

5. The Bundesverfassungsgericht's human dignity review: *Solange III* and its application in subsequent case law

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1. INTRODUCTION

The Bundesverfassungsgericht, the Federal Constitutional Court of Germany, has given effect to the primacy of EU law over national constitutional law for more than 30 years. In its *Solange II* judgment of 1986, it decided to refrain from reviewing EU measures in light of the fundamental right of the Basic Law, so long as the EU standard of fundamental rights protection remained, in essence, comparable to that of the Basic Law.¹ As fundamental rights protection at the EU level has improved over the past 30 years, the *Solange II* condition does not have much practical significance nowadays. Therefore, EU measures and national measures – insofar as they are determined by EU law – are generally not measured against German fundamental rights.

However, in a judgment delivered on 15 December 2015 – known as *Solange III* – the Bundesverfassungsgericht developed a new condition for the application of the principle of primacy.² It turned the constitutional identity review that it had introduced in its *Lisbon* judgment into a safeguard mechanism for the protection of human dignity in individual cases. It confirmed that the primacy of EU law was limited by German constitutional principles that are beyond the reach of European integration, notably the guarantee of human dignity. Human dignity, as it is enshrined in the Basic Law, must be upheld in each individual case, even when applying national legal provisions that are determined by EU law.

¹ BVerfG, 22 October 1986, 2 BvR 197/83 *Solange II*, BVerfGE 73, 339.

² BVerfG, 15 December 2015, 2 BvR 2735/14 *Solange III*.

This chapter examines the advent of this new condition for the application of the principle of primacy in *Solange III* and the subsequent case law of the Bundesverfassungsgericht. It argues that the condition can help to improve fundamental rights protection in Germany and in the EU more generally without posing a substantial threat to the primacy of EU law. In particular, recent case law shows that the Bundesverfassungsgericht gives a narrow meaning to the essence of German constitutional rights that corresponds to human dignity, thereby limiting the new human dignity review to extreme cases.

Section 2 of this chapter illustrates the basic features of the Bundesverfassungsgericht's approach to EU law as they were defined in *Solange II* and confirmed in *Solange III*. Section 3 sets out three conditions for the primacy of EU law that were developed by the Bundesverfassungsgericht prior to *Solange III*, namely the *Solange II*, the *ultra vires* and the constitutional identity condition. Section 4 examines the *Solange III* judgment in depth, and Section 5 considers the application of the condition that was developed in this judgment in subsequent case law.

2. CONSTITUTIONAL REVIEW OF EU LAW: *SOLANGE I TO III*

The Bundesverfassungsgericht developed its basic approach to EU law in the famous *Solange I* and *Solange II* judgments. In the *Solange I* judgment of 1974, it stated that it would exercise constitutional review of EU acts so long as [*solange*] fundamental rights protection at the EU level was less adequate than that offered by the Basic Law.³

In the *Solange II* judgment of 1986, the Bundesverfassungsgericht reversed its approach. It recognised that EU fundamental rights protection had improved so that fundamental rights were now adequately protected at the EU level. Consequently, it decided that it would no longer review EU acts for their compliance with the Basic Law, so long as the EU standard of fundamental rights protection remained substantially equivalent to the inalienable minimum protection of fundamental rights in the Basic Law.⁴ The *Solange II* ruling related to EU regulations, but it was later extended to directives.⁵ It was reaffirmed by the

³ BVerfG, 29 May 1974, BvL 52/71 *Solange I*, BVerfGE 37, 271, 285.

⁴ BVerfG, 22 October 1986, 2 BvR 197/83 *Solange II*, BVerfGE 73, 339, 387.

⁵ BVerfG, 13 March 2007, 1 BvF 1/05 *Emission Allowances*, BVerfGE 118, 79, paras 69–70; D Thym, 'Separation Versus Fusion: How to Accommodate

fundamental rights section of the 1993 *Maastricht* judgment and the 2000 *Banana* judgment.⁶

The Bundesverfassungsgericht still adheres to the *Solange II* rule.⁷ In the *Solange III* judgment of 15 December 2015, it confirmed that:

In general, sovereign acts of the European Union and acts of German public authority – to the extent that they are determined by Union law – are, due to the precedence of application of European Union Law [*Anwendungsvorrang des Unionsrechts*], not to be measured against the standard of the fundamental rights enshrined in the Basic Law.⁸

In *Solange III*, the Bundesverfassungsgericht distinguished between the EU provisions that do leave implementing discretion [*Gestaltungsspielraum*] to the Member States and those that do not. If EU law leaves a degree of implementing discretion, the Basic Law remains relevant. National measures that are not fully determined by EU law [*nicht vollständig determiniert*] are scrutinised in light of the Basic Law. On the other hand, national measures that are fully determined by EU law are not reviewed for their compliance with the Basic Law.⁹ This distinction according to the degree of implementing discretion left to the Member States has been applied by the Bundesverfassungsgericht for many years.¹⁰ It also seems to have influenced the ECJ, which drew a similar

National Autonomy and the Charter? Diverging Visions of the German Constitutional Court and the European Court of Justice' [2013] *European Constitutional Law Review* 391, 402.

⁶ FC Mayer, 'Multilevel Constitutional Jurisdiction', in A von Bogdandy and J Bast (eds), *Principles of European Constitutional Law* (Hart Publishing 2010) 411. See BVerfG, 12 October 1993, 2 BvR 2134, 2159/92 *Treaty of Maastricht*, BVerfGE 89, 155; BVerfG, 7 June 2000, 2 BvL 1/97 *Bananas*, BVerfGE 102, 147.

⁷ D Thym, 'Vereinigt die Grundrechte!' [2015] *Juristenzeitung* 53, 55. See also J Masing, 'Einheit und Vielfalt des Europäischen Grundrechtsschutzes' [2015] *Juristenzeitung* 477, 480.

