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Solange, Farewell: The Federal German Constitutional Court and the Recognition of the Court of Justice of the European Communities as Lawful Judge

E.R. Lanier*

I. INTRODUCTION

In a decision as surprising as it is significant for the future course of European economic integration, the Constitutional Court of the Federal Republic of Germany (Bundesverfassungsgericht) has—at least for the foreseeable future—voluntarily suspended the exercise of a crucial aspect of its jurisdiction. Its landmark decision1 of October 22, 1986, announces the German Constitutional Court’s recognition of the Court of Justice of the European Communities as the lawful adjudicator of all issues growing out of Community secondary law, even where the conflict concerns basic personal rights guaranteed by the Federal German Constitution. Through this ruling, the Federal Constitutional Court has reversed its own precedent2 of more than a decade’s standing and has

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1 Judgment of Oct. 22, 1986, 73 BVerfGE 339 [hereinafter Solange II]. The popular name of the decision, Solange II, is drawn from the introduction to the holding of the Federal Constitutional Court: “As long as [Solange II] the European Communities, especially the decisions of the Court of the Communities, generally guarantee an effective protection of fundamental rights as against the sovereign power of the Communities ....” Id. at 387 (translated by the author with the assistance of Brigitte M. Fessle).

2 Judgment of May 29, 1974, 37 BVerfGE 271, 14 Common Mkt. L.R. 540 (1974) [hereinafter Solange I]. This case is popularly named Solange I for the use of the same phrase in the court’s decision:

As long as [Solange I] the integration process [in the European Communities] has not progressed so far that Community law also receives a catalogue of fundamental rights decided on by a parliament and of settled validity, which is adequate in comparison with the catalogue of fundamental rights contained in the [German] Constitution, a reference by a court in the Federal Republic of Germany to the Bundesverfassungsgericht in judicial review proceedings involving conflicts of Community secondary law and fundamental rights under the German Basic Law... is admissible and necessary ....” Id. at 285, 14 Common Mkt. L.R. at 554. At issue in Solange II and its predecessor case was the coordination of European Community secondary law with basic rights grounded in the Grundgesetz für die Bundesrepublik Deutschland, the Federal German Constitution, also known as the Basic Law. European Community secondary law consists of those “legal provisions issued by the Community institutions within the sphere of competence conferred upon them” by the EEC treaty. See infra note 3. See
signaled a new phase in the legal history of European economic coordination and integration.

II. THE FIRST SOLANGE RULING

Fundamental human rights standards are conspicuously absent from the Treaty of Rome creating the European Economic Community. Given the German experience in the twentieth century with totalitarian oppression and the destruction of the Weimar Constitution under right- and left-wing radicalism in the late 1920s and early 1930s, it is not surprising that widespread debate erupted in the Federal Republic of Germany during the 1960s over this "democracy deficit" in the European Community. An early line of decisions in the Court of Justice of the European Communities increased some Germans' fear that the Community would disregard fundamental rights guaranteed by the German Basic Law (Grundgesetz). For example, in Stork v. High Authority the European Court emphasized its narrow function in interpreting the legal effects of Community instruments. The court

Judgment of Oct. 18, 1967, 22 BVerfGE 293, 296, summarized in 5 COMMON MKT. L. REV. 483 (1968). European Community secondary law includes generally, then, the legislative and regulatory measures adopted by the European Community institutions established in the EEC Treaty. The specific types of European Community secondary law at issue in Solange I and II were import and export regulations adopted by the Council or Commission of the Communities. Primary European Community law is, on the other hand, the EEC Treaty itself and the obligations contained within its terms. These were not in contention in either Solange I or in Solange II. The Constitutional Court observed that "there is at the moment nothing to support the view that rules of the Treaty establishing the EEC, that is, primary Community law, could be in conflict with provisions of the Constitution of the Federal Republic of Germany." Solange I at 277, 14 Common Mkt. L.R. at 548–49.

Each of these decisions addressed fundamental rights under the Grundgesetz to the exclusion of adjectival provisions appearing there. See infra note 25 regarding the enumeration of fundamental rights in the Grundgesetze. As the court noted in Solange I, the question of a conflict between Community secondary law and "the law of the [German] Constitution outside its catalog of fundamental rights" remained open. Solange I at 277, 14 Common Mkt. L.R. at 549 (emphasis in the original).

3 Treaty Establishing the European Economic Community, done at Rome, March 25, 1957, 298 U.N.T.S. 11 (1958) [hereinafter EEC Treaty]. Ulrich Scheuner had suggested the reasons for this omission:

The Treaties instituting the Coal and Steel Community and the European Economic Community do not contain any provisions dealing with human rights. The economic objectives of the Treaties did not seem to stir up problems in this field, the more so as they were directed towards greater freedom of trade and of personal mobility. Only when the realization of the goals of the common market entailed a vast system of economic dirigism, did the question arise whether some measures of the Communities would encroach upon the liberties protected by national constitutional law.


4 For a discussion of the elements and development of this debate, see Scheuner, supra note 3, at 171–73.

in that decision deemed itself incapable of either examining directly the national constitutional provisions of member states or, by extension, applying them in immediate fashion. In Stork it directly disclaimed any authority to apply German constitutional rights concerning property and economic liberty. The European Court continued this self-limiting approach in other decisions such as Sgarlata v. EEC Commission, a case in which "basic principles governing all member countries" were at issue.

These decisions, and the evolving dynamics of Community law, further heightened German concern regarding possible intrusions by the Community upon constitutionally guaranteed human rights:

When considerable parts of Community Law came to be regarded as directly applicable, demanding immediate application within the States, and when supremacy of Community Law was proclaimed by the Court, the question became urgent whether the transfer of powers to the Community ... include[d] the recognition of the primacy of European enactments even over norms of the [German] Federal Constitution.

Stork was concerned with Grundgesetz arts. 12 & 14 (W. Ger.). Article 12 addresses freedom of trade, occupation and profession, together with a prohibition against forced labor; article 14 concerns the right of property (Eigentum), inheritance (Erbrecht) and their subjection to condemnation (Enteignung) for the common good.


Sgarlata v. Commission of the European Communities, 1965 E. Comm. Ct. J. Rep. 215. Also troubling were the decisions of the European Court in cases such as Präsident Ruhrkolen-Verkaufsgesellschaft m.b.H, et al. v. High Authority of the European Coal and Steel Community, 1960 E. Comm. Ct. J. Rep. 423, in which the court raised considerable questions regarding its perception of the role of human rights within Community law. In these cases, one observer notes:

[T]he Court refused to recognize fundamental rights as such. Perhaps its reaction is, with hindsight, explicable; the issue may have been presented to it in the wrong way. When an applicant sought to rely directly on a fundamental right protected by his own law, even by his national constitution, the Court reacted by re-asserting the supremacy of Community law over the laws, even the constitutional laws, of the Member States. The development of Community law had often naturally responded to the way in which a question has been put to it, whether by an applicant in a direct action or by a court of a Member State on a reference.

L. Brown & F. Jacobs, The Court of Justice of the European Communities 269 (2d ed. 1983). C.J. Mann has suggested a somewhat more institutional basis on which to explain the seeming antipathy of the early Court of Justice towards issues of human rights, especially when these rested on national constitutional bases:

[T]he power of the Court is limited ..., [It] is qualified to determine only certain issues, and then often only one facet of the particular issue in question. For this reason, the Court has carefully delineated its jurisdictional authority when challenged ..., [T]he extremely abstract and truncated reasoning of the Court ..., reflects a prudent attempt to avoid potentially embarrassing confrontations between Community and Member State policy. In this way, the Court had manifested a keen awareness of the real limits of its power in the development of Community law.

C. Mann, The Function of Judicial Decision in European Economic Integration 513 (1972).

Scheuner, supra note 3, at 172.
A formal German response to this question appeared in the 1974 ruling of the Federal Constitutional Court in Solange I.9

Solange I resulted in a "clarification," if not the final resolution, "of the relationship between the guarantees of fundamental rights in the [Federal German] Constitution and the rules of secondary Community law."10 This "clarification" complicated and obscured the coordination of the Community and German legal orders until it was, for all practical purposes, put to rest twelve years later in the 1986 decision (Solange II) handed down by the Federal Constitutional Court.

