"Solange" doctrine – *its development and the relevance today*

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Introduction

In the present paper I intend to expose the evolution and relevance of the Solange doctrine. Being a topic closely linked to fundamental rights, it is essential to make a small contextualization of the historical-legal moment in which the whole Solange doctrine develops, and the impact that the behavior of the courts has for the development of certain topics - namely fundamental rights.

The instruments establishing the European Communities do not refer explicitly to the protection of fundamental rights. Some scholars point to several reasons for this. One of them is that during the treaty negotiation it was realized that the protection of human rights in Europe should be transferred to another context, specifically, to another international organization, the Council of Europe. This institution would take care of issues concerning the respect for human rights and fundamental freedoms. In fact, the Council of Europe was created, and its institution was fundamental for the elaboration of the European Convention on Human Rights. A second reason is that the delegations of the founding states of the communities realized that the immediate inclusion of a catalog of fundamental rights in the founding treaty would create conflicts between the emerging community law and the constitutional rights of the member states. Another reason is related to the concern of the states that the coverage of human rights issues by the treaty could expand, in an insecure manner, the competencies of the newly created institutions. In this context, the development of fundamental rights protection in the EU - and certainly some political impulses - was the result of cooperative (and at the same time the constant tension) work between the national courts and the Court of Justice.

1. *Solange*(s) doctrine development

Until the late 1960s, the European Court of Justice (hereinafter ECJ) consistently refused to deal with questions of fundamental rights under EU law[1]. It was only in 1969 that this picture began to change – not coincidentally, after the decisions of the constitutional courts of Italy and Germany[2]. The first major judgment that marks this turning point is *Stauder*[3]. In this case, although the Court does not go into great depth on the subject of the protection of

[1] OJANEN, T., Making the Essence of Fundamental Rights Real: The Court of Justice of the European Union Clarifies the Structure of Fundamental Rights under the Charter: ECJ 6 October 2015, Case C-362/14, Maximillian Schrems v Data Protection Commissioner. *European Constitutional Law Review, 12*(2), 318-329. doi:10.1017/S1574019616000225 (2016)

[2] PHELAN, William., The role of the German and Italian constitutional courts in the rise of EU human rights jurisprudence: A response to Delledonne & Fabbrini, TRiSS Working Paper Series, No. TRiSS-WPS-02-2020, Trinity College Dublin, The University of Dublin, Trinity Research in Social Sciences (TRiSS), Dublin (2020):

[3] Case 29/69 Stauder v. City of Ulm [1969] ECR 419

fundamental rights - one might even say that it is an *obiter dictum* - it adopts a remarkable position by bringing up a doctrine that will inform its jurisprudence for decades: fundamental rights are part of the general principles of Community law[4].

The second important case in the matter was *Internationale Handelsgeselschaft*[5] - which lead to the famous *Solange* decision. The case dealt in more depth with the question of Community protection of fundamental rights. It is also well known for having strengthened the basis of the doctrine of the primacy of doctrine of the primacy of Community law over internal rights. And there seems to be no coincidence there. The reasoning of the Court, in the judgment, makes clear the link between the primacy of Community law and protection of fundamental rights by Community institutions. Like it was mentioned in that judgment:

"3 (...) *the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure. (...);*

4. (...) respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community[6]".

These statements made by the ECJ were presented in a concatenated manner. While paragraph 3 was concerned with establishing the supremacy of Community law, immediately afterwards, in paragraph 4, it pronounced itself on the need to protect protection of fundamental rights, not only with recourse to the "general principles of law", which had already been mentioned in the *Stauder* case, but also to the "constitutional traditions common to the States". What are the reasons for this linkage? The first reason, as already anticipated, concerns the viability of national courts admitting the doctrine of supremacy. As Joseph Weiler rightly points out, from the viewpoint of domestic courts at least: "*to accept the supremacy of Community law without the guarantee that this superior law would not violate rights fundamental to the legal patrimony of an individual member state would be virtually impossible*"[7]. In a growing state of tension, the ECJ seems to have foreseen that supremacy could only be affirmed if it were

[4] European Court of Justice. Case Erich Stauder v City of Ulm, Sozialamt2 (Case 29/69), Judgment of 12.11.1969.

