Human Dignity and Constitutional Identity: The Solange-III-Decision of the German Constitutional Court

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1. As long as the German constitution is in force, the Federal Constitutional Court of Germany intends to enforce the right to human dignity, law of the European Union not withstanding. It is going to enforce that right not only *against* conflicting Union law if necessary, but also *parallel* to its European protections. That is the central message of the court's historic decision of January 26th, 2016, in its second European arrest warrant case (press release in English: here; for the first decision on the European arrest warrant of 2005 cf. the English translation here). Therefore, although the words "as long as" ("solange") do not appear in the text of the decision, it still can aptly be called "Solange III" (cf., also pondering that title, here, and – considering "Solange Two-and-a-half": here and here).

2. The holding of the Court, as far as the constitutional right to human dignity itself is concerned, is straightforward enough: A citizen of the United States of America was sentenced to 30 years of imprisonment in Italy – in absence and without notice or representation by a lawyer. The German Higher Regional Court (Oberlandesgericht) allows his extradition from Germany to Italy, relying on a European arrest warrant and considering it to be sufficient that a new evidentiary hearing for him in Italy is "at least not impossible" („jedenfalls nicht ausgeschlossen").

His constitutional complaint is successful: The Constitutional Court finds a violation of his right to human dignity (Art. 1 sec. 1 Basic Law) and refers the case back to the Regional Court. The right to dignity protects the principle of individual guilt, which mandates "minimum guarantees of the rights of the accused in criminal trials" (cf. §§ 52, 56, 59, 76, 83 f., 107).

To be criminally sanctioned, your guilt must be established in a judicial process with at least a minimum standard of fairness. If you are sentenced to 30 years in jail without a meaningful chance for your day in court this falls short of the minimum standard.

As the long standing case law of the Court also makes clear, this must have consequences for extraditions, too (cf. § 60). German courts have an independent responsibility to ensure ("Gewährleistungsverantwortung", cf. § 59), that those minimum guarantees will not be violated.

To extradite somebody who was sentenced in absentia like this, you have to make sure enough that he will get a new evidentiary hearing. It is not enough to content yourself with the prospect that such a hearing is "at least not impossible". The right to dignity demands more.

3. But that is, of course, by far not all there is to the judgement: What if Union law would dictate that same result anyhow? Would it then still be the business of the German Constitutional Court to apply the German Constitution – or would it not, under the Solange-II framework, be precluded from exercising its jurisdiction here at all?

The Constitutional Court activates its competence for an "identity review" vis-à-vis the European Union that it derived from the Constitution in its Lisbon-judgement of 2009 (English translation: here, cf. §§ 240-241, 332). It does not simply hold, that the right to human dignity is violated. More precisely, it finds a violation of the right to human dignity as part of that constitutional identity which is protected as unamend-

able by the constitution-amending legislature and as untransferable to the European Union by Art. 1 sec. 1 *in conjunction with* Art. 23 sec. 1 cl. 3 and Art. 79 sec. 3 Basic Law) (cf. § 35 of the Solange-III-decision).

Insofar as the Court stresses once more that it will protect this constitutional identity, which it considers to be "integrationproof" (integrationsfest), even against conflicting Union law, it quite directly responds to – and denies – the statements by the Court of Justice of the European Union in its Melloni judgement of 2013 to the effect that the constitutions of the member states are not allowed to interfere with the European arrest warrant framework decision (cf. Solange-III, §§ 78, 82 f., quoting Melloni).

4. The identity review in this case, to be sure, has a harmonious result: The Constitutional Court sees no conflict with constitutional identity and hence no need to disregard Union law. Having examined the relevant Union law (cf. §§ 85-107) the Court concludes, that that law (1.) did not *demand* the violation of human dignity by the decision to extradite and (2.) even *prohibits* extraditions without minimal investigations by the extraditing authorities (cf. § 105: „Das Unionsrecht steht daher Ermittlungen [...] durch die nationalen Justizbehörden nicht nur nicht im Wege, es verlangt sie.").

The first of these findings (European *allowance* to apply the minimum standard of fairness that is required by human dignity; no *prohibition* of individual review) the Constitutional Court considers to be so obvious, that it sees no need to refer the case to the Court of Justice for a preliminary ruling (acte clair, cf. § 125). Its second finding (European *duty* to investigate before extradition) the Court considers to be less obvious, at least in its implications for the individual case (cf. § 125: „Grenzen der Ermittlungspflicht [...] in der Rechtsprechung des Gerichtshofs der Europäischen Union nicht geklärt [...]").

But, remarkably, the Court does not consider it to be decisive for its handling of the case, if European law already mandates the same respect for human dignity: It exercises its jurisdiction *anyway*, enforcing the right to human dignity parallel to any mandatory European protections. Specifically, it does not investigate how the case would have had to be resolved under the framework of its emission trade decision of 2007, under which it excercises German constitutional rights review only where European law does not dictate a specific result, but leaves a leeway. The decision treats identity review for violations of the right to dignity as a category of review under which it is *immaterial* if European law, too, already mandates the result, that the individual right demands, or simply does not hinder the protection of the right by German constitutional law.

