

**ACES Working Paper 2011:**  
**Dealing with the Fallout:**  
**West Germany's Response to the *Solange* Decision (1974)**

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**Abstract**

The European Union's powerful legal system has proven to be the vanguard moment in the process of European integration. As early as the 1960s, the European Court of Justice established an effective and powerful supranational legal order, beyond the original wording of the Treaties of Rome through the doctrines of direct effect and supremacy. Whereas scholars have analyzed the evolution of EU case law and its implications, only very recent historical scholarship has examined how the Member States received this process in the context of a number of difficult political and economic crises for the integration process. This paper investigates how the national level dealt with these fundamental transformations in the European legal system. Specifically, it examines one of the Union's most important member states, the Federal Republic of Germany. Faced with a huge number of cases dealing with European law, German judges dealt with the supremacy of European law very cautiously, negotiating between increasingly polarized academic, public and ministerial debates on the question throughout the 1960s. By the mid 1970s, the German Constitutional Court famously limited the power of the ECJ in its *Solange* decision (1974). This was an expression of a broader discourse in Germany from 1968 onwards about the qualitative nature of democracy and participation in public life and was in some aspects a marker, at which the German elites felt comfortable expressing the value of their national constitutional system on the European stage. This paper examines the political, media and academic build up and response to the Constitutional Court's decision in the 1970s, arguing that the national "reception" is central to understanding the dynamics and evolution of European Union legal history.

The growth in influence of the European Court of Justice (ECJ) following its attempt to establish the direct effectiveness and supremacy of European Law in the mid 1960s is now a well-known and increasingly central part of the integration narrative. It has not always been the case that Law has been so central to European integration histories. Most analyses placed weight almost exclusively on the political<sup>1</sup>, economic<sup>2</sup> or ideological<sup>3</sup> elements of European integration. The legal dimension gained prominence since the revelatory works of legal scholars such as Eric Stein<sup>4</sup>, Hjalte Rasmussen<sup>5</sup> and Joseph Weiler<sup>6</sup> in the 1980s<sup>7</sup>. The question as to why the ECJ appeared so successful in driving a federalizing agenda in the legal realm despite the seemingly recalcitrant political atmosphere of the mid-1960s and since, has become recurrent in political and legal sciences ever since. Frequently, the models produced by these schools of thought have examined the expansion of the ECJ's power through the "constitutionalisation" paradigm – namely that direct effect and supremacy represented a natural evolution from the Treaty of Rome and their articulation had saved the process of integration from its opponents. Frequently, such models – usually nowadays grouped under the heading "Integration through Law" (ITL)<sup>8</sup> - made assertions about the strategic nature of the ECJ's choices<sup>9</sup>, or the influence of empowered sub-national actors<sup>10</sup>, or the willingness to accept less escape from legal obligations in exchange for greater voice in the formation of those laws<sup>11</sup>.

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<sup>1</sup> Moravcsik, A. (1998). The Choice for Europe: Social Purpose and the State Power from Messina to Maastricht, London, UCL Press.

<sup>2</sup> Gillingham, J. (2003). European Integration, 1950-2003: Superstae or New Market Economy?, Cambridge: Cambridge University Press.

<sup>3</sup> Lipgens, W. (1982). A History of European Integration: Vol. One: The Formation of the European Unity Movement 1945-50, Oxford: Clarendon Press.

<sup>4</sup> Stein, E. (1981). "Lawyers, Judges and the Making of a Transnational Constitution." American Journal of International Law 75(1 (1981)): 1-27.

<sup>5</sup> Rasmussen, H. (1986). On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking, Dordrecht, Boston, Lancaster: Martinus Nijhoff Publishers.

<sup>6</sup> Weiler, J. (1999). The constitution of Europe : "do the new clothes have an emperor?" and other essays on European integration. Cambridge ; New York, Cambridge University Press.

<sup>7</sup> Stein, E. (1964). "Toward Supremacy of Treaty - Constitution by Judicial Fiat: On the Margin of the Costa Case." Michigan Law Review 63(1964): 491-518.

<sup>8</sup> Cappelletti, M., M. Seccombe, et al. (1985). Integration through law : Europe and the American federal experience. Berlin ; New York, W. de Gruyter.

<sup>9</sup> Garrett, G. (1995). "The Politics of Legal Integration in the European Union." International Organisation 49(1995): 171-181.; Garrett, G., D. R. Keleman, et al. (1998). "The European Court of Justice, National Governments and Legal Integration in the European Union." International Organisation 52(1): 149-176.; Moravcsik, A. (1998). The Choice for Europe: Social Purpose and the State Power from Messina to Maastricht, London, UCL Press.

<sup>10</sup> Burley, A. and W. Mattli (1993). "Europe Before the Court: A Political Theory of Legal Integration." International Organisation 47 (1993): 41-76, Mattli, W. and A.-M. Slaughter (1995). "Law and Politics in the European Union: A Reply to Garrett." International Organisation 49(1 (Winter 1995)): 183-190, Mattli, W. and A.-M. Slaughter (1998). "Revisiting the European Court of Justice." International Organisation 52(1 (Winter)): 177-

Recently, not only has the concept of constitutionalisation come under question<sup>12</sup>, but also the ongoing release of primary source materials from national archives has allowed historians to place the ITL theories under real empirical scrutiny<sup>13</sup>. This especially holds true for studies of how the Member States 'received' the ECJ's decisions, both within the courtroom, but also crucially amongst the public, academia and within the government machinery itself. These "Reception Studies" reveal a more nuanced and complicated reality than can be easily incorporated into a generalizing model. This, of course, rests on the theoretical assumption that the Law and the Courtroom, both national and supranational, do not exist in vacuums, immune to broader public and intellectual opinion. Instead, it works on the presumption that judicial decision-making dialectically both mirrors and informs elements of wider social discourse and that legitimate judgment requires a delicate reconciliation of legal rationale with the reason of popular will.<sup>14</sup> Diverse perceptions of national interest, varied institutional dynamics, as well as oscillating streams of public and academic opinion towards the ECJ and European integration led to a non-linear acceptance of the ECJ's jurisprudence by national actors across time and across geography. If our understanding of a constitutionalized order rests of the presumption of a consistently applied, highest law of the land, then the historical approach to legal integration does much to undermine this. What exists instead is a patchwork, non-uniform reception in the Member States, resulting in conditional barriers erected by national courts and concessions won from the supranational institutions.

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209, Mattli, W. and A.-M. Slaughter (1998). "The Role of National Courts in the Process of European Integration: Accounting for Judicial Preferences and Constraints, in Slaughter, Anne-marie & Alec Stone Sweet & JHH Weiler (eds.), *The European Courts and the National Courts - Doctrine and Jurisprudence: Legal Change in its Social Context.*" Oxford: Hart Publishing: 253-276.

<sup>11</sup> Weiler, J. (1999). *The constitution of Europe : "do the new clothes have an emperor?" and other essays on European integration.* Cambridge ; New York, Cambridge University Press.

<sup>12</sup> Rasmussen, M. (2010). Constructing and Deconstruction European 'Constitutional' European Law. Some reflections on how to study the history of European law. *Europe. The New Legal Realism.* K. H.-S. Henning Koch, Ulrich Haltern and Joseph Weiler (eds.). Aarhus, DJØF Publishing: 639-660.; Vauchez, A. (2010). "The transnational politics of judicialization. Van Gend en Loos and the making of EU polity." *European Law Journal* 16(1): 1-28.

<sup>13</sup> Davies, B. (2007). *Constitutionalising the European Community: West Germany Between Legal Sovereignty and European Integration, 1949-1975.* *European Studies/German.* London, King's College London. **PhD.**, Davies, B. (2008). "Meek Acceptance? The West German Ministries' Reaction to the Van Gend en Loos and Costa decisions." *Journal of European Integration History* 14(2): 20.. See also forthcoming 'Reception Studies' on France by Julie Bailleux (University of Panthéon Sorbonne), on the Netherlands by Jieskje Hollander (University of Groningen) and on the United Kingdom by the author of this paper.

<sup>14</sup> Kahn, P. W. (1999). *The Cultural Study of Law: Reconstructing Legal Scholarship.* Chicago: University of Chicago Press.

Nowhere is this more apparent than after the German Constitutional Court's (BVerfG) *Solange* decision of May 29, 1974, in which the court issued a long awaited and highly controversial judgment in a case that had bounced between the national and European court systems for a number of years. A main protagonist in this protracted courtroom drama was the Administrative Court of Frankfurt am Main (FAC), which, when asked to rule on the applicability of a European regulation by a German export firm, had first requested a preliminary ruling from the ECJ<sup>15</sup> but then re-referred the case to the BVerfG a short while later<sup>16</sup>. While the BVerfG did not find a problem with the technical details in the case at hand, it did take the opportunity to articulate its opinion on the relationship between European law and the national constitutional order. It explained that it would accept submissions by its own national courts on the constitutionality of European legislation, as long as ("*solange*" in German) the (then) European Community lacked a fundamental rights provision, drawn up through a parliamentary mechanism, equivalent to that given in the West German Basic Law. This was a direct U-turn from the court's earlier decision in 1967, in which it ruled European legislation was separate from the national order and therefore inadmissible for adjudication by German public authorities<sup>17</sup>. Instead, it more fairly reflected increasingly strident calls from amongst the West German legal academy and public media for checks on the ECJ's growing power, predominately through ensuring "greater structural congruence"<sup>18</sup> between the European institutions and the Federal Republic.

In essence, as the President of the BVerfG confirmed in subsequent writings and media interviews<sup>19</sup>, the court deliberately aimed to place pressure on the ECJ and the supranational institutions to improve rights protection and parliamentary representation to a standard

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<sup>15</sup> Internationale Handelsgesellschaft 11/70 [1970] ECR 1125

<sup>16</sup> BVerfGE 37, 271 2 BvL 52/71 *Solange* I

<sup>17</sup> BVerfG 'Constitutional Rights' decision of 18th October 1967 [1968] Europarecht 134 – It is worth highlighting at this point that this decision was made by the First Senate of the BVerfG. The later *Solange* decision was made by the Second Senate. The implications of this will become apparent later as the Government attempts to deal with the political fallout to the case.

