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Hedging European Integration: The Maastricht Judgment of the Federal Constitutional Court of Germany

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Abstract

This Essay will report, analyze, and criticize the eighty-five page opinion of the Constitutional Court. Notwithstanding any criticism, the judgment is certain to have an impact on the European Union as it emerges from the Maastricht Treaty. The concluding section will assess that impact. By way of introduction, the following section will give a survey of earlier opinions rendered by the Constitutional Court on issues relating to European integration.

ESSAYS

HEDGING EUROPEAN INTEGRATION: THE MAASTRICHT JUDGMENT OF THE FEDERAL CONSTITUTIONAL COURT OF GERMANY*

*Karl M. Meessen***

INTRODUCTION

It is at the federal level that a federation, once founded by a compact of its composing states, decides upon the validity of federal acts of government. Unlike a federal state, the European Union¹ — the new name of the functionally enlarged European Communities (“Community” or “E.C.”) — continues to depend upon the view from below. The Member States of the European Union have retained the power of constitutional review of legislative and administrative acts adopted by the Union. Such power of review may be in violation of European law. Yet at the same time, it may be mandated by Member State law. Litigation brings the conflict to a head: does the last word on the validity of European legislative or administrative acts lie with the Court of Justice of the European Communities or with Member State courts? In the latter case, the Unionwide validity of European Union acts may be placed in jeopardy, and, in the former case, Member States may be considered to have abandoned a core element of their sovereignty.

The jurisprudence of the Federal Constitutional Court of Germany (the “Constitutional Court” or the “Court”) has shifted back and forth between a more European and a more national

* For a German language version of the paper, see Karl M. Meessen, *Maastricht nach Karlsruhe*, 47 NEUE JURISTISCHE WOCHENSCHRIFT 549 (1994).

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1. See Treaty on European Union, Feb. 7, 1992, art. A(3), [1992] 1 C.M.L.R. 719, reprinted in 31 I.L.M. 247 (1992) (amending Treaty Establishing the European Economic Community, Mar. 25, 1957, 1973 Gr. Brit. T.S. No. 1 (Cmd.5179-II), 298 U.N.T.S. 3 (1958)) [hereinafter TEU].

stance. Its latest pronouncement, the Maastricht judgment of October 12, 1993,² reserves the right of final review for German courts. Consequently, despite confirming the constitutionality of the Maastricht Treaty, the judgment qualifies for the latter category of a nationally assertive position.

This Essay will report, analyze, and criticize the eighty-five page opinion of the Constitutional Court. Notwithstanding any criticism, the judgment is certain to have an impact on the European Union as it emerges from the Maastricht Treaty. The concluding section will assess that impact. By way of introduction, the following section will give a survey of earlier opinions rendered by the Constitutional Court on issues relating to European integration.

I. *FLUCTUATING CASE LAW*

In the first cases submitted to the Constitutional Court, constitutional complaints filed against E.C. regulations were dismissed on the ground that they were not directed against "German" acts of state as is required under the Statute on the Constitutional Court.³ The opinion also noted that the E.C. system of judicial review should not be considered deficient merely because it was different from the German system.⁴

The Constitutional Court took a step backward seven years later when it judged inadequate the newly developed protection of fundamental rights by the Court of Justice of the European Communities (the "Court of Justice").⁵ In the *Stauder* case⁶ of 1969, the Court of Justice had begun stating fundamental rights in the form of "general principles of Community law" and applying them as a standard of Community legislation.⁷ In the *Nold*

2. Bundesverfassungsgericht (Federal Constitutional Court) [hereinafter BVerfG], Judgment of Oct. 12, 1993 (Maastricht), 89 Entscheidungen des Bundesverfassungsgerichts [hereinafter BVerfGE] 155.

3. See Order of Oct. 18, 1967, 22 BVerfGE 293; see also Order of July 5, 1967, 22 BVerfGE 134.

4. Order of Oct. 18, 1967, 22 BVerfGE at 298.

5. Order of May 29, 1974 (Solange I), 37 BVerfGE 271.

6. Erich Stauder v. City of Ulm, Sozialamt, Case No. 29/69, [1969] E.C.R. 419, [1970] 9 C.M.L.R. 112.

7. *Id.* at 425, [1970] 9 C.M.L.R. at 119; Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel, Case No. 11/70, [1970] E.C.R. 1125, 1134, [1972] 11 C.M.L.R. 255, 282.

case⁸ of 1974, the protection of fundamental rights was indirectly given a written law basis when the Court held that the European Human Rights Convention reflected general principles of E.C. law.⁹ A fortnight after the *Nold* decision, the Constitutional Court of Germany decided to reserve for itself a right to review Community legislation pursuant to the fundamental rights of the German Constitution "as long as" the European Communities had no "catalogue" of European fundamental rights upon which to rely.¹⁰ That catalogue should be adopted by the European Parliament and it should reflect the same standard of protection guaranteed by the German Constitution.¹¹

Five years later, the Constitutional Court started inching towards a revision of its 1974 pronouncement.¹² It eventually overturned that decision by suspending any constitutional review of Community legislation "as long as" the Court of Justice sustained the existing standard of protection of fundamental rights under European law, which was considered to have meanwhile become quite adequate.¹³

The pro-European trend reached its high-water-mark when, in 1987, the Constitutional Court overturned a decision by the highest tax court of Germany for having "in an objectively arbitrary manner" failed to submit a case for another preliminary ruling to the Court of Justice under Article 177 of the E.C. Treaty.¹⁴ "Failure to submit" was diplomatic language to explain that the Federal Tax Court had decided to ignore a preliminary ruling by the Court of Justice, which in its view exceeded the limits of judicial law-making by attributing directly binding effects to an E.C. directive on value-added tax.¹⁵

The recent setback, ominously announced by scholarly papers authored by the judge-rapporteur in charge of Europe related cases, occurred on October 12, 1993.¹⁶ Several individual

8. *J. Nold v. Commission*, Case No. 4/73, [1974] E.C.R. 491, [1974] 14 C.M.L.R. 338.