[5] Case 11/70 Internationale Handelsgesellschaft [1970] ECR 1125

[6] European Court of Justice. Case Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel (Case 11/70). Judgment of 17.12.1970

[7] WEILER, Joseph H. H. The transformation of Europe. In: WEILER, Joseph H. H. The constitution of Europe: "Do the new clothes have an emperor?" and other essays on European integration. Cambridge University Press, 1999, p. 24.

coupled with the issue of the protection of fundamental rights. It can be said that it was because of this position that, later on - and after some setbacks - domestic courts began to admit the idea of a supremacy of community law.

The second function, more specific, has to do with a message that the ECJ wanted to give to the internal courts in view of a tension that was becoming more latent between them. By coupling the themes of the protection of fundamental rights and the supremacy of Community law, the ECJ of Justice accepted to the same terms - i.e., within the framework of fundamental rights - which meant moving towards the fundamental rights - which implied moving toward the construction of a common judicial environment, in which the courts assume the same starting points that inform the legal system. At the same time, the rapprochement with the domestic courts was done under the reservation of the supremacy of subject to the supremacy of Community law.

The first major occasion when a constitutional court raised the clear hypothesis of controlling community acts in view of fundamental rights was in the so-called *Frontini* case[8], judged by the Italian Constitutional Court in 1973. In this case, the possibility of controlling the founding treaties of the European communities was discussed. Although the decision called for cooperation between the European and the Italian legal orders, the Italian Constitutional Court concluded that such control of the treaties was possible and made a point of emphasizing its role as guarantor of the fundamental rights founded in the Italian Constitution[9]. The following year, the ECJ again addressed the issue of fundamental rights. In *Nold* (1974), in addition to the Court's insistence that fundamental rights are part of the general principles of law and of the common constitutional traditions of the member states, it brought a new source of protection of fundamental rights: international human rights treaties serve to guide the application of community law[10] [11].

Sometime after the *Nold* trial, the German Constitutional Court handed down one of the most controversial judgments in the entire history of the relationship between the ECJ and

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[8] Judgement no. 183, Frontini, of 27.12.1973, in Foro Italiano, 1974, I, col. 8 et seq. and judgement no. 170, Granital, in Foro Italiano, 1984, I, col. 2077 et seq. In these judgments, the Italian TC reserved for itself the possibility of reexamining the constitutionality of the law approving Italy's participation in the Communities in case of violation of fundamental rights by Community legislation. However, the Corte Costituzionale demonstrated that it did not intend to use this power of review in practice, in tribute to the quality of the human rights jurisprudence of the Court of Justice and provided that the degree of protection ensured corresponded to the parameters of the Italian Constitution (judgment of 21.4.1989, no. 232)

[9] Corte Constituzionale. Sentenza 183/1973. 18.12.1973.

[10] European Court of Justice. Case J. Nold, Kohlen- und Baustoffgroßhandlung v. Commission of the European Communities (Case 4/73). Judgment of 14.11.1974.

[11] Such as the *European Convention on Human Rights (ECHR)*

constitutional courts: it is the so-called *Solange* case[12] (“*as long as”* – in German: *so lange wie*; *solange*). The Solange decision itself was originated in a case at first referred to the ECJ in 1970 by the Frankfurt administrative court. In its preliminary ruling in 1970, the ECJ stated that, in order to maintain the 'uniformity and efficacy' of Community law, the law could not be bound “by allegations that it runs counter to either fundamental rights as formulated by the constitution of that state or the principles of a national constitutional structure”[13]. In concrete control and taking secondary Community law into consideration, the German Constitutional Court found that Community law lacked a catalog of fundamental rights, which rendered the Community institutions ineffective in protecting fundamental rights. In this sense, the Constitutional Court established that as long as (*solange*) Community law did not have a catalog of fundamental rights emanating from a parliament and similar to the catalog of fundamental rights established by the Bonn Basic Law, it was up to the Constitutional Court to verify the compatibility of Community law with the fundamental rights enshrined in the German legal system[14]. It is important to note that the Solange case was the direct result of resistance from the Frankfurt Administrative Court, which did not accept the judgment of the ECJ in the aforementioned *Internationale Handelsgeselschaft* case and submitted it to the German Constitutional Court[15]. The German Constitutional Court, realizing that the doctrine of supremacy would offend the community law from the protection of fundamental rights at the domestic level, established the "as long as" formula. The decision was widely criticized, especially by doctrinal sectors both in Germany and in other member states of the European Communities[16]. Two of the main criticisms referred to the fact that, with the decision, the Court intended, in fact, to "Germanize" the European Communities, insofar as it imposed standards of protection of fundamental rights established in Germany as a parameter for the protection of fundamental rights at the European level. Moreover, the idea of a catalog of fundamental rights at the European level did not take into account other legal traditions – such as the British – which, at least at the time of the decision, did not rely on a written charter to promote the

