The European Court and National Courts
Doctrine and Jurisprudence:
Legal Change in its Social Context
Report on Germany

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I. Introduction

This paper\(^1\) mainly deals with the development of the jurisprudence of the German Federal Constitutional Court (Bundesverfassungsgericht) concerning the relationship between European Community law and the German legal order. The Federal Constitutional Court is the highest Court in Germany. Its decisions are binding upon all other state authorities including all other courts. The Federal Constitutional Court’s decisions handed down in a number of proceedings have the effect of statutes.\(^2\) Therefore, the Federal Constitutional Court’s approach to European integration is particularly relevant. Lower courts must and do observe Federal Constitutional Court’s decisions. Different approaches by lower courts, like that of the Federal Tax Court (Bundesfinanzhof) can only be preliminary.

The paper will show that although the case law of the Federal Constitutional Court has not developed in a completely consistent fashion, certain strands of reasoning can be detected. Traditionally, the focus has been on the question whether basic rights as guaranteed in the Basic Law are sufficiently protected under European Community law. The Maastricht decision of October 12, 1993\(^3\) constitutes a major shift as it addressed the issues of sovereignty and Kompetenz-Kompetenz, thus exploring in detail the limits to the transfer of power to the European Communities. In Maastricht, the German Federal Constitutional Court preserves itself the competence to determine the limits of

\[^1\] I wish to thank Beate Rudolf for her invaluable assistance.

\[^2\] Cf. § 31 BVerfGG.

Community jurisdiction (Kompetenz-Kompetenz). In cases of drastic ultra vires acts of the Communities, the Federal Constitutional Court apparently would not accept the ECJ (Court of Justice of the European Communities) as having the final and exclusive authority to interpret the Founding Treaties and thus define the competences of the Communities.

In the examination of the Constitutional Court’s case law prior to Maastricht, two main questions arise. First, to what extent did the Constitutional Court use the theory that national law and Community law constitute two autonomous legal orders, on which the ECJ founded the priority of Community law? Second, how did the Constitutional Court try to ensure an effective protection of basic rights within Community law? This part will also show how the Constitutional Court’s case law paved the way for the Maastricht decision in using German constitutional law as the yardstick of the application of Community law in Germany. The controversial Maastricht decision directly addresses the problem of Kompetenz-Kompetenz. It is based on the traditional assumption that only sovereign states and not international or supranational organizations may have Kompetenz-Kompetenz, that is the power to design their own competences. Because these and other controversial assumptions and statements are so fundamental to the relationship between national and supranational law and for the cooperation between supranational and national authorities or courts, this paper analyses the Maastricht decision extensively.

This analysis explains the effects of the Constitutional Court’s interpretation of democracy as the people’s right to a parliament with substantive powers. It will also show how the Court endeavored to uphold the Maastricht Treaty by giving its provisions a content compatible with the German constitution. A central point in these considerations are the passages of the decision dealing with the monetary union, one of the most controversial parts of the Treaty within Germany before the judgment was handed down.

The last part of the paper primarily undertakes an evaluation of the cooperative relationship between the Federal Constitutional Court and the ECJ. By this, the Constitutional Court wants to give a legal backing to the influence it tries to exert on the jurisprudence of the ECJ, especially as far as it concerns the progressive development of European law by interpretation of the Founding Treaties. This section also elucidates the different sources of influence on the Constitutional Court’s jurisprudence, the most prominent of which is ‘La doctrine’, the academic community consisting of professors of public, European and international law including former and future justices. This predominantly legal discussion of foreign policy questions like the ratification of the Maastricht Treaty is a specific feature of contemporary Germany.
II. Doctrinal Matrix

1. Constitutional Law Background

The questions of the relationship between European law and German constitutional law and of the relationship between the ECJ and national courts have centered around only a few provisions of the Basic Law. Prominent among them is the former Art. 24 para. 1 (now Art. 23 para. 1, 2nd sentence) which provides for the transfer of sovereign powers to inter-governmental institutions by legislation. All legislation has to respect the limits set by the Constitution. 4

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4 Art. 24 para. 1 of the Basic Law read: "The Federation may by legislation transfer sovereign powers to inter-governmental institutions."

In connection with the ratification of the Treaty of Maastricht, a new Art. 23 was adopted, which provides:

"(1) (European Union) For the realization of a unified Europe, the Federal Republic of Germany cooperates in the development of the European Union which upholds democratic, social and federal principles, the rule of law and the principle of subsidiarity and which guarantees the protection of basic rights in a way which is basically comparable to this Basic Law. For this, the Federation may by legislation with consent of the Bundesrat (Federal Council) transfer sovereign powers. Art. 79 paras. 2 and 3 apply to the establishment of the European Union as well as to the alteration of its treaty basis and to comparable regulations, which modify or amend the content of this Basic Law or which facilitate such modifications or amendments.

(2) The Bundestag (Federal Chamber) and, through the Bundesrat (Federal Council), the Länder participate in matters of the European Union. The Federal Government has to inform the Bundestag (Federal Chamber) comprehensively and as early as possible.

(3) The Federal Government hears the Bundestag (Federal Chamber) before its participation in the legislation of the European Union. The Federal Government takes into account the opinion of the Bundestag (Federal Chamber) in its negotiations. Details shall be regulated by a law.

(4) The Bundesrat (Federal Chamber) has to be involved in the formation of the will of the Federation insofar as it would have to participate in a corresponding domestic measure or insofar as the Länder would be competent under domestic law.

(5) Insofar as interest of the Länder are affected in a field under the exclusive competence of the Federation or insofar as the Federation has otherwise jurisdiction, the Federal government takes into consideration the comments of the Bundesrat (Federal Council). The opinion of the Bundesrat (Federal Council) has to be considered pertinently at the formation of the will of the Federation, if the legislative powers of the Länder, the establishment of their agencies or their administrative procedures are affected mainly; thereby, the responsibility of the Federation for the whole state will be respected. The Federal Government has to give its consent in matters which may lead to an increase of expenditures or a decrease
Changes to the Constitution are possible if approved by a majority of two thirds of the Bundestag (parliament) and of the Bundesrat (second chamber, composed of representatives of the states or "Länder"). However, the Constitution itself limits this power by the so-called "eternal guarantee clause". According to this provision, the Constitution cannot be changed as far as specified fundamental principles are concerned - notably the fundamental principles of individual basic rights.

Since the Federal Constitutional Court is not an appellate court, its powers are limited to constitutional law questions. The yardstick to be applied depends on the procedure by which the Court has been accessed. The main decisions on the relationship of European law and German law have been handed down either by way of a constitutional complaint or "concrete" norm control.

\[\text{(6)}\] If mainly exclusive legislative competences of the Länder are affected, the exercise of the rights pertaining to the Federal Republic of Germany as a member state of the European Union, shall be transferred from the Federation to a representative of the Länder nominated by the Bundesrat (Federal Council). The rights are exercised in cooperation with and in agreement with the Federal Government; thereby, the responsibility of the Federation for the whole state will be respected.

\[\text{(7)}\] Details on paras. 4 to 6 shall be regulated by a federal law with the consent of the Federal Council.


5 Art. 79 para. 1 of the Basic Law: "This Basic Law can be amended only by laws which expressly amend or supplement the text thereof. In respect of international treaties the subject of which is a peace settlement, the preparation of a peace settlement, or the abolition of an occupation regime, or which are designed to serve the defence of the Federal Republic, it shall be sufficient, for the purpose of clarifying that the provisions of this Basic Law do not preclude the conclusion and entry into force of such treaties, to effect a supplementation of the text of this Basic Law confined to such clarification."

6 Art. 79 para. 2 of the Basic Law: "Any such law shall require the affirmative vote of two thirds of the members of the Bundestag and two thirds of the votes of the Bundesrat."

7 Art. 79 para. 3 of the Basic Law reads: "Amendments of this Basic Law affecting the division of the Federation into Länder, the participation in principle of the Länder in legislation, or the basic principles laid down in Articles 1 and 20, shall be inadmissible."

8 Art. 93 para. 1 no. 4a: "The Federal Constitutional Court decides on constitutional complaints, which can be introduced by everyone alleging a violation of his/her basic rights or the rights contained in Arts. 20 para. 4, 33, 38, 101, 103, 104 by an act of public power."
In a constitutional complaint anyone can ask the Court to find that an act of a German authority (including courts) violated the complainant's fundamental rights. No other reason for non-constitutionality of that act can be invoked. Through the procedure of norm control any court has to request the Federal Constitutional Court to rule on the constitutionality of statutory law, if the referring court is convinced that, by applying this norm in its decision, it would violate the Constitution. Decisions handed down in the procedure of norm control have the effect of statutes.\(^9\)

2. Doctrinal Matrix Before and After the Maastricht decision

The jurisprudence of the German Federal Constitutional Court has developed over a period of several years. Two intertwined strands of reasoning are evident prior to the Maastricht decision. The first is that the recognition of the autonomy of Community law is gradually eroded, despite the underlying concern of the Constitutional Court to ensure that lower courts respect the priority of Community law over national law. The second is the conviction that there are limits to the transfer of power by the member states to the European Communities. Before the Maastricht decision, these limits were found in the basic rights guaranteed by the Basic Law. With that decision, the principles of democracy and sovereignty came into play. The Court's new assumption in Maastricht is that the integration process must, in a certain way, be controlled by the representatives of the people, i.e. by parliament. This follows from the principle of democracy. At the current stage of integration, the Court still recognizes the major legitimating function of the national parliaments; the European parliament only has a supporting legitimating function.\(^11\) Therefore, integration must develop within the framework of the Treaties to which the

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9 Art. 100 para. 1: "If a court considers unconstitutional a statute the validity of which is relevant to its decision, the proceedings shall be stayed, and a decision shall be obtained from the Land court competent for constitutional disputes if the constitution of a Land is held to be violated, or from the Federal Constitutional Court if this Basic Law is held to be violated. This shall also apply if this Basic Law is held to be violated by Land law or if a Land law is held to be incompatible with a federal law."

Art. 100 para. 1 concerns the procedure of "concrete" norm control whereas Art. 93 para. 1 no. 2 provides a procedure of "abstract" norm control.

Art. 93 para. 1 no. 2: "The Federal Constitutional Court decides in case of disputes or doubts concerning the formal or material compatibility of federal or state law with this Basic Law or the compatibility of the state law with other federal law at the request of the Federal Government, a state government or one third of the members of parliament."

10 § 31 BVerfGG.

national parliaments have given their consent. Ultra vires acts would be "undemocratic" according to this logic. This new conceptional framework is different from the Court’s approach as developed before Maastricht. Theoretically, the limits to Community jurisdiction have become narrower, because the German Federal Constitutional Court now generally reserves for itself the jurisdiction to declare ultra vires acts of the Communities inapplicable in Germany. In Maastricht, the Court reversed its case law according to which only acts of German authorities are directly subject to constitutional complaints. Now, also ultra vires acts of the Community may be challenged before the Federal Constitutional Court.

The earlier approach, according to which Community acts could not be directly challenged in German courts had led to a factual supremacy of Community law over national law. The Federal Constitutional Court maintains the supremacy of Community law in Maastricht emphasizing its "cooperative relationship" with the ECJ. However, according to Maastricht the supremacy of Community law does not extend to ultra vires acts.

Before Maastricht, the Federal Constitutional Court’s concern was not generally ultra vires acts of the Communities, but only the basic rights as set forth in the German Basic Law. This refers to the famous "Solangé"cases. Through Solangé and other cases, the case law of the Federal Constitutional Court on basic rights and European integration gradually developed into a de facto concession to the ECJ of almost exclusive jurisdiction (Solangé II). In the end, basic rights are no more a real limit to the ECJ’s exclusive jurisdiction, because the ECJ itself protects basic rights sufficiently. Then came the Maastricht decision, in which the Federal Constitutional Court declared ultra vires acts of the Communities inapplicable in Germany. This is a shift away from the basic rights paradigm, even though the Federal Constitutional Court manages to review ultra vires problems, principles of democracy and rights to democratic elections in the framework of a constitutional complaint procedure concerning the Treaty of Maastricht.

Thus, the Maastricht decision of October 12, 1993 exceeds the basic rights approach of earlier cases. Within the procedure of constitutional complaints the Federal Constitutional Court, for the first time, deals with the guarantee of general, direct, free, equal and secret elections (Art. 38 of the Basic Law) as a subjective right. The Court ruled that this forbids the "weakening ... of the legitimization of state power gained through an election, and of the influence of the exercise of such power, by means of a transfer of duties and responsibilities

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12 See e.g. 22 BVerfGE 297 (1967); 37,BVerfGE 283 (1974).

of the Federal Parliament, to the extent that the principle of democracy, declared as inviolable in Art. 79, para. 3 in conjunction with Art. 20, paras. 1 and 2 of the GG, is violated". Therefore, it was crucial to decide whether the German parliament still had influence over the future development of the European Union. The Court found that Germany had only transferred limited powers to the European Communities by ratifying the Treaty of Maastricht. Thus, the control of the parliaments of Germany and the other member states was preserved: The point of no return to a European State had not been surpassed. Consequently the court reasoned, there was no violation of the complainant’s right protected under Art. 38 of the Basic Law, and the Treaty of Maastricht could be ratified by Germany.

III. Doctrin, Jurisprudence and Beyond

1. Doctrinal Shifts of the Federal Constitutional Court’s Jurisprudence and their Possible Causes

From a strictly doctrinal point of view, the case law of the Federal Constitutional Court has developed in a relatively consistent fashion. But there were shifts in the factual evaluation of the ECJ’s function and ability to protect the basic rights (Solange I and Solange II) and to promote the integration process on the basis of and within the limits set by the Founding Treaties. The following section attempts to identify reiterated shifts in the jurisprudence and will try to offer some explanations for them. It will be shown that although the Court verbally recognized the autonomy of Community law in its first decision on the relationship between Community law and national law, the approach nevertheless remained within the concepts of international law. In particular, the question of the limits to a transfer of power pursuant to Art. 24 para. 1 of the Basic Law was already posed in 1967 and only culminated in the 1993 Maastricht decision, by which the Court reserved its right to control whether the development of Community law - be it by Community act or decision of the ECJ - constitutes a transgression of the revised Founding Treaties.

a) From EC Law as an Autonomous Legal Order to Qualification as International Law

In its early cases dealing with the relationship of Community law and German law, the Court relied on the ECJ’s position that Community law

constituted an autonomous legal order. The Federal Constitutional Court recognized the supremacy of Community law over national law, albeit in the form of "priority in application" ("Anwendungsvorrang"), and not "priority in validity" ("Geltungsvorrang").