⁸ Official English translation of BVerfG, 15 December 2015, 2 BvR 2735/14 *Solange III*, para 36.

⁹ BVerfG, 15 December 2015, 2 BvR 2735/14 *Solange III*, para 39.

¹⁰ See e.g. BVerfG, 13 March 2007, 1 BvF 1/05 *Emission Allowances*, BVerfGE 118, 79, para 69; BVerfG, 14 October 2008, 1 BvF 4/05, BVerfGE 122, 1, paras 84–85; BVerfG, 19 July 2011, 1 BvR 1916/09 *Le Corbusier*, BVerfGE 129, 78, paras 53–54. See also BVerfG, 'National Report' (2014) XVI Congress of the Conference of European Constitutional Courts, <http://www.confueuconstco.org/reports>, 3.

distinction in its seminal *Åkerberg Fransson* and *Melloni* judgments of 2013.¹¹

The Bundesverfassungsgericht refrains from scrutinising national measures that are completely determined by EU law in light of the Basic Law in order to give effect to the primacy of EU law.¹² In *Solange III*, it referred to the *Costa/ENEL* judgment of the ECJ and noted that the uniform application of EU law was crucial for the success of the EU.¹³ A community of 28 Member States could not survive if the uniform application of its law was not guaranteed.¹⁴ The Bundesverfassungsgericht explicitly recognised that the primacy of EU law over national law also applied with regard to national constitutional law.¹⁵ The transfer of competences to the EU released German authorities from their general obligation to respect the fundamental rights in the Basic Law.¹⁶

3. THREE CONSTITUTIONAL LIMITS TO PRIMACY

The Bundesverfassungsgericht refrains from scrutinising national measures that are completely determined by EU law in light of the Basic Law in order to give effect to the primacy of EU law. However, it does not accept any 'blanket precedence of Union law over national constitutional law'.¹⁷ From its perspective, the respect for the primacy principle is grounded ultimately in German constitutional law and not in EU law.¹⁸ The Bundesverfassungsgericht accepts only precedence in application [*Anwendungsvorrang*] of EU law, not the genuine supremacy of EU

¹¹ Case C-617/10, *Åkerberg Fransson*, EU:C:2013:105, para 29; Case C-399/11, *Melloni*, EU:C:2013:107, para 60.

¹² BVerfG, 15 December 2015, 2 BvR 2735/14 *Solange III*, para 36.

¹³ Case 6/64, *Costa/ENEL*, EU:C:1964:66; BVerfG, 15 December 2015, 2 BvR 2735/14 *Solange III*, para 37.

¹⁴ BVerfG, 15 December 2015, 2 BvR 2735/14 *Solange III*, para 37.

¹⁵ *Id.*, para 38.

¹⁶ *Id.*, para 39.

¹⁷ BVerfG *supra* n.10, 9.

¹⁸ See M Bäcker, 'Das Grundgesetz als Implementationsgarant der Unionsgrundrechte' [2015] *Europarecht* 389, 392; H Sauer, 'Grundrechtskollisionsrecht für das europäische Mehrebenensystem: Konkurrenzbestimmung–Kollisionsvermeidung–Kohärenzsicherung', in N Matz-Lück and M Hong (eds), *Grundrechte und Grundfreiheiten im Mehrebenensystem: Konkurrenzen und Interferenzen* (Springer 2011) 32; Masing, *supra* n.7, 481.

law.¹⁹ This conceptual view has important practical implications. According to the Bundesverfassungsgericht, the Basic Law limits the effect of EU law in the German legal order. Three conditions need to be fulfilled so that the Basic Law permits the transfer of competences to the EU or the exercise of competences by the EU. In this section of the chapter, the three conditions are each discussed in turn (3.1–3.3), before some common features are identified (3.4).

3.1 The *Solange II* Condition

The first condition that limits the application of the primacy principle was developed in the *Solange II* judgment, mentioned above. The Bundesverfassungsgericht refrains from reviewing national measures that are fully determined by EU law in light of the Basic Law, so long as the EU standard of fundamental rights protection is essentially comparable to that of the Basic Law.²⁰ As the *Solange II* ruling relates to EU fundamental rights protection in general, only systemic deficiencies of fundamental rights protection at the EU level would lead to the application of the fundamental rights enshrined in the Basic Law.

Since 1992, the *Solange II* condition is reflected expressly in Article 23(1) of the Basic Law, which governs the relationship between national and supranational law. That provision stipulates that the Federal Republic of Germany participates in European integration ‘that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law’.²¹

The common view in German academic literature is that it is currently highly unlikely that the EU level of fundamental rights protection will fall below the level of protection that would trigger the *Solange II* condition.²² In *Solange III*, the Bundesverfassungsgericht itself held that Article 6 of the Treaty on European Union (TEU), the Charter and the case law of the ECJ generally provide for effective fundamental rights

¹⁹ M Hong, ‘Human Dignity, Identity Review of the European Arrest Warrant and the Court of Justice as a Listener in the Dialogue of Courts: Solange-III and Aranyosi’ [2016] *European Constitutional Law Review* 549, 552.

²⁰ See BVerfG, 22 October 1986, 2 BvR 197/83 *Solange II*, BVerfGE 73, 339, 387.

²¹ Translation by Deutscher Bundestag, <https://www.bundestag.de/gg>.

²² See e.g. (with further references) A Schwerdtfeger, ‘Europäisches Unionsrecht in der Rechtsprechung des Bundesverfassungsgerichts: Grundrechts-, ultra-vires- und Identitätskontrolle im gewaltenteiligen Mehrebenensystem’ [2015] *Europarecht* 290, 292; H-G Dederer, ‘Die Grenzen des Vorrangs des Unionsrechts’ [2014] *Juristenzeitung* 313, 313–14.

scrutiny of EU measures.²³ Hence, the *Solange II* condition does not seem to have any practical relevance these days.

