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Abstract

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JUDICIAL PROTECTION OF THE INDIVIDUAL BY THE EUROPEAN COURT OF JUSTICE

*David O'Keeffe**

INTRODUCTION

I am honored to write in this edition of the *Fordham International Law Journal* dedicated to President Ole Due. I had the privilege to work as a Référendaire, legal secretary, at the European Court of Justice ("Court of Justice" or "Court") of the European Communities to The Hon. Mr. Justice Thomas F. O'Higgins, former Chief Justice of Ireland, and Judge of the Court from 1985 to 1991. During that time, I came to know Ole Due, first as Judge, and then as President of the Court. Like everyone who worked at the Court, and those who appeared before him, I appreciated President Due's judicial skills and fairness. On a personal level, I recall particularly his simplicity of manner, his genuine interest in young staff members, and his unforced informality. I welcome this opportunity to join in this tribute to President Due.

It is difficult not to be impressed by what has been created by the judges in Luxembourg since the constitution of the Court.[1] Many observers have compared their work to that of the pioneering U.S. constitutional judges, such as Chief Justice John Marshall. One may also use another analogy, drawn from the fourteenth and fifteenth centuries, when the King's judges in the Palace of Westminster created the common law in a procedure remarkably similar to that of the Article 177 reference of the EC Treaty.[2] Similar to the King's judges, the European judges, while few in number, are engaged in the process of creat-

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1. Treaty Establishing the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 167, *as amended in* TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES (EC Off'l Pub. Off. 1987).

2. Treaty Establishing the European Community, Feb. 7, 1992, [1992] 1 C.M.L.R. 573 [hereinafter EC Treaty], *incorporating changes made by* Treaty on European Union, Feb. 7, 1992, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 719, 31 I.L.M. 247 [hereinafter TEU].

ing a new legal order over a remarkably short period in time. This Essay focuses on one aspect of the work of the European Court, that of judicial protection of the individual, an area where it appears that the Court has taken steps towards the creation of a common law for Europe, or *ius commune.*

I. *DEVELOPING A BODY OF LAW FOR PROTECTION OF THE INDIVIDUAL*

The Court of Justice has developed a remarkable case law concerning judicial protection of the individual. Initially based on direct effect, the case law concerning judicial protection of the individual subsequently developed on rights and remedy bases.[3] The first generation case law involves issues such as direct effect, primacy of Community law, and the autonomy of the Community legal order.

The second generation case law deals with the relationship of national law and Community law as regards enforcement of Community law rights.[4] This case law is built on the assumption that national rules will apply in resolving disputes that are founded in Community law, in areas such as unjust enrichment and remedies. Clearly this may lead to lack of uniformity as the effective enforcement of Community law rights may differ from one Member State to another, depending on national provisions for enforcement.[5]

In response to this problem, the Court has recently fash-

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3. From a vast literature, see most recently, Roberto Caranta, *Judicial Protection Against Member States: A New Jus Commune Takes Shape,* 32 COMMON MKT. L. REV. 703, 703-26 (1995); Deirdre Curtin & Kamiel Mortelmans, *Application and Enforcement of Community Law By the Member States: Actors in Search of a Third Generation Script, in* 2 INSTITUTIONAL DYNAMICS OF EUROPEAN INTEGRATION, ESSAYS IN HONOUR OF HENRY G. SCHERMERS 423-66 (1994); SACHA PRECHAL, DIRECTIVES IN EUROPEAN COMMUNITY LAW: A STUDY ON EC DIRECTIVES AND THEIR ENFORCEMENT BY NATIONAL COURTS (1995); Walter Van Gerven, *Bridging the Gap Between Community and National Laws: Towards a Principle of Homogeneity in the Field of Legal Remedies,* 32 COMMON MKT. L. REV. 679-702 (1995).

4. Deirdre Curtin, *The Decentralised Enforcement of Community Law Rights: Judicial Snakes and Ladders, in* CURTIN & O'KEEFFE, CONSTITUTIONAL ADJUDICATION IN EUROPEAN COMMUNITY AND NATIONAL LAW 1, 33-49 (1992).

