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Manfred Zuleeg

Abstract

Though not exempt from the impacts of national practice and thinking, the European Community ("EC") is favored by bonds of law stronger than in other international organizations. The European Community constitutes a new legal order of international law for the benefit of which Member States have limited their sovereign rights, albeit within limited fields. The subjects of this new legal order are not only Member States but also their nationals. Independent of the legislation of Member States, Community law, therefore, not only imposes obligations on individuals, but also intended to confer upon them rights which become part of their legal heritage. The EC Treaty, although concluded by way of an international convention, nevertheless represents the constitutional document of a community of law. The essential characteristics of the Community's legal order are the precedence of Community law over the law of the Member States and the direct effect of its provisions on the Member States and their nationals. . . . Legal cohesion in the European Community is essentially weakened if a conflict arises between the European Community and national courts over the competence to deny the validity or applicability of Community law and the scope of constitutional rules. A study of the relationship between the European Court of Justice and the German Federal Constitutional Court, Bundesverfassungsgericht ("Constitutional Court"), presents this scenario.

A COMMUNITY OF LAW: LEGAL COHESION IN THE EUROPEAN UNION

*Manfred Zuleeg**

I. THE NOTION OF LEGAL COHESION

The European Union unites nation states which were some decades ago more or less isolated from each other and partly hostile to each other. The purpose of European integration is to prevent the evils of nationalism. To this end, the founders of the European Communities established, through a series of treaties¹ ("Foundation Treaties"), a supranational power which now makes up the core of the European Union. The preambles to the Foundation Treaties indicate that the integration of nation states into a supranational entity should establish a stable peace in Europe, serve the common interests, and promote economic and social progress of the European peoples. The success of this endeavor depends on the readiness of the Member States to renounce their traditional concept of sovereignty. Presently, tendencies designed to restore the old order of international relations are perceptible. While it is true that centrifugal forces also exist within some nation states, in general the nation guarantees politically that such forces do not lead to the destruction of the state.

The European Union, comprised of fifteen nations, lacks the political will expressed by a single European people to keep

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1. See Treaty Establishing the European Community, Feb. 7, 1992, [1992] 1 C.M.L.R. 573 [hereinafter EC Treaty], incorporating changes made by Treaty on European Union, Feb. 7, 1992, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 719, 31 I.L.M. 247 [hereinafter TEU]. The TEU, *supra*, amended the Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II) [hereinafter EEC Treaty] as amended by Single European Act, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741 [hereinafter SEA] in TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES (EC Off'l Pub. Off. 1987). Until 1995, the twelve EU Member States were Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, and the United Kingdom. TEU, *supra*, pmb. On January 1, 1995, Austria, Finland, and Sweden became Member States of the European Union. See Hugh Carney, *Sweden Gives Clear Yes to EU: Vote in Favour of Membership Keeps Enlargement Timetable on Course*, FIN. TIMES, Nov. 14, 1995, at 1 (discussing accession of new states).

together in spite of oncoming difficulties. In such a situation, Europe is mainly tied together by the political will of the Member States which may be diminished by various reasons. Although political participation of the European peoples represented in the European Parliament compensates the weakness of the system to an increasing extent, it is still far from countervailing the resistance of a national government to European integration.

Additional support for a united Europe may be brought about by the benefits from the Foundation Treaties and from the policies of EC institutions, especially by economic or social advantages for individuals of similar economic or social situations. In "Euro-jargon", the appropriate expression for this effect is "economic and social cohesion" as used in Article 130a of the Treaty Establishing the European Community ("EC Treaty").² According to Article 130a, in order to promote its overall harmonious development, the European Community shall develop and pursue its actions leading to the strengthening of its economic and social cohesion.³ This provision conceals the redistributive policies of the European Community. Nevertheless, the notion may be extended to other economic and social benefits.

