Abhandlungen

Re-Examining *Solange I* Constitutionalism Beyond the State and the Role of Domestic Constitutional Courts

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Fifty years have passed since the Federal Constitutional Court (FCC) rendered one of its most widely discussed and influential decisions: *Solange I*. On May 29, 1974, the FCC famously held that it would review European Community law by the standards of German constitutional law for so long as the Community had not received a catalogue of fundamental rights, which is adequate in comparison with the catalogue contained in the German Basic Law.[1] Only a handful of cases may qualify to potentially celebrate them in fifty years' time. *Solange I* is one of them. Why? What intellectual and institutional aspects of this decision are worth celebrating and preserving in Europe and beyond?

The decision marks a tectonic shift: For the first time, a domestic constitutional court asserted jurisdiction to (indirectly) review the law of a supranational organisation based on principles of constitutionalism. Constitutionalism, as we understand it, is the legal institutionalisation of a commitment to the individual and collective self-government of free and

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1 Bundesverfassungsgericht (BVerfG, German Federal Constitutional Court), 29 May 1974; Entscheidung des Bundesverfassungsgerichts (BVerfGE, Decision of the Federal Constitutional Court) 37, 271 (285) (*Solange I*).

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equal persons. On the state level, this commitment generally takes the form of a written constitution and includes a commitment to human rights, democracy and the rule of law as a basis – effectively institutionalising some version of a liberal constitutional democracy. There is arguably no constitution enacted after 1990 that does not pledge allegiance to the three normative pillars of constitutionalism: human rights, democracy, and the rule of law. Constitutionalism is also central to the progressive development of law beyond the state. The *Solange I* decision is a clear articulation of this idea.

What the decision of *Marbury v. Madison* was for domestic constitutionalism,[2] *Solange I* was for constitutionalism beyond the state. More specifically, the decision stood for two core ideas that would play a central role in constitutional discussions over the following half-century: First, for acts of institutions beyond the state to be effectively applied domestically, constitutional standards would have to be met by these institutions. As a result, constitutional principles and ideas are relevant not only for the domestic law of states but for law beyond the state as well. Second, domestic apex courts have a role to play in assessing whether those basic constitutional standards are met. The relationship between the national and the international is not primarily a political affair left to the legislative and executive branches. Accepting these two basic ideas was a precondition for the emergence of accounts of constitutionalism beyond the state, constitutional pluralism and the idea of global constitutionalism: The idea that the same constitutional principles guide the domestic, supranational and international institutions.

Courts in Europe and beyond have since adopted some version of the *Solange* approach,[3] and constitutional pluralism, a constitutional theory that

2 United States Supreme Court (U.S.), *Marbury v. Madison*, decision of 24 February 1803, 5 U.S. 137. The decision of the U.S. is widely credited for claiming for the first time the power of judicial review over legislation.

3 See, e.g., Corte costituzionale (Italian Constitutional Court), *Spa Fragd v. Ministro delle Finanze,* judgment of 13 April 1989, no. 232/1989; Conseil d'Etat (French Council of State), *Arcelor,* 2 February 2007, no. 287110; Conseil constitutionnel (French Constitutional Council), *Air France,* 15 October 2021, no. 2021-940 QPC; ECHR, *Bosphorus v. Ireland,* judgment of 30 June 2005, no. 45036/98; ECJ, *Kadi v. Council and Commission,* judgment of 3 September 2008, case nos C-402/05 P and C-415/05 P, ECLI:EU:C:2008:461; EGC, *Kadi v. Council and Commission,* judgment of 30 September 2010, case no. T-85/09, ECLI:EU:T:2010:418. The Polish Constitutional Tribunal adopted the *Solange* standard following the enactment of the European Union (EU) Charter of Fundamental Rights. The Tribunal held that the Polish constitution provided higher standards than the newly adopted EU Charter. Trybunał Konstytucyjny (Czech Constitutional Tribunal), *Supronowicz,* judgment of 16 November 2011, no. SK 45/09, para. 2.10.