3.2 The *Ultra Vires* Condition

The second condition for the transfer to or exercise of competence by the EU is that the EU does not act *ultra vires*. The Bundesverfassungsgericht is prepared to review EU acts that do not respect the limits of the competences conferred on the EU by the Member States. It considers itself as the ultimate arbiter of the principle of conferral.²⁴ The *ultra vires* condition was first mentioned in the *Maastricht* judgment and it was further developed in the *Lisbon*, *Honeywell* and *Gauweiler* judgments.²⁵

The *ultra vires* condition does not extend to all *ultra vires* acts. It is triggered only in the case of a drastic violation of the principle of conferral. The Bundesverfassungsgericht has made clear that it will exercise jurisdiction over an act of the EU that is structurally significant and clearly *ultra vires*.²⁶ This means that the EU act has to be 'manifestly in violation of competences' and this violation has to be 'highly significant in the structure of competences between the Member States and the Union with regard to the principle of conferral'.²⁷

The Bundesverfassungsgericht has assessed the ECJ's application of the Charter in the seminal *Åkerberg Fransson* case in light of the principle of conferral in the *Counter-Terrorism Database* judgment.²⁸ It warned that it would not accept an extension of the scope of the Charter to domestic measures that have only a vague link with EU law.²⁹ It

²³ BVerfG, 15 December 2015, 2 BvR 2735/14 *Solange III*, para 46.

²⁴ See Schwerdtfeger supra n.22, 292–93.

²⁵ BVerfG, 12 October 1993, 2 BvR 2134, 2159/92 *Treaty of Maastricht*, BVerfGE 89, 155, 188; BVerfG, 30 June 2009, 2 BvE 2/08 *Treaty of Lisbon*, BVerfGE 123, 267, para 240; BVerfG, 6 July 2010, 2 BvR 2661/06 *Honeywell*, BVerfGE 126, 286, para 55; BVerfG, 14 January 2014, 2 BvR 2728/13 *Gauweiler*, BVerfGE 135, 366.

²⁶ Interestingly, in an extrajudicial report, the Bundesverfassungsgericht noted that the *ultra vires* condition applies to 'clear or structurally significant' (emphasis by the author) *ultra vires* acts and therefore presented the two as alternative instead of cumulative criteria. See BVerfG supra n.10, 3.

²⁷ Official English translation of BVerfG, 6 July 2010, 2 BvR 2661/06 *Honeywell*, BVerfGE 126, 286, para 61.

²⁸ *Åkerberg Fransson* supra n.11.

²⁹ BVerfG, 24 April 2013, 1 BvR 1215/07 *Counter-Terrorism Database*, BVerfGE 133, 277, para 91; Editorial Comments, 'Ultra Vires: Has the Bundesverfassungsgericht Shown Its Teeth?' [2013] *Common Market Law Review* 925,

concluded, however, that the *Åkerberg Fransson* case did not constitute a clear *ultra vires* act.³⁰

3.3 The Constitutional Identity Condition

The third condition for the transfer to and exercise of competences by the EU is that the constitutional identity of the Basic Law is respected. The identity condition, as it was developed in the *Lisbon* judgment of the Bundesverfassungsgericht, protects a functioning democracy within the sovereign German state, and more precisely ‘the ability of a constitutional state to democratically shape itself’.³¹ It may be directed against the transfer of competences to the EU in sensitive policy fields.³² The way in which the identity condition was formulated in the *Lisbon* judgment was thus related to the enactment of primary EU law.³³ The Bundesverfassungsgericht derived the identity condition from Article 23(1) of the Basic Law and from the ‘eternity clause’ enshrined in Basic Law Article 79(3).³⁴

While the *ultra vires* condition applies only to clear and structurally significant *ultra vires* acts, the identity condition prohibits any violation of the constitutional identity of the Basic Law.³⁵ Moreover, in contrast to the *Solange II* condition, the identity condition is triggered not only in the case of systemic deficiencies at the EU level, but whenever the identity of the Basic Law is at issue in an individual case, as the *Gauweiler* judgment has shown.³⁶

927. For a detailed analysis of the judgment and its conceptual underpinnings, see Thym *supra* n.5.

³⁰ BVerfG, 24 April 2013, 1 BvR 1215/07 *Counter-Terrorism Database*, BVerfGE 133, 277, para 91.

³¹ BVerfG, 30 June 2009, 2 BvE 2/08 *Treaty of Lisbon*, BVerfGE 123, 267, para 252. See Thym *supra* n.5, 400.

³² Thym *supra* n.5, 399–400.

³³ Schwerdtfeger *supra* n.22, 294–95.

³⁴ BVerfG, 30 June 2009, 2 BvE 2/08 *Treaty of Lisbon*, BVerfGE 123, 267. Article 79(3) of the Basic Law: Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible. Translation by Deutscher Bundestag, <https://www.bundestag.de/gg>.

³⁵ Schwerdtfeger *supra* n.22, 299. The author refers to BVerfG, 14 January 2014, 2 BvR 2728/13 *Gauweiler*, BVerfGE 135, 366, paras 27–29.

³⁶ Dederer *supra* n.22, 315.