Even if the Member States are willing to fulfill the requirements of European integration, they are often prone to give in to internal pressures to counter exigencies from the outside. Moreover, national egoism or dogma may cause the reluctance of a Member State or an individual to abide by the imperatives of the European Union. Traditional international law suffers under these deficiencies caused by the dominance of the system and the idea of nation states. Treaties in general are not as effective as internal national law.

In the European Community, the situation is different. Though not exempt from the impacts of national practice and thinking, the European Community is favored by bonds of law stronger than in other international organizations. The European Community constitutes a new legal order of international law for the benefit of which Member States have limited their sovereign rights, albeit within limited fields. The subjects of this

2. See EC Treaty, *supra* note 1, art. 130a, [1992] 1 C.M.L.R. at 612.

3. *Id.*, art. 130a, ¶ 1, [1992] 1 C.M.L.R. at 612.

new legal order are not only Member States but also their nationals. Independent of the legislation of Member States, Community law, therefore, not only imposes obligations on individuals, but also intended to confer upon them rights which become part of their legal heritage.⁴ The EC Treaty, although concluded by way of an international convention, nevertheless represents the constitutional document of a community of law. The essential characteristics of the Community's legal order are the precedence of Community law over the law of the Member States⁵ and the direct effect of its provisions on the Member States and their nationals.⁶

The EC Treaty has established its own system of law which must be applied by the courts of the Member States.⁷ It would be contrary to the nature of such a system to allow Member States to introduce or to retain measures capable of prejudice to the practical effectiveness of the EC Treaty. The binding force of the EC Treaty and of measures taken in application of it must not differ from one Member State to another as a result of internal measures, lest the functioning of the Community system should be impeded and the achievement of the aims of the EC Treaty placed in peril. Consequently, conflicts between the rules of the European Community and national rules must be resolved by applying the principle that Community law takes precedence.⁸ Thus, the particular traits of the Community's legal order may be characterized generally by the concepts of unity, effectiveness, precedence, and direct effect.

Unity of Community law would not persist were there not a court applying, or at least interpreting, this law in the same way throughout the European Community. This task is primarily the

4. *See Van Gend en Loos v. Netherlands Fiscal Administration*, Case 26/62, [1963] E.C.R. 1, 26, [1963] 2 C.M.L.R. 105, 122.

5. *See EC Treaty*, *supra* note 1, art. 5, [1992] 1 C.M.L.R. at 591. Article 5 states:
Member States shall take all appropriate measures, whether general or particular, to ensure fulfillment of the obligations arising out of the Treaty or resulting from actions taken by the institutions of the Community. They shall facilitate achievement of the Community's tasks.

They shall abstain from any measure which could jeopardize the objectives of this Treaty.

Id.

6. Opinion 1/91, European Economic Area I, [1991] E.C.R. I-6079, 6102.

7. *See Van Gend en Loos*, [1963] E.C.R. at 26, [1963] 2 C.M.L.R. at 122.

8. *Walt Wilhelm v. Bundeskartellamt*, Case No. 14/68, [1969] E.C.R. 1, 14, [1969] 8 C.M.L.R. 100, 118-19.

responsibility of the Court of Justice of the European Communities ("ECJ," "Court of Justice," or "Court").⁹ The European Community itself, the Member States, and their inhabitants are subject to the Court's authority. According to Article 164 of the EC Treaty, the Court shall ensure observance of laws through the interpretation and application of the EC Treaty.¹⁰

Without a judicial power, Community law would be threatened by subsequent practice of the Member States and the aims of the Foundation Treaties and their amendments would be unattainable.¹¹ In order to prevent such a situation, the Foundation Treaties instill powers in the ECJ which are likely to combat such a development. These powers include, most importantly, the infringement procedure and the procedure of preliminary rulings.

The latter type of jurisdiction fosters cooperation between the ECJ and the courts of the Member States.¹² In cases that national courts refer to the ECJ, the ECJ decides only upon certain elements of the litigation, namely the validity and the interpretation of Community law. The national courts consider the rest.