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embraces the basic tenets of this approach, has become the mainstream account in European Union (EU) scholarship on the relationship between EU law and domestic constitutional law.[4]

It is not our intention to simply celebrate *Solange I* on the occasion of its 50th Anniversary but to re-examine the landmark decision critically, to reassess its historical context, its legacy, and its significance today with the benefit of fifty years of academic reflection, to trace the ensuing judicial and political development, and to examine the various and partially competing narratives flowing from the decision.[5]

The special issue analyses *Solange I* from three distinct vantage points. It sets forth a historical analysis of the decision and its historical context, analyses the legacies of *Solange* and constitutional pluralism in light of alternative approaches to transnational constitutional engagement and reflects upon the role of domestic constitutional courts beyond the state in turbulent times like ours.

I. Historical Analysis of *Solange I* and Its Historical Context

The *Solange I* decision was a reaction to the disconnect between the bold legal integration pursued by the Court of Justice of the European Union (CJEU) with *Van Gend en Loos* and *Costa / E.N.E.L.*, on one side, and the unimpressively moderate level of fundamental rights protection guaranteed by the European institutions at this particular point in time on the other side. *Alec Stone Sweet* has succinctly summed up the dilemma arising from this disconnect: 'Without supremacy, the CJEU had decided, the common market was doomed. And without a judicially enforceable charter of rights, national courts had decided, the supremacy doctrine was doomed.'[6]

The perception of the decision is very different today compared to 1974, inviting a fresh historical analysis of the decision and its historical context. Today, *Solange I* is widely credited in academic literature for spurring the development of fundamental rights protection in the EU. While this narrative

4 For an overview, see Gareth Davies and Matej Avbelj (eds), *Research Handbook on Legal Pluralism and EU* (Edward Elgar 2018).

5 For this type of inquiry into a historical judicial decision, see already with regard to the CJEU's *Van Gend en Loos*-judgment Joseph H. H. Weiler, 'Editorial', I.CON 12 (2014), 1-3.

6 Alec Stone Sweet, *The Judicial Construction of Europe* (Oxford University Press 2004), 89.

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is not beyond dispute,[7] the *Solange I* decision certainly triggered a remarkable wave of activity by political actors over real concerns about the future of the European integration project after the announcement, making European fundamental rights protection a top priority of several European institutions. *Bill Davies* provided a detailed account of how the *Solange I* decision resulted in 'a year-long inquiry by the European Parliament on the consequences of the *Solange* decision' and even prompted German chancellor *Helmut Schmidt* to intervene behind the scenes.[8]

At the time of its enactment, the decision was highly controversial inside and outside the FCC, dividing the Senate and German legal academia into an integration-friendly and an integration-sceptic camp. Three of the eight justices sitting on the Second Senate dissented, marking the last time of open disagreement in the court about whether, as opposed to how, to exercise judicial review over EU law. While the Senate majority reiterated that 'no other court' was entitled to discharge the FCC from its 'constitutional task' of protecting 'the fundamental rights guaranteed in the Basic Law',[9] the minority expressed its concern that domestic judicial review of EU law would 'surrender a piece of European legal unity, jeopardise the existence of the Community, and deny the fundamental idea of European unification'.[10] This fundamental disagreement between majority and minority and the fact that constitutional reservations against the primacy of EU law by national constitutional courts have become a common feature in the relationship between EU law and national law invite questions about how to assess this pivotal juncture in European constitutionalism and what a parallel universe without *Solange I* might look.