<sup>18</sup> Schlochauer, H. J. (1951). "Der übernationaler Charakter der Europäischen Gemeinschaft für Kohle und Stahl." *Juristen-Zeitung* 10 (1951): 289-290, Schlochauer, H. J. (1955). "Rechtsformen der europäischen Ordnung." *Archiv des Völkerrechts* 5 (1955/5): 40-62, Schlochauer, H. J. (1963). "Das Verhältnis des Rechts der Europäischen Wirtschaftsgemeinschaft zu den nationalen Rechtsordnung der Mitgliedstaaten." *Archiv des Völkerrechts* 11(1 (1963)): 1-34.

<sup>19</sup> Benda, E. (1974). "Das Spannungsverhältnis von Grundrechten und übernationalen Recht." *Deutsches Verwaltungsblatt* 10(11): 389-396.. See also subsequent media interviews "Zur Frage der Schaffung eines europäischen Grundrechtskatalog", interview with Ernst Benda, Deutsche Welle, 09.04.1975

equivalent to that at the national level. This is clearly representative of the wishes expressed in broader West German social discourse documented below. It appears to be more than coincidental then that the Community moved to address these specific issues in the years immediately following the *Solange* decision. For instance, in 1977 the European Parliament, Council and the Commission issued a Joint Declaration concerning the protection of fundamental rights<sup>20</sup>, and in 1979, the ECJ promised to “draw inspiration from constitutional traditions common to the Member States”<sup>21</sup>. Of course, 1979 also saw the long delayed implementation of direct elections to the European Parliament. As such, it might be argued that German intellectual and public opinion of the 1960s and 1970s, channeled through the resonant voice of the BVerfG, shaped the institutional constellation of European governance at the end of the 1970s and the implications those changes have had today. The perception of continued relative weakness of the European Parliament, despite the reform of 1979, evidently lies behind the BVerfG’s more recent jurisprudence requesting (in *Solange* fashion) increased national parliamentary representation at the supranational level<sup>22</sup>. We might also consider German leadership<sup>23</sup> in the advocacy and creation of the Charter of Fundamental Rights as a parallel to the BVerfG’s decision-making, despite the court’s rescinding of its 1974 decision in the subsequent *Solange II* case in 1986.<sup>24</sup> Furthermore, the fact that a long list of German parliamentarians brought the Lisbon Treaty case to the court gives credence to the approach advocated in this paper of looking beyond the courtroom to appreciate most accurately the dynamics of European legal integration. With this in mind, there is clear ancestral lineage between the recurring themes in broader social and intellectual debates of the 1960s and 1970s documented here and those since the Maastricht Treaty in contemporary Germany.

This ‘external’ dimension to the *Solange* decision – its attempt to influence political and judicial forces outside of the FRG – is only one part of the story. There was equally as much resistance to the decision ‘internal’ to the state too. Indeed, the government itself, whilst under attack by the Commission, stood against the BVerfG in principle. As such, the government found itself in

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<sup>20</sup> "Joint Declaration by the European Parliament, the Council and the Commission", in *Official Journal of the European Communities (OJEC)*. 27.04.1977, No C 103, pp. 1.

<sup>21</sup> Case 44/79 Hauer vs. Land Rheinland Pfalz [1979] European Court Report 321

<sup>22</sup> BVerfG, 2 BvE 2/08 vom 30.6.2009

<sup>23</sup> Castiglione, D., J. Schönlau, et al. (2008). Constitutional politics in the European Union : the Convention moment and its aftermath. New York, Palgrave Macmillan.

<sup>24</sup> See BVerfG decision of 22<sup>nd</sup> October 1986 ‘*Solange II*’ [1987] Common Market Law Review 225

between the proverbial rock and hard place. The 'internal' debates in academia, in the public sphere and in the various relevant government ministries leading up to and after the BVerfG's *Solange* decision are the predominant focus of this paper. In one sense – the historian's sense – documenting this discourse is important simply because this narrative does not exist elsewhere. However, these debates also matter to those interested in comprehending the full mechanics of European legal integration, particularly in light of the changes in European governance seemingly prompted by the *Solange* decision. Moreover, this narrative delivers fare for those hoping to understand the dynamics between the spheres of law, society, politics and public opinion. This is a complex relationship at the best of times. In this case, however, the complexity is multiplied by the fact the law under question is not strictly one's own. By crossing the disciplinary boundaries between History, Law and Political Science, recent scholarship has tried with some success to tie developments in European governance to long-term trends in the nature of administrative and representative governance<sup>25</sup>.

To add yet another layer to this intricacy, it is important to remember the critical significance of European integration to the still very young Federal Republic (FRG) of the 1960s and 1970s. By pooling sovereignty over its war-making industries - and soon after its entire economy - the FRG used European integration to begin the process of reconciliation with its Western neighbours. In one way, the cause of integration replaced the need for an exclusive national identity in the divided and occupied country. More importantly, the FRG, as Europe's biggest export economy, is supportive of economic and political integration because the increased economic exchange that this furthered undoubtedly fuelled its prosperity and underlined its post-War identity of the '*Wirtschaftswunder*'<sup>26</sup>. At the same time, another crucial aspect of the FRG's self-definition was the rigor of its democratically orientated legal system. Centered on an inviolable adherence to a progressive set of basic rights enshrined in the new Basic Law, combined with a clear separation of powers and incorporation of checks and balances, the new national constitutional order, if

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<sup>25</sup> Lindseth, P. L. (2010). Power and legitimacy : reconciling Europe and the nation-state. Oxford ; New York, N.Y., Oxford University Press.

<sup>26</sup> Abelshausen, W. (2004). Deutsche Wirtschaftsgeschichte seit 1945, Munich: C H Beck Verlag.; Nicholls, A. (1995). The Bonn Republic: West Germany Democracy 1945-1990, London: Longman.; Pulzer, P. (1995). German Politics 1945-1995, Oxford: Oxford University Press.; Gortemaker, M. (2005). Kleine Geschichte der Bundesrepublik Deutschland, Munich: C H Beck Verlag.; Kettenacker, L. (1997). Germany since 1945, Oxford: Oxford University Press.

deemed only temporary at the start<sup>27</sup>, sought to define and demarcate the essence of the FRG. The BVerfG, when asked to rule on European legal supremacy, found itself sucked dead center into a maelstrom of competing perceptions of the new post-war Germany. The two options the court faced – deny supremacy and protect national rights provisions, or accept supremacy and potentially undermine national constitutional integrity – were in their own way equally unpalatable and destined to raise debate and controversy.

The West German legal academy had long struggled with the questions of the nature of European law and its relationship to the domestic order<sup>28</sup>. The reception of the constitutionalisation process among West German legal academia was fraught by heated discussion, with the majority of legal experts unwilling, at first, to accept the legal autonomy – the ‘supranationality’ – of law created by Community institutions<sup>29</sup>. Mainstream opinion up until the mid-1960s regarded the Community as an albeit complex and original international organization and accordingly its law effective as standard international law and therefore subject to final national judicial adjudication. A small group of scholars, closely aligned to, or members of, the governing elite worked as vocal advocates of the ECJ and the ‘supranationality’ of the new legal order<sup>30</sup>. Early discussions between the two sides of the debate centered on the ability of the national government to transfer legal sovereignty to the Community institutions through Article 24 of the constitution<sup>31</sup>, with the pro-integrationists claiming the right for the Community to use the powers conferred to it fully.

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<sup>27</sup> The Basic Law was meant to be a temporary document, governing the western half of Germany until unification could be achieved. See, amongst others, Hesselberger, D. (2001). Das Grundgesetz. Kommentar für die politische Bildung, Bonn: Bundeszentrale für Politische Bildung.

<sup>28</sup> See Davies, B. (2007). *Constitutionalising the European Community: West Germany Between Legal Sovereignty and European Integration, 1949-1975*. European Studies/German. London, King's College London. **PhD**, Davies, B. (2008). "Meek Acceptance? The West German Ministries' Reaction to the Van Gend en Loos and Costa decisions." Journal of European Integration History 14(2): 20.

<sup>29</sup> Compare this to the ECJ's reasoning in the Van Gend en Loos decision

<sup>30</sup> Included in this group political actors of some significance – none more so than Walter Hallstein and Hans von der Groeben, but also other scholars such as Carl-Friedrich Ophüls, who was a lead delegate on West Germany's negotiating team drawing up the Treaty of Rome, or Karl Carstens, a top official at the Foreign Office throughout the period and later Federal President.

<sup>31</sup> See, for instance, Pigorsch, W. (1959). Die Einordnung völkerechtlicher Normen in das Recht der Bundesrepublik Deutschland. Eine Studie zu den Artikeln 25, 59 und 79 des Grundgesetzes für die Bundesrepublik vom 23. Mai 1949, Hamburg: Hansischer Guldenverlag.

By the start of the 1960s, a compromise position, heavily influenced by the work of Hans-Jürgen Schlochauer<sup>32</sup>, had been achieved by the two sides of the debate, in which it was accepted that a certain level of 'structural congruence' between the democratic institutions of the FRG and the EC would enable a legitimate transfer of sovereignty. After the introduction of the direct effect and supremacy doctrines, opinions on the two sides of the debates once again clashed. The pro-integrationists, spurred on by the ECJ's jurisprudence, began to establish a network of scholars to further their position. The creation of dedicated journals, such as *Europarecht* in 1964, and the holding of conferences, in particular, the Bensheim Colloquium<sup>33</sup> in 1964, helped to consolidate the pro-integration position and promulgate the view amongst a growing number of mainstream scholars<sup>34</sup>. On the other side, some scholars began questioning the wisdom of transferring national competency to a set of institutions without the democratic or basic rights safeguards found in the national constitution<sup>35</sup>. By the time the BVerfG's 'Constitutional Rights' ruling in 1967 accepted the supremacy and effectiveness of EC law by default (see above), opinion had radicalized still further.

At the turn of the 1970s, a number of important decisions emerged at the turn of the decade. In November 1969, during the *Stauder vs. Ulm* case<sup>36</sup>, the ECJ ruled against its earlier decisions of 1959 and 1960<sup>37</sup>, declaring that fundamental rights protection did actually form a general principle of Community law, even if a specific catalogue of rights did not yet exist. Following on from its de facto recognition of the supremacy of Community law in 1967, the BVerfG added

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<sup>32</sup> Schlochauer, 1956, p 367. The argument about the necessity for a certain amount of structural congruency between national and supranational levels has its origins in the works of Alfred Verdross, an Austrian scholar, whose opinion was influential in the West German Foreign Office

<sup>33</sup> See Davies, B. (2007). *Constitutionalising the European Community: West Germany Between Legal Sovereignty and European Integration, 1949-1975*. *European Studies/German*. London, King's College London. **PhD.**, chapter 2. For the growth of transnational judicial networks, with close ties to Brussels, see Alter, K. J. (2008). "Jurist Advocacy Movements in Europe and the Andes: How Lawyers Help Promote International Legal Integration." *SSRN eLibrary*.