This moves the protection of human dignity vis-à-vis the European Union within the European multi-level system of rights protection closer to the model that the Constitutional Court has always applied to the relation between the constitution and the European Convention on Human Rights: a model of layers of additional protection, that can complement each other, instead of a model of separation of applicability of constitutional rights and other rights (for these two models cf. here and here). The Charter of Fundamental Rights of the European Union does not form a minimum layer of human rights protection, to be sure: It keeps confined to its field of application according to Art. 51, that is, it is "applicable to the Member States only when they are implementing Union law" (Art. 51 sec. 1). But within the reach of the German constitution its right to human dignity does, according to Solange-III, form a minimum standard which acts of public authorities may in no case violate, regardless if those acts are determined by Union law or not.

5. Human dignity is a notoriously vague concept. It can legitimately be asked if it is not too vague to be properly justiciable at all. But there is a way to escape dignity's vagueness: Get specific and focus on the dignity core of the constitutional right in question.

In Solange III the Constitutional Court rightly refers to the guilt principle in criminal law, that it has long since derived from human dignity. It could easily additionally have drawn on its rich case law on other specific rights, namely the rights to a fair trial (Art. 2 sec. 1 in conjunction with Art. 20 sec. 3 Basic Law) and the right to a hearing (Art. 103 sec. 1 Basic Law) to justify the conclusion, that the dignity core of these

rights or, as the Court puts it, the "minimum guarantees of the rights of the accused in criminal trials" have been violated.

The German Constitutial Court has continually applied the term "human dignity" for over sixty years now, and it has derived from it strict and specific constitutional limits, for example for electronic eavesdropping of the home, online searches of computers (English translation here) or for the targeted shooting of innocent passengers in an abducted airplane to save the life of others in non-warlike circumstances (English translation here).

Of course one can argue about each of these decisions. The basic principles of the Court's long standing case law, however, match the original meaning of Art. 1 Basic Law: It can be shown, that the right to human dignity was meant to be concretised in the dignity core („Menschenwürdegehalt") of the *other* constitutional rights. That core was understood to be narrow, but at the same time as capable of some limited evolution, thereby allowing for some measure of living originalism.

6. Since its Lisbon judgement the Constitutional Court has also stressed the *absolute character* of the protection of constitutional identity. It does so once more in Solange III (cf. § 49: „Die [...] für integrationsfest erklärten Schutzgüter dulden auch keine Relativierung im Einzelfall [...]."). As far as human dignity is concerned, this also comports with the Courts previous case law. The Court has always considered the right to dignity to be an absolute right that cannot be relativized by any case-by-case-balancing against countervailing interests.

But are absolute rights even rationally possible? A forceful objection claims that because of the fallibility of any human proposition all rights have to be kept open for case-by-case-balancing against opposing reasons (see e.g. here, p. 62-66). But that objection is misleading: Absolute rights don't have to be irrefutable or absolutely certain. It is enough, that the balancing of reasons leads with sufficient certainty to the result, that any exceptions to the right can be excluded. If that is the case, it would not be irrational to hold the right to be absolute. On the contrary, it would then be irrational to keep insisting that the right still has got to have exceptions.

Again, one can of course argue about many of the potential concretisations for the dignity core of any given constitutional right. But I think one might still be able to agree that there are *some* strict limits that cannot be crossed. Whoever thinks, for example, that the dignity core of the right to life is not necessarily violated, if an airplane with innocent passengers is shot down to save the life of other people, might concede, that the dignity core of that right *is* always violated if the plane is shot down not to save other lifes, but to prevent property damage, however big that damage might be.

7. Solange-III, therefore, is good news for the protection of fundamental rights in the European Union.

Identity review based on the right to dignity can be understood as a narrow exception to the precedence of Union law. It might, of course, create the temptation for the Court to expand the concept of human dignity too far into the area of "ordinary" fundamental rights cases (early warning: here or here), and it might therefore be advisable to find additional solutions for those ordinary cases, for example by materially europeanizing constitutional rights or by widening the understanding of the Court's jurisdiction to encompass Union rights as well (see Matthias Bäcker's suggestions here or here).

But if identity review for human dignity violations stays confined to the indispensable dignity core of constitutional rights – as it should – it has solid foundations in the text, history and structure of the German Constitution and in the case law of the Constitutional Court. And if exercised responsibly by the Constitutional Court it will with the greatest likelyhood not weaken, but strengthen the legitimacy of the Court of Justice of the European Union in Luxembourg.

Dialogue in the European and global community of courts will become increasingly indispensable. One example is the Finogenov judgement of 2011 by the European Court of Human Rights in Strasbourg, that explicitely refers to the German airline aviation case, carefully distinguishing the facts of that case from that

of its own case (cf. §§ 231-232). The Court of Justice of the European Union in Luxembourg can without doubt also profit from some cooperative dialogue with the member states' constitutional courts, as long as it remains confined to matters of fundamental importance for that national constitutional identity for which Art. 4 of the Treaty on European Union itself demands the Unions respect.

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