3.4 Common Features of the Three Conditions

The link between the *ultra vires* and the identity condition is that, according to the Bundesverfassungsgericht, EU acts are always *ultra vires* if they violate German constitutional identity because competences violating national constitutional identity could not have been transferred to the EU in the first place.³⁷ As far as the relationship between the *Solange II* condition and the identity condition is concerned, the Bundesverfassungsgericht already has construed the fundamental rights provisions of the Basic Law as an element of the constitutional identity in its *Solange I* and *Solange II* judgments.³⁸ According to Hans-Georg Dederer, the common core of all three conditions is therefore the protection of the constitutional identity of the Basic Law.³⁹

Moreover, the three conditions set out above have in common that they are not apt to guarantee the respect of the fundamental rights of the Basic Law in individual cases. According to the *Solange II* condition, national measures that are completely determined by EU law are reviewed in light of the Basic Law only if EU fundamental rights protection in general falls below a certain minimum level. I mentioned above that it is highly unlikely that the general level of EU fundamental rights protection will fall short of this standard nowadays. The *ultra vires* condition does not serve as a case-by-case safeguard mechanism for the fundamental rights of the Basic Law either because EU measures can violate the fundamental rights of the Basic Law without exceeding the EU's competences. Finally, the identity condition, as it was developed in the *Lisbon* judgment, is limited mainly to the transfer of competences to the EU in sensitive policy fields. It was not designed to ensure the respect of the fundamental rights of the Basic Law in individual cases.

³⁷ BVerfG, 14 January 2014, 2 BvR 2728/13 *Gauweiler*, BVerfGE 135, 366, para 27.

³⁸ BVerfG supra n.10, 15; Dederer supra n.22, 316. See BVerfG, 29 May 1974, BvL 52/71 *Solange I*, BVerfGE 37, 271, 279; BVerfG, 22 October 1986, 2 BvR 197/83 *Solange II*, BVerfGE 73, 339, 375.

³⁹ Dederer supra n.22, 316–17.

4. *SOLANGE III*: THE ADVENT OF A CASE-BY-CASE REVIEW FOR THE RESPECT OF HUMAN DIGNITY

Originally, the identity condition did not appear to aim to ensure the respect of German fundamental rights in individual cases. However, the Bundesverfassungsgericht expanded the function of the identity condition in the seminal *Solange III* case. It turned the identity condition into a safeguard mechanism for the protection of human dignity in individual cases, as Subsection 4.1 shows. This new variant of the identity condition emerged in a European Arrest Warrant (EAW) case. Subsection 4.2 claims that there are good reasons for this. Subsection 4.3 argues that the Bundesverfassungsgericht successfully reconciled effective fundamental rights protection with the principle of primacy of EU law in the *Solange III* case. Finally, Subsection 4.4 demonstrates that the Bundesverfassungsgericht did not resort to its newly developed variant of the identity condition to decide the actual case at hand.

4.1 A New Variant of the Constitutional Identity Condition

In *Solange III*, the Bundesverfassungsgericht developed the constitutional identity condition into a safeguard mechanism for the protection of human dignity in individual cases. It confirmed that German constitutional identity comprised the protection of human dignity and it presented human dignity as the core of other fundamental rights that needs to be upheld in every case.

As a first step, the Bundesverfassungsgericht emphasised that the constitutional identity of the Basic Law entailed the protection of human dignity. Human dignity was a constitutive principle of the Basic Law, guaranteed not only by its Article 1, but also by the ‘eternity clause’ enshrined in its Article 79(3).⁴⁰ Therefore, respect for human dignity was an element of the constitutional identity of the Basic Law.⁴¹ It enjoyed priority over the primacy of EU law and served as a limit to European integration.⁴² Human dignity traditionally plays a central role in German constitutional law.⁴³

⁴⁰ BVerfG, 15 December 2015, 2 BvR 2735/14 *Solange III*, paras 48–49.

⁴¹ *Ibid.*

⁴² *Id.*, paras 40–42.

⁴³ See H Dreier, ‘Bedeutung und systematische Stellung der Menschenwürde im deutschen Grundgesetz’, in K Seelmann (ed), *Menschenwürde als Rechtsbegriff: Tagung der internationalen Vereinigung für Rechts- und Sozialphilosophie* (Franz Steiner 2005) 3.

After having confirmed that respect for human dignity was part of German constitutional identity, the Bundesverfassungsgericht associated human dignity with fundamental rights more generally. It declared that it would guarantee the respect for domestic fundamental rights unreservedly [*uneingeschränkt*], if this was required to protect human dignity.⁴⁴ The underlying assumption is that a violation of other domestic fundamental rights may, at the same time, violate human dignity. The Bundesverfassungsgericht would review domestic measures that are completely determined by EU law in light of the fundamental rights of the Basic Law, if a violation of these rights also entailed a violation of human dignity. It plans to perform this review in each individual case [*im Einzelfall*].⁴⁵ It will scrutinise, on a case-by-case basis, that the respect for human dignity is maintained in measures that are determined completely by EU law.

The denomination '*Solange III*' was first used to describe the judgment in a few blog posts that appeared shortly after its publication.⁴⁶ It seems appropriate, insofar as the new human dignity condition is certainly different from the *Solange II* condition. *Solange II* related to the general level of EU fundamental rights protection in a systemic way, whereas *Solange III* requires respect for human dignity in the individual case at hand. However, the *Solange III* condition is not a completely new condition, but a new variant of the constitutional identity condition. Moreover, it has not replaced *Solange II*, but, rather, completed it.

Read together with the *Solange II* condition, the approach of the Bundesverfassungsgericht can be summarised as follows: an EU measure or domestic measure completely determined by EU law will not be assessed in the light of the fundamental rights of the Basic Law, so long as the general EU standard of fundamental rights protection is essentially equivalent to that afforded by the Basic Law, and so long as there is no infringement of human dignity in the case at issue.

⁴⁴ BVerfG, 15 December 2015, 2 BvR 2735/14 *Solange III*, para 49.

⁴⁵ Ibid.