[12] Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle fur Getreide und Futtermittel, 2 C.M.L.R. 540 (1974)
[13] DAVIES, B., Pushing Back: What Happens When Member States Resist the European Court of Justice? A Multi-Modal Approach to the History of European Law. *Contemporary European History*, (2012). *21*(3), 417–435. http://www.jstor.org/stable/23270672
[14] BverfGE, 37, 271.
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[16] KOKOTT, Juliane. Report on Germany; SLAUGHTER, Anne-Marie et al (ed.). The European Court and national courts – doctrine and jurisprudence. Legal change in its social context. Oxford: hart Publishing, 1998, p. 118-1

protection of fundamental rights[17]. From a political standpoint, the decision clearly undermined the authority of the Community institutions in that it called into question their authority to protect human and fundamental rights. Hence, on April 5, 1977, the European Parliament, the European Council, and the European Commission produced the Joint Declaration on Fundamental Rights, which emphasized the importance of respecting the fundamental rights enshrined in the constitutional traditions of the member states and in the European Convention on Human Rights[18]. On the European Court's part, it continued to insist on the need to ensure a uniform degree of protection of fundamental rights through the Community judiciary. The *Hauer*[19] case can be taken as an example of this insistence. Here the ECJ included the ECHR in its human rights jurisprudence and has explicitly embraced uniformity of material obligation as primary policy consideration – which underlines the principle of direct effect, already established in *van Gend en Loos*[20].

Already in the 1980s, another case heard by the German Constitutional Court produced remarkable effects on the development of community law. In 1986, a decision was handed down that dealt with an alleged violation of fundamental rights established in the German Constitution by community acts. On that occasion, the Court established that Community law, through the case law of the Luxembourg Court, already demonstrated a satisfactory degree of protection of fundamental rights. And so, it affirmed that as long as this satisfactory degree of protection was assured, the Constitutional Court would not analyze the compatibility of community acts in light of the fundamental rights established in the Fundamental Law. Because the formula "as long as" was kept in the decision, the doctrine started to call it Solange II[21]. The most important thing to note is that, although the Constitutional Court adopted a posture of greater deference to community law, it made a point of maintaining a potential conflict with the ECJ, which was clear from the use of the formula "as long as", which implied a possible rupture if certain conditions occurred. In other terms, the Constitutional Court was consistent with its conclusion in the Solange I case. The judgment of the Solange II case did not eliminate conflicts between the ECJ and domestic courts, especially constitutional courts. However, it can be said that, as a result of the case, the level of contestation about the non-existence of a

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[17] idem
[18] https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31977Y0427(01)&from=ET
[19] Case Liselotte Hauer v. Land Rheinland-Pfalz (Case 47/79). Judgment of 13.12.1979.
[20] BOOM, S. J. The European Union after the Maastricht Decision: Will Germany Be the "Virginia of Europe?" *The American Journal of Comparative Law*, *43*(2), 177–226. (1995) https://doi.org/10.2307/840514
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catalog of fundamental rights within the scope of community law was significantly reduced. After all, in the Solange II case, it was recognized that the community institutions provided an adequate level of protection of fundamental rights. So "as long as" as the European legal order had not developed an adequate standard of fundamental rights, the German Constitutional Court would "disapply" European law that conflicted with the fundamental rights guaranteed in the German legal order, but "as soon as" it fail to protect fundamental rights we are still here[22]. To such a degree that in another case on the relationship between community law and internal rights, the Maastricht case[23] (often called Solange III)[24], judged in the 1990s, the discussion revolved around the existence of a democracy in Europe[25]. In light of the European Union's qualified majority voting system, any transfer of power from Germany to the European Union under the Treaty of Maastricht necessarily violates the Democracy Principle established on Article 38(1) of the Basic Law – which is a part of the German constitutional "Democracy Principle", that says that state authority must emanate from the people[26]. Although the arguments touched on the alleged violation, by the Maastricht treaty, of the right to suffrage established in the Bonn Basic Law, the ineffectiveness of the community institutions for the protection of fundamental rights was not contested as a matter of principle.

