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# Comment

# Can International Tribunals Maintain Impact in an Era of Great Power Competition? Arbitration and Coalition Building in the South China Sea



## I. Introduction

The international legal order is in upheaval. While some form of international law will endure even the combined consequences of a risen China's maritime expansion, Russia's territorial conquest or Trump's contempt for international organisations and predictable rules, it is unclear whether this international law will be more akin to an constitutionalised international legal order,[1] a liberal international order,[2] an authoritarian international law[3] that seeks to consolidate authoritarian rule at home and abroad or a mix of elements of them. While some are confident that fundamental norms of international law and some of law's basic functions for order will survive,[4] others expect courts and tribunals – central actors of international law in international relations – to play a much-reduced role.[5] It is easy to point to

1 Jan Klabbers, Anne Peters and Geir Ulfstein, *The Constitutionalization of International Law* (Oxford University Press 2009); Jeffrey L. Dunoff and Joel P. Trachtman (eds), *Ruling the World?: Constitutionalism, International Law, and Global Governance* (Cambridge University Press 2009).

2 G. John Ikenberry, 'The End of Liberal International Order?', Int'l Aff. 94 (2018), 7-23; David A. Lake, Lisa L. Martin and Thomas Risse, 'Challenges to the Liberal Order: Reflections on *International Organization*', IO 75 (2021), 225-257.

3 Tom Ginsburg, 'Authoritarian International Law?', AJIL 114 (2020), 221-260.

4 Eyal Benvenisti, 'The Resilience of International Law in the Face of Empire', Just Security, 17 February 2025, <https://www.justsecurity.org/107820/resilience-international-empire/>, last access 8 May 2025; Heike Krieger, 'Von den völkerrechtlichen Fesseln befreit? – Zur Ordnungsfunktion des Völkerrechts in einer Welt im Umbruch', Der Staat 62 (2023), 579-612.

5 Ginsburg (n. 3), 258.

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the fact that the International Court of Justice (ICJ) and the Permanent Court of Arbitration (PCA) are in higher demand than ever and that some of this demand is a direct response to conflict, war or great power expansion.[6] But this increased activity says very little about the effects and impact of international adjudication in specific cases and about how to concretely identify and measure this impact.

This comment, turning to the South China Sea Arbitration of 2016[7] and based on detailed empirical research,[8] argues that the arbitral tribunal has gained politically meaningful effects on interactions in the South China Sea disputes. Crucially, even the high level of tensions in the past two years, consistent non-compliance and resolute actions of a great power could not diminish the award's impact.[9]

## II. Great Power Claims Defied by Adjudication

In January 2013, the Philippines initiated arbitral proceedings against China under Annex VII of the United Nations Convention on the Law of the Sea (UNCLOS).[10] This decision was triggered by a change of the territorial status quo at Scarborough Shoal in 2012 and by a recognition that a clarification of permissible maritime claims is needed to address the complex entanglement[11] of territorial and maritime disputes with great power competition in the South China Sea.

China, however, rejected the tribunal's jurisdiction and did not participate in the proceedings.[12] The tribunal ruled that China's claims within the nine-

6 'World Court Faces "Unprecedented Number" of Cases. Interview with Phillipe Gautier', UN News 2024, <https://news.un.org/en/interview/2024/10/1155951>, last access 8 May 2025; Permanent Court of Arbitration, 'Annual Reports', <https://pca-cpa.org/resources/publications/>, last access 8 May 2025.

7 PCA, The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China), merits award of 12 July 2016, case no. 2013-19.

8 Christian Schultheiss, Beyond Compliance. The Impact of the South China Sea Arbitration on the South China Sea Disputes (manuscript under review).

9 For the distinction between impact of law and compliance with law, see Lisa Martin, 'Against Compliance' in: Jeffrey L. Dunoff and Mark A. Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press 2013), 591-610.

10 United Nations Convention on the Law of the Sea of 10 December 1982, 1833 UNTS 396.

11 Peter Dutton, 'Three Disputes and Three Objectives. China and the South China Sea', Naval War College Review 64 (2011), 42-67.

12 Government of the People's Republic of China, 'Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines' of 7 December 2014, <https://www.fmprc.gov.cn/eng/wjb/zzjg_663340/bianhaisi_eng_665278/plpbo/202405/t20240530_11322463.html>, last access 8 May 2025.

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dash line were incompatible with the law of the sea to the extent that these exceed the limits prescribed by UNCLOS.[13] It determined that any historic rights, if ever they existed, had been extinguished. Additionally, China could not lawfully use straight baselines to enclose the Spratly Islands and assert Exclusive Economic Zone (EEZ) or continental shelf rights based on them as a collective unit. Second, the tribunal assessed the legal status of specific maritime features under Article 121 of UNCLOS, concluding that none of the Spratly Islands nor Scarborough Shoal qualified as islands capable of generating an EEZ or continental shelf. Third, the tribunal found that several Chinese actions violated various further obligations, including restrictions on traditional Filipino fishing at Scarborough Shoal, destructive environmental practices such as harvesting giant clams in the presence of Chinese law enforcement agencies, unauthorised construction at Mischief Reef and risky and dangerous conduct of Chinese maritime law enforcement vessels.

China has repeatedly stated that it will not comply with the award.[14] China's insistence on claims beyond the normal territorial sea, EEZ and continental shelf is not in compliance with the award's major finding. Still, the literature discusses whether China complies with single points of the award.[15] This is not surprising as assessing compliance requires an understanding of a judgment's demands, an assessment of whether the facts satisfy these demands and 'how much compliance is enough'.[16] Non-compliance is

13 Lucy Reed and Kenneth Wong, 'Marine Entitlements in the South China Sea: The Arbitration Between the Philippines and China', AJIL 110 (2016), 746-760; Chinese Society of International Law, 'The South China Sea Arbitration Awards: A Critical Study', Chinese Journal of International Law 17 (2018), 207-748; Christian Schultheiss, '"One of the First Matters to Be Addressed but Distinct" or "Distinct but Inseparable"? The Distinction Between Maritime Entitlement and Sea Boundary Delimitation in the Philippines v. China Arbitration', Asian Journal of International Law 11 (2021), 1-12.

14 Ministry of Foreign Affairs of the People's Republic of China, 'Statement of the Ministry of Foreign Affairs of the People's Republic of China on the Award of 12 July 2016 of the Arbitral Tribunal in the South China Sea Arbitration Established at the Request of the Republic of the Philippines' of 12 July 2016, <https://www.mfa.gov.cn/eng/zy/gb/202405/t20240531_11367334.html>, last access 8 May 2025.

15 See for instance, Hao Duy Phan and Lan Ngoc Nguyen, 'The South China Sea Arbitration: Bindingness, Finality, and Compliance with UNCLOS Dispute Settlement Decisions', Asian Journal of International Law 8 (2018), 36-50; Julian Ku and Chris Mirasola, 'Tracking Compliance with the South China Sea Arbitral Award: China's 2017 Summer Fishing Moratorium May Rekindle Conflict with the Philippines', Lawfare, 7 March 2017, <https://www.lawfaremedia.org/article/tracking-compliance-south-china-sea-arbitral-award-chinas-2017-summer-fishing-moratorium-may>, last access 8 May 2025; Bill Hayton, 'Denounce but Comply: China's Response to the South China Sea Arbitration Ruling', Georgetown Journal of International Affairs 18 (2017), 104-111.

16 Alexandra Huneeus, 'Compliance with Judgments and Decisions', in: Cesare P. R. Romano, Karen J. Alter, and Yuval Shany (eds), *The Oxford Handbook of International Adjudication* (Oxford University Press 2014), 437-463 (444).

illustrated by the China Coast Guard's repeated interferences with Philippine Coast Guard vessels at Second Thomas Shoal (a low-tide elevation China cannot legally claim), the occupation of Mischief Reef (a low-tide elevation China cannot legally claim), incidents in the Philippine EEZ and China's annual fishing ban,[17] where it applies to Philippine waters. It must be stated that not every incident is automatically an instant of non-compliance with the award. This situation of non-compliance, though, does not mean that the award has had no effects on interactions in the disputes, as the next section will show.

## III. Impacts Despite Non-Compliance of a Major Power

Indeed, the award has had politically important impacts on Southeast Asian claimant states, China and non-regional countries. It is important to look at the Philippines not as a passive recipient of the tribunal's award. State and non-state actors from the Philippines and increasingly from other Southeast Asian countries not party to the arbitration struggle to give effect to the award because of China's non-compliance. The idea that impacts result from various efforts in post-adjudication interactions has also been observed in the case of regional human rights courts.[18]

The first impact is a convergence of the legal positions of Southeast Asian claimants. In a series of Notes Verbales in 2020, the Philippines, Vietnam, Indonesia and Malaysia have adopted essential elements of the arbitral award on permissible claims as their own legal positions.[19] These expressions were

17 Embassy of the Philippines in the United States, 'Press Release on China's Fishing Moratorium over the South China Sea' of 27 May 2024, <https://philippineembassy-dc.org/press-release-on-chinas-fishing-moratorium-over-the-south-china-sea/>, last access 8 May 2025.

18 Armin von Bogdandy, Flávia Piovesan, Eduardo Ferrer Mac-Gregor and Mariela Morales Antoniazzi. (eds), *The Impact of the Inter-American Human Rights System: Transformations on the Ground* (Oxford 2024).

19 Permanent Mission of the Philippines to the United Nations, 'Note Verbale No. 000191-2020' of 6 March 2020, <https://www.un.org/depts/los/clcs_new/submissions_files/mys_12_12_2019/2020_03_06_PHL_NV_UN_001.pdf>, last access 8 May 2025; Permanent Mission of Vietnam to the United Nations, 'Note Verbale No. 22/HC-2020' of 30 March 2020, <https://www.un.org/depts/los/clcs_new/submissions_files/mys_12_12_2019/VN20200330_ENG.pdf>, last access 8 May 2025 ; Permanent Mission of Malaysia to the United Nations, 'Note Verbale HA 26/20' of 29 July 2020, <https://www.un.org/depts/los/clcs_new/submissions_files/mys_12_12_2019/2020_07_29_MYS_NV_UN_002_OLA-2020-00373.pdf>, last access 8 May 2025; Permanent Mission of the Republic of Indonesia, 'Note Verbale No. 148/POL-703/VI/20', of 12 June 2020, <https://www.un.org/depts/los/clcs_new/submissions_files/mys_12_12_2019/2020_06_12_IDN_NV_UN_002_ENG.pdf>, last access 8 May 2025.

triggered by Malaysia's submission for an extended continental shelf.[20] While the Notes Verbales of Vietnam and Malaysia do not mention the award, adopting the award as their own legal positions is arguably more important. Thus, the award has provided something very consequential – a clarification of permissible claims that Indonesia, Malaysia, the Philippines and Vietnam share. Before the arbitral award was rendered, these four countries had no shared position on the maximum extent of legal entitlements in the South China Sea.

This convergence matters beyond legal dynamics as the second impact shows. The award has resulted *de facto* in a minimum demand of Southeast Asian claimants for negotiations with China. Minimum demand in this context means that it is unlikely that Southeast Asian claimants will accept an arrangement with China that is inconsistent with the award. The Philippines, for instance, terminated their negotiations on the joint development of oil and gas with China in 2022,[21] because these negotiations focused on joint development in a geographic area China cannot legally claim pursuant to the award. Indonesia's position explicitly excludes negotiations with China on boundary delimitation or related issues such as joint development in the above-mentioned note verbale. The recent joint statement of China and Indonesia[22] appears no exception to that even if its wording invited push-back.[23] Moreover, during negotiations for a code of conduct – a negotiation process about rules for conflict behaviour that has been ongoing for about 30 years – several Southeast Asian claimants have rejected provisions that would be inconsistent with the award. The arbitration therefore represents not only an individual but also a common minimum demand for multilateral negotiations. In other words, the award now amounts to a common baseline for the Philippines, Vietnam, Indonesia, and Malaysia in their negotiations with China from which they are unlikely to retreat.

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20 Malaysia, 'Malaysia's Partial Submission to the Commission on the Limits of the Continental Shelf' of 12 December 2019, <https://www.un.org/depts/los/clcs_new/submissions_files/mys85_2019/20171128_MYS_ES_DOC_001_secured.pdf>, last access 8 May 2025.

21 Department of Energy of the Philippines, 'DOE Statement on the Announcement of the Termination of Joint Oil and Gas Negotiations with China' of 25 June 2022, <https://www.doe.gov.ph/press-releases/doe-statement-announcement-termination-joint-oil-and-gas-negotiations-china>, last access 8 May 2025.

