Promoting European Constitutionalism? The Ambivalent Role of National Constitutional Courts from *Solange I* to *Solange IV*

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Abstract

This paper focuses on the implications of *Solange IV* (‘*Right to be Forgotten II*’) and argues that this judgment is at least as bold as *Solange I* was at the time since it promises to overcome the classic ‘nationalisation’ of European conflicts and to make European Union (EU) constitutional law (fundamental rights) the focal point of debates about the decisions of a truly European polity. The paper argues that despite its German label, *Solange IV* is a truly European approach to which the German Federal Constitutional Court (GFCC) was only a latecomer. This new model bears the potential to catalyse a more genuine and meaningful engagement with the Charter by constitutional courts, thereby fostering the integrative dimension of EU constitutional law. This is potentially further strengthening the role of Art. 2 Treaty on European Union (TEU). At the same time, it risks the disintegrative effects of divergent national interpretations and still leaves room for sidelining EU standards through interpretation. Some domestic constitutional courts, however, seem to resist this new development, opting instead to rearticulate *Solange II* and combine it with a principle of consistent interpretation. While this is potentially an attractive avenue for constitutional orders with a strong *social acquis*, we argue that this strategy is neither without risks nor without alternatives.

Keywords

Constitutional integration – European constitutionalism – pluralism – fundamental rights – rule of law – social rights – national constitutional courts – Court of Justice of the European Union

I. Introduction

This paper focuses on the implications of Solange IV (‘*Right to be Forgotten II*’) and argues that this judgment is at least as bold as *Solange I* was at the time since it promises to overcome the classic ‘nationalisation’ of European conflicts and to make EU constitutional law the focal point of debates about the decisions of a European polity. While fundamental rights only form a part of EU constitutional law, they are of particular relevance for shaping the EU legal order and its values. The paper asks how the role of domestic constitutional courts in promoting EU constitutional law has

changed through this new approach, how it is in continuity or in contrast to the approach developed in *Solange I*. In doing so, the paper juxtaposes *Solange I & II* vs. *Solange IV* as two ideal types of European judicial dialogue about pluralistic fundamental rights protection. We first introduce the model of *Solange I & II* and outline the broad issues of conflict in the pluralistic fundamental rights order of the EU over time (II.). We then present Solange IV as an alternative model and situate the case within a broader context by comparing it with similar decisions by other constitutional courts in the EU (III.). We thereby seek to clarify if and in how far distinct domestic approaches to European constitutionalism pursued in the respective constitutional orders converge. We will also briefly sketch out preliminary implications for three core policy fields: economic integration, migration, and climate change. On this basis, we seek to assess the potential of *Solange IV* to strengthen the integration of an EU polity through EU constitutional law and ask how far a potential fragmentation of interpretation of EU fundamental rights risks limiting this potential. The fourth part of the paper adds a further comparative layer (IV.). While *Solange IV* suggests that *Solange I & II* are outdated, comparative analysis reveals that the motivation and strategic goals underlying *Solange I & II* are still vital for constitutional courts that are latecomers to European judicial dialogue. We use the case of the Portuguese Constitutional Court (*Tribunal Constitucional*) to illustrate this point and assess how and if *Solange I & II* might also remain relevant despite *Solange IV*. We end with a conclusion regarding the future fabric of fundamental rights protection in the EU in light of the two ideal types (V.).

II. *Solange I & II* as an Ideal Type Model of Court Interaction in the EU

The *Solange* doctrine of the GFCC is among the most prominent reactions of national courts to European integration. The first *Solange*-decision signalled the GFCCs ambition to co-shape fundamental rights protection at EU level (1.). Once fundamental rights at the EU level consolidated, the court developed new instruments to maintain its influence on EU law (2.). While the GFCC's focus after *Solange II* was less on fundamental rights control, the entry into force of the EU Charter of Fundamental Rights created new conflicts between national and EU fundamental rights protection that were mirrored in the domestic constitutional case law of various Member States (3.). More recently, the GFCC – now with its first senate in the lead –

followed the path of other constitutional courts in the EU and accepted EU fundamental rights as a standard of review in domestic proceedings (4.). In many ways, this latter line of jurisprudence is much more conciliatory and cooperative than the approaches taken in *Solange I*, ultra vires, and identity review. However, it seems – to some extent – driven by similar concerns about the interpretative power of the court itself.

1. The GFCC Between Self-Confidence and Mission: *Solange I & II*

In light of increasing public authority exercised by the then European Community, the GFCC ruled in 1974 that 'as long as the integration process has not progressed so far that Community law receives a catalogue of fundamental rights […] of settled validity', the court would still review Community law by the standard of fundamental rights under the German Basic Law.[1] Eight years later, the GFCC found in *Solange II* that fundamental rights protection at the European level had reached an extent and quality that is adequate to the fundamental rights catalogue under the German Basic Law.[2] The Court declared that it would no longer review EU law by the standard of the German Basic Law as long as this level of fundamental rights protection in the EU is maintained.[3] It justified this decision by reference to the case law of the European Court of Justice (ECJ), which had meanwhile further developed fundamental rights as general principles of European law and, in doing so, relied to a significant extent not only on the common constitutional traditions of the Member States but also on the case law of the European Court of Human Rights (ECtHR). The GFCC would only admit a complaint if the complainant showed 'in detail that the present evolution of law concerning the protection of fundamental rights in European Community law […] does not generally ensure the protection of fundamental rights required unconditionally in the respective case'.[4] While the European Court of Justice had mentioned fundamental rights as a standard of review in its own case law already five years before *Solange I* in Stauder,[5] it seems a fair assessment

1 FCC, order of 29 May 1974, 2 BvL 52/71, BVerfGE 37, 271 (para. 56) – *Solange I*.

2 FCC, order of 22 October 1986, 2 BvR 197/83BVerfGE 73, 339 (para. 105) – *Solange II*.

3 FCC, *Solange II* (n. 2), para. 132.

4 FCC, order of 7 June 2000, 2 BvL 1/97, BVerfGE 102, 147 (para. 54) – *Banana Market Order*.

5 ECJ, *Erich Stauder v. City of Ulm*, judgment of 12 November 1969, case no. 29/69, ECLI:EU:C:1969:57, para. 7.

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that *Solange I* has – together with similar lines of jurisprudence in other Member States[6] – further pushed the development of fundamental rights at the European level.[7] Whether its impact was more a political one[8] or also forced the ECJ to develop fundamental rights more seriously[9] is difficult to assert. In any case, *Solange I* soon formed part of the discursive tools to remind European actors to take fundamental rights seriously as a genuine part of an EU legal order. However, *Solange I* also solidified the separation between national and EU fundamental rights as distinctive spheres that could not overlap but should rather be neatly delineated.

The motivation of the GFCC to develop the *Solange I* doctrine is contested. It is indeed likely that there was no single motivation. The court was likely driven both by concerns about effective protection of fundamental rights in multi-level governance[10] and fears of losing power to ordinary courts. The latter could have bypassed the constitutional court through referrals to the ECJ, had the GFCC not insisted on its power to review European law even after a referral procedure in case of a potential breach of fundamental rights. It is also plausible that the court found itself in an institutional setting between an activist ECJ and an activist Frankfurt Administrative Court that forced it to take a stance.[11] However, by framing the status quo of fundamental rights protection at the European level as *not yet* sufficient, the GFCC de facto communicated an ambition to co-shape Euro-

6 See in particular the *controlimiti* doctrine in Italy: Italian Corte costituzionale, *Frontini v. Ministero delle Finanze*, judgment of 18 December 1973, no. 183/1973; Italian Corte costituzionale, *SpA Fragd v. Amministrazione delle Finanze dello Stato*, judgment of 21 April 1989, no. 232/1989. For the differences in the approach of the German FCC and the Corte costituzionale, see in this issue Ana Bobić, 'Constitutional Courts in the Face of the EU's Reconfiguration', HJIL 85 (2025), 523-545, see there: footnote 2; and in this issue Niels Graaf, '"*Solange*", "*Fintantoché*", "*Tant que*": On the Local Remodelling of a Canonical German Decision in French and Italian Constitutional Debates', HJIL 85 (2025), 479-501. For the discursive impact of *Solange I* in the Italian legal scholarship, see also Niels Graaf, in this issue.

7 Mattias Wendel, Permeabilität im europäischen Verfassungsrecht. Verfassungsrechtliche Integrationsnormen auf Staats- und Unionsebene im Vergleich (Mohr Siebeck 2011), 460. For an earlier assessment Rudolf Streinz, Bundesverfassungsgerichtlicher Grundrechtsschutz und Europäisches Gemeinschaftsrecht. Die Überprüfung grundrechtsbeschränkender deutscher Begründungs- und Vollzugsakte von Europäischem Gemeinschaftsrecht durch das Bundesverfassungsgericht (Nomos 1989), 51-61.