5. The Court's case law concerning unjust enrichment in the case of recovery of taxes imposed by the Member States in violation of Community law is the classic example. *See* Rewe v. Landwirtschaftskammer fur das Saarland, Case 33/76, [1976] E.C.R. 1997, [1977] 1 C.M.L.R. 533; *Just v. Danish Ministry for Fiscal Affairs,* Case 68/79, [1980] E.C.R. 501, [1981] 2 C.M.L.R. 714.

ioned[6] a case law which, while co-existing with the first and second generations, attempts to address uniformity by providing effective remedies in national legal orders as a matter of Community law. This third generation case law, brilliantly characterized by Curtin and Mortelmans,[7] is based on the desire to provide genuine solutions for the shortcomings of direct effect, or *effet utile*, in the absence of adequate or effective national enforcement measures of Community law rights.[8] In the third-generation case law, the Court has developed a new cause of action in Community law and has altered national rules pertaining to interim relief and procedure. The third generation case law penetrates not only into the procedural laws of the Member States, it has also effected private law, and other fields, including Member State constitutional law.[9]

II. *DEVELOPING PROCEDURES TO ENFORCE THE BODY OF LAW*

A. *Directives Have Direct Effect*

The Court's acceptance of the doctrine of direct effect goes far beyond the wording of Article 189 of the Treaty.[10] The Treaty states "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 choice of form and methods."[11] The Court has clearly been concerned with ensuring the *effet utile* of Community law. The concern appears to be linked to the notion of judicial protection of the individual. Very often the principles of *effet utile* and judicial protection of the individual appear together in the Court's decisions.[12] In *Van Duyn v. Home Office*, for example, the Court held that "the useful effect [of a directive] would be weakened if individuals were prevented from relying on it before their national courts."[13] The

6. The Court's case law was not necessarily fashioned chronologically.

7. Curtin & Mortelmans, *supra* note 3.

8. *Id.* at 433-34.

9. Regina v. Secretary of State For Transport ex parte Factortame Limited, Case C-213/89, [1990] E.C.R. I-2433, [1990] 3 C.M.L.R. 1.

10. EC Treaty, *supra* note 2, art. 189, [1992] C.M.L.R. at 693.

11. *Id.*

12. Caranta, *supra* note 3, at 705-06. Caranta remarks that it is not always easy to distinguish the two principles which are deeply connected in the case law. *Id.*

13. Van Duyn v. Home Office, Case 41/74, [1974] E.C.R. 1337, [1974] 1 C.M.L.R. 16.

Court further solidified development of the two principles by subsequently allowing individuals to rely on rights created by Community directives where the directives were not implemented by Member States within the stipulated time.[14] In holding that a Member State may not plead, as against individuals, its failure to perform the obligations the directive entails,[15] the Court in *Becker*,[16] utilized the same reasoning of useful effect and protection of the individual as in *Van Duyn*.[17] The holding was later extended to cover other state authorities such as regional or civic authorities.[18] The Court also subsequently held that provisions of national law must be interpreted in conformity with Community law, even before the time limit for implementing a directive has expired,[19] although recent case law appears to cast doubt upon such a proposition.[20]

In *Marshall I*, the Court eliminated the possibility that directives might have horizontal direct effect.[21] Horizontal direct effect would allow individuals to rely on the provisions of a directive, provided the directive met requirements of the direct effect test, in cases solely involving individuals. The *Marshall I* judgment left individuals in an absurd situation regarding access to legal remedies. Individuals could rely on a directive if suing a Member State or an emanation thereof but not if they were suing an individual, even though the underlying problem might be identical in both cases.[22]

B. *Alternatives to Direct Effect*

In light of controversy generated by the *Marshall I* judgment it was not surprising that the Court subsequently changed

14. Becker v. Finanzamt Münster-Innenstadt, Case 8/81, [1982] E.C.R. 53, [1982] 1 C.M.L.R. 499.

15. *Becker*, [1982] E.C.R. at 73, [1982] 1 C.M.L.R. at 514.

16. *Id.*

17. *Van Duyn*, [1974] E.C.R. at 1337, [1974] 1 C.M.L.R. at 16.