Under the procedure of preliminary rulings, the national courts function as Community courts. The founders of the European Community have thereby invented an effective tool to separate the observance of Community law from political interventions. The political forces in the Member States continue to influence Community law and its impact on citizens, but policy is restricted to a change of the rules. The conclusion therefrom is that economic and social cohesion, as well as legal cohesion, are inherent to the European Community. As long and as far as Article L of the Treaty on European Union ("TEU") excludes the

9. EC Treaty, *supra* note 1, art. 164, [1992] 1 C.M.L.R. at 684. The European Court of Justice ("ECJ") is the highest authority on the interpretation of Community Law. *Id.*

10. *Id.*

11. See JÜRGEN SCHWARZE, *THE ROLE OF THE EUROPEAN COURT OF JUSTICE IN THE INTERPRETATION OF UNIFORM LAW AMONG THE MEMBER STATES OF THE EUROPEAN COMMUNITIES* (1988).

12. *Schwarze v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, Case 16/65, [1965] E.C.R. 1151, 1165; *Michele Ferrer Lederer*, Case C-147/91, [1992] E.C.R. I-4097, 4115; see generally, Carl Otto Lenz, *The Role and Mechanism of the Preliminary Ruling Procedure*, 18 *FORDHAM INT'L L.J.* 388 (1995) (detailing role and purpose of ECJ preliminary rulings).

Court's jurisdiction over the TEU,¹³ legal cohesion does not work in the European Union.¹⁴

II. *THE CONFLICT OF COURTS*

Legal cohesion in the European Community is essentially weakened if a conflict arises between the European Community and national courts over the competence to deny the validity or applicability of Community law and the scope of constitutional rules. A study of the relationship between the ECJ and the German Federal Constitutional Court, *Bundesverfassungsgericht* ("Constitutional Court"), presents this scenario.

The debate again concerns the protection of fundamental rights. The first struggle over fundamental rights broke out in 1974 when the Constitutional Court proclaimed in a case known as *Solange I* that any German court must refuse to apply Community law if it conflicted with fundamental rights derived from the German Constitution, the Fundamental Law, *Grundgesetz*.¹⁵ The Constitutional Court added the proviso that this rule is binding as long as Community integration has not reached a stage at which a catalogue of fundamental rights, comparable to the one included in the Fundamental Law, is set up by a parliament for Europe. Three judges dissented. For them, the EC protection of fundamental rights was sufficient.

In *Solange I*, Community law was not affected. The Constitutional Court held that the Community rule in question was up to the standard of the Fundamental Law, but in principle Community law from then on was at the discretion of the German courts. The dissenting vote, however, showed that at the time, the ECJ had already established a system of fundamental rights equivalent to that of the Fundamental Law.¹⁶ It is a myth that *Solange I*¹⁷ encouraged the ECJ to incorporate fundamental rights into Community law. Beginning in 1969, the ECJ had developed the protection of fundamental rights based on the com-

13. TEU, *supra* note 3, art. L, O.J. C 224/1, at 99 (1992), [1992] 1 C.M.L.R. at 738.

14. See Manfred Zuleeg, *Der Rechtliche Zusammenhalt der Europäischen Gemeinschaft*, 3 ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 475-97 (1963) (presenting more extensive study of legal cohesion in European Community).

15. Judgment of May 29, 1974, 37 BVerfGE 271, [1974] 2 C.M.L.R. 540 (F.R.G.) [hereinafter *Solange I*]. The German word *solange* means "as long as."

16. *Id.* at 291, [1974] 2 C.M.L.R. at 555.