Solange I involved certain aspects of European Council and Commission Regulations11 which required, in part, the payment of a bond in conjunction with export license applications. The purpose of the bond requirement was to secure performance of the obligation to export during the period of license validity. The petitioner had forfeited such a bond in a corn flour export transaction and protested this result to the administering agency.12 When no relief was forthcoming, the company brought suit for a refund in the Administrative Court (Verwaltungsgericht) in Frankfurt am Main.13 The company alleged in the suit that the agency had violated its constitutional rights under the Federal Republic's Basic Law.14

9 Solange I, supra note 2.
10 Id. at 277, 14 Common Mkt. L.R. at 548.
12 The agency was the Einfuhr- und Vorratsstelle für Getreide und Futtermittel (Import and Supply Office for Cereals and Fodder), a federal office. Community regulations are administered through the administrative machinery of the member states. This fact often strikes Americans—who are accustomed to a more or less rigorous division of functions among the various levels of government—as a bit odd. Germans are more comfortable with such an arrangement. Compare, for instance, the long-standing practice of German cities which have traditionally discharged their autonomous powers (Selbstverwaltungsangelegenheiten) in tandem with duties imposed on them as agents of higher levels of government (Auftragsangelegenheiten). See the discussion in R. Wells, German Cities: A Study of Contemporary Municipal Politics and Administration 153–55 (1932). Similarly, Grundgesetz art. 83 (W. Ger.) provides that the Länder (states) of the Federal Republic are required to execute federal laws as "matters of their own concern (als eigene Angelegenheit)."
13 The Administrative Court (Verwaltungsgericht) is the court of original jurisdiction in the federal German judicial system having general competence over administrative matters, excluding tax and social insurance, which are handled by separate, specialized courts. The Administrative Courts, together with the Higher Administrative Court (Oberverwaltungsgericht), are regarded as courts of the Länder; the administrative court structure is capped by the Federal Administrative Court (Bundesverwaltungsgericht) in Berlin. See N. Horn, H. Kötz & H. Leser, German Private and Commercial Law: An Introduction 33–34 (1982) [hereinafter N. Horn, H. Kötz & H. Leser].
14 At issue was, in part, the principle of Verhältnismäßigkeit which, in its constitutional sense, is difficult to translate precisely. It addresses the necessity for proportionality and reasonableness in the acts performed by public authorities. The principle is grounded in the mandate of Grundgesetz art. 20 (W. Ger.) that "[l]egislation shall be subject to the constitutional order; the executive [branch of government] and the judiciary shall be bound by law and justice." It is, therefore, a requirement for "non-
The Frankfurt Administrative Court elected to refer the case\textsuperscript{15} to the European Court of Justice for a preliminary ruling\textsuperscript{16} regarding the legality of the contested regulations. The Administrative Court left no doubt that, in its view, German courts should not enforce Community regulations that contravene fundamental rights arising from the German Constitution: despite its ratification of the EEC Treaty, the Federal Republic had impliedly reserved—in the absence of equivalent protections afforded by the Community—the right to protect fundamental liberties guaranteed in the Grundgesetz.\textsuperscript{17} The Frankfurt Administrative Court concluded that since “less oppressive measures could be used to achieve the end of supervising the market,”\textsuperscript{18} the Community regulations should be declared invalid by the European Court.

The European Court of Justice, in its subsequent preliminary ruling,\textsuperscript{19} took issue with the German Administrative Court’s view concerning the application of the German Basic Law by Community organs:

Recourse to legal rules or concepts of national law to judge the validity of instruments promulgated by Community institutions would have the effect of harming the unity and efficacy of Community law. The validity of such instruments can only be judged in the light of Community law . . . . Therefore the validity of a Community instrument or its effect within a member-State cannot be affected by allegations that it strikes at either the fundamental rights


\textsuperscript{16} Under article 177 of the EEC Treaty, the Court of Justice of the European Communities had jurisdiction to provide “preliminary rulings” concerning validity and interpretation of acts of the institutions of the Community. In addition, that article provides that:

Where any such question [of validity or interpretation] is raised before a court or tribunal of one of the Member States, such court or tribunal may, if it considers that its judgment depends on a preliminary decision on this question, request the Court of Justice to give a ruling thereon.

\textsuperscript{17} Judgment of Mar. 18, 1970, 9 Common Mkt. L.R. 294, 295 (1970). The Administrative Court went further and argued that the contested regulations were not only unenforceable, but a violation of the Treaty creating the European Economic Community:

Failure to observe these structural principles of the German Constitution within the framework of European Community law is technically a breach of the E.E.C. Treaty. It cannot have any validity within the sphere of national law . . . . [T]he E.E.C. institutions are obliged to recognise that [the petitioner’s asserted German constitutional right] is an essential part not only of the law of the Federal Republic but also of the Community.

\textit{Id.} at 295–96.

\textsuperscript{18} \textit{Id.} at 302.

as formulated in that State's constitution or the principles of a national constitutional structure.\textsuperscript{20}

The European Court made it clear, however, that the nonapplication of specific German constitutional standards did not mean the absence of corresponding norms in Community law:

An examination should however be made as to whether some analogous guarantee, inherent in Community law, has not been infringed. For respect for fundamental rights has an integral part in the general principles of law of which the Court of Justice ensures respect. The protection of such rights, while inspired by the constitutional principles common to the member-States, must be ensured within the framework of the Community's structure and objectives.\textsuperscript{21}

The European Court found that the bond forfeiture provision of the regulations did not constitute an unreasonable burden on trade,\textsuperscript{22} and concluded that no fundamental right recognized in Community law had been violated.

Upon remand of the case to the Administrative Court in Frankfurt, that court hotly contested the European Court's view of the relation between Community and national law:

The question is certainly justified as to whether a certain decline in national institutions and constitutionality must be suffered as the price for the construction of a political union of Europe . . . . [If] Community law . . . is given precedence over any divergent constitutional provisions, and this European legal system is exempt from the obligations contained in . . . the [national] Constitution, it would lead to a constitutional and legal vacuum.\textsuperscript{23}

\textsuperscript{20}Id. at 1135, 11 Common Mkt. L.R. at 285.

\textsuperscript{21}Id. The European Court has taken a recent opportunity to reaffirm its holding in \textit{Internationale Handelgesellschaft}, both as to the autonomous character of Community law and the necessity to look to "the general principles of law, the observance of which it ensures," in fashioning fundamental rights within the Community legal order. See Staatsanwalt Freiburg v. Keller, 1986 E. Comm. Ct. J. Rep. , 48 Common Mkt. L.R. 875, 883–84 (1987). Ironically, this decision was reached on October 8, 1986, only two weeks prior to the ruling of the Federal Constitutional Court in \textit{Solange II}.


\textsuperscript{23} Judgment of Nov. 24, 1971, 11 Common Mkt. L.R. 177, 184–85 (1972). The Administrative Court saw a threat to the democratic order of the German Federal Republic itself in the position taken by the European Court:

For [if the position of the European Court were sustained] constitutional law would be eliminated as the highest national check on a European legislation that is becoming increasingly more expansive \textit{without the institution of the equivalent legal safeguards}. The democratic constitutional state guaranteed by the Constitution will itself only be able with difficulty to remain faithful to its basic decisions in constitutional law if as a result of particular advancing integration processes crucial spheres are withdrawn from its jurisdiction and, with the constant decline in the standing of the national legislature placed under a supranational, 'purely executive regime' which does not have to observe the fundamental principles laid down in . . . the Constitution in its measures. The supreme power contained in and bound by the
The Administrative Court, accordingly, initiated a review of these issues by the Federal Constitutional Court in Karlsruhe.24

In its 1974 review of this issue, the Constitutional Court ruled that protection of German constitutional rights could not, under conditions then prevailing, be guaranteed by the European Court in its interpretation and application of Community secondary law:

In this [connection], the present state of integration of the Community is of crucial importance. The Community still lacks a democratically legitimated parliament directly elected by general suffrage which possesses legislative powers and to which the Community organs empowered to legislate are fully responsible on a political level; it still lacks in particular a codified catalogue of fundamental rights, the substance of which is reliably and unambiguously fixed for the future in the same way as the substance of the [national] Constitution and therefore allows a comparison and a decision as to whether, at the time in question, the Community law standard with regard to fundamental rights generally binding in the Community is adequate in the long term measured by the standard of the Constitution with regard to fundamental rights . . . .25

Constitution must not yield to a constitutional change effected from the outside by the Community, for which the democratic authorisation for the future has not been ensured. Id. at 185 (emphasis in the original).