8 For this argument, see Franz C. Mayer, 'A Parallel Legal Universe – The *Solange I* Dissent and Its Legacy', HJIL 85 (2025), 451-477.

9 Karen J. Alter, 'So Long as We Are a Constitutional Democracy: The *Solange* Impulse in a Time of Anti-Globalism', HJIL 85 (2025), 599-626.

10 On this aspect, see Alter (n. 9).

11 Andrej Lang argues that the GFCC intended to moderate between two opposing camps – a pro-integrationist camp and a camp that viewed European integration as a threat to democracy and fundamental rights. See Andrej Lang, '*Solange I* in the Mirror of Time and the Divergent Paths of Judicial Federalism and Constitutional Pluralism', HJIL 85 (2025), 411-449.

pean law and to push it in a direction that would match the German standard of fundamental rights protection as developed by the GFCC itself. In this perspective, the first two *Solange* cases testify to a self-confident and mission-minded court that wanted to shape European law actively – and arguably according to the German model.

2. Alternative Doctrinal Avenues of Communication

However, once EU fundamental rights were established at the EU level, first in the case law of the ECJ and since the Lisbon Treaty also in the EU Charter of Fundamental Rights (CFR), the influence of the GFCC seemed to wane. Initially, the GFCC retained a minimum control by allowing individual complaints against decisions by ordinary courts that unduly refrained from referral to the ECJ.[12] Thereby the GFCC could at least ensure that potential violations of European fundamental rights reached the ECJ without directly reviewing EU law itself. Instead, the GFCC developed other doctrinal techniques to get hold of EU law. Since its *Maastricht* decision the court allows individuals to challenge EU law for exceeding the competences of the EU (*ultra vires*).[13] While Maastricht is only concerned with the review of treaty law, the GFCC has meanwhile extended *ultra vires* control to any act by an EU organ, including the ECJ.[14] In addition, the court further developed identity control, according to which primacy of EU law would only go so far as the respective regulations would not affect the constitutional identity under the German Basic Law.[15] Here again, the court claimed the power to review EU legal acts directly and to prohibit their application even if fundamental principles of EU law, such as the principle of mutual trust, were impeded.[16] Both *ultra vires* and identity control allowed the court direct review of EU legal acts. While the standard of review in identity control is governed by national constitutional law, in *ultra vires* cases the court also

12 Heiko Sauer, Jurisdiktionskonflikte im Mehrebenensystem. Die Entwicklung eines Modells zur Lösung von Konflikten zwischen Gerichten unterschiedlicher Ebenen in vernetzten Rechtsordnungen (Springer 2008), 296.

13 FCC, order of 12 October 1993, 2 BvR 2134, 2159/92, BVerfGE 89, 155 (para. 106) – *Maastricht*.

14 FCC, judgment of 21 June 2016, BVerfGE 142, 123 (paras 143-145) – *OMT-Programme*; FCC, judgment of 5 May 2020, BVerfGE 154, 17 (para. 116) – *PSPP-Programme*.

15 FCC, order of 15 December 2015, 2 BvR 2735/14, BVerfGE 140, 317 (paras 43-46) – *Identity Control*.

16 For a reading of Solange I as a case of identity review, see Julian Scholtes, 'Freeing Constitutional Identity from Unamendability: *Solange I* as a Constitutional Identity Judgment', HJIL 85 (2025), 547-568.

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engaged in an interpretation of primary EU law, including an interpretation of competences and an assessment of proportionality in respect of the proper identification of competences.[17] Moreover, identity review and *ultra vires* review differed in terms of their effects: identity review only affects the primacy of EU Law, while *ultra vires* challenges its very validity.[18] Other constitutional courts in the EU made similar doctrinal efforts to maintain constitutional courts' review of EU law and develop strategies of communication with the ECJ.[19]

3. Remaining Conflicts About Fundamental Rights Protection in the EU

The relationship between domestic constitutional courts and the ECJ remained complicated even after the entry into force of the EU Charter of Fundamental Rights. At the surface the respective scope of the Charter and domestic constitutional law is clearly delineated. According to Article 51 of the Charter, EU fundamental rights only apply to Member States 'when they are implementing EU law'. Article 53 of the Charter clarifies that '[n]othing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized, in their respective fields of application, […] by Member States' constitutions.' The reality, however, turned out to be much more complicated not least because the EU's pluralistic fundamental rights system lacks a hierarchical order between the respective declarations of rights and courts.[20]

When first confronted with a claim for prevailing higher domestic fundamental rights standards in *Melloni*, the ECJ ruled that when implementing EU law, domestic fundamental rights could only apply if they would not compromise the level of protection provided by the Charter nor the primacy, unity and effectiveness of EU law.[21] The court thereby significantly

17 FCC, *PSPP-Programme* (n. 14), paras 119-153.

18 Wendel, *Permeabilität* (n. 7), 474.

19 Wendel, *Permeabilität* (n. 7), 473; for Denmark, Danish Højesteret, *Dansk Industri (DI), acting for Ajos A/S v. The estate left by A*, judgment of 6 December 2016, case no. 15/2014, and for the Czech Republic, Czech Ústavní soud, *Slovak Pensions XVII*, judgment of 31 January 2012, no. PL. ÚS 5/12 (both on ultra vires).

20 Aida Torres Pérez, 'Melloni in Three Acts: From Dialogue to Monologue', Eu Const. L. Rev. 10 (2014), 308-331 (329). On the features of EU fundamental rights pluralism see Federico Fabbrini, *Fundamental Rights in Europe. Challenges and Transformations in Comparative Perspective* (Oxford University Press 2014), 19-26.

21 ECJ, *Stefano Melloni v. Ministerio Fiscal*, judgment of 26 February 2013, case no. C-399/11, ECLI:EU:C:2013:107, para. 60.

curtailed the scope of the application of domestic fundamental rights and argued that the EU legislator had previously regulated the issue at stake and thereby provided a 'common definition'[22] of the content of the right to fair trial in the Charter. While the court continued to stretch the scope of the Charter to the discontent of many,[23] it also allowed the application of stricter national standards in cases where EU secondary law left a margin of discretion to the Member States.[24] The ECJ thereby distinguished between situations entirely determined by EU law and those where this is not the case.[25]

This case law has provoked strong criticism for insisting on the trinity of primacy, unity, and effectiveness rather than taking the pluralistic element of the EU's fundamental rights order more seriously and giving it further shape.[26] More specifically, some authors also called for the ECJ to show more respect for the protection of national constitutional identity as protected in Article 4(2) TEU and to concretise the provision's meaning within the pluralistic fundamental rights system of the EU.[27] As a reaction, domestic constitutional courts increasingly relied on identity review to protect fundamental rights standards considered higher than in the Charter.[28] The ECJ, however, even remained silent on the issue of constitutional law after explicitly being invited by the Italian Corte costituzionale in *Taricco*.[29] Although the ECJ proved to be much more conciliatory in this case than in *Melloni* by including the common constitutional traditions of the Member States under Article 49 of the Charter,[30] the relationship between domestic constitutional courts and the ECJ on fundamental rights issues remained full of tensions[31] not least because the question of who has the final authority over defining national identity

22 ECJ, *Stefano Melloni v. Ministerio Fiscal*, opinion of AG Bot of 2 October 2012, case no. C-399/11, ECLI:EU:C:2012:600, para. 126.

23 ECJ, *Åklagaren v. Hans Åkerberg Fransson*, judgment of 26 February 2013, case no. C-617/10, ECLI:EU:C:2013:105, para. 21.

24 ECJ, *Åklagaren v. Hans Åkerberg Fransson* (n. 23), para. 36; ECJ, *Jeremy F. v. Premier ministre*, judgment of 30 May 2013, case no. C-168/13 PPU, ECLI:EU:C:2013:358, para. 53.

25 Torres Pérez (n. 20), 326.

26 Torres Pérez (n. 20), 327.

27 Torres Pérez (n. 20), 327.

28 FCC, *Identity Control* (n. 15); Italian Corte costituzionale, *Taricco I*, order of 23 November 2016, no. 24/2017.

29 Italian Corte costituzionale, *Taricco I* (n. 28), para. 6.

30 ECJ, *M. A. S. and M. B.*, judgment of 5 December 2017, case no. C-42/17, ECLI:EU:C:2017:936, para. 52.

31 The Italian Corte costituzionale reacted in a rather hostile manner to the conciliatory move by the ECJ, Italian Corte costituzionale, *Taricco II*, judgment of 10 April 2018, no. 115/2018.

remained unresolved.[32] This ongoing tension has led some scholars to criticise the increasing marginalisation of constitutional courts in the European constitutional order.[33]

Consequently, identity review is constantly looming. Moreover, the ECJ made sure that constitutional courts could not impede the right to referral by ordinary courts even in cases where domestic constitutional provisions were at stake at the same time.[34] In particular, where a situation is entirely determined by EU law, domestic constitutional courts are effectively sidelined. Given the increasing scope of EU law, domestic constitutional courts still feared losing control, influence, and interpretative power.