9. *Id.* at 507, [1974] 14 C.M.L.R. at 354.

10. Order of May 29, 1974 (Solange I), *supra* note 5, at 271.

11. *Id.* at 285.

12. Order of July 25, 1979 (Vielleicht), 52 BVerfGE 187.

13. Order of Oct. 22, 1986 (Solange II), 73 BVerfGE 339.

14. Order of Apr. 8, 1987, 75 BVerfGE 223, 234.

15. Bundesfinanzhof, 20 EUROPARECHT 191, 193-96 (1985); Gerda Kloppenburg v. Finanzamt Leer, Case No. 70/83, [1984] E.C.R. 1075, 1084, [1985] 42 C.M.L.R. 205, 216.

16. Paul Kirchhof & Claus-Dieter Ehlermann, *Deutsches Verfassungsrecht und*

complaints had been filed against the federal statute ratifying the Maastricht Treaty establishing the European Union, as an amendment to the Constitution facilitating the ratification of the treaty. Dismissing those complaints, most of them as inadmissible and one of them as unfounded, the Maastricht Treaty was set to enter into force on November 1, 1993, which was, ten months later than originally planned. Hence, the immediate effect of the judgment was positive. That effect, however, was offset by a number of constraints the Constitutional Court imposed on future steps towards European integration as well as on the operation of day-to-day European politics.

II. *THE MAASTRICHT OPINION*

Subject to some clarification, the Maastricht judgment seems acceptable in so far as it grants individuals the right to base constitutional complaints on a violation of the democratic principle. The principle of democracy, developed to serve as a standard of substantive law in the Maastricht proceedings and in future cases, requires some qualifying supplementation. The Constitutional Court's *obiter dictum* as to the right to review legislative and administrative acts of the European Union, however, violates European law and is unwarranted under German constitutional law.

A. *Democracy as an Individual Right*

According to Article 93(1) no. 4a of the Basic Law (Grundgesetz, i. e. the German Constitution), constitutional complaints have to be based on at least one of the individual rights enumerated in that provision. As one might expect, the complaints invoked a great number of those rights. The Constitutional Court, however, considered only one of the complaints to be admissible, and then, only to the extent that it was based upon a violation of the right to vote in elections to the Federal Diet (Bundestag).¹⁷ The reason was that the right to vote was potentially affected by a transfer of competences by the German

Europäisches Gemeinschaftsrecht, EUROPARECHT 11 (Beiheft 1/1991); Paul Kirchhof, *Europäische Integration und nationales Verfassungsrecht*, 23 ZEITSCHRIFT FÜR ARBEITSRECHT 459 (1992); Paul Kirchhof, *Europäische Einigung und der Verfassungsstaat der Bundesrepublik Deutschland*, in J. Isensee (Hrsg.), *EUROPA ALS POLITISCHE IDEE UND ALS RECHTLICHE FORM* 63 (1993).

17. Judgment of Oct. 12, 1993, *supra* note 2, at 171-79.

parliament to another institution.¹⁸

Indeed, it requires an individual right to advance an individual complaint. Indirectly, however, constitutional rules of a non-individual, objective character may become relevant if such rules affect the legality of a limitation of an individual right. In an early case, the Constitutional Court held that the constitutional guarantee of personal freedom, which may be limited by a legislative act, is impaired whenever the legislative act is invalid for some other reason, such as lack of competence.¹⁹ Taking up that approach in the Maastricht case, the Constitutional Court now considers it possible that the right to vote becomes meaningless if parliament, though composed by perfectly democratic elections, transfers its powers by way of an international agreement.²⁰

The starting point for the argument is well taken. But where does it lead to? Is any transfer of powers from parliament to another body, be it a supranational organization or an administrative agency inside Germany, vulnerable to attack by individual complainants purporting to protect the integrity of their right to vote in federal elections? The answer is no, and that answer is not contradicted by anything the Constitutional Court said in the Maastricht opinion. On the contrary, the Constitutional Court pointed out that the right to vote has to be "emptied" ("entleert"), rather than merely diminished, before an individual voter has standing to file a constitutional complaint.²¹ In that respect, German observers will remember the so-called Enabling Law of 1933 by which the then Imperial Diet (Reichstag) transferred its powers to the Imperial Government headed by Adolf Hitler.²² It is comforting to know that, by reference to the Maastricht judgment, a single voter would have the right to challenge such an act of collective abdication.

18. *Id.* at 171-72.

19. *Cf.* Judgment of Jan. 16, 1957 (Elfes), 6 BVerfGE 32, 41; Order of June 6, 1989 (Reiten im Walde), 80 BVerfGE 137, 152-54.

20. Judgment of Oct. 12, 1993, *supra* note 2, at 172.

21. *Id.*

22. Gesetz zur Behebung der Not von Volk und Reich (Law to Remove the Right of the People and the Reich), Mar. 24, 1933, 1933 REICHSGESETZBLATT [hereinafter RGBL] I 141 (Ger).