<sup>34</sup> Evidence for this is the discernible shift in opinion in the influential German Public Teachers Association Meeting in Kiel, 1964. See Kaiser, J. H. (1964). *Bewahrung und Veränderung demokratischer und rechtstaatlicher Verfassungsstruktur in den internationalen Gemeinschaften*. Tagung der deutschen Staatsrechtslehrer Kiel, Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer

<sup>35</sup> See, as a typical example of this position, the comments of the Wilhelm Wengler in Wengler, W. (1968). "Aus Wissenschaft und Praxis, Grundrechtsminimum und Equivalenz der Grundrechtsschutzsysteme." *Juristen-Zeitung* 10: 2..

<sup>36</sup> Case 29/69 *Stauder vs. Ulm* [1969] European Court Report 419

<sup>37</sup> Case 1/58 *Stork vs. High Authority* [1959] European Court Report 17, Case 36-38 and 40/59 *Ruhrkohlenverkaufsgesellschaften vs. High Authority* [1960] European Court Report 423

in the 1971 Lütticke decision the positive recognition of the doctrines of supremacy and direct effect<sup>38</sup>. As such, between the years 1967 to 1971, the BVerfG became the first court overall to fully recognize the supremacy and direct effectiveness of European law in relation to national law, not however explicitly with regard to constitutional law<sup>39</sup>. This question as the relationship between national constitutional law and the European legal system remained open and became a particularly controversial topic of discussion amongst legal-academia. The ECJ's preliminary ruling in the *Internationale Handelsgesellschaft* case<sup>40</sup> brought things to head by declaring that in the name of the "uniformity and efficacy of Community law", fundamental rights of Member States may have to be sidelined in the face of conflicting European regulations. In other words, building on the *Costa vs. ENEL* case, European law now broke Member States' constitutional law. The most vocal critic of the ECJ in West German legal academia was the University of Mainz professor, Hans-Heinrich Rupp<sup>41</sup>. His attacks on the EC's lack of basic rights provisions and democratic structure prompted an intense debate with the pro-integration scholars, most notably Hamburg's Hans-Peter Ipsen<sup>42</sup>. Such was the contention in this debate, that the effect of EC law on the national constitution became part of a parliamentary enquiry commission in 1972.

The ECJ's statement again strongly divided opinion in West German academia. Supporting the ECJ, scholars such as Gert Meier, argued the ECJ was merely re-stating the autonomy of the EC legal order, which was increasingly accepted during the 1960s. Its separateness meant that it

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<sup>38</sup> Firma Alfons Lütticke GmbH, Köln-Deutz, BVerfG [1972] 1 EuR 51

<sup>39</sup> At this moment then, as Alter points out the BVerfG had gone further than any other national court in accepting the radical jurisprudence from the ECJ of the early 1960s - Alter, K. (2001). Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe, Oxford: Oxford University Press.. Mann argues that the reason for the BVerfG's endorsement of the ECJ at this point was due to the political 'paralysis' of the EC during the mid-1960s, and that a rejection at this point would have been a body blow for the integration project Mann, C. J. (1972). The Function of Judicial Decision in European Economic Integration, The Hague: Martinus Nijhoff Publishers.. Weiler maintains a similar argument, seeing closer judicial integration during the 1960s as the corollary to political disintegration within the European Council Weiler, J. (1999). The constitution of Europe : "do the new clothes have an emperor?" and other essays on European integration. Cambridge ; New York, Cambridge University Press.).

<sup>40</sup> See note 15 above

<sup>41</sup> Rupp, H. H. (1970). "Die Grundrechte und das Europäische Gemeinschaftsrecht." Neue Juristische Wochenschrift 9(1970): 353-359, Rupp, H. H. (1974). Grundgesetz und "Wirtschaftsverfassung", Tübingen: JCB Mohr (Paul Siebeck).

<sup>42</sup> Ipsen, H. P. (1970). "Verfassungsperspektiven der Europäischen Gemeinschaften - Vortrag gehalten vor der Berliner Juristischen Gesellschaft am 17 April 1970." Berlin: Walter de Gruyter & Co, Ipsen, H. P. (1972). Europäisches Gemeinschaftsrecht, Tübingen: JCB Mohr (Paul Siebeck).

could not be bound to the conditions of national legal orders<sup>43</sup>. On the other side, the specialist journal, *Außenwirtschaftsdienst des Betriebs-Beraters*, published a critique of the ECJ's decision by the Hamburg based lawyer Helmut Rittstieg. In this, Rittstieg argued the ECJ's claim to incorporate that spirit of national constitutions was too "vague" and "questionable" to protect an individual's rights. He claimed basic rights remained a "secondary condition" for the ECJ behind that of the general effectiveness of the EC and that this judgment barely represented a successful pursuance of basic rights provisions at the EC level.<sup>44</sup> The FAC followed the argumentation offered by Rittstieg, promptly refusing to apply the ECJ's ruling and again referred the case – this time to the BVerfG, resulting in the *Solange I* decision. In the following three years, 1971 to 1974, the debate around the applicability of EC law in West Germany reached its most intense phase.

What stood out most about the FAC's reference however was the heavy influence of a speech given by Hans Heinrich Rupp<sup>45</sup>, a legal professor from Mainz, from whose work the court quoted directly in its referral<sup>46</sup>. In a speech to the German Academy of Judges in January 1970<sup>47</sup>, Rupp launched a polemic attack, rebelling against the so-called "Kiel Wave" and against the growing acceptance amongst legal-academic opinion that the transfer of sovereignty through Article 24 (i) BL empowered an autonomous supranational legal entity to issue directly effective and supreme regulations within the national constitutional framework. While scholars, for example Wilhelm Wengler<sup>48</sup>, merely posed the question during the 1960s as to how competencies could be transferred to – in terms of a deficit in democratic legitimacy – structurally incongruent institutions, Rupp now openly and strongly criticized this process. He declared that the ECJ had sidelined the Basic Law in its 1963-4 jurisprudence as a 'farce' and denied that the Community held any kind of institutional resemblance with the Federal Republic

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<sup>43</sup> Meier, G. (1970). "Commentary to European Court of Justice Decision 29/69." *Deutsches Verwaltungsblatt*(1970): 614-615.

<sup>44</sup> Rittstieg, H. (1971). "Commentary to European Court of Justice Decision 11/70." *Außenwirtschaftsdienst des Betriebs-Beraters* 4(1971): 183-185.

<sup>45</sup> Hans Heinrich Rupp (1926) is a Professor of Public Law at the University of Mainz, having also worked at Tübingen (1963-4), Marburg (1964-1968).

<sup>46</sup> Alter, K. (2001). *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe*, Oxford: Oxford University Press.

<sup>47</sup> Rupp, H. H. (1970). "Die Grundrechte und das Europäische Gemeinschaftsrecht." *Neue Juristische Wochenschrift* 9(1970): 353-359.

<sup>48</sup> Wengler, W. (1968). "Aus Wissenschaft und Praxis, Grundrechtsminimum und Equivalenz der Grundrechtsschutzsysteme." *Juristen-Zeitung* 10: 2.

at all. In this, Rupp rejected obviously not only the line taken by supranationalist scholars, such as Ophüls, von der Groeben, Grewe, but also directly attacked Ipsen. Rupp continued in the speech to vent angrily against the Community, describing it as a regime lacking democratic rule and a regime without fundamental rights arguing against the pragmatic 'structural congruence' compromise of the 1960s.

Most importantly for the debate, Rupp rejected the direct effect and supremacy of Community Law, particularly over and above the fundamental rights of the Basic Law. He went against the BVerfG's 1967 decision, which stated that the BVerfG had no competence to judge Community Law, arguing that if the Community norm is adopted into West German law, then the final arbiter on its applicability must be the national judiciary – in this case the BVerfG. Specifically, Rupp advocated the verification of European regulations by the BVerfG against national fundamental rights as an important step in the legitimization of the Community. It was not enough, he contended, for scholars such as Ipsen to argue that conflicts with the Basic Law would not arise because of the technical nature of the Community. The Europe such a policy would create would be unified, but only under a bureaucratic technocracy. Only a Europe built and judged on the democratic, legitimate ideals of its constituent parts would be acceptable to future generations.

With Rupp clearly drawing the battle lines on this issue, it was the turn of the focus of his criticism, Hans Peter Ipsen, to respond to the charges. Three months later, in a speech held in Berlin, Ipsen accused Rupp of not fully understanding the nature of the integration process – for Ipsen, it remained a merely technical, economic procedure and therefore basic rights need not be touched upon<sup>49</sup>. Rupp was accused of having a late nineteenth century comprehension of constitutional law, whereas Ipsen prided himself on a more progressive, internationalized understanding. Ipsen pulled no punches in his attack on Rupp, asking why other more experienced democracies such as Belgium and Holland would be as "suicidal" as to agree to the supremacy of EC law. He challenged Rupp to name an area of EC competence that would seriously affect the provision of national fundamental rights, and if one were found, he would

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<sup>49</sup> Ipsen, H. P. (1970). "Verfassungsperspektiven der Europäischen Gemeinschaften - Vortrag gehalten vor der Berliner Juristischen Gesellschaft am 17 April 1970." Berlin: Walter de Gruyter & Co.

provide the EC provision that provides an equal guarantee in this area. In the end, Ipsen highlighted how the *Stauder vs. Ulm* decision of 1969 demonstrated the ECJ's commitment to fundamental rights and how these were, at national and EC levels, indistinguishable. Ipsen went on then in 1972 to publish an extensive survey of EC Law comprising over fifteen hundred pages, with its implications for the Federal Republic<sup>50</sup>. In this, he crystallized his view that fundamental rights are guaranteed in the EC through its inability to affect them in any meaningful way. Calling Rupp a dogmatist, Ipsen conclusively rejected the need for national judicial control over EC law.