III. *Solange IV* as an Emerging Trend in European Constitutional Jurisprudence

The increasing European integration, the unresolved conflict about the relation between the respective fundamental rights catalogues in the EU and the fear of losing interpretative power may have led to the emergence of a new ideal type model of interaction between national and EU fundamental rights. This new ideal type is articulated in particular detail in the two decisions on the rights to be forgotten by the GFCC's first senate (1.). This time, however, it was not the GFCC that started the development but instead joined a broader development in the domestic constitutional jurisprudence (2.). The new ideal type model reflected in *Solange IV* promises a new cooperative spirit and opens up space for a truly European constitutional dialogue while at the same time creating risks for new incoherence and sidelining of the Charter (3.). To assess the future role of EU constitutional law, it will be crucial to see how the centralising tendency of the *Solange IV* model may team up with the Commission's fight for the protection of EU values via Art. 2 TEU (4.). The analysis of the potential impact of *Solange IV* on three significant policy fields already now reveals the potential for new

32 Francesco Vigano, 'Melloni Overruled? Considerations on the "Taricco II" Judgment of the Court of Justice', New Journal of European Criminal Law 9 (2018), 18-23 (19). More generally the ECJ has been reluctant to apply and substantiate Article 4 para. 2 TEU in its case law, on this Giacomo Rugge, 'The Italian Constitutional Court on Taricco: Unleashing the Normative Potential of "National Identity"?', Quest. Int'l. L. 37 (2017), 21-29 (24).

33 Jan Komarék, 'National Constitutional Courts in the European Constitutional Democracy', I.CON 12 (2014), 525-544. Marco Dani, 'National Constitutional Courts in Supranational Litigation: A Contextual Analysis', ELJ 23 (2017), 189-212.

34 ECJ, *Aziz Melki and Sélim Abdeli*, judgment of 22 June 2010, case nos C-188/10 and C-189/10, ECLI:EU:C:2010:363, para. 57.

conflict and raises the question of how far *Solange IV* really renders the *Solange I & II* model obsolete (5.).

1. From Separation to Unity? – *Solange IV* as a New Spirit of Dialogue

While the earlier case law on the relation between EU law and domestic constitutional law was mostly dominated by the second senate of the GFCC, the first senate, being primarily responsible for fundamental rights review, had only rarely engaged with the ECJ. In reaction to *Åkerberg Fransson* the first senate emphasised that an all too broad scope of application of the Charter would ultimately 'be judged as an ultra vires act or […] would call into question the identity of the constitutional order.'[35] The GFCC's first senate thereby disclosed its imminent fear of losing power to the ECJ and ordinary courts in the field of fundamental rights protection.[36]

In the two decisions on the right to be forgotten,[37] the GFCC's first senate then changed its strategy and accepted the primacy of the Charter in situations determined by EU law. It decided that whenever a situation is fully determined by EU law, only Charter rights would be applicable to the case.[38] In addition, the GFCC claimed the authority to review such cases itself by the standard of the Charter and thereby opened up for the first time the possibility of invoking the Charter in individual complaints before the GFCC.[39] Where a case was only partially determined by EU Law, the court would primarily apply fundamental rights of the Basic Law.[40] However, the first senate explicitly presumed that fundamental rights of the Basic Law would also ensure the level of protection of the Charter, while admitting that

35 FCC, judgment of 24 April 2013, 1 BvR 1215/07, BVerfGE 133, 277 (para. 91) – *Counter-Terrorism Database*.

36 On the limited effect of this protest Daniel Thym, 'Friendly Takeover, or: The Power of the "First Word". The German Constitutional Court Embraces the Charter of Fundamental Rights as a Standard of Review', Eu Const. L. Rev. 16 (2020), 187-212 (193-194).

37 FCC, order of 6 November 2019, 1 BvR 16/13, BVerfGE 152, 152 – *Right to be Forgotten I*; FCC, order of 6 November 2019, 1 BvR 276/17, BVerfGE 152, 216 – *Right to be Forgotten II*.

38 FCC, *Right to be Forgotten II* (n. 37), para. 32.

39 Some called this a 'revolutionary step', Mathias Wendel, 'The Two-Faced Guardian – Or How One Half of the German Federal Constitutional Court Became a European Fundamental Rights Court', CML Rev. 57 (2020), 1383-1426 (1396).

40 FCC, *Right to be Forgotten I* (n. 37), paras 42, 45.

this presumption can be rebutted.[41] Taken together, these decisions can be labelled as *Solange IV* as they represent a new ideal type model regarding the relation between domestic and EU level in the pluralistic European fundamental rights system.[42] While not featuring an 'as long as'-argument,[43] the two decisions concern the same core problem, namely whether domestic or European fundamental rights are applicable in a given case and which court is entitled to apply the respective standards. Unlike in *Solange I*, this time, the model was not invented by the GFCC. Rather, the court jumped on the bandwagon of an ongoing trend in European constitutional jurisprudence.[44]

For the specific German context, this new ideal type is marked by four characteristics that allow to assess continuity and innovation by *Solange IV* in relation to *Solange I & II* as well as *ultra vires* or identity review.

To begin with, *Solange IV* shifts away from the erstwhile separation theory that governed *Solange I & II*. According to this theory, EU fundamental rights and domestic fundamental rights are two entirely separate spheres.[45] Accordingly, depending on whether a case was determined by EU law or not, the EU Charter *or* the Basic Law applied and the ECJ *or* the GFCC had judicial competence.[46] In *Solange IV* the GFCC now explicitly acknowledges that EU and national fundamental rights can apply simultaneously, thereby also recognising fundamental rights pluralism in Europe.[47] In doing so, the

41 FCC, *Right to be Forgotten I* (n. 37), paras 55-62. For a critique of this presumption see Dana Burchardt, 'Backlash against the Court of Justice of the EU? The Recent Jurisprudence of the German Constitutional Court on EU Fundamental Rights as a Standard of Review', GLJ 21 (2020), 1-18 (7).

42 The exact numbering differs a bit, depending on whether one counts Identity Control as Solange III or not and whether one counts the two decisions on the right to be forgotten separately or as one decision. See Rainer Hofmann, Alexander Heger and Tamara Gharibyan, 'Die Wandlung des Grundrechtsschutzes durch das Bundesverfassungsgericht – Recht auf Vergessen I und II als "Solange III"?', KritV 102 (2019), 277-292; Mathias 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', Eu Const. L. Rev. 12 (2016), 549-563; Mathias Honer, 'Recht auf Vergessen I und II: Was bedeuten die Entscheidungen für Bürger, Gerichte und EuGH?', Legal Tribune Online of 9 December 2019, at <https://www.lto.de>, last access 23 April 2025.

43 For a reconstruction of this type of argument, see Armin von Bogdandy and Luke Dimitrios Spieker, 'Countering the Judicial Silencing of Critics: Article 2 TEU Values, Reverse Solange, and the Responsibilities of National Judges', Eu Const L. Rev.15 (2019), 391-426 (408).

44 See below, III. 2.

45 On the so-called separation thesis see Daniel Thym, 'Separation Versus Fusion – or: How to Accommodate National Autonomy and the Charter? Diverging Visions of the German Constitutional Court and the European Court of Justice', Eu Const. L. Rev. 9 (2013), 391-419.

46 Wendel, 'The Two-Faced Guardian' (n. 39), 1403.

47 Wendel, 'The Two-Faced Guardian' (n. 39), 1403-1404; Matej Avbelj, 'The Federal Constitutional Court Rules for a Bright Future of Constitutional Pluralism', GLJ 21 (2020), 27-30; Jud Mathews, 'Some Kind of Right', GLJ 21 (2020), 40-44.

first senate opens up for cooperation and interaction rather than for new conflicts.[48] Moreover, the new approach leaves behind the earlier scepticism with which the first senate met the broad scope of application of EU fundamental rights in *Åkerberg Fransson*.