17. *Id.* at 285, [1974] 2 C.M.L.R. at 551.

mon constitutional tradition of the Member States and of treaties on human rights concluded by them.¹⁸

The fragile coexistence of two schemes of protection of fundamental rights with potential conflicts lasted up to the year 1986. In a case known as *Solange II*, the Constitutional Court decided that it would no longer review the acts of the Community institutions for violations of fundamental rights granted by the German Constitution. As long as the European Community, especially the ECJ, guarantees an effective protection of fundamental rights, and this protection is essentially equivalent to the fundamental rights of the Fundamental Law, control by German courts is restricted to the question of whether Community law generally attains the level of the unrenounceable essence of protection accorded by German constitutional law.¹⁹

Not merely armistice, but even peace seemed to be achieved between the European Community and the German jurisdictions, at least for the Second Senate of the Constitutional Court.²⁰ In 1992, the First Senate of the Constitutional Court followed the decision of the Second Senate. If a German law, like the law prohibiting work at night for women, is inapplicable as assessed by the ECJ because of discrimination against women, a reference by a German court to the Constitutional Court is inadmissible because the Constitutional Court recognizes the jurisdiction of the ECJ. German law is no longer relevant for the decision of the inferior court.²¹

The peace was brusquely interrupted in 1993 by the Judgment of the Second Senate on the accession of Germany to the TEU in what is known as the *Maastricht* judgment.²² With regard to fundamental rights, the Second Senate cited only the restriction of the abandonment of judicial review of Community acts by German courts from the judgment known as *Solange II* and not the abandonment itself. Subsequently, the Second Senate

18. *Stauder v. City of Ulm, Sozialamt*, Case 26/69, [1969] E.C.R. 419, [1970] C.M.L.R. 112; *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, Case 11/70, [1970] E.C.R. 1125, [1972] C.M.L.R. 255.

19. Judgment of Oct. 22, 1986 *Wunsche Handelsgesellschaft*, 73 BVerfGE 339, 376, [1987] 3 C.M.L.R. 275 (F.R.G.) [hereinafter *Solange II*].

20. The Constitutional Court is composed of two Senates, comprised of chambers of eight judges deciding independently from each other.

21. 85 BVerfGE 191, 203 (F.R.G.); following *Stoeckel*, Case C-345/89, [1991] E.C.R. I-4047, 4067.

22. Judgment of Oct. 12, 1993, 89 BVerfGE 155 (F.R.G.).

claimed that the Constitutional Court may control any sovereign power whatsoever exerted on German soil, including acts of a supranational organization. Curiously enough, the Second Senate classified this claim as a modification of a decision concerning Eurocontrol,²³ but not of *Solange II*, despite that this judgment explicitly refrained from a review of Community acts, after having extensively demonstrated that the EC standard of protection is equivalent to the German one.²⁴

The Second Senate continues by the presentation of a "relation of cooperation" between the ECJ and the Constitutional Court which, however, is not identical to the procedure of preliminary rulings. The new sort of cooperation means that the ECJ is guaranteeing the protection of fundamental rights in each case for the whole territory of the European Community while the Constitutional Court may restrict itself to ensure the indispensable fundamental rights standard.²⁵

These cryptic sentences give rise to the assumption that the Second Senate had in mind a kind of guardianship of the Constitutional Court over the ECJ.²⁶ Similarly, the Constitutional Court confers to itself jurisdiction over acts of Community institutions in order to check whether these institutions remain within the limits of sovereign powers attributed to them or whether they break out of these limits. The judgment of the First Senate on the work of women at night was not even deemed worthwhile of mention by the Second Senate.

The Administrative Court of Frankfurt on Main ("Administrative Court") allows the Constitutional Court the opportunity to realize its intention to control Community acts. The Administrative Court must decide on the distribution of quotas concerning the import of bananas from third countries into the European Community. The authority administering the licences to import bananas from third countries into Germany refused the allocation of such a licence to an import firm on the base of the so-called Bananas Regulation.²⁷ The Administrative Court re-

23. Judgment of June 23, 1981, *Eurocontrol*, 58 BVerfGE 1, 27 (F.R.G.).

24. *Solange II*, 73 BVerfGE at 378, 386-87 (F.R.G.).

25. Judgment of Oct. 12, 1993, 89 BVerfGE at 175; see 33 I.L.M. 388 (1994) (providing English translation of judgment).

26. See Christian Tomuschat, *Die Europäische Union unter der Aufsicht des Bundesverfassungsgerichts*, in *EUROPÄISCHE GRUNDRECHTE-ZEITSCHRIFT* 489-96 (1993).

