall be securely fenced ...".
2. Coal Mines Act, s49: "The roof and sides of every travelling road and working place shall be made secure". Compare Mines and Quarries Act 1954, s48, for a less absolute duty.
3. The creation of a remedy for breach of statutory duty is a flood example of judicial legislation in England. And what of that outstandingly "activist" decision, reached by a majority of one, in Donoghue v Stevenson?
4. EC Treaty, art 146.
5. As experience showed, Article 169 was not a total solution - hence the new power of sanction under EC Treaty, art 171(2) introduced by the Maastricht Treaty.
"horizontal" direct effect. Where a provision of a directive imposes a clear, precise and unconditional obligation, against whom can it be invoked?

8.8.1 Ratti

The problem arose in *Ratti* because Italy had failed to implement the directive on labelling of dangerous solvents. The existing Italian law was in some respects more stringent, and in some respects less stringent, than the directive. Mr Ratti followed the labelling rules laid down in the directive and was prosecuted for not complying with the more stringent (and incompatible) Italian rules. The question for the Court was whether Mr Ratti could rely on the terms of the directive to escape prosecution under the Italian law. The Court held that he could:

"A Member State which has not adopted the implementing measures required by a directive in the prescribed periods may not rely, as against individuals, on its own failure to perform the obligations which the directive entails."  

This result, confirmed soon afterwards in *Becker*, seems consistent both with equity and with common sense. It applies the Common Law principle of estoppel. The *Case Study* says, condescendingly:

"Whatever superficial attraction this argument may have when deployed against the Member State itself, which admittedly has responsibility for its own legislative programme, it is difficult, if not impossible to use this argument convincingly in the case of the so-called 'emanations of the State' [such as] police authorities (Johnston), health boards (Marshall) local government bodies (Fratelli Costanzo) and professional bodies established or supported by statute (Royal Pharmaceutical Society and Thieffry). ... Such bodies are manifestly not in control of the national legislative programme and it can hardly be said that they have committed any wrong in failing to secure the implementation of the directive by national legislation."

Of the cases mentioned, neither *Royal Pharmaceutical Society* nor *Thieffry* had anything to do with directives, far less the direct effect of directives. It is not clear why they are cited.

4. HL p227; EPF p16.
5. The questions in *Royal Pharmaceutical Society* were whether professional rules of the Society in relation to dispensing of medicines could constitute "measures" within the meaning of Article 30 of the Treaty and, if so, whether they could be justified under Article 36. The answer to both questions was "yes". The question in *Thieffry* was whether the Paris Bar, whose rules for admission required a French law degree, was bound to recognise Mr Thieffry's Belgian law degree as equivalent to a French degree. Mr Thieffry's Belgian degree had already been recognised by the University of Paris as equivalent to a French degree for the purposes of admitting Mr Thieffry to the CAPA.
As regards the other cases (Johnston, Marshall and Fratelli Costanzo), the question is not whether police authorities, health boards or local authorities are "responsible for the national legislative programme". As we have seen, the obligation of result prescribed by Article 189 is not conditional on national legislation but is, rather, an obligation which is binding on the State however, or through whomsoever, it may choose to act. The question is whether bodies through which the State acts are entitled to plead in their own favour non-performance by the State of the Treaty obligation to implement a directive.

The laws of the Member States take radically different views of what constitutes "the State". Some have a highly developed theory of the State, while the best that can be said of the United Kingdom is that the law on the matter is unclear.1 Faced with this divergence, the Community aim must be to achieve equality of treatment and result as between Member States - the so-called "level playing field".

8.8.2 Fratelli Costanzo

Nowhere is the level playing field more important than in awarding public works and public procurement contracts. Article 29(5) of Council Directive 71/305 on public works contracts prescribed the conditions under which "obviously abnormally low" tenders could be excluded. These conditions included the right of the tenderer to be heard.

In Fratelli Costanzo the question was whether the Municipal Council of Milan was entitled to exclude from consideration as "anomalous" (because too low) the tender of Fratelli Costanzo for works on a stadium in preparation for the 1990 World Cup. The exclusion of Fratelli Costanzo was based on a temporary Italian Decree Law which purported, "in order to speed up procedures for the award of public works contracts", to derogate from Article 29(5) by allowing awarding authorities to exclude, without a hearing, "anomalously" low tenders solely on the basis of mathematical calculations.

The Court of Justice was asked by the national court whether Member States were entitled to derogate in this way from Article 29(5) and, if not:

"... was the municipal authority empowered, or obliged, to disregard the domestic provisions which conflicted with the aforesaid Community provision (consulting the central authorities if necessary), or does that power or obligation vest solely in the national courts?"