22 'Joint Statement Between the People's Republic of China and the Republic of Indonesia on Advancing the Comprehensive Strategic Partnership and the China-Indonesia Community with a Shared Future' of 9 November 2024, <https://english.www.gov.cn/news/202411/10/content_WS67301550c6d0868f4e8ecca9.html>, last access 8 May 2025.

23 Aristo Rizka Darmawan, 'Has Indonesia Fallen into China's Nine-Dash Line Trap?', The Interpreter 12 November 2024, <https://www.lowyinstitute.org/the-interpreter/has-indonesia-fallen-china-s-nine-dash-line-trap>, last access 8 May 2025.

The third impact is that the clarification of permissible and non-permissible claims facilitates the Philippines' efforts to publicise incidents and garner international support. Third countries can more readily assess typical claim ameliorative activities of the China Coast Guard such as ramming or shooting with water cannons because a legal assessment of the question in whose waters an incident occurs is often possible. Manifestations of support for the Philippines can be seen in the greater readiness of countries from the Indo-Pacific and Europe to single out China or to provide security assistance.[24] A fourth impact is a certain isolation of China's legal position by the standard of expressions found in Notes Verbales to the United Nations (UN).[25] Whereas China was able to point to several countries that objected to the arbitral proceedings in the past,[26] all countries except China that have expressed an opinion on the South China Sea in Notes Verbales to the UN have expressed support for parts of the award.[27]

The common denominator of these four impacts – convergence, common minimum demand for negotiations, mobilisation of international support, and a certain isolation of China's legal position – is that the arbitration has brought the four Southeast Asian countries closer together than they used to be and has hence contributed to coalition building among them. This matters because the lack of cohesion among Southeast Asian claimants is one reason why the Association of Southeast Asian Nations (ASEAN) is considered 'strategically incompatible' to cope with the South China Sea disputes.[28]

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24 Sebastian Strangio, 'France, Philippines to Begin Negotiating Reciprocal Access Agreement', The Diplomat 26 April 2024, <https://thediplomat.com/2024/04/france-philippines-to-begin-negotiating-reciprocal-access-agreement/>, last access 8 May 2025; 'Philippines, Germany Commit to Reaching Defence Pact This Year', Euractiv 5 August 2024, <https://www.euractiv.com/section/china/news/philippines-germany-commit-to-reaching-defence-pact-this-year/>, last access 8 May 2025.

25 The Notes Verbales of Australia, China, France, Germany, Indonesia, Japan, Malaysia, New Zealand, the Philippines, UK, US and Vietnam are available at <https://www.un.org/depts/los/clcs_new/submissions_files/submission_mys_12_12_2019.html>, last access 8 May 2025.

26 AMTI CSIS, 'Who Is Taking Sides after the South China Sea Ruling?', Asia Maritime Transparency Initiative 15 August 2016, <https://amti.csis.org/sides-in-south-china-sea/>, last access 8 May 2025.

27 The US, France, Germany and the UK have recently reiterated their positions in the context of the Philippines' submission for an extended continental shelf. See the Note Verbale of the US of 5 December 2024 and the joint Notes Verbales of Germany, France and the UK of 10 March 2025, available at <https://www.un.org/depts/los/clcs_new/submissions_files/submission_phl1_2024.htm>, last access 8 May 2025.

28 Evan Laksmana and Waffaa Kharisma, Safeguarding the Shared Maritime Domain Between Indonesia, Vietnam, and Malaysia (CSIS Event Report 2020).

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## IV. High Levels of Tensions — Impact or Irrelevance of the Arbitral Award?

These impacts have emerged between 2020 and 2023. But tensions have reached a new level in the past two years: incidents have occurred more frequently, more intensely and within many parts of China's claimed nine-dash line simultaneously.[29] The most violent standoffs between China and the Philippines occurred at Second Thomas Shoal.[30] These standoffs prompted the United States (US) to offer more support and illustrate the potential of these disputes between the Philippines and China to result in a direct confrontation between the US and China.[31] This raises the question of whether these tensions have reversed the award's impacts or whether South-east Asian countries have nevertheless continued to build on the arbitral award in their interactions. The following zooms in on two concrete cases, namely the China-Philippines Understanding on Second Thomas Shoal and the Philippine Maritime Zones Act.

### 1. The China-Philippines Understanding on Second Thomas Shoal

Under the pressure of fierce confrontations, the Philippines has consented to an understanding with China on modalities for Philippine resupply and rotation missions to Second Thomas Shoal in July 2024.[32] Second Thomas Shoal is a low-tide elevation in the Spratly Islands that China cannot legally

29 Incidents with China Coast Guard vessels happened at Luconia Shoal, Sabina Shoal, the Natuna Islands, the Paracel Islands, Scarborough Shoal, and elsewhere inside the nine-dash line. According to Sari, some actions of Chinese vessels may have amounted to the use of force within the meaning of Article 2(4) of the UN Charter. Aurel Sari, 'Maritime Incidents in the South China Sea: Measures of Law Enforcement or Use of Force?', International Law Studies 103 (2024), 463-511.

30 Associated Press, 'Philippines Says It Won't Back down, but Won't Start War, after Clash with China', Voice of America 23 June 2024, <https://www.voanews.com/a/philippines-says-it-won-t-back-down-but-won-t-start-war-after-clash-with-china/7666757.html>, last access 8 May 2025.

31 Karen Lema, 'Exclusive: Philippines Turned down US Help amid South China Sea Tensions – Military Chief', Reuters 5 July 2024, <https://www.reuters.com/world/asia-pacific/philippines-turned-down-us-help-amid-south-china-sea-tensions-military-chief-2024-07-05/>, last access 8 May 2025.

32 Christian Schultheiss, 'Can China and the Philippines Save Their South China Sea Understanding?', The Diplomat 8 August 2024, <https://thediplomat.com/2024/08/can-china-and-the-philippines-save-their-south-china-sea-understanding/, last access 8 May 2025.

claim pursuant to the arbitral award.[33] Does this understanding therefore contradict the idea that the award represents *de facto* a minimum demand for negotiations?

The Philippine presence on Second Thomas Shoal, one of the Spratly features, is the BRP *Sierra Madre*, a rusting ship intentionally run aground. This vulnerable Philippine presence is in constant need of resupply. If China succeeds in preventing resupply missions, the Philippines would be forced to withdraw from the shoal. Hence, Manila seeks to continue resupply and rotation. But China tries to ensure the Philippines does not fortify its presence. After acrimonious exchanges, China and the Philippines then announced an understanding on Second Thomas Shoal. While they immediately contradicted each other as to what they have agreed upon, several publicly reported resupply and rotation missions occurred suggesting the understanding is in place. The arrangement is not published but it appears to contain a previous notification model in order to deconflict resupply missions. The Philippines notifies Chinese authorities in advance about resupply missions and the China Coast Guard does no longer oppose Philippine resupply of the shoal.

As noted above, Second Thomas Shoal is a low-tide elevation and on the Philippine continental shelf. Legally, provisional arrangements of a practical nature such as this one are without prejudice to claims.[34] Therefore, even if this arrangement covers a geographic area China cannot legally claim, this does not imply that the Philippines acquiesced in the existence of Chinese maritime entitlements to this area. However, whether such an arrangement is inconsistent with the award is ultimately more a factual question than a legal one.[35] If China could use the arrangement to advance its claim to Second Thomas Shoal, for instance by delaying or withholding resupply, then it would contradict the award.[36] This arrangement, though, does not appear to allow that or to strengthen China's bargaining position in any other way. This is because the arrangement respects the Philippines need to resupply this shoal without allowing China to expand its presence. In sum, this arrangement does not undo one of the award's impacts. The Philippines remains unlikely to accept arrangements that are inconsistent with the award. This

33 PCA, *South China Sea Arbitration* (n. 7), para. 647.

34 UNCLOS, Articles 74 para. 3 and 83 para. 3; ICJ, *Minquiers and Ecrehos* (France/United Kingdom), judgment of 17 November 1953, ICJ Reports 1953, 47 (58-59).

35 Christian Schultheiss, 'Joint Development of Hydrocarbon Resources in the South China Sea After the Philippines Versus China Arbitration?', Ocean Dev. Int. Law 51 (2020), 241-262.

36 This appears to be the position of Antonio Carpio, a former Supreme Court Justice of the Philippines. Faith Argosino, 'Carpio Fears PH Pact on Ayungin Shoal May Expand China's Reach', Inquirer.Net 29 January 2025, <https://www.inquirer.net/426796/carpio-fears-ph-pact-on-ayungin-shoal-may-expand-chinas-reach/>, last access 8 May 2025.

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does not exclude the possibility of reaching cooperative arrangements altogether. But these arrangements must not result in factual vulnerabilities for the Philippines.

## 2. The Philippine Maritime Zones Act

The Philippine Maritime Zones Act was approved on 7 November 2024.[37] It defines the maritime zones of the Philippines. As the coordinates of the zones are not yet published, it is not possible to conclude to what extent these zones are defined in accordance with UNCLOS as stated in section 2. But two points should be mentioned about this act. First, section 5 of the act clarifies the Philippine claim to the so-called 'Kalayaan Island Group'. This is the Philippine name for some of the Spratly Islands over which the Philippines claims territorial sovereignty. Importantly, the act seems not to project an EEZ and continental shelf claim from the Kalayaan Island Group. It does also not claim an EEZ within the group where the features of this group are located beyond the EEZ as generated from the mainland baselines. This is important because when comparing this act with the submissions for an extended continental shelf of Malaysia in 2019,[38] the Philippines,[39] and Vietnam[40] in 2024, one trend becomes apparent. Malaysia, the Philippines, and Vietnam do not base their claims to continental shelves on features in the Spratly Islands but only on their respective mainland baselines. This is then concrete evidence of a further convergence of the positions of these three countries in accordance with the award.

However, it must be noted that this convergence remains limited. Malaysia has protested the Philippine Maritime Zones act and the Philippine submission for an extended continental shelf, because the Philippine con-

37 Philippine Maritime Zones Act of 7 November 2024, Republic Act No. 120641, <https://lawphil.net/statutes/repacts/ra2024/pdf/ra_12064_2024.pdf>, last access 8 May 2025.

38 Malaysia, 'Malaysia's Partial Submission to the Commission on the Limits of the Continental Shelf' (n. 20).

39 Republic of the Philippines, 'A Partial Submission of Data and Information on the Outer Limits of the Continental Shelf of the Republic of the Philippines in the West Palawan Region Pursuant to Article 76 of the United Nations Convention on the Law of the Sea', 14 June 2024, <https://www.un.org/depts/los/clcs_new/submissions_files/phl1/2023PhlEsDoc001Secured.pdf>, last access 8 May 2025.

40 Socialist Republic of Vietnam, 'Submission to the Commission on the Limits of the Continental Shelf Pursuant to Article 76, Paragraph 8 of the United Nations Convention on the Law of the Sea. Partial Submission in Respect of Vietnam's Extended Continental Shelf: Central Area (VNM-C)', 17 July 2024, <https://www.un.org/depts/los/clcs_new/submissions_files/submission_vnm_95_2024.htm>, last access 8 May 2025.

tinental shelf claim is partly generated from the Philippine territorial claim to Sabah, which is generally recognised as a federal state of Malaysia.[41] Vietnam and China have also protested the Philippine submission for an extended continental shelf.[42] The effect of these protests is that the Commission on the Limits of the Continental Shelf (CLCS) will defer a recommendation on the Philippine's submission for an extended continental shelf. In accordance with annex I of its rules of procedure, the CLCS does not make recommendations about extended continental shelf submissions if these are about disputed areas.[43] This is therefore an example that shows how unresolved disputes between Malaysia or Vietnam and the Philippines hamper their submissions for an extended continental shelf and, ultimately, their dealings with China.

Second, section 14 of the Philippine Maritime Zones Act requires the Philippines to 'exercise all other maritime rights and jurisdictions in accordance […] with the South China Sea Arbitration'. A salient question emerges. Does this mean that any potential future arrangement between China and the Philippines that is not in accordance with the arbitral award would be a violation of that very act? It is difficult to answer this question in the abstract, as the act does not spell out any explicit conditions for such arrangements. But a recent decision by the Supreme Court of the Philippines gives some indication that provisional arrangements can violate the Philippine constitution.[44] In 2023, the Court declared the Joint Marine Seismic Undertaking (JMSU) unconstitutional on several grounds. The JMSU is a former joint exploration arrangement between China, the Philippines, and Vietnam covering a part of the Spratly Islands. It is premature to conclude that Philippine national law has enshrined the South China Sea Arbitration as a minimum demand for negotiations. But whether a provisional arrangement such as the JMSU or the one on Second Thomas Shoal is in accordance with the arbitral award or not clearly matters under Philippine domestic and constitutional law.