B. *The Level of Democratic Legitimacy*

After pronouncing itself in favor of the admissibility of one of the individual complaints for the aforementioned reasons, the Constitutional Court examined and eventually dismissed the complaint on its merits.²³ The issue of questioning the constitutionality of the Maastricht Treaty has thereby been laid to rest. The rule developed by the Constitutional Court and applied in the Maastricht complaint, however, can henceforth be invoked as a constitutional standard whenever someone decides to submit for constitutional review a future German statute ratifying an amendment of the Maastricht Treaty, whose revision is, under its own terms, envisaged for 1996.²⁴

The starting point for the Constitutional Court's reasoning is set forth in a constitutional clause recently inserted into the German Constitution ("Grundgesetz" or "Basic Law") to cover the acceptance of the Maastricht Treaty. Article 23 of the Basic Law, whose original version has become obsolete as a result of German reunification, subjects a treaty establishing a European Union, as well as any other agreement providing for a major amendment of such a treaty, to the regular requirements of procedural and substantive law regarding amendments to the constitution: the statute approving such an agreement has to be adopted by a two-thirds-majority in both houses of parliament, and the principles of Articles 1 and 20 of the Basic Law have to be observed. The new rule reflects earlier case law on the more generally worded Article 24 of the Basic Law, which simply states that "the Federation may transfer powers to international institutions by way of legislative acts." Establishing the European Union indeed means altering the German Constitution, subjecting it only to those fundamental principles of human dignity, due process and democratic decision-making that may not be affected by any amendment to the Constitution.

The Constitutional Court's discussion of admissibility resulted in identifying the principle of democracy as the principal standard for review. Clearly, constitutional amendments, in particular if designed to set up the European Union, imply changing the process of democratic decision-making. The "level of democratic legitimacy," however, as the Constitutional Court put

23. Judgment of Oct. 12, 1993, *supra* note 2, at 181.

24. TEU, *supra* note 1, art. N(2), O.J. C224/1, at 99, [1992] 1 C.M.L.R. at 739.

it, has to be maintained.²⁵ Obviously, democratic legitimacy would be seriously undermined if the bulk of decision-making power were transferred from Member State parliaments to the Council of the European Union where Member State governments engage in a supranational bargaining process quite remote from control by national parliaments. The Court touched upon this problem but did not make it the center-piece of its argument.²⁶ Instead, it devoted its attention to the possibility of a subsequent erosion of powers on the part of national parliaments if the Maastricht Treaty authorized the European Union to assume additional powers not specifically transferred to it.²⁷

Accordingly, the Court did not draw up a balance sheet of competences transferred versus competences retained by the Federal Diet. Rather, it proceeded directly to examining those provisions of the Maastricht Treaty that could be considered susceptible to a later expansion of competences. The Court reviewed a number of provisions of that kind, but either (i) found them to be lacking binding character, such as Article F(3) of the Treaty under which the European Union is entitled to "provide itself with the means necessary to attain its objectives and carry through its policies,"²⁸ or (ii) gave the rules a narrow interpretation so as to make changes subject to formal amendments of the Treaty, which would in turn be subject to parliamentary approval and constitutional review. An example of the latter type of argument was the discussion of a possible need to supplement the third stage of the monetary union by a corresponding transfer of additional economic policy competences.²⁹ Furthermore, the Court emphatically declared that any further enlargement of competences under the implied-powers doctrine or under the *effet-utile* principle of interpretation would be contrary to European Law.³⁰

The controlling principle is based on precedent in German constitutional law. In a case relating to a purely domestic context, the parliament was deemed to be precluded from divesting itself of essential elements of its decision-making power in favor

25. Judgment of Oct. 12, 1993, *supra* note 2, at 182.

26. *Id.* at 184.

27. *Id.* at 187-88.

28. *Id.* at 194-95.

29. *Id.* at 206-07.

30. *Id.* at 210.

of indirectly legitimized decision-makers.³¹ The Court was close to declaring unconstitutional a statute by which the state governments, when called upon to examine applications for the construction of nuclear plants, were merely instructed to observe the "standards of scientific and technical knowledge."³² The doctrine of obliging Parliament to retain its essential decision-making power was transferred to an international context in the *Eurocontrol* case.³³ Eurocontrol, a governmental organization dealing with safety in certain segments of airspace, was considered free to proceed from "raising" fees to "collecting" them since the latter activity, though not specifically mentioned in the convention setting up Eurocontrol, was found to be covered by its "program of integration."³⁴ With respect to NATO, the program of integration was found in two further cases to include parliamentary approval of an authority extended to the United States government to decide upon the location of nuclear and chemical weapons.³⁵ The Court added that, in an international context, a lesser degree of precision was required lest the Federal Republic lose its capability of foreign policy action.³⁶

There is no reason to criticize the Constitutional Court for scrutinizing the conclusiveness of the enabling provisions contained in the Maastricht Treaty on the European Union, and yet, there is a difference between Eurocontrol and NATO, on the one hand, and the European Union, on the other. Both Eurocontrol and NATO are purely governmental organizations. Decisions are taken without any direct democratic control. By contrast, the European Union and the European Communities, as its predecessor institutions, have been endowed since 1952 with a parliamentary body originally called the Assembly.³⁷ Since 1979, its members are directly elected. The competences of the European Parliament in law-making, budgeting and exercising political control have continuously been expanded, most

31. Order of Aug. 8, 1978 (Kalkar), 49 BVerfGE 89, 126.

32. Gesetz über die friedliche Verwendung der Kernenergie und den Schutz gegen ihre Gefahren (Atomgesetz) § 21, at 316 (Dec. 23, 1959).

