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# Towards a New History of European Law, 1950-1980[1]

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Jacques Delors, long-term President of the European Commission during the 'Golden Age' of European integration in the 1980s, once famously described the European Union (EU) as an "Unidentified Political Object". It is a polity that is particularly hard to define. Most have now settled on simply calling it something unique and new, a sui generis entity. What causes this confusion is, in large part, the juxtaposition of the continued fragmented political will of the Member States and their reluctance to surrender competency to central European institutions with the quasi-federal nature of the Union's legal system, which by many accounts has been 'constitutionalised' by the Court of Justice of the European Union (ECJ). In this judicial narrative, the ECJ established doctrines in decisions in the 1960s that not only turned European law into the law of the land in the Member States, but also the *supreme* law of the land in the Member States. In turn, the Member States have done little to resist this constitutionalisation of European law. It is as if, as once famously formulated by one of the original scholars of this judicial fait accompli, the ECJ has led the quiet revolution, 'tucked away in the fairyland Duchy of Luxembourg...blessed with benign neglect'.[2] This statement sparked off nearly two decades' worth of political and social science research that sought to explain how the ECJ had successfully pulled off this coup. Despite the incredible theoretical sophistication employed by this subsequent scholarship, very little of it drew on documents found in historical archives across Europe. In short, no one tested the assumptions against the reality of what happened in this 'quiet revolution'.

That is now changing. Historians are gaining access to national, European, public and private archives and are slowly piecing together the legal and constitutional history of the EU. This is a

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[1] This paper is a concise version of a paper jointly written with Morten Rasmussen (University of Copenhagen) published under the title *From International Law to a European* Rechtsgemeinschaft*: Towards a New History of European Law, 1950-1979*, in Johnny Laursen (ed.), Institutions and Dynamics of the European Community, 1973-83 Nomos, Baden-Baden, 2014.

[2] Eric Stein, Thoughts from a Bridge: A Retrospective of Writings on New Europe and American Federalism, University of Michigan Press, Michigan, 2000, 16.

complicated, multi-lingual, multi-national task that requires knowledge of both national and European history, and also a sufficient command of the Law and judicial processes. This paper presents its reader with a concise overview of the findings of this new history, whose dual aim is to better inform scholarship on EU law as well as shed light on the origins and evolution of a public institution that now governs over half-a-billion people across Europe.

**The Nature of European Integration**

European integration is, above all else, a process of law. The first president of the European Commission, Walter Hallstein, who was also a prominent professor of law, perceived the integration process as fundamentally legal in nature. Law was to achieve what "centuries of blood of iron could not" – a unified Europe.[3] Certainly, European law is finely woven into almost all aspects of integration, whether those are questions of a broad institutional nature or of specific public policies. Moreover, the development of the European legal system seemingly constitutes one of the most important and clearest examples of institutional self-empowerment and the promotion of federalist ideology by the European institutions in the overall integration process. The European legal order was born in what is best considered an emerging European polity within strictly limited domains of competency.[4] The development of a coherent, legitimate and compelling European legal order was far from automatic. A coherent legal system that was uniformly enforced across member states would be an important element in the construction of the common market.

In both the Treaty of Paris (1951) and Treaty of the European Economic Community (EEC) (1957), which provided the spine of European primary law during this period, the main aim was one of market liberalisation, including the creation of a common market built on the four freedoms of free movement of trade, capital, services and labour, including a common competition policy.[5] However, most, if not all, member states continued to pursue national economic, industrial and social policies in order to protect national markets, tax and social systems against European attempts at constructing a common market. Efforts by the European

[3] Walter Hallstein, *Europe in the Making*, Allen and Unwin, London, 1972, 30.
[4] W. Kaiser, B. Leucht and M. Rasmussen, eds, *The History of the European Union: Origins of a Trans- and supranational Polity 1950-72*, Routledge, London, 2009.
[5] A. Milward, *The European Rescue of the Nation-State*, Routledge, London 1992.

institutions to establish the four freedoms met very serious obstacles and, if achieved at all, occurred at best in a piecemeal and delayed fashion.

Essentially, the establishment of the common market had all but stalled by the late 1960s and the oncoming economic crisis of the 1970s would serve only to exacerbate the problems. The real revolution only came after the Single European Act in 1986. We would therefore not be surprised to find a relatively scarce demand for legal recourse by national citizens in the 1950s and 1960s, followed by a modest increase in the 1970s.