In Solange I, the Constitutional Court repeated that Community law formed an autonomous legal order flowing from an autonomous source. Thus, it was neither part of the national legal order nor international law. The Community is no state, specifically no federal state, but a community sui generis involved in the process of advancing integration. The Court further stated that the ECJ must determine the binding force, interpretation and observance of Community law. And, the competent national organs must determine the binding force, interpretation and observance of the constitutional law of the Federal Republic of Germany. This, according to the Federal Constitutional Court, causes no problem as long as the two legal orders do not conflict with respect to their content. The ECJ and the Federal Constitutional Court, therefore, have a duty, according to the latter, to attempt to reach a consensus between the two legal orders in their jurisprudence. However, in a case of conflict between domestic law and Community law, the Federal Constitutional Court qualifies and limits the supremacy of Community law over domestic law. It emphasized that the Founding Treaties do not bind the Federal Republic and the member states in a unilateral way. This, in a way, foreshadows the cooperative relationship between the Federal Constitutional Court and the ECJ stressed in Maastricht. The organs of the Community are also bound to strive for resolutions of such conflicts that are consistent with peremptory norms of the constitutional law of the Federal Republic of Germany. The Court underlines that acknowledging this conflict does not constitute a treaty violation. Rather, it triggers the treaty mechanism within the European organs leading to a political solution of the conflict. In the case before it, the Court stated that as basic rights could be guaranteed on multiple levels it did not harm the Community if member states guaranteed farther reaching rights. Therefore, the Federal Constitutional Court considered itself not to be prevented from rejecting the priority in application of Community law in a given case. This amounts to a denial of the autonomy of Community law by subjecting it to national constitutional law, especially

15 Cf. e.g. 22 BVerfGE 293, 296 (1967).

16 Cf. e.g. 31 BVerGE 145 ff. (1971).

fundamental rights, under certain circumstances. In the "Maybe-Decision" of 1979, the logical consequence to this limitation of supremacy of EC law would have been to ensure the protection of basic rights procedurally by letting the Constitutional Court also control decisions of the ECJ. However, the Federal Constitutional Court shied away from this consequence in an obvious attempt to restrict Solange I. Recognizing the need for uniformity in interpreting and applying Community law, the Constitutional Court decided that the EC Treaty requires full respect of the ECJ's interpretation of a Community law norm. Therefore, the Federal Constitutional Court denied its jurisdiction to declare Treaty provisions applicable in Germany with a meaning different from the interpretation given to them in a preliminary ruling by the ECJ.

There is no explicit reference to the autonomous character of Community law, although the Court could have used it as an argument in favor of exclusive competence of the ECJ to interpret EC law. This would have been in line with the distinction of competences between the ECJ and national courts made in Solange I. Instead, the Court referred to the object and purpose of the EC Treaty to argue that Art. 177 gives the ECJ the final say in the "reciprocal influences of national and Community legal order". In a way, this emphasis on the interrelationship and mutual influences of the national and the Community legal orders qualifies the autonomous character of EC law. Thus, the Court in effect strengthened the position of the ECJ within Germany at the price of qualifying the principle of autonomy of Community law. Later decisions no longer refer any more to the autonomy of Community law.

Although the main features of the Solange II case were identical to that of Solange I (allegations concerning the violation of basic rights by a German authority applying secondary Community law) the Court, this time, did not refer to the autonomy of the Community legal order. Instead, the perspective changed from the Founding Treaties as the basis for the obligation of both the ECJ and national courts to avoid conflicts of their respective case law (Solange I) to the German law transferring sovereign powers to the Communities as the final yardstick in deciding on the applicability of Community law contradicting German constitutional law. Thus, the Constitutional Court reserved for itself

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22 73 BVerfGE 339 ff., 375 (1986).
the final say in the case of a conflict with the ECJ. Solange II, which recognized the ECJ as an effective guardian of fundamental rights, lays the doctrinal groundwork for Maastricht. A possible explanation of this shift is the fact that in Solange II the Constitutional Court also had to decide whether the ECJ was a "lawful judge" pursuant to Art. 101 para. 1 of the Basic Law. As the Court obviously wanted to reach that result in order to reinforce the obligation of courts to request a preliminary ruling according to Art. 177, it had to overcome the difficulty that the ECJ is not a national organ. Therefore, the Constitutional Court, again, heavily relied on the functional interplay between national courts and the ECJ.23 Stressing the autonomy of the Community legal order would not have been compatible with this argument. The Court said:

"The functional interplay of the Court of Justice of the European Communities with the courts of member states together with the fact, that the Founding Treaties - based on the ratification laws pursuant to Arts. 24 para. 1, 59 para. 2 s. 1 of the Basic Law, and the derived Community law, adopted on the basis of the Treaties, are part of the domestic legal order of the Federal Republic of Germany and have to be observed, interpreted and applied by its courts, qualify the ECJ as a lawful judge pursuant to Art. 101 para. 1 s. 2 of the Basic Law, to the extent that the ratification laws of the Founding Treaties transfer jurisdiction to that court."

In the two lastly mentioned cases, the shift away from the paradigm of the autonomous legal order promoted the effectiveness of EC law. That the court no longer referred to the "autonomy" of the Community legal order in these cases, cannot be understood as a move to a more nationalistic approach. However, the more extensively the Federal Constitutional Court has to deal with European integration, the more its international law approach to the new phenomenon of supranationality comes to the surface.

The Maastricht decision does not mention the autonomy of Community law. This can be explained by the issues in that case. The Court had to decide whether the Treaty of Maastricht allowed for a transfer of power to the European Communities to an extent that would violate the individual's right to elect a German Bundestag with substantive powers. Consequently, it was the extent of power transferred by the Treaty, not precisely the relationship of Community law and national law that the Court had to deal with.

To conclude, that the Federal Constitutional Court no longer refers to EC law as an autonomous legal order does not seem to express a different approach or

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a policy change of the Court towards European integration. Rather, the international law approach of the Court to EC law becomes explicit as soon as the Court deals more comprehensively with EC law. Moreover, the international law approach does not only underline the recent Maastricht-judgment of the Kirchhof Court, but also the decisions of the Steinberger Court (e.g. Solange I) which are commonly considered as integration friendly. German courts never really supported the theory that Community law flows from an autonomous source, even though early decisions of the Federal Constitutional Court speak of the "autonomy" of Community law.

b) From an Expansive Interpretation of Art. 24 para. 1 to a Restrictive Interpretation - the Question of Protecting Human Rights Effectively

According to Art. 24 of the Basic Law, the Federation may by legislation transfer sovereign powers to intergovernmental institutions. In a 1967 case concerning constitutional complaints against Community regulations, the Court ruled that they were inadmissible since they were not directed against acts of German authorities.25 Thereby, it recognized a de facto supremacy of Community law over national law.

As the Court held the constitutional complaints inadmissible, it could leave open the question whether and to what extent the Federal Republic of Germany had been able to exempt the Community organs from being bound by German basic rights when it had transferred sovereign powers under Art. 24 para. 1 of the Basic Law.26

In a 1971 decision, the Court only used Art. 24 para. 1 as an argument in favor of the obligation to recognize a judgment of the ECJ.27

It was in Solange I28 that the Federal Constitutional Court for the first time touched upon the question of the limits of transferring sovereign powers under Art. 24 para. 1. The Court held that this provision does not allow legislation of the inter-governmental institution to change the basic structure of the Constitution on which its identity is founded. Such a change would require a constitutional amendment.29 The basic rights belong to this basic structure. Therefore, the Court ruled that preliminary requests in the procedure of norm control were admissible and required after requesting the decision of the ECJ.

25 See e.g. 22 BVerfGE 297 (1967).
26 22 BVerfGE 293 ff., 298 f. (1967).
according to Art. 177 of the Treaty, "as long as Community law does not contain a valid and formulated catalogue of basic rights established by a parliament which is equivalent to the catalogue of basic rights of the Basic Law." The relevance of the stage of integration of the Community is underlined by the words "as long as". It is noteworthy that the Constitutional Court did not take into account the Nold decision of the ECJ which had been handed down two weeks before the Solange I decision. In the Nold decision, the ECJ emphasized that fundamental rights belonged to the general principles of law which it had to guarantee. Thereby, the European Court would be guided by the common constitutional traditions of the member states. In Nold, the ECJ held that it could not consider legal acts incompatible with the fundamental rights recognized and protected by the constitutions of those states. The ECJ would also consider international treaties on the protection of human rights. In the "Solange I" (as long as I) decision the Court thus reserved the right to ensure, by way of norm control, that Community law as interpreted by the ECJ was applied in a manner not violating the fundamental rights contained in the Basic Law. It should be noted that in the case concerned, the Constitutional Court did not find a violation of fundamental rights. The decision is named after the words of its operative part that norm control is admissible "as long as the integration process of the Community has not advanced to the point that the Community law also contains a valid and formulated catalogue of basic rights established by a parliament that is equivalent to the catalogue of basic rights of the Basic Law". However, the wording suggests a possible restriction of the Court's jurisdiction at a later stage. The decision was heavily criticized for making German basic rights a standard for the further development of Community rights.

30 This is the operative part of the judgment (translation by the author), 37 BVerfGE 271, ff., 271 (1974).

31 Court of Justice of the European Communities, Case 4/73 of May 14, 1974, Nold/Commission, European Court Reports 1974, 491 ff.

32 Solange I was handed down on May 29, 1974.

33 37 BVerfGE 271 (1974).

34 The norm control was directed against a Community law rule which provided for the forfeiture of a deposit that had to be paid upon the granting of a license for export or import of specified goods, if the holder did not make use of that license. The complainant alleged that this rule violated his freedom of profession (Art. 12 of the Basic Law).

After Solange I, the Federal Constitutional Court shows more and more willingness to relinquish its control as to whether the application of Community Law by German authorities may violate the basic rights. This more integration-friendly approach by the Federal Constitutional Court is a consequence of the ever growing importance of fundamental rights in the ECJ’s newer case law. At the same time, the Federal Constitutional Court’s increasing willingness to accept the ECJ as an effective protector of the rights of the individual can be seen as a reaction to the heavy criticism met by Solange I.

The so-called "Maybe decision" (Vielleicht-Beschluß) of 1979 is widely seen as a reaction to the criticism of Solange I. The case dealt with the application of Arts. 92 and 93 on subsidies of the then EEC Treaty by the Commission. The ECJ had interpreted these provisions as excluding the right of national courts to find a national subsidy incompatible with the EEC Treaty as long as the Commission has not taken a decision in that matter. The referring German court had seen this interpretation as violating the basic right to effective judicial protection as guaranteed by Art. 19 para. 4 of the Basic Law. The Federal Constitutional Court rejected that opinion because it considered itself to be bound by the ECJ’s interpretation of Community law according to Art. 177. The Court stated that it did not have the power "to declare applicable for the territory of the Federal Republic of Germany norms of primary Community law with a content contradicting the content given to them by the ECJ". Much more famous than this operative part of the decision is the obiter dictum which resulted in the name Maybe decision and which shows a certain willingness of the Court to reconsider Solange I:

"The Senate leaves open whether and possibly how far - maybe in view of the political and legal developments in the European area accomplished in the meantime - the principles of the decision of May 29, 1974 (37 BVerfGE 271 ff.) can be further upheld unrestricted."

In the Maybe decision, the Federal Constitutional Court uses Art. 24 para. 1 of the Basic Law in an unusual way. In order to give reasons for declaring inadmissible the request for norm control, the Court stated that the requesting court had failed to allege that the German law transferring sovereign powers to the European Communities (act of accession or "Zustimmungsgesetz") was unconstitutional. As the Constitutional Court considered itself bound by the

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interpretation of Community law given by the ECJ, the constitutionality of this legislation could not be the object of a norm control. By this way of reasoning, the Court upheld the view that Art. 24 para. 1 could be used to control whether the transfer of powers was within the constitutional limits prescribed by the Basic Law. At the same time, the Constitutional Court ensured respect of the decisions of the ECJ without materially departing from Solange I.

Subsequent decisions of the Court confirm its readiness, in principle, to relinquish its control in view of further development in the protection of basic rights in the Community. Although the two Eurocontrol decisions do not directly concern Community law, they show that the Court would loosen its requirements for transfer of sovereign powers under Art. 24 para. 1. It interprets that clause as an ensurance of effective protection of fundamental rights. However and this is important against the background of Solange I - the Court does not presuppose that the protection by an international organization has to correspond to that under the Basic Law. These decisions open the door for Solange II.

In the "Meanwhile" decision the Court applied the standard spelled out by Solange I only to find that the regulation in question did not surpass the outer limits of Art. 24 para. 1 of the Basic Law. Specifically, it did not consider it necessary that Community law contained the requirement that there must be a democratically legitimized empowerment of the executive to legislate, a requirement under German law according to Art. 80 para. 1 of the Basic Law. Neither was it obligatory, in the Court’s view, to have a rule similar to Art. 19 para. 1 of the Basic Law in the sense that a regulation interfering with a specific basic right must cite that right. Moreover, the Court deemed it useful to explicitly leave open whether, in the future, it will not exercise its jurisdiction "as long as on the Community level a sufficient protection in comparison with the basic rights of the Basic Law is generally guaranteed, in particular by the ECJ".

This was the position that the Court finally took in 1986 in the landmark

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40 58 BVerfGE, 1 ff. (1981); 59 BVerfGE, 63 ff. (1981). Both decisions concerned constitutional complaints against the transfer of jurisdiction, the one to Belgian courts for all litigation concerning EUROCONTROL’s fees, and the other the transfer of jurisdiction to the ILO’s administrative tribunal for labour litigation concerning EUROCONTROL’s permanent officials.

"Solange II decision" (As long as II). The constitutional complaint alleged a violation of the right to a lawful judge (Art. 101 para. 1) by the Federal Administrative Court (Bundesverwaltungsgericht). That Court had declared legal the denial of an import license to the applicant without either referring the question to the ECJ for a second time or to institute a procedure of norm control before the Federal Constitutional Court. As to the first point the Constitutional Court ruled that the ECJ was a "lawful judge" pursuant to Art. 101 para. 1 of the Basic Law. Therefore, individuals may force lower courts to request preliminary rulings under Art. 177 of the EC Treaty by filing a constitutional complaint. In the case before the Constitutional Court, however, the Federal Administrative Court’s decision not to request a second preliminary ruling in the same question was not arbitrary and therefore not in violation of Art. 101 para. 1. The importance of the decision lies in the Court’s reasoning concerning the second point, viz. the opinion proffered that the Federal Administrative Court should have referred the question to the Constitutional Court to decide on whether the regulation of the Commission on which the denial of the license was based and its interpretation by the ECJ constituted a violation of German basic rights. The Court now recognized the protection of fundamental rights by the ECJ as being sufficient. Therefore, the Federal Constitutional Court would not exercise its jurisdiction over the application of secondary Community law serving as a legal basis for the conduct of German courts and authorities "as long as the European Communities, in particular the Court of Justice of the Communities, generally ensures an effective protection of the basic rights against acts (Hoheitsgewalt) of the Communities, which basically corresponds to the protection of basic rights compelled by the Basic Law. ... Such requests for preliminary ruling under Art. 100 para. 1 of the Basic Law are consequently inadmissible." 