II. The Legacy of *Solange* in Light of Alternative Approaches to Transnational Constitutional Engagement

The reflection about the legacy of *Solange I* gives rise to competing interpretations and narratives, raising the question whether, fifty years on,

7 The former German CJEU-judge *Ulrich Everling* has forcefully argued that this narrative is a myth. See Ulrich Everling, 'Bundesverfassungsgericht und Gerichtshof der Europäischen Gemeinschaften nach dem Maastricht-Urteil' in: Albrecht Randelzhofer, Rupert Scholz and Dieter Wilke (eds), *Gedächtnisschrift für Eberhard Grabitz* (C. H. Beck 1995), 57-75 (74). See also Vlad Perju, 'On Uses and Misuses of Human Rights in European Constitutionalism' in: Silja Voeneky and Gerald Neuman (eds.), *Human Rights, Democracy, and Legitimacy in a World of Disorder* (Cambridge University Press 2018), 263-295 (274-280).

8 Bill Davies, Resisting the European Court of Justice: West Germany's Confrontation with European Law, 1949-1979, (Cambridge University Press 2012), 193-194.

9 BVerfGE, *Solange I* (n. 1), para. 282.

10 BVerfGE, *Solange I* (n. 1), para. 298.

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there is something in the *Solange I* decision and its aftermath that is worth celebrating and preserving, both in intellectual and institutional terms, in Europe and beyond. Yet we suggest that regardless of which side one takes, *Solange I* needs to be considered as part of the evolution of European constitutionalism. While we realise that one cannot speak of a single European 'Solange story', as the *Solange I* decision is understood and applied differently along national lines, the decision itself is deeply tied to the legacy of constitutional pluralism and constitutes an integral part of European constitutional heritage. This broader picture would be missed by restricting the analysis of the decision to the lens of German constitutional law, disregarding the reception of the decision and alternative approaches in the constitutional orders of other EU member states.

The legacy of *Solange I* also significantly depends on how we perceive its trajectory in the context of the FCC's case law on European integration. We may see *Solange I* as the original sin that first imposed harmful deviations from the primacy of EU law, and continuity, or even path dependency, from thereon to the widely criticised judgments of the FCC on the Maastricht Treaty and recently on the European Central Bank's PSPP-program. Viewed in this light, *Solange I* constitutes a precursor of a narrow-minded resistance to European integration that is ultimately premised on the idea of national constitutional supremacy.

Or alternatively, we may consider the FCC's *Maastricht* judgment to mark a sharp discontinuity from the path taken by *Solange I*. Under this reading, *Solange I* could be understood to stand for a particular way of understanding constitutional pluralism and the role of domestic constitutional courts, which marks a counterpoint and contrast to the intransigent sovereigntist or identity-oriented jurisprudence that has become dominant more recently. Against this background, the *Solange* legacy may be interpreted as one of constructive transnational engagement and a plea to extend constitutionalism from its traditional nation state setting to the European constitutional space. From this perspective, the decision arguably contributed to the transformation of the European Communities' self-logic from one preoccupied with the ordoliberal prerogative of establishing and maintaining an internal market through the fundamental market freedoms to one more seriously concerned with the protection of fundamental rights. The rationale for such constructive transnational engagement is that there is no divergence of common constitutional principles but a debate over what would best realise these principles in a given case.[11] Thus,

11 Susanne Baer, Kriszta Kovács and Maya Vogel, 'Constitutionalism Today: The Prospects of the European Constitutional Community' in: Kriszta Kovács (ed.), *The Jurisprudence of Particularism: National Identity Claims in Central Europe* (Hart 2023), 187-208.

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in an ideal scenario, this form of transnational constitutional engagement may result in the development of a basic normative consensus on common constitutional principles and reduce fragmentation tendencies between different polities, for it creates incentives for EU institutions to observe the constitutionalist concerns of the domestic legal orders.[12] In this sense, the domestic constitutional court's conditional resistance to CJEU can ultimately serve as the beginning of a productive relationship.