**Demand for Legal Recourse**

There were in essence two categories of legal recourse to the ECJ possible under the Treaties of Paris and Rome: (i) direct actions by the Commission and member state governments (articles 33-37 and 40 Treaty of Paris and 169-175 EEC treaty) and (ii) a preliminary ruling mechanism (article 41 Treaty of Paris and article 177 EEC Treaty) which allowed national courts to send questions directly to the ECJ which concerned the validity (Treaty of Paris and EEC Treaty) and interpretation (EEC Treaty) of European law. National courts of last instance were obliged to refer to the ECJ under the EEC Treaty. To simplify somewhat with regard to the direct actions, only cases based on article 33 (Treaty of Paris) and article 173 (EEC Treaty) directly involved private litigants. However, this avenue for private litigants to question European legislation or administrative practice was blocked from the early 1960s onwards. Whereas the case law of the ECJ in the ECSC actually eased access for litigation by societies and firms,[6] the EEC Treaty was purposely formulated to limit access to avoid possible systematic undermining by national citizens of Council of Ministers decisions.[7] This choice was so deeply political that the ECJ clearly did not dare to change it in its case law.[8] The consequences were that few cases

[6] Case 3 and 4/54, 11 February 1955 ECR 63 and 91.
[7] A. Boerger de-Smedt, 'Negotiating the Foundations of European Law, 1950–57: The Legal History of the Treaties of Paris and Rome', *Contemporary European History* 21, 3 (2012), 339-356, 353.
[8] E. Stein and J. Vining, 'Citizens' access to judicial review of administrative action in a transnational and federal context', *American Journal of International Law* 70 (1976), 219-241, 230 and for a provocative analysis that considers the fundamental reason for the ECJ case law to be the wish by the Court to turn itself into an appellate jurisdiction H. Rasmussen, 'Why is Article 173 Interpreted against Private Plaintiffs?', *European Law Review* (1980), 112-127.

concerning article 173 arose, and when they did, the ECJ made sure not to rule on the substance of the case,[9] making this particular legal mechanism much less effective and important.[10]

The system of preliminary ruling references eventually provided the most important avenue of access to the Court for a broader range of litigants. As early as the first handful of cases, the ECJ transformed article 177 into a mechanism of treaty enforcement. In the Van Gend en Loos and Costa v. E.N.E.L. cases in 1963 and 1964,[11] the ECJ introduced the principles of direct effect and primacy of European law, albeit at first restricted to certain types of treaty articles.[12] Together, these doctrines created a mechanism of enforcement whereby private litigants could go to national courts with cases where national authorities infringed European law, and request that the judge send a preliminary reference to the ECJ. The ECJ could then interpret European law in such a way that potentially conflicting national laws would be highlighted and national courts could then—if they chose to follow the ECJ's advice—set national law aside.

Why, then, was the mechanism of preliminary reference used by national courts in the EEC at all, particularly since it was not used in the case of the ECSC before 1958? Firstly, Dutch constitutional reforms of 1953 and 1956 gave international law primacy in the Dutch legal order, but only if this was characterised as self-executing, i.e. was formulated in a clear and unambiguous way and was enforceable directly by national courts.[13] This made Dutch courts interested in enquiring as to what extent European primary or secondary law was self-executing. In the period from 1961 to 1964, fifteen of the eighteen references came from Dutch courts, including several of the most important in doctrinal terms, giving life to the mechanism.

Secondly, pro-integration legal elites, in and outside the European institutions, albeit a small minority compared with the overwhelming body of sceptical or disinterested national jurists,

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[9] S. A. Scheingold, *The Law in Political Integration. The Evolution and Integrative Implications of Regional Legal Processes in the European Community*, Quid Pro Books, Louisiana, New Orleans, 2010, 46.
[10] A. Vauchez, 'The transnational politics of judicialization. Van Gend en Loos and the making of EU polity', *European Law Journal* 16, 1, Jan. (2010), 25.
[11] Case 26/62 *Van Gend en Loos vs. Nederlandse Administratie der Belastingen* [1963] European Court Report 1 and Case 06/64 *Costa vs. ENEL* [1964] European Court Report 585.