"Solange II" can be seen as the highest point of harmony and convergence between the German Federal Constitutional Court and the ECJ. After Solange II it was generally accepted that the positions of the Federal Constitutional Court and the ECJ had become rather close. This is true at least from a pragmatic result-oriented approach. On the other hand, Solange II, which is commonly understood as integration-friendly, clearly

42 73 BVerfGE 339 ff. (1986).

43 The provision reads: "No one may be removed from the jurisdiction of his lawful judge."


points out to the international law basis of the Community. According to the Court, Community law is valid in Germany because the German ratification statute under Arts. 24 para. 1, 59 para. 2 of the Basic Law says so. Therefore, the ECJ is a "lawful judge" insofar as the ratification statute has transferred to it the power to administrate justice. The Court then repeats that the transfer of power is limited by the basic structure of each member state's constitution, on which its identity is founded. In contrast to Solange I, the Court did not hold that the basic rights of the Basic Law as such were part of that fundamental structure. In Solange II, only the legal principles underlying the basic rights section of the Basic Law were called non-renouncable. This is an obvious attempt to limit the restriction to Art. 24 para. 1 to counter the criticism to Solange I. To defend its position, the Constitutional Court referred to the jurisprudence of the Italian Constitutional Court.

It is striking that in Solange II, the German Federal Constitutional Court gave up the two requirements stated in the Solange I decision rendered twelve years earlier. In Solange II, the Federal Constitutional Court did not insist any more on a protection of the basic rights under the Basic Law in each individual case, nor did it request a codified catalogue of basic rights on the Community level. Rather, the Court set forth that, on the ground that there has been a development of the fundamental rights jurisprudence of the ECJ, the Common Declaration of the European Parliament, the Council and the Commission of the European Communities of April 5, 1977 on the respect of Fundamental Rights and the Declaration of the European Council on Democracy of April 7/8, 1978, a minimum standard of substantial basic rights protection is generally guaranteed, which principally meets the constitutional requirements of the Basic Law. The Federal Constitutional Court noted thereby that the ECJ takes account of the European Convention on Human Rights and that it was not relevant that the Community as such was not a party to the European Convention on Human Rights.

When the Federal Constitutional Court was called upon to decide whether the


47 73 BVerfGE 339 ff., 375 (1986).


50 BVerfG ibid.
Federal Minister of Justice had to control the constitutionality of a judgment by the ECJ before giving the exequatur, it further confirmed the recognition of the ECJ's protection of human rights. The Court held that courts and agencies of the Federal Republic of Germany were neither entitled nor obliged to review acts of organs of the European Communities. Therefore, it had to be left open whether the complainant was right in that the decision of the ECJ violated her basic rights.

However, the Federal Constitutional Court reserved its jurisdiction for exceptional cases. The Court said that it could be left open whether the challenged regulations of the Commission violated the complainant's basic rights, as neither the complainant’s allegations nor the preliminary ruling by the ECJ showed that the Court of Justice was absolutely and generally unable or unwilling to recognize or protect her basic rights. For this reason only, recourse to the German Federal Constitutional Court was inadmissible. In a way, Solange II is encouraging critique to the jurisprudence of the ECJ. As far as the basic rights of the individual are concerned, it is at least misleading to argue with the level of basic rights protection that the Community generally guarantees.

The Constitutional Court affirmed its Solange II jurisprudence in a constitutional complaint procedure the following year, when it reversed a judgment of the Federal Tax Court for not having requested a preliminary ruling by the ECJ. The Court held that the Tax Court had violated the complainant’s right to a lawful judge when denying the direct effect of the Sixth Directive on the sales tax even though the ECJ had ruled in favor of direct effect on request of the lower tax court. But then, after the entry into force of the Single European Act, the Federal Constitutional Court, in a new composition, seems to follow again a slightly more reserved approach to the ECJ. In a 1989 decision, the Federal Constitutional Court mentions, without cause, the possibility of a constitutional complaint if the basic rights’ standard compelled by the Basic Law cannot be realized through recourse to the ECJ. Even though not inconsistent with the logic and theory of Solange II, this statement may foreshadow a different policy of the Court.

In 1992, the basic rights jurisprudence of the Federal Constitutional Court was

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54 BVerfG, decision of May 12, 1989, 3 NJW 974 (1989). This is the so-called "Wenn-nicht-Beschluß" (if-not decision).
integrated into the Basic Law by amendment. According to the new Art. 23, the Federal Republic of Germany cooperates in the development of the European Union "which guarantees the protection of basic rights in a way that is basically comparable to this Basic Law". Art. 23 furthermore requires that the European Union upholds democratic, social and federal principles, the rule of law and the principle of subsidiarity. The drafting of Art. 23 was heavily influenced by the Federal Constitutional Court’s case law and by the academia. Art. 23 is the expression of a more self-conscious Germany trying to set some conditions for integration. Moreover, the new integration article - Art. 23 - requires a 2/3-majority for the establishment of the European Union and for Treaty-amendments, whereas a simple majority was sufficient under the old Art. 24. The reason probably is, that after the Second World War, Germany could be happy to be integrated in any international organization; postwar Germany could only gain, not lose thereby. Thus, Art. 24 was to make international and supranational integration easy, even though it could lead to a materially change in the constitutional order. After the Second World War, there was no specter of the waning state, of Germany loosing control over major policy decisions affecting the people under its jurisdiction. In view of this new aspect, Art. 23 now requires a constitution amending majority of 2/3 of the legislature. Germany's "conditions" on European integration are certainly also the attribute of a state more powerful and more influential on the international plane than it used to be. As Germany identifies itself with a specific type of "Rechtsstaat" (rule of law), where courts rather than politicians make important choices, it is the Federal Constitutional Court rather than the German representatives in the council of ministers who tries harder to influence the process of integration. Solange I influenced the fundamental rights jurisprudence of the ECJ. In the recent Maastricht decision the Federal Constitutional Court warns the ECJ against being too dynamic in interpreting Community law. The rest of the paper will no more deal with basic rights as a potential limit to the priority of EC law; it rather addresses the problem of Kompetenz-Kompetenz.

c) Kompetenz-Kompetenz

Kompetenz-Kompetenz means the legal power ("competence") to define one's own competence. Traditionally, it is relevant with regard to international courts and tribunals. It lies with the court as only it - and not the parties to the dispute - is competent to interpret the declarations and conventions establishing its jurisdiction. Kompetenz-Kompetenz is also relevant in the law of international organizations. According to traditional concepts of state theory and of the law of international organizations, only states and not international organizations have Kompetenz-Kompetenz. International and supranational organizations only have the competences transferred to them by the member
states. The theory of the only attributed competences of international organizations suggests that member states should be able to protect themselves against drastic ultra vires acts of the organization. Kompetenz-Kompetenz with regard to the EC Treaty and the Treaty of Maastricht concerns the question whether organs of the Community (e.g. the ECJ) or organs of member states (e.g. the Federal Constitutional Court) are "competent" to decide in the last resort whether the Community act within the competences transferred to it by the Founding Treaties, or whether they act ultra vires. Within the "legal community" (Rechtsgemeinschaft) of the European Communities, Kompetenz-Kompetenz thus means "quis judicabit?" (who or which court decides?).

The 1987 decision of the Constitutional Court reversing the Federal Tax Court was the first to deal with Art. 24 para. 1 and the problem of Kompetenz-Kompetenz. In that decision, the Federal Constitutional Court approved of the law-making function of the ECJ as being compatible with the transfer of sovereign power under Art. 24 para. 1 of the Basic Law, thus limiting its own power to review judgments of the ECJ. It rejected the view of the Tax Court that the jurisprudence of the ECJ concerning the direct applicability of directives transgressed its powers under the EC Treaty and was therefore not covered by the German ratification law. As the EC Treaty does not give the Community unlimited jurisdiction, the Constitutional Court stated: "The Community is no sovereign state in the sense of international law with Kompetenz-Kompetenz over its internal affairs."

In the Maastricht decision the question of Kompetenz-Kompetenz turned out to be much more crucial as the ratification of the Treaty of Maastricht depended upon its outcome.

aa) Who Decides on Adhesion to the European Union?

As set forth, the case law of the Federal Constitutional Court until its Maastricht Decision of Oct. 12, 1993 essentially concerned the protection of basic rights. Kompetenz-Kompetenz rather was a secondary or underlying concern. The Maastricht decision, even though handed down in the framework of a constitutional complaint procedure, has a broader approach. It directly and primarily concerns the problem of Kompetenz-Kompetenz. According to Art. 38 of the Basic Law "the deputies to the German Bundestag shall be elected in

57 BVerfG ibid. p. 242.
general, direct, free, equal, and secret elections". The Federal Constitutional Court interpreted Art. 38 of the Basic Law for the first time as not only guaranteeing the formal right to general, direct, free, equal, and secret elections. But also gave Art. 38 of the Basic Law a substantive content. The Court said that Art. 38 of the Basic Law guaranteed a subjective right of the individual to elect a German Bundestag with substantive powers:

"1. Art. 38 GG (Grundgesetz) forbids the weakening, within the scope of Art. 23 GG, of the legitimization of state power gained through an election and of the influence on the exercise of such power by means of a transfer of duties and responsibilities of the Federal Parliament, to the extent that the principle of democracy declared as inviolable in Art. 79 para. 3 in conjunction with Art. 20 paras. 1 and 2 of the GG, is violated."59

In the tradition of its basic rights jurisprudence, the Federal Constitutional Court takes up the limits of the integration power under Art. 24, now more specifically under Art. 23 of the Basic Law. The principles of basic rights and of democracy are both among the limits falling under the "eternal guaranty" clause of Art. 79 para. 3 of the Basic Law and are thus binding also for constitutional amendments in the framework of international or supranational integration. Earlier decisions of the Federal Constitutional Court focused on the basic right limits, whereas Maastricht takes up - and this is the change - the principle of democracy as a measure and limit for German cooperation in European integration. The rather unusual consequence is that now, at least theoretically any citizen may challenge German ratification laws to international treaties that transfer sovereign rights to international organizations as undemocratic. The new interpretation of the right to vote thus leads to a kind of actio popularis with respect to important international or supranational treaties. This may be understood as another example showing a German tendency to constitutionalize even foreign policy.

Thus, the German Federal Constitutional Court had to give its consent to the Maastricht Treaty. On the other hand, some scholars had requested a popular referendum. The argument was that ratification of the Maastricht Treaty was the beginning of a process that, by and by, would lead to a European Federation and thus the elimination of Germany’s sovereignty and status as a state. These scholars requested an anticipatory popular referendum, because participation of the people must take place before it is too late; before the point of no return in the development following the ratification of the Treaty of Maastricht is

59 33 ILM 395 (1994).
reached. This approach leads to the question whether and how far adhering to the European Union implies giving up Germany’s statehood in the long run. Member states will not lose their statehood as long as the principle of the limited transfer of powers to the Communities applies. If, even by the ratification law to the Maastricht Treaty, only limited powers are transferred to the Communities, the further development of the Union remains in a way under the control of the parliaments of Germany and the other member states. According to this reasoning of the German Federal Constitutional Court, the competences transferred to the European Union must not permit an autonomous development towards a European Federal State with Kompetenz-Kompetenz. From its different approach, the Federal Constitutional Court dealt with the problem of the vanishing statehood of member states. The Court finally reached the conclusion that Kompetenz-Kompetenz was still with Germany. The German Bundestag was still in control of major decisions. Therefore, the Court rejected the complainants’ allegations that their constitutional right to vote the German Bundestag was unduly weakened in contravention of Art. 38 of the Basic Law.


A clearly international law approach to the Communities and to the European Union underlies the Maastricht judgment as well as Solange II. Accordingly, Community law applies in Germany only because the German ratification laws to the Founding Treaties say so. In Maastricht, the Federal Constitutional Court makes its international law approach even clearer:

"... even after the Maastricht Treaty has entered into force, the Federal Republic of Germany remains a member of an inter-governmental community, the authority of which is derived from the member states and has binding effect in German sovereign territory only if a German order governing application of law (Rechtsanwendungsbefehl) is issued in respect of it. Germany is one of the 'High contracting parties' which have given as a reason for their commitment to the Maastricht Treaty, concluded 'for an unlimited period' (Art. 1), their desire to be members of the European Union for a lengthy period; such membership may, however, be terminated by means of an appropriate act being passed. The validity and application of European law in Germany derive from the order governing application of law contained in the Act of Accession. Germany is therefore maintaining its status as a sovereign State in its own right as well as the status of sovereign equality with other States in the sense of Art. 2, sub-para.1

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More important, in Maastricht, the court draws drastic consequences from its international law approach to the communities: Similar to ultra vires acts of traditional international organizations, acts transgressing the competences transferred to the Communities by the Founding Treaties are not binding in the domestic sphere, according to the Court.

"If, for example, European institutions or governmental entities were to implement or to develop the Maastricht Treaty in a manner no longer covered by the Treaty in the form of it upon which the German Act of Accession is based, any legal instrument arising from such activity would not be binding within German territory. German State institutions would be prevented by reasons of constitutional law from applying such legal instruments in Germany. Accordingly, the German Federal Constitutional Court must examine the question of whether or not legal instruments of European institutions and governmental entities may be considered to remain within the bounds of the sovereign rights accorded to them, or whether they may be considered to exceed those bounds."  