18. Fratelli Costanzo v. Comune di Milano, Case 103/88, [1989] E.C.R. 1839, [1989] 3 C.M.L.R. 258.

19. Officier Van Justitie v. Kolpinghuis Nijmegen, Case 80/86, [1987] E.C.R. 3969, [1987] 2 C.M.L.R. 18.

20. Mundt v. Landrat des Kreises Schleswig-Flensburg, Case C-156/91, [1992] E.C.R. I-5567.

21. Marshall v. Southampton and South West Hampshire Area Health Authority, Case 152/84, [1986] E.C.R. 723, [1986] 1 C.M.L.R. 688 [hereinafter *Marshall I*].

22. See the opinion of Advocate General Van Gerven in Marshall II. Marshall II, Case C-271/91, [1993] E.C.R. I-4367, I-4373, [1993] 3 C.M.L.R. 293, 301.

course. Complementing the case law founded on the direct effect doctrine, the Court created a new remedies based case law. The Court had first intimated a new approach to the protection of individual rights in *von Colson*,[23] where it relied on an extensive interpretation of Article 5 of the Treaty[24] to impose an obligation on national courts to interpret national law in the light of the wording and purpose of the directive. The Court specifically introduced this approach in order to implement a directive where no directly effective provision was available to provide an adequate remedy. Subsequently, in *Marleasing*,[25] the Court extended this obligation to national legislation adopted before the directive, adding that national courts were required to interpret national law "as far as possible"[26] with Community directives.

In *Faccini Dori*,[27] the Court consolidated developments by adding that if the result prescribed by a directive cannot be achieved by way of interpretation, Community law requires the Member States to compensate for any damage caused to individuals through failure to transpose a directive. The requirement was to exist, however, only so long as the conditions for state liability set forth in *Francovich*[28] are met.

The requirement of interpreting national laws in conformity with a directive and the principle of Member State liability set forth in *Francovich* are either complementary or alternative to the doctrine of direct effect of directives.[29] All three doctrines have been developed by the Court in order to provide effective judicial protection for the individual. The first two doctrines, however, are built on the assumption that direct effect is not necessary and that remedies may be available even where a directive has no direct effect. They allow individuals to claim remedies based on a directive even in a horizontal situation, such as that in *Marleasing*, thus, avoiding the denial of the remedy estab-

23. Sabine von Colson and Elisabeth Kamann v. Land Nordrhein-Westfalen, Case 14/83, [1984] E.C.R. 1891, [1984], 2 C.M.L.R. 430.

24. EC Treaty, *supra* note 2, art. 5, [1992] C.M.L.R. at 591.

25. Marleasing v. La Comercial Internacional de Alimentación, Case C-106/89, [1990] E.C.R. I-4135, [1990] 1 C.M.L.R. 305.

26. *Marleasing*, [1990] E.C.R. at I-4144, [1990] 1 C.M.L.R. at 311.

27. Faccini Dori v. Recreb Srl, Case C-91/92, [1994] E.C.R I-3325, [1994] 1 C.M.L.R. 665.

28. Francovich v. Italy, Joined Cases C-6/90 & C-9/90, [1991] E.C.R. I-5357, [1993] 2 C.M.L.R. 66.

29. Van Gerven, *supra* note 3, at 682.

lished by *Marshall I.* Both pending and subsequent case law will establish the limits of Member State liability and the liability of individuals for a breach of Community law in horizontal situations.[30]

C. *Uniform Remedies to Protect Community Law Rights*

Another development, that of the so-called third generation case law of the Court, is equally arresting. In its earlier case law, the Court had been reluctant to interfere in national procedural issues.[31] In cases such as *Rewe*, the Court held that each national legal system should determine the procedural aspects of actions relating to the individual rights protected by Community law.[32] These earlier cases established the safeguard clause, indicating that each national legal system could determine the procedural aspects of actions relating to the protection of individual rights protected by Community law, provided that domestic remedies were effective, and no less favorable than those for the enforcement of comparable national rights.[33] In terms of remedies, the national court must apply directly effective Community law either under the existing provisions of national law, or on its own motion, as required in *Simmenthal.*[34] Initial reluctance to interfere with national procedural remedies subsequently declined. In particular, following *Simmenthal*, the Court insisted on national courts' obligation to make effective judicial remedies available. When necessary to provide effective judicial remedies, national courts were to deny application of relevant national procedural rules.[35]

The most decisive developments concerning effective judicial protection, however, have occurred only recently. In

30. Brasserie du Pêcheur, Case C-46/93 (Eur. Ct. J.) (not yet reported); Factortame III, Case C-48/93 (Eur. Ct. J.) (not yet reported); Dillenkofer, Case C-187/94 (Eur. Ct. J.) (not yet reported).