⁴⁶ See e.g. M Hong, 'Human Dignity and Constitutional Identity: The Solange-III Decision of the German Constitutional Court' (18 February 2016) Verfassungsblog, <http://verfassungsblog.de/human-dignity-and-constitutional-identity-the-solange-iii-decision-of-the-german-constitutional-court/>; C Bilz, 'Konfrontation statt Kooperation? "Solange III" und die Melloni-Entscheidung des EuGH' (15 March 2016) Junge Wissenschaft im Öffentlichen Recht Blog, <https://www.juwiss.de/26-2016/>; E Uría Gavilán, 'Solange III? The German Federal Constitutional Court Strikes Again' (22 April 2016) European Papers, <http://www.europeanpapers.eu/it/europeanforum/solange-iii-german-federal-constitutional-court-strikes-again>.

4.2 Human Dignity, the European Arrest Warrant and Individual Guilt

After having set out the new human dignity condition in abstract terms in the first part of the judgment, the Bundesverfassungsgericht moved on to examine the precise case at hand in the second part. The national measure at issue was a decision to enforce an EAW. The complainant, Mr R, a citizen of the United States of America, had been sentenced – *in absentia* and without legal representation – to 30 years' imprisonment by an Italian court in 1992. More than 20 years later, he was arrested in Germany pursuant to an EAW. A German Higher Regional Court, the *Oberlandesgericht* Düsseldorf, permitted his surrender to Italy because it assumed that the complainant would have the right to a new evidentiary hearing there. It made this assumption on the basis of information provided by the relevant Italian prosecutor.

The Bundesverfassungsgericht held that the decision to extradite Mr R to Italy violated the principle that individual guilt is a prerequisite for punishment (*nulla poena sine culpa*).⁴⁷ This principle was violated because the Higher Regional Court had not investigated whether the complainant would actually get the opportunity to defend himself effectively in Italy, according to the legal situation and legal practice in this Member State.⁴⁸ As the Bundesverfassungsgericht had held in previous cases, the principle of individual guilt stemmed from the right to human dignity. For this reason, its violation was at the same time a violation of the constitutional identity of the Basic Law.⁴⁹

It is not a coincidence that the Bundesverfassungsgericht developed the new human dignity condition in an EAW case. Conflicts between EU and national fundamental rights tend to occur where the principle of mutual recognition is applied in the former third pillar and in particular in the context of the EAW.⁵⁰ National implementation of an EAW has been

⁴⁷ BVerfG, 15 December 2015, 2 BvR 2735/14 *Solange III*, para 51.

⁴⁸ *Id.*, para 110.

⁴⁹ *Id.*, para 48. For an analysis of the relationship between the right to human dignity and the principle of culpability in German constitutional law, see M Kremnitzer and T Hörnle, 'Human Dignity and the Principle of Culpability' [2011] *Israel Law Review* 115, 122.

⁵⁰ A prominent example: *Melloni* supra n.11.

challenged before the constitutional courts of several Member States.⁵¹ Criminal law scholars have generally questioned whether *Cassis de Dijon* style mutual recognition can be transferred from the single market to criminal law.⁵² It was even claimed that the EAW framework has led to a serious erosion of classical constitutional rights to a fair trial in many Member States.⁵³

The introduction of the new human dignity condition in *Solange III* shows that the Bundesverfassungsgericht is concerned about this development and that it is prepared to address it. Therefore, *Solange III* should not simply be understood as a move by the Bundesverfassungsgericht to strengthen its own powers of review. Julian Nowag emphasises that the reaffirmation of the Bundesverfassungsgericht's own powers of review should be understood in the context of the *Gauweiler* preliminary reference procedure.⁵⁴ He notes that some members of the Bundesverfassungsgericht might have considered it necessary to reaffirm its power before approving the Outright Monetary Transactions Programme and thereby following the ECJ in a later case.⁵⁵ This assessment could be correct, but it should not be forgotten that the EAW poses actual problems in terms of fundamental rights protection. It would be wrong to assume that the only reason that drove the Bundesverfassungsgericht to develop the human dignity condition was a selfish one. The Bundesverfassungsgericht might also have aimed to strengthen the rights of individuals in the context of the EAW.

⁵¹ J Komárek, 'European Constitutionalism and the European Arrest Warrant: In Search of the Limits of the "Contrapunctual Principles"' [2007] Common Market Law Review 9.

⁵² V Mitsilegas, 'The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU' [2006] Common Market Law Review 1277, 1280.

⁵³ A Albi, 'Erosion of Constitutional Rights in EU Law: A Call for "Substantive Co-Operative Constitutionalism": Part 1' [2015] Vienna Journal on International Constitutional Law 151, 164–75. See also A Albi, 'An Essay on How the Discourse on Sovereignty and on the Co-Operativeness of National Courts Has Diverted Attention from the Erosion of Classic Constitutional Rights in the EU', in M Claes and others (eds), *Constitutional Conversations in Europe: Actors, Topics and Procedures* (Intersentia 2012).

⁵⁴ J Nowag, 'EU Law, Constitutional Identity, and Human Dignity: A Toxic Mix? Bundesverfassungsgericht: Mr R' [2016] Common Market Law Review 1441, 1445–46.

⁵⁵ Nowag *supra* n.54, 1446.

4.3 Reconciliation of Primacy and Fundamental Rights Protection

The condition for the application of the principle of primacy that was developed in *Solange III* contributes to the effective protection of individuals' fundamental rights. The Bundesverfassungsgericht guarantees and enforces the right to human dignity even if the impugned domestic measure is completely determined by EU law. At the same time, the Bundesverfassungsgericht is cautious to avoid grave disrespect of EU law; although it declared that respect for human dignity had priority over primacy of EU law, it attempted to reconcile the two principles.