41 See the Note Verbale made available by the Commission on the Limits of the Continental Shelf at <https://www.un.org/depts/los/clcs_new/submissions_files/submission_phl1_2024.htm>, last access 8 May 2025.

42 Note Verbale made available by the Commission on the Limits of the Continental Shelf (n. 41).

43 Commission on the Limits of the Continental Shelf, 'Rules of Procedure of the Commission on the Limits of the Continental Shelf' (2008), CLCS/40/Rev. 1, <https://documents.un.org/doc/undoc/gen/n08/309/23/pdf/n0830923.pdf>, last access 8 May 2025.

44 Supreme Court of the Philippines, *Bayan Muna Party-List vs President Macapal-Arroyo*, decision of 10 January 2023, G. R. No. 182734, <https://lawphil.net/judjuris/juri2023/jan2023/gr_182734_2023.html>, last access 8 May 2025.

The two brief examples of the China-Philippines Understanding on Second Thomas Shoal and the Philippine Maritime Zones Act illustrate that not even a high level of tensions fuelled by China's insistence on maritime claims could reduce the award's impact. To the contrary, the legal positions of the Philippines, Malaysia, and Vietnam converged further and they were able to a limited extent to build on the award in their exchanges.

## V. Concluding Reflections: Great Power Competition and the Continuous Relevance of Adjudication

The comment concludes with reflections on the likely-to-persist role of adjudication in an era of great power expansion and competition. As regards the South China Sea Arbitration, the tribunal's award gained impact through the activities and choices of some members of the international community that seek to give effect to the award. Before the award, Southeast Asian countries had no common position on the extent of acceptable legal entitlements in the South China Sea, they now have one. Southeast Asian countries had no common minimum demand for their bilateral and multilateral negotiations with China, they now have one. Whereas China could point to a few states that supported China's position, none of them has reiterated their support in Notes Verbales to the UN. While European Union (EU) Member States and EU institutions were reluctant to merely single out China in their statements on the South China Sea prior to the award, they have now joined a group of states that do so on a regular basis and provide limited security assistance to the Philippines. The award has become the common focal point of Southeast Asian and non-regional states on the disputes. The common denominator of these impacts is to have incentivised some coalition building between the (middle) powers of Southeast Asia and the wider Indo-Pacific and Europe.

The emerging coalition, however, remains limited and therefore less effective than it could be. Southeast Asian countries know much better what they do *not* want in their interactions with China as opposed to what they *do* want. Southeast Asian claimants have not yet developed a shared agenda for how the maritime domain should be governed in line with the arbitral award. This strongly weakens the potential of the coalition. Southeast Asian will not be able to get China to accept regional arrangements on marine natural resources, marine protected areas or maritime law enforcement that they cannot agree on themselves.

China's dispute behaviour remains largely noncompliant and undeterred by the arbitral award. But the Chinese Communist Party still regards international law as a force to reckon with as illustrated by its Central Committee's call for strengthening 'discourse power and influence in international legal affairs, use (of) legal methods to safeguard our country's sovereignty'.[45] This is not surprising as not even China's sustained noncompliance and the high level of near-permanent incidents in 2024 could undo the arbitration's impacts. Few would therefore go as far as *Masala* and suggest that a realist foreign policy needs to 'free itself from the self-imposed shackles of international legal dogma'.[46] *Masala* has a point in that in German foreign policy discourse it is not uncommon to replace an argument about the benefits and costs of foreign policy decisions with an unspecified reference to international law. But the impacts of the South China Sea Arbitration illustrate that freeing oneself from international law is not a particularly realistic option.

Russia may have made a similar experience. As suggested by *Cuéllar* and *Hathaway* the decision by many states to support Ukraine financially and militarily may have been partly influenced by 'the ICJ's decision [at the provisional measures stage] that Russia's invasion of Ukraine was unlawful […]. International law often has force in this way – by shaping how states respond to one another's actions.'[47] Moreover, some suggested that the US suspended weapons delivery to Israel for a limited time and other countries reduced their deliveries[48] in the wake of the ICJ's indication for provisional measures.[49] Therefore, this comment's finding of politically meaningful impacts of arbitration beyond compliance may very well apply to further cases

45 CCP Central Committee, 'CCP Central Committee Decision Concerning Several Major Issues in Comprehensively Advancing Governance According to Law', VII 7, available in *China Law Translate*, 2014, <https://www.chinalawtranslate.com/fourth-plenum-decision/>, last access 8 May 2025.

46 Carlo Masala, *Weltunordnung* (3rd edn, C. H. Beck 2022), 157. Own translation.

47 Mariano-Florentino Cuéllar and Oona A. Hathaway, 'The International Court of Justice's Balancing Act', Carnegie Endowment for International Peace 2024, <https://carnegieendowment.org/posts/2024/01/the-international-court-of-justices-balancing-act?lang=en>, last access 8 May 2025. A decision at the provisional measures stage only indicates that a claim is plausible.

48 Zain Hussain, 'How Top Arms Exporters Have Responded to the War in Gaza', SIPRI Commentary 2024, <https://www.sipri.org/commentary/topical-backgrounder/2024/how-top-arms-exporters-have-responded-war-gaza>, last access 8 May 2025.

49 Oona A. Hathaway, 'Taking Stock of ICJ Decisions in "Ukraine v. Russia" Cases – And Implications for South Africa's Case against Israel', Just Security, 5 February 2024, <https://www.justsecurity.org/91781/taking-stock-of-icj-decisions-in-ukraine-v-russia-cases-and-implications-for-south-africas-case-against-israel/>, last access 8 May 2025.

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even if a demonstration of these impacts requires a detailed empirical analysis.

Finally, international law has served the Philippines as a useful instrument in its statecraft in the South China Sea. Clearly, no coalition can be built around a set of rules in which its members see no benefit. But the present case suggests limitations to a purely instrumentalist view of law and also offers some evidence against the idea of a movement towards hegemonic international law.[50] While it is true that great powers sometimes try to construct legal rules and agreements to increase their bargaining power, to consolidate expansion or constrain another country's responses, smaller and middle powers are little different, at least, from the point of view of great powers.[51] International law is not an instrument that is only in the hands of the powerful because the right to authoritatively interpret the law mainly remains with courts and tribunals. No amount of Chinese pressure has changed that in the case of the South China Sea Arbitration and, ultimately, it is the emerging coalition of states around the award that ensures this point. International law is also more than an instrument, because it follows its own logic – the logic of legal argument, claim and counterclaim, appeals to justice, practices of legality and contestation.[52] Mastering the legal logic may bring about a legal victory, but not necessarily compliance. To turn a legal victory into impact in interactions, various actors combine law with diplomacy (e. g., coalition building around an increasingly more specific common goal) and preparedness for conflict (e. g., investments in coast guard, navy and surveillance capabilities).

It is sometimes pointed out that scholarship needs to develop the methodologies to explore the various effects of great powers competition on international law.[53] This comment's analysis of the South China Sea Arbitration finds that non-compliance is not the end of international law. While a core function of international tribunals is to settle disputes and bring

50 Detlev F. Vagts, 'Hegemonic International Law', AJIL 95 (2001), 843-848 discussing Heinrich Triepel, *Die Hegemonie. Ein Buch von Führenden Staaten* (Kohlhammer Verlag 1938) and Carl Schmitt, *Positionen und Begriffe, im Kampf mit Weimar-Genf-Versailles – 19. Völkerrechtliche Formen des modernen Imperialismus* (1st edn, Duncker & Humblot 1932/4th edn Duncker & Humblot 2014).

51 Christian Schultheiss, Ocean Governance and Conflict in the East and South China Sea. Negotiating Natural Resources, Institutions and Power (Amsterdam University Press 2024).

52 Jutta Brunnée and Stephen J. Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge 2010); Max Lesch and Christian Marxsen, 'Norm Contestation in the Law Against War: Towards an Interdisciplinary Analytical Framework', HJIL 83 (2023), 11-38.

53 Sarah Nouwen et al., 'Call for Papers. Great Power Competition: What Difference Does It Make to International Law?', EJIL: Talk!, 20 October 2024, <https://www.ejiltalk.org/announcement-call-for-papers-joint-ejil-jiel-symposium/, last access 8 May 2025.

about compliance, non-compliance does not imply a decision of a court or tribunal is without effect or consequence. Beyond questions of compliance and non-compliance, courts and tribunals can exert an impact on international negotiations and dispute interactions, not least, through the efforts of the members of the international community and these effects belong to an understanding of international law in times of changing international order.

*Christian Schultheiss*

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# Re-Reading Historic Articles in the ZaöRV: Anniversary Series

# Von der staatlichen Souveränität zu den Menschenrechten – und zurück? Völkerrechtliche Perspektiven auf Migration am Beispiel des Kollektivausweisungsverbots der Europäischen Menschenrechtskonvention

Anuscheh Farahat*
Universität Wien, Wien, Österreich/Austria
*anuscheh.farahat@univie.ac.at*

Jonathan Kießling**
Friedrich-Alexander-Universität, Zentrum für Menschenrechte, Erlangen-Nürnberg, Deutschland/Germany
*jonathan.kiessling@fau.de*



* Professorin für Öffentliches Recht in seinen europäischen Bezügen an der Universität Wien.
** Doktorand, Friedrich-Alexander-Universität, Erlangen.

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## Abstract

Fragen der Rechtmäßigkeit von Kollektivausweisungen beschäftigen den Europäischen Gerichtshof für Menschenrechte seit vielen Jahrzehnten vor allem im Bereich des Migrationsrechts. Sie entfalten besondere Relevanz im Kontext von Pushbacks, Seenotrettung, Extraterritorialität und zunehmend auch im Rahmen von Grenzschließungen in Reaktion auf die sog. geopolitische „Instrumentalisierung“ von Migrant:innen. Der vorliegende Beitrag rekonstruiert den Begriff der Kollektivausweisung und seine dogmatische Entwicklung anlässlich des 100-jährigen Jubiläums des Max-Planck-Instituts für ausländisches öffentliches Recht und Völkerrecht in Auseinandersetzung mit einem Beitrag von Karl Doehring in der ZaöRV aus dem Jahr 1985. Er setzt Doehrings klassisch zwischenstaatlich gedachte Konzeption in Kontrast zur Entwicklung der EGMR-Rechtsprechung und untersucht die Relevanz menschenrechtlicher Argumente im gegenwärtigen Migrationsrecht. Der Beitrag gleicht zunächst den völkerrechtlichen Begriff der Massenausweisung, den Doehring verwendet, mit dem menschenrechtlichen Begriff der Kollektivausweisung ab. Hier zeigen sich zentrale konzeptionelle Unterschiede, die verdeutlichen, wieso dem Kollektivausweisungsverbot in seinem heutigen Verständnis eine prominente Rolle zukommt. Anschließend wird Doehrings völkerrechtliche Argumentation im Detail nachvollzogen und in den zeithistorischen Kontext eingeordnet. Sie ist von einer zwischenstaatlichen Perspektive auf Migration und einer grundlegenden Migrationsskepsis geprägt, wobei menschenrechtliche Vorschriften nur eine marginale Rolle spielen. Darauf aufbauend schlägt der Beitrag schließlich die Brücke zu den aktuellen Debatten um das Kollektivausweisungsverbot im Speziellen und Praktiken der Exklusion an den europäischen Grenzen im Allgemeinen.