[12] M. Rasmussen, 'Establishing a Constitutional Practice of European Law: The History of the Legal Service of the European Executive, 1952–65', *Contemporary European History* 21, 3 (2012), 375-397.
[13] See K. V. Leeuwen, 'On Democratic Concerns and Legal Traditions: The Dutch 1953 and 1956 Constitutional Reforms "Towards" Europe', *Contemporary European History* 21, 3 (2012), 357–374.

may very well have played a vanguard role in bringing the mechanism of preliminary references to life. Cases central to the European legal story, such as Van Gend en Loos (1963), Costa v. E.N.E.L. (1964), Defrenne (1971) and Cassis de Dijon (1979), were all test cases dependent more on the actions of pro-integration legal elites than on demand for litigation from national citizens or firms.

Tentatively then, it can be concluded that as a road for litigation by private actors, the preliminary ruling mechanism was neither very suitable nor indeed much used before the mid-1970s. What this meant to the history of European law in the first three decades under consideration here was that it remained an elite battle. While there was certainly awareness among the public and in political circles, particularly in Germany,[14] the actual details of the legal disputes and cases were the subject for those with specialised professional and academic knowledge.

**The struggle over the constitutional practice in European law 1952-1966**

Let us first take a closer look at the two different visions of European law inherent in the treaties: intergovernmentalist and federal. The general consensus between the governments both negotiating the Treaty of Paris and the Treaties of Rome was to set up a permanent court that would control the legality of the decision-making and administrative practice of the European executives, first and foremost the High Authority (HA), and then later the Commission and the Council. While the ECSC was an administrative Community in which the HA with some discretion administered the decisions already laid down in the treaties, the EEC Treaty in terms of enforcement followed the norms of international law and relied on the application of European law by national courts. What this meant in practice was that member state governments and administrations would have considerable control of the impact of European legislation in the member states, and accordingly, most national courts did not apply international law in a way that openly undermined or defied national governments and parliaments.

[14] B. Davies, *Resisting the European Court of Justice: West Germany's Confrontation with European Law 1949-1979*, Cambridge University Press, Cambridge, 2012. See chapter 3 for public and media debates on the ECJ and European Law & chapter 4 for concomitant political discussions.

However, the intergovernmental vision of how a European legal order would function was not the only one contained in the wordings of the treaties. An alternative, constitutional and federalist vision had crept into the Treaty of Paris under pressure particularly from the German delegation led by Walter Hallstein. The latter considered law a key instrument in achieving European unification and believed the ECJ could play a role similar to that of the United States Supreme Court in building a European 'Rechtsgemeinschaft'. The concessions granted the federalist vision were few. They included, for example, a general formulation in article 31 that the Court should ensure that the law was observed.[15] This meant ensuring the uniformity of European law in order to grant national citizens equality before the law. The legal means to do this were rudimentary to say the least. Another element of constitutional law rather than international law was the access—if somewhat restricted—of firms to legal recourse against the decisions of the HA in article 33. The question was now: which vision of European law would the Court choose in its case law?

With the defeat of the EDC Treaty in the French National Assembly on 30 August 1954, the most fervent federalist dreams died. What remained was merely the significantly less ambitious and more limited ECSC. Federalist ideas would nevertheless deeply shape the institutional agency in the field as well as influence academic debates about the nature of European law. The small Legal Service of the HA would, as early as 1954, adopt a federal understanding of the Treaty of Paris and the role of the ECJ of the ECSC. The Legal Service wanted the ECJ to assume a constitutional role similar to that of the US Supreme Court. While leading voices in the Court—like Advocate-General Maurice Lagrange— openly found that European law had a federal purpose, albeit based on his alternative approach of comparative law, the judgments of the ECJ were mostly technical and sparse on doctrinal viewpoints. Clearly, the position of the ECJ before 1958 was far from certain. This insecurity may have restrained the Court, but we know with some certainty that the composition of the judges on the bench played an important role for the conservative stance of the Court.

In the post 1958 era, several factors would nevertheless significantly improve the possibility of convincing the ECJ to adopt the constitutional position of the legal service. Firstly, despite the strong international law traits of the EEC Treaty, the broad scope of the objective of the new

[15] Article 31 ECSC stated: "The function of the Court is to ensure the rule of law in the interpretation and application of the present Treaty and of its implementing regulations".