Scholars that view *Solange I* in this more constructive and integration-friendly light may find further support in the fact that the *Solange* approach represents a more flexible and graduated form of accountability than the doctrines of ultra vires and constitutional identity[13] relied upon by the FCC and other domestic constitutional courts today. While the concept of national constitutional identity as it is applied by some domestic constitutional courts sets a fixed and unamendable limit on European integration,[14] *Solange* is a graduated accountability mechanism because a domestic constitutional court invoking the *Solange* formula indicates that the intensity and extent of its review of EU law is dependent on EU institutions taking fundamental rights already guaranteed by domestic law into account. Putting it differently, there is not only a threat of 'negative' sanctions but, conversely, the requested consideration of constitutional principles protected by domestic norms is rewarded by a reduction in the level of scrutiny applied by the domestic constitutional court with respect to EU law. The *Solange* approach can thus be characterised as a 'carrot and stick' method that allows to give not only negative but also positive feedback depending on the extent to which EU institutions take the principles of constitutionalism as protected by domestic institutions seriously.[15] At the same time, we should not forget that the *Solange I* decision views European conflicts about fundamental rights through a purely nationalised prism. By contrast, the recent approach pursued by the FCC in *Solange IV* ('Right to be Forgotten II') puts the emphasis

12 Andrej Lang, Die Verfassungsgerichtsbarkeit in der vernetzten Weltordnung: Rechtsprechungskoordination in rechtsordnungsübergreifenden Richternetzwerken (Springer 2020), 158.

13 It should be noted, though, that the FCC also used the concept of constitutional identity to support its *Solange I* decision, BVerfGE, *Solange I* (n. 1), para. 280. See, Monika Polzin, 'Identity and Eternity: The German Concept of Constitutional Identity', in: Kriszta Kovács (ed.), *The Jurisprudence of Particularism: National Identity Claims in Central Europe* (Hart 2013), 57-78 (63). Christian Tomuschat, 'The Defense of National Identity by the German Constitutional Court' in: Alejandro Saiz Arnaiz and Carina Alcoberro Llivina (eds), *National Constitutional Identity and European Integration* (Intersentia 2013), 205-220 (208).

14 *Jacobsohn* argues that the FCC set such a fixed and static limit. Gary J. Jacobsohn, 'The Exploitation of Constitutional Identity' in: Kriszta Kovács (ed.), *The Jurisprudence of Particularism: National Identity Claims in Central Europe* (Hart 2023), 33-56.

15 Lang (n. 12), 448.

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on EU constitutional law instead by allowing to review acts based on the EU Charter if entirely determined by EU law or based on the domestic constitution whenever EU law leaves room for pluralism.

III. The Role of Domestic Constitutional Courts Beyond the State

Recent political and legal developments have rendered the legacy of *Solange I* more complicated and more interesting, providing a new context for reflecting on its relevance. The rise of populist authoritarian nationalists within and beyond the European Union, the disintegration of the European Union, and the backlash against international institutions bring into question whether the theory of constitutional pluralism and doctrinal approaches to constitutional engagement beyond the state – including *Solange*, ultra vires, and constitutional identity – are suitable mechanisms for domestic constitutional courts in turbulent times like ours. It may be argued, for example, that key domestic constituents of international and supranational institutions, such as constitutional courts, have a responsibility to be supportive rather than adversarial towards those institutions, given their precarious authority.

The recent rule of law crisis in Hungary and Poland has posed a challenge to the *Solange* approach insofar as the captured Hungarian Constitutional Court and the Polish Constitutional Tribunal have strategically referred to the case law of other domestic constitutional courts, first and foremost the FCC imposing constitutional limits on the primacy of EU law.[16] These captured courts have referred to their German counterpart to legitimise their decisions. Yet a closer look may reveal that in contrast to the FCC, these courts do not give due regard to EU law supremacy in general, and they do not claim the need to intervene when their constitutions would require more baseline protection of fundamental rights and more democratic accountability than EU law. Their goal is not a better protection of universal constitutional principles within the EU and the creation of a culture of constitutional obedience.[17] Rather, their goal is to allow derogations from some of their governments' obligations under EU law.[18] *Daniel Kelemen* and *Laurent Pech*

16 Magyarország Alkotmánybírósága (Hungarian Constitutional Court), decision of 30 November 2016, 22/2016. (XII. 5.) AB határozat Trybunał Konstytucyjny (Polish Constitutional Tribunal), judgment of 7 October 2021, no. K 3/21.