Second, like *Solange I*, *Solange IV* serves as a tool to shape EU fundamental rights protection, this time, however, through direct involvement. By claiming authority to interpret primary EU law directly, *Solange IV* resembles *ultra vires* review and just like in *ultra vires* cases, the GFCC acknowledges the obligation of referral and thereby the ultimate interpretative authority of the ECJ as far as EU fundamental rights are concerned.[49] However, the concrete practice of referral will depend on the assessment of potential divergences between EU and national fundamental rights. The presumption that national fundamental rights already ensure the same level of protection as EU fundamental rights, makes it unlikely that the first senate intends to frequently ask for preliminary rulings of the ECJ. Nevertheless, the first senate's emphasis of the obligation of referral differs from the second senate's approach, who acknowledges the acceptance of ECJ rulings only 'as long as the CJEU applies recognized methodological principles and the decision it renders is not objectively arbitrary from an objective perspective'.[50]

Third, while the GFCC's first senate assumes the power to interpret EU law directly, it does not claim the power to assess the exercise of public authority by EU organs. Also in this respect, the approach in *Solange IV* differs from the second senate's approach, in particular the latter's approach on *ultra vires* review in cases like *PSPP*[51] and *OMT*.[52] In these cases, the GFCC's second senate claimed the authority to directly assess the measures taken by the European Central Bank (ECB). By challenging the ECB's competence, it de facto challenged the validity of its acts, despite formally acknowledging the ECJ's exclusive competence to declare act of EU law invalid. The focus on measures taken by domestic authorities implementing EU law also means that *Solange IV* does not challenge the validity of EU law and thereby also differs from *ultra vires* review despite the formal acknowledgment of *ultra vires* and identity control as means of review.[53] However, *Solange IV* bears the potential to indirectly challenge the validity of EU Law should the GFCC consider the EU law provision to be implemented by

48 Wendel, 'The Two-Faced Guardian' (n. 39), 1404.
49 FCC, *Right to be Forgotten I* (n. 37), para. 72.
50 FCC, *PSPP-Programme* (n. 14), para. 112.
51 FCC, *PSPP-Programme* (n. 14).
52 FCC, *OMT-Programme* (n. 14).
53 FCC, *Right to be Forgotten II* (n. 37), para. 49.

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national authorities itself incompatible with EU fundamental rights. Moreover, in assessing whether or not EU law fully harmonises a matter or not, as is required to determine the standard of review, again requires the GFCC to interpret EU law itself.[54] It remains to be seen whether the GFCC is indeed willing to refer a case to the ECJ in such an event.

Fourth, *Solange IV* re-centralises fundamental rights control at the GFCC. By including EU fundamental rights in the standard of review the court allowed individuals to file a complaint on the basis of an alleged violation EU fundamental rights directly with the GFCC. In the German constitutional order such a complaint can also be raised against decisions by ordinary courts. Thereby, the GFCC re-gained interpretative power both from ordinary courts and from the ECJ, who could have otherwise developed fundamental rights protection in a dialogue excluding the GFCC.[55]

Solange IV as an ideal type promises a more cooperative attitude of the first senate of the GFCC towards the ECJ that may indeed allow for a joint effort of interpreting and developing fundamental rights in the EU. This approach is in remarkable contrast to the continuing confrontative mode of the GFCC's second senate.[56] It is part of a wider trend among constitutional courts in the EU that have developed similar approaches. It still remains to be seen if and how these approaches indeed lead to a common fundamental rights standard and doctrine in the EU.

2. The GFCC Coming Late to the Party: *Solange IV* in Comparative Perspective

While the GFCC likes to think of itself as the spearhead of national constitutional self-assertion and dialogue with the ECJ, it is a latecomer regarding the new model of integrative and cooperative fundamental rights application. It is therefore certainly presumptive to coin this approach '*Solange IV*-model' for a lack of better alternatives and the sake of this article. Prior decisions by other constitutional courts across Europe had already inaugurated this model long before the GFCC first senate's *Solange IV* decision. By explicitly recognising these decisions in its reasoning the GFCC appeared as 'one – albeit self-conscious – actor among many'.[57] Each of these

54 Wendel, 'The Two-Faced Guardian' (n. 39), 1411.

55 Wendel, 'The Two-Faced Guardian' (n. 39), 1401.

56 Wendel, 'The Two-Faced Guardian' (n. 39), 1414-1422; Thym, 'Friendly Takeover' (n. 36), 200 ('janus-faced' institution).

57 Thym, 'Friendly Takeover' (n. 36), 196.

decisions has its own trajectory and it is beyond the scope of this paper to provide a comprehensive comparative analysis.[58] Instead, we wish to highlight the most significant features and peculiarities of each of these decisions in the respective constitutional order with the goal of outlining the contours of *Solange IV* as a truly European model of dialogue.

Already in 2012, the Austrian Verfassungsgerichtshof ruled that, based on the principle of equivalence,[59] the rights enshrined in the Charter can form part of the standard of review in constitutional proceedings if the respective Charter right corresponds to a right guaranteed by Austrian constitutional law.[60] More specifically, the court required that the respective Charter right needs to be equivalent to Austrian constitutional rights in their wording and purpose ('Formulierung und Bestimmtheit').[61] Although the court does not interpret this requirement restrictively, it excludes a significant part of the Charter, namely those provisions considered to be mere 'principles',[62] thereby potentially excluding a whole range of provisions on social and environmental issues.

Like the GFCC, the Austrian Verfassungsgerichtshof distinguishes between matters partially and fully determined by EU law.[63] In the latter case, Charter rights apply exclusively.[64] Where a matter is only partially determined by EU law, EU and national fundamental rights apply simultaneously, although the court in practice tends to just apply and interpret national fundamental rights whenever they offer the same level of protection as their equivalent in the Charter.[65] A thorough analysis of the court's case law since 2012 shows that detailed engagement with Charter rights and their interpre-

58 But see the comprehensive analysis of the decisions in Austria, Italy and Germany by Clara Rauchegger, 'National Constitutional Courts as Guardians of the Charter: A Comparative Analysis of the German Federal Constitutional Court's Right to be Forgotten Judgments', Cambridge Yearbook of European Legal Studies 22 (2020), 258-278, and the extensive analysis in Wendel, 'The Two-Faced Guardian' (n. 39), 1387-1395.

59 Austrian Verfassungsgerichtshof, *Charter of Fundamental Rights of the European Union*, judgment of 14 March 2012, case nos U 466/11-18 and U 1836/11-13, para. 5.2.

60 Austrian Verfassungsgerichtshof, *Charter of Fundamental Rights of the European Union* (n. 59), para. 5.5.

61 Austrian Verfassungsgerichtshof, *Charter of Fundamental Rights of the European Union* (n. 59), para. 5.5.

62 Austrian Verfassungsgerichtshof, *Charter of Fundamental Rights of the European Union* (n. 59), para. 5.5. The court itself mentions Arts 22 and 37 of the Charter as evident examples of different normative structure but leaves it open whether other provisions also count as principles rather than rights.

63 Austrian Verfassungsgerichtshof, *Austrian Laws on Data Retention*, judgment of 27 June 2014, case nos G 47/2012-49, G 59/2012-38 and others, III.2.2.4.

64 Austrian Verfassungsgerichtshof, *Austrian Laws on Data Retention* (n. 63), IV.3.1-3.2.

65 Rauchegger (n. 58), 270.

tation by the ECJ remains the exception.[66] The decision significantly centralised fundamental rights review in Austria, despite the court's promise not to affect the 'power of all courts and tribunals to refer questions […] to the CJEU for a preliminary ruling'.[67] Although meanwhile sanctioned by the ECJ,[68] this centralisation provoked fierce critique in Austrian legal scholarship.[69]

The decision by the Austrian Verfassungsgerichtshof reflects the general openness of Austrian constitutional law to integrate international human rights into the domestic standard of review. The European Convention on Human Rights (ECHR) forms part of Austrian constitutional law and traditionally plays an important role in the case law of the court. Likewise, the decision reflects the rather relaxed attitude towards EU law. Unlike the GFCC, the Verfassungsgerichtshof has always accepted the primacy of EU law without any conditions derived from the national constitutional order as long as 'basic principles' of constitutional law are not concerned.[70] The approach of the GFCC's second senate is remarkably absent in the Austrian case.

The Italian Corte costituzionale accepted the Charter as a standard of review in 2017 and declared that it would review national measures determined by EU law in the light of both Italian constitutional law and the Charter.[71] Applying EU law as a yardstick for the review of domestic legal acts was, however, less of a novelty for the Corte.[72] The Italian Constitutional Court has long accepted EU law as a yardstick when reviewing regional laws in abstract review procedures and when deciding conflicts between domestic law and not directly applicable EU law in concrete review.[73] However, unlike

66 Rauchegger (n. 58), 269-271.

67 Austrian Verfassungsgerichtshof, *Charter of Fundamental Rights of the European Union* (n. 59), para. 5.7.

68 ECJ, *A v. B and Others*, judgment of 11 September 2014, case no. C- 112/13, EU:C:2014:2195, para. 46, building on ECJ, *Aziz Melki and Sélim Abdeli* (n. 34).