That the ECJ's adjudication of the Charter is subjected to critical peer review by the Bundesverfassungsgericht through the condition developed in *Solange III* certainly strengthens individuals' rights. The ECJ is pressured to interpret Charter rights in a way that does not infringe the German conception of human dignity because it will want to avoid the invalidation of national measures that are completely determined by EU law in Germany. The human dignity condition is therefore not only beneficial for right holders in Germany but also for individuals across the entire EU. The previous *Solange* judgments certainly had just such a positive effect. According to the Bundesverfassungsgericht, it is generally accepted that it was their influence that made the ECJ develop fundamental rights protection in the EU legal order.⁵⁶

According to the Bundesverfassungsgericht, the condition would not pose a substantial threat to the uniform application of EU law because it would function as a safeguard mechanism for exceptional cases only. It substantiated this argument in three ways. First, the Bundesverfassungsgericht announced that it would only apply the condition in exceptional cases under narrowly constrained conditions [*ausnahmsweise, unter eng begrenzten Voraussetzungen, in eng begrenzten Einzelfällen*].⁵⁷ This seems to indicate that the court will not be quick to establish a violation of the core of fundamental rights in future cases. Second, a violation of human dignity by EU measures will be very rare in the opinion of the Bundesverfassungsgericht because Article 6 TEU, the Charter and ECJ case law generally provide for effective fundamental rights protection.⁵⁸ To prove this claim, the Bundesverfassungsgericht referred to four judgments of the ECJ in which the latter had declared

⁵⁶ BVerfG supra n.10, 15.

⁵⁷ BVerfG, 15 December 2015, 2 BvR 2735/14 *Solange III*, paras 43–46.

⁵⁸ Ibid.

provisions of EU law to be in violation of Charter rights.⁵⁹ Third, the Bundesverfassungsgericht emphasised that it was the only domestic authority that could determine a violation of German constitutional identity.⁶⁰ In line with the Basic Law's commitment to European integration, this exclusive jurisdiction prevented domestic authorities from easily disrespecting the primacy of EU law.⁶¹

The arguments put forward by the Bundesverfassungsgericht suggest that the condition developed in *Solange III* will not lead to judicial review of EU measures in the light of national fundamental rights on a regular basis. The condition is narrowly construed and it will be reserved for exceptional cases. It will be applied only by the Bundesverfassungsgericht, which has shown its general commitment to European integration on many occasions. Therefore, it certainly does not seem to pose a substantial threat to the uniform application of EU law. The condition developed by the Bundesverfassungsgericht can be welcomed as a successful balance between the primacy of EU law and effective fundamental rights protection.

4.4 A Mere Obiter Threat

The lengthy statements on human dignity in *Solange III* were not actually relevant to the case at hand. The Bundesverfassungsgericht announced merely that it would give priority to human dignity if it was in conflict with EU law. It did not establish such a conflict in the specific case and therefore saw no need to trigger the identity condition.⁶² As Julian Nowag puts it, the Bundesverfassungsgericht did not 'press the constitutional identity bomb button', but 'plant[ed] a constitutional identity mine'.⁶³

⁵⁹ BVerfG, 15 December 2015, 2 BvR 2735/14 *Solange III*, para 46. The Bundesverfassungsgericht referred to Joined Cases C-92/09 and C-93/09, *Schecke and Eiffert*, EU:C:2010:662; Case C-131/12, *Google Spain*, EU:C:2014:317; Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland*, EU:C:2014:238; Case C-362/14, *Schrems*, EU:C:2015:650.

⁶⁰ BVerfG, 15 December 2015, 2 BvR 2735/14 *Solange III*, para 43.

⁶¹ *Ibid.*

⁶² *Id.*, para 84.

⁶³ Nowag *supra* n.54, 1447. First use of the term 'identity bomb': M Steinbeis, 'Europarechtsbruch als Verfassungspflicht: Karlsruhe zündet die Identitätskontrollbombe' (26 January 2016) Verfassungsblog, <http://verfassungsblog.de/europarechtsbruch-als-verfassungspflicht-karlsruhe-zuendet-die-identitaetskontroll-bombe/>.

The Bundesverfassungsgericht avoided any conflict between EU law and German constitutional identity by reading a degree of implementing discretion into the relevant EU secondary law. It recognised that the decision to extradite Mr R to Italy was determined by the EAW Framework Decision,⁶⁴ which, in principle, enjoyed primacy over domestic law.⁶⁵ However, it found that the relevant provision of the EAW Framework Decision did not oblige the Higher Regional Court to execute the EAW in the case at issue and that there was therefore no conflict between EU law and German constitutional identity.

The extradition decision was determined by Article 4a(1) of the EAW Framework Decision, which governs the execution of an EAW in cases of conviction *in absentia*.⁶⁶ According to this provision, the execution of an EAW can be refused if the individual concerned was convicted in his absence in the requesting Member State, unless one of a number of premises listed in Article 4a(1)(a)–(d) is fulfilled. The famous *Melloni* case was governed by Article 4a(1)(a)–(b). These provisions demanded the surrender of Mr Melloni because he had been aware of the scheduled trial.⁶⁷ In contrast, Mr R, the complainant in the *Solange III* case, had not personally been served with the decision by which he was convicted.⁶⁸ This meant that Article 4a(1)(d) of the EAW Framework Decision was applicable. This article provides that an EAW has to be executed if the convicted individual will be served with the judgment immediately after the surrender and will be informed of his or her right to a retrial or appeal that allows the merits of the case to be re-examined. Based on information provided by the Italian prosecutor, the German Higher Regional Court assumed that Mr R did indeed have a right to have the merits of the case re-examined in Italy and it therefore authorised his extradition.

However, the Bundesverfassungsgericht held that Article 4a(1)(d) of the EAW Framework Decision required surrender only if the executing judicial authority had in fact established that the individual had a right to

⁶⁴ Council Framework Decision 2002/584/JHA (EAW Framework Decision) [2002] OJ L190/1; Council Framework Decision 2009/299/JHA amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA [2009] OJ L81/24.

⁶⁵ BVerfG, 15 December 2015, 2 BvR 2735/14 *Solange III*, para 76.