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## Keywords

EMRK – Massenausweisung – Kollektivausweisung – Art. 4 ZP 4 EMRK – staatliche Souveränität – Menschenrechte

## I. Einleitung

Im Rahmen der Europäischen Menschenrechtskonvention[1] (EMRK) ist das Verbot der Kollektivausweisung eine zentrale Schnittstelle zwischen Migrationsrecht und Menschenrechtsschutz. Seit der Entscheidung der Großen Kammer des Europäischen Gerichtshofs für Menschenrechte (EGMR) in der Sache *Hirsi Jamaa u. a. gegen Italien*[2] (2012) ist das Konzept der Kollektivausweisung eng verknüpft mit zentralen (menschen-) rechtlichen Problemfeldern des europäischen Migrationsrechts: Pushbacks, Seenotrettung, Extraterritorialität. Es steht exemplarisch für die „Vermenschenrechtlichung"[3] des Migrationsrechts. Jüngere Urteile des Gerichtshofs[4] werfen grundlegende Fragen über die Natur und Reichweite dieser Vorschrift auf. Das Kollektivausweisungsverbot ist dadurch zu einer prominenten Arena der Auseinandersetzungen um das europäische Migrationsrecht geworden.[5]

Illustrativ für die weiterhin hohe Relevanz dieser Vorschrift stehen mehr als 30 beim EGMR anhängige Beschwerden gegen Lettland, Litauen und Polen. Diese Fälle betreffen die Situation Schutzsuchender, die aus Belarus

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1 Europäische Konvention zum Schutze der Menschenrechte und Grundfreiheiten v. 4. November 1950, BGBl. II 1952, 685.

2 EGMR (Große Kammer), *Hirsi Jamaa and Others v. Italy*, Urteil v. 23. Februar 2012, Nr. 27765/09.

3 Jürgen Bast, 'The Rise of Human Rights Limits to Migration Control – A European Perspective', AJIL Unbound 118 (2024), 208-213; Jürgen Bast et al., Human Rights Discourse in Migration Societies. A Research Agenda (31. Januar 2024), MeDiMi Research Group, MeDiMi Working Paper No. 1, SSRN: <https://ssrn.com/abstract=4711930>.

4 EGMR (Große Kammer), *N. D. und N. T. v. Spain*, Urteil v. 13. Februar 2020, Nr. 8675/15 und 8697/15; EGMR, *A. A. v. Nordmazedonien*, Urteil v. 5. April 2022, Nr. 55798/16 u. a.; exemplarisch für die überwiegend kritische Rezeption dieser Entscheidungen siehe Maximilian Pichl und Dana Schmalz, '"Unlawful" May Not Mean Rightless', Verfassungsblog, 14. Februar 2020, doi: 10.17176/20200214-164325-0; Vera Wriedt, 'Expanding Exceptions? AA and Others v. North Macedonia, Systematic Pushbacks and the Fiction of Legal Pathways', Strasbourg Observers, 30. Mai 2022.

5 Maximilian Pichl, *Rechtskämpfe. Eine Analyse der Rechtsverfahren nach dem Sommer der Migration* (Campus Verlag 2021), insbes. 97 ff.; Janna Wessels, 'Reverse Strategic Litigation by Governments? Negotiating Sovereignty and Migration Control Before the European Court of Human Rights', AJIL Unbound 118 (2024), 214-218 (216 f.).

kommend an den Grenzen der Europäischen Union (EU) zurückgeschoben wurden und anschließend unter teils lebensgefährdenden Bedingungen im Grenzgebiet festsaßen. Diese Maßnahmen erfolgten als Reaktion auf die sog. „Instrumentalisierung“[6] von Schutzsuchenden durch das belarussische Regime.[7] Erst kürzlich wurden drei dieser Verfahren von den zuständigen Kammern des EGMR an die Große Kammer verwiesen.[8] Gerügt wird jeweils – unter anderem – eine Verletzung des Kollektivausweisungsverbots aus Art. 4 ZP 4 EMRK. Weitere Verfahren sind zu erwarten, wenn EU-Mitgliedstaaten wie Polen ihre jüngst angekündigten Pläne zur Aussetzung des Asylrechts mit dem Argument der „Instrumentalisierung“ zu rechtfertigen versuchen.[9]

Eine der frühesten wissenschaftlichen Auseinandersetzungen mit dem Thema der Kollektivausweisung – sowohl in der deutschsprachigen Wissenschaft,[10] als auch darüber hinaus[11] – ist Karl Doehrings Aufsatz „Die Rechtsnatur der Massenausweisung unter besonderer Berücksichtigung der

6 Siehe zum “Instrumentalisierungsargument”: Catharina Ziebritzki, ‘Warum die “Instrumentalisierung” Asylsuchender kein Argument für die Aussetzung ihrer Grundrechte ist’, Kritische Justiz 55 (2022), 152-166; das Konzept der Instrumentalisierung ist im Zuge der Reform des Gemeinsamen Europäischen Asylsystems in die neu geschaffene KrisenVO (VO-EU 2024/1359v. 14. Mai 2024 zur Bewältigung von Krisensituationen und Situationen höherer Gewalt im Bereich Migration und Asyl und zur Änderung der Verordnung (EU) 2021/1147, 22. Mai 2024, ABl. L 1/24) aufgenommen worden.

7 Louise Majetschak und Lena Riemer, ‘Poland’s Power Play at Its Borders Violates Fundamental Human Rights Law’, EJIL:Talk!, 16. November 2022.

8 EGMR, *C. O. C. G. and Others v. Lithuania*, Pressemitteilung v. 17. April 2024, Nr. 17764/22; EGMR, *R. A. and Others v. Poland*, Pressemitteilung v. 26. Juni 2024, Nr. 42120/21; EGMR, *H. M. M. and Others v. Latvia*, Pressemitteilung v. 4. Juli 2024, Nr. 42165/21.

9 So der von Polens Premierminister Donald Tusk verkündete Plan. Dazu Alan Charlish und Pawel Florkiewicz, ‘Poland’s Tusk Vows to Defend EU Border Amid Asylum Row’, Reuters 16. Oktober 2024, <https://www.reuters.com/world/europe/polands-tusk-says-future-liberal-democracy-hinges-migration-policy-2024-10-16/>, zuletzt besucht 20. Mai 2025.

10 Siehe lediglich Karl Doehring, ‘Ausweisung’ in: Hans-Jürgen Schlochauer (Hrsg.), *Wörterbuch des Völkerrechts Bd. I* (De Gruyter 1960), 129-132 (132); Willibald Pahr, ’Das 4. Zusatzprotokoll zur Europäischen Menschenrechtskonvention’, Juristische Blätter 86 (1964), 187-196; Klaus Dieter Deumeland, ’Das Verbot der Xenelasie bei Ausweisung von Ausländern in der Bundesrepublik Deutschland’, AWR Bulletin: Vierteljahresschrift für Flüchtlingsrecht (1984), 182-187; Alfred Verdross und Bruno Simma, *Universelles Völkerrecht. Theorie und Praxis* (Duncker & Humblot 1984), 800.

11 Siehe lediglich Krishna Iyer, ‘Mass Expulsion as Violation of Human Rights’, I. J. I. L. 13 (1974), 169-175; Vishnu D. Sharma und F. Wooldridge, ‘Some Legal Questions Arising from the Expulsion of the Ugandan Asians’, ICLQ 23 (1974), 397-425; Alfred M. de Zayas, ‘International Law and Mass Population Transfers’, Harv. Int’l. L. J. 16 (1975), 207-258; Guy S. Goodwin-Gill, ‘The Limits of the Power of Expulsion in Public International Law’, BYIL 47 (1976), 55-156 (141 ff.); Alfred M. de Zayas, ‘Collective Expulsions in the Light of International Law’ in: Theodor Veiter (Hrsg.), *Entwurzelung und Integration. Rechtliche, soziale und politische Probleme von Flüchtlingen und Emigranten* (Braumüller 1979), 57-64.

indirekten Ausweisung",[12] der 1985 in der Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV) erschienen ist. Die menschenrechtliche Praxis zum Kollektivausweisungsverbot hat sich seit Doehrings Aufsatz erheblich weiterentwickelt. Das 100-jährige Jubiläum des Max-Planck-Instituts für ausländisches öffentliches Recht und Völkerrecht, dessen Direktor Doehring von 1980 bis 1987 war, bietet einen Anlass und eine Gelegenheit, Doehrings Argumentationslinie in Bezug zu aktuellen migrationsrechtlichen Debatten zu setzen. Doehring hat die zeitgenössischen Entwicklungen im menschenrechtlichen Bereich in seiner Argumentation weitgehend außer Acht gelassen und betrachtete das Phänomen der Kollektivausweisung in erster Linie aus einer zwischenstaatlichen Perspektive, die die Souveränität der Staaten ins Zentrum rückt. Sein Text repräsentiert damit die Perspektive des klassischen Völkerrechts, das die universalistische Grundstruktur des Menschenrechtsschutzes noch nicht voll rezipiert, obgleich bereits die zeitgenössische Menschenrechtspraxis hierzu Anlass geboten hätte, wie wir zeigen werden. Vor dem Hintergrund gegenwärtiger rechtspolitischer Forderungen nach der „Rückgewinnung" staatlicher Souveränität im Migrationsbereich ist die Auseinandersetzung mit Doehrings Argumentation und ihre Gegenüberstellung mit dem menschenrechtlichen Status quo daher vielversprechend.

Die Auseinandersetzung erfolgt in drei Schritten: Zunächst gleichen wir den völkerrechtlichen Begriff der Massenausweisung, den Doehring verwendet, mit dem menschenrechtlichen Begriff der Kollektivausweisung ab. Hier zeigen sich zentrale konzeptionelle Unterschiede, die verdeutlichen, wieso dem Kollektivausweisungsverbot in seinem heutigen Verständnis die eingangs geschilderte prominente Rolle zukommt (II.). Anschließend wird Doehrings völkerrechtliche Argumentation im Detail nachvollzogen und in den zeithistorischen Kontext eingeordnet. Sie ist von einer zwischenstaatlichen Perspektive auf Migration und einer grundlegenden Migrationsskepsis geprägt, wobei menschenrechtliche Vorschriften nur eine marginale Rolle spielen (III.). Darauf aufbauend schlägt der letzte Abschnitt die Brücke zu den aktuellen Debatten um das Kollektivausweisungsverbot im Speziellen und Praktiken der Exklusion an den europäischen Grenzen im Allgemeinen (IV.).

12 Karl Doehring, 'Die Rechtsnatur der Massenausweisung unter besonderer Berücksichtigung der indirekten Ausweisung', ZaöRV 45 (1985), 372-389.

## II. Begriffsbestimmung: Massenausweisung vs. Kollektivausweisung

Ausweisung ist in Doehrings Konzeption definiert als „die staatliche Anweisung gegenüber einer natürlichen Person, das Territorium des Staates zu verlassen".[13] Um eine Massenausweisung handele es sich dann,

> „wenn die staatliche Anordnung, das Territorium zu verlassen, nicht an einzelne Individuen wegen ihrer persönlichen Eigenschaften oder ihres persönlichen Verhaltens ergeht, sondern Menschengruppen wegen ihrer besonderen Merkmale oder ihres Verhaltens kollektiv ausgewiesen werden. In diesem Fall wird das einzelne Individuum allein wegen seiner Gruppenzugehörigkeit ausgewiesen."[14]

Der Begriff „Massenausweisung" war in der rechtswissenschaftlichen Literatur noch bis in die 1990er Jahre im Umlauf,[15] findet heute aber kaum noch Verwendung. Durchgesetzt hat sich stattdessen der Begriff „Kollektivausweisung", den auch die Verbotsvorschriften der regionalen Menschenrechtsverträge verwenden. Erstmals kodifiziert wurde das Verbot der Kollektivausweisung im Vierten Zusatzprotoll (ZP) zur EMRK, das 1963 verabschiedet wurde und 1968 in Kraft trat. Art. 4 ZP 4 EMRK lautet: „Kollektivausweisungen ausländischer Personen sind nicht zulässig."[16]

Die Entscheidung für den Begriff der Kollektivausweisung ist keine rein terminologische Frage. Vielmehr bringt der Begriff die konzeptionelle Grundlage zum Ausdruck, auf der das heutige Verständnis dieser Norm beruht, wie wir im Folgenden zeigen werden.

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13 Doehring, 'Massenausweisung' (Fn. 12), 372.

14 Doehring, 'Massenausweisung' (Fn. 12), 374.

15 Jean-Marie Henckaerts, *Mass Expulsion in Modern International Law and Practice* (Brill 1995); in etwas anderem Zusammenhang Sonja Köhler, *Das Massenvertreibungsverbot im Völkerrecht* (Berlin Verlag 1999).