27. Council Regulation No. 404/93, O.J. L47/1 (1993).

ferred the case to the Constitutional Court and asked it whether the Regulation is compatible with the fundamental rights as guaranteed by the Fundamental Law.²⁸ Thus, the conflict went into an acute stage.

The Second Senate of the Constitutional Court, which has the authority to decide such questions, has already indicated its view on this issue. Upon a constitutional complaint from an importer of third-country bananas, the Appellate Administrative Court of Kassel, the *Verwaltungsgerichtshof*, reversed a decision which had refused an interim order allocating additional licences. The Constitutional Court cited an infringement of Article 14 of the Fundamental Law guaranteeing the right to property as a fundamental right. Provisional legal protection might not be granted in time by another authority. Thus, the right to judicial review would also be violated.²⁹

The ECJ in *Port v. Bundesanstalt*³⁰ recently countered that it alone has the authority to review the legality of Community institutions' action or inaction. The Community institutions are required to act when the transition to the common organization of the banana market infringes upon certain traders' fundamental rights which are protected by Community law, such as the right to property and the right to pursue a professional or trade activity. The Court of Justice repeated the exceptions established in former judgments.³¹

The Court of Justice acknowledged that national courts have the power to grant interim relief when implementing a national measure based on a Community regulation. That power may only be exercised under strict conditions ensuring the effectiveness of the Community's legal order but, at the same time, safeguarding the protection of individual rights as far as necessary.

Regarding the procedure of preliminary rulings, the ECJ

28. Decision of 24 Oct. 1996, reference No. 1 E 798/95 (V).

29. BverfG, 1st Chamber of the 2d Senate, Decision of 25 Jan. 1995, Cases 2 BuR 2689/94 and 2 BuR 52/95, 49 *NEUE JURISTISCHE WOCHENSCHRIFT* 950 (1995).

30. *Port v. Bundesanstalt für Landwirtschaft und Ernährung*, Case C-68/95 (Eur. Ct. J. Nov. 26, 1996) (not yet reported).

31. *Zuckerfabrik Süderdithmarschen v. Hauptzollamt Itzehoe*, Case C-143/88, [1991] E.C.R. I-415, 541; *Atlanta v. Bundesamt für Ernährung und Forstwirtschaft*, Case C-465/93, [1995] E.C.R. I-3761, 3794-95, [1996] 1 C.M.L.R. 575, 596-97.

cited *Factortame*.³² In *Factortame*, the ECJ held that the national court, which had referred questions of interpretation for a preliminary ruling in order to enable it to decide whether a national measure was compatible with Community law, must be able to grant interim relief and suspend the application of the disputed national action until it could deliver its judgment based on the interpretation given in accordance with Article 177 of the EC Treaty.³³

The ECJ continued, however, by stating that the situation raised by the national court in *Port v. Bundesanstalt* differs from the situation at issue in *Factortame*.³⁴ The present case is not about granting interim measures in the context of the national implementation of a Community regulation whose validity is being contested in order to ensure interim protection of rights which individuals derive from the Community legal system.³⁵ Rather, it is about granting traders interim judicial protection in a situation where, by virtue of a Community regulation, the existence and scope of traders' rights must be established by a Commission measure which the Commission has not yet adopted. In such a situation, only the Court of Justice or the Court of First Instance, as the case may be, can ensure judicial protection for the persons concerned.

Regulation No. 404/93 establishing a common organization of the banana market provides for a special procedure empowering the Commission to take measures to assist the transition from the arrangements existing before the entry into force of this Regulation to those implemented by this Regulation. The Court of Justice designated such transitional measures as the appropriate means to tackle the hardship cases alleged by the plaintiff. Consequently, there is no need for interim measures of the national courts.³⁶

The plaintiff has already announced that the procedure before the Constitutional Court must continue. The abstract claim of the Constitutional Court to review Community acts expressed in the *Maastricht* judgment may now become concrete.