The national court drew particular attention to the distinction between "the result to be achieved" and "choice of form and methods", implying that Article 29(5) prescribed a "result to be achieved".2

Continued from previous page.

(qualifying certificate for the profession of Advocate in France). The Court held that the Paris Bar could not, in these circumstances, refuse to recognise the Belgian degree.

1. See, for example, Lord Reid in Chandler v DPP [1964] AC 753 at 790, and the directions to the jury in Olive Ponting.
The Court held that Member States were not entitled to depart to any material extent from the provisions of Article 29(5), and that:

"Administrative authorities, including municipal authorities, are under the same obligation as a national court to apply the provisions of Article 29(5) of Council Directive 71/305/EEC and to refrain from applying provisions of national law which conflict with them".  

Bearing in mind the scorn heaped by British politicians and newspapers on the "Mediterranean" Member States for alleged indifference to their Treaty obligations in implementing directives, it is truly astonishing that the judgment in Fratelli Costanzo should be condemned as an example of impermissible judicial activism. But the judgment can in any event be seen, like Simmenthal, to be the logical consequence of the early case-law discussed above, as well as the case-law on estoppel.

3.9.3 Marshall, Johnston and Foster

The problem in Marshall and Johnston (to which Foster should be added for completeness) was not different in principle, but the context was different. Those cases, all referred by United Kingdom courts, concerned Directive 76/207 on equal treatment of men and women in employment. The question was whether the claimants could invoke the principle of State estoppel against their employers - respectively, a health authority, a police authority and a public corporation.

In Marshall, the Employment Appeal Tribunal had found that Miss Marshall's employers were, "in effect, the State". The Court of Appeal, in its order for reference, said that the health authority was "an emanation of the State". (The expression "emanation of the State", used subsequently by the Court of Justice in Johnston, appears for the first time in this order of the Court of Appeal). In its observations before the Court of Justice, the United Kingdom conceded that "in terms of United Kingdom constitutional law, health authorities are Crown bodies and their employees, including hospital doctors and nurses and administrative staff, are Crown servants". The United Kingdom sought, however, to distinguish between the State as employer, having the same rights and obligations as other employers, and the State in other capacities.

It is certainly anomalous that public sector employees should be treated differently from private sector employees. But it is not easy to see how the distinction proposed by the United Kingdom (which could not have been applied uniformly in all Member States) would have

2. In Foster, Lord Donaldson MR said that the Court of Justice was guilty of a "terminological error" in equating an "emanation of the state" with a "public authority". But half a page later he cites, with apparent approval, Denning LJ as saying that the British Transport Commission (whose status was "indistinguishable" from that of the British Gas Corporation) was a "public authority". See [1988] ICR at pp588 B-C and 588 H - 589 A. This serves to illustrate the problem of talking about "the State" in the United Kingdom.
removed the anomaly consistently with the already-established principle of estoppel. At any rate, the argument was rejected both by the Advocate General (Sir Gordon Slynn)\(^1\) and by the Court, which held that:

"where a person involved in legal proceedings is able to rely on a directive as against the State he may do so regardless of the capacity in which the latter is acting, whether employer or public authority. In either case it is necessary to prevent the State from taking advantage of its own failure to comply with Community law."\(^2\)

It should be noted that, in reaching this conclusion, the Court expressly excluded the possibility of giving directives "horizontal direct effect".\(^3\)

\textit{Johnston} was almost contemporaneous with \textit{Marshall} which had not been decided when \textit{Johnston} was argued. Miss Johnston was a policewoman nominally employed by the Chief Constable of the Royal Ulster Constabulary. The argument of the United Kingdom was that the Chief Constable was constitutionally independent of the State and that, in any event, a distinction should be drawn between the Chief Constable \textit{qua} employer and the Chief Constable in other capacities.\(^4\)

The facts stated in the order for reference showed that the Chief Constable was a public authority. That being so, the Court had only to confirm its conclusion in \textit{Marshall}.

\textit{Foster v British Gas} was the first case where the Court was specifically asked to define the category of bodies or authorities against whom the direct effect of directives could be pleaded. The House of Lords asked only one question which raised the point directly:

"Was the British Gas Corporation (at the material time) a body of such a type that the appellants are entitled in English courts and tribunals to rely directly upon Council Directive 76/207 ... so as to be entitled to a claim of damages on the ground that the retirement policy of the British Gas Corporation was contrary to that directive?"

The significance of the words in parentheses ("at the material time") is that the British Gas Corporation - a statutory corporation with monopoly rights - was privatised after the events giving rise to the claims of Mrs Foster and the other appellants. The case therefore concerned the position of the public corporation before privatisation.