24 The Federal Constitutional Court has its origin in Grundgesetz part IX and is statutorily governed in its operations by the Statute Concerning the Federal Constitutional Court. Gesetz über das Bundesverfassungsgericht, Bundesgesetzblatt, Teil I [BGBl.I] 2229–30, BGBl.III 1104–1 (W. Ger.). In general terms, this court has a monopoly of power to decide constitutional issues in the Federal Republic. Grundgesetz art. 93 (W. Ger.). No other court, confronting a question regarding the federal constitutionality of a given law, may decide such issues. Under the provisions of Grundgesetz art. 100 (W. Ger.), another court must stay its own proceedings and obtain a ruling (Entscheidung) from the Federal Constitutional Court before considering the case further. This court-to-court submission (Vorlageverfahren) is regarded as a form of "concrete norm control" (Kronkrete Normenkontrolle). This procedure is to be contrasted with a constitutional complaint (Verfassungsbeschwerde) submitted under Grundgesetz art. 93(1)(4a) (W. Ger.), which may be initiated by any person claiming infringement by a public authority upon a right under the Grundgesetz. See generally the discussion of the Federal Constitutional Court and its functions appearing in N. Horn, H. Kötz & H. Leser, supra note 13, at 20–26. In 1985, the Constitutional Court received 3,066 constitutional complaints; in the same year, only 37 submissions from other courts ("concrete norm control" cases) came before the court. See E. Hübner & H. Rohlf, Jahrbuch der Bundesrepublik Deutschland: 1986/1987 300 (1986). Solange I was an example of a Vorlageverfahren; Solange II, discussed infra, came before the court on an individual constitutional complaint (Verfassungsbeschwerde).

25 Solange I, supra note 2, at 280. 14 Common Mkt. L.R. at 550–51. The Federal Republic of Germany, of course, has such a "codified catalog of fundamental rights":

The first chapter of the Basic Law is entitled "Basic Rights" ("Grundrechte"). These are in line with the general human and civil rights now recognized in all constitutional states in the West, and covered by the European Convention for the Protection of Human Rights. Here one finds the basic principles that everyone has the right to life, corporeal integrity, and the unhampered development of his personality (art. 2); that everyone is equal before the law (art. 3); that freedom of belief, conscience, religion, and ideology is inviolable (art. 4); and that everyone has the right to express himself freely in speech, writing, or pictures (art. 5).
The court reasoned that the intent of the German legislature in assenting to the EEC Treaty could not have been to transfer such powers to the Community so that the Community, by simple regulation, could enact measures that would infringe upon the constitutional order of the Federal Republic:

Article 24 of the Constitution deals with the transfer of sovereign rights to inter-State institutions. This cannot be taken literally. Like every constitutional provision of a similar fundamental nature, Article 24 of the Constitution must be understood and construed in the overall context of the whole Constitution. That is, it does not open the way to amending the basic structure of the Constitution, which forms the basis of its identity, without a formal amendment to the Constitution; that is, it does not open any such way through the legislation of the inter-State institution.26

The court therefore insisted on its continued exercise of the power to protect the integrity of fundamental rights in the German Basic Law, even against the European Court's interpretations of Community secondary law, "[a]s long as this legal certainty . . . is not achieved in the course of the further integration of the Community . . ."27 The question of whether the European Court was to be regarded as the "lawful adjudicator" of these matters in the sense of the

Here, too, are the basic right of assembly (art. 8), the inviolability of the home (art. 13), and the right of petition (art. 17). In addition, all Germans are granted the right to form associations and societies, especially in the field of industrial relations (art. 9), to make a free choice of their career, place of work, and place of training (art. 12), and to refuse on grounds of conscience to serve in the armed forces (art. 4). The state affords special protection to marriage and the family (art. 6), and it guarantees the right of property and inheritance by providing that there shall be no expropriation except for the common good and against fair compensation (art. 14). Some other basic rights are conferred elsewhere in the Basic Law, such as the right to a hearing in the courts, the freedom from punishment under retroactive laws, and the freedom from double punishment for a single act (art. 103). There are also provisions on the citizen's rights in relation to arrest and detention (art. 104).

N. HORN, H. KÖTZ, & H. LESER, supra note 13, at 21–22.

26 Solange I, supra note 2, at 279, 14 Common Mkt. L.R. at 550. This implied reservation under Grundgeset art. 24 (W. Ger.) was strict in requiring a virtual equivalency in fundamental rights protection by the transferee organization as a condition of the Constitutional Court's recognition of its competency to adjudicate fundamental rights under the Grundgeset. Decisions from the court—after Solange I, but before Solange II—relaxed this standard somewhat. In Eurocontrol I (Judgment of June 23, 1981, Bundesverfassungsgericht, W. Ger., 58 BVerfGE 1), the court reasoned that article 24 contemplates Germany's participation in international organizations; hence, the standard of fundamental rights equivalency cannot be placed so high as to preclude effectively such participation. In Eurocontrol II (Judgment of Nov. 10, 1981, Bundesverfassungsgericht, W. Ger., 59 BVerfGE 63), the court found no infringement of the basic right to judicial review where the Administrative Court of the International Labor Organization was granted jurisdiction over labor disputes arising from the operation of the Eurocontrol organization. Neither of these decisions concerned the European Community; they have some bearing, however, on the court's growing acceptance of Federal German participation in international organizations and the practical implications of the participation. See generally A. Greifeld, Requirements of the German Constitution for the Installation of Supranational Authority, 20 COMMON Mkt. L. Rev. 87 (1983).

27 Solange I, supra note 2, at 280, 14 Common Mkt. L.R. at 551.
Basic Law was left open. The court struck a brighter note by conceding that "[w]hat is involved is ... a legal difficulty arising exclusively from the Community's continuing integration process, which is still in flux and which will end with the present transitional phase."

A vigorous dissent by three of the eight judges of the Constitutional Court challenged the majority view regarding the limited transfer of power to the Community through the Treaty of Rome. In their view, this transfer vested "sovereign rights" in the Community whose exercise was not to be limited by subsequent national review:

The sovereign acts which are to be recognized and which are not subject to any national review include the law-making of the European Community organs. The rules of law issued by them cannot therefore be dependent in their validity and applicability on whether they match the criteria of national law. In content, Community law takes precedence over divergent provisions of national law. This applies not only in relation to norms of simple national law, but also vis-a-vis norms of the national Constitution dealing with fundamental rights.

Moreover, from the dissent's perspective, the majority's anxiety over basic rights was misplaced, since "[t]he protection of fundamental rights guaranteed inside the Community does not differ in essence and structure from the fundamental rights system of the [German] national Constitution" and, in any event, the Community should not be under a requirement to protect basic rights "in precisely the same form" in which the constitutions of member states protect them.

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28 Grundgesetz art. 101(1) (W. Ger.) guarantees that "[n]o one may be removed from the jurisdiction of his lawful judge (Niemand darf seinem gesetzlichen Richter entzogen werden)." Since the Constitutional Court had implied a continuing reservation in favor of national protection of basic rights in the accession of the Federal Republic to the EEC Treaty, it follows that the European Court might not be considered a "lawful judge" with respect to a final adjudication of this category of rights. The court refrained, however, from making an explicit declaration to this effect.

29 Solange I, supra note 2, at 280-81, 14 Common Mkt. L.R. at 551.

30 Id. at 291, 14 Common Mkt. L.R. at 559.

31 Id. at 295-96, 14 Common Mkt. L.R. at 562. The dissent's use of the wording "Community law take precedence over divergent provisions of national law [Gemeinschaftsrecht geht inhaltlich abweichenden Bestimmungen des nationalen Rechts vor]" was purposeful; it evokes ancient principles of the German constitutional order ("The law of the Empire takes precedence over state law [Reichsrecht bricht Landesrecht]") and fundamental provisions of the modern Grundgesetz art. 31 (W. Ger.) ("Federal law shall override Land law [Bundesrecht bricht Landesrecht]"). The dissenting judges are positing a vertical integration of Community and German law, in opposition to the coordination of autonomous systems championed by the majority opinion.

32 Solange I, supra note 2, at 296-97, 14 Common Mkt. L.R. at 563.

33 Id. at 297, 14 Common Mkt. L.R. at 563. This phrase is somewhat hyperbolic; the majority judges nowhere required Community law to protect fundamental rights in exactly the same fashion as does national law.
The majority opinion in *Solange I* voiced strong views regarding the integrity of fundamental rights under the German Basic Law. The minority judges, in turn, expressed their concerns with respect to the integrity of Community legislation and the goal of a united Europe:

> If the applicability of secondary Community law were dependent on its satisfying the fundamental rights norms of a national Constitution, then—since the member-States guarantee fundamental rights to differing extents—the situation could arise where legal rules of the Communities are applicable in some member-States, but not in others. This would result, precisely on the field of Community law, in a fragmentation of law. To open up this possibility means exposing a part of European legal unity, endangering the existence of the Community, and negating the basic idea of European unification. 34

Although the decision reached by the Federal Constitutional Court in *Solange I* provoked a storm of criticism,35 the ruling remained in force for a dozen years. An uneasy peace settled over Europe in those quarters concerned with the unity of the European Community system and the integration of the eco-

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34 *Id.* at 298, 14 Common Mkt. L.R. at 564.
35 The Commission reported that it had informed the Federal German government of its “grave concern” regarding the decision, asserting that:

> This ruling is contrary to Community law—and in particular to the principle of its autonomy and of its primacy over national law, including constitutional law—and to all the relevant case law of the European Court. Accordingly it is a dangerous threat to the unity of Community law and creates uncertainty as to the latter’s uniform application.