16 In den beiden authentischen Sprachfassungen – Englisch und Französisch – lautet der Wortlaut: "Collective expulsion of aliens is prohibited." bzw. "Les expulsions collectives d'étrangers sont interdites." Art. 22 Abs. 9 der AMRK (American Convention on Human Rights v. 22. November 1969, UNTS 1144, 123) regelt nahezu wortgleich: "The collective expulsion of aliens is prohibited." bzw. "Es prohibida la expulsión colectiva de extranjeros." Einen Sonderfall stellt Art. 12 Abs. 5 S. 1 der AfrKRMV (African Charter on Human and Peoples' Rights v. 27. Juni 1981, UNTS 1520, 217) dar, dessen englische Sprachfassung lautet: "The mass expulsion of non-nationals shall be prohibited." Die gleichermaßen authentische französische Fassung verwendet hingegen auch hier den Begriff "l'expulsion collective". Möglicherweise geht die Abweichung auf einen Übersetzungsfehler aus dem Französischen ins Englische zurück. Zum Ganzen, siehe Lena Riemer, *The Prohibition of Collective Expulsion in Public International Law* (Diss. Berlin 2020), abrufbar unter: <https://refubium.fu-berlin.de/handle/fub188/27681>, zuletzt besucht 7. Mai 2025.

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## 1. Prozedurales Verständnis anstatt quantitativer Menschen"-masse"

Dem Kollektivausweisungsverbot kommt vor allem deshalb hohe Relevanz zu, weil es eine kategorische Unterscheidung trifft zwischen der im Grundsatz erlaubten[17] Individualausweisung und der verbotenen Kollektivausweisung. Um das Phänomen der Massen- bzw. Kollektivausweisung zu umreißen, werden häufig die *travaux préparatoires* des Vierten Zusatzprotokolls zur EMRK zum Ausgangspunkt genommen. Diese enthalten den vagen Hinweis, dass das Expertenkommitee es als wünschenswert erachte, eine Norm zu schaffen „by which collective expulsions of the kind which was a matter of recent history, would be formally prohibited".[18] Dieser Passus wird üblicherweise als Verweis auf die zwangsweisen Bevölkerungstransfers und Maßnahmen ethnischer Homogenisierung interpretiert, die während des Zweiten Weltkriegs stattfanden und die mit den Grenzziehungen im Nachkriegs(ost-)europa einhergingen.[19] So beinhaltete das Potsdamer Protokoll von 1945 die Vereinbarung der Siegermächte darüber

> „[…] that the transfer to Germany of German populations, or elements thereof, remaining in Poland, Czechoslovakia and Hungary, will have to be undertaken. They agree that any transfers that take place should be effected in an orderly and humane manner […]"[20]

Historische Beispiele[21] wie dieses ersetzen jedoch keine rechtsdogmatische Definition. Welche Kriterien machen also die Massen- bzw. Kollektivausweisung zur solchen?

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17 Doehring, 'Massenausweisung' (Fn. 12), 373; insbesondere der EGMR betont dies in st. Rspr.: '[…] Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations, including the Convention, to control the entry, residence and expulsion of aliens', EGMR, *Hirsi Jamaa* (Fn. 2), Rn. 113; kritisch: Marie-Bénédicte Dembour, 'The Migrant Case Law of the European Court of Human Rights. Critique and Way Forward' in: Basak Çali, Ledi Bianku und Iulia Motoc (Hrsg.), *Migration and the European Convention on Human Rights* (Oxford University Press 2021), 19-40 (29 ff.).

18 Council of Europe, DH/Exp (61) 35 Final of 17 October 1961, Rn. 53, zu finden in: 'Collected Edition of the "Travaux Préparatoires" of Protocol No. 4', (1976), 446.

19 Henckaerts, *Mass Expulsion* (Fn. 15), 8-12; Anselm Zölls, *Das Verbot der Kollektivausweisung nach Art. 4 Protokoll Nr. 4 EMRK. Diskriminierungs- und Willkürverbot im Ausweisungsrecht* (Mohr Siebeck 2021), 3; Jean-Marc Hausman und Aglaé Dispa, 'La notion d'expulsion collective d'étrangers, prévue à l'article 4 du protocole 4 à la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales', Ann. Dr. Louvain 65 (2005), 73-86 (75).

20 The Berlin (Potsdam) Conference, July 17-August 2, 1945, <https://usa.usembassy.de/etexts/ga4-450801.pdf> zuletzt besucht 7. Mai 2025.

21 Als weiteres Beispiel werden häufig die Massenausweisungen von Inder:innen, Pakistanis und Bangladeshis aus Uganda im Jahr 1972 unter Idi Amin herangezogen, s. dazu Sharma und Wooldridge (Fn. 11).

Der Begriff der Massenausweisung impliziert eine quantitative Abgrenzung: Ausweisungen sind dann menschenrechtswidrig, wenn sie eine so hohe Anzahl von Nichtstaatsangehörigen auf einmal betreffen, dass sie buchstäblich *en masse* erfolgen. Erforderlich wäre demnach die Festlegung einer Mindestanzahl an Ausländer:innen, die von einer Ausweisung betroffen sein müssen. Der EGMR – und vor ihm die Europäische Menschenrechtskommission (EKMR) – haben zwar die Mehrzahl der unter Art. 4 ZP 4 EMRK vorgebrachten Individualbeschwerden als unzulässig abgewiesen; die Ablehnung beruhte jedoch nie darauf, dass die Gruppe der Betroffenen zu klein gewesen wäre.[22] Inzwischen hat der EGMR eine solche quantitative Abgrenzung auch ausdrücklich zurückgewiesen.[23] In der Literatur wurde das Konzept eines quantitativen Minimums nicht weiter konkretisiert; regelmäßig wird hingegen auf die Wertungswidersprüche einer beliebigen Quantifizierung hingewiesen und betont, dass sich auch einzelne Personen auf den Schutz des Kollektivausweisungsverbotes berufen können sollen.[24]

Dieses auf den ersten Blick wenig intuitive Ergebnis erklärt sich daraus, dass ein quantitatives Minimum unweigerlich neue Abgrenzungsfragen nach sich ziehen würde. Bereits Doehring wies darauf hin, dass sich die „Massenausweisung […] natürlich auch so gestalten [kann], daß der sie vollziehende Staat den Vorgang als massenhafte Einzelausweisung fingiert."[25] Die Festlegung einer Mindestanzahl würde demnach nicht darüber hinweghelfen, dass die Definition der Kollektivausweisung Kriterien erfordert, nach denen bestimmt wird, welche (vermeintlichen Einzel-)Fälle einen ausreichenden inneren Zusammenhang aufweisen, um aufaddiert zu werden.[26] Das quantitative Element der Definition müsste zwingend um ein qualitatives Element ergänzt werden.[27] Auch in der Rechtsprechung der EKMR und des EGMR wird dieses Problem deutlich: In vielen Fällen waren die Beschwerdeführenden Adressat:innen formal individueller Ausweisungsentscheidungen, die je-

22 Jean-Marie Henckaerts, 'The Current Status and Content of the Prohibition of Mass Expulsion of Aliens', HRLJ 15 (1994), 301-317 (302); Hausman und Dispa (Fn. 19), 80; einzig in EKMR, *O. and Others v. Luxembourg*, Unzulässigkeitsentscheidung v. 3. März 1978, Nr. 7757/77 warf die Kommission die Frage auf, ob die Ausweisung von (nur) drei Personen ausreichen könne, verwarf die Individualbeschwerde jedoch letztlich aus anderen Gründen.

23 EGMR (GK), *N. D. und N. T.* (Fn. 4), Rn. 194.

24 Henckaerts, 'Current Status' (Fn. 22), 301 ff.; Jeroen Schokkenbroek, 'Prohibition of Collective Expulsion (Article 4 of Protocol No. 4)' in: Pieter van Dijk, Fried van Hoof, Arjen van Rijn und Leo Zwaak (Hrsg,), *Theory and Practice of the European Convention on Human Rights* (4. Aufl., Intersentia 2006), 945-955; Zölls (Fn. 19), 82-88.

25 Doehring, 'Massenausweisung' (Fn. 12), 380.

26 Zum Kriterium eines konnektiven Elements, Riemer (Fn. 16), 57 ff.

27 Zu quantitativen und qualitativen Anknüpfungspunkten siehe Zölls (Fn. 19), 13-17 und Henckaerts, 'Current Status' (Fn. 22), 301 ff.; Doehring schien nach der Intention des ausweisenden Staates abzugrenzen, Doehring, 'Massenausweisung' (Fn. 12), 380.

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doch inhaltlich identisch mit Entscheidungen waren, die gegenüber anderen Personen in vergleichbarer Situation ergingen.[28]

Die EKMR löste diese konzeptionellen Fragen dahingehend auf, dass sie dem Kollektivausweisungsverbot aus Art. 4 ZP 4 EMRK ein dezidiert verfahrensrechtliches Verständnis zugrunde legte. Bereits im Jahr 1975 formulierte die Kommission eine Definition der Kollektivausweisung als

> „any measure of the competent authority compelling aliens as a group to leave the country, except where such a measure is taken after and on the basis of a reasonable and objective examination of the particular cases of each alien of the group".[29]

Die Kommission nähert sich demnach derselben Frage von einem anderen Ende: Eine Kollektivausweisung liegt immer dann vor, wenn die Ausweisungsentscheidung *nicht* auf einer individuellen Prüfung der Umstände jedes Einzelfalles beruht. Fehlt es an einer solchen Prüfung, dann liegt eine Ausweisung „as a group" vor und es spielt keine Rolle, aus welchen Gründen die Ausweisung stattdessen erfolgte.[30] Die Kollektivausweisung ist definiert durch die negative Abgrenzung von der Individualausweisung, die sich wiederum durch eine individuelle Prüfung auszeichnet. Dieses qualitative Kriterium der Einzelfallprüfung tritt in der Rechtsprechung der EKMR und des EGMR nicht nur neben ein quantitatives Kriterium, sondern ersetzt dieses vollständig.[31] Folglich wird das Kollektivausweisungsverbot der EMRK operationalisiert als Verfahrensrecht, genauer gesagt: als Recht auf ein individuelles Ausweisungsverfahren.[32]

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28 Siehe exemplarisch EKMR, *A. v. Netherlands*, Unzulässigkeitsentscheidung v. 6. Mai 1986, Nr. 11618/85; dies erklärt auch, wieso viele Beschwerdeführende vor den Vertragsorganen der EMRK eine Verletzung von Art. 4 ZP 4 EMRK im Hinblick auf die Ablehnung ihres Asylantrags rügen, siehe exemplarisch EKMR, *Tahiri v. Sweden*, Unzulässigkeitsentscheidung v. 11. Januar 1995, Nr. 25129/94.

29 EKMR, *Becker v. Denmark*, Unzulässigkeitsentscheidung v. 3. Oktober 1975, Nr. 7011/75, Council of Europe, European Commission of Human Rights, Decisions and Reports 4, 215-256 (235).

30 Insofern unterscheidet sich die Herangehensweise von Doehrings Vorschlag auf die (positiv festzustellende) Intention des ausweisenden Staates abzustellen, Doehring, 'Massenausweisung' (Fn. 12), 380.

31 Zölls (Fn. 19), 54.

32 Zögerlich: Maarten den Heijer, 'Reflections on Refoulement and Collective Expulsion in the Hirsi Case', IJRL 25 (2013), 265-290 (284); ebenfalls zögerlich: Jürgen Bast, Frederik von Harbou und Janna Wessels, *Human Rights Challenges to European Migration Policy* (Nomos 2022), 126; differenzierend Zölls (Fn. 19), 13, 89; den (ausschließlich) verfahrensrechtlichen Charakter explizit betonend statt vieler: Hanaa Hakiki, 'The ECtHR's Jurisprudence on the Prohibition of Collective Expulsions in Cases of Pushbacks at European Borders: A Critical Perspective' in: Stephanie Schiedermair, Alexander Schwarz und Dominik Steiger, *Theory and Practice of the European Convention on Human Rights* (Nomos 2022), 133-163 (139).