2. Solange doctrine relevance

Given this evolutionary framework, one can perceive the importance that the constitutional courts have had for the formation and consolidation of a doctrine for the protection of fundamental rights in the EU law context. It is true that the judgments of the ECJ itself wanted to demonstrate that there was a "democratic deficit" in the communitarian institutions due to the emphasis on the protection of fundamental rights[27]. In other words, the Court itself was aware of this problem. But it is clear, on the other hand, that the ECJ did not act spontaneously[28], when developing a doctrine on fundamental rights, but was challenged by

[22] SCHÜTZE, R., An Introduction to European Law, 2nd edition, Cambridge University Press (2015), p. 285
[23] Georg Brunner KG v Hauptzollamt Hof, ECLI:EU:C:1972:81
[24] MAKOWSKI K.D., Solange III: The German Federal Constitutional Court's Decision On Accession To The Maastricht Treaty On European Union (2014)
[25] BOOM, S. J. The European Union after the Maastricht Decision: Will Germany Be the "Virginia of Europe?" *The American Journal of Comparative Law*, *43*(2), 177–226. (1995) https://doi.org/10.2307/840514
[26] Idem
[27] MANCINI, Federico. Safeguarding human rights: the role of the European Court of Justice. In: MANCINI, Federico. Democracy and Constitutionalism in the European Union: Collected Essays. Oxford: Hart Publishing, 2000
[28] MANCINI, Federico. Democracy and the European Court of Justice. In: MANCINI, Federico. Democracy and Constitutionalism in the European Union: Collected Essays. Oxford: Hart Publishing, 2000,

the domestic courts, especially by the Constitutional Courts of Italy and Germany[29]. Although the judges of the ECJ intended to establish criticism of the community institutions, they rather used the criticism that the domestic courts had already formulated, both to their own judgments and to the community structure itself, which was not very open to the protection of fundamental rights. The ECJ took this criticism upon itself by insisting on developing more vigorously what it itself had already found in judgments in the 1960s, notwithstanding the Solange I judgment, which in essence said that the European communities needed to protect fundamental rights. The evolving picture also makes one think that the various cases of the ECJ in response to challenges posed by domestic courts, especially the Italian and German constitutional courts, constitute the first major case of judicial communication between domestic and international courts – at least from the point of view of their profound impact on the structure of a given legal order, in this case the EU legal order.

One of the consequences of the increasing dialogue between Courts, pointed out by Slaughter, is that judges are not reluctant to argue with each other, even caustically, and do not fear that there will be a fundamental breakdown in their relations. This would mean that courts around the world are viewing their relations not from a diplomatic view that seeks to avoid conflict, but from an understanding of how courts should relate internally – internally, conflicts are admitted and even predictable[30]. In other words, tension would be a positive sign of cross-judicial communication. In such a context, courts see themselves as autonomous actors belonging to a common judicial sphere. The response given by the ECJ shows how the dialogue between courts – even if tense – was stimulated by the judgments of the constitutional courts of Germany and Italy during the 1960s and maintained with the most dramatic decisions, such as the one in the Solange I case in the 1970s. The creation of a common judicial environment that allowed for conflict was even encouraged by the ECJ when it used the idea of general principles of law to develop fundamental rights in the community sphere. This allowed the ECJ to approach domestic systems in two ways. The first way has to do with how to control community acts that violate fundamental rights. As Bruno de Witte explains, the ECJ took as a reference the evolution of the French system of constitutionality control (funny enough, neither Italian nor German), whose Constitution does not have a Bill of Rights. There, the jurisprudential construction of the *Conseil Constitutionnel* allowed the emergence of a series