> By claiming the power to verify the compatibility of Community secondary legislation with the fundamental rights in the Basic Law, the Constitutional Court is impugning the exclusive jurisdiction of the Court of Justice to ensure that in the interpretation and application of the treaties the law is observed . . . .


Christoph Vedder has observed that “[t]he first *Solange* decision was flat out damned for legal reasons and on grounds of [European] integration politics.” Vedder, *Ein neuer gesetzlicher Richter?*, 10 NEUE JURISTISCHE WOCHENSCHRIFT 526, 527 (1987) (translated by the author). None of this could have escaped the notice of the Constitutional Court, which must have been uncomfortable with the strident response to its ruling in *Solange I*. A portent of things to come appeared in its “Vielleicht [Perhaps . . . ]” Judgment of July 25, 1979, Bundesverfassungsgericht, W. Ger., 52 BVerfGE 187. The question before the Constitutional Court in that case was one of potential conflict between primary Community law—the EEC Treaty—and the Grundgesetz. Predictably, the Constitutional Court ruled that the European Court has exclusive jurisdiction to interpret the Treaty and that its interpretation was binding on the German courts. It went further and, in pure obiter dicta, expressed doubts about the continuing validity of its rule in *Solange I*, questioning “whether and, if applicable, to what extent, the principles [of Solange I] can, in view of the political or legal developments occurring in the intervening time in Europe, claim unlimited application in future matters concerning norms of derivative Community law.” *Id.* at 202–03.
nomic, social, and political orders on the continent. This impasse was not to be broken until the Constitutional Court took up the issue once again in Solange II in late 1986.

III. Solange II

When an opportunity arose twelve years later for the Federal Constitutional Court to reconsider the position taken in Solange I, the question presented itself to the court, appropriately enough, in a context similar to the circumstances...
giving rise to its original opinion. International trade regulations of the EEC Council and Commission were once again to provide the legal background of a dispute striking at the heart of the continuing disagreement respecting the coordination of Community and national law.

A. The EEC Regulatory Framework of Solange II

Some of the most important provisions of the Treaty of Rome are those that address the foundation of a common market for agricultural products within the Community. Title II of the Treaty—encompassing Articles 38 through 47, inclusive—erects the general framework of a Community "common agricultural policy" which is designed to achieve the objectives delineated in Article 39. These include, inter alia, increased agricultural productivity, a fair standard of living in the agricultural sector of the Community, market stabilization, the assurance of supply availability, and reasonable prices to consumers of Community agricultural products.

The Treaty terms envision an arsenal of devices to be employed in the pursuit of this common agricultural policy. Common competition rules, coordinated national market organizations, and the implementation of a Community-wide market organization are specifically contemplated, together with "all [other] measures necessary to achieve the objectives set out in Article 39, in particular price controls . . . and [a] common machinery for stabilising importation or exportation."  

The Community first applied this broad authority under the Treaty in 1967 to the intra-Community market encompassing processed fruits and vegetables. In that year, the Council promulgated regulatory controls for processed fruits and vegetables containing sugar and glucose, based upon the guidelines provided by an earlier regulation addressed to an interim sugar market organization in the Community. A year later, this regulation was itself replaced by a far-ranging regulatory scheme for processed fruit and vegetable products.

38 EEC Treaty, supra note 3, at art. 40(2)(a)–(c).
39 Id. at art. 40(3).
42 Council Regulation (EEC) No. 865/68 of June 28, 1968, 11 J.O. COMM. EUR. (No. L153) 8 (1968), 1968 Special Eng. Ed. 225 (1972). Although article 7 of this Regulation enabled the Council to adopt "necessary provisions to co-ordinate and standardise the treatment accorded by each Member State to imports from third countries," it was to do so on a proposal from the Commission. Article 14 of the Regulation provided, however, for the creation of a Management Committee for Products Processed from Fruit and Vegetables, consisting of national representatives and presided over by a representative of the Commission. This Committee, under the provisions of article 15, was to formulate necessary regulatory controls for consideration by the Commission. Regulations so adopted were to have immediate effect although the Council could override the Commission decision within one month of the Commission action. The use of the Management Committee system was contested, but approved, in
Under Article 7 of this comprehensive regulation, the power to adopt rules governing the system of trade in processed fruits and vegetables with non-EEC nations was vested in the Council. Subsequently, in 1971, the Council set forth a series of basic guidelines for the adoption of protective measures with respect to the importation of processed foods into the Community.43

This regulation was displaced in 1975 by a Council Regulation44 which preserved, verbatim, in Article 7(1), important limiting language of its predecessor making clear the stop-gap character of this regulatory authority:

If, by reason of imports or exports, the Community market in one or more of the products specified in Article 1(1) [of this Regulation] is or is likely to be exposed to serious disturbances which might endanger the objectives set out in Article 39 of the Treaty, appropriate measures may be applied in trade with third countries until such disturbances or the threat thereof has ceased.45

Moreover, this amended Council Regulation was supplemented by a later provision which enumerated, in its Article 1, the elements of a "serious market disturbance" such as would trigger the mechanism for the imposition by the Commission of import restrictions. These elements included

- a) the volume of imports or exports affected or foreseen;
- b) the quantities of products available on the Community market;
- c) the prices for Community products on the Community market or the foreseeable trend of these prices and in particular any excessive upward or downward trend thereof in relation to prices in the years immediately preceding;
- d) where the mentioned above situation arises as a result of imports, the prices obtaining on the Community market, at a comparable stage, for products from third countries, and in particular any excessive downward trend in these prices.46

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44 Council Regulation (EEC) No. 1927/75 of July 22, 1975, 18 O.J. EUR. COMM. (No. L198) 7 (1975). In the event of a serious market disturbance, the Commission had the power to adopt necessary measures with immediate effect throughout the Community (art. 7(2)); the Council, however, could later amend or annul the Commission's action at the request of a member state (art. 7(3)). This Council veto procedure was also approved by the European Court in Köster, Berodt & Co., 1970 E. Comm. Ct. J. Rep. 1161, 11 Common Mkt. L.R. 288 (1972).


When a consideration of these factors indicated the presence of a market disturbance, an import license could be denied in toto to an applicant, subject to the limitation that such measures should be employed "only to such extent and for such length of time as is strictly necessary."  

Confronted with chaotic conditions in the canned mushroom market within the Community during the first two quarters of 1974, the EEC Commission moved to adopt emergency provisions restricting the importation of canned mushrooms and subjecting such imports to special licensing procedures under the authority of Council Regulation No. 1427/71.

The 1974 Commission Regulation in Article 1(1) initiated a general requirement within the Community for special import licenses regarding preserved mushrooms from nonmember countries, effective August 26, 1974. Pursuant to Article 2(2) of that regulation, the Commission was given the authority to determine the quantities of goods for which import licenses were to be issued to individual importers, with these quantities to be fixed in accordance with the standards set forth in Article 3. Article 3 (as amended in 1975 by Commission Regulation 1869/75) fixed the importable quantities at a percentage, to be determined by the Commission from time to time on the basis of prevailing market conditions within the Community, of the amounts introduced into the Community by the importer during the corresponding period of 1973. Moreover, Article 1(2) of the regulation (as amended by Regulation 1869/75) required that licenses be obtained in advance and on a quarterly basis. In addition to the draconian measures set forth in the Council's Regulation allowing the wholesale denial of any import license altogether, this reservation proved successful in providing a tool for the flexible reduction of such imports. For the third quarter of 1976, the Commission fixed imports at a ceiling of 70 percent of the applicable reference amount determined by Article 3 of Regulation 1869/75, by

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47 Id. at art. 2(1). This provision permitted the "total or partial discontinuation of the issue of [import] certificates" as to products falling within the import certificate system; the same provision also allowed total and partial suspension of imports of products not within the import certificate system.

48 Id. at art. 2(2).

49 Commission Regulation (EEC) No. 2107/74 of Aug. 8, 1974, 17 O.J. EUR. COMM. (No. L218) 54 (1974). The preamble to the Regulation noted that "imports into the Community of preserved mushrooms during the 1973 marketing year amounted to some 40,000 metric tons," a figure "considerably higher" than in previous years; that imports in the first half of 1974 ran 50% higher than the same period in 1973; and that "offer prices from third countries are 20 to 30% less than the cost price within the Community . . . ." Id.

50 Id. This Regulation was later amended by the adoption of Commission Regulation (EEC) No. 1869/75 of July 22, 1975, 18 O.J. EUR. COMM. (No. L190) 23 (1975).