33. Order of June 23, 1981 (Eurocontrol), 58 BVerfGE 1, 37.

34. *Id.* at 37-40.

35. Judgment of Dec. 18, 1984 (Pershing), 68 BVerfGE 1; Order of Oct. 29, 1987 (Chemiewaffen), 77 BVerfGE 170.

36. Judgment of Dec. 18, 1984, *supra* note 35, at 92, 99; Order of Oct. 29, 1987, *supra* note 35, at 77, 170, 230-34.

37. See TEU, *supra* note 1, O.J. C 224/1, at 98, [1992] 1 C.M.L.R. at 737.

recently by the Maastricht Treaty itself.³⁸ To be sure, those competences still lag behind those of the Federal Diet or other national parliaments. Nevertheless it would be a mistake to consider the transfer of competences to the European Union an unmitigated loss of democratic control as in the case of Eurocontrol and NATO.

Such compensatory considerations have a firm foothold in Article 79 of the German Constitution. That provision does not safeguard any particular institutional structure of democratic decision-making. It safeguards the principle of democracy or, as the Court put it, the level of democratic legitimacy. The level of democratic legitimacy, however, may be maintained by any democratically elected parliament. Thus, democratic legitimacy may be derived partly from the Federal Diet and partly from the European Parliament. Emphasis may shift from the one to the other even though, as should be added, it is hard to conceive, given the very size and diversity of Europe, that the European Parliament could ever replace national parliaments altogether.³⁹

With respect to fundamental rights, the Constitutional Court acknowledged compensating for a loss of nationally granted rights by a commensurate gain of rights granted on a European level.⁴⁰ No valid reason exists to reach a different conclusion in the case of democratic legitimacy. Any transfer of constitutional autonomy to the European Union might deprive Germany of a core element of sovereign statehood.⁴¹ Such loss, unless justifiable under the principle of openness towards European integration, may be contrary to the guarantee of the sovereign statehood of Germany, which may, or may not, be another principle barred from constitutional amendment considered by Article 79(3) of the Basic Law.⁴² The principle of democracy, however, would only be violated if a partial loss of influence on the part of the Federal Diet were not compensated for by a cor-

38. See, e.g., Eberhard Grabitz, *Institutionelle Anpassung der EG, in WEITERENTWICKLUNG DER EUROPÄISCHEN GEMEINSCHAFTEN UND DER MARKTWIRTSCHAFT, REFERATE DES XXV. FIW-SYMPOSIUMS* 105, 111-19, 124-31 (1992).

39. Cf. Fritz W. Scharpf, *Europäisches Defizit und deutscher Föderalismus*, 3 *STAATSWISSENSCHAFTEN UND STAATSPRAXIS* 293, 296-99 (1992).

40. Order of Oct. 22, 1986 (Solange II), *supra* note 13, at 376.

41. Cf. PETER M. HUBER, *MAASTRICHT - EIN STAATSTREICH?* 29-31 (1993).

42. Cf. *id.* (supporting supposed guarantee of sovereign statehood); *Bundesregierung (F.R.G.) ENTWURF EINES GESETZES ZUR ÄNDERUNG DES GRUNDGESETZES*, Oct. 2, 1992, *BUNDESTAGSDRUCKSACHE* 12/3338, at 7.

responding gain of influence by the directly elected European Parliament. The European Parliament looks poised to make sure that such compensatory democratic legitimacy will be accorded whenever the Member States decide to move another step ahead in the process of European integration.

C. *Exceeding the Program of Integration*

Reviewing acts of the European Union was not the subject of the Maastricht complaint. All the same, the Constitutional Court decided to let its position be known: future legislative, administrative or judicial acts adopted by the European Union that exceed the "program of integration" will not have binding force in Germany.⁴³ If ever the European Union chose, for example, to take legal measures on the basis of Article F(3) of the Maastricht Treaty, German authorities will be obliged to withhold their "allegiency" ("Gefolgschaft"), as the Constitutional Court put it in somewhat Wagnerian language.⁴⁴ And if ever legal acts of the European Union "broke out" of the competences transferred to it, it would be for the Constitutional Court to provide final review in Germany.⁴⁵ Furthermore, the Constitutional Court, explicitly overruling its long-time jurisprudence, expanded the protection of fundamental rights from German acts of state to cover European legal acts as well.⁴⁶

To be sure, not every petty measure adopted by the European Union without authority under the Maastricht Treaty would now be considered to constitute an excess of the program of integration. The focus of the Constitutional Court rather was on aspects of judicial law-making characteristic of the jurisprudence of the Court of Justice.⁴⁷ At that point, the Constitutional Court even seemed to regret having in the past been so generous as to acknowledge the potential direct effect of E.C. directives. Thus, it can no longer be taken for granted that it would reach the same conclusion if it had to review the value-added tax directive today.⁴⁸ With regard to the recent *Francovich* judgment by

43. Judgment of Oct. 12, 1993, *supra* note 2, at 188.

44. *Id.* at 195.

45. *Id.* at 188.

46. *Id.* at 175.

47. *Id.* at 210.

48. See *supra* note 15 and accompanying text (discussing overreaching by Federal Tax Court in failing to submit case to Court of Justice for preliminary ruling).

the Court of the European Communities,⁴⁹ the Maastricht opinion makes one wonder whether German courts would now be expected to deviate from that judgment and refuse to award damages in a case where there is a failure to implement an E.C. directive.