[29] KOSKENNIEMI, The effect of rights on political culture. In: ALSTON, Philip (ed.). The EU and human rights. New York: Oxford University Press, 1999
[30] SLAUGHTER, Anne Marie, op. cit., p. 68

of rights without being explicitly stated in any written document[31]. The form, therefore, was not original, but was associated with a conquest verified in a member state (one of the most important in the whole context of the history of the European Union as it is today) of the Europe Union (*community* at the time). The second way guaranteed that, if the ECJ used the idea of general principles, it would always be close to internal rights. No new rights would emerge, they would merely be reproduced for the community sphere. In this context, it was much more comfortable for the states to accept the protection of fundamental rights through general principles, because this would bring the jurisprudence of the ECJ much closer to their realities. The reading that the *transjudicial* dialogue between the internal courts and the ECJ preferred conflict and dissent, instead of harmony and consensus reinforces the idea that the jurist's role, in a plural society, is to disagree. It is possible to say that from this conflict between the internal courts and the ECJ emerged the formalization of the protection of fundamental rights. After several developments, finally the Maastricht Treaty (1992), which established the European Union, definitely established in its article F (2): *"2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law."*.[32]

Finally, the Treaty of Lisbon, the last great reform of the European Union that until today, has proved to be doomed to failure due to the contrary reaction of some Member States to its content[33], recognizes the mandatory character of the Charter of Fundamental Rights - a pre-treaty instrument of doubtful enforceability. It also refers to fundamental rights in several of its provisions and states that the formal accession of the European Union to the European Convention on Human Rights will be proposed[34].

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[31] DE WITTE, Bruno. The past and future role of the European Court of Justice in the protection of human rights. in ALSTON, Philip (ed.). The EU and human rights. New York: Oxford University Press, 1999

[32]Treaty on European Union. Available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:11992M/TXT consulted in 01.12.2022

[33] The Lisbon Treaty was intended as a response to the rejection of the Treaty that established the Constitution of Europe. Lack of democracy, openness and transparency in the community structure were the main reasons for the people of France and the Netherlands to oppose the instrument. Paradoxically, as De Búrca rightly shows, the Lisbon Treaty was precisely negotiated in a non-transparent way and with the help of the states' executives only. This is perhaps the reason for its failure. DE BÚRCA, Gráinne. The EU on the Road from the Constitutional Treaty to the Lisbon Treaty on https://jeanmonnetprogram.org/wp-content/uploads/2014/12/080301.pdf consulted in 01.12.2022

[34] Cf. https://www.coe.int/en/web/human-rights-intergovernmental-cooperation/accession-of-the-european-union-to-the-european-convention-on-human-rights

3. Conclusion

The protection of fundamental rights, especially nowadays, is of extreme relevance. At a time when we are witnessing the outbreak of war, the constant disrespect for the human person itself, both in the "real world" and in the "virtual world", this subject seems to be more current than ever. As it was exposed throughout the paper, the development of these rights in the context of the European Union is done fundamentally through a continuous dialogue between national courts and the court of the European Union. The European case law exposed, *especially* Solange example clearly demonstrates that, without the contribution of the constitutional courts, the ECJ might never have developed a doctrine for the protection of fundamental rights. And, although it is very difficult to think in terms of historical assumptions, it seems that it would even be doubtful that European integration would have evolved to the level of Monetary Union, for example, if the constitutional courts had not collaborated with the community institutions. The protection of fundamental rights, especially nowadays, is of extreme relevance.

Hence, it is easy to understand that the constant tension that exists between these two bodies actually stimulates further development of the protection of fundamental rights, even if it is, in the last instance, by political impulses. The Solange doctrine makes this point very clearly, as the resistance of the German court has set an important precedent on this topic. By establishing that “as long as” the EU has not developed a certain point when it comes to the protection of fundamental rights, then it is the (national) courts that will do this task (being true guardians[35]). In a second phase of the doctrine, the ECJ has established that it also has its interest in the protection of such rights, since if the national courts are to apply the "as long as", they will be in constant observation of the "as soon as" they fail.

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[35] In reference to the Latin expression: *Quis custodiet ipsos custodes?*

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