31. Caranta, *supra* note 3, at 705.

32. Rewe v. Landwirtschaftskammer für das Saarland, Case 33/76, [1976] E.C.R. 1989, [1976] 1 C.M.L.R. 533.

33. *Id.* at 1997-98; *See also supra* note 5 (discussing case law concerning unjust enrichment).

34. Amministrazione delle Finanze dello Stato v. Simmenthal, Case 106/77, [1978] E.C.R. 629, [1978] 3 C.M.L.R. 263.

35. *See, e.g.*, Amministrazione Delle Finanze Dello Stato v. San Giorgio, Case 199/82, [1985] E.C.R. 3595, [1983] 2 C.M.L.R. 658; Johnston v. Chief Constable of the Royal Ulster Constabulary, Case 222/84, [1986] E.C.R. 1651, [1986] 3 C.M.L.R. 240.

Factortame I,[36] for example, concerning national rules for interim relief, the Court held that:

> The full effectiveness of Community law would be just as much impaired if a rule of national law could prevent a court seised of a dispute governed by Community law from granting interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under Community law. It follows that a court which in those circumstances would grant interim relief, if it were not for a rule of national law, is obliged to set aside that rule.[37]

The national court was, therefore, obliged to set aside the rule of national law which prevented it from granting interim relief.

In *Zuckerfabrik*,[38] the Court was confronted with a case that combined elements of *Factortame I* and *Foto-Frost*.[39] In the latter case, it had held that only the Court itself may decide on the invalidity of Community legislation. In *Zuckerfabrik*, the issue was whether, in proceedings for interim relief, a national court could suspend the operation of a national measure adopted on the basis of a Community regulation and which was challenged on the ground that the regulation itself violated Community law. The difficulty was that, according to *Foto-Frost*, the national court could not rule on the invalidity of the Community regulation, but *Factortame* required effective judicial protection in interim proceedings. Applying the two cases, the Court held that national courts could suspend enforcement of national administrative measures adopted on the basis of Community regulation, even though they could not rule on the invalidity of the Community measure.[40] In order to do so, however, serious doubts must exist as to the validity of the national measure, an issue which would ultimately be decided by the Court.[41]

Completely new in *Zuckerfabrik* were the Court's observations on the national rules of procedure governing interim re-

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36. *Factortame I*, [1990] E.C.R. 2433, [1990] 3 C.M.L.R. 867.

37. See record 21 of the *Factortame I* decision. *Id.*

38. Zuckerfabrik Süderdithmarschen AG v. Hauptzollamt Itzehoe, Cases C-143/88 & C-92/89, [1991] E.C.R. I-415, [1991] 3 C.M.L.R. 1.

39. Foto-Frost v. Hauptzollamt Lübeck-Ost, Case 314/85, [1987] E.C.R. 4199, [1987] 3 C.M.L.R. 57.

40. *Zuckerfabrik*, [1991] E.C.R. at I-542, [1991] 3 C.M.L.R. at 83.

41. See record 29 of the *Zuckerfabrik* decision. *Id.*

lief. The Court noted that national rules differ from one Member State to another. This differentiation jeopardizes the uniform application of Community law. Because the Court considered uniform application of Community law a fundamental requirement of the Community legal order, it held that:

> The suspension of enforcement of administrative measures based on a Community regulation, whilst it is governed by national procedural law, in particular as regards the making and examination of the application, must in all the Member States be subject, at the very least, to conditions which are uniform so far as the granting of such relief is concerned.[42]

The result of *Zuckerfabrik* was, therefore, to establish a minimum set of requirements for the granting of interim relief, including such considerations as urgency. The implications of the judgment are enormous because they challenge the view, repeated by the Court in the very same case, that "the rules of the procedure of the courts are a matter of national law."[43] In short, *Zuckerfabrik* establishes standards of Community procedural law that take priority over national rules of procedure. The Court's approach has been characterized as a transition from a negative application of the principle of effective judicial protection to a positive one.[44]

The *Francovich* case further exemplifies this trend. In *Francovich*, the Court premised state liability on principles of effective judicial protection of the individual and *effet utile*. The Court stated that the principle of state liability was inherent in the system of the Treaty.[45] In so holding, the *Francovich* court founded the individual's right to judicial protection directly on Community Law.[46]

This new rule in the Community legal order has significant consequences for the legal orders of the Member States. Because the principle of state liability derives from the Treaty, it must apply in a uniform manner throughout the Community. The Court held, however, that even though principles of state liability derive from the Treaty, national liability rules still apply.