On the whole, actions for constitutional review in Germany of measures already found legal by the Court of Justice of the European Communities will rarely be successful. Nevertheless, attorneys may try and present cases for review. They could even be rewarded by providing their clients with some bargaining power resulting from the uncertainties inherent in any litigation. The administrative implementation of decisions adopted by organs of the European Union might thereby be delayed.

The Court's *obiter dictum* is not without significance. Is it justified? The answer will first be given under European law and then under German constitutional law with the latter, of course, exclusively determining the perspective of the Constitutional Court.

Under Article 164 of the E.C. Treaty, it is for the Court of Justice to "ensure observance of law and justice in the interpretation and application of this Treaty."⁵⁰ There is no exception to that principle. If there were one, the authority of the Court of Justice would be seriously undermined. It would in particular be undermined if, from the point of European law, Member State courts were free to second-guess and contradict positions adopted by the Court of Justice. More importantly, the principle for Unionwide validity of European legal acts would be abandoned. In a most sensitive case involving an Italian statute on the nationalization of utilities, the Court of Justice explained the need for Unionwide validity and proclaimed the supremacy of European law.⁵¹ Since that decision, the Court of Justice has not moved an inch from that position.⁵²

In an effort to justify its approach, the Constitutional Court,

49. *Francovich v. The Republic of Italy*, Joined Cases Nos. C-6/90 and C-9/90, [1991] E.C.R. I-5357, I-5415, [1993] 2 C.M.L.R. 66, 114.

50. Treaty Establishing the European Economic Community, Mar. 25, 1957, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II), 298 U.N.T.S. 3, 73 (1958) [hereinafter E.C. Treaty].

51. *Costa v. ENEL*, Case No. 6/64, [1964] E.C.R. 585, 593-94, [1964] 3 C.M.L.R. 425.

52. See, e.g., Court of Justice, Opinion 1/91, O.J. C 110/1 (1992), [1991] E.C.R. I-6079, I-6102.

quoting the *Zwartveld* ruling of the Court of Justice,⁵³ made mention of an obligation of Community Organs to engage in "loyal cooperation with member states."⁵⁴ In addition, the Constitutional Court quoted with approval a statement made by the head of the Legal Service during the Maastricht proceedings that Community Organs would always seriously consider any Member State concerns that certain community action might infringe upon its constitutional law, and that the Community Organs would endeavor to find a way to proceed in conformity with the constitutional law of that Member State.⁵⁵ In the *Zwartveld* opinion, the Court of Justice, however, merely found the Commission obliged to comply with a request for judicial assistance on the part of a Member State court implementing Community law.⁵⁶ The statement by the head of the Legal Service gives accurate expression to what follows from common sense, namely an intention to avoid unnecessary conflicts.⁵⁷ It is well known that many matters within the competence of the European Union remain unregulated and that European law, even where it offers a rule, does not necessarily exclude additional rules of Member State law as long as they do not disregard the purpose of the rule of European law.⁵⁸ Neither authority, if a statement made by an official at the oral hearing may be called such, suggests that Member States are free to declare acts of the European Union *ultra vires* after the Court of Justice has found them to be in conformity with European law.

The Constitutional Court's assertion that it reserves for itself final control of legal acts of the European Union that exceed the "program of integration" contradicts European law. Does German constitutional law mandate such an outright challenge to European law? The controlling rule again is found in Article 79(3) of the Basic Law, which precludes from constitutional amendment not only the principle of democracy but also the principle of due process. Like the principle of democracy, due

53. Judgment of Oct. 12, 1993, *supra* note 2, at 202.

54. *Zwartveld*, Case No. C-2/88 Imm, [1990] E.C.R. I-3365, I-3373, [1990] 3 C.M.L.R. 457, 463.

55. Judgment of Oct. 12, 1993, *supra* note 2, at 202.

56. *Zwartveld*, [1990] E.C.R., at I-3373, [1990] 3 C.M.L.R. at 458.

57. Judgment of Oct. 12, 1993, *supra* note 2, at 202.

58. *Cf.* *Walt Wilhelm v. Bundeskartellamt*, Case No. 14/68, [1969] E.C.R. 1, 13-16, [1969] 8 C.M.L.R. 100, 105-117.

process is not guaranteed with respect to any particular system of judicial review, including review by the Constitutional Court. The Constitutional Court's early pronouncement on the lack of reviewability of legal acts of the Community so held.⁵⁹ The same reasoning underlies the more relaxed position the Constitutional Court adopted in 1986 regarding the observance of the fundamental rights of the German Constitution.⁶⁰ In the Maastricht opinion, the Constitutional Court specifically endorsed that opinion, which is referred to in Germany as the *Solange II* ("As-Long-As no. 2") decision.⁶¹ One may wonder why the Constitutional Court did not follow that approach and hence failed to examine whether transferring final review to the Court of Justice, though necessarily reducing the right of review by Member State courts, maintained the level of due process guaranteed in Germany.⁶²

If the Constitutional Court had, as it should have, assessed the comparative level of due process, it could hardly have avoided the conclusion that the Court of Justice lived up to the standard of protection under German law. The Constitutional Court itself made that point with respect to the protection of fundamental rights.⁶³ It did so despite the fact that the standard of review of fundamental rights is necessarily different, whereas, in reviewing acts *ultra vires*, it is only Community law that has to be applied, either by the Court of Justice, or a German court double-checking the Court of Justice for an "excess of the program of integration." The record of the Court of Justice may not be flawless. In the *Francovich* case, for instance, the Court of Justice may have advanced too far and even have done so in an unfortunate desire to lend judicial support to the implementation of directives.⁶⁴ If the *Francovich* case was wrongly decided, it

59. See *supra* note 3 and accompanying text (discussing Constitutional Court's early rejection of complaints not directed against German acts of state).