17 For more on the latter concept, see Karen J. Alter, 'National Perspectives on International Constitutional Review: Diverging Optics' in: Erin F. Delaney and Rosalind Dixon (eds), *Comparative Judicial Review* (Edward Elgar 2018), 244-271.

18 For more on this, see Kriszta Kovács, 'Identities, the Jurisprudence of Particularism and Possible Constitutional Challenges' in: Kriszta Kovács (ed.), *The Jurisprudence of Particularism. National Identity Claims in Central Europe* (Hart 2023), 1-32.

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have argued against this background that given constitutional pluralism's susceptibility to being abused by captured constitutional courts, it should be replaced with a more traditional understanding of the primacy of EU law as developed by the CJEU in *Costa / E. N. E. L.*[19] At the same time, one may wonder whether the turbulent times we live in do not render a constitutional pluralist account even more appropriate and whether exploitation by captured constitutional courts should require other normally functioning constitutional courts to modify their approach.

IV. Outlook on the Special Issue

The Special Issue consists of three interrelated sets of articles. The first set invites a historical analysis of the content and context of the *Solange I* decision, because *Solange I* is more than just an old judicial decision with little relevance for our world today. The Europeanisation of public law scholarship has contributed to transforming the decision into a symbol for a new era of domestic constitutional court engagement beyond the state in Europe and beyond. It has become a focal point for decades of scholarly discourse and imagination and is now ripe for historicization. Relying upon available files from the federal archive (*Bundesarchiv*), *Andrej Lang's* article provides a detailed historical analysis of the reasoning and the context of the decision. Positing that *Solange I* embodies a pivotal juncture in European constitutionalism between a judicial federalist and a constitutional pluralist vision, *Lang* assesses the plausibility of the competing constitutional narratives about *Solange I* from a historical perspective. He finds that the decision contains elements of a modern understanding of the role of constitutional courts in multi-level governance and had a lasting impact on European fundamental rights governance, including on the case-law of the CJEU, concluding that the FCC's scepticism towards the CJEU's unconditional supremacy claim without adequate fundamental rights protection on the EU level was deeply rooted in constitutional thought.

Franz Mayer takes an alternative view, arguing that the legal development towards more fundamental rights sensitivity in the EU had already been on track with or without *Solange*. Focusing on the dissenting minority in *Solange I*, and more generally on all dissenting opinions in the FCC's European integration related cases, *Mayer* explores what a parallel universe

19 Daniel Kelemen and Laurent Pech, 'The Uses and Abuses of Constitutional Pluralism: Undermining the Rule of Law in the Name of Constitutional Identity in Hungary and Poland', Cambridge Yearbook of European Legal Studies 21 (2019), 59-74 (61).

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might look like in which the defeated judges from *Solange I* were in the majority. In his view, one of the most restrictive doctrinal features introduced by the majority in *Solange I* is the so-called *'Brückentheorie'* (*theory of the bridge*), according to which EU law exclusively enters the domestic legal order through the bridge of the ratification statute, thereby effectively downgrading EU to the status of a simple federal statute. He is also critical of the fact that not a single European law-related decision, including *Solange I*, has so far been issued as a plenary decision by both Senates, even though some questions of European integration may be of such great importance that they cannot be left to one Senate alone to decide.

Solange I contributes to constitutional history in another sense, too. As *Niels Graaf* demonstrates by analysing the extensive scholarly uses of the *Solange* decisions in Italian and French public law scholarship, the decisions operated as a glue that pasted together divergent constitutional communities. Although the meaning ascribed to these decisions changes in different constitutional contexts, the development of French and Italian domestic doctrine was accompanied, justified, criticised and, sometimes, triggered by *Solange* invocations. As a result, a shared core narrative emerged around *Solange*, namely that constitutional courts are entitled to review EU laws applied domestically on their conformity with the respective national constitution.