69 For a detailed critique see Franz Merli, 'Umleitung der Rechtsgeschichte', Journal für Rechtspolitik 20 (2012), 355-361 (355-359); Magdalena Pöschl, 'Verfassungsgerichtsbarkeit nach Lissabon', ZÖR 67 (2012), 587-609 (595-599). For an assessment and critique from an EU law perspective see Andreas Th. Müller, 'An Austrian Ménage a Trois: The Convention, the Charter, and the Constitution' in: Katja S. Ziegler, Elizabeth Wicks and Loveday Hodson (eds), *The UK and European Human Rights. A Strained Relationship?* (Hart 2015), 299-320 (307-317).

70 Christoph Grabenwarter, 'National Constitutional Law Relating to The European Union' in: Armin von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (2nd edn, Hart 2010), 83-129 (85).

71 Italian Corte costituzionale, judgment of 7 November 2017, no. 269/2017, 5.2.

72 Davide Paris, 'Constitutional Courts as European Union Courts', Maastricht J. Eur. & Comp. L. 24 (2017), 792-821 (801).

73 Paris (n. 72), 802-803.

in Germany and Austria, in Italy, not even measures fully determined by EU law were to be exclusively reviewed under the Charter. Moreover, by requiring ordinary courts – within the limits established in *Melki* and *A. v. B.* – to first refer a case to the Corte costituzionale, the court tried to re-centralise fundamental rights review. Although the Corte has meanwhile abandoned this rigid approach,[74] re-centralisation was initially a core motive for the Corte since in the absence of individual complaints, the Italian Constitutional Court fully depends on constitutionality references by the ordinary courts.[75]

Like in the Italian case, the issue of competition between ordinary courts and the constitutional court was a driver of the decisions in Belgium and France that included the Charter into the standard of review.[76] Both the Belgian Cour constitutionnelle and the French Conseil constitutionnelle, however, continue to give preference to national fundamental rights. The Belgian Cour constitutionnelle simply interprets national fundamental rights in the light of EU fundamental rights.[77] The French Conseil constitutionnelle, while mentioning equal protection through rights enshrined in the Charter, primarily applies national fundamental rights.[78]

Unlike in Austria, the French Conseil constitutionnelle and the Italian Corte costituzionale have subordinated the primacy of EU law to significant constitutional limits. Their approach thereby also comprises elements resembling the approach of the GFCC's second senate. While the famous Italian *controlimiti* doctrine dates back to the 1970s,[79] the *Taricco* saga has illustrated the continuing relevance of constitutional identity as a limitation to the primacy of EU law. Likewise, the identity review continues to feature in French constitutional jurisprudence.[80]

74 Giuseppe Martinico and Giorgio Repetto, 'Fundamental Rights and Constitutional Duels in Europe: An Italian Perspective on Case 269/2017 of the Italian Constitutional Court and Its Aftermath', Eu Const. L. Rev. 15 (2019), 731-751 (737-739).

75 Rauchegger (n. 58), 272.

76 Wendel, 'The Two-Faced Guardian' (n. 39), 1387-1389 and 1392-1394.

77 Belgian Cour constitutionnelle, judgment of 15 March 2018, no. 29/2018, paras B.9, B.10.5 and B.15 ff. applying an approach developed in the context of international human rights law (Belgian Cour constitutionnelle, judgment of 22 July 2004, no. 136/2004) now to EU fundamental rights.

78 French Conseil constitutionnelle, *Law Related to the Protection of Business Secrets*, decision of 26 July 2018, no. 2018-768 DC, paras 14 ff.; equal protection by the EU Charter of Fundamental Rights is mentioned in paras 10, 12 and 38.

79 See Corte costituzionale, *Frontini v. Ministero delle Finanze* (n. 6); Italian Corte costituzionale, *SpA Fragd v. Amministrazione delle Finanze dello Stato* (n. 6). references in n. 6.

80 See in more detail Wendel, 'The Two-Faced Guardian' (n. 39), 1393. On the continuing impact of the Solange doctrine in French and Italian scholarship, see Niels Graaf (n. 6).

3. *Solange IV*'s Potential and Limits for European Constitutionalism

Solange IV as a new approach of articulating fundamental rights pluralism in the EU has the potential to significantly impact European constitutionalism. The integrative openness of this approach suggests that EU fundamental rights gain more prominence in national constitutional dialogues. The mere fact that these rights may now be interpreted and applied in various constitutional orders of EU Member States enhances the visibility of the Charter[81] as well as the potential for comparative cross-referencing, mutual learning, and dialogue. This dialogue is also likely to be no longer a merely bilateral conversation between the ECJ and the constitutional court of one single Member State, but rather a truly transnational dialogue involving the voices of many Member State constitutions. This also bears the potential to overcome the national 'framing' of fundamental rights conflicts that have a genuine European dimension. While it is, of course, not a given that the multiplicity of interpretations of the Charter will lead to converging interpretations, let alone to a common European fundamental rights doctrine,[82] it allows at least for an open conversation about how EU fundamental rights should be interpreted. If national constitutional courts would indeed engage in a regular application and active interpretation of the Charter, EU constitutional law could become a focal point of normative constitutional debates in the EU. The regular reference to the shared normative framework has, in turn, the potential to further integrate a constitutional order.[83] In order to achieve this goal, there is no need that these references would always be identical and share the same interpretation. Rather, conflictive interpretations of and references to the very same document still render this document the centre of normative debate and may allow it to become a shared symbolic representation of the constitutional order.[84] Lack of coherence and convergence in interpretation, therefore is not so much an issue to be concerned about as long as there is a forum to openly communicate about these

81 Rauchegger (n. 58), 276.

82 For a sceptical account see Claus Dieter Classen, 'Kann eine europäische Grundrechtsdogmatik entstehen?', EuR 57 (2022), 279-301 (284-294) and Jan Komárek, 'Why National Courts Should not Embrace EU Fundamental Rights' in: Sybe de Vries, Ulf Bernitz and Stephen Weatherill (eds), *The EU Charter of Fundamental Rights as a Binding Instrument. Five Years Old and Growing* (Hart 2015), 75-92 (82-88).

83 Anuscheh Farahat, Transnationale Solidaritätskonflikte. Eine vergleichende Analyse verfassungsgerichtlicher Konfliktbearbeitung in der Eurokrise (Mohr Siebeck 2021), 50-64.

84 Farahat (n. 83), 60-63.

interpretations.[85] Our focus is less on the coexistence of various constitutional orders and their impact on the European constitutional order,[86] but instead on how divergent interpretations of a the text of EU constitutional law might paradoxically strengthen rather than weaken its integrative function.

What is, however, a prerequisite for the Charter to become the core normative point of reference for the EU constitutional order is that domestic constitutional courts and the ECJ truly engage with EU fundamental rights and their interpretation. A mere routine of referencing the respective provision(s) in the Charter and assuming that it is already included in the domestic standard of review will not do. The current practice of most constitutional courts, who just mention the Charter provision without further interpretative efforts,[87] is a sign that the integrative potential is not easily realised and that there is a serious risk of marginalising the Charter rather than putting it centre stage.[88] Some authors have even articulated the risk that an all too autonomous interpretation of the Charter by national constitutional courts may ultimately undermine the authority of the ECJ.[89]

Likewise, it is an open question whether this new approach will have the potential to truly enhance a cooperative relationship between the ECJ and national constitutional courts and to reduce open confrontation. It has been emphasised that rather than applying the threat of the 'last word' the *Solange IV* model may unleash the 'forward-looking power of the "first word"' that might ultimately still allow national constitutional courts to proactively influence and shape EU fundamental rights law rather than just defend national constitutional law against it.[90] Thereby, national constitutional courts may still be 'a pain in the neck of the European Court of Justice'.[91] While the *Solange IV* model allows national courts to speak the same language as the ECJ, they still have different dialects that they will try to guard against the ECJ. The emphasis of the GFCC on the 'primary applica-

85 But see: Karsten Schneider, 'The Constitutional Status of Karlsruhe's Novel "Jurisdiction" in EU Fundamental Rights Matters: Self-Inflicted Institutional Vulnerabilities', GLJ 21 (2020), 19-26 (25).

86 For such an analysis from the perspective of constitutional pluralism, see Ana Bobić, 'Constructive versus Destructive Conflict: Taking Stock of the Recent Constitutional Jurisprudence in the EU', Cambridge Yearbook of European Legal Studies, 22 (2020), 60-84; Bobić, 'Constitutional Courts' (n. 6); Giuseppe Martinico, 'The "Polemical" Spirit of European Constitutional Law: On the Importance of Conflicts in EU Law', GLJ 16 (2015), 1343-1374.