In answering the question put, the Court was careful to distinguish between its own jurisdiction ("to determine the categories of persons against whom the provisions of a directive may be relied on") and that of the national courts ("to decide whether a party to proceedings before them falls within one of the categories so defined").

1. \[1986\] ECR at p735.
2. \[1986\] ECR at p749, point 49.
3. \[1986\] ECR at p748, point 48.
4. \[1986\] ECR at p748, point 43.
Following the very careful Opinion of Advocate General van Gerven, the Court adopted the well-established Common Law technique of extracting the underlying principle from previously decided cases:

"... The Court has held in a series of cases that unconditional and sufficiently precise provisions of a directive could be relied on against organisations or bodies which were subject to the authority or control of the State or had special powers beyond those which result from the normal rules applicable to relations between individuals."1

In the light of the precedents, the Court propounded the test to be applied by the national court:

"... A body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals is included in any event among the bodies against which the provisions of a directive capable of having direct effect may be relied on."2

The Court studiously avoided saying whether the British Gas Corporation, as such, was or was not an "organ" or "emanation" of the British State. In considering the correctness of the decision, it must be remembered that employment law is not the only field in which Community law has to deal with public undertakings. Thus Article 90 EC makes special provision for applying the competition rules to such undertakings, and the Public Works and Public Supply Contracts Directives3 had, since the 1970s, imposed on them, as bodies charged directly or indirectly with spending public funds, obligations essential to make the internal market a level playing field.

8.8.4 Faccini Dori

In Faccini Dori,4 the Court had to decide whether to depart from what it had said in Marshall and, following the encouragement of three advocates general,5 hold that directives could have horizontal direct effect (direct effect as between private parties) where the provision in question otherwise met the criteria of direct effect. The Court's reasons for not doing so were that:

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"... The case-law on the possibility of relying on directives against State entities is based on the fact that under Article 189 a directive is binding only in relation to 'each Member State to which it is addressed'. ...

The effect of extending that case-law to the sphere of relations between individuals would be to recognise a power in the Community to enact obligations for individuals with immediate effect, whereas it has competence to do so only where it is empowered to adopt regulations." 1

The Case Study summarises the Court's case-law in the following way:2

"... The ECJ took an enormous step in Van Duyn in holding that in the absence of implementing legislation a directive could be relied upon by individuals as having a direct effect against a Member State. ... The concept of 'the State' was then widened by the Court to bring in emanations of the State (broadly defined) so as to make the direct effect doctrine operate against them too. At this point a sudden timidity overcame the Court and it backed away from the logic of its approach leaving unprotected all persons who attempt to rely upon the provisions of an unimplemented directive against a 'private sector' defendant. This startling inconsistency in the daily operation of the Community legal regime must call into question the legitimacy of the first step."

The accusation that the decision in Faccini Dori was "timid" is, to say the least, surprising in a Case Study which takes the literal interpretation of texts as the norm of proper judicial conduct. The reader will judge whether the Court's approach has been "startlingly inconsistent". It is, however, simply incorrect that the result has been to "leave unprotected all persons who attempt to rely upon the provisions of an unimplemented directive against a 'private sector' defendant".

Such persons are protected in two ways: first, by the obligation upon national courts, so far as possible, to interpret national law in conformity with Community law (interprétation conforme) - see Von Colson and Kamann and Marleasing - and, second, by "Francovich liability". Yet both are condemned in the Case Study as examples of judicial activism.

8.8.5 Interprétation conforme3

The principle that national courts should interpret national law in such a way as to comply with international obligations is not a novelty in United Kingdom law. In Garland v British Railway Engineering Ltd4 a

2. HL p227; EPF p17.
3. Sometimes referred to in English as "uniform interpretation".
"It is a principle of construction of United Kingdom statutes, now too well established to call for citation of authority, that the words of a statute passed after the Treaty has been signed and dealing with the subject matter of the international obligation of the United Kingdom, are to be construed, if they are reasonably capable of bearing such a meaning, as intended to carry out the obligation, and not to be inconsistent with it. A fortiori is this the case where the Treaty obligation arises under one of the Community Treaties to which section 2 of the European Communities Act 1972 applies." 1

The explanation and formulation of the principle by the Court of Justice in Von Colson was:

"... The Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. It follows that, in applying the national law and in particular the provisions of a national law specifically introduced in order to implement Directive No 76/207, national courts are required to interpret their national law in the light of the wording and the purpose of the directive in order to achieve the result referred to in the third paragraph of Article 189." 2

The principle was applied without apparent difficulty by the House of Lords in Litster 3 where words were read into the implementing statutory instrument in order to give full effect to the Transfer of Undertakings ("TUPE") Directive. The vexed question, but apparently in the United Kingdom only, is whether as the Court said in Marleasing 4 the principle requires the national courts to interpret a prior national provision in the light of a subsequent directive. 5

Most European legal systems presuppose that a legal text "speaks" at the moment when the judge is called upon to apply it. The judge is confronted with two texts - a Community text and a national text, the one superior to the other in the hierarchy of norms. He is, in principle, called upon to apply both. The technique of interprétation conforme

enables him to do so by interpreting the latter so as to give effect to the former. The time when the texts came into existence as legal norms is, for this purpose, irrelevant.