60. See *supra* note 13 and accompanying text (discussing *Solange II*).

61. Judgment of Oct. 12, 1993, *supra* note 2, at 174-75.

62. Order of Oct. 22, 1986 (*Solange II*), *supra* note 13, at 376.

63. See *supra* notes 60-62 and accompanying text (discussing observance by Constitutional Court of fundamental rights of German Constitution).

64. See *Francovich v. The Republic of Italy*, Joined Cases Nos. C-6/90 and C-9/90, [1991] E.C.R. I-5357, I-5415, [1993] 2 C.M.L.R. 66; see, e.g., Fritz Ossenbühl, *Der gemeinschaftsrechtliche Staatshaftungsanspruch*, 107 DEUTSCHES VERWALTUNGSBLATT 993 (1992) (presenting critical reviews of *Francovich* judgment); Joachim Karl, *Die Schadensersatzpflicht der Mitgliedstaaten bei Verletzungen des Gemeinschaftsrechts*, 38 RECHT DER INTERNATIONALEN WIRTSCHAFT 440 (1992) (presenting critical reviews of *Francovich* judgment); see,

is for reviewers to criticize the Court of Justice and it is for the Court of Justice to correct itself, as it did, when it moved from *Hag I* in 1974 to *Hag II* in 1990, regarding the conformity of territorially limited trademarks with the principle of free movement of goods.⁶⁵ The proven ability of correcting itself may even deserve more respect than an attitude of having been right all along.

On matters of competence, the record of the Court of Justice is perfectly acceptable.⁶⁶ The Constitutional Court at least should have given its reasons for its differing view. Instead of doing so, the Constitutional Court referred to two earlier decisions.⁶⁷ One of those decisions, the ruling in *Eurocontrol*, relates to an international institution that does not provide for any system of judicial review whatsoever.⁶⁸ Member States could not, and did not, transfer a right of final judicial review to that organization. Hence, there was no need to examine the legality of any transfer of judicial powers under Article 79 of the German Constitution. The other decision cited by the Constitutional Court was related to the European Economic Community, but it was rendered to implement and enforce a judgment of the Court of Justice, which by no means intimated contradicting the Court of Justice or reserving a right of final control to German courts.⁶⁹

The German Constitution does not prohibit the transfer of final control to the Court of Justice. There is not even a need to invoke the somewhat elusive principle of "open statehood" set forth both in the preamble of the Constitution and in the new

e.g., John Temple Lang, *New Legal Effects Resulting from the Failure of States to Fulfill Obligations Under European Community Law: The Francovich Judgment*, 16 FORDHAM INT'L L.J. 1 (1992-1993) (presenting more positive assessment of *Francovich* judgment); Fernand Schockweiler, *Die Haftung der EG-Mitgliedstaaten gegenüber dem einzelnen bei Verletzung des Gemeinschaftsrechts*, 28 EUROPARECHT 107 (1993) (presenting more positive assessment of *Francovich* judgment).

65. *Cf.*, *e.g.*, S.A. CNL-SUCAL NV v. Hag GF AG, Case No. C-10/89, [1990] E.C.R. I-3711, at I-3757-60, [1990] 3 C.M.L.R. 571, 595-97; Van Zuylen Freres v. Hag A.G., Case No. 192/73, [1974] E.C.R. 731, [1974] 2 C.M.L.R. 127.

66. *See* Hans Kutscher, *Über den Gerichtshof der Europäischen Gemeinschaft*, 16 EUROPARECHT 392, 400, 406-10 (1981); *see also* Statement made by Judge Zuleeg in Carl Otto Lenz, *Der Vertrag von Maastricht nach dem Urteil des Bundesverfassungsgerichts*, 46 NEUE JURISTISCHE WOCHENSCHRIFT 3038 (1993).

67. Judgment of Oct. 12, 1993, *supra* note 2, at 188.

68. Order of June 23, 1981, *supra* note 33.

69. Order of July 25, 1979 (Vielleicht), *supra* note 12.

version of Article 23.⁷⁰

III. CONFIRMING THE HALT OF EUROPEAN INTEGRATION

The Constitutional Court allowed the Maastricht Treaty to enter into force. The *ratio decidendi*, however, defined a standard of review that, due to the incomplete statement of the rule, seems to set a higher threshold for future statutes ratifying treaty amendments than actually warranted. Unlike those grounds forming part of the *ratio decidendi*, the *obiter dictum* regarding the review of *ultra vires* acts has no binding force under Section 31(1) of the Statute on the Constitutional Court.⁷¹ Nevertheless, that *obiter dictum* will, despite the criticism raised here, exert persuasive force on German governmental agencies, courts and especially politicians who traditionally enjoy backing up their policy statements by references to Constitutional Court opinions. As to the effects on the European Commission, the head of its Legal Service was probably right when he mentioned the deference usually extended to the constitutional law of member states and their constitutional courts.⁷² Instead of facing the prospect of an action brought under Article 170 for an infringement of the treaty, which may now be enforced by imposing penalty payments,⁷³ Germany has a fair chance of seeing its constitutional concerns preempted by additional caution in European Union decision-making. These slow-down effects are compounded by a series of statements made by the Constitutional Court that seem destined to either down-play the present level of integration or to provide ammunition for attacks against further steps of integration.

