HIGHLIGHT

SOLANGE III? THE GERMAN FEDERAL CONSTITUTIONAL COURT STRIKES AGAIN

ELISA URÍA GAVILÁN*

KEYWORDS: Constitutional Court of Germany – European arrest warrant – fundamental rights – conviction *in absentia*.

If there is a national court which is famous for its prominence in the European Union (EU) arena that is, undoubtedly, the Federal Constitutional Court of Germany, the *Bundesverfassungsgericht* (*BVerfG*). It has rendered ground-breaking judgments, such as *Solange I*,[1] *Solange II*,[2] *Maastricht*,[3] *Lisbon*,[4] *Gauweiler*,[5] that have represented a milestone not only for the German constitutional framework but also for the whole process of European integration. On 15 December 2015 the *BVerfG* issued a seminal order, which has already been named by some authors as *Solange III*.[6]

This time, the German Court examined the complaint of a citizen of the United States who had been condemned in absence by a court in Florence (Italy) to a custodial sentence of thirty years in 1992. In 2014, he was arrested in Germany on the basis of a European arrest warrant (EAW).[7] The complainant submitted that his conviction in Italy

* Ph.D. candidate, University Carlos III of Madrid, elisa.uria@uc3m.es.

[1] Federal Constitutional Court of Germany, judgment no. 37, 271 of 29 May 1974.

[2] Federal Constitutional Court of Germany, judgment no. 73, 339 of 22 October 1986.

[3] Federal Constitutional Court of Germany, judgment no. 89, 155 of 12 October 1993.

[4] Federal Constitutional Court of Germany, judgment no. 123, 267 of 30 June 2009.

[5] For the first time in history, the German Constitutional Court asked the Court of Justice of the European Union (CJEU) for a preliminary ruling (Federal Constitutional Court of Germany, judgment no. 2728/13 of 14 january 2014). The Grand Chamber of the CJEU gave an answer by judgment of 16 June 2015 in case C-62/14, *Gauweiler.*

[6] Federal Constitutional Court of Germany, order no. 2735/14 of 15 December 2015. See M. HONG, *Human Dignity and Constitutional Identity: The Solange-III: Decision of the German Constitutional Court*, in *Verfassungsblog*, 18 February 2016, verfassungsblog.de.

[7] Framework Decision 2002/584/JHA of the Council of the European Union on the European arrest warrant and the surrender procedures between Member States (2002 Framework Decision).

www.europeanpapers.eu
ISSN 2499-8249
doi: 10.15166/2499-8249/40

had been ruled without any guarantees. Nevertheless, the Düsseldorf Higher Regional Court declared the extradition of the complainant to be permissible.

The US citizen raised a constitutional appeal and thus the case arrived to the *BverfG.* For the very first time, it undertook its "identity review" over the implementation of an EAW.[8] By virtue of this kind of control, protection of fundamental rights by the *BVerfG* may include review of national acts determined by the EU law and ultimately may result in them having to be declared inapplicable. According to the Constitutional Court, the principle of individual guilt (*Schuldprinzip*) – as rooted in the guarantee of human dignity enshrined in the German Constitution – had been violated in this case and therefore annulled the decision of the court executing the EAW.

It seems ineluctable linking this case to *Melloni*:[9] they both deal with the respect to procedural rights in a conviction *in absentia* in the context of a EAW and they involve two Constitutional Courts. In *Melloni*, the Court of Justice of the European Union (CJEU) interpreted Art. 53 of the Charter of Fundamental Rights of the European Union (Charter) to mean that the Member States could apply higher standards of fundamental rights protection than the Charter except where, by doing so, they would fail to respect the primacy, unity and effectiveness of the EU law. The crucial difference between *Melloni* and this judgment is that in the former all the guarantees had been scrupulously followed. Against this background, a question arises: if the 2002 Framework Decision entitles Member States to refuse the enforcement of a EAW in some situations, such as the one of lack of guarantees in trials in absence, why the *BverfG* decided to apply the "identity control" anyway?

Arguably, the substantial difference between the two cases allowed the *BverfG* to reassert its competence on the "identity review" without drawing its ultimate consequence and declare inapplicable an EU act within the German territory. The judges of Karlsruhe are sending a message to Luxembourg: they are determined to carry out an "identity review" even on those cases fully covered by EU law and therefore they are not following the CJEU's approach to Art. 53 of the Charter settled in *Melloni.* This defiant attitude of the German Court may have a two-fold reading. On the one hand, it may be understood as a threat for the uniformity of EU law and for the principle of mutual trust, whereof the EAW is a cornerstone. On the other hand, it is an evidence of the disbelief of the national courts with regard to the standard of protection of fundamental rights at the EU level. In this regard, they want to make sure they remain as the ultimate watchdog concerning the protection of fundamental rights.

[8] The "identity review" was established in the judgment of the BVerfGE in *Lisbon*, cit.

[9] Court of Justice (Grand Chamber), judgment of 26 February 2013, case C-399/11, *Stefano Melloni v. Ministerio Fiscal* (at the request for a preliminary ruling from the Spanish Constitutional Court).