51 This percentage represented an increase over the 55 percent ceiling fixed by Commission Regulation (EEC) No. 661/76 of Mar. 25, 1976, 19 O.J. EUR. COMM. (No. L80) 15 (1976), which governed preserved mushroom imports for the second quarter of 1976. The Commission attributed the market improvements to "the application of the protective measures" contained in its earlier regulations;
the final half of 1976, market conditions had improved to such an extent that the Commission adjusted this ceiling upward to 100 percent of the applicable reference quantity.52

At the end of 1976, the Commission repealed its regulatory restrictions in their entirety since, in its judgment, protective measures were no longer justified, given the improved market circumstances in the Community.53 Their enforcement in Germany prior to revocation, however, was to set in motion the elements of a constitutional confrontation which would ultimately resolve the lingering doubts created by the first Solange decision and, in the process, alter the legal landscape of Europe.

B. Solange II before the German Courts

On July 9, 1976, a German processed-foods importer, Wünsche Handelsgesellschaft, filed an application for a license to import one thousand tons of Taiwanese canned mushrooms into the Federal Republic of Germany. Directed to the Federal Office of Food and Forestry (Bundesamt für Ernährung und Forstwirtschaft), the import license application was, after internal review, denied by the agency on July 15, 1976, on the basis of the EEC Community Regulations then in effect.54

In its subsequent complaint before the Administrative Court (Verwaltungsgericht) in Frankfurt am Main, the importer attacked this agency decision on the grounds that the EEC regulations in issue were invalid since they were premised on poor market conditions which no longer existed at the time of the license application.55 The petitioner argued that, as temporary protective measures, the regulations had lost their basis in fact and, therefore, in law. *Cessante ratione*
legis, cessat et ipsa lex: the regulations should have been repealed by the Commission as soon as the market crisis in processed mushrooms had passed. 56

The evidentiary record before the Administrative Court was replete with indications that the emergency existing in the European market for canned mushrooms which sparked the initial Commission Regulations of 1974 had abated by the time petitioner had applied for an import license. 57 The German Federal Office of Food and Forestry had sought modification of the Commission’s regulations so as to allow increased imports from without the Community, but to no avail. 58

The Administrative Court, in dismissing the complaint, ruled that the contested regulations were consistent with the objectives of Article 39 of the Treaty of Rome. On the record before the court, it found no manifest abuse of discretion by the Commission in maintaining import restrictions after the first two quarters of 1976. Moreover, the court rebuffed the petitioner’s effort to seek a preliminary ruling on its objections to the regulations by the European Court of Justice. 59

On an immediate review 60 of this decision, the Federal Administrative Court (Bundesverwaltungsgericht) in Berlin agreed that the central issue in the case was the continuing validity after June 1976 of the Community’s regulations. In the court’s view, the denial could have been premised only on Commission Regulation No. 2107/74 which, in turn, looked for an authoritative base in Council Regulations Nos. 1927/75 and 1928/75. 61 The court observed that the Commission’s regulatory authority in this regard had been restricted by the Council to the enactment of provisions “only to the extent and for the period of time absolutely necessary” and that the regulations “would therefore have to be repealed as soon as the disturbances against which it was designed to protect have been eliminated or no longer threaten to occur.” 62 For the Federal Ad-

57 Solange II, supra note 1, at 346.
58 Id.
59 Id., at 344–45.
60 sprungrevision permits the petitioner to by-pass the Higher Administrative Court, the normal appellate tribunal reviewing cases arising in an Administrative Court.
61 Solange II, supra note 1, at 345.
62 See id. at 345–46, where the Federal Constitutional Court reviews the reasoning (Begründung) of the Federal Administrative Court in the latter court’s Judgment of Mar. 21, 1981.
ministrative Court, then, the observance by the Commission of the Council's regulatory limitation was the paramount issue, a question it regarded as singularly appropriate to the European Court of Justice. Accordingly, the Federal Administrative Court sought a preliminary ruling from the European Court as to the validity of the Commission's Regulation.63

C. The European Court of Justice

In the proceedings before the European Court resulting in its preliminary ruling of May 6, 1982, the petitioner repeated its contentions regarding the invalidity of the contested Commission Regulations beyond the end of June 1976.64

The Commission, for its part, insisted that its regulations should be tested for their validity as of the time of their adoption65 and not—as petitioner apparently had done—in light of post facto market developments. Measured by this standard, the Commission argued, its regulations were neither factually erroneous nor were they an abuse of its discretion. The Commission introduced statistical evidence from the German Federal Statistics Office (Statistisches Bundesamt)66 and the French National Federal Association for Products Processed from Fruits and Vegetables (Association Nationale Interprofessionelle des Fruits et Légumes Transformés)67 indicating that, although an intermittent rise in canned mushroom prices had taken place in the Community market since the drastic drop of 1972–1974, the pre-1972 price level had not again been achieved until the last months of 1976.68 From the Commission's perspective, the information available to it in mid-1976 did not warrant a repeal of protective measures regarding the canned mushroom market but, at most, allowed incremental opening of the Community's borders to third countries as provided in Regu-

63 See supra note 16, concerning the authority of the European Court of Justice to issue preliminary rulings on application by national courts of the member states. The issue posed here by the Federal Administrative Court to the European Court, as reported in Wünsche, was a model of comprehensiveness:

Did Regulation (EEC) No 2107/74 of the Commission of 8 August 1974 laying down protective measures applicable to imports of preserved mushrooms . . . infringe the combined provisions of Article 7(1) of Regulation (EEC) No 1927/75 of the Council of 22 July 1975 concerning the system of trade with third countries in the market in products processed from fruit and vegetables . . . and Article 2(2) of Regulation (EEC) No 1928/75 of the Council of 22 July 1975 laying down detailed rules for applying measures in the market in products processed from fruit and vegetables . . . in so far as it was retained in force after 30 June 1976?


64 Id. at 1483–85.
67 Id. at 1486.
68 Id. at 1486–87.
Conceding that these measures were of a temporary character and intended to persist only as long as absolutely necessary, the Commission nevertheless insisted, with respect to the “assessment of economic events,” on “wide discretion” to consider factors beyond those enumerated in Article 1 of Regulation 1928/75. The European Court concurred and ruled that the regulations were valid.

D. On Return to the Federal Administrative Court

In the renewed proceedings before the Federal Administrative Court, the disappointed importer assailed the adequacy of the procedure before the European Court, insisting that its decision had ignored the factual record, particularly the evidence indicating a rise in market prices for canned mushrooms in the last two quarters of 1976. The court had, in addition, relied on nonverifiable data and on statistics devoid of evidentiary competence. These apparent abuses assumed constitutional proportions in petitioner's view. The European Court had usurped, the petitioner claimed, the function of the national court in making factual determinations, denying it the constitutional guarantee of adjudication of these issues by a lawful judge. Further, the petitioner insisted that it had been deprived of its constitutional privilege freely to practice its trade and that its constitutional right to a hearing had been violated.

69 Id. at 1487.
70 The Commission asserted that
[it] [the Commission] enjoys a wide discretion with regard to the assessment of economic events. It remains free to take into account factors other than those listed in Article I of Regulation No 1928/75. It must give special consideration to those factors, but may also adopt measures where just one of the indicators discloses the existence of a serious threat. It must in addition limit or abolish the effect of the measures adopted once they are no longer absolutely necessary.
Id. at 1485.
71 "In [the factual] circumstances [shown to the court], it cannot be denied that the Commission kept within the limits of its discretion in considering, when it adopted the contested regulations, that the situation on the market did not yet permit the abolition of the protective measures introduced in 1974." Id. at 1492.
72 These proceedings are summarized in Solange II, supra note 1, at 349–51.
73 Id. at 350.
74 Id. (nicht überprüfbare Zahlen und statistiken mit fehlender Aussagekraft).
75 K.P.E. Lasok has observed that the Community Court is "competent only to rule on the question of Community law referred to it" for a preliminary ruling pursuant to the EEC Treaty. See EEC Treaty, supra note 3, at art. 177. "[T]he national court remains competent to decide the dispute between the parties and any other issue of fact or law." K. LASOK, THE EUROPEAN COURT OF JUSTICE: PRACTICE AND PROCEDURE 46 (1984) [hereinafter LASOK]. To the extent that the European Court had determined factual issues, it acted without proper jurisdiction, depriving petitioner of a lawful judge within the meaning of Grundgesetz art. 101(1) (W. Ger.). Solange II, supra note 1, at 351.
76 Solange II, supra note 1, at 351. Petitioner's argument was grounded in Grundgesetz art. 12(1) (W. Ger.), governing the practice of trades, occupations and professions.
tially by the European Court's consideration of improper evidence.\textsuperscript{77} To secure a review of these contentions, the petitioner sought to have the court present the case to the Federal Constitutional Court in Karlsruhe. In the alternative, it sought leave to appeal anew to the European Court.\textsuperscript{78}

The Federal Administrative Court rejected each of these maneuvers, holding that, while petitioner had the right to an appeal to the European Court under the Treaty, this right had been satisfied by that court's earlier consideration of the evidence before it.\textsuperscript{79} Further, no direct review of the constitutional law implications of the European Court decision was available in the Constitutional Court. While that court had asserted in \textit{Solange I} the right to evaluate secondary Community law against the standard of German constitutional rights, it claimed no authority directly to review the decisions of the European Court as such.\textsuperscript{80}

\textsuperscript{77} \textit{Solange II}, supra note 1, at 350. \textit{Grundgesetz} art. 103(1) (W. Ger.) guarantees that "[i]n the courts everyone shall be entitled to a hearing in accordance with the law." Since the petitioner felt that the European Court had not given proper attention to a major part of its argument, it argued before the Federal Constitutional Court that the European Court had violated this constitutional right to be heard.