The Federal Constitutional Court thus extends its jurisdiction over community acts. In the pre-Maastricht era, the Federal Constitutional Court only asked whether the German ratification laws to the Founding Treaties or German acts applying Community law transgressed the integration power under Art. 24 of the Basic Law; in particular, whether they violated the principle guarantees of basic rights. That meant that Community acts could only be challenged indirectly and with the allegation that they were not compatible with Art. 79 para. 3 of the Basic Law, i.e. they violated the basic rights. Now, Community acts can be challenged directly before the Federal Constitutional Court with the allegation that they are not covered by the German ratification laws to the Founding Treaties. Ultra vires acts of the Communities shall be inapplicable in Germany. The standard is no longer Art. 24 (now Art. 23) of the Basic Law along with Art. 79 para. 3. Rather, the standard for the Federal Constitutional Court, when judging Community acts, are now the German ratifications reproducing the Founding Treaties. The potential for conflict with the ECJ is obvious. The European Communities have developed into a system where the ECJ is competent to interpret the treaties authoritatively. Relying on the basic right to

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61 33 ILM 395 ff., 424 f. (1994); the German original version is reproduced in 20 EuGRZ 429 ff., 439 (1993).

vote and the democracy principle, the German Federal Constitutional Court has indirectly constitutionalized the interpretation of the Founding Treaties. According to Maastricht, ultra vires acts of the communities violate the constitutional right to vote a German parliament with substantial powers (Art. 38 of the Basic Law). If, however, the Federal Constitutional Court had not reserved itself some residual jurisdiction for grave conflicts between national and Community law, a European organ would authoritatively decide on the distribution of competences between Germany and the European Communities. Then, an argument could be made that Kompetenz-Kompetenz would lie with the Communities. This could apply, if, based on an ultradynamic jurisprudence of the ECJ, there would be no more effective check on the usurpation of powers by Community organs.

cc) Kompetenz-Kompetenz and Democracy

According to the conception of the German Federal Constitutional Court, Kompetenz-Kompetenz of the Federal Republic of Germany is a matter of democracy. The European Parliament, even after obtaining substantial competences through the Treaty of Maastricht, still does not have legislative powers comparable to those of a national parliament in a democratic state. More importantly, according to the Federal Constitutional Court, granting more powers to the European Parliament could not even remedy the so-called democracy deficit of the European Communities. On the contrary, the democratic legitimacy of the Communities lies with the national parliaments of the member states. As there is not one European people, the European Parliament cannot provide the necessary democratic legitimization of the Communities. Rather the peoples of the member states provide the democratic basis through parliamentary control of their delegates to the Council of Ministers. If, as the Court assumes, the


64 Cf. also P. Badura, Der Bundesstaat Deutschland im Prozeß der europäischen Union, in: G. Ress/T. Stein (Eds.), Vorträge, Reden und Berichte aus dem Europainstitut - Sektion Rechtswissenschaft - der Universität des Saarlandes, Nr. 298 (1993), p. 18.; a detailed analysis of the democratic deficit and of remedial measures offers G. Ress, Über die Notwendigkeit der parlamentarischen Legitimierung der Rechtsetzung der Europäischen Gemeinschaften, in:
indirect democratic legitimization of Community power lies with the national
delegates in the Council of Ministers, this could even be used as an argument
against the further transfer of powers to the European Parliament at this stage.
In its judgment, the Court refers to the extra-legal conditions for the functioning
of democracy such as ongoing free interaction of social forces, interests and
ideas.

"In cases where they do not already exist, actual conditions of this kind may be
developed, in the course of time, within the institutional framework of the European
Union. ... Within the community of States which is the European Union, democratic
legitimization is by necessity effected by the parliaments of the individual member,
states receiving information on the activities of the European institutions. To an
increasing extent, in view of the degree to which the nations of Europe are growing
together, the transmission of democratic legitimization within the institutional structure
of the European Union by the European Parliament elected by the citizens of the
member states must also be taken into consideration. Even at the present stage of
development, legitimization by the European Parliament has a supportive function,
which could be strengthened if the European Parliament were elected on the basis of
a uniform electoral law in all member states pursuant to Art. 138, para. 3 of the EC
Treaty and if its influence on the policy and law-making of the European Communities
were to increase. The important factor is that the democratic foundations upon which
the Union is based are extended concurrent with integration, and that a living
democracy is maintained in the member states while integration proceeds. If too many
functions and powers were placed in the hands of the European inter-governmental
community, democracy on the level of the individual States would be weakened to such
an extent that the parliaments of the member states would no longer be able to convey
adequately that legitimization of the sovereign power exercised by the Union.

If the peoples of the individual States (as is true at present) convey democratic
legitimization via the national parliaments, then limits are imposed by the principle of
democracy on an extension of the functions and powers of the European
Communities."\(^{65}\)

The national parliaments thus primarily provide for the democratic legitimization
of the Communities,\(^ {66}\) but the European Parliament has at least a supportive


\(^{66}\) For critique see: B.-O. Bryde, Die bundesrepublikanische Volksdemokratie als Irrweg
der Demokratietheorie, in: 5 Staatswissenschaft und Staatspraxis 305 ff. (1994); for support
see H. Klein, Europa - Verschiedenes gemeinsam erlebt, FAZ of October 17, 12 f. (1994) and
G. Schuppert, Zur Staatswerdung Europas, in: 5 Staatswissenschaft und Staatspraxis 35 ff.,
49 (1994).
function thus far. In this respect, it is interesting to note that the Austrian parliament shares the opinion that accession to the European Union considerably modifies the system of democracy in Austria. Therefore, the Maastricht Treaty had to be subjected to a popular referendum in Austria.

The Federal Constitutional Court generally recognizes that the requirement of a law made by parliament as the basis for acts touching the position and in particular the basic rights of the individual (Gesetzesvorbehalt; rule of law; proviso of legality) cannot be applied in an equally strict manner to national and supranational acts. Otherwise, the international and supranational integration provided for by the Basic Law would become impossible. On the other hand, the process of integration must remain sufficiently predictable. This, again, concerns the question of who decides in cases of conflicts concerning the integration program, which is laid down in the Founding Treaties and which binds domestic authorities and individuals on the basis of the German ratification laws. The Federal Constitutional Court held that it would decide under certain circumstances, but it said that it would exercise its jurisdiction "in a cooperative relationship" with the ECJ.

Assuming there is an indirect democratic legitimization of the Communities through the Council, it is problematical that the Council could hardly ever be dismissed in case its policy does not reflect the will of the peoples. The Council could only be dismissed in the hypothetical case that the peoples of all member states would remove their governments at the same time. Therefore, the Council of the European Communities is not subject to any meaningful political control. (Cf. K. Doehring, Staat und Verfassung in einem zusammenwachsenden Europa, 7 ZRP 98ff., 100 (1993); J. Kokott, Deutschland im Rahmen der Europäischen Union - zum Vertrag von Maastricht, 119 AoR 207ff., 215 (1994)). This shows that, in the long run, only the European Parliament could provide a sufficient basis for a democratic European Union. It may seem problematical if, at a later stage, the German Federal Constitutional Court should decide again on whether and at what stage of integration the extra-legal or specific privileged conditions for the existence of one European people are fulfilled.


Ibid. at 396.
dd) Interpreting the Treaty of Maastricht to Avoid Kompetenz-Kompetenz of the Communities

According to the Federal Constitutional Court, accession to the Treaty of Maastricht is only compatible with the Basic Law, if the process of integration remains sufficiently predictable and if no Kompetenz-Kompetenz is transferred to the European Communities. The topic of Kompetenz-Kompetenz is particularly treated in three contexts. Perhaps the least problematical point is Art. F para. 3.

aaa) Art. F para. 3 of the Treaty Establishing the European Union Does not Give the Union a Broad and Unspecified Competence

Art. F para. 3 of the Treaty Establishing the European Union reads:

"The Community provides itself the means necessary to achieve its aims and to implement its policies."

The German Federal Constitutional Court interprets Art. F para. 3 of the Maastricht Treaty as follows:

"The requirement of sufficient statutory definition of the sovereign right granted, and therefore of parliamentary responsibility for their granting, would, however, be violated if Art. F, para. 3 of the Maastricht Treaty were applied to grant exclusive competence (Kompetenz-Kompetenz) for jurisdictional conflicts to the European Union as a community of sovereign States. Art. F, para. 3 merely states the political intention that the member states forming the Union wish to provide it, within the scope of the required procedures, with the means necessary to attain its objectives and carry through its policies. If European institutions were to interpret and administer Art. F, para. 3 of the Maastricht Treaty in a manner which conflicts with its substance, which has been assumed into the German Act of Accession, such conduct would not be covered by the Act of Accession and would therefore not be legally binding within Germany, which is one of the member states. German institutions would be forced to refuse compliance with any legal instruments based upon an interpretation of Art. F, para. 3 of the Maastricht Treaty of this nature.

The very fact that there is no point in the Maastricht Treaty at which it is clear that the contracting parties have agreed to establish the Union as an independent legal entity with powers on its own, conflicts with the view that an exclusive competence for jurisdictional conflicts has been established. According to the interpretation applied by the Federal Government, the Union does not have a distinct legal personality either in terms of its relationship with the European Communities or of its relationship with the
The German Federal Constitutional Court thus sees Art. F para. 3, notwithstanding its formulation, rather as a mere statement of political intention than as a binding norm. Also, the Federal Constitutional Court points out that the European Union is no subject of international law. The Federal Constitutional Court created a new legal term for the European Union, "Staatenverbund" (community of states). The term Staatenverbund apparently first appears in an article on European integration written by the reporting Justice Kirchhof shortly before he drafted the Maastricht decision. This 1992 article already contains important principles of the Maastricht decision. According to the Federal Constitutional Court, the European Union is a "Staatenverbund", a community of states, which is distinguished from a "Staatenbund", a confederation of states on the one hand, and a "Bundesstaat", a federal state, on the other hand. Correspondingly, German doctrine continues to refer to the organs of the European Communities rather than to the Council and the Commission of the European Union. This corresponds to the legal situation, but not to practice. According to their own new regulations, the Council and the Commission have now turned into the Council and the Commission of the European Union.

The Federal Constitutional Court’s interpretation of Art. F para. 3 of the Maastricht Treaty apparently corresponds to the will of the contracting parties and to the treaty system. Art. F para. 3 of the Maastricht Treaty thus does not transfer some broad and unspecified competence to the European Union.

bbb) Germany May Withdraw

There are two references to the possibility of withdrawal in the Maastricht decision. One is with regard to monetary union, the other is formulated more generally:

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"Therefore, even after the Maastricht Treaty has entered into force, the Federal Republic of Germany remains a member of an inter-governmental community (Staatenverbund), the authority of which is derived from the member states and has binding effect in German sovereign territory only if a German order governing application of law (Rechtsanwendungsbefehl) is issued in respect of it. Germany is one of the 'High contracting parties' (Herren der Verträge = masters of the Treaties) which have given as the reason for their commitment to the Maastricht Treaty, concluded 'for an unlimited period' Art. Q), their desire to be members of the European Union for a lengthy period; such membership may, however, be terminated by means of an appropriate act (gegenläufiger Akt) being passed. The validity and application of European law in Germany derive from the order governing application of law contained in the Act of Accession. Germany is therefore maintaining its status as a sovereign State in its own right as well as the status of sovereign equality with other States in the sense of Art. 2, sub-para. 1 of the UN Charter ...

This passage of the Maastricht decision is not easy to interpret. The term "appropriate act being passed" or the act to the contrary (gegenläufiger Akt) grammatically refers to the Treaty Establishing the European Union. But the clause appears in direct context of the statement about Germany as one of the "Herren der Verträge". German doctrine uses the term "Herren der Verträge" (masters of the Treaties) to show that member states still control the process of integration and to deny a Kompetenz-Kompetenz of the Communities. In this context, the term "appropriate act being passed" or act to the contrary (gegenläufiger Akt) does not only refer to a withdrawal of the Treaty Establishing the European Union, but also to the three Founding Treaties establishing the European Communities. Moreover, Art. O (accession to the Union) and Art. Q (indefinite validity) of the Treaty Establishing the European Union govern both membership and indefinite validity with regard to the Treaty Establishing the European Union and with regard to the Founding Treaties of the European Communities. An isolated withdrawal from the Union is not provided for.

The passage on withdrawal from the Union viz. the Communities is also ambiguous as to whether it refers to termination of the Treaties by mutual agreement or to the possibility of unilaterally renouncing them. A grammatical interpretation of the short passage reproduced above would rather lead to the conclusion that the Federal Constitutional Court only refers to the possibility to terminating the Treaties by mutual agreement. According to German doctrine, it is not self-evident that the High Contracting Parties may terminate the

74 Ibid. at 424 f.

75 Cf. e. g. T. Oppermann, Europarecht 1991, 84, 115, 153, 164 f., 266 f., 298.
Founding Treaties by mutual agreement. Several authors have concluded that the Communities have reached an integration standard that legally excludes even their dissolution by mutual agreement.  

The statement of the Federal Constitutional Court concerning withdrawal from the Communities may refer to the possibility that Germany, in an extreme situation, may unilaterally denounce the Founding Treaties. Such an act would obviously violate Art. Q of the Treaty Establishing the European Union, according to which the Treaty is valid for an indefinite period of time. Therefore, it is hard to assume that the Federal Constitutional Court may have envisaged such a unilateral step. But the passage on withdrawal from the communities appears in the context and framework of explanations where the Court strongly emphasizes Germany’s remaining sovereignty and where the Court underlines that community law is only valid within Germany because the domestic law says so. A contextual understanding of the statement on withdrawal from the Communities thus suggests that Germany, in a most probably theoretical and extreme situation may leave the Communities without consent of the other member states. As already mentioned, such an interpretation would violate the Founding Treaties unless one considers drastic ultra vires acts of the Communities as a fundamental change of circumstances in the sense of Art. 62 of the Vienna Convention on the Law of Treaties. The principle "friendliness to public international law" underlying the Basic Law (Völkerrechtsfreundlichkeit des Grundgesetzes) rather hinders such an approach. On the other hand, we are here confronted with the fundamental question of "Who decides?" According to the Federal Constitutional Court, the principle of democracy requires, at the present stage of integration of the Communities, that the final responsibility stays with the German parliament. If the point of no return has already been passed and if a unilateral withdrawal from the Communities is legally excluded under all circumstances, then it is

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76 Ipsen was probably the earliest taking this view. For references on the different views on the termination of the Communities by mutual agreement, see T. Oppermann, Europarecht 1991, 85. Oppermann himself does not exclude a termination legally. According to Beutler, a termination by mutual agreement is illegal. B. Beutler, in: Beutler/Bieber/Pipkorn/Streil, Die Europäische Union 1993, p. 7. But see R. Streinz, Europarecht 1992, p. 3.

77 In this sense the explanations to the Austrian Bundesverfassungsgesetz (Federal Constitutional Law) on accession to the European Union. Cf. 1546 der Beilagen zu den Stenographischen Protokollen des Nationalrates XVIII. GP, Reprint of April 12,1994, p. 7. On fundamental change of circumstances, see infra pp. 22 ff.

much harder to uphold the thesis of the final say and the final responsibility of the German parliament. These reasons permit an understanding of the ambiguous passage of the Maastricht-judgment according to which a unilateral denunciation of the Founding Treaties could be justified under national constitutional law as a last resort against too much integration by ultra vires acts of the Communities.

ccc) Germany Controls Whether and Under What Conditions It Enters the Monetary Union

(i) Monetary Union and Kompetenz-Kompetenz

The establishment of a monetary union under a European Central Bank modifies the sovereignty of member states fundamentally. Therefore, the Federal Constitutional Court considers it essential that Germany, viz. the German parliament, controls the transition to the monetary union. The Federal Constitutional Court tries very hard to interpret the Treaty in a way that does not automatically lead to monetary union, if its position is that Germany - in particular, the German parliament - still controls the process of and the transition to the monetary union. This issue is not primarily linked to the relationship between national courts and the ECJ. However, it is most closely linked to the problem of Kompetenz-Kompetenz as it appears in the context of state theory and of the law of international organizations, that is to the question whether Germany still controls the integration process. The Court tries to explain that Germany and not the European Commission or the Council of Ministers decides upon this major step of further integration. According to the Federal Constitutional Court, it is the German parliament who attributes these further powers entailed by the monetary union to the Communities. Therefore, according to the logic of the Court, Germany still controls the integration process and has Kompetenz-Kompetenz.