Community, i.e. the common market, made it much more palatable to suggest that the nature of European law was essentially constitutional rather than international. Secondly, constitutional reforms in the Netherlands in 1953 and 1956 had placed that member state at the forefront with regard to the enforcement of international law by national courts.[16] Thirdly, European law movements were formed from below mainly on the initiative of the first association already established in 1954, the French Association de Juristes Européens, as well as with the help of the European Commission between 1958 and 1961. Finally, in 1961 the European umbrella organisation, FIDE, was established. While these associations would not have the desired impact in terms of convincing national legal elites to accept and contribute to the construction of a European legal order, they did help provide information about how European law was received nationally and helped legitimise the case law of the ECJ. Overall, the foundation of the European law associations was a sign that an academic and professional field of European law was slowly beginning to grow, if still very limited.[17]

Two preliminary references sent respectively from Dutch and Italian courts provided the cases on which the ECJ established its new doctrines. The Van Gend en Loos case, which concerned the tariff standstill during the establishment of the common market (article 12, EEC Treaty), had been promoted by a network in the Dutch Association of European law during 1962. The Italian Costa v. E.N.E.L. case was raised by two Italian lawyers, who wanted to question the Italian government's nationalisation of the electricity industry, a major Italian economic and political conflict in the mid 1960s.[18] At the doctrinal level these two cases dealt respectively with the extent to which the Treaties of Rome were self-executing in the sense that they created rights that litigants could pursue before national courts and, if this were the case, whether European law would be given primacy over national law both antecedent or posterior.

The Legal Service had no doubts on this point. In the proceedings of the Van Gend en Loos case, it argues that parts of the EEC Treaty were formulated in such clear terms that these articles obviously created rights for litigants before private courts. Moreover, the treaties implied that European law had primacy vis-à-vis national law. A teleological or constitutional interpretation

[16] Van Leeuwen, Constitutional Reforms.
[17] Rasmussen, Legal Service, 384 and A. Bernier, 'Constructing and Legitimating. Transnational jurist networks and the making of a Constitutional Practice of European Law, 1950-1970', *Contemporary European History* 21, 3 (2012), 399-415.
[18] Vauchez, *The Transnational*, 19-22.

of the purpose and objectives of the treaties justified fully the direct effect and primacy of European law. The ECJ ultimately followed the lead of the Legal Service with a narrow judgment of four against three, promoted primarily by the two new judges Lecourt and Trabucchi. Finally, adopting the long proposed teleological interpretation of the Legal Service, the ECJ cautiously introduced direct effect only for article 12, indicating that only treaty articles with negative obligations on member states, i.e. obligations not to act, had direct effect. The next step would be taken a little more than a year later in the Costa v. E.N.E.L case. Prior to the ECJ judgment, the Italian Constitutional Court had made a controversial judgment, in which it confirmed the classic principle of *lex posterior derogat legi priori* stating that subsequent national legislation could overrule pre-existing European law. Confronted with this serious threat against the uniform enforcement of European law, the ECJ finally followed the Legal Service and stated that European law, on condition that it had direct effect, must have primacy over national law.

With these two judgments, the ECJ chose the constitutional vision of European law contained in the treaties over the intergovernmental one. However, it did so in a cautious way limiting at first the practical consequences in terms of enforcement to only parts of the treaties. What is clear is that although a revolution had occurred in the philosophy of the Court and the key doctrines on the enforcement of European law, the practical effects were at first negligible for the member states.

The first test of these judgments came with the Empty Chair Crisis. If the treaty text and institutional structure remained unscathed even after a virulent attack on the Communities by Gaullist France, it was relatively safe to conclude that no single member state would be able to provoke serious institutional reform of the Communities. Certainly, getting all the member states to agree to curb the Court would be impossible, given the differences articulated on the Court's role in the initial negotiations of the Treaties. The Court's revolution had survived its first immediate test and by 1967, the first steps of a legal revolution had taken place.