Perhaps fearing an unwelcome outcome to the BVerfG's ruling in the re-referred case, the ECJ guaranteed in the *Nold vs. Commission* case<sup>51</sup>, delivered two weeks before the *Solange* decision to uphold the provision of national fundamental rights in its jurisprudence by judging invalid any regulations incompatible with national constitutions. In a sense, the ECJ sought to pre-empt the BVerfG by declaring national constitutional rights safe and protected by EC law. However, this did not change the BVerfG's decision. The criticism against its 1967 decision from Rupp and others had greatly alarmed the BVerfG and it sought to redress the imbalance it had created from its 1967 ruling in its decision of May 1974<sup>52</sup>. In particular, the BVerfG adhered closely to the terminology of the ongoing academic debates and renounced a form of 'structural congruence' between the Federal Republic and the Community. It stated that it withheld the right to judge the applicability of a Community norm against the basic rights, as long a) the Community lacked a comparable catalogue of rights of its own. In one short decision, the BVerfG had shifted dramatically to favour the side of the legal-academic spectrum that it had angered with its 1967 decision. As a result, it now faced the wrath of those scholars, with whom it had previously sided.

Ipsen was of course quick to react to the decision, describing it as "wrong... deceptive, superficial and legally erroneous"<sup>53</sup>. He accused the BVerfG of shortsightedness and that it was

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<sup>50</sup> Ipsen, H. P. (1972). *Europaisches Gemeinschaftsrecht*, Tübingen: JCB Mohr (Paul Siebeck).

<sup>51</sup> Case 4/73 [1974] *Nold vs. Commission*, European Court Report, 491-507

<sup>52</sup> *Internationale Handelsgesellschaft vs. Einfuhr- und Vorratsstelle für Getreide und Futtermittel 'Solange I'*, 37 BVerfG 271 [1974]

<sup>53</sup> Ipsen, H. P. (1975). "BVerfG versus EuGH re "Grundrechte", Zum Beschluß des Zweiten Senats des Bundesverfassungsgerichts vom 29 Mai 1974 (BVerfGE Bd, 37 S, 271)." *Europarecht* 14(3 (1979)): 223-238.

crucial to keep in mind that the stage of the Community criticized by the BVerfG was in fact transitory, and therefore might well lack some basic rights protection. The final stage of the Community would however not be helped by the retention of Member State control over its constitutional development. The fact that the BVerfG retained the power to decide if a regulation was 'inapplicable' in West Germany, but not 'invalid' was described by Ipsen as 'ironic'. He questioned the difference between the two terms, seeing this as a deliberate means to confuse what was really being stated by the BVerfG – that it now sought to control the integration process. Reinhard Riegel, who had earlier argued for the exclusive competency of the ECJ to rule on EC law, sided strongly with Ipsen on two accounts<sup>54</sup>. Firstly, he argued with Ipsen, that it was for the Community, in dialogue with the Member States, to set its own standards of basic rights protection. Secondly, he criticized the BVerfG for demanding a codification of basic rights protection that was neither needed nor in the remit of the BVerfG to demand. He believed the Federal Republic lay open to the charge of not fulfilling its duty to implement Community regulations. Meinhard Hilf and Eckhart Klein argued separately that the BVerfG had merely opened a "Pandora's Box", with an argumentation that was bound to "infect" other national courts<sup>55</sup> and have "fatal" consequences for the EC legal system<sup>56</sup>. Hilf argued that the Federal Republic now be liable for charges for failing to fulfill its Treaty obligations, although the government itself opposed the BVerfG's decision<sup>57</sup>. Gert Meier, while recognizing the deficit in basic rights protection in the Community, condemned the *Solange I* decision because it went against the principle of autonomy of the EC's legal system established in the 1960s<sup>58</sup>.

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<sup>54</sup> Riegel, R. (1974 (a)). "Bundesverfassungsgerichtsbeschuß Anmerkung." Neue Juristische Wochenschrift 48(1974): 2176-2177, Riegel, R. (1974 (b)). "Zum Problem der allgemeinem Rechtsgrundsätze und Grundrechte im Gemeinschaftsrecht." Neue Juristische Wochenschrift 36(1974): 1585-1590.

<sup>55</sup> Hilf, M. (1975). "Sekundares Gemeinschaftsrecht und deutsche Grundrechte. Zum Beschluss des Bundesverfassungsgericht vom 29. Mai 1974." Zeitschrift für ausländisches öffentliches Recht und Völkerrecht(1975): 51-66.

<sup>56</sup> Klein, E. (1975). "Stellungnahme aus der Sicht des deutschen Verfassungsrechts." Zeitschrift für ausländisches öffentliches Recht un Völkerrecht(1975): 67-78.

<sup>57</sup> Hilf, M. (1975). "Sekundares Gemeinschaftsrecht und deutsche Grundrechte. Zum Beschluss des Bundesverfassungsgericht vom 29. Mai 1974." Zeitschrift für ausländisches öffentliches Recht und Völkerrecht(1975): 51-66.

<sup>58</sup> Meier, G. (1974). "Bundesverfassungsgerichtsbeschuß Anmerkung." Neue Juristische Wochenschrift(48 (1974)): 1704-1705.

Against this wash of criticism, Albert Bleckmann alone saw a positive aspect in the BVerfG's decision. He argued that in the close wording of the decision, an implicit acceptance of both Direct Effect and Supremacy could be found, in as much as the BVerfG was arguing that with a basic rights catalogue at the EC level, it would no longer have a say in the validity of EC law in West Germany<sup>59</sup>.

The West German public remained resolutely pro-integration before, during and after the *Solange* crisis<sup>60</sup>. However, mass media coverage, which, if we presume newspaper editors attempt to publish stories and perspectives of perceived interests to their readers, became increasingly polarized on the question of European legal supremacy over the period between 1963 and 1975. Early media coverage of European integration during the 1950s and 1960s was at first idealistic, and then increasingly disillusioned following French dithering over the EDC, the failure of the EPC and the perception of unfair treatment of West German companies within the ECSC. As a result, the media lost interest in European integration, typified by the muted response to the Treaty of Rome in all the major dailies<sup>61</sup>, as well as sparing coverage of the key ECJ decisions in 1963 and 1964.

A coming to terms with the implications of the ECJ's jurisprudence characterized the phase 1963-1969. At first, the public disinterest meant that coverage of the decisions was scarce, particularly as political events (British accession attempts and the Elysees Treaty) monopolized the coverage of European events. As a result, it was left to many specialized economic publications to begin the discussion on the new legal order emerging from Luxembourg. Predominant amongst these was the coverage of the *Handelsblatt*, whose initial lauding of the ECJ was soon replaced by its concerns that the ECJ had made two important mistakes: it had gone far enough to polarize the French against integration, but not actually done enough to

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<sup>59</sup> Bleckmann, A. (1975). "Zur Funktion des Art 24 Abs 1 Grundgesetzes." *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*: 79-84.

<sup>60</sup> For a range of Eurobarometer results confirming this, see Inglehart, R. and K. Reif (1991). *Eurobarometer: The Dynamics of European Public Opinion: Essays in Honour of Jacques-René Rabier*, London: Macmillan.

<sup>61</sup> The coming to force of the Treaty of Rome on the 1<sup>st</sup> January 1958 barely made the headlines, reflecting and propagating a general passive indifference to the events amongst the general population, typical of the 'permissive consensus'

consolidate the European legal system<sup>62</sup>. In this second observation lay the most important and widespread West German critique of the ECJ. By the mid-1960s, many commentators were drawing on the West German constitution to highlight weaknesses in the European order, particularly on questions of the division of powers and the protection of the basic rights. In essence, media coverage lamented the lack of a 'structural congruence' between the national and supranational systems. The juxtaposition of the two constitutional systems was provided with more substance by the coverage on the BVerfG's 'Constitutional Rights' ruling with even the two well-read broadsheets, the Frankfurter Allgemeine Zeitung (FAZ)<sup>63</sup> and Die Welt<sup>64</sup>, and the well-known periodical, Der Spiegel<sup>65</sup>, delivering powerful critiques of the ECJ and willing the action "in the German point of view"<sup>66</sup>

A much fiercer polarization of opinion characterizes media coverage in the period between 1970 and 1974, particularly due to the continued willingness to compare national and supranational systems of governance. Whereas these comparisons took place on specific issues in the 1960s, the 1970s saw a growth in impact-making, generalized headlines about a perceived intrusion on the national legal system. For instance, the Handelsblatt ran the headline "Conflict: German and EEC Law" in August 1971 for a story covering an ongoing and complicated case before the BVerfG involving the importation of milk powder<sup>67</sup>. Shortly thereafter, die Welt newspaper declared "Foreign Law is Supreme" in its headline on a story involving a Berlin based furniture importer<sup>68</sup>. On the same story, the Hamburger Abendblatt published under the headline "Legal Differences"<sup>69</sup>. This continued tendency from the 1960s to compare and contrast national and European systems, coupled with the BVerfG's de facto acceptance of the ECJ's jurisprudence at the end of the 1960s, prompted the media, as had happened in academia, to examine the relationship between the Basic Law and EC legislation. The examination of this question began in earnest at the start of 1972.

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<sup>62</sup> Unzufrieden mit dem Europa-Gericht", das Handelsblatt, 21.05.1963; "Mit dem Rechtsschutz hapert es in der EWG", das Handelsblatt, 05.05.1964; „EWG-Verordnungen verfassungswidrig?“, das Handelsblatt, 13.02.1964

<sup>63</sup> „Urteile machen Geschichte“, FAZ, 22.02.1965

<sup>64</sup> No title, Die Welt, 06.10.1965

<sup>65</sup> Spiegel, 04.03.1964

<sup>66</sup> "Es wird Sache der Bundesregierung sein, den deutschen Standpunkt zu vertreten", in no title, Die Welt, 06.10.1965

<sup>67</sup> "Konflikt: Deutsches und EWG-Recht", Handelsblatt, 20.08.1971

<sup>68</sup> "Ausländisches Recht hat Vorrang", die Welt, 03.11.1971

<sup>69</sup> „Rechtsunterschiede“, Hamburger Abendblatt, 19.07.1972

In April 1972, the Ludwigshafen-based newspaper, the Rheinpfalz, published a commentary on a television broadcast, "Recht im Gespräch", from the Mainz-based public service station ZDF involving an interview with the President of the BVerfG, Ernst Benda. In the program, Benda had advocated the creation of a catalogue of fundamental rights for the EC, similar to the basic rights in the FRG's constitution<sup>70</sup>. He claimed this to be the solution to the complex dilemma posed by the penetration of EC law into the FRG's constitutional life, namely the recognition of supreme, effective EC legislation juxtaposed against the urgency in not simply abandoning "legitimate German interests" and the carefully created West German constitutional order. Benda saw his role, holding such an influential position, as a mediator to ensure an avoidance of conflict between the two legal systems. This would be achieved through a transposition of the FRG's basic rights to a general community wide fundamental rights provision. Such a clear and strong belief in the value of the West German constitutional order was countered only partly in the program by the ECJ's German judge, Hans Kutscher, who claimed that the growth of EC law has actually increased the provision of fundamental rights to European citizens.