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42. *Id.*

43. *Id.*

44. Caranta, *supra* note 3, at 714.

45. See record 35 of the *Francovich* decision. *Francovich*, [1991] E.C.R. at I-5381, [1993] 2 C.M.L.R. at 114.

46. *Francovich*, [1991] E.C.R. at I-5382, [1993] 2 C.M.L.R. at 115.

In the absence of Community legislation, therefore, it is for the internal legal order of each Member State to designate competent courts and to establish detailed procedural rules to govern actions intended to safeguard the rights which Community law conveys to individuals.[47]

As a result of *Francovich*, the Court introduced a new cause of action into the legal order of every Member State. The action allows an award of damages in favor of an individual against a Member State for damage caused by the State's breach of Community law.[48] Like *Factortame* and *Zuckerfabik*, this new action introduces significant change into the procedural laws of the Member States. All three cases demonstrate enforcement of Community law rights through the introduction of common remedies, the setting aside of national law, the granting of new procedural rights for interim relief, and the introduction of new causes of action. The collective effect of such enforcement on the national procedural rules will be enormous.

In *Marshall II*,[49] for example, the Court held that where a Member State has chosen financial rewards as the compensation for discriminatory dismissal, the compensation must be full and adequate. National rules on compensation offering a lesser remedy may not be applied. In so holding, the *Marshall II* decision cuts across differing national damage rules to form a uniform rule of compensation.

It is interesting to compare *Francovich* and *Marshall II* as regards to damages. In *Francovich*, the amount of compensation would be a pre-determined amount, whereas in *Marshall II*, the fixing of damages is inevitably discretionary. According to *Marshall II*, damages must be adequate in that they must make reparation for the loss and damage sustained.[50] The *Marshall II* decision mandates individual interpretation by national courts. The interpretation and application of the *Marshall II* requirements, therefore, may vary from one Member State to another as well as internally within a Member State.

The underlying theme of *Marshall II* is interesting in that it is predicated upon the premise that Member States may choose

47. *Id.*

48. *Francovich*, [1991] E.C.R. at I-5382, [1993] 2 C.M.L.R. 85-86.

49. *Marshall II*, [1993] E.C.R. at I-4386, [1993] 3 C.M.L.R. at 318-19.

50. *Id.* at I-4389, [1993] 3 C.M.L.R. at 324.

the means by which they achieve the aim of a Community directive so long as their choice is consistent with the aims of the directive. In *Marshall II*, the Court realized that it faced only two choices: reinstatement of the plaintiff by the national court or damages. Although the Court accepted adequate damages as an effective remedy, the possibility that the remedy for discriminatory dismissal could differ from one Member State to another remains.

Varying remedies is not an insignificant matter. Dismissal in the current employment market can effectively mean the termination of a career, not simply of a given employment. Furthermore, in establishing that adequate damages must be awarded regardless of national award limitations, the Court has imposed a new duty on national courts. The application of this duty is difficult in the extreme. It is not clear to what extent national courts may take national laws into account when assessing damages. This is presumably the next step and if pursued by the Court, will require the Court to provide far-reaching guidance on basic principles of compensation. Inevitably this will result in some form of harmonization.[51]

The apogee of this case law is *Faccini Dori*,[52] where the Court held that in cases where damage has been suffered as a result of the State's obligation, the national court must "uphold the right of aggrieved consumers to obtain reparation in accordance with the national law on liability."[53] How this requirement is to be applied in practice is not specified.[54] Potential for serious procedural difficulties will exist in some Member States.[55] It is clear,

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51. Curtin & Mortelmans, *supra* note 3, at 452-53; Van Gerven, *supra* note 3, at 694-95, 699.