**The Unfolding Battle: The 1967 Lecourt Court and National Pushback 1967-1979**

The 1970s marked a period of remarkable generational and political change in Europe in general, but particularly for the now newly singular European Community. The resignation of de Gaulle

in April 1969 and the new breakthrough for European cooperation at the summit of The Hague allowed a renewed sense of political dynamism for integration. Enlargement with Britain, Denmark and Ireland—in place by late 1972—marked a genuine victory for the supranational institutional method vis-à-vis the competing free trade area model. The ECJ overcame the caution of the 1960s and became more forceful in its quest to create a European 'Rechtsgemeinschaft' on the basis of the initial steps taken in the mid-1960s. This '1967 Court'—led by French judge Robert Lecourt from 1967 to 1976 and motivated by a shift in leadership and new members with a federalist persuasion—would push the boundaries of EU law further than ever, but at the same time, in doing so, would awaken the national judicial dragons and, as a result, the second half of the 1970s was characterised by national courts 'pushing back'[19] against the ECJ.

While members like Donner remained in the Court, there must still have been on-going contestation among the judges about the nature of European law, but this generational and ideological shift secured a body of new judges on the Court who were clearly inclined to view the Treaties as the basis for a federal constitution for Europe. Lecourt came to the Court in 1962 and helped tip the balance in favour of accepting the direct effect and primacy, until he was replaced in the Presidency in 1976 by the somewhat more traditionalist German judge, Hans Kutscher, who, as will be shown, eventually was able to bring a change of his own to the Court's general countenance on these issues.

As a result of these changes in political environment and personnel, the ECJ's case law of the 1970s proved to be as expansive as at any time in the Court's history. Arguably, the ECJ expanded and deepened its constitutional practice in the key fields of enforcement (direct effect and primacy), the implied powers of the institutions,[20] the common market in all its dimensions,[21] and finally human rights. The developments in these two fields—enforcement and human rights protection—highlighted both the audacity of the ECJ in the early part of the decade

[19] B. Davies, 'Pushing Back: What Happens When Member States Resist the European Court of Justice? A Multi-Modal Approach to the History of European Law' *Contemporary European History* 21, 3 (2012), 417-435.
[20] ECJ Case 22/70 Commission of the European Communities v Council of the European Communities.(AETR), ECR, 1971, 263.
[21] ECJ Case 08/74, Procureur du Roi v Benoît and Gustave Dassonville, ECR 1974, 837; ECJ Case 43/75 Gabrielle Defrenne contre Société anonyme belge de navigation aérienne Sabena, (1976), ECR, 1976, 455 and ECJ Case 120/78, Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein, ECR 1979, 649.

and also the extent to which national courts and administrations began to take notice of the judgments issued from Luxembourg in the latter half of the 1970s.

The problem of how to improve the enforcement of European law in national courts remained a central one in the late 1960s and into the 1970s. While the ECJ through new judgments could expand direct effect to new treaty articles,[22] the key problem concerned directives, which in contrast to regulations and self-executing treaty articles, did not have direct applicability. Instead, they constituted framework decisions, from which national administrations could choose the means of implementing (article 189, EEC Treaty). Any lingering doubts were swept away in the Van Duyn judgment of December 1974, where the Court declared explicitly that the binding effects of directives could be called upon by individuals before national courts. Directives, under certain conditions of clarity and intent, were now also directly effective.

This decision was contested immediately by the member states, particularly Britain and France. In its Cohn-Bendit ruling in 1978, the Conseil d'Etat rejected the ECJ's reading of article 189 in a referral from a lower French court deciding that it could not possibly conceive of directives with direct effect.[23] The strength of the opposition to the constitutional practice of the ECJ was extremely dangerous to the institution. In fact, the Court, subsequently in close cooperation with the Legal Service of the Commission, found it necessary a few short years later to actually place specific limitations on the doctrine of direct effect for directives, ruling in the Marshall case in 1986,[24] that directives could only impose obligations vertically on public bodies, but not horizontally between private individuals or bodies.[25]

A direct consequence of the enforcement mechanism devised by the ECJ out of article 177 was the growing concern of the German legal elite and public about the ramifications of a European legal order with direct effect and primacy, on the protection of basic rights in Germany. The German constitutional system had been re-built in the postwar period on the idea of immutable