87 Rauchegger (n. 58), 270; Wendel, 'The Two-Faced Guardian' (n. 39), 1410.

88 Burchardt (n. 41), 13; Wendel, 'The Two-Faced Guardian' (n. 39), 1400.

89 Burchardt (n. 41), 13, 15.

90 Thym, 'Friendly Takeover' (n. 36), 201, 204-206.

91 Thym, 'Friendly Takeover' (n. 36), 203-204.

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tion' of domestic fundamental rights can be understood to leave 'wide scope for the idiosyncrasies of German fundamental rights case law and doctrine'.[92] However, the ambiguous 'primary' application may also be understood more as a temporal guideline allowing serving as 'a pragmatic tool to sustain the effective operation of the judiciary' rather than as normative primacy.[93]

Whether the *Solange IV* model will indeed contribute to a transnational constitutional discourse based on the Charter or will just provide a disguise for pushing autonomous domestic interpretation through the backdoor[94] will depend in the end on the willingness of national constitutional courts to actively involve the ECJ through preliminary procedures. The explicit restrictive conditions mentioned by the Austrian Verfassungsgerichtshof regarding its obligation to refer are rather disappointing in this respect.[95] The Verfassungsgerichtshof intends to refrain from referral where the interpretation of a Charter right has already been clarified in the case law of the ECtHR or other high courts[96] and, more generally, whenever a right enshrined in the Charter has the same scope as a right enshrined in the ECHR.[97] Furthermore, referral should not be limited to issues of fundamental rights interpretation but also extend to questions concerning the delimitation of whether or not a specific provision of EU law fully harmonises a subject matter or not. A preliminary reference on these issues has thus far not been explicitly considered by domestic constitutional courts.[98] Should domestic constitutional courts, however, apply a restrictive practice of referral, potentially diverging Charter interpretations in the Member States will continue to coexist without a forum to actually discuss and reconcile these interpretations. In this regard, it would also be worth thinking about new forms of procedural participation in proceedings before the ECJ, such as a possibility to consult other constitutional courts beyond the one being party to a conflict in the proceedings to allow for a broader view of perspectives and a truly European exchange of interpretative views. This could be done by giving domestic constitutional courts the right to submit written observa-

92 Wendel, 'The Two-Faced Guardian' (n. 39), 1405.

93 Thym, 'Friendly Takeover' (n. 36), 207.

94 For a critique in this sense Jörn Axel Kämmerer and Matthias Kotzur, 'Vollendung des Grundrechtsverbunds oder Heimholung des Grundrechtsschutzes?', NVwZ 39 (2020), 177-184 (181-183), labelling the decisions on the right to be forgotten as 'Solange 1.5'; Burchardt (n. 41), 13-17.

95 Pöschl (n. 69), 597-598; Müller (n. 69), 315-316.

96 Austrian Verfassungsgerichtshof, *Charter of Fundamental Rights of the European Union* (n. 59), para. 40.

97 Austrian Verfassungsgerichtshof, *Charter of Fundamental Rights of the European Union* (n. 59), para. 44.

98 Burchardt (n. 41), 16.

tions. Such a model would also provide a forum for reconciling interpretative coherence and pluralistic elements that recognise different traditions of constitutional interpretation and doctrine.

4. EU Constitutional Law as the Central Point of Reference and the Increasing Role of Art. 2 TEU

Solange IV's potential to reinforce EU constitutional law as the focal point of normative debates in the EU is likely to be reinforced by the recent tendency of the Commission and the ECJ to increasingly rely on core constitutional norms, particularly Art. 2 TEU. The Commission has recently pushed Art. 2 TEU to defend the rule of law against authoritarian constitutionalism in several EU countries.[99] After a number of cases in which Art. 2 TEU served to support other EU constitutional norms, such as Art. 19 TEU, the Commission has recently boldly relied on Art. 2 TEU alone in an infringement proceeding against Hungary.[100] The ECJ has thus far accepted the invitation to give Art. 2 TEU more prominence and enhance the constitutional dimension of its jurisprudence by increasing the justiciability of the values mentioned in this provision. This case law is not only meant to counter authoritarian ambitions across Europe, but is also likely to give EU core constitutional law more prominence in interpreting other Treaty provisions as well as secondary EU law.[101] It thereby enhances the visibility and discursive relevance of EU constitutional law and is likely to also contribute to further centralisation of constitutional debates at the ECJ.

It is in this context that the *Solange IV* model has been identified as a tool to strengthen 'the back of colleagues under threat from authoritarianism'[102] by enabling domestic courts in authoritarian regimes 'to quash domestic acts because they violate fundamental principles of EU law'.[103] The emphasis on

99 ECJ, *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas*, judgment of 27 February 2018, case no. C-64/16, ECLI:EU:C:2018:117; ECJ, *LM*, judgment of 25 July 2018, case no. C-216/18 PPU, ECLI:EU:C:2018:586; ECJ, *L and P*, judgment of 17 December 2020, case nos C-354/20 PPU and C-412/20 PPU, EU:C:2020:1033. ECJ, *Repubblika v. Il-Prim Ministru*, judgment of 20 April 2021, case no. C-896/19, ECLI:EU:C:2021:311.

100 Action brought on 19 December 2022 – *European Commission v. Hungary*, case no. C-769/22, OJ C 54/16.

101 Armin von Bogdandy and Luke Dimitrios Spieker, 'Die Verfassungsprinzipien' in: Armin von Bogdandy and Jürgen Bast (eds), Unionsverfassungsrecht (Nomos 2024), 123-177 (146-148).

102 Matthias Goldmann, 'As Darkness Deepens: The *Right to be Forgotten* in the Context of Authoritarian Constitutionalism', GLJ 21 (2020), 45-54 (53).

103 Goldmann (n. 102), 52.

the primacy of EU law may render it more difficult for authoritarian regimes to shield their disruptive practices under the disguise of constitutional identity. Instead of constitutional identity, European values as enshrined in Art. 2 TEU are likely to gain more prominence in future constitutional discourse between the EU and its Member States.[104] While this perspective is indeed promising in terms of supporting the integrative function of EU constitutional law, it hinges on the willingness of constitutional courts to put domestic constitutional identity aside to the benefit of EU fundamental rights. The fact that the GFCC's second senate still insists on its broad use of ultra vires and identity control and that even the first senate explicitly recognised these instruments[105] casts some doubt on how far the primacy of EU fundamental rights will take in practice.

While the emphasis on primacy of EU fundamental rights may strengthen the discourse on EU constitutional law, it also reinforces the power of both domestic constitutional courts and the ECJ. On a positive note, this may support a truly pluralistic interpretation of EU constitutional law developed in concert by a multitude of actors in the EU on various levels of governance. Domestic constitutional courts may exercise their power proactively by framing European constitutional conflicts in their respective perspective, thereby forcing the ECJ to deal with their suggested interpretations, while the ECJ itself retains the power of the last word. While beneficial for the pluralistic concept of EU constitutional law, *Solange IV* also fuels fears of an imbalance of powers and a 'gouvernement des juges'.[106] Moreover, the increasing centralisation of constitutional discourse at EU level may also carry some danger. Authoritarian and right-wing governments across Europe are already aiming at more power at EU level. If successful, this will ultimately also affect the composition of the ECJ. While established case-law cannot be quashed in a brush, judicial backlash cannot be precluded. It is hard to predict how realistic a scenario is in which a distorted interpretation of EU constitutional law is ultimately turned against liberal or progressive domestic governments. The strong emphasis on human rights in Art. 2 TEU promises to be a forceful barrier as it links EU constitutional law with international human rights law so that a regressive interpretation of EU fundamental rights is at least not easy to sustain.

104 This alternative conception of articulating constitutional concerns through common values rather than exclusive identity claims aligns with Spieker's suggestion that constitutional courts should reformulate identity claims as common value concerns under Art. 2 TEU to overcome the inherently divisive nature of constitutional identity discourse. See Luke Dimitrios Spieker, 'Framing and Managing Constitutional Identity Conflicts: How to Stabilize the *Modus Vivendi* Between the Court of Justice and National Constitutional Courts', CML Rev. 57 (2020), 361-398.

105 FCC, *Right to be Forgotten II* (n. 37), para. 49.

106 Müller (n. 69), 311.

5. *Solange IV*'s Potential Impact on Three EU Core Policies

Finally, the potentially integrative effect of the new approach reflected in *Solange IV* may also have significant impact on three EU core policy fields: asylum law, economic integration, and climate change. It has already been observed that by defining the level of harmonisation, secondary EU law has a significant effect on the potential unity or diversity of fundamental rights protection in the EU.[107] In this light, asylum law is a field that is particularly strongly determined through EU law and also already heavily infused with the jurisprudence of the ECtHR, often applying rights that are enshrined in identical wording in the Charter. The *Solange IV* model, therefore, offers the chance to mobilise the Charter where domestic law still leaves protection gaps. This is neatly illustrated by the Charter judgment of the Austrian Verfassungsgerichtshof, in which the court used Article 47(2) of the Charter to extend the guarantees of Article 6(1) ECHR to asylum procedures[108] even if this did not help the applicant in the concrete case. While this example illustrates the potential relevance of the new approach it also shows its limited impact in an area heavily infused with case law on EU fundamental rights by European courts.