Anders als in der Literatur bisweilen angenommen,[33] handelt es sich hierbei nicht um eine Innovation der jüngeren Rechtsprechung seit den 2000er-Jahren. Vielmehr zieht sich das verfahrensrechtliche Verständnis durch den gesamten Korpus der Rechtsprechung sowohl der EKMR als auch, später, des EGMR. Bereits während des Entstehungsprozesses der Norm kreisten die Debatten prominent um Fragen des Ausweisungs*verfahrens*: Ausgangspunkt des Kollektivausweisungsverbots war der Wunsch, die EMRK um eine Vorschrift zu ergänzen, die vor *willkürlichen* Ausweisungen schützt, wobei die Verfahrensrechte aus Art. 13 Internationaler Pakt über bürgerliche und politische Rechte – der zu diesem Zeitpunkt bereits im Entwurfsstadium vorlag – als Vorbild dienten.[34] Die Verfasser:innen waren sich jedoch uneinig, ob die neu zu schaffende Norm darüber hinaus auch beschränkte inhaltliche Gründe vorgeben solle, aus denen eine Ausweisung erfolgen darf oder sogar bestimmten Ausländer:innen ein Bleiberecht vermitteln solle.[35] Der Begriff der Kollektivausweisung erhielt erst spät Einzug in den Entwurf, zunächst als zusätzlicher Abs. 3.[36] Er stand dabei in engem Zusammenhang mit den Verfahrensrechten in Abs. 2 des Entwurfs, wie die Formulierung einer der Entwurfsfassungen verdeutlicht: „(3) Decisions of expulsion shall only be taken in individual cases; collective expulsion shall not, in any circumstance, be permitted."[37] In (weitgehend deklaratorischer) Ergänzung zu den Verfahrensrechten aus Abs. 2 verbot dieser Zusatz als absolutes Minimum solche Ausweisungen, die nicht einmal auf einer individuellen Ausweisungsentscheidung beruhten. Nachdem die Uneinigkeit hinsichtlich der Absätze 1 und 2 dazu führte, dass beide gestrichen wurden, blieb das heutige Kollektivausweisungsverbot als einziger Inhalt von Art. 4 ZP 4 stehen.

33 Daniel Thym, 'Menschenrechtliche Trendwende? Zu den EGMR-Entscheidungen über "heiße Zurückweisungen" an den EU-Außengrenzen und humanitäre Visa für Flüchtlinge', ZaöRV 80 (2020), 989-1020 (994).

34 Council of Europe, AS/Jur XII (10) 1 of 21st August 1958, Rn. 5, zu finden in 'Collected Edition of the "Travaux Préparatoires" of Protocol No. 4' (1976), 12.

35 Council of Europe, AS/Jur XII (10/3 of 10th November 1958), Rn. 9, Appendix, zu finden in 'Collected Edition of the "Travaux Préparatoires" of Protocol No. 4' (1976), 33-41; Council of Europe, DH/Exp (60) 27 and Appendix I, II of 10 February 1961, Rn. 56, zu finden in 'Collected Edition of the "Travaux Préparatoires" of Protocol No. 4' (1976), 331.

36 Council of Europe, DH/Exp (61) 30 Revised of 6 October 1961, zu finden in 'Collected Edition of the "Travaux Préparatoires" of Protocol No. 4' (1976), 428.

37 Council of Europe, DH/Exp (61) 32 of 6 October 1961, zu finden in 'Collected Edition of the "Travaux Préparatoires" of Protocol No. 4' (1976), 430; andere Entwurfsfassungen lauteten "In no circumstances shall a measure of collective expulsion be taken." oder "Decisions of expulsion shall only be taken in individual cases.", Council of Europe, DH/Exp (61) 31 of 6 October 1961, zu finden in 'Collected Edition of the "Travaux Préparatoires" of Protocol No. 4' (1976), 429; siehe hierzu auch Hakiki, *The ECtHR's Jurisprudence* (Fn. 32), 139.

Dieser Abriss der Entstehungsgeschichte deckt sich mit den Prämissen Doehrings und anderer Autoren[38] seiner Zeit. Einerseits wurde das staatliche „Recht zur Ausweisung"[39] als Ausfluss von Souveränität begriffen und ins freie Ermessen des Staates gestellt; zugleich wurden jedoch willkürliche Ausweisungen abgelehnt.[40] Unter diesen Prämissen manifestiert sich das spezifische Unrecht der Kollektiv- bzw. Massenausweisung in ihrer Willkür, d. h. nicht im „Ob" der Ausweisung – dieses liegt im Ermessen des Staates – sondern im „Wie".[41] Es ist daher folgerichtig, die Spannung zwischen inhaltlicher Ermessensfreiheit einerseits und Schutz vor Willkür andererseits durch Anforderungen an das Verfahren aufzulösen.[42]

In diesem Lichte ist auch die geschilderte prozedurale Operationalisierung des Kollektivausweisungsverbots durch die Straßburger Menschenrechtsorgane zu verstehen. Obwohl die Ausweisung als solche im Grundsatz mit der EMRK vereinbar ist,[43] wirkt Art. 4 ZP 4 EMRK als Willkürverbot[44] im Ausweisungsrecht, indem es eine individuelle Einzelfallprüfung garantiert. Dies impliziert keine Abkehr vom oben erläuterten historischen Kontext – im Gegenteil: Die Konzeption des Kollektivausweisungsverbots als Recht auf ein individuelles Ausweisungsverfahren ermöglicht es, die Willkür als spezifisches Unrecht der Kollektivausweisung aus den historischen Beispielen zu abstrahieren und als Menschenrechtsverletzung zu adressieren.

Zum Erscheinungszeitpunkt von Doehrings Abhandlung im Jahr 1985 hatte sich ein dezidiert menschenrechtliches Verständnis des Kollektivausweisungsverbots bereits herausgebildet. Der geschilderte Ansatz der EKMR und die damit einhergehende Definition waren seit einem Jahrzehnt etabliert. Umso überraschender ist es, dass Doehring diese Entwicklung – abgesehen

38 Mangels zeitgenössischer weiblicher Autorinnen zu diesem Themenkomplex wird hier die männliche Form verwendet, um die historische Unterrepräsentation von Frauen in der Völkerrechtswissenschaft nicht zu verschleiern.

39 Siehe Fn. 17.

40 Doehring, 'Massenausweisung' (Fn. 12), 373 f.; Goodwin-Gill (Fn. 11), 58-59 m. w. N.

41 Ähnlich Verdross und Simma (Fn. 10), 800: 'Massenausweisungen sind grundsätzlich völkerrechtswidrig, da sie die individuellen Verhältnisse nicht berücksichtigen können.'

42 Illustrativ: Goodwin-Gill (Fn. 11), der die zeitgenössische Literatur kritisierte, da die übliche Formulierung, das Recht zur Ausweisung dürfe nicht missbraucht oder willkürlich ausgeübt werden, zu vage und unzureichend sei (55 ff.). Um die Grenzen dieser staatlichen Freiheit zu konkretisieren, schlug er Verfahrensrechte vor, die an Art. 13 IPbpR angelehnt sind (122 ff.). Diese Vorschläge griff auch Doehring, 'Massenausweisung' (Fn. 12) auf, 379.

43 Damit ist selbstredend nicht ausgeschlossen, dass Ausweisungssachverhalte neben Art. 4 ZP 4 EMRK andere Menschenrechte verletzen, wie etwa das Recht auf Achtung des Privat- und Familienlebens (Art. 8 EMRK) oder das Verbot unmenschlicher oder erniedrigender Behandlung oder Strafe (Art. 3 EMRK als Ausdruck des menschenrechtlichen Refoulement-Verbots). Diese 'Vermenschenrechtlichung' des Migrationsrechts setzt sich jedoch erst in den späten 1980er Jahren durch, siehe dazu Bast (Fn. 3), 211; s. auch unten III. 2.

44 Zölls (Fn. 19), 110.

von einem einzigen Verweis auf die genannten Normen[45] – nicht rezipierte. An die Stelle des menschenrechtlichen Begriffes einer Kollektivausweisung trat in seiner Analyse die vage umrissene Massenausweisung, die er zwar mit Verweisen auf historische Ereignisse hinterlegte,[46] Lösungsvorschläge für die auf der Hand liegenden konzeptionellen Fragen dabei jedoch schuldig blieb. Abschnitt III. wird die möglichen Gründe vertiefen, die hinter diesem „blinden Fleck" stehen.

## 2. Kollektivausweisung als Instrument der Migrationskontrolle

Doehrings Konzeption der Massenausweisung unterscheidet sich in einer weiteren Hinsicht von denjenigen Konstellationen, in denen Art. 4 ZP 4 EMRK heute zentrale Relevanz zukommt.

Für Doehring und andere Autoren[47] seiner Zeit ist das Phänomen der Massenausweisung eng verbunden mit dem Begriff der (Vertreibung aus der) Heimat: Bei Doehring war der Begriff der Massenausweisung – anders als der Schutzbereich von Art. 4 ZP 4 EMRK[48] – nicht auf die Ausweisung Personen ausländischer Staatsangehörigkeit beschränkt, sondern erfasst auch die Ausweisung eigener Staatsangehöriger.[49] Auch wenn das geltende Völkerrecht laut Doehring kein isoliertes Recht auf Heimat[50] kenne, bestehe ein enger Bezug der Massenausweisung zum Selbstbestimmungsrecht der Völker, das „vorwiegend von Staatsangehörigen, die auf dem Territorium des Staates ihrer Staatsangehörigkeit leben"[51] in Anspruch genommen werden könne, aber auch „bei Gruppenvertreibung fremder Staatsangehöriger aus einem

45 Doehring, 'Massenausweisung' (Fn. 12), 375.

46 Doehring, 'Massenausweisung' (Fn. 12), 375 f.

47 Siehe Fn. 38.

48 Das Verbot der Ausweisung eigener Staatsangehöriger findet sich stattdessen in Art. 3 Abs. 1 ZP 4 EMRK: 'Niemand darf durch eine Einzel- oder Kollektivmaßnahme aus dem Hoheitsgebiet des Staates ausgewiesen werden, dessen Angehöriger er ist.'

49 Doehring, 'Massenausweisung' (Fn. 12), 372 f.

50 (Völker-)rechtlich hat sich ein "Recht auf Heimat" nicht durchgesetzt. Der Begriff wird im deutschsprachigen Raum vorwiegend von den sog. Vertriebenenverbänden und in Publikationen aus diesem Kontext verwendet, siehe <https://www.bund-der-vertriebenen.de/charta-auf-deutsch>, zuletzt besucht 7. Mai 2025, siehe Gilbert H. Gornig und Dietrich Murswiek (Hrsg.), *Das Recht auf die Heimat* (Duncker & Humblot 2006) und weist eine Nähe zu geschichtsrevisionistischen, zum Teil rechtsextremen Narrativen auf. Zum Ganzen: Eva Hahnová und Hans Henning Hahn, *Die Vetreibung im deutschen Erinnern. Legenden, Mythos, Geschichte* (Schöningh 2010), 448 ff., 521 ff. Zur Rolle Alfred de Zayas' in diesem Diskurs siehe Eva Hahnová und Hans Henning Hahn, *Die Vetreibung im deutschen Erinnern. Legenden, Mythos, Geschichte* (Schöningh 2010), 610 ff., sowie Rainer Ohlinger, 'A. M. de Zayas: A Terrible Revenge (Buchrezension)', H-Soz-Kult, 19. Februar 1997.

51 Doehring, 'Massenausweisung' (Fn. 12), 381.

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Territorium, in dem sie bisher befriedet gelebt haben, von Bedeutung“[52] sei. Doehring stand hier die Konstellation der Grenzverschiebungen nach einem internationalen Konflikt vor Augen, die dazu führt, dass Menschen im neu gezogenen Staatsgebiet zu „Fremden“ werden, die aus ihrer bisherigen Heimat vertrieben werden. In einem 1979 erschienenen Beitrag setzte auch Alfred de Zayas das Kollektivausweisungsverbot in Verbindung zu einem kollektiven Recht auf Selbstbestimmung und einem „right to live on their own soil“ bzw. „right to the homeland“[53]. Sein Verständnis des spezifischen Unrechts der Kollektivausweisung umschrieb de Zayas wie folgt:

> „The transplantation of peoples deeply rooted in the land and social milieu of one country brings with it not only physical discomfort and economic loss but also moral and psychological shock which may permanently ruin the lives of persons who are unable to adjust to a new and perhaps inhospitable environment.“[54]

Diese Verknüpfung mit dem Begriff von Heimat setzt die Massen- bzw. Kollektivausweisung in Verhältnis zu einem spezifischen Bild von Migration: Die Massenausweisung „entwurzelt“[55] Personen aus dem Staat, dem sie vorher zugeordnet[56] waren, und macht sie zu mobilen „Vertriebenen“. Massenausweisung *generiert* also Migration und ist gerade keine Reaktion *auf* Migration.