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[22] For example: Case 28/67 Molkerei-Zentrale Westfalen/Lippe gmbh, (1968) ECR 143 and Case 13/68 spa Salgoil v. Italian Ministry of Foreign Trade (1968) ECR 453.
[23] 'Cohn-Bendit', Minister of Interior v. Daniel Cohn-Bendit, Conseil d'État decision of 22 Dec. (1978) Recueil Lebon, 524, (1980).
[24] ECJ Case 152/84 M. H. Marshall v Southampton and South-West Hampshire Area Health Authority.
[25] F. Bignami, 'Comparative Law and the Rise of the European Court of Justice', Conference paper delivered at European Union Studies Association, Boston, MA, March 3-6, 2011, 26.

fundamental rights written into an unchangeable part of the national constitution and protected by a powerful constitutional court. By giving European law primacy over this sacred national turf and offering a relatively weak promise to uphold fundamental rights 'common to the Member States' in return, the ECJ was running the risk of a very real confrontation with the highest judges of Europe's largest member state. The German administrative court took up the gauntlet and referred the case back to its own Federal Constitutional Court (FCC) in Karlsruhe. Eventually, the FCC conditioned its acceptance of European legal primacy, claiming final judgment as to whether national fundamental rights provisions were under threat or not, "as long as (German: Solange) the integration process has not progressed so far that Community law receives a catalogue of fundamental rights decided on by a parliament and of settled validity, which is adequate in comparison with the catalogue of fundamental rights contained in the Basic Law".[26] These stirrings of national discontent had a profound influence on the on-going process that was shaping the European legal structure, demonstrating that the European legal order that has emerged is as much a product of national agency as it is of the constitutional practice launched by the Court in Luxembourg.

As the ramifications of direct effect and primacy became ever clearer, the field of actors participating in the formation of the constitutional practice grew substantially. Private litigants found ever greater recourse to Luxembourg through their national systems—exemplified in the rising number of article 177 references to the ECJ by the end of the 1970s. National administrative and judicial elites had also woken up to the ECJ's and the Legal Service's game. There was no longer the possibility that big changes to the workings of the Treaty could be made "tucked away in the sleepy Duchy", as Eric Stein so famously put it.

## Conclusion

This paper seeks to present a first, if tentative and often partial, narrative of the emergence of the constitutional practice of European law from 1950 to 1979. The argument has been that due to the slow development of a set of comprehensive public policies at European level, beyond those related to the coal, steel and agricultural sectors, there was a relatively low level of demand for

[26] German Constitutional Court case 2 BVL 52/71, Solange I.

legal recourse among national citizens until the mid 1970s. Moreover, national courts in several member states were unlikely to send preliminary references to the ECJ, although acceptance of the procedure gradually increased in the 1970s. As a result, what shaped the history of European law, and the particular legal order that developed in the Communities, was a battle between legal elites, of which the Legal Service of the Commission, the Court and the national European Law Associations were key driving forces. As early as 1963-64, under incitement by the Legal Service, the ECJ launched a constitutional practice that would not only shape its case law in the following decades, but also become the dominant paradigm through which European law would be perceived by the European institutions and in the nascent academic field of European law. The key doctrines underpinning this new practice—direct effect and primacy—were cautiously formulated and the effect of the new enforcement mechanism they constituted was little felt by the member states at first.

It was only with the major shift in personnel of the Court in 1967, that a more aggressive development of ECJ case law occurred. As the legal order began to take shape and have ever more saliency for the lives of citizens and national judicial hierarchies, the national response became increasingly active and reactive towards a system, which had been imposed from the top down but which had immense potential influence over the structure of national governance. The national responses—certainly in the 'Big Three'—were different in nature, being judicial and political in different measures, but were similar in message: there were limits, boundaries the Court could not cross, and the national level must have a say in defining these. Absolute core concerns of the national governments about the nature of democratic accountability and human rights protections came to the fore.

In this sense, the history of European law became politicised during the 1970s as the ECJ was forced to legitimise, defend, and even backtrack on some of its most radical, federally inspired case law. The Court was about to enter a new phase in the 1980s: it was required to both defend the constitutional practice it had established, which was now backed and increasingly used by some, perhaps many, in the national judiciaries, while at the same time winning the acceptance of the national high courts and parliamentary bodies that found their particular areas of competence encroached upon. Thus, we find in events of the 1970s like the FCC's Solange decision of 1974, the House of Lord's critique of Van Duyn of 1975, or in the French Aurillac amendment of 1981 the seeds for our own on-going contemporary discussions about the

democratic deficit, parliamentary involvement in European legislation and popular control over the European executive.

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