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

33. *Id.*

34. *Port v. Bundesanstalt*, Case C-68/95 (not yet reported).

35. *Id.*

36. *Id.*

The Court of Justice, on the other hand, strictly interdicts all sorts of judicial review of Community acts by national courts in the field of the common market for bananas. In this way, the conflict has become imminent. It may, however, be that the Constitutional Court will exercise control over Community acts but will reach the conclusion that fundamental rights are not affected due to the possibility that import firms may get relief through transitional measures implemented by the Commission through the ECJ. The replay of *Solange I* would be striking.

III. *THE IMPACT OF THE RULE OF LAW*

The conflict of national courts within the European Community is provoked by the Constitutional Court's claim to review Community acts. The highest German court strives for a minimal guarantee of protection of fundamental rights as they are formulated in the German Constitution and shaped by the Constitutional Court itself. No urgent need, however, is detectible. After *Solange II*, the standard of protection of fundamental rights by EC Courts has not been lowered. To the contrary, both the system of fundamental rights and their extent have been completed. The ECJ requires an effective judicial protection of fundamental rights. Cooperation between the ECJ with the national courts is mandated in the framework of preliminary rulings under Article 177 of the EC Treaty.

The system of protection of fundamental rights in the European Community closely resembles the German one, except for a catalogue in the Constitution. Differences may arise by balancing a specific fundamental right against others or against a public interest like the establishment of a common market of bananas. Regarding the right to property, the European Community and the German courts agree that this right does not include the mere expectation to get profits. In Germany, however, total deprivation of earnings is considered a prejudice to property, whereas the ECJ excludes profits entirely from the protection of the right to property. But the right to exercise a professional or trade activity remains applicable, so the tradesman enjoys the protection of at least one fundamental right.³⁷ The intensity of protection of a certain fundamental right may di-

37. *Germany v. Council*, Case C-280/93, [1994] E.C.R. I-4973, 5065-66, [hereinafter *Common Market of Bananas*].

verge from the European Community to the Member State, but reciprocally another right or a public interest may gain less or more weight. This is no sufficient reason to correct the Community system by national measures.

The *Maastricht* judgment of the Constitutional Court demonstrates that there is more at stake than the optimal protection of fundamental rights. On German territory, not only must the sovereign powers of national authorities be subordinated to the ultimate control of the Constitutional Court, but also those of a supranational organization must be subordinated.³⁸ The idea behind this demand is nothing else than the traditional concept of sovereignty. The state is and must continue to be the highest authority on national soil. A member of the Second Senate, who as Reporting Judge wrote the *Maastricht* judgment of the Constitutional Court, spoke about the necessity of maintaining national identities.³⁹ His statement is revealing. He does not care about the independent authority of the European Community and its own legal order. He ignores the prerogatives of the European Parliament representing the peoples of the Member States and the powers of the Community to issue acts with binding force on the Member States.⁴⁰

The third consideration of the Preamble to the Maastricht Treaty confirms the attachment to the principles of liberty, democracy, the rule of law, and respect for human rights and fundamental freedoms.⁴¹ In the German version, the rule of law is called *Rechtsstaatlichkeit*, a notion derived from the *Rechtsstaat*, the state of law. The ECJ transformed this notion into *Recht-*

38. Judgment of Oct. 12, 1993, 89 BVerfGE at 175.

39. Paul Kirchhof, *Der deutsche Staat im Prozeß der europäischen Integration*, in *HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND*, vol. VII, 855 (Josef Isensee & Paul Kirchhof eds., 1992). Kirchhof stated:

The constitution empowers or obliges the State to bind herself externally in the Community of Nations, to conclude special treaties or to exercise her sovereignty only in concordance with other States by means of a membership in an interstate institution. Therefore, the European States at present do not shield themselves from other States or nationals of other States, but they maintain their originality in a people related by birth and descent, by a territory belonging to themselves, and by a cultural community of language, religion, art and historic experience.

Id. at 866 (Author's translation).