Unabhängig vom konkreten Fall der Massenausweisung wurde die Bezugnahme auf ein „Recht auf Heimat“ dafür kritisiert, dass sie Migration in zweifacher Hinsicht negativ konnotiert:

> „Die Bindung an Heimat gilt hier als konstitutiv für ein gutes Leben; Migration wird mit Deprivation gleichgesetzt und Migranten werden als Heimatlose gesehen. Solche Entwurzelte verdienen unser Mitleid, stellen aber auch eine Bedrohung für jede ‚verwurzelte‘ Kultur dar, in die sie einwandern. Das Recht auf Heimat ist dementsprechend zunächst einmal ein Recht der aufnehmenden Gesellschaft, Einwanderung zu begrenzen […]“[57]

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52 Doehring, ‘Massenausweisung’ (Fn. 12), 381.

53 De Zayas, ‘Collective Expulsions‘ (Fn. 11), 62; auch Iyer (Fn. 11) ging es um die Ausweisung von Staatsangehörigen und derjenigen ‘who, for generations have made a place their native land’ (174). Die Massenausweisung verletze deren ‘basic right to reside in the country of their birth’ (169).

54 De Zayas, ‘Collective Expulsions’ (Fn. 11), 63.

55 Siehe den Titel des Sammelbandes von Theodor Veiter (Hrsg.), Entwurzelung und Integration. Rechtliche, soziale und politische Probleme von Flüchtlingen und Emigranten (Braumüller 1979).

56 Anuscheh Farahat, Progressive Inklusion. Zugehörigkeit und Teilhabe im Migrationsrecht (Springer 2014), 75 ff.

57 Rainer Bauböck, Gibt es ein Recht auf Einwanderung?, IHS Political Science Working Paper 18, (1994), 23.

Tatsächlich zog Doehring aus seinen Ausführungen genau diese Schlussfolgerungen für den Umgang von Aufnahmestaaten mit denjenigen Menschen, die von Massenausweisung betroffen sind:

> „Drittstaaten sind daher berechtigt, Abwehrmaßnahmen gegen die Einreise fremder Staatsangehöriger gerade auch bei der Massenausweisung zu treffen. Sie sind berechtigt die Grenzen zu schließen und die Einreise zu verweigern."[58]

Ironischerweise ist jedoch gerade die Verweigerung der Einreise fremder Staatsangehöriger regelmäßig Gegenstand von Kollektivausweisungsverfahren vor dem EGMR. Konträr zu Doehrings und de Zayas' Konzeption entfaltet das Kollektivausweisungsverbot aus Art. 4 ZP 4 EMRK migrationsrechtliche Relevanz nicht deshalb, weil die Kollektivausweisung Menschen vertreibt und damit unfreiwillige *Migration generiert*, sondern als normative Begrenzung der Maßnahmen, die Staaten als *Reaktion auf Migration* treffen dürfen. Auch und gerade bei der Kontrolle oder „Abwehr" von Migration sind Staaten an das Kollektivausweisungsverbot gebunden. Sie müssen also grundsätzlich[59] gewährleisten, dass jede betroffene Person ein individuelles Ausweisungsverfahren durchläuft und die Möglichkeit hat, Einwände gegen die eigene Ausweisung vorzubringen.

Dabei unterscheiden die rechtlichen Maßstäbe des Kollektivausweisungsverbots nicht danach, ob die ausgewiesenen Personen bereits seit mehreren Jahren im ausweisenden Staat lebten,[60] als Schutzsuchende dort aufhältig waren,[61] am Grenzposten abgewiesen wurden,[62] unmittelbar nach (irregulärem) Grenzübertritt aufgegriffen und abgeschoben wurden,[63] oder das Staatsgebiet noch gar nicht erreicht hatten[64]. Speziell die letztgenannte Konstellati-

58 Doehring, 'Massenausweisung' (Fn. 12), 388; ähnliche Schlussfolgerungen zieht de Zayas, 'Collective Expulsions' (Fn. 11), 60; beide Autoren weisen im selben Kontext auch darauf hin, dass das Asyl- und Flüchtlingsrecht zu anderen Ergebnissen führen kann.

59 Zu den Ausnahmekonstellationen, die sich aus der jüngeren EGMR-Rechtsprechung ergeben, siehe unten IV. 1.

60 EGMR, *Berdzenishvili and Others v. Russia*, Urteil v. 20. Dezember 2016, Nr. 14594/07 und sechs andere Beschwerden, Rn. 18 ff.; EGMR, *Shioshvili and Others v. Russia*, Urteil v. 20. Dezember 2016, Nr. 19356/07, Rn. 11 ff.; die Umstände dieser Fälle dürften am nähsten an den historischen Konstellationen sein, auf die auch Doehring seine Ausführungen bezieht, siehe auch Zölls (Fn. 19), 4.

61 EGMR, *Andric v. Sweden*, Unzulässigkeitsentscheidung v. 23. Februar 1999, Nr. 45917/99; EGMR, *Čonka v. Belgium*, Urteil v. 5. Februar 2002, Nr. 51564/99; EGMR, *Sultani v. France*, Urteil v. 20. September 2007, Nr. 45223/05.

62 EGMR, *M. K. and Others v. Poland*, Urteil v. 23. Juli 2020, Nr. 40503/17, 42902/17 und 43643/17; EGMR *Shahzad v. Hungary*, Urteil v. 8. Juli 2021, Nr. 12625/17.

63 EGMR, *Sharifi and Others v. Italy and Greece*, Urteil v. 21. Januar 2014, Nr. 16643/09; EGMR (GK), *N. D. und N. T.* (Fn. 4); EGMR, *M. H. and Others v. Croatia*, Urteil v. 18. November 2021, Nr. 157679/18 und 43115/18.

64 EGMR, *Hirsi Jamaa* (Fn. 2).

on hat in der jüngeren Rechtsprechung des EGMR besondere Relevanz erlangt, worauf wir noch zurückkommen werden.

## III. Migrationsskepsis und zwischenstaatliche Perspektive – Der Topos der Massenausweisung im zeithistorischen Kontext

Obwohl die menschenrechtlichen Konturen des Verbots der Kollektivausweisung Mitte der 1980er Jahre jedenfalls in der Rechtsprechung der EKMR bereits klar erkennbar waren, konzipierte Karl Doehring das Verbot der Massenausweisungen ausschließlich aus einer klassischen-völkerrechtlichen Perspektive, die zwischenstaatliche Beziehungen ins Zentrum stellt und Rechte von Individuen nur ausnahmsweise in den Blick nimmt (1.). Dieser Zugriff auf das Thema mag einerseits dem Umstand geschuldet sein, dass das Verbot der Kollektivausweisung im Kontext der Migrationskontrolle in den 1980er Jahren noch wenig prominent war. Der starke Fokus auf staatliche Souveränität im Umgang mit Fremden erklärt sich aber auch aus den rechts- und vor allem migrationspolitischen Diskursen seiner Zeit (2.). Die bald darauf einsetzende umfassende „Vermenschenrechtlichung" migrationspolitischer und -rechtlicher Diskurse hatte sich im Entstehungszeitpunkt des Texts allenfalls angedeutet (3.). Zeugnis davon sind Verweise auf individualrechtsschützende Elemente im Verbot der Massenausweisung bei Doehring.

### 1. Das Verbot der Massenausweisung im zwischenstaatlich-völkerrechtlichen Paradigma

Doehring verortete das Verbot der Massenausweisung in erster Linie im Völkergewohnheitsrecht.[65] Sein argumentativer Ausgangspunkt war, dass das Völkerrecht den Staaten grundsätzlich „weites Ermessen" im Falle von Einzelausweisungen einräumt. Er erkannte zwar an, dass diese „gewohnheitsrechtliche Freiheit" durch Menschenrechte teilweise beschränkt sei, widmete dieser Frage aber keine weitere Aufmerksamkeit.[66] Bei Massenausweisungen sei „die Staatengemeinschaft" dagegen zunehmend der Auffassung, dass Staaten zumindest einer strikten Begründungspflicht unterlägen.[67] Solche Aus-

65 Doehring, 'Massenausweisung' (Fn. 12), 374.
66 Doehring, 'Massenausweisung' (Fn. 12), 373 f.
67 Doehring, 'Massenausweisung' (Fn. 12), 374.

weisungen seien leicht als „willkürlich" zu charakterisieren, wenn sie nicht durch „ganz spezifische Gründe" gerechtfertigt seien.[68] Dieser allgemeine Grundsatz könne durch vertragliche Vereinbarungen zwischen den Staaten verdrängt werden.[69] Als Beispiel für ein vertragliches Verbot nannte Doehring Verbote von Massenausweisungen in menschenrechtlichen Verträgen.[70] Die entsprechende Fußnote blieb die einzige explizite Erwähnung der menschenrechtlichen Verbote der Kollektivausweisung in Art. 4 ZP 4 EMRK, Art. 22 (9) AMRK und in Art. 12 (5) der African Charter on Human and Peoples' Rights.[71]

Dieser Hinweis auf menschenrechtliche Normen spielte in Doehrings weiterer Argumentation praktisch keine Rolle mehr. Insbesondere ging es ihm nicht um die Frage, wie die entsprechenden Vorschriften auszulegen waren oder gegen welche staatliche Praxis sie in Anschlag gebracht werden konnten. Der Schutzbereich der menschenrechtlichen Verbote blieb im Dunkeln. Diese dürftige Auseinandersetzung kontrastiert mit den Untersuchungen von Guy Goodwin-Gill, der sich ebenfalls mit der Frage der Rechtmäßigkeit von Ausweisungen im Völkerrecht beschäftigte, dabei aber bereits 1976 die Menschenrechtsverträge ausführlich würdigte.[72] Anknüpfungspunkt für Doehrings rechtsdogmatische Überlegungen waren dagegen mögliche Rechtfertigungsgründe, die die gewohnheitsrechtlich (sic!) verbotene Massenausweisung ausnahmsweise rechtfertigen können.

Rechtfertigungsgründe konnten sich nach Doehring insbesondere aus dem Recht der Staatenverantwortlichkeit und hier konkret aus dem Selbsterhaltungsrecht (Art. 33 des International Law Commission (ILC)-Entwurfs zu Staatenverantwortlichkeit von 1980[73]) ergeben.[74] Massenausweisungen waren danach gerechtfertigt, wenn sie die einzige Möglichkeit darstellen, „ernstliche Gefahren" für das Interesse und die Erhaltung des Staates abzuwehren. Zwar müsse die Massenausweisung den Anforderungen der Verhältnismäßigkeit genügen und sei möglicherweise „problematisch", wenn sie zugleich eine Verletzung von Menschenrechten darstelle und damit gegen *jus cogens* verstoße.[75] Interessanterweise ging Doehring aber davon aus, dass „im äußersten Falle das Selbsterhaltungsrecht vorrangig" sei, sofern der Staat die Lage nicht

68 Doehring, 'Massenausweisung' (Fn. 12), 374.
69 Doehring, 'Massenausweisung' (Fn. 12), 374.
70 Doehring, 'Massenausweisung' (Fn. 12), 375.
71 Doehring, 'Massenausweisung' (Fn. 12), 375.
72 Goodwin-Gill (Fn. 11), 135 ff., 139-143.
73 ILC, 'Draft Articles on State Responsibility', (1980), ILCYB, Vol. II, Part Two, 30.
74 Doehring, 'Massenausweisung' (Fn. 12), 377.
75 Doehring, 'Massenausweisung' (Fn. 12), 377.

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selbst verschuldet habe.[76] Bemerkenswert ist diese Argumentation gleich auf zwei Ebenen.