The second set of the Special Issue takes a look at the legacy of *Solange* in light of alternative approaches to transnational constitutional engagement. It addresses the competing interpretations and narratives of the decision and how the decision relates to alternative approaches and subsequent case law in the broader context of European constitutional heritage. *Matej Avbelj* views the original contribution of the *Solange I* doctrine to modern legal and political thought and practice beyond the state in its insistence on non-regression of the existing standards of human rights protection. He argues that the historical accomplishment of *Solange I* lies in its ingenious pursuit of structural congruence, which worked as a cohesive force and brought the plurality of legal and political orders closer together by integrating them under the common pluralist vault of shared values, principles and practices.

Ana Bobić sees *Solange I* as a blueprint of constructive constitutional conflict. She conceptualises the German court's commitment to observe the development of the EU law as a form of progressive integration that she further explores in the current contexts of the Euro crisis and criminal law. She concludes that it is the role of national constitutional courts to continuously track and monitor the EU's developments and to reroute discussions about political choices to the political branches of power.

Julian Scholtes looks at the prominent doctrine of constitutional identity that was first tentatively introduced by *Solange I* before the FCC co-opted

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and more clearly articulated the concept in its judgment on the Lisbon Treaty and makes the case for recovering *Solange I*'s relevance as a constitutional identity judgment. The key difference between the conception of constitutional identity in *Solange I* and in *Lisbon* is, according to *Scholtes*, the lack of references to the eternity clause of Article 79(3) of the German Basic Law in *Solange I*. He argues against this background that taking *Solange I* seriously as a constitutional identity judgment opens a door to an understanding of constitutional identity that is freed of its problematic association with unamendability.

The third set recognises that the recent rise of populist authoritarian nationalism, the disintegration of the European Union, and the backlash against international institutions has brought into question whether the theory of constitutional pluralism and doctrinal approaches to constitutional engagement beyond the state, such as *Solange*, ultra vires, and constitutional identity are suitable mechanisms for domestic constitutional courts. The contribution of *Anuscheh Farahat* and *Teresa Violante* explores 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 (fundamental rights) the focal point of debates about the decisions of a truly European polity. Although *Farahat* and *Violante* acknowledge the risk of disintegrative effects of divergent national interpretations, they emphasise the potential of the *Solange IV* model to catalyse a more genuine and meaningful engagement with the EU Charter by domestic constitutional courts, thereby fostering the integrative dimension of EU constitutional law.

A further challenge for domestic constitutional court engagement beyond the state is how to make a well-targeted contribution under the highly complex conditions of international cooperation. *Karen Alter*'s article focuses on the role of constitutional courts in protecting rights and democracy in the age of anti-globalism. After summarising fifty years of *Solange* pushback, *Alter* calls for more *Solange*-type pushback to deal with the threats of overglobalisation and anti-globalism. She contends, however, that the FCC missed the true mark in its recent *OMT* and *PSPP* case law by focusing on the EU and the CJEU, failing to notice that greater forces are at work and that the real culprit in violating German citizens' democratic and fundamental rights was globalisation. Her contribution therefore suggests a return to the *Solange* strategy of calling for political change and demanding that politicians and judges protect individual rights and national democracy.

National constitutional courts protecting global interests are also the focus of the contribution of *Eyal Benvenisti* who notes that a central concern with global governance is that decisions of international organisations may affect

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the interests of 'others' without being politically accountable to them. *Benvenisti* explores against this background whether and to which extent national constitutional courts such as the FCC can and should narrow these accountability gaps toward 'the other' and whether these courts should take the interests of disregarded strangers into account, provide strangers with a voice in the adjudicative process, and develop substantive and procedural duties to protect them. He concludes, based on integrating into the *Solange I* framework the FCC's 2021 judgment of *Neubauer*, that indirect review by national constitutional courts that pays due regard to the rights of affected foreigners could improve the functionality of international organisations and their adoption of inclusive and accountable outcomes that balance the rights and interests of all affected by the international organisation.

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