Shortly thereafter, Benda's wish to influence the creation of European basic rights began to come into fruition, as the Frankfurt Administrative Court (FAC) made its reference to the BVerfG that would result in the latter's *Solange I* decision. Coverage of this reference was unsurprisingly limited geographically to the Frankfurt papers. The Frankfurter Rundschau reported factually on the reference in May 1972, citing the astonishment of EC lawyers that the FAC would question the constitutionality of EC law again, after the BVerfG had already ruled on this issue in 1967<sup>71</sup>. Such action raised potentially difficult consequences for the EC. In a further editorial in the same issue, the paper wrote that every German citizen should have full judicial protection against potentially unconstitutional EC law, and therefore it could not criticize the FAC's reference to the BVerfG<sup>72</sup>. It conceded that the Communities were extremely complex legal institutions, in which national interest played a cursory role, but it also asserted that the rights of the citizen must always take precedence.

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<sup>70</sup> „Für europäische Grundrechte“, die Rheinpfalz, 18.04.1972

<sup>71</sup> „EWG-Verordnung in Karlsruhe unter der Lupe“, Frankfurter Rundschau, 12.05.1972

<sup>72</sup> „Rechtssicherheit hat Vorrang“, Frankfurter Rundschau, 12.05.1972

The FAC's reference and the general question of the constitutionality of EC legislation had become in this way an important news story. It must also be remembered that in this period of the mid-1970s, the BVerfG had gained both political and public prominence due to a series of high profile political cases held before it, not the least its decision on the constitutionality of Brandt's Ostpolitik in 1973<sup>73</sup>. As a result, the question of how to protect the Basic Rights was never far from the headlines over the following two years.

In October 1973, the *Augsburger Allgemeine Zeitung* examined the question not from the national viewpoint, but at what the ECJ had been doing to accommodate national concerns, in particular with reference to two cases involving the ECJ from the local region. In one case, the Court conferred the same guaranteed rights as German workers onto an Italian migrant worker in Augsburg, which the paper welcomed as a confirmation that rights can be protected through the European legal mechanisms without costs for the individual. The second case was the *Stauder vs. Ulm*<sup>74</sup> decision, in which the ECJ declared fundamental rights protection was an integral part of EC legislation. The paper referred to the case, if not specifically by name or with an assessment of its true importance, as a "triumph of the individual"<sup>75</sup>, declaring in conclusion that such successes were a reason to forget the smaller problems of domestic politics.

Another regional paper, the *Mannheimer Morgenpost*, reported on the meeting of the judges from the various levels of federal and state constitutional courts<sup>76</sup> found in the FRG's legal system. It stated that the main talking point was the relationship between the Basic Law and EC legislation and that the most difficult task facing the West German legal community was the transposition of a comparable fundamental rights catalogue, with the Basic Law as a model, on to the EC. The problematic, the article claimed, stemmed from the inability of the Member States to agree on a suitable level of rights protection in the original treaties. This proved, according to the judges in discussion, particularly disadvantageous to the FRG, whose "system of Basic Rights is more developed than anywhere else"<sup>77</sup>. This political failure would make it almost impossible to introduce a catalogue through the political arena and instead the judges

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<sup>73</sup> See Säcker, H. (2003). *Das Bundesverfassungsgericht*, Bonn: Bundeszentrale für politische Bildung.

<sup>74</sup> Case 29/69 *Stauder vs. Ulm* [1969] European Court Report 419

<sup>75</sup> "In Europa jedem sein Recht", *Augsburger Allgemeine Zeitung*, 19.10.1973

<sup>76</sup> As well as the ECJ Judge, Hans Kutscher

<sup>77</sup> „Grundrechte auf dem europäischen Markt“, *Mannheimer Morgenpost*, 26.10.1973

agreed that it was best left to the judiciary, i.e. the ECJ to develop its own fundamental rights provisions<sup>78</sup>. This provides the further insight that, alongside Ernst Benda's revelation from the previous year<sup>79</sup>, the highest levels of the West German judiciary were openly seeking to prompt the ECJ through judicial, public and academic dialogue into developing a basic rights catalogue comparable to that of the FRG. Clearly, they believed the ECJ would pay credence to such debates at the national level.

The Handelsblatt however remained critical that such an approach could work. It wrote that there was no guarantee that if the ECJ were to undertake such a task, that it would choose to mimic the West German model. Instead, it was far more likely to use the lowest common denominator between the Member States, resulting in a retardation of the Basic Law, the "most progressive national constitution" and its basic rights<sup>80</sup>. With the media awaiting the BVerfG's decision on the FAC's reference, and leading judicial personalities raising the possibility of an inter-court dialogue to solve the basic rights dilemma, the tension entering 1974 was palpable as newspaper tried to keep the issue in public attention. Under the headline "Here is where the national cow is slaughtered", the Rheinische Post published a long and detailed survey of the composition and activities of the ECJ since its inception in 1952<sup>81</sup>. Claiming that despite its importance, ruling over nine states and 250 million citizens, the existence of the Court was unknown to many. After outlining the nature of the Court, the paper decided that the ECJ held an overtly political role, deciding independently from and between national interests.

Shortly after the Rheinische Post published its critique of the ECJ, the BVerfG issued its *Solange* decision. Coverage of the decision occurred throughout the media spectrum, with some newspapers going beyond the mere factual reports and dedicating editorial opinion to the situation. The reaction to the decision was divided, mirroring the opinion in the BVerfG itself. The Hannoverische Allgemeine Zeitung was critical of the BVerfG in the extreme. It wrote that the already shaken EC had received a further "knock" from the BVerfG, which could unleash

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<sup>78</sup>"In Europa jedem sein Recht", Augsburg Allgemeine Zeitung, 19.10.1973

<sup>79</sup>"Für europäische Grundrechte", die Rheinpfalz, 18.04.1972

<sup>80</sup>"Europarecht bricht das nationale Verfassungsrecht", Handelsblatt, 30.10.1973

<sup>81</sup>"Hier wird die nationale Kuh geschlachtet", Rheinische Post, 31.05.1974

dangerous long-term consequences for the Community<sup>82</sup>. The damage was twofold, with the decision raising the danger that the European legal system could splinter, and denying the ECJ an “earned” vote of confidence from the national level. The result of this is the threat that the EC legal order could simply “fall apart”, before the ECJ has fully completed it. Admittedly, the article conceded, the BVerfG limited its power of review until that time that the EC held its own comparable set of basic rights, but the paper argued this condition would be impossible to fulfill in the “foreseeable future”, because only Italy, out of the other eight Member States, had a comparable constitution to the Basic Law. Moreover, the chance of reaching the political agreement needed to bolster the European Parliament according to the terms of the BVerfG was unthinkable. The article went on to cast doubt on the validity of the decision by highlighting the fact that the BVerfG’s opinion was so divided, and that the argument posited by the majority opinion felt “suspiciously self-righteous”. It concluded that the BVerfG dealt Europe yet another defeat.

In a second article on the decision, the paper stressed the further “disagreeable” result of the decision: a patchwork of EC legislation, valid in some Member States and not in others<sup>83</sup>. The *Süddeutsche Zeitung* provided a similar. It also referred to the *Solange I* decision as a “blow” for the integration process. It also, however, emphasized that the decision was limited both in scope – the BVerfG had turned out the initial complaint and still refused to hear cases directly against EC law – and time – the decision was valid only as long as the EC did not have a comparable fundamental rights provision<sup>84</sup>. The *Stuttgarter Zeitung* was also critical of the decision, believing it to have created a “special status” for the FRG and exposed that danger, under which the EC legal order stood. The *Stuttgarter Nachrichten* also carried a commentary laced with irony on the decision, asking whether it was right or not that EC law be measured against “our good constitution”<sup>85</sup>.

However, several voices in the media supported the BVerfG’s decision. The *Kieler Nachrichten* issued the most active support. Writing under the headline “The European III”, the article

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<sup>82</sup> „Stoß aus Karlsruhe“, *Hannoversche Allgemeine Zeitung*, 14.08.1974

<sup>83</sup> „Bundesverfassungsgericht will EG-Recht überprüfen“, *Hannoversche Allgemeine Zeitung*, 14.08.1974

<sup>84</sup> „Grundgesetz geht vor EG-Recht“, *Süddeutsche Zeitung*, 14.08.1974

<sup>85</sup> „Kautionsklauseln“, *Stuttgarter Nachrichten*, 15.08.1974

praised the “courage” of the BVerfG in voicing the opinion of the “great majority of Europeans” towards the European integration process and calling to question the democratic failings of the EC<sup>86</sup>. It claimed the BVerfG, through its decision, underlined the lack of democratic legitimacy in a Community run by a “bureaucratic apparatus” (Commission), a Council, which was not answerable to any parliament, and a European Parliament, whose existence was merely “theoretical”. Moreover, the ECJ had based its jurisprudence on the presumption of supremacy of EC law over national law without actually considering the importance that this law should stem from a “democratic” system.

Other sources, while not openly critical of the decision, remained only lukewarm in their support for the BVerfG. For instance, die Welt newspaper published merely a cursory mention of the case, despite it making the headlines in the other broadsheets<sup>87</sup>. The Mannheimer Morgenpost also printed a solely factual reconstruction of the case, without any commentary pro or contra the decision<sup>88</sup>. The Frankfurter Rundschau, which had earlier welcomed the reference made by the FAC to the BVerfG, placed a lot of emphasis on the reasoning made by the FAC, rather than the BVerfG, with almost a third of the article dedicated to the Frankfurt Court, but also made no commentary on the nature of the BVerfG’s decision.