\textsuperscript{78} \textit{Solange II}, supra note 1, at 349–50.

\textsuperscript{79} In a prior decision, the Federal Constitutional Court had taken the position that a German court could request a second ruling from the European Court where a preliminary ruling obtained under the EEC Treaty was incorrect or unclear. See \textit{EEC Treaty}, supra note 3, at art. 177. \textit{See also} Judgment of July 25, 1979, \textit{Bundesverfassungsgericht}, 52 BVerGE 187, 201; Milch, Fette- und Eier Kontor G.m.b.H. v. Hauptzollamt Saarbrucken, 1969 E. Comm. Ct. J. Rep. 165, 180, where the court held that "[a]n interpretation given by the Court of Justice binds the national court in question but it is for the latter to decide whether it is sufficiently enlightened by the preliminary ruling given or whether it is necessary to make a further reference to the [European] Court." As noted by the Constitutional Court, the Federal Administrative Court "rejected a renewed appeal to the European Court pursuant to Article 177, paragraph 3, of the EEC Treaty on the basis that the appropriate presentation of the appeal referred solely to the [European] Court's consideration of evidence; this however did not constitute a reason to question the propriety or clarity of the judgment." \textit{Solange II}, supra note 1, at 351.

\textsuperscript{80} \textit{Solange II}, supra note 1, at 351. In \textit{Solange I}, the Constitutional Court had disclaimed the power to pass directly on the validity of Community secondary law as implemented or enforced by a Community organ (including the European Court):

An initial barrier to the jurisdiction of the Bundesverfassungsgericht emerges from the fact that it can only make the subject of its review acts of German State power, that is, decisions of the courts, administrative acts of the authorities and measures of the constitutional organs of the Federal Republic of Germany. For this reason, the Bundesverfassungsgericht regards as inadmissible a constitutional action (Verfassungsbeschwerde) by a citizen of the Federal Republic of Germany directly against a Community regulation.

\textit{Solange I}, supra note 2, at 283, 14 Common Mkt. L.R. at 553; \textit{see also} Judgment of Oct. 18, 1967, 22 BVerGE 293, 297, \textit{summarized in 5 COMMON MKT. L. REV.} 483 (1968). As a result

\textit{[t]he Bundesverfassungsgericht never rules on the validity or invalidity of a rule of Community law. At most, it can come to the conclusion that such a rule cannot be applied by the authorities or courts of the Federal Republic of Germany in so far as it conflicts with a rule of the Constitution relating to fundamental rights.}

\textit{Solange I}, supra note 2, at 281–82, 14 Common Mkt. L.R. at 552. Petitioner's demand, then, that the decision of the European Court be transferred directly to the Federal Constitutional Court for constitutional review was dismissed. This result would not, of course, preclude a \textit{de novo} constitutional complaint against a German court which approved an "unconstitutional" result in the European Court. \textit{See supra} note 24. Petitioner subsequently took advantage of this procedure.
The Federal Administrative Court observed that petitioner had made no argument before the European Court regarding any infringement of constitutional rights. Moreover, the court noted, petitioner’s basic thrust centered on the invalidity of the protective measures adopted by the Commission when examined in light of the controlling Council Regulations: the dispute was, at base, a question dealing with the coordination and interpretation of higher and lower orders of secondary Community law, a process over which the European Court has proper jurisdiction. For the Berlin Court, then, a direct review by the German Constitutional Court or a renewed appeal to the European Court both were foreclosed to the petitioner.

E. Before the Federal Constitutional Court

Frustrated in its efforts to secure a direct judicial review, the petitioner filed a constitutional complaint with the Constitutional Court in Karlsruhe, naming the Federal Administrative Court as respondent. This complaint alleged a basket of constitutional violations, addressing the propriety of the Berlin Court’s decision not to submit the matter to the European Court or to the Federal Constitutional Court for further direct review and contending that the Community Regulations were, in operation, violations of fundamental rights under the German Basic Law.

81 The petitioner had asserted primarily the lack of a factual basis for the extension of the contested regulations beyond June 30, 1976. See Wünsche, 1982 E. Comm. Ct. J. Rep. 1479, (1981-1983 Transfer Binder) Common Mkt. Rep. (CCH) ¶ 8830. Its constitutional arguments were not pressed with vigor until the return of the case to the Federal Administrative Court after the preliminary ruling by the Court of Justice. The bulk of the petitioner’s dissatisfaction at that point centered on the purported “mishandling” of the case by the latter court.

82 The Federal Constitutional Court considered that by asserting that the [Commission] Regulations (EEC) No. 1412/76 and No. 2284/76 are not covered by the authorization of [Council] Regulation (EEC) No. 1927/75 Article 7 § 1, [the petitioner] was measuring secondary Community law. Even if one should use as a basis the legal theory espoused in the Federal Constitutional Court’s decision [in Solange I], the Federal Constitutional Court was not authorized to conduct such a review, since it concerns interpretation of Community law exclusively ... for which the European Court alone has jurisdiction.

83 The Constitutional Court observed that, “[w]ith its constitutional complaint, the petitioner alleges that the judgment of the Federal Administrative Court encroaches upon its procedural and substantive fundamental rights [verletze sie in prozessualen und materiellen Grundrechten].” Id. at 355. The petitioner argued that by holding enforceable Commission Regulations (EEC) No. 1412/76, 19 O.J. EUR. COMM. (No. L158) 37 (1976) and No. 2284/76, 19 O.J. EUR. COMM. (No. L258) 5 (1976), the Federal Administrative Court had sanctioned violations by the EEC Commission of the constitutional guarantees of proportionality and legal certainty rooted in Grundgesetz arts. 2(1), 12(1) & 20(3) (W. Ger.). See generally Solange II, supra note 1, at 359–62. While the enabling legislation of Council Regulation (EEC) No. 1927/75, 18 O.J. EUR. COMM. (No. L198) 7 (1975) effectively incorporated these constitutional protections by narrowly restricting the range, both as to substance and time, of permissible regulatory action which could be taken by the Commission, the petitioner maintained that the latter body had ignored these limitations, thereby violating not only the conditions imposed by the Council but important
In petitioner’s view, the Federal Administrative Court had done nothing more than rubber-stamp the erroneous decision of the European Court; to the extent that the European Court had violated petitioner’s constitutional rights, these violations tainted the decision of the Federal Administrative Court as well.84

F. The Decision in Solange II

A central point in the Constitutional Court’s 1974 holding in Solange I had been that the Community institutions that could, with elaboration, serve as protective bulwarks against the intrusion by Community agencies upon basic and fundamental rights guaranteed by the German Basic Law were not yet fully developed. Its review of these institutions in Solange II persuaded the court in 1986 that circumstances in the Community had changed to such an extent that the earlier reservations regarding Community institutions could be abandoned. A unanimous Constitutional Court ruled that the European Court is now to be regarded as the lawful adjudicator where Community secondary law is alleged to be in conflict with fundamental rights under the German Constitution.85

principles of German constitutional law as well. Solange II, supra note 1, at 360. Moreover, according to the petitioner, the arbitrary manner in which the Commission adopted its regulations, seemingly without relation to actual market conditions prevailing in the Community, had the ultimate effect of depriving the petitioner of the freedom to pursue its trade and occupation as guaranteed by Grundgesetz art. 12(1) (W. Ger.). Solange II, supra note 1, at 361. Beyond these substantive constitutional violations, the petitioner alleged that procedural aspects of the decisions in the European Court and, derivatively, in the Federal Administrative Court had infringed on other protections afforded by the Basic Law. The European Court had, petitioner claimed, relied on improper evidence in its proceedings and ignored the facts presented there on petitioner’s behalf. See supra notes 73, 74 and 77, and accompanying text. Petitioner had thus been deprived of its constitutional guarantee of the right to be heard grounded in Grundgesetz arts. 19(4) & 103(1) (W. Ger.). In addition, the Federal Administrative Court was said to have negated the constitutionality assured access to a lawful judge rooted in Grundgesetz art. 101(1) (W. Ger.) when it adopted the findings of fact improperly made by the European Court of Justice. See supra note 75 and accompanying text. The decision of the Federal Administrative Court neither to refer the case to the Constitutional Court nor to resubmit it to the Court of Justice was also alleged to be a denial of the right to a lawful judge. See Solange II, supra note 1, at 351; see also infra note 84.