But the Federal Constitutional Court’s explanations on the monetary union also concern its relationship with the ECJ and its approach to EC law for several reasons: (I) The Court’s statements on monetary union concern the distribution of power between member states and community organs. This indirectly affects the distribution of power between the ECJ as a Community organ and national

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courts. (2) The Court interprets the Treaty of Maastricht even though this falls into the exclusive competence of the ECJ. (3) The Court emphasizes conditions for Germany’s integration into monetary union, foremost the ability to withdraw and thus limits the reach of Community law provisions.

The following section shows how hard the Court tries to fit the provisions of the Maastricht Treaty on monetary union into its paradigm of German parliamentary control of the integration process.

(ii) Interpreting the Provisions on Monetary Union to Make them Constitutional - An Effort in Cooperation

The Federal Constitutional Court had to ask whether the development leading to the monetary union was sufficiently anticipated by the ratification law to the Treaty Establishing the European Union. If the Maastricht Treaty permitted a not sufficiently anticipated development beyond parliamentary control, this would violate the right to democratic participation derived from Art. 38 of the Basic Law. The Federal Constitutional Court tries to interpret the Treaty to make it constitutional. This is the German Court’s part of its "cooperative relationship" with the European Communities. Art. 109j para. 4 of the Treaty Establishing the European Communities reads: "If by the end of 1997 the date for the beginning of the third stage has not been set, the third stage shall start on 1 January 1999". According to the Federal Constitutional Court, this provision should be considered as an objective rather than a date that can be legally enforced. In principle, the ECJ is competent to interpret the articles of the Treaty. The statements of the Federal Constitutional Court are an emanation of Germany’s remaining sovereignty and Kompetenz-Kompetenz as understood by the Constitutional Court. If the Maastricht Treaty would automatically lead to a monetary union and if member states including Germany could not control whether the stability requirements were fulfilled, this would violate the principle of democracy.

According to Art. 5 of the Treaty Establishing the European Economic Community, member states are under a duty to facilitate the achievements of the Community’s aims. The Federal Constitutional Court points out that the provision implies an obligation to mutually cooperate with the Communities as

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81 Cf. 33 ILM 434 (1994).
According to the Federal Constitutional Court, the concern of the German Federal Parliament to reserve the right to make its own evaluation on the transition to the third stage of economic and monetary union, and therefore to resist any relaxation of the criteria for stability, may be based in particular on Art. 6 of the Protocol on the Convergence Criteria. The convergence criteria to be fulfilled in order to reach the third stage of the monetary union are: the achievement of a high degree of price stability; the sustainability of the government financial position; the observance of the normal fluctuation margins provided for by the Exchange Rate Mechanism of the European Monetary System, for at least two years, without devaluing against the currency of any other member state; and the durability of convergence achieved by the member state and of its participation in the exchange rate mechanism of the European Monetary System being reflected in the long term interest rate levels. According to Art. 109j of the Treaty Establishing the European Communities the Council decides by a qualified majority, among other things, whether it is appropriate for the Community to enter the third stage and, if so, set the date for the beginning of the third stage. Thereby, the Council "takes due account of the reports" by the Commission and the European Monetary Institute on the convergence criteria specified in the Protocol on the Convergence Criteria. According to the already mentioned Article 6 of this Protocol, the Council can only replace the convergence criteria laid down in the Protocol unanimously. From this requirement of unanimity, the Federal Constitutional Court concludes, in a complicated operation, that there can be no relaxation of the convergence criteria without German consent and thus not without substantial participation of the German Federal Parliament.

The Federal Court's reasoning is complicated and not totally convincing. The Council only has to take "due account" of the reports on the convergence criteria in the framework of its majority decision on entrance into the third stage (Art. 109j para. 3 of EC Treaty). Moreover, as to the convergence criteria, we are dealing with economic facts. The evaluation of economic facts is not fully

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82 33 ILM 434 (1994).

83 Art. 6 of the Protocol on the Convergence Criteria Referred to in Article 109j of the Treaty Establishing the European Communities reads: "The Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, the EMI or the ECB as the case may be, and the Committee referred to in Article 109c, adopt appropriate provisions to lay down the details of the convergence criteria referred to in Article 109j of this Treaty, which shall then replace this Protocol." Reproduced at 33 ILM 353 (1994).
justiciable. It will also be important who decides. The Federal Constitutional Court tries very hard to minimize these imponderables and thus concludes that the German Federal Parliament sufficiently controls with respect to the strict convergence criteria. 84

Interpreting the provisions on the monetary union, the Federal Constitutional Court tried very hard to avoid conflicts between German constitutional law and European law (viz. international law). Such conflicts could only be resolved by the precedence of either national or international/European law. European law requires precedence, but national constitutional law cannot totally give way to supranational law as long as the Communities are not a Federal State with Kompetenz-Kompetenz. The interpretational endeavors of the Federal Constitutional Court have to be seen against this background. Once the Court had accepted the constitutional complaint alleging violation of the principle of democracy, it was feared that the Federal Constitutional Court might require the Federal Government to renegotiate the provisions on the monetary union or even to make a reservation as the United Kingdom and Denmark did. The Court’s approach to interpret the provisions on the monetary union to make them constitutional was the alternative to these further reaching possibilities. It could be seen as an effort of the Federal Constitutional Court to cooperate in European integration.

(iii) Withdrawal from the Community of Stability

The Protocol on the Transition to the Third Stage of Economic and Monetary Union underlines "the irreversible character of the Community’s movement to the third stage of Economic and Monetary Union"85. According to Art. 109I para. 4 of the Treaty, the Council "shall adopt the conversion rates at which the currencies of member states shall be irrevocably fixed and at which

84 33 ILM 436 (1994): "In conclusion, the Federal Republic of Germany is not, by ratifying the Maastricht Treaty, subjecting itself to an uncontrollable, unforeseeable process which will lead inexorably towards monetary union; the Maastricht Treaty simply paves the way for gradual further integration of the European Communities as a community of laws. Every further step along this way is dependent either upon conditions being fulfilled by the parliament which can already be foreseen, or upon further consent from the Federal Government, which consent is subject to parliamentary influence. Even after transition to the third stage, development of the monetary union is subject to foreseeable standards as thus to parliamentary accountability ...".

irrevocably fixed rate the ECU shall be substituted for these currencies ... ." This would suggest that at least a unilateral withdrawal from the monetary union is inadmissible. For the Federal Constitutional Court, respect for the convergence criteria, which have to be understood strictly, is vital to the question of withdrawal. The Court sets forth:

"The Maastricht Treaty sets long-term standards which establish the goal of stability as the yardstick by which the monetary union is to be measured, which endeavor, by institutional provisions, to ensure that these objectives are fulfilled, and which finally do not stand in the way of withdrawal from the Community as a last resort if it proves impossible to achieve the stability sought."

and:

"This concept of the monetary union as a community of stability is the basis and object of the German Act of Accession. If the monetary union were not able to continually develop that stability existing upon transition to the third stage as provided by the mandate of stability which has been agreed upon, it would move away from the concept upon which the Maastricht Treaty is based."

The future economic development cannot be predicted even if the Treaty and the relevant protocols contain many provisions on stability. Therefore, the Federal Constitutional Court takes into account the eventuality of failure of the community of stability. Especially the second passage quoted suggests the invocation of rules like fundamental change of circumstances, clausula rebus sic stantibus or frustration. According to Art. 62 of the Vienna Convention on the

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86 But see C. Tomuschat, Die Europäische Union unter der Aufsicht des Bundesverfassungsgerichts, 20 EuGRZ 489 ff., 495, note 33 (1993). According to Tomuschat, denunciation of or withdrawal from the monetary union is admissible pursuant to Art. 56 of the Vienna Convention on the Law of Treaties. Art. 56 reads:

"(1) A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:

(a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or

(b) a rights of denunciation or withdrawal may be implied by the nature of the treaty ...

87 33 ILM 436 (1994).

88 33 ILM 437 (1994).
Law of Treaties, "a fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the Treaty unless: (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the Treaty; and (b) the effect of the change is radically to transform the obligations still to be performed under the Treaty." These are very strict requirements. The rule on fundamental change of circumstances plays no role in state practice. Moreover, it would not be easy for Germany to maintain that a potential relaxation of the convergence criteria is a fundamental change of circumstances from an objective perspective. If, according to Art. 109j EC Treaty, member states evaluate economic facts by majority, it seems natural that not necessarily the especially strict requirements of Germany will prevail. It would thus be difficult for Germany to withdraw from the monetary union unilaterally.

Whether it would be compatible with European and international law to withdraw from the monetary union by mutual consent is another question. The Protocol on the Transition to the Third Stage of Economic and Monetary Union underlines "the irreversible character of the Community’s movement to the third stage of Economic and Monetary Union" speaks against dissolution by mutual consent. The monetary union appears as an essential further development of the Founding Treaties which are "concluded for an unlimited period". By accepting these reservations, the other member states showed that they consider these reservations as compatible with the object and purpose of the Treaty. The better reasons probably speak for the admissibility of withdrawal from the monetary union by mutual consent. This is even true if one adheres to the view that withdrawal from the Communities by mutual consent is excluded on account of the stage of integration reached by now.

The Federal Constitutional Court’s explanations on withdrawal from the "community of stability" interpret the Treaty to make it constitutional. At the same time they underline the importance of strictly adhering to the convergence criteria. In this sense they could be understood as an appeal to the Community

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institutions and to the other member states. The Federal Constitutional Court constitutionalized the convergence criteria; transgressing the convergence criteria would be an undemocratic ultra vires act. In the same judgment, the Court emphasized the Communities’ duty to take the constitutional interests of the member states into account. Thus, in a certain way, even the Court’s explanations on monetary union can be seen in the larger context of cooperation and dialogue between Community institutions and the Federal Constitutional Court.

e) Conclusion

The above shows that the importance of the Maastricht decision does not lie in a change of the jurisprudence of the Federal Constitutional Court on the problem of Kompetenz-Kompetenz. The Court did not doctrinally change grounds from the earlier decision involving Kompetenz-Kompetenz; in fact, it never recognized Kompetenz-Kompetenz as lying with the Community. What makes the Maastricht decision special is the detailed discussion of various provisions of the Treaty of Maastricht to find out whether they constitute a transfer of Kompetenz-Kompetenz to the Communities, thus violating the Federal Parliament’s prerogatives. The Maastricht decision can be seen as indicating how the Federal Constitutional Court may, in future, exercise an additional control of the development of Community law, notably whether Community organs have transgressed their authority.

The second point of importance is the Federal Constitutional Court’s view of democracy as presupposing a parliament with substantive powers. This in turn requires that a transfer of sovereign powers to an inter-governmental organization under the new Art. 23 para. 1 of the Basic Law is limited. Moreover, if the German parliament empowered the European Communities unrestrictedly, Germany would lose its statehood according to the traditional concept of sovereignty adopted by the Court. This is a consequence that the Basic Law in its present form does not provide for. A sovereign state is characterized by its Kompetenz-Kompetenz: If the Treaty of Maastricht had procured the European Communities with Kompetenz-Kompetenz, this would

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have been unconstitutional under German law.93 Therefore, in the reasoning of the Constitutional Court, reserving its right to review whether Community organs have acted ultra vires is a precondition to finding ratification of the Treaty of Maastricht constitutional. The Kompetenz-Kompetenz of Germany as opposed to the Kom-petenz-Kompetenz of the Communities implies, according to this logic, that national authorities, viz. the Federal Constitutional Court and not supranational organs (viz. the ECJ) decide on the applicability of ultra vires acts in Germany.

2. The European Court and National Courts

a) The German Federal Constitutional Court’s "Cooperative Relationship" with the ECJ94

According to the Founding Treaties, the ECJ decides authoritatively on the interpretation of Community law. However, this monopoly of the ECJ has been challenged and qualified by the highest national courts of some member states claiming their jurisdiction to control whether Community acts remain within the constitutional authorization. Pursuant to this approach by the Federal Constitutional Court, only acts within constitutional authorization benefit from the supremacy of Community law.95 This conflicts with the position of the ECJ under Community law.

Until the Maastricht-judgment, the Federal Constitutional Court held that it could only control the constitutionality of acts or emanations of the German government.96 The Federal Constitutional Court reviewed the German implementation acts to acts of the Communities directly; the corresponding Community acts, however, were subject to an indirect control. The German Federal Constitutional Court reversed this jurisprudence in its judgment on the Treaty of Maastricht saying:

94 For a general evaluation see H. Gersdorf, Das Kooperationsverhältnis zwischen deutscher Gerichtsbarkeit und EuGH, 24 DVBl 674 ff. (1994).
96 Cf. 58 BVerfGE 1, 27 (1981) EUROCONTROL.
"Acts of the particular public power of a supranational organization which is separate from the State power of the member states may also affect those persons protected by the basic rights in Germany. Such acts therefore affect the guarantees provided under the Basic Law and the duties of the Federal Constitutional Court, which include the protection of basic rights in Germany, and not only in respect of German governmental institutions (BVerfGE 58, 1, 27 reversed). However, the Federal Constitutional Court exercises its jurisdiction regarding the applicability of derivative Community law in Germany in a "cooperative relationship" with the ECJ."97

According to the Federal Constitutional Court, "the ECJ guarantees the protection of basic rights in each individual case for the entire area of the European Communities; the Federal Constitutional Court can therefore limit itself to a general guaranty of mandatory standards of basic rights." Here, the Federal Constitutional Court refers to the already cited passage of Solange II saying that it was not shown that the ECJ was absolutely or generally unable or unwilling to recognize or protect the basic rights of the complainant.98 Thus, the Federal Constitutional Court tries to put its Maastricht decision in the tradition of the Solange II decision. The Federal Constitutional Court’s ruling on the non-binding character of ultra-vires acts must be seen in this relatively restrictive context. From the Maastricht decision, it should be clear that only the Federal Constitutional Court and no other German state authority can decide on the non-binding character of a piece of Community legislation.99 And the Constitutional Court would do so only in exceptional cases.

The Federal Constitutional Court’s dictum must not be misunderstood in the sense that, now, any German state organ, any court or any agency may challenge the validity of Community acts.100 Such an approach would lead to the fragmentation of Community law. The context of the Court’s statements on the non-binding force of ultra-vires acts of the Communities leaves no room for an interpretation challenging the Federal Constitutional Court’s monopoly on

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97 33 ILM 388 ff., 396 (1994). However, the author translated "Abweichung von BVerfGE 58, 1, 27" with "BVerfGE 58, 1, 27 reversed" instead of "notwithstanding BVerfGE 58, 1, 27" which is the ILM version.