The other Frankfurt newspaper, the FAZ, provided the most subtle, even covert, support for the BVerfG’s decision. In its wording of its report, the FAZ frequently referred to the Basic Law as “our” constitution or to “our” basic rights catalogue<sup>89</sup>, implying an implicit association with the BVerfG’s choice to defend the national constitution against the externalized European order. The wording of the FAZ’s article stands out, as in all of the coverage of the *Solange I* decision, this is the only time that this possessive pronoun is used (except for the singular ironic use in the *Stuttgarter Nachrichten*<sup>90</sup>) and is particularly unusual for the FAZ’s otherwise measured style. In a further commentary in its economics section, the FAZ denied some the critique leveled at the decision. In particular, it claimed that the fears that the EC legal system will disintegrate were unfounded and that the wording of the BVerfG’s decision had made the *Solange*-clause a last

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<sup>86</sup> „Europäisches Übel“, Kieler Nachrichten, 15.08.1974

<sup>87</sup> „Verfassungsgericht schränkt EG-Recht ein“, die Welt, 15.08.1974

<sup>88</sup> „Deutsches Recht geht vor Europarecht“, Mannheimer Morgenpost, 14.08.1974

<sup>89</sup> „Vorrang der Grundrechte vor dem europäischen Gemeinschaftsrecht“, FAZ, 15.08.1974

<sup>90</sup> „Grundgesetz geht vor EG-Recht“, Süddeutsche Zeitung, 14.08.1974

minute “emergency brake” to prevent an infringement on the basic rights<sup>91</sup>. Moreover, it claimed that instead of complaining, the ECJ should understand the *Solange* I decision as a call for strengthening and improving the EC legal system. Following the logic of the decision, the ECJ should introduce a catalogue of fundamental rights, which, if not identical to the West German model, should use this as a paragon for their development. This was not, so claimed the FAZ, an “axe to the roots” of the Community.

However, the immediate reaction from the European institutions, in particular the Commission, was to criticize the *Solange* I decision, a fact that received plenty of attention in the West German press. The FAZ reported on the “dramatic tone”<sup>92</sup> of the letter of complaint written by the Commission and given to the Federal Government. It argued that the letter was paradoxical, since it was addressed to a government which actually shared the Commission’s view on the case, but was nominally responsible externally for all the acts of the federal institutions, in this case the BVerfG. Die Welt, after only reporting cursorily on the *Solange* I decision itself, published two articles on the Commission’s angry reaction to the BVerfG. Covering extensively the arguments given by the Commission’s chosen spokesperson, Guido Brunner, one of the FRG’s Commissioners, the report stated that the vast majority of legal academic opinion had accepted the autonomy of the EC legal system and this precluded any right of the BVerfG to judge on the validity of EC legislation<sup>93</sup>. In a second article on the subject, the paper criticized the Commission’s position much more strongly. Stating that it had taken the Commission more than six months to respond to the *Solange* decision in this manner, die Welt article called into question the working effectiveness of the Commission as an institution<sup>94</sup>. Its reaction provided fuel for the widespread critique of the Brussels “technocracy”. Noting too the difficulty in which the Commission was placing the Federal Government, the article believed this was an attempt to close the lid on a “Pandora’s box” of legal consequences emanating from the decision. The report continued to state that, if other supreme courts followed the BVerfG’s suit, then, similar to the FAZ’s reckoning<sup>95</sup>, the *Solange* I decision would indeed represent an axe blow to the core of

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<sup>91</sup> „Kein Tiefschlag für Europa“, FAZ, 16.09.1974

<sup>92</sup> „Die Kommission kritisiert das Bundeverfassungsgericht“, FAZ, 21.12.1974

<sup>93</sup> „Brüssel pocht auf Vorrang für EG-Recht“, die Welt, 23.12.1974

<sup>94</sup> „Späte Reaktion aus Brüssel“, die Welt, 30.12.1974

<sup>95</sup> „Kein Tiefschlag für Europa“, FAZ, 16.09.1974

the EC<sup>96</sup>. The *Die Welt* article demonstrated also however, that this could prove to be an overreaction to the situation. It claimed, the *Solange* doctrine was intellectually limited, binding neither the First Senate of the BVerfG, which had denied the ability to rule on EC law in 1967 nor truly taking into account the nature of the transfer of sovereignty made through Article 24 (i) BL.

In the face of increasingly vitriolic media and academic debates, the BVerfG's reasoning in the *Solange* decision is increasingly simple to explain. Concerned by the lack of 'structural congruence' – predominately in the realms of parliamentary representation and fundamental rights provision – between the national and European levels, the court moved to increase the salience of these issues for the supranational institutions. The 'structural congruence' argument was a central theme in both academic and media debates from the 1960s onwards.

Yet we still face one puzzle – why was the West German government so reluctant or unable to act on the concerns of so many of its citizens? In essence, why did the German government not take the steps made by the BVerfG itself? To an extent, it had. A primary concern of the German Foreign Office during the 1960s had been to increase the legitimacy and influence of the European Parliament.

Despite this, the government remained inert in response to the ECJ and its positioning as the Community's constitutional court in the Van Gend and Costa decisions. Government figures in the AA and the Economics Ministry were vaguely aware of the importance of the ECJ's decisions and saw some benefits in the expansion of EC law to overcome diplomatic problems, particularly with the French. However, there is little evidence to suggest that there was a systematic attempt to pursue or allow legal integration because political integration was so stagnant. Even the government's submission to the ECJ on the crucially important Van Gend en Loos case was the result of a low-level administrator over-stepping his competencies, and thereby incurring the wrath of his superiors<sup>97</sup>. Discussion of legal developments rarely took place in the political decision making areas of the AA, even if the State Secretary, Karl Carstens,

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<sup>96</sup> „Späte Reaktion aus Brüssel“, *die Welt*, 30.12.1974

<sup>97</sup> See Davies, B. (2007). *Constitutionalising the European Community: West Germany Between Legal Sovereignty and European Integration, 1949-1975*. *European Studies/German*. London, King's College London. **PhD**.

held a keen interest in Community law and published on the topic in the academic debates of the 1960s.

Most importantly though, a strongly pro-integration stance was locked into the official policy of the Federal Republic right from the start of its existence. Not only did the Basic Law include specific articles allowing for the transfer of sovereignty to international organizations, but also it is important to remember the overwhelming importance of Konrad Adenauer<sup>98</sup> in the early FRG. At the start of the FRG, Adenauer was three people rolled into one: the most dominant political character in Bonn, Federal Chancellor, and Foreign Minister (to the extent that the occupied state could have one). This meant that European policy – even when it dealt with the technical details of economic integration – was the remit of the Foreign Office and this had a default mode set to the pro-integrationist stance of the Chancellor. Only once Ludwig Erhard replaced Adenauer did the Economics Ministry gain more say. That took place in 1963 – nine months after the publication of *Van Gend en Loos*. The timing was a recurring theme: Indeed, to some extent also, other events distracted the political leadership at the most inopportune times, with, for example, changes in leadership coinciding with major court cases and decisions<sup>99</sup>.

Indeed, a crucial element in understanding the passivity of the West German bureaucracy is the internal structural constellation. Prompted by models of the West German administration provided by Katzenstein<sup>100</sup> and Bulmer and Patterson<sup>101</sup>, the unclear delineation of competencies and the subsequent competition for the leadership of European policy between the Foreign and Economics Ministries resulted in the sidelining of the two so-called “Constitutional Ministries” – the Justice and Interior Ministries. This is important, as both held clear concerns about the ECJ’s decisions. The result of this was that the monitoring of EC law in the West German administration balanced between the Economics Ministry, monitoring law of a technical nature,

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<sup>98</sup> There are numerous excellent biographies of Adenauer and analyses of his tenure. His own memoirs are an excellent place to start: Adenauer, K. (1966). *Memoirs 1945-1963*, London: Weidenfeld and Nicolson.

<sup>99</sup> Most noticeably, the switch between Erhard and Adenauer in the middle of the publications of *Van Gend en Loos* and *Costa* and even more importantly, the resignation of Brandt due to the *Guillermé* Affair two weeks before the BVerfG’s *Solange I* decision in May 1974

<sup>100</sup> Katzenstein, P. J. (1987). *Policy and Politics in West Germany: The Growth of a Semi-sovereign State*, Philadelphia: Temple University Press.

<sup>101</sup> Bulmer, S. and W. Paterson (1987). *The Federal Republic of Germany and the European Community*, London, Allen and Unwin.

and the Foreign Office, monitoring legal developments with a political character. Only at the point of the *Solange* decision did the Constitutional Ministries play a central role in the formation of the FRG's European policy. The people best qualified to understand the domestic implications of the ECJ's decisions were shut out from the start<sup>102</sup>.

Yet by the time of *Solange* case, the constitutionalisation process deeply divided the Constitutional Ministries were both between each other and within themselves. Whilst the Justice Minister Ewald Bucher was famously criticized for being so anti-ECJ, many of the Justice Ministry's employees revealed their embarrassment of this situation to their ministerial counterparts<sup>103</sup>. This also reflected the fact that many of the constitutional specialists within the Constitutional Ministries participated in heated academic debates occurring at the same time. The result of this was that the Justice Ministry spent several months delaying the government's response to the BVerfG, creating a weak, watered down technical rejection of the *Solange* I decision. This pleased no one, highlighted the divisions within the administration and incurred the anger of the European Commission, who publicly criticized the government and the BVerfG in an open letter to the West German media.

Ultimately, the fallout from the *Solange* decision hit the government hardest. It followed the reaction to the BVerfG's decision in May 1974 with interest, with newspaper cuttings and academic reviews being collected by the BIM<sup>104</sup>. In August 1974, the Justice Minister Hans-Jochen Vogel verbally informed the new cabinet under Chancellor Helmut Schmidt<sup>105</sup> of the implications of the *Solange* decision, warning of a potential conflict between the ECJ and the BVerfG<sup>106</sup>. In order to minimize the potential for this, the BMJ was instructed to take up unofficial contact with the Judicial Service of the Commission to assess the mood in Brussels

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<sup>102</sup> The implications of the institutional constellation in the FRG and the continual sidelining of the Constitutional Ministries are discussed at length in Davies, B. (2007). *Constitutionalising the European Community: West Germany Between Legal Sovereignty and European Integration, 1949-1975*. European Studies/German. London, King's College London. PhD.