40. See J.H.H. Weiler, *Does Europe Need a Constitution? Reflections on Demos, Telos, and the German Maastricht Decision*, 1 *EUR. L. J.* 219-58 (1995).

41. TEU, *supra* note 1, pmb., O.J. C 224/1, at 1 (1992), [1992], C.M.L.R. at 719.

sgemeinschaft, community of law, enabling it to apply its meaning to the European Community. The Fundamental Law, in Article 23, requires *Rechtsstaatlichkeit* of the European Union as a condition of Germany joining the European Union.

First of all, the rule of law demands that one abide with the law. According to Article 177, paragraph 3 of the EC Treaty, a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law shall bring the matter before the ECJ whenever a question of validity or interpretation of Community law is raised in a case pending before the court or tribunal.⁴² The treaty-making parties thereby monopolized the judicial review of the validity of Community acts with the ECJ. The Constitutional Court, although it is the highest court in Germany, is not exempt from the obligation stemming from the EC Treaty to refer questions of validity to the ECJ. The referring court is bound by the answer. There is no opportunity left to escape from the subordination of the national court. It is true that the EC institutions may not exert powers that are *ultra vires*, but it is up to the ECJ to trace the limits. The Constitutional Court restricts its review to the applicability of Community acts in Germany. This restraint does not alter the legal situation because the ban on application is tantamount to invalidity. The Community act concerned loses its effectiveness. The end result is that the Constitutional Court by its own is neither competent to assess the invalidity of a Community act nor to declare the inapplicability of such an act. Secondly, the principle of equality is an essential element of the rule of law. The Court of Justice deduces from special prohibitions of discriminations in the Foundation Treaties that Community law contains a general principle of this kind.⁴³ Consequently, all those who are affected by the sovereign powers of the Community institutions must be treated equally. A national court, even a constitutional court, is not authorized to erode the effectiveness of the principle by an exemption for its country. A constitutional court should be particularly sensitive to this aspect of the problem. The Member States are included into the protection by the principle of equality. They may not be forced to tolerate

42. EC Treaty, *supra* note 1, art. 177, ¶ 3, [1992] 1 C.M.L.R. at 689.

43. Klensch v. Staatssekretär für Landwirtschaft und Weinbau, Joined Cases 201 and 202/85, [1986] E.C.R. 3477, 3507, [1988] 1 C.M.L.R. 151, 164-65.

a deviation from a Community act in a certain Member State due to the case law of its constitutional court.

Thirdly, the principle of equality is closely related to the principle of uniformity of the Community's legal order. The latter principle is especially important for provisions of Community law directly applicable in the Member States. These rules must be fully and uniformly applied in all the Member States from the date of their entry into force and for as long as they continue in force. These provisions are a direct source of rights and duties for all those affected, whether Member States or individuals who are parties to legal relationships under Community law.⁴⁴ Inapplicability of Community acts by virtue of case law created by national courts in a certain Member State would split up the Community into provinces of different law and necessarily lead to a loss of effectiveness of the Community's legal order. This result is irreconcilable with the rule of law.

Fourth, in accordance with the principle of the precedence of Community law, the relationship between provisions of the Foundation Treaties and directly applicable measures of the institutions on the one hand, and the national law of the Member State on the other, is such that those provisions and measures not only render automatically inapplicable any conflicting provision of current national law by their entry into force, but also preclude the valid adoption of new legislative measures to the extent to which they would be incompatible with Community provisions. Indeed, any recognition of the legality of national legislative measures which encroach upon the exercise of Community legislative power or which are otherwise incompatible with Community law would amount to a corresponding denial of the obligations undertaken unconditionally and irrevocably by Member States pursuant to the EC Treaty and would, thus, imperil the foundations of the European Community. The effectiveness of Article 177 of the EC Treaty would be impaired if the national courts were prevented from forthwith applying Community law in accordance with the decisions of the Court of Justice. It follows therefrom that every national court must, in a case within its jurisdiction, apply Community law in its entirety and