⁶⁶ EAW Framework Decision *supra* n.64; Council Framework Decision 2009/299/JHA *supra* n.64.

⁶⁷ *Melloni* *supra* n.11, paras 35–46.

⁶⁸ BVerfG, 15 December 2015, 2 BvR 2735/14 *Solange III*, para 3.

a retrial or trial *de novo*.⁶⁹ The Higher Regional Court was not obliged to surrender Mr R on the basis of a mere assumption of his rights in Italy. As the Higher Regional Court had not actually investigated the complainant's right to a fair trial in Italy, but instead relied on assurances from the Italian authorities, its decision to execute the EAW was therefore not mandated by EU secondary law in the form of Article 4a(1)(d) of the EAW Framework Decision.⁷⁰ According to the Bundesverfassungsgericht, the national measure at issue was not completely determined by EU law and it was therefore to be reviewed in light of the fundamental rights of the Basic Law.

The Bundesverfassungsgericht interpreted 4a(1)(d) of the EAW Framework Decision itself, instead of asking the ECJ to do so in a preliminary reference. It explicitly stated that the correct interpretation of EU law in this case was evident, in a way that did not leave room for any reasonable doubt and was thus a matter of *acte clair*.⁷¹ This assessment is questionable. The ECJ has not yet interpreted Article 4a(1)(d) in this way. It is definitely not beyond reasonable doubt that it would do so, since it has emphasised thus far that the EAW Framework Decision seeks to 'facilitate and accelerate judicial cooperation' by establishing 'a new simplified and more effective system for the surrender of persons convicted or suspected'.⁷²

5. HUMAN DIGNITY REVIEW SINCE *SOLANGE III*

The *Solange III* judgment did not go unnoticed by the ECJ, which reacted to it in its judgment in the joined cases *Aranyosi and Căldăraru*.⁷³ The ECJ found that Member States could refuse to execute an EAW under certain conditions if the person to be extradited might face inhumane and degrading detention conditions in the requesting Member State.⁷⁴ This finding marks 'a change in tone and posture compared to *Melloni*' and it shows that the ECJ can be 'an attentive

⁶⁹ Id., paras 88–90.

⁷⁰ Id., para 125.

⁷¹ BVerfG, 15 December 2015, 2 BvR 2735/14 *Solange III*, para 125.

⁷² *Melloni* supra n.11, para 37.

⁷³ Case C-404/15, *Aranyosi and Căldăraru*, EU:C:2016:198.

⁷⁴ For an analysis of the judgment, see e.g. G Anagnostaras, 'Mutual Confidence is Not Blind Trust! Fundamental Rights Protection and the Execution of the European Arrest Warrant: *Aranyosi and Căldăraru*' [2016] Common Market Law Review 1675.

listener' because it directly took into account the *Solange III* judgment of the Bundesverfassungsgericht.⁷⁵

The Bundesverfassungsgericht, for its part, repeatedly referred to *Solange III* in its subsequent case law and confirmed its key message on several occasions.⁷⁶ In several cases, it noted that sovereign acts of the EU and acts of German public authority – to the extent that they are determined by EU law – should generally not be measured against the fundamental rights of the Basic Law. However, the primacy of EU law was limited by the constitutional principles that are beyond the reach of European integration [*integrationsfest*], pursuant to Articles 23(1) and 79 of the Basic Law. In particular, these principles encompassed the guarantee of human dignity enshrined in Article 1 of the Basic Law. Human dignity had to be upheld in every individual case, even when applying national legal provisions that are determined by EU law.⁷⁷

In two decisions delivered after *Solange III*, complainants before the Bundesverfassungsgericht asserted that their human dignity was violated by an act of German public authority that was determined by EU law.⁷⁸ Just as in *Solange III*, the impugned national act was a decision by a lower court to enforce an EAW.

In *Solange III*, the Bundesverfassungsgericht had held that, in order to rely on the exception to the primacy of EU law, complainants had to submit in a substantiated manner that their human dignity was in fact interfered with.⁷⁹ This requirement was satisfied in both subsequent EAW cases and the constitutional complaints were therefore admissible in this regard. One case concerned the surrender of a Croatian citizen to the United Kingdom by means of an EAW. The Bundesverfassungsgericht acknowledged implicitly that the complainant had sufficiently substantiated the violation of his human dignity because it did not find inadmissibility in this regard.⁸⁰ In the other EAW case, the complainant claimed that his surrender to Romania would violate his human dignity because

⁷⁵ Hong *supra* n.19, 561–62.

⁷⁶ Case law that was delivered until 30 September 2017 could be considered.

⁷⁷ BVerfG, 15 December 2015, 2 BvR 2735/14 *Solange III*, para 36; BVerfG, 6 May 2016, 2 BvR 890/16, para 19; BVerfG, 6 September 2016, 2 BvR 890/16, para 32; BVerfG, 21 September 2016, 2 BvL 1/15, para 32; BVerfG, 18 August 2017, 2 BvR 424/17, para 32.

⁷⁸ BVerfG, 6 May 2016, 2 BvR 890/16; BVerfG, 6 September 2016, 2 BvR 890/16; BVerfG, 18 August 2017, 2 BvR 424/17.

⁷⁹ BVerfG, 15 December 2015, 2 BvR 2735/14 *Solange III*, para 36.

⁸⁰ BVerfG, 6 September 2016, 2 BvR 890/16, paras 27–29.

of the conditions of detention in that Member State. The Bundesverfassungsgericht stated that this claim was admissible because the complainant had analysed the case law of the ECJ and the European Court of Human Rights on the size of prison cells in-depth and had substantiated why his human dignity would be at risk in Romania.⁸¹ The two cases show that the Bundesverfassungsgericht does not set a very high threshold for claims regarding violations of human dignity.