As an example of the former, the term, "Staatenverbund," introduced to characterize the European Union should be considered. That new combination of two existing words is placed squarely into the midst of a number of traditional terms, such as Staatenbund (confederation), Staatenverbindung (international organization) and Bundesstaat (federal state). Putting

70. KLAUS VOGEL, DIE VERFASSUNGSENTSCHEIDUNG DES GRUNDGESETZES FÜR EINE INTERNATIONALE ZUSAMMENARBEIT, EIN DISKUSSIONSBEITRAG ZU EINER FRAGE DER STAATSTHEORIE SOWIE DES GELTENDEN DEUTSCHEN STAATSRICHTS 42 (1964).

71. Bundesgesetzblatt 2230 (1985I)

72. Cf. *supra* note 55 and accompanying text (quoting statement made during Maastricht proceedings).

73. Cf. E.C. Treaty, *supra* note 50, art. 170, 298 U.N.T.S. at 75.

“Staaten-” in the beginning suggests an emphasis on the constituent elements rather than the common organization. Combining it with “-verbund” instead of “-bund,” has the charm of novelty but is burdened with connotations of former usage that are less than inspiring, such as networks of public utilities or of suburban train services.

The term Staatenverbund apparently has to be credited to Paul Kirchhof, the judge rapporteur of the Maastricht proceedings, who declared his preference for that term as opposed to the term “supranational organization,” which, in his view, implies an erosion of the statehood of its members.⁷⁴ In the Maastricht opinion, the new term is, on the one hand, used only interchangeably with the traditional designation “supranational organization,”⁷⁵ which is firmly rooted in other European languages as well.⁷⁶ On the other hand, the Constitutional Court lent support to Kirchhof’s approach of scaling back the European Union by including, in a somewhat technical context, the astonishing statement that, should “(monetary) stability of the Community” fail, there was always the possibility of “leaving the Community.”⁷⁷

Examples of arguments against future steps of integration are the emphasis the Court placed upon the absence of a European nation (Staatsvolk)⁷⁸ and its listing of requirements of homogeneity for a people to constitute a nation, oddly enough by reference to a paper of Hermann Heller published in 1928.⁷⁹

In fact, the development of European integration after the Second World War has outgrown the old dichotomy of “state or non-state,” and Herman Heller, further down in his 1928 paper, proved not far off the mark musing over the possibility of best

74. Paul Kirchhof et al., *Europäische Einigung und der Verfassungsstaat der Bundesrepublik Deutschland*, in JOSEF ISENSEE (ed.), *EUROPA ALS POLITISCHE IDEE UND ALS RECHTLICHE FORM* 63, 64, 93 (1993).

75. Cf. Judgment of Oct. 12, 1993, *supra* note 2, at 184.

76. See, e.g., Paul Reuter, *COMMUNAUTÉ EUROPÉENNE DU CHARBON ET DE L’ACIER* 140 (1953); Riccardo Monaco, *Le comunità sopranazionali nell’ordinamento internazionale*, 8 *COMUNITÀ INTERNAZIONALE* 441 (1953); Peter Hay, *FEDERALISM AND SUPRANATIONAL ORGANIZATIONS* (1966); Joseph Weiler, *The Community System: the Dual Character of Supranationalism*, 1 *Y.B. EUR. L.* 267 (1981).

77. Judgment of Oct. 12, 1993, *supra* note 2, at 204.

78. *Id.* at 188.

79. *Id.* at 186; Hermann Heller, *Politische Demokratie und Soziale Homogenität* (1928), reprinted in H. HELLER, 2 *GESAMMELTE SCHRIFTEN* 421 (1971).

preserving the nation by a "European federal state."⁸⁰ The potential for a supranational organization with a remarkable degree of socio-psychological coherence has been amply demonstrated during the last four decades. It was confirmed by the introduction, in the Maastricht Treaty, of a novel status called "citizenship of the Union."⁸¹ In 1953, Robert Schuman, who was one of the architects of postwar Europe, had this definition of the notion of supranationality to offer:

Supranationality is placed in the middle between, on the one hand, international individualism respecting the integrity of national sovereignty and knowing only of such limitations of sovereignty that are of an occasional, contractual and revocable nature and, on the other hand, the federalism of states that are subordinated to a superstate endowed with territorial sovereignty . . . The notion of supranationality "covers legally binding reality," the idea will prove fertile. As opposed to confederationist concepts it has the advantage of clarity.⁸²

Today, there is little to add to those words that, in the final analysis, were left unchallenged by the Constitutional Court when it found that the question presented was not whether the Basic Law permitted or precluded German membership in a European state. It is a question that may indeed never arise in the process of European integration.

The thrust of the Maastricht opinion and of the multifaceted statements contained therein make a forceful plea for a halt in the process of European integration. That halt, however, may have already occurred before the judgment was rendered: as a result of the Treaty itself and of political events accompanying its ratification.

Treaties establishing supranational organizations, like constitutions, only deal with those long-term problems of political organizations that were perceived by their founders. The U.S. Constitution establishes and, at the same time, limits the powers of the Union. The authors of the *Federalist Papers* endeavored to explain to the hesitant people of the State of New York how well the rights of their home state would be protected under the fed-

80. Heller, *supra* note 79, at 433. I owe this reference to a comment made by Judge Zuleg at a conference on February 18, 1994, in Innsbruck, Austria.

81. E.C. Treaty, *supra* note 50, art. 8, 298 U.N.T.S. at 17-18.

82. Robert Schuman, *Préface*, in Reuter, *supra* note 76, at 7 (translated from French by author).

eral constitution.⁸³ Before Maastricht, the European Communities pledged to strive for an ever closer union. Apparently, the organizational structure of the European Communities appeared too weak and the remaining powers of the Member States were considered too strong to suggest any risk of "over-integration."