44. Minister for Finance v. Simmenthal, Case 106/77, [1978] E.C.R. 629, 643-44, ¶¶ 18-19 [1978] 3 C.M.L.R. 263, 283; *Factortame*, [1990] E.C.R. at I-2473, [1990] 3 C.M.L.R. at 1.

protect rights which Community law confers upon individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule.⁴⁵

After *Simmenthal* in 1978, the Court of Justice has not reiterated any preclusion of validity of national legislative measures, but it has confirmed the principle of precedence of Community law with the consequence that conflicting national law and acts of Member State institutions are inapplicable.⁴⁶ Community law even takes precedence over the constitutional law of the Member States including the provisions on fundamental rights. Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the Community would have an adverse effect on the uniformity and efficiency of Community law. The validity of such measures can only be judged in the light of Community law. The law stemming from the EC Treaty, an independent source of law, because of its very nature, cannot be overridden by rules of national law, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being questioned. Therefore, the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that Member State or the principles of a national constitutional structure. Fundamental rights, however, are guaranteed by the Community's legal system.⁴⁷

German constitutional law supports the foregoing point of view. The *Rechtsstaat*, though only mentioned in relation to the constitutional structure of the Länder, the Member States of the Federation, is regarded as an unalterable constitutional principle of the Fundamental Law. *Rechtsstaatlichkeit* of the European Union as a condition of German membership would be endangered if the case law of the Constitutional Court could diminish the rule of law within the European Community.

The clause on principles, which is unalterable even by

45. *Simmenthal*, [1978] E.C.R. at 644, [1978] 3 C.M.L.R. at 1.

46. *Nimz v. City of Hamburg*, Case C-184/89, [1991] E.C.R. I-297, I-321, [1992] 3 C.M.L.R. 699, 714.

47. *Handelsgesellschaft*, [1970] E.C.R. at 1135, [1972] C.M.L.R. at 283-84.

amendments of the Fundamental Law in Article 79, paragraph 3, refers only to Articles 1 and 20, omitting Articles 2 to 19 where the details of the protection of fundamental rights are laid down. Article 1 of the Fundamental Law declares that the dignity of men is inviolable and ensures the binding force of fundamental rights on the legislative, executive, and judicial powers as directly applicable law. Consequently, the actual version of the provisions on fundamental rights may be amended. As far as the fundamental rights in Community law differ from the German system, the Constitutional Court is not entitled to apply the actual version of fundamental rights in German constitutional law to Community acts.

Article 101, paragraph 1 of the Fundamental Law is interpreted as granting a fundamental right to get a law suit decided by the court determined by law for such a litigation. The Constitutional Court extends this right to the ECJ. If a German court refrains from a reference to the ECJ under Article 177, paragraph 3 of the EC Treaty, the party concerned may, by constitutional complaint, appeal to the Constitutional Court for a review of whether the failure to act was arbitrary.⁴⁸ In one case, the Constitutional Court even charged the *Bundesfinanzhof*, the highest financial court in Germany, of "objective arbitrariness" in having omitted to ask for a preliminary ruling of the Court of Justice.⁴⁹ The Constitutional Court, in dealing with Community acts allegedly violating fundamental rights, may not fall short of the standard established by its own cited decisions. It would be arbitrary to refuse the transfer of control to the exclusively competent court.

If the Constitutional Court, nonetheless, persists in its claim to review Community acts, this breach of the uniformity of the Community's legal order would exemplify a lack of fidelity to the European Union. Other Member States might follow. Those without a constitutional jurisdiction would be incited to get rid of unpleasant obligations under Community law by political action. Legal cohesion would break up. The Constitutional Court will find it a challenge to avoid such an outcome.⁵⁰

48. 73 BverfGE at 366-70.

49. 75 BverfGE at 233-34.

50. See Ulrich Everling, *Will Europe Slip on Bananas? The Bananas Judgment of the Court of Justice and National Courts*, 33 COMMON MARKET L. REV. 401-37 (1996) (commenting on treated problems).