In the field of economic integration, the eurozone crisis has illustrated the potential importance of EU fundamental rights. While most national constitutional courts 'nationalised' the conflicts and solved them under domestic law alone, at least in the first phase of the crisis, many have called for a stronger role of EU fundamental rights, in particular social rights.[109] The ECJ on the other hand, only reluctantly engaged in a more thorough analysis of EU fundamental rights and did not give particular weight to the social rights enshrined in the Charter.[110] This observation illustrates the limitations and risks involved in applying the new approach. On the one hand, national constitutional courts might limit the relevance of EU fundamental rights to

107 Wendel, 'The Two-Faced Guardian' (n. 39), 1405.

108 Rauchegger (n. 58), 271.

109 See Claire Kilpatrick, 'Constitutions, Social Rights and Sovereign Debt States in Europe: A Challenging New Area of Constitutional Inquiry' in: Thomas Beuckers, Bruno de Witte and Claire Kilpatrick (eds), *Constitutional Change Through Euro-Crisis Law* (Cambridge University Press 2017), 279-326; Claire Kilpatrick, 'The Displacement of Social Europe: A Productive Lens of Inquiry', Eu Const. L. Rev. 14 (2018), 62-74; Aoife Nolan (ed.), *Economic and Social Rights after the Global Financial Crisis* (Cambridge University Press 2014).

110 Anuscheh Farahat and Christoph Krenn, 'Der Europäische Gerichtshof in der Eurokrise: Eine konflikttheoretische Perspektive', Der Staat 57 (2018), 357-385 (366-372); Anuscheh Farahat, 'Transnational Solidarity Conflicts: Can Courts Ban the Destructive Potential?' in: Mark Dawson (ed.), *Substantive Accountability in Europe's New Economic Governance* (Cambridge University Press 2023), 217-239 (234-238).

those being equivalent to domestic fundamental rights, like the Austrian court did in order to exclude provisions on social and environmental matters that are considered to be mere principles. On the other hand, where national courts do not include such a limitation, the prevalence of EU fundamental rights might lead to a lower social rights standard than enshrined in some domestic constitutions (such as in Portugal for instance). Here, the familiar conflict about the implications of Article 53 of the Charter and the possibility to apply a higher standard of protection pop up once again.

Finally, it will be interesting to see how the new approach might impact upcoming conflicts about climate change and fundamental rights conflicts. Up to now, there is only limited EU legislation in this field. This is about to change and will give the ECJ a more prominent role in this field. While the first climate litigation case before the ECJ was not successful and a similar case before the ECtHR was at least partually successful.[111] It is still unclear how the very progressive approaches applied for instance by the GFCC in its Climate Change case[112] could be reconciled with the more hesitant approach of the ECJ[113] when it comes to conflict.

Whatever the outcome of these more specific conflicts, the *Solange IV* approach certainly shifts the focus of debate in fundamental rights matters. At the same time, it may raise new concerns regarding specifically high levels of protection, in particular when it comes to social rights. At first glance, one could read *Solange IV* as an approach that trades the national protection reflexes on which *Solange I & II* were based for the joint development of European constitutionalism. The looming conflicts about the level of protection could, however, refresh the defensive attitude of constitutional courts. The question, therefore, arises if and to what extent the *Solange IV* approach really renders the approach of *Solange I & II* obsolete.

IV. The Continuing Relevance of *Solange II* – the Portuguese '*Solange*' Moment

In some jurisdictions, the *Solange II* model still plays an important role. That is the case in Portugal, partly explained by the German case law's

111 ECtHR, *Verein KlimaSeniorinnen Schweiz and others v. Switzerland*, judgment of 9 April 2024, no. 53600/20.

112 FCC, order of 24 March 2021, BVerfGE 157, 30 (paras 182-265) – *Climate Change*.

113 ECJ, *Armando Carvalho and Others v. European Parliament and Council of the European Union*, judgment of 25 March 2021, case no. C-565/19 P, ECLI:EU:C:2021:252, paras 45-50, 103, denying the admissibility for a lack of individual concern.

influence in drafting the national constitutional provisions directly addressing the relationship between national law and EU law. Despite its prolonged silence on said provisions, the Constitutional Court has recently produced relevant case law addressing its value (1.). In its initial ruling, the Court incorporated the doctrines of *Solange II* and counter-limits, setting the stage for future generous and friendly engagements with EU law and the ECJ on concrete review cases (2.). Under a renewed composition, the Court specified its terms of engagement with EU law in cases concerning the application of EU fundamental rights in abstract review of national provisions determined by EU law. However, it did not follow through with the European influence, rejecting the application of a *Solange IV* model. A sharply divided Court developed a creative application of the principle of consistent interpretation. It incorporated the EU standard in the national parameters, maintaining that it will review the constitutionality of national law in light of national fundamental rights, even if it transposes EU law (3.). How consistent interpretation performs vis-à-vis *Solange IV* is difficult to predict in the face of only one judgment of a sharply divided court.

1. The Portuguese Constitutional Court's Recent *Solange II* Moment

In some jurisdictions, the relationship between EU law and national constitutional law shows that the *Solange II* model still influences the harmonisation between different legal orders. In Portugal, the Constitutional Court only recently addressed the problem of whether the national jurisdiction can review EU law against constitutional yardsticks. This has been a contested topic since the 2004 constitutional revision, directly inspired by the *Solange II* ruling and the Italian *Frontini* case, in preparation for the Constitutional Treaty, which enshrined a primacy clause in the constitutional text that reads as follows:

> 'The provisions of the treaties that govern the European Union and the norms issued by its institutions in the exercise of their respective competences are applicable in Portuguese internal law in accordance with Union law and with respect for the fundamental principles of a democratic state based on the rule of law. [Article 8(4)]'

Although it joined the European project in 1986, the Constitutional Court never addressed the impact of accession on the system of sources of law nor engaged in direct dialogue with the ECJ until recently. Indirect interaction

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was, however, prominent during the Eurozone crisis as the Court gained recognition as the 'only veto player'[114] to European-induced austerity policies. Its 'austerity case law' gained notoriety as the Court 'nationalised' European conflicts to insulate them from the reach of EU law and, therefore, partly preserved the welfare state.[115]

2. Ruling 422/2020 – Has the Constitutional Court Joined the Eurofriendly Club?

In 2020,[116] on a case about the application of the principle of equality in EU law, the Court clarified that Article 8(4) of the Constitution entails primacy at the national constitutional level and acknowledged the ECJ's role in interpreting EU law. Despite recognising the persisting lines of friction in the interaction between the EU and national legal orders, the Constitutional Court emphasised the importance of avoiding conflicts, pointing to the example of *Tarico II* as a landmark case of accommodation between the European and national levels.

Claiming that friendliness towards European integration is a fundamental constitutional principle, and assuming that the constitutional text reserves for itself the *Kompetenz-Kompetenz* to determine which conflicts fall in its jurisdiction, the Constitutional Court asserted that constitutional openness to EU law also grants it immunity from constitutional review in principle. If EU law does not breach certain limits – the fundamental principles of the democratic rule of law or the limits of the agreement on the joint exercise of the powers necessary for the construction and deepening of the EU – it is applicable on the terms defined by the Treaties and the ECJ case law. In principle, EU law cannot be measured against constitutional parameters, and the ECJ holds the last word on its validity and interpretation. The application of the *Solange II* doctrine in the judgment is due to the fact that the doctrine served as a source of inspiration for the 2004 constitutional revision, together with the Italian *Frontini* judgement that guided the development of the *controlimiti* doctrine.

114 José M. Magone, 'Portugal Is Not Greece: Policy Responses to the Sovereign Debt Crisis and the Consequences for the Portuguese Political Economy' in: Christian Schweiger and José M. Magone (eds), *The Effects of the Eurozone Sovereign Debt Crisis. Differentiated Integration Between the Centre and the New Peripheries of the EU* (Routledge 2015), 346-360.

115 See supra III. 5.

116 Portuguese Tribunal Constitucional, *Hierarchy Between National and Non-National Sources*, judgment of 15 July 2020, no. 422/2020.