<sup>103</sup> Letter, 29<sup>th</sup> September 1967, in PAA-B20-200-1662 Allgemeine Rechtsfragen nicht Institutionelle Art (4 Nov 1966-30 Juni 1970)

<sup>104</sup> BA B106 39568 Bundesinnenministerium: Vereinbarkeit von EWG-Recht mit dem Grundgesetz. Band 4: Feb 1973 – Dez 1974

<sup>105</sup> Willy Brandt resigned as Chancellor in May 1974, two weeks before the *Solange* Decision due to a scandal involving an East German spy in the Chancellor's Office.

<sup>106</sup> See Letter, 5<sup>th</sup> September 1974 in BA B106 39568 Bundesinnenministerium: Vereinbarkeit von EWG-Recht mit dem Grundgesetz. Band 4: Feb 1973 – Dez 1974

towards the BVerfG and West Germany as a whole. The meeting took place in October 1974 and showed that the Commission felt the need to make a strong response to the BVerfG, even to the point of taking West Germany to the ECJ under the infringement proceeding of Art 169 EC<sup>107</sup>. A French MEP even wrote to the Commission to instigate this procedure<sup>108</sup>. However, the BJM representative argued that the BVerfG had ignored the opinion of the government, which in basis was also that of the Commission. If the Commission were to attack the government, this would only fuel anti-integration feeling in the Federal Republic. When this was reported back to Chancellor Helmut Schmidt in a cabinet meeting at the end of October 1974, he stated the need for West German representatives at the EC to ensure all legislation would meet the basic rights provision with the Basic Law. However, the government had not escaped a reaction by the Commission. In December 1974, Commission President Ortolí wrote to Foreign Minister Hans-Dietrich Genscher to criticize the *Solange* decision and called upon the government to consider ways in which the damage to the integration process by the BVerfG should be minimized<sup>109</sup>. At the same time, the press received a copy of the letter, which the German media roundly attacked<sup>110</sup>.

The negotiations and behind-the-scenes trading that occurred after the BVerfG's decision in May 1974 lasted well into the late 1970s and the government attempts to minimize and deal with the fallout to the case was truly remarkable. It reveals the government's rather desperate attempts to avoid the Commission initiating infringement proceedings against Germany at the ECJ. Certainly now though, legal integration and its consequences within the national systems was top of the political agenda. The European Specialists from across all of the Federal ministries discussed different options of dealing with the political fallout to the BVerfG's decision at a number of high-level political meetings running right into late-1970s. Top priority was, according to the results of one such meeting, giving the press and other commentators no reasons

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<sup>107</sup> Memo, 9<sup>th</sup> October 1974 in BA B106 39568 Bundesinnenministerium: Vereinbarkeit von EWG-Recht mit dem Grundgesetz. Band 4: Feb 1973 – Dez 1974

<sup>108</sup> See Memo, 9<sup>th</sup> October 1974 in BA B106 39568 Bundesinnenministerium: Vereinbarkeit von EWG-Recht mit dem Grundgesetz. Band 4: Feb 1973 – Dez 1974. The French Gaullist MEP Coustet raised this proposal in a written question (414/74) on 8th October 1974.

<sup>109</sup> See Letter, 19<sup>th</sup> December 1974, in BA B106 39568 Bundesinnenministerium: Vereinbarkeit von EWG-Recht mit dem Grundgesetz. Band 4: Feb 1973 – Dez 1974

<sup>110</sup> See for example "Die Kommission kritisiert das Bundesverfassungsgericht", FAZ, 21.12.1974

to play up the importance of the story<sup>111</sup>. The government indicated it had no desire to play the role of poster-boy for elements within the Community keen to undermine the power and integrity of its legal system<sup>112</sup>. This was not entirely successful as, in July 1975, the British Embassy in Bonn forwarded a letter to the Foreign Office asking to host a Parliamentary Scrutiny Committee coming from London, which wanted to learn more from the West Germans about promoting national oversight over the Community institutions!<sup>113</sup>.

Despite this, a long series of negotiations between the Justice Ministry, the European Legal Service and the Commission through into 1976 allowed for a political solution to the dilemma. The Commission did not want to raise the intensity of the debate and was willing to hold off from the threatened infringement proceedings<sup>114</sup>. This suited the West German approach down to the ground. Instead, behind the scenes, negotiations began about a compromise first suggested by the German Advocate General at the ECJ, Gerhard Reischl, in late 1974, which would see the Community tied officially to the standards of rights protection found in the European Convention of Human Rights<sup>115</sup>. Whilst the Chancellor himself found the suggestion “sufficient and practical”,<sup>116</sup> there were some reservations in the Justice Ministry about whether this went far enough<sup>117</sup>. Despite these, the Justice Ministry seemed willing to accept this as a compromise, especially after receiving notification from the Embassy in Rome later that year that the Italian Constitutional Court ruled in its *Chimiche* case in a manner mirroring the BVerfG’s *Solange* decision<sup>118</sup>. It seemed that the overarching goal of a functioning, effective Community legal system was more important to the Germans at this point and compromise seemed the lesser of two evils. The threat of growing fragmentation of the Community legal system at the hands of

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<sup>111</sup> Ressortbesprechung, 6<sup>th</sup> January 1975 in PAA-424.50 – Grundrechte und EG-Rechte – 121874

<sup>112</sup> A point which was emphasised in a letter to a Cabinet meeting at the Chancellor’s Office by the Justice Minister in October, 1974 – Letter from Vogel to Bundeskanzleramt, 17<sup>th</sup> October 1974 in PAA-424.50 – Grundrechte und EG-Rechte – 121874

<sup>113</sup> Letter from British Embassy, 9<sup>th</sup> July 1975 in PAA-424.50 – Grundrechte und EG-Rechte – 121874

<sup>114</sup> Letter from Seidel (Economics) to Teske (Justice) and AA, 12<sup>th</sup> January 1976 in PAA-424.50 – Grundrechte und EG-Rechte – 121874

<sup>115</sup> Letter to Chancellor Schmidt from Reischl from 14<sup>th</sup> November 1974, in PAA-424.50 – Grundrechte und EG-Rechte – 121875

<sup>116</sup> Letter to Reischl from Chancellor Schmidt from 9<sup>th</sup> December 1974, in PAA-424.50 – Grundrechte und EG-Rechte – 121875

<sup>117</sup> Outline from Justice to Foreign Ministry from 16<sup>th</sup> April 1975, in PAA-424.50 – Grundrechte und EG-Rechte – 121874

<sup>118</sup> 30 October 1975, n. 232, *Società industrie chimiche Italia centrale (I.C.I.C.)*, in Giur. Cost. 2211

the constitutional courts in Germany and Italy would also go a long way in explaining the Joint Declaration of the Community institutions in 1977<sup>119</sup>.

With the political fallout from the Commission seemingly mollified, there just remained the question of dealing with the domestic protagonist – the BVerfG. The ministries had already discussed several possible ways of working around the court's decision. One suggestion involved using the historically pro-integration First Senate of the court (which had ruled in the Constitutional Rights case in 1967) against the Second (which had ruled in *Solange*)<sup>120</sup>. Other more drastic options floated – notably from the European Legal Service - included changing the laws that established the BVerfG, as well as constitutional amendment to make integration easier<sup>121</sup>. Whilst none of these options was deemed viable, German representatives in the Community were asked through a direct intervention of the Chancellor to ensure that Community legislation did not break any fundamental rights provisions<sup>122</sup>.

Moreover, the government took steps to isolate and exclude the Second Senate of the BVerfG, particularly its Vice-President, Walter Seuffert. Seuffert wrote to the Foreign Office to enquire more about the Commission's letter to Germany in December 1974, and on receipt of the reply went straight to Foreign Minister Hans-Dietrich Genscher to express his dismay with the Commission's actions, asking the government to show solidarity with the court and to allow the BVerfG aid in drafting the government's response. This, however, was something that the ministries were not willing to do. Instead, Seuffert, despite repeated requests through January and February 1975, was denied access to the drafts of the government's response to the Commission's letters. Indeed, the Justice Ministry sent later ECJ judge, Kai Bahlmann, who then led its Public Law section, to speak with Seuffert and pass on news of his exclusion because this was now a political, not legal issue<sup>123</sup>. Seuffert did not take the news well<sup>124</sup> and so appealed directly to Chancellor Schmidt, who in the presence of both Foreign and Justice Ministers

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<sup>119</sup> See above and "Joint Declaration by the European Parliament, the Council and the Commission", in *Official Journal of the European Communities (OJEC)*. 27.04.1977, No C 103, pp. 1.

<sup>120</sup> Outline from Justice on 5<sup>th</sup> September 1974, in PAA-424.50 – Grundrechte und EG-Rechte – 121874

<sup>121</sup> Memo from Foreign on 8<sup>th</sup> October 1974, in PAA-424.50 – Grundrechte und EG-Rechte – 121874

<sup>122</sup> Protocols of the 87 Meeting of the Cabinet of the Federal Government on 6<sup>th</sup> November 1974.

<sup>123</sup> Report from the State Secretary Committee on European Affairs on 21<sup>st</sup> February 1975, in PAA-424.50 – Grundrechte und EG-Rechte – 121874

<sup>124</sup> Letter from Bahlmann to Foreign on 18<sup>th</sup> March 1975, in PAA-424.50 – Grundrechte und EG-Rechte – 121874

ensured that Seuffert would see the government's response before it was sent. As a result, the Chancellor's Office requested in late March 1975 a copy of the ministries' draft letter to the Commission, which until that point, the ministries had deemed unnecessary to send to the cabinet level. Reluctantly, and wary of provoking a domestic constitutional battle with the BVerfG, the Foreign and Justice Ministries sent the letter to the Chancellor's Office in April 1975<sup>125</sup>. At a pre-meeting briefing for the cabinet discussion, the Foreign Office legal section informed the Justice and Foreign Ministry State Secretaries that at all costs, Seuffert should be excluded from adding to the draft – notably this point was capitalized and underlined in the document<sup>126</sup>. The Foreign Ministry claimed that this was now a political matter and the government could neither have its “hands tied” by the court nor have Seuffert “cause problems”. It is somewhat ironic then that the result of the cabinet meeting was the decision to have the two State Secretaries meet Seuffert to discuss the contents of the letter<sup>127</sup>. It was even more so that, when the meeting took place at the end of May 1975, Seuffert had a paragraph prepared that he demanded be included in the letter and declared that he would call the Foreign Ministry with additional amendments in June<sup>128</sup>. The paragraph, which denied the claim that the BVerfG was trying to undermine the coherence of the Community legal system, was ultimately included in the German response. After Seuffert kept his promise of calling again in June, this time with no additional amendments, the letter was signed, sealed, and delivered to the Commission in June 1975. This was not quite the end of the story, as the Legal Committee of the European Parliament expressed its concern with the *Solange* decision in October 1975, but by that time, neither Commission nor the German government had the desire to fight so by the start of 1976, the EP's concerns were brushed aside.