The two EAW cases confirm that *Solange III* has paved the way for an extended review of EU measures for their compliance with the Basic Law and has thereby enhanced the Bundesverfassungsgericht's powers of review. Before *Solange III*, the Bundesverfassungsgericht considered itself incompetent to undertake any fundamental rights review of national measures that are completely determined by EU law. Now, a substantiated claim of the violation of human dignity, in respect of a national act that is completely determined by EU law, will fulfil the admissibility criteria for constitutional complaints. Moreover, in both cases, the Bundesverfassungsgericht granted the complainants a preliminary injunction because their complaints were not manifestly unfounded.⁸²

By September 2017, when this chapter was submitted, the Bundesverfassungsgericht had reached a final decision on the merits in one of the two EAW cases. The complainant in this case had asserted that surrender to the UK would violate the core of his right to remain silent in criminal proceedings and therefore his human dignity and Germany's constitutional identity. The Bundesverfassungsgericht concluded that the constitutional complaint was unfounded because the decision of the lower court to surrender the complainant to the UK did not violate constitutional principles that are beyond the reach of European integration pursuant to Articles 23(1) and 79 of the Basic Law.⁸³

First, the Bundesverfassungsgericht indicated that the decision to surrender the complainant to the UK was completely determined by EU law. It repeated the ECJ's finding in *Aranyosi*, according to which a judicial authority can refuse to execute an EAW only in the exhaustively listed cases of non-execution laid down in the EAW Framework Decision.⁸⁴ The assessment of the suspect's silence in criminal proceedings

⁸¹ BVerfG, 18 August 2017, 2 BvR 424/17.

⁸² BVerfG, 6 May 2016, 2 BvR 890/16, para 22; BVerfG, 18 August 2017, 2 BvR 424/17, para 38.

⁸³ BVerfG, 6 September 2016, 2 BvR 890/16, para 30.

⁸⁴ *Id.*, para 31. See *Aranyosi and Căldăraru* supra n.73, 80.

was not listed as grounds for non-execution.⁸⁵ The complainant would therefore have to be surrendered to the UK under EU law.

The Bundesverfassungsgericht then recalled that the primacy of EU law was limited by the guarantee to human dignity of the Basic Law.⁸⁶ The judicial authority that decides on the execution of the EAW was obliged to investigate the legal and factual situation in the requesting Member State if the person concerned claimed in a substantiated way that their human dignity was at risk.⁸⁷

However, the Bundesverfassungsgericht concluded that the complainant's human dignity would not be violated by his surrender to the UK. The right to silence touched upon human dignity, but not every element of the constitutional protection of this right was part of the guarantee to human dignity of Article 1 of the Basic Law.⁸⁸ Only a violation of the very core of the right to silence would violate Article 1.⁸⁹ For example, it would violate the suspect's human dignity if he was forced to incriminate himself by coercive means.⁹⁰ The guarantee provided by Article 1 of the Basic Law does not prohibit interpreting the suspect's silence in one way or another in the criminal proceedings, as would be possible under UK law.⁹¹ The complainant's human dignity was therefore not at risk and the decision of the lower court to surrender him to the UK was in line with the Basic Law.⁹²

This ruling confirms that the Bundesverfassungsgericht intends to disregard the primacy of EU law in exceptional and extreme cases only. Only the very core of constitutional principles is protected by Article 1 of the Basic Law, and this human dignity core is narrowly construed. As mentioned above, the *Solange III* review of human dignity does not appear to pose a substantial threat to the uniform application of EU law. The final decision on the merits in the other EAW case, currently pending, will be an opportunity for the Bundesverfassungsgericht to flesh out its definition of the human dignity core of constitutional principles for the purpose of the application of the *Solange III* review.⁹³

⁸⁵ BVerfG, 6 September 2016, 2 BvR 890/16, para 31.

⁸⁶ Id., para 32.

⁸⁷ Id., para 33. See also BVerfG, 18 August 2017, 2 BvR 424/17, para 33.

⁸⁸ BVerfG, 18 August 2017, 2 BvR 424/17, paras 34–36.

⁸⁹ Ibid.

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² BVerfG, 6 September 2016, 2 BvR 890/16, paras 36–37.

⁹³ See BVerfG, 18 August 2017, 2 BvR 424/17.

6. CONCLUSION

It can be concluded that the Bundesverfassungsgericht created a powerful review mechanism in *Solange III*. It developed a new variant of the constitutional identity condition that guarantees the respect for German fundamental rights in every individual case. It associated constitutional identity with human dignity by confirming that the constitutional identity of the Basic Law entailed the respect for human dignity. It then declared that it would uphold the core of the fundamental rights and constitutional principles of the Basic Law on a case-by-case basis.

The new review mechanism does not alter the Bundesverfassungsgericht's general approach to EU law, but it adds a further condition to it. The basic rule remains that sovereign acts of the EU and acts of German public authority – to the extent that they are determined by EU law – are not to be measured against the fundamental rights of the Basic Law. With this rule, the Bundesverfassungsgericht gives effect to the primacy of EU law. However, the primacy of EU law is limited by German constitutional principles that are beyond the reach of European integration [*integrationsfest*] pursuant to Articles 23(1) and 79 of the Basic Law. Human dignity belongs to these principles and it has to be respected in every individual case for this reason, even if this means going against EU law.

Nevertheless, the new human dignity review does not pose a substantial threat to the primacy principle. *Solange III* has certainly enhanced the Bundesverfassungsgericht's powers of review. If complainants assert that their human dignity was violated by a national measure that is completely determined by EU law, their claims are admissible if they are substantiated. However, recent case law shows that the Bundesverfassungsgericht construes the core of constitutional rights and principles very narrowly. The primacy of EU law is ignored only in cases of extreme violations of human dignity. The Bundesverfassungsgericht should flesh out this very core of constitutional rights and principles in future cases.