Concerning the 'counter-limits', the Court affirms, in the same vein as *Solange II*, that the European project guarantees a degree of effectiveness of fundamental values of the democratic rule of law, that is to say 'parametric values equivalent to those recognized in our constitutional text, namely through the jurisdictional control of the ECJ – whose nature, in the proper sphere of EU law, is functionally homologous, in its guarantee dimension to the guarantee carried out by the Constitutional Court'. The Court concluded its unanimous decision by elaborating a general guiding principle for future cases:

> 'Under Article 8(4) of the CRP, the Constitutional Court may only consider and refuse to apply a rule of EU law if it is incompatible with a fundamental principle of a democratic state based on the rule of law that, in the context of EU law (including, therefore, the CJEU case law), does not have a parameter materially equivalent to that recognised in the Constitution since such a principle necessarily applies to the agreement on the "[…] exercise jointly, in cooperation or by the Union's institutions, of the powers needed to construct and deepen the European Union".'

3. Ruling 268/2022:[117] The Principle of Consistent Interpretation as a Tool to Incorporate EU Constitutional Law in National Constitutional Law

The sudden openness of the Portuguese Constitutional Court towards EU integration manifested in 2020 has not been followed up yet. Although the Court referred to the ECJ that same year, it was dropped later.[118] Instead, the Court has recently adopted an innovative tool to deal with the Charter's yardsticks, whose implications are yet to be ascertained.

In 2022, the Court was confronted with an abstract review request on the national instrument implementing the controversial Data Retention Directive that was declared invalid by the ECJ in 2014[119] (in 2016,[120] the

117 Portuguese Tribunal Constitucional, *Retention of Personal Data Relating to Communications*, judgment of 19 April 2022, no. 268/2022.

118 The referral would later be withdrawn upon notification from the ECJ since the European Court delivered a decision in 2021 on the validity question submitted by the Lisbon Court. See ECJ, *Autoridade Tributária e Aduaneira v. VectorImpacto – Automóveis Unipessoal Lda*, order of the President of the Court of 26 October 2021, case no. C-136/21, ECLI:EU:C:2021:925.

119 ECJ, *Digital Rights Ireland Ltd v. Minister for Communications, Marine and Natural Resources and Others*, judgment of 8 April 2014, case nos C-293/12 and C-594/12, ECLI:EU:C:2014:238.

120 ECJ, *Tele2 Sverige AB v. Post- och telestyrelsen and Secretary of State for the Home Department v. Tom Watson and Others*, case nos C-203/15 and C-698/15, ECLI:EU:C:2016:970.

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ECJ had also stated that the invalidity affected the national implementing instruments).[121] This case encapsulated the problem that had emerged in other jurisdictions concerning the review of national provisions determined by EU law. The differentiation between partial and full determination by EU law was not relevant to the reasoning of the Court. On the contrary, the Court asserted its exclusive competence to rule on the validity of national provisions in abstract review cases, even if they are determined by EU law.

The stakes were high, mainly because data protection is the policy area with the densest line of case law on the Charter. Whereas in concrete review cases, the Constitutional Court (or any ordinary court) is bound to disapply national law that conflicts with EU law to respect the principle of primacy according to the *Simmenthal*[122] doctrine, in abstract review cases, there is a clear separation between the problem of constitutionality, that relates to the validity of national law, and the issue of incompatibility with EU law, that may lead to the disapplication of national law. To the Portuguese judges, these are cases of validity and not inapplicability of the national provisions. Such a stance centralises the interpretative role in the national constitutional court, guaranteeing that it remains the *dominus* of the adjudication process.

How did the Court then implement the constitutional mandate enshrined in Article 8(4) of the Constitution in this case? The Lisbon Court developed a creative application of the principle of consistent interpretation that allowed it to incorporate both the demanding EU standard of protection into the national catalogue and to accommodate the constitutional provisions that assign it the role of the ultimate guardian of the Constitution. Albeit affirming its exclusive jurisdiction to invalidate norms and to determine that it is bound, in these proceedings, by the national catalogue of fundamental rights, it also stated its duty towards EU law through the principles of loyal cooperation, consistent interpretation, and primacy. Although the decision invalidated, with *erga omnes* force, the contested provisions, based on the national standards, the Constitutional Court spoke not only with its voice but also with the ECJ's voice, resorting to the Charter case law that was incorporated in the national *acquis* through a substantiated and grounded reasoning. According to the Rapporteur's recent scholarly writings, the Con-

121 See Teresa Violante, 'How the Data Retention Legislation Led to a National Constitutional Crisis in Portugal', Verfassungsblog, 9 June 2022, doi: 10.17176/20220610-032725-0, at <https://verfassungsblog.de>, last access 23 April 2025.

122 ECJ, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*, judgment of 9 March 1978, case no. 106/77, ECLI:EU:C:1978:49.

stitutional Court has an active duty to interpret the Constitution in accordance with EU law.[123]

4. Consistent Interpretation vis-à-vis *Solange IV*

The approach developed by the Portuguese Constitutional Court is conceptually different from the test developed by the GFCC's first senate in *Solange IV*. Despite the explicit friendliness towards EU law parameters and case law, the standard of review for the Portuguese Constitutional Court always remains the national catalogue and its interpretation in light of EU law involves a critical engagement with the Charter. Furthermore, it may allow the national judges to calibrate which standards to incorporate and to which extent, an operation that cannot easily be performed when national constitutional courts apply the Charter directly.

In practice, however, the Portuguese approach may well lead to similar results as *Solange IV*. In cases only partially determined by EU law, this approach de facto often only results in an interpretation of national fundamental rights in light of the Charter. Nevertheless, the Portuguese approach bears one fundamental difference to *Solange IV* on the procedural side: by keeping the national catalogue as the standard of review, the Court reserves for itself not only the sovereignty over the cooperative process, but also the exclusive sovereignty over the standard of review. In exceptional cases, the Court may reach different results than the ones borne by the European standard without referring the case to the ECJ. Such a result is more likely in cases involving social rights, given that the Portuguese constitution features a thick social rights catalogue (the most precise and detailed among the EU Member States), whereas social rights in the EU Charter are much less developed. It is both likely and understandable that the Constitutional Court will take its task seriously to effectively protect these rights even in cases where EU fundamental rights would lead to a different result. At the same time, the potential conflict between levels of protection could – or even should – already be solved on the level of EU constitutional law. Art. 53 of the Charter provides that higher (domestic) levels of protection should not be touched upon. In the past, the interpretation of this provision by the ECJ has been a delicate issue as the *Melloni* doctrine allows the displacement by

123 Afonso Patrão, 'A relevância da Carta dos Direitos Fundamentais da União Europeia na Fiscalização da constitucionalidade das normas nacionais' in: Pedro Machete, Gonçalo de Almeida Ribeiro, Mariana Canotilho and Cláudia Saavedra Pinto (eds), *Estudos em Homenagem ao Conselheiro Presidente Manuel da Costa Andrade. Volume I* (Almedina 2023), 9-46.

Luxembourg of the national standard in situations entirely determined by EU law. However, the approach of joint constitutional development in *Solange IV* could also lead to a stronger reading of this provision initiated by national constitutional courts.

Consistent interpretation will likely evolve as a new spirit of dialogue between the Portuguese Court and the ECJ, like *Solange IV*. However, it can also remain as a dormant avenue to channel growing scepticism towards EU fundamental rights. It will very much depend on future compositions of the Court,[124] the type of emerging conflicts involving EU fundamental rights and whether the latter differ from the high social rights standards enshrined in the 1976 Constitution, which is still a perceived symbol of the democratic promise of the revolution.

V. Conclusion

50 years after the decision in *Solange I*, it seems that many constitutional courts of the Member States have turned the relationship between national and EU fundamental rights upside-down. Under the *Solange IV* approach, domestic courts throughout the EU set themselves free from the constraints of the national systems of sources of law and moved to directly applying EU constitutional law to cases fully or partially determined by EU law, although domestic standards remain applicable in parallel in the latter case. Despite its German label, *Solange IV* is a truly European approach to which the GFCC was only a latecomer. On one hand this new model bears the potential to catalyse a more genuine and meaningful engagement with the Charter by constitutional courts, thereby fostering the integrative dimension of EU constitutional law. On the other hand, it risks the disintegrative effects of divergent national interpretations and still leaves room for sidelining EU standards through interpretation.

Some domestic constitutional courts, however, seem to resist this new development, opting instead to rearticulate *Solange II* and combine it with a principle of consistent interpretation. This alternative approach, although in practice likely not all too different from *Solange IV*, enables the Court to shield the national catalogue from an eventual downgrade that might result from the direct mobilisation of EU law. Such a tool is particularly attractive for courts concerned with the social *acquis* of their national constitutions, such as the case of Portugal and illustrates the continuing salience of conflicts about the level of protection.

124 Six judges voted for the consistent interpretation model, while six other judges would vote for a model similar to *Right to Be Forgotten II*.