98 73 BVerfGE 339, 387 (1986) and above, p. 7.


decisions regarding the validity of Community acts.\footnote{101}

The Federal Constitutional Court affirms that there is a mutual relationship of cooperation between the Communities and the member states. Member states must not only fulfill their obligations under Community law. Rather, the Communities are also under a duty to take the constitutional interest of member states into account. The fundamental rights jurisprudence of the ECJ is seen partly as a reaction to the German Solange I decision. The "cooperative relationship" with the ECJ is also directed toward the mutual influence of the European Court and of the constitutional courts of member states. The ECJ may dislike this. But, against that, the Federal Constitutional Court points to the Kompetenz-Kompetenz, which is still with the member states.

The concept of a cooperative relationship between the constitutional courts of the member states and the ECJ is not new, Frowein, in 1976, diagnosed a cooperative relationship between the ECJ and the constitutional courts of member states in the mélanges for the Federal Constitutional Court.\footnote{102} Many share the opinion that the German Constitutional Court’s Solange I decision substantially influenced the fundamental rights jurisprudence of the ECJ.\footnote{103} In this respect, it should be noted that the cooperative relationship is no one-way street. The Maybe decision is a clear example of how the Federal Constitutional Court responded in a positive way to the ECJ’s growing human rights jurisprudence. This respect of the ECJ for the Constitutional Court’s concern with human rights can be seen as an engagement in a cooperative relationship with the Constitutional Court, which constituted the underlying motivation for the latter’s decision to recognize the ECJ’s exclusive competence in interpreting Community law. The Federal Constitutional Court may have hoped to again influence the ECJ by "Solange III". This time, the Federal Constitutional Court’s concern was not only fundamental rights, but more generally the dynamic activism of the Luxembourg Court. One might argue that here, as in the Maybe decision, the Federal Constitutional Court tries to establish a cooperative relationship with the ECJ to arrive at a division of competences.
between the two courts in order to preserve what is regarded as fundamental to the political system of Germany.104

b) The Federal Constitutional Court - Last Instance in Disputes on Foreign Relations Politics?

The Federal Constitutional Court is often reproached as taking over competences of other branches of government by setting detailed limits to future government action that leave little or no room to maneuver. Mindful of that criticism, the Court tried in the Maastricht decision to assure itself of wide support for its judgment while respecting the political decision taken by parliament.105

The main way by which the Court sought support is its emphasis on the constitutionality of the envisaged monetary union. After the elaboration of the Maastricht Treaty, there was widespread fear within Germany that the monetary union would weaken the German currency. This special attachment of the German population to a strong currency stems from the historical experience of currency reforms in Germany entailing the loss of life-long earnings. In addition, the strength of the Deutsche Mark is considered by many as a achievement of post-war Germany which should not be given up lightly.106 One should bear in mind that with the unification of Germany and the currency union preceding it, the population of the former GDR experienced an albeit nominal devaluation of their earnings107 while the population of the former FRG feared inflation through a rise in money necessary to cope with unification. Thus, political support for the anti-Maastricht forces grew. It was within this context that the


106 J. Wieland even goes so far as to say that "to the general public the Mark is a foundation of the Republic which is perhaps more important than the Constitution itself", cf. J. Wieland, Germany in the European Union - The Maastricht Decision of the Bundesverfassungsgericht, 5 EJIL 259 ff., 260 (1994).

107 Despite the fact that the lack of purchasing power of the East German currency (Mark der DDR) was notorious, the psychological impact of giving up one’s currency was such as to prohibit a political decision in favor of economically sound exchange rates. One relevant factor may also have been that in the GDR the official exchange rate between the two German currencies had been 1:1.
Federal Constitutional Court rendered its Maastricht decision. This background explains why the Court elaborated in detail on the question of monetary union and why it emphasized the respect of the convergence criteria by making it a precondition for the constitutionality of the Maastricht Treaty.

The Maastricht decision is another good example of how the Federal Constitutional Court copes with the German tendency to constitutionalize foreign policy questions. Perhaps more than in other countries with a constitutional court, a defeated opposition will try to have the political decision overturned by the Constitutional Court. To some extent, this is due to the fact that the Federal Constitutional Court does not apply the political question doctrine. Every constitutional law question must be answered by the Court as long as the procedural requirements are fulfilled. Especially with the procedure of abstract norm control\(^{108}\) (i.e. the control of the constitutionality of a norm unrelated to a concrete case before a court, which can be instituted by a political party constituting one third of the MPs in the Bundestag) a law adopted can be subjected to constitutional scrutiny. Yet it is not only due to constitutional procedure that the Federal Constitutional Court is called upon to decide politically controversial questions. To a great extent, the national identity of post-war Germany is founded on and shaped by the constitution. Instead of an identity based on the nation-state, discredited by the Nazis, the Federal Republic of Germany developed a "constitutional patriotism" (Verfassungspatriotismus), i.e. a pride in the values protected by the constitution and the established political system. The Basic Law is considered a major achievement in overcoming Germany’s undemocratic past. Therefore, respect for the constitution is indispensable and has to be ensured to prevent even the appearance of a relapse to that past. This concern is also the reason why the political discussion, especially in delicate questions, cannot focus openly on national interests, as they are seen as a return to mere power politics associated with Germany’s recent history. Instead, the constitutionality of the measure envisaged is regarded as being decisive.

These are some of the reasons why the Constitutional Court has been called upon to decide the most controversial political decisions, such as the deployment of nuclear missiles within Germany in the 1980s, or more recently the participation of the German Bundeswehr in the UN’s Somalia mission or the engagement of the Bundeswehr in NATO actions concerning former Yugoslavia.

\(^{108}\) Art. 93 para. 2: "The Federal Constitutional Court decides in disputes or cases of doubt concerning the formal or material compatibility of federal statutes or statutes of the Länder with this Basic Law (...) upon the application by the Federal Government, the government of a Land or one third of the members of the Federal Parliament."
As to the Maastricht decision, the Court had to take into account the widespread Euro-scepticism that had replaced the eu(ro)phoria of the 1980s. The judgment shows how the Court tried to steer a course between the two positions taken by the German public: On the one hand, the demands to declare the Treaty of Maastricht not compatible with the Basic Law, so that at least a re-negotiation of the Treaty would have been necessary, and the position that the Treaty should be ratified without any conditions attached so that the development towards an "ever closer union" could continue. While respecting the political position taken by the German parliament which had, through the ratification law to the Treaty of Maastricht, opted in favor of the latter position, the Court nevertheless took the objections seriously by using them to ensure that major future changes in the conception of the division of competences between the European Communities and the member states will be subjected to both parliamentary control and that of the Federal Constitutional Court.

c) The Interplay of Community Law and National Law in the Jurisprudence of Other German Courts

The jurisprudence of the Federal Constitutional Court has generally remained unopposed by other German courts. Courts have accepted the supremacy of Community law and the ECJ's exclusive competence to interpret Community law. They widely make use of the procedure to request a preliminary ruling under Art. 177 of the EC Treaty. However, recently, the Federal Labor Court (Bundesarbeitsgericht) has begun to use this procedure to force the ECJ to reconsider decisions that even the traditionally employee-friendly Labor Court regards as being too far reaching. In one case the Labor Court explicitly stated that it requested a preliminary ruling because it did not envisage that it would follow the jurisprudence of the ECJ. This refers to the case of Bötel in which the European Court had ruled that a part-time employee has to be paid for the time spent on the employees' council even though the meetings had taken place outside the employee's working hours. That decision was heavily criticized by German scholars for not taking into account that under German law membership in the employees' council is a honorary, non-paid function. The ECJ's interpretation of EC law amounts to a change of

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character of that function. The Labor Court shares this criticism of the ECJ; in its view, the European Court seems to have misunderstood the German law background. In its request for a preliminary ruling in a similar case, the Labor Court explicitly asked whether Community law prohibits the institution of an honorary membership in the employees' council. This question is rightly translated by a critic as meaning "Do you really believe the Böteli decision is correct?"

A second case in point is the case of Paletta. Several years in a row, the family of Mr. Paletta had fallen ill at the end of their vacation in their home town in Italy. His employer refused to pay the salary during the time of the employee's illness because he did not accept the Italian medical certificates produced by Mr. Paletta. The ECJ ruled that the medical findings are binding upon the employer if they are made by an authority of the employee's place of residence. The strong criticism that this decision encountered was based on the fact that the ECJ seemed to exclude any effective means against abuse of the right to continued salary in the case of an illness. Sharing this concern, the Federal Labor Court referred the same case to the ECJ again, explaining that this extensive interpretation of the ECJ's decision would amount to a violation of the principle of proportionality. By submitting the same case to the Court of the European Communities a second time, the critical attitude of the Federal Labor Court towards the ECJ is even more obvious than in the Böteli case.

This development can be seen as an attempt by the Labor Court to establish its own "cooperative relationship" with the ECJ. The Court attempts to enter into


113 Ibid. at 278.


a dialogue on the interpretation of Community law by pointing out the municipal law background of a question and by stressing that the consequences of a chosen interpretation have to be taken into account. This reflects an increased sense of self-consciousness by the Labor Court, which does not see itself in an inferior position vis-a-vis the ECJ and which asserts its own right and obligation to ensure a coherent national legal system.

It should be noted that in the field of labor law the Federal Labor Court was not the first German court to use the procedure of preliminary ruling to harmonize national and European law. Already in 1991, two labor courts of first instance had requested the ECJ to reconsider its rulings dealing with the succession in labor contracts through the sale of an enterprise. Under German law, employees have the right to challenge the transfer of an enterprise. According to the established case law of the Federal Labor Court, the legal consequence of that challenge is that the seller remains bound by the existing labor contract between the employees and the transferring enterprise. The ECJ, however, held that despite the employee's challenge to the sale the seller is freed of any obligation under the existing labor contract. Upon the referrals of the two lower labor courts, the ECJ distinguished its prior case law and in effect reversed its rulings as requested by the Federal Labor Court.

As the criticism of the European Court's decisions mounts, one can expect that the Labor Court will continue its dialogue with the ECJ in this manner, especially in cases where the latter's decisions summarily abolish an elaborate and long-standing case law of the Federal Labor Court. A case in point could be the transfer of parts of enterprises. According to the jurisprudence of the ECJ, such a transfer takes place even when merely a task that used to be fulfilled by a single person is transferred to another enterprise. The result is that this

118 Sect. 613a of the Civil Code (Bürgerliches Gesetzbuch, BGB).


122 Case of Christel Schmidt/Spar- und Leihkasse der früheren Ämter Bordesholm, Kiel und Cronshagen, Decision of April 14, 1994, 11 NZA 545 ff. (1994). The case concerned a cleaning woman who was in charge of the premises of a small bank branch. The bank

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one employee by law becomes an employee of the enterprise to which the task has been transferred. In contrast to the Federal Labor Court’s case law, no additional condition has to be met, such as the transfer of specific means to fulfill the task or of the pre-existing organizational structure. There are already calls for further requests for preliminary rulings to bring about changes or limitations of the European Court’s interpretation in this matter. A comparable situation is developing with regard to the ECJ’s jurisprudence concerning factual discrimination. According to the ECJ, there is factual discrimination if a provision negatively affects a significantly higher percentage of women than of men and if it cannot be proved that there are objective reasons for this distinction. The ECJ has, for example, extended the right to continued salary in case of illness to part-time workers who are mainly women, and has ruled that the employer cannot renounce a contract with a woman on the grounds that her pregnancy (unknown at the time of conclusion of the contract) prevents her by law from fulfilling her contractual obligation to work at night or from replacing another pregnant worker. Critics of this case-law see this as an attempt to realize social policy objectives - for which the Community does not have competence - through the labor law competences of

wanted to extend its general contract with a cleaning company to this branch as well. The cleaning enterprise offered Ms Schmidt to work for them, but she refused to do so because she considered the conditions of the new contract to be less favorable than those of the old contract. Therefore, she asked the courts to find that there was a transfer of a part of the bank’s enterprise, so that her contract with the bank now extended by law to the cleaning company.


Case of Webb/EMO Air Cargo 'AUK'S Ltd., Case No. C-32/93, Decision of July 14, 1994, 11 NZA 783 f. (1994). However, the ECJ’s decision might have been less employee-friendly, had the replacing worker’s contract not been concluded for an unlimited period.
the EC. It is also to be feared that the increase in social benefits are accorded to holders of part-time jobs will render these jobs too costly, especially for small enterprises. Hiring women might thus become an unbearable economic burden if there are no compensatory measures taken on the national level. This might have the result that by increasing the legal protection of women, especially in part-time jobs, the number of such jobs will decrease, so that the aim pursued is thwarted by the means employed. These examples show that the impact of Community law on the German legal order is increasingly noticed, and that the legal community becomes aware of the potential of a "cooperative relationship" with the ECJ.

The one Court that for a long time adhered to its own jurisprudence on the relationship of Community law and national law is the Federal Tax Court (Bundesfinanzhof). The first case relevant to this question was decided by the Tax Court in 1968. The case concerned the legal consequences of a Community regulation within the member states. Basing its reasoning on the ECJ's jurisprudence on the autonomous character of EC law, the Tax Court concluded that it was the task of the separate member states' courts to resolve the conflict between the Community law norm and the national norm. The Tax Court decided that there was only a priority in application, not in validity - a qualification shared by the Federal Constitutional Court in its 1971 decision. However, the Tax Court, again pre-empting the Constitutional Court's jurisprudence, indicated that in specific cases, provisions of the Basic Law, in particular basic rights, can hinder the application of a Community regulation. As to the autonomy of Community law, the Federal Tax Court underlines that this "autonomy" is created by the transfer of powers to the European Communities under Art 24 para. 1 of the Basic Law. Therefore, the


131 93 BFHE 102 ff. (1968).

132 BFH ibid. at 102, first operative paragraph.

133 BFH ibid. at 108 f.
The extent to which the Federal Tax Court reserved its right to control the constitutionality of Community law became clear in the 1981 decision on the direct applicability of directives. The Court rejected the ECJ’s jurisprudence in that matter by arguing that the transfer of powers under Art. 24 para. 1 of the Basic Law did not include legislative competences in the field of turnover taxes. The direct effect of a directive on that tax would, however, amount to such a competence. Considering the wording of the EC Treaty as being clear, the Tax Court concluded that the pertinent jurisprudence of the ECJ was not valid within the German legal order. With this reasoning, the Court explicitly supported the position of the French Conseil d’Etat. What the Court did, in fact, was not an interpretation of the German act of accession under Art. 24 para. 1, but of the EC Treaty itself. Thus, it encroached upon the exclusive domain of the ECJ. Despite the criticism that the decision encountered, the Federal Tax Court repeated its position in 1985. This time, it became clear that the Tax Court interpreted Art. 24 para. 1 of the Basic Law as allowing a transfer of powers to an intergovernmental institution only insofar as its future development of that institution is foreseeable. This reasoning resembles that of the Federal Constitutional Court in the Maastricht decision and shows a certain uneasiness at the progressive development of Community law by the ECJ. The decision was

134 BFH ibid. at 107.

135 93 BFHE 405 ff. (1968).