If *interprétation conforme* creates a real difficulty for judges in the United Kingdom, it should be noted that the standard formulation of the judge's obligation is to apply the national law in light of the directive "as far as possible".¹

### 3.8.8 Francovich

The scope and conditions of *Francovich* liability were at issue in two cases in which judgment was delivered as this book went to press.² This restricted the present writer in commenting on the Court's reasoning in *Francovich*. But six points can be made to put *Francovich* in context.

First, the obligation of the Court under the Treaties is to "ensure that the law is observed", not only in their *interpretation*, but also in their *application*. As we have seen from the early ECSC cases, the Court has, from the beginning, interpreted this extensive remit as requiring it to administer an internal system of law in which gaps have to be filled so as to make it consistent and coherent. This may or may not be an activist view of its role, but it was certainly well established long before the United Kingdom signed the Act of Accession.

Second, non-contractual liability to make good loss and damage caused by failure to perform obligations is a general principle of law expressly recognised in Article 215 of the EC Treaty.

Third, the obligation in principle of Member States, not simply to "undo" (*rapporter*) State action which the Court has declared to be unlawful under Community law, but to "repair" (*réparer*) its unlawful effects, was recognised long before British accession by the judgment in *Humblet*.³ It is the scope of that principle and the conditions for applying it that remain to be determined.

Fourth, the Directive in question in *Francovich* (Directive 80/987 on the protection of employees in the event of their employer's insolvency) was one with which Member States were required to comply by 1983 at the latest. Italy's failure to comply had been the subject of proceedings brought by the Commission under Article 169, and the Court had declared Italy to be in breach of its Treaty obligations.⁴

Fifth, the plaintiffs in the national proceedings (*Francovich*, *Bonifaci* and 33 others) had brought proceedings in the Italian courts to require the Italian State to make good the guarantees to which they would have been entitled had the State implemented the Directive, failing

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which for payment of damages. The question of State liability was therefore directly in issue in the national court.

Sixth, the question put to the Court of Justice by the Italian court specifically asked whether Community law required the State to make good loss and damage sustained by an individual in consequence of the State's failure to implement a directive.

This was a question which the Court was bound to answer. The Court's reasoning has been criticised as being laconic and even inadequate to support its conclusion. One may complain that the result was illogical, inexpedient or both. But one cannot, as Dicey pointed out, reasonably complain because the Court answered a question which was put to it, in this case, by the national court, the point having been put directly in issue by the parties before that court.

3.9 Conclusion

Judicial activism, in the sense used in the Case Study, is not just a slogan. It is a myth. Individual judges, like heads of Oxford colleges, have their own prejudices and preconceptions. From time to time, these may influence their individual approach to the decision of particular cases.

But neither in Britain nor in Luxembourg do they get together to decide cases in such a way as to enhance their own powers and diminish those of others. The favourable opinion of the House of Lords Select Committee\(^1\) is a welcome antidote to the Case Study.

The purpose of this case study has been to show how, in practice, the Court of Justice came to reach some of the decisions that are said to be "logically flawed or skewed by doctrinal or idiosyncratic policy considerations". The Court did not launch these decisions on an unsuspecting world. They grew out of previously established case-law in response to questions put to the Court which it was the Court's function and duty to answer.

The answers the Court gave - the decisions it reached - may, in the view of the observer, be right or wrong. No-one suggests that they should not be exposed to criticism, since it is through the interaction of case-law and commentary that the law is developed.

But the judge's role cannot be confined to that of providing a technocratic literal interpretation of texts produced by others. The Common Law would not exist if it were. Nor would Equity. Nor would the canon of modern administrative law developed by the courts in the 30 years - historically a very short time - since the "activist" speech of Lord Reid in *Ridge v Baldwin*.\(^2\)

In any system based on case-law the judge must proceed from one case to another seeking, as points come up for decision, to make the


\(^2\) [1964] AC 40.
legal system consistent, coherent, workable and effective. He will not always be successful. But to attack him for seeking to do what British judges have always done - in Dicey's words, "to maintain the logic and symmetry of the law"\(^1\) - is to deny the very inheritance of the Common Law.

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