The activity and, to some extent, the activism of the European Commission headed by President Jacques Delors have changed the situation. Fear has spread that the process of integration could become self-perpetuating and could no longer be stopped. Hence, a countervailing principle was incorporated into the text of the Maastricht Treaty: the principle of subsidiarity.⁸⁴ It calls upon the European Union to exercise competences that have exclusively been transferred to it "only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the member states and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community."⁸⁵

In Germany, the exercise of concurrent jurisdiction by the Federal Parliament has to satisfy requirements of subsidiarity set forth in Article 72(2) of the German Constitution. As a standard for constitutional review, that provision has proven quite ineffective. German commentators therefore tend to doubt whether the subsidiarity clause in the E.C. Treaty could ever serve as an effective instrument of judicial control.⁸⁶ There are procedural devices, however, to implement subsidiarity.⁸⁷ One of them is to adjust law-making procedures so as to warn Member State legislators of forthcoming projects of European Union legislation. The new text of Article 23(3) and (4) of the Basic Law obliges

83. ALEXANDER HAMILTON ET AL., *THE FEDERALIST OR, THE NEW CONSTITUTION* (Everyman's Library 1948) (1787-88).

84. *See generally* E.C. Treaty, *supra* note 50, 298 U.N.T.S. at 3 (incorporating principle of subsidiarity).

85. E.C. Treaty, *supra* note 50, art. 3b, 298 U.N.T.S. at 16.

86. Von Dieter Grimm, *Subsidiarität ist nur ein Wort*, *FRANKFURTER ALLGEMEINE ZEITUNG*, no. 217, Sept. 17, 1992, at 38; Wernhard Möschel, *Zum Subsidiaritätsprinzip im Vertrag von Maastricht*, 47 *NEUE JURISTISCHE WOCHENSCHRIFT* 3025 (1993); *see also* Nicholas Emiliou, *Subsidiarity: An Effective Barrier Against "the Enterprises of Ambition"?*, 17 *EUR. L. REV.* 383 (1992) (presenting detailed analysis of E.C. Treaty as instrument of judicial control).

87. Commission of the European Communities, *The Principle of Subsidiarity, Communication to the Council and the European Parliament*, Oct. 27, 1992, SEC (92) 1990 final.

the German government to give the Federal Diet and also the second chamber, the Federal Council (Bundesrat), early occasion to make their views known regarding pending acts of European legislation.⁸⁸

In addition, the subsidiarity clause may prompt a reconsideration of judicial law-making under the *effet utile* principle.⁸⁹ *Effet utile* is no longer exclusively defined by the objective of an ever closer union. Hence, the principle of dynamic interpretation⁹⁰ has now been neutralized to some extent by the more static notion of subsidiarity.⁹¹ On that count, the Constitutional Court may not have been wrong after all, even though it derived its restrictive view not from the principle of subsidiarity but rather from a supposedly new approach under the Maastricht Treaty of distinguishing between exercising competences properly transferred and expanding them by way of amendment.⁹²

The close votes on the two Danish referendums and on the French referendum, the near success of Conservative "Eurosceptics" in toppling the British government and the partly learned, partly populist debate in Germany on substituting the ECU for the Deutschmark are ample proof of depletion of pro-integrationist sentiment in a number of Member States. Furthermore, the issue of enlargement of the European Union to the North and to the East can no longer be withheld from the political agenda. This is therefore an unlikely moment for further steps of integration, either by way of a legal instrument taking stock of what has been reached so far, or by way of the revision of the Maastricht Treaty envisaged under its Article N(2) for 1996.

CONCLUSION

All in all, the Federal Constitutional Court of Germany seems to have pulled the emergency brake at a moment when

88. TEU, *supra* note 1, O.J. C 224/1.

89. *See, e.g.*, ANNA BREDIMAS, *METHODS OF INTERPRETATION AND COMMUNITY LAW* 77-89 (1978) (discussing principle of *effet utile*); *cf., e.g.*, Van Duyn v. Home Office, Case No. 41/74, [1974] E.C.R. 1337, 1348, [1975] 1 C.M.L.R. 1, 9. The German translation of the Dutch original opinion, unlike the English translation, adds the French term "*effet utile*" in brackets behind the German equivalent for "useful effect."

90. *See, e.g.*, Bleckmann, *Teleologie und dynamische Auslegung des Europäischen Gemeinschaftsrechts*, 14 *EUROPARECHT* 239, 255-56 (1979).

91. *Cf.* Ulrich Everling, *Reflections on the Structure of the European Union*, 29 *COMMON MKT. L. REV.* 1053, 1070-71 (1992).

92. Judgment of Oct. 12, 1993, *supra* note 2, at 209-10.

the integrationist train had already come to a halt. The Constitutional Court's pronouncement, therefore, adequately reflects today's public opinion, nailing it down, however, for an indefinite period of time. Public opinion is known for its lack of steadiness. Thus, politics may change and call for further substantial steps towards European integration at a time when the Constitutional Court's pronouncement will still stand.

Notwithstanding the temporary halt of European integration, European politics can move ahead. A period of consolidation does not signal the beginning of disintegration. The so-called bicycle theory — a momentary standstill resulting in a fall — does not apply. On the contrary, exploiting the new opportunities offered by the Maastricht Treaty may bring about a convergence not only of economies and currencies but of the peoples of Europe as well.