138 BFH ibid. at 443.


141 BFH ibid. at 387.
rightly criticized because of disregard for the ECJ's exclusive competence under Art. 177 of the EC Treaty.\textsuperscript{142} The Decision of the Federal Constitutional Court of 1987,\textsuperscript{143} by which it ruled that the Tax Court's decision not to request a preliminary ruling violated the right to a lawful judge, effectively ended the controversy.

What remains, however, is the question of the underlying reasons of the Tax Court's decisions. The distrust towards the ECJ's approach of "integration through jurisprudence" has already been mentioned. Another reason seems to be a power struggle between the Federal Tax Court and the ECJ. In an early decision, the Tax Court had in a request for a preliminary ruling criticized the ECJ for demanding from national courts that they ensure the fulfillment of the EC Treaty through decisions in individual cases, although there were other means provided for by the Treaty.\textsuperscript{144} This shows that the Tax Court did not want to be turned into a mere assistant to the ECJ but tried to reserve its own independence through exclusive competences for itself. Interestingly, although the Federal Constitutional Court overruled the Tax Court, it finally arrived at a similar position. Yet, the main difference between the jurisprudence of both courts is that the Constitutional Court limits its own control to extreme cases of ultra-vires acts of Community organs.\textsuperscript{145}

d) "La Doctrine" and its impact on the Federal Constitutional Court

The most important landmark decisions in Germany are Solange I, Solange II and the recent Maastricht decision, all by the Federal Constitutional Court. These decisions, even though not inconsistent, manifest different approaches to European integration. They can be explained in the context of the politico-doctrinal contexts of their time and in the framework of the Federal Constitutional Court's "cooperative relationship" with the ECJ.


\textsuperscript{143} 73 BVerfGE 339 ff. (1986).

\textsuperscript{144} BFH, Decision of 18 July, 1967, 2 EuR 360 ff. (1967).

\textsuperscript{145} However, Meessen maintains that today the Federal Constitutional Court regrets to have overruled the Tax Court, see K. Meessen, Hedging European Integration: The Maastricht-Judgment of the Federal Constitutional Court of Germany, 17 Fordham Int’l Law Journal 510 ff., 520 f (1994).
aa) Solange I

The Federal Republic of Germany considers the protection of the basic rights guaranteed in the Basic Law as probably the major asset of the "new" post Third Reich Germany.146 After World War II, Germany somewhat lost its confidence in politics and in the legislature. The Federal Constitutional Court is to fill this vacuum. These are elements of the identity of post-war Germany and may help to explain the Federal Constitutional Court’s requirement in Solange I that within the Communities a court must protect the fundamental rights of the individual guaranteed "in a valid and formulated catalogue of basic rights established by a parliament, which is adequate to the catalogue of basic rights of the Basic Law".147 Until 1974, the ECJ had rather neglected the element of fundamental rights of the individual in its jurisprudence. The heavily criticized Solange I decision was a reaction to this deficit.

Solange I, on the other hand, was criticized for "Germanizing" the Communities - of putting them too closely under the restraints of the German Basic Law.148 It was considered a backward decision, which might damage the process of integration.149

As opposed to the Solange II and the Maastricht decisions, Solange I was handed down as a split decision, with three out of eight justices dissenting.150 According to the dissenting justices, basic rights are not only guaranteed by the Basic Law within the national legal order of the Federal Republic of Germany, but also by the legal order of the European Communities. No member state can request that fundamental rights are guaranteed on the Community level in


147 Cf. the Solange I-decision, 37 BVerfGE 271 (1974), supra note 10 and accompanying text.


exactly the same way as under the national constitution. Particularly, the ECJ ensures respect for the rule of law and the basic rights on the Community level, the dissenting vote says. The dissenters read Art. 24 of the Basic Law regarding the transfer of sovereign powers in a way that forbids national authorities to review acts of the supranational organization. The legal order of the Communities is structurally congruent with the German constitution, according to the dissenters. Therefore, the Federal Constitutional Court has no jurisdiction to review Community law on whether it is compatible with the Basic Law. The Federal Constitutional Court, the dissenters concluded, cannot rule on the validity or invalidity or the applicability or inapplicability of Community law within Germany. The dissenting vote in Solange I underlines the authors' trust in the Community legal order. The dissenters do not raise the problem of ultra vires acts and Kompetenz-Kompetenz, perhaps assuming these problems are factually irrelevant.

It is interesting to note that, like the reporting judge in Solange II, one of the dissenters in Solange I was particularly internationally educated: Justice Rupp had been a research fellow at Harvard Law School and had been a fellow at the Kaiser-Wilhelm-Institute for Foreign and Private International Law, the predecessor of the Max-Planck-Institute. This background explains his reluctance to accept a national law standard for actions of an international organization.

The requirement of a written catalogue of basic rights was especially criticized. It was rightly maintained that other countries like the United Kingdom of Great Britain and Northern Ireland protected the basic rights effectively without such a written catalogue. The condition of a fundamental rights protection modeled exactly upon the protection of basic rights in Germany could indeed

151 Ibid. at 297.

152 Ibid. at 292.

153 Ibid. 295.

154 But see the Austrian draft ratification law on the Treaty Establishing a European Union. Accordingly, democracy in Austria is substantially modified by accession to the European Union. Therefore, a popular referendum is required.

155 Justice Hirsch had been a MP of the Bavarian State legislature; of Justice Wand there is no information available.

hinder further integration. The Commission of the European Communities told
the federal government that the decision of the Federal Constitutional Court
raised grave concerns and that it put at risk a most important principle of the
Founding Treaties, i.e. the uniform application of Community law in all member
states. The Commission explicitly reserved its right to initiate a procedure
against the Federal Republic of Germany for violation of the treaties.157

Thus, Solange I was overwhelmingly criticized, both nationally and
internationally. However, many who had criticized Solange I harshly later
admitted that this decision had a positive influence on the development of the
fundamental rights protection within the Communities.158

In the 1970s and 80s, the ECJ further developed its fundamental rights
jurisprudence.159 The ECJ now also bases its judgments on the European
Convention on Human Rights which all member states of the European
Communities approved.160 As a reaction to these developments on the
European plane and possibly also to the strong criticism of Solange I, the
Federal Constitutional Court handed down its Maybe and Meanwhile
decisions.161 These decisions appeared to signal a peace-making between the
Federal Constitutional Court and the ECJ.162 They were steps towards the
Court’s approach in Solange II.

157 Cf. Zeidler ibid. 732. On the problem whether the grounds for decision of Solange I
constitute a violation of the Treaty under Art. 169 EC Treaty, see M. Hilf, 35 ZaöRV 51 ff.,
60 ff. (1975); Meyer equally suggests a procedure against the Federal Republic of Germany

158 Cf. H. Golsong, casenote, 1 EuGRZ 17 f., 18 (1974); H. P. Ipsen, Das
Bundesverfassungsgericht löst die Grundrechtsproblematik, Zum "Mittlerweile"-Beschluß des
Verfassungsrecht in der Rechtsprechung des Bundesverfassungsgerichts, 47 JZ 1092 f. (1988);
J. Scherer, Solange II: Ein grundrechtspolitischer Kompromiß, Zum Verhältnis von
Gemeinschaftsrecht und nationalem Verfassungsrecht nach dem Solange II-Beschuß des

159 Cf. R. Streinz, Bundesverfassungsgerichtlicher Grundrechtsschutz und Europäisches
Gemeinschaftsrecht (1989), 51 ff.

160 Cf. W. Zeidler, Wandel durch Annäherung - Das Bundesverfassungsgericht und das
Europarecht, in: Brandt/Gollwitzer/Henschel, Ein Richter, ein Bürger, ein Christ, Festschrift
für Helmut Simon (1987), 727 ff., 738 f.

161 Cf. supra p. 5 f.

162 Tomuschat commented on the Maybe-decision with the statement: "peace in sight".
Thus, the doctrine did not follow the Federal Constitutional Court’s reasoning in Solange I. The critique is mostly directed against the critical approach of the Federal Constitutional Court towards the Communities and towards the ECJ. Most scholars and the dissenters in Solange I share the opinion that basic rights are sufficiently guaranteed on the European plane. Critics feared that the integration process may be unduly impeded by the Federal Constitutional Court’s approach. In Solange I, the Federal Constitutional Court, in a way, already touched the problem of Kompetenz-Kompetenz with regard to basic rights. This approach of the Federal Constitutional Court as such does not meet with critique. It is generally accepted that there must be some kind of a remedy against ultra vires acts of the Community encroaching on fundamental rights. Some authors, however, are of the opinion that there is a milder remedy that would be more in accordance with Germany’s international obligations. Rather than declaring Community acts that violate basic rights inapplicable in Germany, the German government should use its influence within the Community organs so that these Community acts or the relevant Community law should be changed. These authors advocated that even Community law violating basic rights should be applicable in Germany temporarily such as not to endanger the uniform application of Community law.163

But, as already mentioned, most criticism of Solange I focused on the different factual evaluation of the protection of fundamental rights in and by the Communities and on the requirements for an effective protection of the individual. Several authors voiced their hope that the Federal Constitutional Court might soon have the chance to overrule Solange I.164

bb) Solange II

Several factors have influenced the change of the Court’s approach from Solange I to Solange II. It might be relevant that the composition of the second Senate of the Court changed completely between Solange I and Solange II.165 Moreover, the mid-seventies, the time of Solange I, was not a hightime for


164 Frowein ibid. at 213.

165 The following Justices were sitting in Solange I: Seuffert, v. Schlabendorff, Rupp, Geiger, Hirsch, Rinck, Rottmann, Wand with Justices Rupp, Hirsch and Wand dissenting. Solange II was handed down unanimously by Justices: Zeidler, Niebler, Steinberger, Träger, Mahrenholz, Böckenförde, Klein and Graßhof.
The Dollar-based Western monetary system had broken down in 1971; member states had to fight against inflation; and they had to deal with the oil crisis. In contrast Solange II was handed down in October 1986 during a very integration-friendly period. The Single European Act commonly acclaimed as a major step towards integration had been signed in February 1986 and had entered into force on July 1, 1987. The Single European Act stands for more integration, but still without the concerns which were raised from within the member states with regard to Maastricht.

Primarily, Solange II appears as a reaction to the Federal Constitutional Court to an intensified fundamental rights jurisprudence of the ECJ. Solange II also seems to be influenced by the harsh criticism met by Solange I. For in Solange II, the Federal Constitutional Court considerably relaxed its requirement for an effective protection of basic rights that meets the standards guaranteed under the German Basic Law. For example, the Federal Constitutional Court insists no more on the requirement of a written catalogue of fundamental rights. Likewise, the Federal Constitutional Court modifies its requirement of a binding catalogue of fundamental rights. For the European Communities are, not formally a party to the European Convention on Human Rights.

Some call the recent Maastricht decision "Solange III". Certainly, the Maastricht decision is less integration-friendly than Solange II. It points out that the Kompetenz-Kompetenz lies with Germany and that ultra vires acts of the Communities, for constitutional reasons, are inapplicable in Germany. In order to understand what could be understood as a step back to pre-Solange II, it is important to analyze the reactions to Solange II. To above explanations to Solange I and Solange II, suggest that Maastricht or Solange III again is a reaction to the case law and jurisprudence of the ECJ and possibly, to a lesser extent, to reactions to Solange II by la doctrine.

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166 Cf. also J.-V. Louis, Casenote, 1 EuGRZ 20 f., 21 (1974).


Reactions to Solange II were more friendly but also less unanimous than the overwhelming criticism of Solange I. Solange II was generally praised by many German scholars, especially by scholars dealing primarily with Community law.\(^{170}\) According to the former president of the Federal Constitutional Court, Wolfgang Zeidler, the Court demonstrated that it was able to flexibly react to changed factual and legal developments.\(^{171}\) Solange II is integration-friendly in two respects. According to Solange II, the European Communities and, in particular, the jurisprudence of the ECJ, now guarantee protection of basic rights that are comparable to the standards guaranteed under the Basic Law. The Federal Constitutional Court only reserves its jurisdiction for the hypothetical case in which the ECJ should become generally and totally unable or unwilling to protect fundamental rights. Moreover, Solange II makes sure that lower courts cooperate with the ECJ. If lower Courts do not request preliminary opinions from the ECJ in contravention of Art. 177 of the EC Treaty, this constitutes a violation of the basic right to a lawful judge pursuant to Art. 101 para. 1 of the Basic Law. The Federal Constitutional Court can now remedy violations of Art. 177 of the EC Treaty by lower German courts upon constitutional complaints alleging violation of Art. 101 para. 1 of the Basic Law.\(^{172}\)

Criticism of Solange II was more on procedural grounds. The Court said that requests for preliminary rulings were "inadmissible" as long as the European Communities, in particular the jurisprudence of the ECJ, generally ensures an effective protection of basic rights against acts of the Community. But there is no procedure in which the Federal Constitutional Court could find out whether the general level of basic rights protection within the Communities was still "generally" sufficient.\(^{173}\)


\(^{172}\) On Solange II, see supra on pp. 14 ff.

cc) The Maastricht Decision or "Solange III"

While Solange II might be explained as a reaction to the harsh criticism of Solange I, this is less true for the Maastricht decision. Like Solange II, the Maastricht decision was handed down without dissenting votes. Four of the justices voting for Solange II in 1986 sat in the Maastricht Court in 1993. Thus, the Maastricht Court had four new judges. Moreover, Justice Steinberger was reporting for Solange II, whereas Justice Kirchhof was reporting for the Maastricht decision. Justice Steinberger is a particularly internationally educated lawyer. He spent a long time at American law schools was a fellow with the Max Planck Institute for Foreign Public and International Law and a professor for international law and European law before becoming a Justice on the Federal Constitutional Court. Now, former Justice Steinberger is one of the directors of the Max Planck Institute for Foreign Public and International Law and teaches, among other subjects, international law and European law at the University of Heidelberg. Likewise, Justice Kirchhof is a professor at the University of Heidelberg. He teaches national public law and tax law. But these factors concerning the compositions of the Solange II court and the Maastricht court should not be overestimated. The Solange II-decision was handed down unanimously, and there are no dissenting or even concurring votes to the Maastricht decision. However, the Maastricht decision ends with the unusual clause: "The following justices participated in the decision: Vice-president Mahrenholz, Böckenhörde, Klein, Graßhof, Kruis, Kirchhof, Winter, Sommer." This leaves room for speculation. All the eight Justices participated in the decision, but whether there were dissenters and who and in what sense is left open. The Maastricht court wanted to create the appearance of unity with regard to the vital question of European integration.

The Maastricht decision concerns a completely new Treaty. Moreover, at the beginning of the 1990’s, European integration again showed symptoms of a crisis. In 1992, the Danish population in its first referendum voted against the Treaty of Maastricht. This provoked a serious crisis for the Communities. Even after the second referendum, which turned out to be in favor of Maastricht, Denmark adhered to the Union only with substantial reservations to the

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174 Justices Mahrenholz, Böckenhörde, Klein and Graßhof.