84 This result flowed from the fact, petitioner asserted, that the Federal Administrative Court “based its decision [solely] on the preliminary ruling of the European Court” and refused to avail itself of additional guidance from the Federal Constitutional Court under the authority of Grundgesetz art. 100(1) (W. Ger.), mandating presentation to the Constitutional Court of issues within its jurisdiction appearing in other German courts (see supra note 24), or from the European Court under the provisions of EEC Treaty, supra note 3, at art. 177 (see supra note 16). Solange II, supra note 1, at 354.

85 The Constitutional Court concluded: “The European Court is a lawful adjudicator within the meaning of Article 101, § 1, Sentence 2, of the Basic Law; this question, until now undecided by the Federal Constitutional Court, . . . must receive an affirmative answer.” Solange II, supra note 1, at 366–67. As a consequence, the procedural duty originating in the first Solange opinion no longer obligates lower German courts to refer cases to the Constitutional Court after a preliminary ruling by the European Court of Justice, even where basic constitutional rights are purportedly infringed by Community secondary law. Being a lawful adjudicator in the sense of the Grundgesetzes, the European Court has the authority under the EEC Treaty to make final decisions (abschliessende Entscheidungsbefugnis)
This dramatic volte-face by the Constitutional Court was prompted by pervasive developments throughout the whole structure of the European Communities. These developments, in the aggregate, placed beyond any cavil the commitment in the Communities to the rule of law, the realization of democratic principles, and the thoroughgoing protection of fundamental human rights. The Constitutional Court was persuaded to reach this conclusion, in the first instance, by concrete developments with respect to the European Court itself; these considerations were reinforced by convincing evidence of a general acceptance of democratic ideals and recognition of fundamental rights by all arms of the Community.

G. The European Court and Fundamental Rights

"In view of the extensive institutional guarantees" by which it is bound, observed the Constitutional Court, "there can no longer be any doubt about the adjudicative quality of the Court of the European Communities." These assurances were found in the conditions of the European Court's organization and function set forth in the Treaty itself; the obligations of impartiality, independence, integrity, and discretion binding its individual judges, together with its fixed procedural standards as expressed in the Protocol on the Statute of the Court; and in the norms established by the Rules of Procedure of the Court of the European Economic Community. The aggregate impact of these

within its assigned competence. Id. at 368. This ruling did not, however, negate the right of a German citizen to bring an independent constitutional complaint with respect to such issues where all other prerequisites of a Verfassungsbeschwerde are met. In that regard, the Constitutional Court found that the petitioner's complaint was admissible (zulässig), but nonetheless without merit (nicht begründet). Id. at 366.

Id. at 367.

The EEC Treaty, supra note 3, at arts. 165–168 establishes the cadre of the Court of the Communities. Article 165 provides for the appointment of judges, article 166 establishes the office of the Advocates-General as assistants to the court; and article 168 permits the court to appoint its own Registrar. Moreover, article 188 provides that "[t]he Court of Justice shall adopt its [own] rules of procedure," subject only to unanimous Council approval.

The Protocol on the Statute of the Court of Justice of the European Communities, March 25, 1957, 298 U.N.T.S. 147 (1958) (annexed to the EEC Treaty, supra note 3), reprinted in 3 Common Mkt. Rep. (CCH) ¶ 4731, is the effective constitution of that court. The Constitutional Court in Solange II was especially swayed by the provisions of the Protocol relating to the judiciary of the court (see articles 2–4 binding the judges to the conscientious and impartial discharge of these duties; article 3, concerning judicial immunities; and article 4 regarding conflicts of interest) and by those provisions establishing standards of procedural due process (see article 17 on the right to counsel; articles 18 and 20 for notice requirements; articles 25–27 addressing the use of witnesses before the court; and article 28, which, as a general matter, requires that all hearings before the court be public). Solange II, supra note 1, at 367.

mandatory standards weighed in favor of the recognition of the European Court as a "lawful judge" within the meaning of the German Basic Law:

The [European] Court [of Justice] is a sovereign judicial administrative organ established by the Community treaties; judicially independent, it makes fundamental and final decisions on the basis and within the framework of normatively established competencies and proceedings pursuant to legal standards and judicial norms. Its members are obligated to independence and non-partisanship; their legal positions are normatively so organized that they assure personal independence. The court's procedure satisfies the constitutional requirement of due process; it assures particularly the right to be heard, procedural challenge and defense opportunities appropriate to the subject of the proceedings, as well as freely chosen, competent counsel . . . .

The European Court's rulings have recognized and applied constitutional principles such as proportionality and the prohibition against excessiveness, the prohibition against ex post facto laws and double jeopardy, and the constitutional duty to give an opinion in individual decisions. The judicial protection of personal rights had been added to the catalog of rights guaranteed by Community law through a ruling of the court. The court acknowledged the
right to be heard as an essential requirement for a fair trial.95 Other rights incorporated by the court in its expanding jurisprudence include freedom of association, the general principle of equality before the law, the prohibition of arbitrariness, freedom of religion, and protection of the family.96 Fundamental liberties pertaining to economic activity, such as property rights and freedom in questions of employment, now appear on the roster of basic guarantees acknowledged in the European Court's decisions.97 Of particular importance to the Constitutional Court was the fact that many of these rights were recognized by the Court of Justice in reliance on the European Convention on Human Rights and through recourse to common constitutional traditions among the states of the Community.98


The rights acknowledged in these cases, the court noted, were in addition to the "express guarantees of liberty stated in the Community treaties themselves," in particular the prohibition against discrimination on grounds of nationality provided for generally in EEC Treaty, supra note 3, at art. 7, and with respect to employment conditions (EEC Treaty, at art. 48), establishment (EEC Treaty, at art. 52), the provision of services (EEC Treaty, at art. 59), and the movement of capital (EEC Treaty, at art. 67).

The list of basic rights recognized by the European Court is extensive, but the Constitutional Court conceded that every right guaranteed by the Basic Law had not been addressed by a ruling of the European Court and that the compilation of rights judicially recognized by the European Court might have a few "holes." This, in itself, was not determinative:

Decisive, however, is the basic position which the Court has by now attained with regard to the Community's obligation to fundamental rights, the normative embodiment of fundamental rights in Community law, and its normative connection (as far as it extends) with the Member State constitutions and with the European Human Rights Convention, as well as the material relevance which the protection of fundamental rights has now gained in the Court's administration of justice.

The quality of human rights protection afforded by the European Court is, therefore, to be regarded as the constitutional equivalent of the fundamental rights assured by the German Basic Law:

On the basis of the current level of the jurisprudence of the European Court, it is not to be expected that the normative intertwining of Community law with the Member States' constitutions will result in a lowering of the Community law fundamental rights protection standard which, according to the Basic Law, could no longer be referred to as a generally appropriate fundamental rights standard. On the one hand, the Court is not obligated to bring the legal principles of Community law down to the least demanding common denominator based on the comparison of all Member States, if such far reaching differences between the Member States' constitutions did not exist then or exist presently. It is rather to be expected that the Court will strive for the best possible upholding of a fundamental law principle within Community law. On the other hand, the normative reference to the European Human Rights Convention, with the present extensive decisional law by the European Court for Human Rights, guarantees a minimum standard of substantive fundamental rights protection which will essentially satisfy the constitutional requirements of the Basic Law.

Another factor also compelled the recognition of the European Court as the lawful adjudicator of issues within its competence under the Treaty of Rome.