### Conclusion

Due to the political constraints of the FRG's post-war position, institutional blockages in the domestic system, and the close handling of policy by a dedicated supranational elite, these concerns could or would not be uttered by the government in the European political arena. Instead, it fell upon the BVerfG to articulate the critiques. The court had waited for a consensus

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<sup>125</sup> Letter from State Secretary of Justice to State Secretary of Foreign containing letter to Chancellor's Office with combined Foreign-Justice position from 24<sup>th</sup> April 1975 in PAA-424.50 – Grundrechte und EG-Rechte – 121874

<sup>126</sup> Letter from Legal Section on 29<sup>th</sup> April 1975 in PAA-424.50 – Grundrechte und EG-Rechte – 121874

<sup>127</sup> Cabinet Protocol from 20<sup>th</sup> April 1975

<sup>128</sup> Meeting report from 23<sup>rd</sup> May 1975 in PAA-424.50 – Grundrechte und EG-Rechte – 121874

to emerge in the academic and media spheres and its *Solange* decision represented these views closely: there simply was not enough similarity, or congruence, between the Basic Law and the European 'constitutional' system for the unconditional acceptance of European legal supremacy and direct effect. The message of the court was clear: with certain improvements, the situation would be different.

The documentation of West German resistance to developments in the European legal arena matters because the changes that this prompted force us to recast our understanding of the formative period of the European legal system. We might presuppose that the court decision that led to the institutionalization of human rights in European jurisprudence and governance has its initial impulse in discourse in West Germany in the early 1950s. The structural congruence argument, raised originally in relation to the European Defense Community, remained alive and relevant in West German legal academia until it was taken up as a template for the *Solange* decision in 1974. Even in the public sphere, assumed by most to be uninterested and inertly permissive of European affairs in this period, took note of the ECJ's actions and in the same methodology of comparison, increasingly found better qualities in the domestic system. Even if legal integration was not headline news at the start of the period, it was by the mid-1970s. The FCC, already the proactive guardian of the Basic Law, watched this consensus emerge before issuing the 1974 judgment. The comparative qualities of the national and European system today still provide inspiration for the FCC to condition its acceptance of European legislation and modes of governance. The failure to have comparative parliamentary controls over the executive at the European level was the ground for the FCC's recent *Lisbon* decision, which too, following this logic, has its intellectual origins in the debates of the 1950s.

Faced with this act of resistance by the largest Member State's most legitimate public body, the Commission and Court backed down, implementing important and lasting changes to the European system of judicial and political governance. Through West German resistance, human rights were institutionalized at the Community level. What ultimately emerges as German European policy is a compromise between competing and complimentary national and sub-

national, state and non-state preferences. As such, we might more accurately understand the Constitutional Court's *Solange* decision as a product of German judicial, public and academic opinion, with an overwhelmed governmental response always some distance behind. This conditions our understanding of the passive consensus and the idea that integration was an elite imposed project. While that is in some part indeed the case, we can now document the push back by increasingly interested and vocal public and intellectual forces within the Member States and how, through the national court systems, this gathered political momentum, which in the case of Germany, is arguably still being felt today.

Clearly then, of the new research being undertaken by historians on the EU's legal system, reception studies of European law within the Member States are some of the most important. Such analyses face the complexity of coming to grips with the national idiosyncrasies of the Member States. In the case reviewed here, we must first locate the dynamics of reception within the unique political culture of the FRG. Its willingness to 'sacrifice' national interests and financial aid in the name of an ever closer union is a product of an exceptional set of circumstances that the FRG found itself in at its founding in 1949. The bureaucratic and institutional constellations and traditions – with ministries at competitive loggerheads over competencies and a supremely powerful and legitimate constitutional court – are equally products of the national historical context. Without these factors in place in our narrative, it is impossible to accurately explain why the *Solange* case came about and why it was the BVerfG and not the FRG government that resisted the ECJ. Focus on the national, on the particular, is crucial in explaining the formation of European law, even if our first instincts point us toward the ECJ, the Legal Service and the other supra- or transnational elements of the system. As is evident from this study, the national reaction has been of particular importance in the molding of the European legal system.

It is crucial to note that despite the apparent disinterest in legal integration vis-à-vis its political or economic corollaries, Law now certainly mattered. Not only was the Justice Ministry drawn in centrally in to the formation of European policy, but also the court cases and the jurisprudential implications were being discussed at the very highest political levels within the

Foreign Office and even the Chancellor himself was involved. In perhaps one way, the real, vibrant legal history of European integration – at least in Germany – begins in May 1974. By the late 1960s, West Germans were increasingly comfortable with their own national constitution and were happy to use it as a standard to which the Community should aspire. Unfortunately, in the ever more explicit comparisons between national and supranational constitutional orders, both in academic and public spheres, the success of the national merely highlighted the democratic and judicial failings of the European. The increased pride in the national constitutional order came at the expense of greater disillusionment with the integration project. The issues raised in the public and academic debates – most specifically, the concerns about the protection of the fundamental rights provisions of the Basic Law – were in reality expressed by the jurisprudence of the FCC in the *Solange* decision. Far from being an “extreme position”<sup>129</sup>, the *Solange* case in fact reflected, to a large extent, opinion in both academia and public opinion. At the time, the FCC was heavily criticized for the decision. Many scholars and commentators saw the FCC’s actions as merely means to secure its power vis-à-vis the ECJ, something which pro-integrationists found entirely undesirable<sup>130</sup>. Yet, when the words of two FCC Justices<sup>131</sup> are taken into account, it is clear that the intention of the FCC was to provoke the ECJ into action regarding the creation and protection of fundamental rights at the supranational level. It could, of course, be countered that Benda and Seuffert were hiding the true intentions of the FCC behind the façade of promoting basic rights, while in reality securing the position of the FCC against the ECJ. Subsequent FCC jurisprudence, most notably the *Solange II* decision<sup>132</sup>, in which the FCC renounced its desire to test European law against the fundamental rights, also demonstrates that the FCC was happy to accept supremacy and direct effect after the ECJ had worked to develop fundamental rights protection at the European level in *Stauder vs. Ulm* and

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<sup>129</sup> Scheuring, "The Approach to European Law in German Jurisprudence.", pg 16

<sup>130</sup> See above all else, the legal academic reception of the *Solange* case in Chapter Two. Scholars such as Ipsen, Riegel, Hilf, and Meier were outspoken in their critique of the decision.

<sup>131</sup> See Seuffert, "Grundgesetz Und Gemeinschaftsrecht." and Benda, "Das Spannungsverhältnis Von Grundrechten Und Übernationalen Recht.", pp 395-6. See also subsequent media publications and interviews with Benda, especially „Zur Frage der Schaffung eines europäischen Grundrechtskatalog“, interview with Ernst Benda, Deutsche Welle, 09.04.1975 and „Für europäische Grundrechte“, die Rheinpfalz, 18.04.1972

<sup>132</sup> 2 BvR 197/83 - *Solange II* decision, 22<sup>nd</sup> October 1986 - BVerfGE 73, 339. The FCC has, since *Solange II*, reiterated its desire to test European law against the Basic Law following the Maastricht Treaty.

*Nold*. While Alter<sup>133</sup> and Stone Sweet<sup>134</sup> argue that *Solange* was indeed the cue for the ECJ to move on basic rights, other scholars, particularly Tomuschat have accused the FCC of pursuing a policy of "basic rights imperialism"<sup>135</sup>, forcing the West German model onto the European stage. By contrast, this book reveals quite evidently that the securing of fundamental rights both in the national constitution and at the European level was a central concern for both the public and legal-academia for almost a decade before the *Solange* decision.

That, in either case, the national constitution could be seen by West Germans as a model for the whole of (integrated) Europe provides new insights into the double process through which West Germans re-shaped their own self-understanding and the image portrayed to the outside world. In regard to the latter, there was evident concern among public and ministerial opinion that the *Solange* case be interpreted by the other Member States as the start of a period of national recalcitrance. Clearly, a positive reception of European legal integration was also a means for the West Germans to prove to its neighbours that the new state really did wish to subsume its own interests for the good of an integrated Europe<sup>136</sup>. Many scholars did indeed call the acceptance of lesser basic rights provision at the supranational level a 'sacrifice' that the Federal Republic had to make in the name of integration<sup>137</sup>. Yet despite this, the FCC did indeed see fit to act, even if this provoked the highly embarrassing threat of infringement proceedings from the Commission<sup>138</sup>. This is clear evidence that the West German political and judicial system was increasingly comfortable within itself and self-confident enough to propose its own principles as a model for Europe. In this sense, the economic and social patterns that defined West Germany

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<sup>133</sup> Alter, Establishing the Supremacy of European Law : The Making of an International Rule of Law in Europe., pg 98

<sup>134</sup> Stone Sweet, Governing with Judges: Constitutional Politics in Europe., pg 172

<sup>135</sup> Tomuschat, "Alle Guten Dinge Sind Iii? Zur Diskussion Um Die Solange-Rechtsprechung Des Bverfg.", pg 351

<sup>136</sup> To circumvent the threat of potential conflict, negotiations took place between the Commission and the West German government to ensure that the implementation of European law within the FRG could never potentially threaten the Basic Law, thereby calling on the FCC to act. See Alter, Establishing the Supremacy of European Law : The Making of an International Rule of Law in Europe., pg 93

<sup>137</sup> Erlor and Theime, "Das Grundgesetz Und Die Offentliches Gewalt Internationaler Staatengemeinschaften.", p 48, p 110

<sup>138</sup> See footnote 108. See also Memo, 9<sup>th</sup> October 1974 in BA B106 39568 Bundesinnenministerium: Vereinbarkeit von EWG-Recht mit dem Grundgesetz. Band 4: Feb 1973 – Dez 1974. The French Gaullist MEP Coustet raised the idea of infringement proceedings against Germany in a written question (414/74) on 8th October 1974.

in the mid- to late 1970s as '*Modell Deutschland*', the paradigm towards which the rest of Western Europe strived, also hold true in a judicial sense.

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