175 The new justices are: Justices Kruis, Kirchhof, Winter and Sommer.

Monetary Union. Likewise, the United Kingdom of Great Britain and Northern Ireland will not participate in the third stage of the monetary union. The French referendum, with 51.05% to 48.95%, came out very narrowly in favor of the European Union. Within the German academic community, some authors were requesting a popular referendum as a precondition to accession to the Treaty of Maastricht. Similar to Solange I, the general context of the Maastricht-judgment was thus characterized by some as a reservation against too much integration. According to Meessen, the Federal Constitutional Court had stopped integration after it had already come to a standstill.

Most importantly, several rulings of the ECJ could be considered as too far reaching. For example, in Francovich the ECJ found a general principle of Community law that member states had to pay damages for not implementing the directives of the Community. This meant damages for not enacting the respective statute. It is doubtful whether such a principle of damages for omissions of the legislator can be derived from the domestic legal orders of member states. In another judgment, the ECJ ruled that German employers had to accept medical certificates from other member states. In the specific case,

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an Italian family of four had all fallen sick altogether during their yearly summer vacation in Italy, according to the certificate. Exactly the same had happened to that family during their summer vacations in the three previous years. In Bronzino, the Court said that, in order to get family benefits for grown up children who are unemployed, it is not necessary that those children are available to a domestic placement service. Rather, the relevant provision in the German statute on availability to placement services "in the territory where this law applies" read together with the EC regulation on family allowances covers the placement services in all member states.\textsuperscript{184} In the Kus decision\textsuperscript{185}, the ECJ had interpreted the resolution of the association council broadly in granting Turkish workers a right to stay in Germany. Environmentalists do not like the judgment of the ECJ forbidding Germany to collect tolls from trucks using the Autobahn for Germany lowered its high automobile taxes at the same time.\textsuperscript{186}

The Community's protectionism against the so-called "dollar bananas"\textsuperscript{187} is difficult to understand both for the German consumer and for lawyers.

Thus, the results of the ECJ's case law are subject to criticism. The German Federal Labour Court now openly criticizes the ECJ's extensive interpretation of the prohibition of factual discrimination. Generally, the punctual influence of the ECJ in specific cases is partly seen as a danger for the consistency of the remaining codified law.\textsuperscript{188} Various preliminary rulings of the ECJ lead to certain provisions of national codifications no longer applying or only applying in modified form, because they would otherwise hinder the "effet util" of Community law.\textsuperscript{189} This may lead to an unequal treatment of similar situations depending on whether the case falls under the Court's ruling or under remaining codification. Moreover, different areas of the law, e.g. labor law, tax law and


\textsuperscript{186} Case No. C-195/90 of May 19, 1992, 3 EuZW 390 (1992).


administrative procedural law, have their own consistencies. They have developed their own principles of justice specific to the particular field. The specialized (national) courts decide real cases and controversies applying those specific principles. The Anglo-American case law method distrusts abstract principles and underlines the importance of having the issues and conflicts of interest sharpened in a real case or controversy before the court.\textsuperscript{190} The ECJ, to the contrary, is far away from the parties and from the real controversies. It decides according to abstract principles, in particular according to the one most important policy principle of "effet util", of promoting integration through law. The ECJ undergoes heavy criticism by German labor lawyers in this respect. In an article called "The ECJ in Labor Law -- the Black Series Goes on", the author states: "Reality is of no interest to the ECJ; the world only exists as will and illusion\textsuperscript{191} to the Court".\textsuperscript{192} Even when the ECJ adopts preliminary rulings, these often have a decisive impact on the case or controversy pending before the national court. If applied too extensively, the preliminary ruling procedure may conflict with the assumption that cases are best decided by courts familiar with the specific legal issues, the parties and the legal and social context of the particular case. The ECJ should be as mindful of this structural problem as compatible with the principles of integration and of "effet util".

One distinguished author sees massive deficiencies with regard to an effective protection of basic rights. He called for a modification of Solange II and that individual complainants be able to directly challenge directives and regulations of the Communities before the Federal Constitutional Court.\textsuperscript{193} This author thus predicted what would become possible after the Maastricht decision.

The Maastricht decision is a critical reaction to the dynamic jurisprudence of the ECJ.\textsuperscript{194} This is clear from the following passage:

\textsuperscript{190} Cf. W. Fikentscher, 2 Methoden des Rechts, Angloamerikanischer Rechtskreis 452 and 462 f. (1975); W. Brugger, Einführung in das öffentliche Recht der USA 83 (1993).

\textsuperscript{191} This is a reference to the famous work by the philosopher A. Schopenhauer, "Die Welt als Wille und Vorstellung" (The world as will and illusion).

\textsuperscript{192} A. Junker, Der EuGH im Arbeitsrecht - Die schwarze Serie geht weiter, 40 NJW 2527 (1994).


\textsuperscript{194} See also C. Grewe, L’arrêt de la Cour constitutionnelle fédérale allemande du 12 octobre 1993 sur le Traité de Maastricht: l’Union européenne et les droits fondamentaux, 5 RUDH, 226 ff., 231 (1993).
"If to date dynamic expansion of the existing Treaties has been based upon liberal interpretation of Art. 235 of the EEC Treaty in the sense of 'competence which rounds off the Treaty' (Vertragsabrundungskompetenz), upon considerations of the implied powers of the European Communities, and upon interpreting the Treaty in the sense of the maximum possible exploitation of the Community’s powers ('effet util') (see Zuleeg, in: von der Groeben/Thiesing/Ehlermann, EWG-Vertrag, 4th Ed. 1991, Art. 2, Annotation 3), when standards of competence are being interpreted by institutions and governmental entities of the Communities in the future, the fact that the Maastricht Treaty draws a basic distinction between the exercise of limited sovereign powers and amendment of the Treaty will have to be taken into consideration. Thus interpretation of such standards may not have an effect equivalent to an extension of the Treaty; indeed, if standards of competence were interpreted in this way, such interpretation would not have any binding effect on Germany."195

These remarks may even be directed against the position taken by Manfred Zuleeg, the German judge at the European Court. The Federal Constitutional Court criticizes Zuleeg for his advocacy of a dynamic expansion of the existing treaties, probably having in mind some judgments on social policy drafted by that judge. The passage in by Zuleeg Groeben/Thiesing/Ehlermann, which the Court cites, does not deal with "effet util" and implied powers.

3. Beyond Doctrine

Post-war Germany still has identity problems. For example, it is much more difficult for German politicians to articulate national interests than for French politicians. In comparison, it is easier for Germany to make its voice heard as the advocate or guarantor of legal principles. Interests and aims which other member states may implement politically tend to be constitutionalized in Germany.

France initiated the Luxembourg Accords requiring that the Council of Ministers decide unanimously whenever the national interest of a member state is at stake. Germany tries to influence the shape of European integration through the judiciary in the name of the fundamental rights of the individual and of democracy.

195 33 ILM 441 (1994).
a) The Solange Era

The 1974 Solange I decision is the expression of a concern for human rights protection against acts of supranational organizations which is at least understandable. Until 1974, the ECJ had rather neglected the element of fundamental rights of the individual in its jurisprudence. The heavily criticized Solange I decision was a reaction to this failing. However, the Federal Constitutional Court probably went too far in promoting this legitimate interest when it required a written human rights catalogue enacted by a parliament and comparable to the standards set up by the Basic Law. Also, the Federal Constitutional Court ignored the beginnings of a fundamental rights jurisprudence of the ECJ.

Germany’s post-war constitutional or human rights patriotism becomes clear when the Court says that Germany is constitutionally prohibited from giving up the fundamental traits of its constitution, upon which the identity of Germany is founded. The basic rights of the individual are such a fundamental trait essential to the identity of the German state.\(^{196}\)

The 1986 Solange II decision is a reconciliation with the ECJ which, meanwhile, had developed judge-made fundamental rights. But the Federal Constitutional Court also reduced its requirements and renounced a written catalogue of human rights adopted by a parliament. Such a catalogue of human rights does not exist although it would be a major factor of European integration making it easier for the people to identify with the European Union.

b) Maastricht and Aftermath

aa) Socio-political and Economic Context

The 1993 Maastricht decision was handed down in an era of Euroscepticism. The ideal of peace had become less important as war among Western European states seems unthinkable. A reunified and more self-conscious Germany was accepted and integrated into the international community. Moreover, it became questionable whether more integration, especially through a European Monetary Union, will still promote economic welfare and growth. Through German reunification every German could feel that a currency union with economically weaker partners may decrease the living standard and income of the people living in the economically more powerful state. The disappearance

of the Deutsche Mark, a symbol of economic stability, is not a perspective attractive to everyone in Germany (rather more so in France).

Thus, the Treaty on European Union constitutes a major and important further integration step without full support of the people and without the enthusiasm of the earlier European movement where the idea of peace was more vital. The latest programs of the political parties no longer mention the European federal state as an aim. In this socio-political and economic context, the German Federal Constitutional Court dared to hand down its provocative Maastricht decision.

bb) "Kompetenz-Kompetenz" and Ultra Vires Acts

As integration becomes more intensive, the Federal Constitutional Court has clearly formulated the question of principle: does the final say -- or the "Kompetenz-Kompetenz" -- rest with the European Union or the national states at this stage of integration? Or - in other words - are the member states still the "masters of the Treaties", (Herren der Verträge) deciding whether to attribute new competences to the European Communities or not? Or can the European Communities themselves create new competences by an EJC accepted too dynamic interpretation of the Treaties?

These fundamental questions about the aim and direction of European integration are - in accordance with good German tradition - put into a constitutional, legal, quasi-positivistic framework. The German Federal Constitutional Court tries to answer the questions in a constitutional complaint procedure concerning the newly created individual right to democracy. Thereby, the Court gets involved in an eminently political question: whether Germany can ratify the Treaty on European Union or not. The Treaty on European Union had the full support of the German parliament; therefore, the Federal Constitutional Court could not have hindered Germany from adhering to it. Also, the Court had always underlined the mutual duty of cooperation of member states and community organs. In this framework, the Federal Constitutional Court interpreted the Treaty of Maastricht to make it constitutional. This can be seen in particular from its restrictive interpretation of the provisions on Monetary Union.197

According to the Court, Germany (like the other member states) still has "Kompetenz Kompetenz". The Treaty is constitutional, because Germany, in particular the democratically elected German parliament, still controls the

process of integration.

However, problems arise when European organs including the ECJ overstep the competences attributed to them by the founding Treaties. The democratically elected German parliament consented to community acts covered by the Treaties; ultra vires acts not covered by the will of the German parliament violate the principle of democracy. The Federal Constitutional Court as the guarantor of basic rights takes on the role of defending the people against undemocratic ultra virus acts of the Communities. These are now directly subject to review by the Federal Constitutional Court.

cc) Impact of the Maastricht decision

The Federal Constitutional Court’s dictum that community acts not covered by the German ratification law are inapplicable in Germany for constitutional reasons sounds like an invitation to criticize and to hold inapplicable even judgments of the ECJ. Lower labour courts in Germany have used the ECJ to implement their very employee-friendly policies against the Federal Labour Court. Some strange and controversial decisions resulted. Now, some lawyers and courts have started to suggest that some of these decisions are inapplicable in Germany.198 There are several labour courts which are again requesting the ECJ to determine in preliminary proceedings under Art 177 whether it really meant what it said on an identical or a similar problem in a case decided shortly before.199 Generally, it has become more acceptable to articulate criticism of the ECJ and the EU. But this is also a consequence of the fact that more people deal with EC law now. The times has gone, when ECJ decisions were commented on only by integration friendly international or European lawyers. Thus, the success of the integration process is accompanies by increased criticism of the ECJ.


The Federal Constitutional Court itself probably will not continue in the provocative manner of the Maastricht decision. The long awaited decision of March 22, 1995 on the television directive - contrary to the expectations - does not implement limits to integration flowing from German federalism. Rather it refers to the duty of the Länder to observe the European law binding upon the Federal Republic of Germany, and which the ECJ interprets authoritatively.  

Otherwise, the decision on the TV directive concentrates on the duty to cooperate between the German Federation and the German Länder.

IV. Conclusions

In its Maastricht decision, the German Federal Constitutional Court underlined its "cooperative relationship" with the ECJ. That the Federal Constitutional Court cooperates with the ECJ is true insofar as the jurisprudence of the Luxembourg Court is probably the major factor of influence for the German Constitutional Court’s decisions concerning Europe and the problem of Kompetenz-Kompetenz.

"La doctrine" in Germany used to consist mostly of the opinions of law professors who specialize in Community law and international law. This academic community tends to find the Constitutional Court’s approach too centered on domestic law. Solange II was drafted by a law professor specializing in Community law and international law. This was the decision most acclaimed and least criticized in German academia. Otherwise, scholarly opinion or "la doctrine" has been rather critical of the Federal Constitutional Court’s judgments concerning the integration of Europe.

However, with respect to Maastricht, publications by German scholars specializing in German public law have prevailed. These authors were generally critical of too much integration. They initiated the important discussion on the implications of a far reaching integration. It was only after the Federal Constitutional Court had handed down its Maastricht decision that some German international lawyers and European law scholars came out supporting the process of integration and criticizing the Federal Constitutional Court.  


Frowein, by far the most critical commentator, the Federal Constitutional Court committed clear breaches of European Union constitutional law. On the other hand, the Maastricht decision already has followers. The explanations to the Austrian law on accession to the European Union say explicitly that the Treaty of Maastricht substantially changes democracy in Austria, that drastic ultra vires acts of the Communities are void and may even entitle Austria to withdraw under international law. Generally, the Maastricht decision is well received. Politicians very much appreciated that the Federal Constitutional Court had permitted the ratification of the Treaty of Maastricht. Interestingly, even many German European law scholars view the judgment as an important contribution to reconcile the various approaches to European integration. There hardly is explicit criticism. The Maastricht decision can be seen as an important contribution to reconciling the various approaches to European integration. It is also partly a compensation for the lack of a proper political debate on the implications of the Treaty of Maastricht and the Monetary Union. Such a discussion took place too late and too superficially in Germany. This factor furthers ambiguous feelings in the population. The Maastricht decision


"... 4. The Court commits a clear breach of European constitutional law when it authorizes German courts and administrative authorities to disregard European law where, according to these authorities, the organs of the Union or Community had no jurisdiction.

5. The Court stresses that Germany can, apparently unilaterally, withdraw from the Union. This is in clear violation of Union constitutional law.

6. The Court correctly explains that the establishment of the currency union is not an automatic matter although the treaty language seems to indicate this.

7. One may hope that the Court’s statements which are in contradiction with European constitutional law will not become effective."


takes away the basis for some of these ambiguous feelings and fears. This way, European integration is better accepted in the country.

In addition to the ECJ, "la doctrine" also influenced certain changes in the generally consistent case law of the Federal Constitutional Court.
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