99 Solange II, supra note 1, at 383. The Federal Constitutional Court attributes these lacunae to the fact that the European Court built its fundamental rights jurisprudence on a case-by-case basis in common law fashion, in contrast to the more comprehensive, civil-law approach appearing in the German Grundgesetz. Id.
100 Id.
101 Id. at 385–86.
As a practical matter, the Constitutional Court conceded that the "decision-making monopoly" of the European Court under Article 177 of the Treaty had worked a "partial, functional integration of the European Court into the several jurisdictions of the Member States."\textsuperscript{102} Frequent resort by national tribunals to the European Court is an established fact; this empirical reality should be acknowledged through the formal recognition of that court as the lawful adjudicator—for purposes of national law—of matters now before it on a regular basis.\textsuperscript{103}

H. The Community Commitment to Fundamental Rights

The Court of Justice of the European Communities is, of course, but one of the major organs established to achieve the objectives of the Treaty of Rome. Even though the commitment of that court to the protection of basic rights is firm, the Federal Constitutional Court could harbor understandable concern regarding the corresponding commitment of other principal Community agencies such as the Council and the Commission. The Federal Constitutional Court noted, looking back, that such considerations had been paramount when it handed down its 1974 decision in Solange I:

\[\text{[I]n light of the state of integration prevailing at that time, the generally binding fundamental rights standard within the European Community did not yet demonstrate legal certainty . . . . The Community was still deprived of our direct democratically legitimated}\]

\textsuperscript{102} As a result of this integration of the European Court into national judicial systems:

\[\text{[i]t becomes evident that the legal orders of the Member States and that of the Community do not stand side by side, separate and isolated, but that they reference one another in myriad ways, are intertwined, and are open to reciprocal effects . . . . In the interest of the purpose of the Treaty with regard to integration, legal certainty, and the equal application of the law, the jurisdictional competency of the European Court under the EEC Treaty, especially in article 177] assures the most uniform interpretation and application possible of Community law by all courts within the jurisdiction of the EEC Treaty . . . .}\]

\textsuperscript{103} The "intertwining" of jurisdictions noted by the Constitutional Court is documented. During the period 1961–1981, the European Court handed down 949 preliminary rulings under the EEC Treaty, \textit{supra} note 5, at art. 177. Of these, 369 were requested by national courts of the Federal Republic of Germany. From this group, 19 came from the Federal Supreme Court of Justice (\textit{Bundesgerichtshof}), 19 from the Federal Social Court (\textit{Bundessozialgericht}), and 3 from the Federal Labor Court (\textit{Bundesarbeitsgericht}). Sixty-one cases were referred to the European Court by the Federal Financial Court (\textit{Bundesfinanzhof}), while the Federal Administrative Court (\textit{Bundesverwaltungsgericht}) submitted ten matters for preliminary rulings. Significantly, lower courts in the Federal Republic had asked for 257 rulings from the European Court during this period of time. \textit{See} Appendix to Chapter 10, in Brown \& Jacobs, \textit{supra} note 7, at 185, 186, 191. On the right of lower national courts to seek preliminary rulings under the EEC Treaty, \textit{supra} note 3, art. 177, \textit{see} Rheinmühlen-Düsseldorf v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel, 1974 E. Comm. Ct. J. Rep. 33. The Constitutional Court's acknowledgment of the Court of Justice as a "lawful judge" within the sense of the \textit{Grundgesetz} comes, then, as a recognition of these realities.
parliament, produced by general elections, possessing legislative power to which the appropriate legislative organs of the Community are politically completely responsible; it was conspicuously lacking a list of fundamental rights...104

Significant democratic developments within Community institutions had, in the meantime, occurred; conditions permitting a less qualified endorsement of the Community’s character as a democratic institution sensitive to the protection of fundamental rights had now been realized:

[T]here has meanwhile developed within the European Communities a standard for fundamental rights protection which in conception, content and effect is to be considered substantially equal to the fundamental rights standard found in the [German] Basic Law. All principal organs of the Community have since recognized in legally relevant form that in the exercise of their authority and in pursuit of the Community’s goals they will allow themselves to be guided in their legal duty by respect for fundamental rights... There is no substantial basis to conclude that the fundamental rights standard [now] obtained in Community law is not sufficiently secured but, rather, is of a transitory nature.105

The Community’s recognition of the legal duty to adhere to basic rights was grounded in a series of events of an overtly political character. In 1977 the Council, Commission, and Parliament of the Community had adopted a Joint Declaration emphasizing the rule of law and respect for basic rights as cornerstones of the Communities and assuring the future application of these ideals.106 A year later, a Declaration on Democracy adopted by the European Council affirmed the Communities’ obligation to democratic principles and the protection of human rights.107 Moreover, the Constitutional Court noted, each member

104 Solange II, supra note 1, at 376–77.
105 Id. at 378.
106 See the Joint Declaration of the European Parliament, Council and Commission of April 5, 1977, providing:
1. The European Parliament, the Council and the Commission stress the prime importance they attach to the protection of fundamental rights, as derived in particular from the constitutions of the Member States and the European Convention for the Protection of Human Rights and Fundamental Freedoms.
2. In the exercise of their powers and in pursuance of the aims of the European Communities they respect and will continue to respect these rights.
107 Statement of the European Council, adopted at Copenhagen, 7–8 Apr. 1978:
The Heads of State and of Government confirm their will... to ensure that the cherished values of their legal, political and moral order are respected and to safeguard the principles of representative democracy, of the rule of law, of social justice and of respect for human rights.
state of the Communities now had ratified the European Convention on Human Rights.\textsuperscript{108}

I. \textit{The Impact of the Ruling}

Each of the principal arms of the European Economic Community—Court, Council, Commission, and Parliament—had, the court concluded in 1986, committed itself by solemn and binding measures to the observance of an intricate and interlocked network of human rights obligations.\textsuperscript{109} Its review at the time of \textit{Solange II} revealed a European synergy of fundamental rights guarantees—some originating within the European Court and some external to it, but all regularly applied by the Court of Justice of the Communities:

1) A mature body of case law protective of these values had developed in the European Court, drawing on national constitutions for inspiration and content;
2) Each nation of the Community had submitted itself to the obligation of the European Convention on Human Rights;
3) The European Council had bound itself to a standard of fundamental rights protection which explicitly absorbed the "constitutional structure of the state" in the protection of human rights; and

The application of these principles implies a political system of pluralist democracy which guarantees both the free expression of opinions within the constitutional organization of powers and the procedures necessary for the protection of human rights.

The heads of State and of Government associate themselves with the Joint Declaration [of the EEC] Assembly, the Council and the Commission whereby these institutions expressed their determination to respect fundamental rights in pursuing the aims of the Communities.

They solemnly declare that the respect for a maintenance of representative democracy and human rights in each Member State are essential elements of membership of the European Communities.

\textit{Commission of the European Communities, Bulletin of the European Communities}, No. 3, at 5, 6 (1978). The statement, in its English version, speaks of "the free expression of opinions within the constitutional organization of powers." The German version, quoted by the court in \textit{Solange II}, supra note 1, at 383, refers to "the constitutional structure of the state [im konstitutionellen Aufbau des Staates]." Such reference to a human rights standard, binding on the Community but anchored in national constitutions, would also have appealed to the Constitutional Court.

\textsuperscript{108} \textit{Solange II}, supra note 1, at 384. The European Convention on Human Rights, \textit{supra} note 98, entered into force on September 3, 1953, and now has been ratified by all member states of the European Communities. At the time of the decision in \textit{Solange I}, France—alone among the members of the Community in 1974—had not ratified the Convention. The court in \textit{Solange II} had conceptual difficulties with the fact that the European Communities, as an entity, were not party to the agreement. It was satisfied, however, by the "normative references" to the Convention made by the European Council, the Parliament, Commission and Council of the Communities (see \textit{supra} notes 103–104), and the European Court's repeated reliance on the European Convention on Human Rights. The Federal Constitutional Court concluded that these references

[together] with the now extensive decisional law of the European Court of Human Rights, guarantee a minimum standard of substantive fundamental rights protection which will basically satisfy the constitutional requirements of the Basic Law. This fact is not altered because the Community as such is not a member of the European Human Rights Convention.

\textit{Solange II}, supra note 1, at 385–86.

\textsuperscript{109} \textit{Solange II}, supra note 1, at 383–84.
4) The Council, Commission and Parliament had united in recognizing Member State constitutions as a derivative source of fundamental rights binding on the Community.

All of these "acts of legally relevant significance," taken together, left no room for further question regarding the status and standing of the Community Court as an integral component of the German legal order within the framework of that court's functions under the Treaty of Rome.

A minimalist view would suggest that the court in Solange II has retained and, by force of repetition, further strengthened the judicial postures of the early days of the Community emphasizing the separate and autonomous character of the national and Community legal orders. The Constitutional Court has now, so runs the argument, simply dissolved a nettlesome procedural block—an important one, to be sure, but one ultimately of the court's own creation—to the finality of the European Court's rulings; even this is limited only to preliminary rulings in cases presenting a potential conflict between Community secondary law and the basic rights of the Grundgesetz. This narrow impact is itself conditional and could seemingly be revoked at a future time if the Constitutional Court should take a dimmer view of the protection of human rights by Community organs.

A maximalist perspective emphasizes the progress towards European integration which the ruling represents. The Constitutional Court by its decision of October 22, 1986 has effectively knitted the Court of Justice of the European Communities into the judicial fabric of the Federal Republic of Germany and has, in so doing, formally acknowledged an objective fact of modern European economic reality. To that extent, the decision is pregnant with portent for the future of Europe. Moreover, the decision stands as clear witness to the emergence in Europe of a European synergy of human rights protection. In recognizing this achievement, the court has contributed meaningfully to the substance, stability, and permanence of that synergy. In this light, Solange II will prove, in the long run, of far greater significance than barring the importation into Europe of another one thousand tons of Taiwanese canned mushrooms.