52. Faccini Dori v. Recreb Srl, Case C-91/92, [1994] E.C.R I-3325 [1994], 1 C.M.L.R. 665.

53. *Faccini Dori*, [1994] E.C.R. at I-3358, [1994] 1 C.M.L.R. at 691.

54. There seem to be several possibilities: (i) may the State be drawn in to an action by way of joinder, by procedural means unknown in some Member States; or (ii) is the State to be sued directly as a co-respondent; or (iii) may the State be sued alone; or (iv) may damages be awarded against the State even if it is not a party to the action; or (v) must the action against the State be taken subsequent to the action between individuals?

55. William Robinson, *Annotation of Case C-91/92, Faccini Dori*, 32 COMMON MKT. L. REV. 629-39 (1995). Robinson observes that national judges will either have to interpret national laws so far as to be *contra legem* or to find a suitable national law on liability upon which to found *Francovich*-based reparation. *Id.*

however, that the Court, although referring to national laws on liability, is in fact harmonizing national legal remedies.

D. *Towards a Remedies-based Case Law*

There is a clear progression in the case law toward remedies, although it cannot be characterized as linear or chronological. Rejecting the application of a national rule because it conflicts with a Community rule, as required by *Simmenthal* and *Factortame*, is largely a negative process. Alternatively, as *Zuckerfabrik* demonstrates, non-application of national rules leads to the positive introduction of new, harmonized, and Community based procedural rules. *Francovich* illustrates the next step: an entirely new cause of action based only on Community law, and enforceable in all Member States on the basis of national procedural law. The ultimate goals to be achieved are the uniform application of Community law and the effective judicial protection of the individual by the imposition of adequate sanctions and remedies.[56]

The progression presented until now is perhaps too linear. It has also elided the difference among cases whose characterization may fall somewhere in between the second or third generation.[57] In recent cases, the Court has retreated to national standards and procedures as regards retroactivity of claims in the areas of social security[58] and equal pay.[59] In the area of employment law, in contrast, the Court granted a "third generation" remedy in *Marshall II*.[60]

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56. Van Gerven considers that "the need for harmonized legal remedies . . . is . . . inherent in the concept of uniformity; in the absence of (sufficiently) harmonized legal remedies, uniform rights cannot be adequately secured throughout the Community." Van Gerven, *supra* note 3, at 690.

57. Curtin and Mortelmans describe *Factortame I* as "hovering around the threshold of the third generation arch-way." Curtin & Mortelmans, *supra* note 3, at 438. They describe the result in *Fratelli Costanzo* as being third generation in that it opts for a uniform Community-wide solution. *Id.* at 443. *UNECTEF v. Heylens* and *Re Purity Requirements for Beer: EC Commission v. Germany* are described as being early birds of the third generation, yet examples of negative integration. Curtin & Mortlemans, *supra* note 3, at 443, 448; Case 222/86, [1987] E.C.R. 4097, [1989] 1 C.M.L.R. 901; Case 178/84, [1987] E.C.R. 4097, [1988] 1 C.M.L.R. 780.

58. Steenhorst-Neerings, Case C-338/91, [1993] E.C.R. I-5475, [1993] 3 C.M.L.R. 341; Johnson II, Case C-410/92, [1994] E.C.R. I-5483, [1994] 1 C.M.L.R. 749.

59. *Vroege*, Case C-57/93, [1994] E.C.R. I-4541, [1995] 1 C.M.L.R. 881; *Fisscher*, Case C-128/93, [1994] ECR I-4541, [1995] 1 C.M.L.R. 881.

60. *Marshall II*, [1993] E.C.R. I-4367, [1993] 3 C.M.L.R. 293.

These judgments may be distinguished on the theory that where the Court allowed the application of national standards or procedures, an adequate national remedy was available although not a perfect one. In contrast, in *Marshall II*, only full compensation, rather than lesser compensation provided for under national law, would provide an adequate remedy. This is consonant with Van Gerven's distinction between essential or constitutive rules and rules laying down non-essential or non-constitutive conditions.[61] The availability of an imperfect remedy could be considered a rule setting forth a non-essential condition. Provided that a national rule does not make enforcement impossible, enforcement would be, according to national rules. If only a perfect remedy would suffice, the requirement of being an essential or constitutive condition would be met, thus, justifying enforcement through a third generation remedy.

Although this analysis is attractive because it explains the recent national standards case law in a way that shows a continuity and coherence with the third generation case law, it begs the question as to what is to be considered essential or constitutive. Impossibility of enforcing rights is not an adequate criterion because imperfect remedies will generally be available under national law. Where national remedies are not available, a *von Colson* remedy could be relied upon.

Thus far, Court of Justice case law has developed common rules on state liability, judicial review, and interim remedies. Commentators discern the emergence of a common law for Europe citing uniform causes of action and uniform remedies created as a result of Community law. In these areas alone, there are a number of issues that remain to be resolved, such as Member State liability for breaches of the Treaty or failure to correctly, or partially, implement directives or the liability of individuals for breach of Community law. Another issue remaining to be resolved is the apparent dichotomy between the rules on Member State liability and those relating to the non-contractual liability of the Community. The impact on national law is already striking, and the creation of new remedies in these areas would accentuate this process. A *de facto* harmonization of national rules in certain areas becomes inevitable.

The Court's role in this process is crucial. By discerning

61. Van Gerven, *supra* note 3, at 694.

rights and remedies "inherent in the system of the Treaty," the Court engages in classic judicial activism. The third generation case law is a development indispensable to ensuring the enforcement of individuals' Community law rights. Nevertheless, this case law dictates a fundamental reassessment of national procedural rules and causes of action within the context of the Community minimum standards, which will have to be provided by the Court. It is doubtful whether Community legislators will intervene, although such intervention would be welcome if the *acquis communautaire*[62] were respected. Substantive conditions for the grant of third generation case law remedies must be specified. Issues such as compensation and the component rules governing the award of damages must be delineated.

The relationship between the Court and the Member State courts will be decisive in this development, as the reception by national courts of third generation remedies will be crucial to achieve uniform application. So too will be the willingness of national courts to refer cases to the Court.[63] One positive signal is that the House of Lords[64] and apparently the Spanish Courts[65] have adopted the Court's case law as regards interim relief, even in areas which are not governed by Community law. This may demonstrate the Member States' receptive approach to a harmonization of remedies.

CONCLUSION

The early case law of the Court, as expressed in *Van Gend en Loos*,[66] *Costa v. ENEL*,[67] and *Simmenthal* can be viewed as the logical articulation of the requirements of the Community legal order and, largely, as a negative application of the principle of ef-

62. The *acquis communataire* is usually defined as *The Community Patrimony* and includes the whole body of Community law, including the Treaties, legislation, the general principles of law, case law, etc. *See* Carlo Curti Gialdino, *Some Reflections on the Acquis Communautaire*, 32 COMMON MKT. L. REV. 1089-121 (1995) (further discussing *acquis communataire*).

63. As The Hon. Mr. Justice Donal Barrington, writing in a non-judicial capacity, notes, "the judicial branch reacts to external stimuli. What it decides depends upon the cases which come before it, but it cannot control the cases which come before it." DONAL BARRINGTON, *The Emergence of a Constitutional Court*, *in* HUMAN RIGHTS AND CONSTITUTIONAL LAW: ESSAYS IN HONOUR OF BRIAN WALSH 251, 253 (1992).

64. M. v. Home Office, [1993] 3 WLR 433; [1993] 3 All ER 537.

65. Caranta, *supra* note 3, at 718.

66. Van Gend en Loos, Case 26/62, [1963] E.C.R. 1, [1963] 2 C.M.L.R. 105.

67. Costa v. ENEL, Case 6/64, [1964] E.C.R. 1141, [1964] 3 C.M.L.R. 425.

fective judicial protection. The third generation case law, in contrast, by its imposition of Community judge-made remedies on national law, is a positive exercise requiring the grant of remedies on the basis of Community law alone. The enforcement of Community law as a matter of Community law is now the focus. Previously, the Court's case law had concentrated largely on substantive law, leaving enforcement to national law rules subject only to the safeguard clause. The new approach impinges on national law in a way that could scarcely have been foreseen.

Future developments will depend upon three factors: (1) the reception by the national courts of the third generation case law and their willingness to refer new cases to the Court of Justice; (2) the forbearance of the Member States in the face of judicial activism with wide-sweeping results; and (3) the Courts' own willingness to extend the case law. These propensities cannot be assumed in light of the recent case law discussed above, and in the face of increased questioning of the Court's role.