Zum einen verstand Doehring nicht die Massenausweisung selbst als Menschenrechtsverletzung, sondern sah nur dann ein Problem, wenn die Ausweisung zugleich ein (anderes) Menschenrecht verletzt. Doehring nannte insbesondere Existenzgefährdungen durch den Verlust des Eigentums oder die Trennung von Familienmitgliedern.[77] Dies entsprach nicht dem bereits 1985 etablierten Verständnis der EKMR, wonach sich aus Art. 4 ZP 4 EMRK selbst bereits ein prozedurales Recht auf individuelle Prüfung der Ausweisung ergibt und damit die Kollektivausweisung selbst die Menschenrechtsverletzung darstellt. Auch Goodwin-Gill stellte bereits 1976 fest, dass eine Ausweisung nicht nur indirekt die Rechte aus Art. 3, 5, 8 und 14 EMRK verletzen könne, sondern Art. 4 ZP 4 EMRK darüber hinaus die Ausweisung als solche reguliere.[78] Für Doehring dagegen war die Kollektivausweisung fremder Staatsangehöriger nicht per se verboten, sondern verstieß nur dann gegen zwingende Normen des Völkerrechts, wenn „gleichzeitig durch sie oder durch ihre Durchführung Menschenrechte verletzt werden".[79] Zum „reinen Tatbestand der Massenausweisung" musste „eine weitere Rechtsverletzung hinzutreten […], will man in ihr einen Verstoß gegen zwingendes Recht sehen."[80]

Bemerkenswert ist zum anderen, dass Doehring das Selbsterhaltungsrecht des Staates letztlich über den Schutz der Menschenrechte stellte, wenn auch nur „im äußersten Falle". Wann ein solcher vorlag, buchstabierte er nicht aus. Da Doehring im weiteren Verlauf der Argumentation aber insbesondere auf Kriegszustand und Bürgerkrieg zu sprechen kam, erscheint es naheliegend, dass er den Vorrang der staatlichen Selbsterhaltung vor allem in diesem Kontext sah, mit der Einschränkung auf verhältnismäßige Maßnahmen.[81] Dies ist insbesondere vor dem Hintergrund wenig überzeugend, dass Art. 33 Abs. 2 lit. a der ILC-Draft Articles von 1980 eine Berufung auf einen Notstand dann ausschließt, wenn die betreffende Maßnahme gegen *jus cogens* verstößt. Gerade einen solchen Verstoß sah aber auch Dohering selbst bei einem gleichzeitigen Verstoß der Massenausweisung gegen Menschenrechte als gegeben an.[82]

76 Doehring, 'Massenausweisung'(Fn. 12), 377.
77 Doehring, 'Massenausweisung' (Fn. 12), 380.
78 Goodwin-Gill (Fn. 11), 137 ff.
79 Doehring, 'Massenausweisung' (Fn. 12), 382.
80 Doehring, 'Massenausweisung' (Fn. 12), 383.
81 Doehring, 'Massenausweisung' (Fn. 12), 377 f.
82 Doehring, 'Massenausweisung' (Fn. 12), 382.

Die Rechtswidrigkeit von Massenausweisungen aus völkerrechtlicher Perspektive wurde bei Doehring also von Beginn an zwischenstaatlich konzipiert. Zwar erwog der Autor kurz, ob individueller „Gerichtsschutz in diesem Fall gefordert werden kann", verwarf dies aber als „zweifelhaft".[83] Die Einhaltung der Rechtfertigungspflicht sollte, ganz im Sinne eines klassisch-völkerrechtlichen Zugangs, über das Recht der Staatenverantwortlichkeit erfolgen, was aus Doehrings Sicht auch den Interessen des Individuums hinreichend Rechnung trug. Der Staat der Staatsangehörigkeit der ausgewiesenen Personen habe nämlich ein Recht auf Wiedergutmachung, wenn seine Staatsangehörigen willkürlich, d. h. ohne entsprechenden Rechtfertigungsgrund ausgewiesen würden.[84] Diese Forderung könne er im Wege des diplomatischen Schutzes geltend machen. Ausnahmsweise müsse hier auch die Aufnahme fremder – und nicht nur eigener – Staatsangehöriger verlangt werden können, da sonst das Verbot der Massenausweisung leerlaufe.[85] Die Durchsetzung der völkerrechtlichen Rechtfertigungspflicht von Massenausweisungen und ihr Verbot im Falle des Fehlens entsprechender Rechtfertigungsgründe erfolgte also strikt zwischenstaatlich.

## 2. Souveränität über Migrationskontrolle im zeithistorischen Kontext

Die zwischenstaatliche Perspektive auf das Verbot der Massenausweisung reflektiert zum einen den Umstand, dass die Omnipräsenz menschenrechtlicher Argumentation wie wir sie heute im Kontext des Ausweisungsrechts und allgemeiner im Kontext des Migrationsrechts kennen, Mitte der 1980er Jahre noch weit entfernt schien. Entsprechende Argumente, die die Ausweisung fremder Staatsangehöriger als Menschenrechtsverletzung verstanden, existierten zwar in der Praxis der EKMR und in der Literatur, waren aber noch nicht breit rezipiert.[86] Doehring sah zwar, dass Massenausweisungen zu Migration führen könnten. Wie stark aber das Verbot der Massenausweisung bzw. der Kollektivausweisung auch den Handlungsspielraum des Aufenthaltsstaates von Migrant:innen einschränken würde, war für ihn noch nicht präsent. Die EKMR selbst hat die Grundlagen für das heutige Verständnis von Art. 4 ZP4 EMRK zwar bereits 1975 gelegt,[87] aber erst

83 Doehring, 'Massenausweisung' (Fn. 12), 379.
84 Doehring, 'Massenausweisung' (Fn. 12), 379.
85 Doehring, 'Massenausweisung' (Fn. 12), 379 f.
86 Siehe insbesondere Goodwin-Gill (Fn. 11), 91, 137 ff.
87 EKMR, *Becker* (Fn. 29).

2002 stellte der EGMR erstmals eine Verletzung der Vorschrift fest.[88] Auch einen Verstoß gegen das menschenrechtliche Refoulementverbot stellte der EGMR erst Ende der 1980er Jahre erstmals fest.[89] Obwohl Ausweisungsfälle bereits lange zuvor als Verletzung von Art. 3 EMRK thematisiert worden waren, erfuhren sie Aufmerksamkeit und Breitenwirksamkeit im migrationsrechtlichen Kontext erst mit der ersten Feststellung einer Verletzung; der Gerichtshof „erwachte" insofern spät.[90] Dies gilt auch für die Feststellung des Verstoßes einer Ausweisung gegen Art. 8 EMRK, die erstmals 1988 erfolgte.[91] Erst diese Entscheidungen gaben der „Vermenschenrechtlichung" des Migrationsrechts Sichtbarkeit und höchstgerichtliche Autorität – und damit den entscheidenden Schub.[92] Doehrings Text erscheint somit einerseits als Teil des völkerrechtlichen Mainstreams seiner Zeit, der den Schritt zur vollen Anerkennung des Individuums als Völkerrechtssubjekt noch nicht nachvollzogen hat. Andererseits waren die entsprechenden Argumente aber bereits verfügbar und wurden von Doehring schlicht nicht rezipiert.

Doehrings Aufsatz erscheint noch in einem weiteren Sinne als „Kind seiner Zeit". Doehring zog klare Grenzen für das Verbot der Massenausweisung und meinte, dass diese insbesondere dort gerechtfertigt seien, wo der Staat schutzsuchende „Fremde aufnimmt, diese Last aber ohne eigene Gefährdung nicht unbegrenzt übernehmen kann".[93] Einem Staat könne keine Pflicht auferlegt werden, „Massen von Fremden zu beherbergen, zu deren Aufnahme er nicht verpflichtet war", weil das Völkerrecht eben kein Recht auf Asyl kenne.[94] Dies spiegelt die öffentliche Debatte der 1980er Jahre. Bereits bevor 1986 die Unionsparteien eine vor allem von der BILD-Zeitung unterstützte mediale Kampagne gegen sog. „Asylschwindler" und „Asylbetrüger" begannen,[95] berichtete der Spiegel schon 1980 von zahlreichen Bürgerinitiativen „gegen Überfremdung" und wachsendem Fremdenhass in Deutschland.[96] Der neue Bundeskanzler Helmut Kohl nannte in seiner ersten Regierungserklärung 1982 die Ausländerpolitik als eines von vier Schwer-

88 EGMR, *Čonka* (Fn. 61).

89 EGMR, *Soering v. UK*, Urteil v. 7. Juli 1989, Nr. 14038/88.

90 Marie-Bénédicte Dembour, *When Humans Become Migrants* (Oxford University Press 2015), 196-249.

91 EGMR, *Berrehab v. The Netherlands*, Urteil v. 21. Juni 1988, Nr. 10730/84.

92 Bast (Fn. 3), 211.

93 Doehring, 'Massenausweisung' (Fn. 12), 378.

94 Doehring, 'Massenausweisung' (Fn. 12), 378.

95 Ulrich Herbert, *Geschichte der Ausländerpolitik in Deutschland* (2. Aufl., C.H. Beck 2017), 299 f.

96 'Raus mit dem Volk', Der Spiegel 38/1980, 19.

punktthemen, wobei es insbesondere darum gehe, unbegrenzte und unkontrollierte Zuwanderung zu verhindern.[97]

Doehrings Text nahm diesen Diskurs nicht explizit in Bezug. Unabhängig davon, wie Doehring selbst sich in dieser Debatte positioniert haben mag, stellt diese Auseinandersetzung jedenfalls den Kontext für Doehrings Argument dar, dass die Grenzen der Aufnahmefähigkeit eines Staates Massenausweisungen rechtfertigen könnten. Den allgemeinen diskursiven Kontext reflektiert ein zweiter Rechtfertigungsgrund, den Doehring ins Feld führte. Aus seiner Sicht konnte eine Massenausweisung auch „gerade zum Schutze der Fremden" erfolgen.[98] Dies sei etwa dann der Fall, wenn der Aufnahmestaat wegen faktischer Unmöglichkeit nicht die notwendige Existenzgrundlage bieten könne oder es „trotz aller Bemühungen es nicht verhindern kann, daß die fremde Bevölkerungsgruppe unter intensiver Bedrohung anderer Gruppen steht".[99] Jenseits internationaler Beispiele, lässt sich auch diese Bemerkung auf den Kontext der ausländerfeindlichen Stimmung im Deutschland der 1980er Jahre rückbeziehen. Seit Beginn der 1980er Jahre waren verstärkt gewalttätige Straftaten gegen Ausländer:innen zu beobachten,[100] die ihren Höhepunkt in den fremdenfeindlichen Ausschreitungen gegen Flüchtlings- bzw. Ausländer:innenunterkünfte in Hoyerswerda (1991) und Rostock-Lichtenhagen (1992) und dem Mordanschlag auf ein von türkischen Familien bewohntes Wohnhaus in Solingen (1993) fanden. Ob diese „Bedrohungen" von Migrant:innen in Deutschland für Doehring bereits als Rechtfertigung einer Massenausweisung ausreichend gewesen wären, kann man bezweifeln. Es lässt sich aber nicht von der Hand weisen, dass die These zu den Grenzen der Aufnahmekapazität und der Unmöglichkeit, „Fremden" Schutz vor gewaltsamer Bedrohung zu gewährleisten, jedenfalls dem Zeitgeist der konservativen migrationspolitischen Debatte entsprach.

Doehring selbst hat sich in seiner früheren Forschung zwar einerseits für völkerrechtliche Mindeststandards im Umgang mit fremden Staatsangehörigen ausgesprochen, die er auch als individualrechtliche Positionen verstand,[101] andererseits aber immer davor gewarnt, diesen zu viele Rechte zuzugestehen, weil dies Migrant:innen von ihrem Heimatstaat und der spezifischen Treueverpflichtung zu diesen „entfremden" könnte.[102] Die Vor-

97 Helmut Kohl, Koalition der Mitte: Für eine Politik der Erneuerung, Regierungserklärung vom 13. Oktober 1982, Bulletin, Nr. 93, Bonn, 14. Oktober 1982, 853-868.

98 Doehring, 'Massenausweisung' (Fn. 12), 378.

99 Doehring, 'Massenausweisung' (Fn. 12), 378.

100 Dazu 'Raus mit dem Volk', Der Spiegel 38/1980 (Fn. 96).

101 Karl Doehring, Die allgemeinen Regeln des völkerrechtlichen Fremdenrechts und das deutsche Verfassungsrecht (Carl Heymanns Verlag 1963), 53 ff.

102 Karl Doehring, 'Die staatsrechtliche Stellung des Ausländers in der Bundesrepublik Deutschland', VVDStRL 32 (1974), 7, 20 f.

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stellung einer eindeutigen Zuordnung von Individuen zu einem Staat, der primär zwischenstaatliche und nicht individualrechtliche Blick auf das Phänomen der Migration und die Idee, dass Staaten grundsätzlich – von den engen Grenzen des völkerrechtlichen Fremdenrechts abgesehen – über Souveränität im Umgang mit Migrant:innen verfügen, durchzog Doehrings Arbeit.[103]

## 3. Spuren menschenrechtlicher Argumentation im Kontext von Massenausweisungen

Trotz dieser grundsätzlich zwischenstaatlichen und souveränitätsorientierten Argumentation finden sich in Doehrings Text auch Passagen, die sich als erste Spuren menschenrechtlicher oder zumindest individualrechtlicher Argumentation verstehen lassen. Dies zeigt sich in der expliziten Referenz auf die Möglichkeit von Menschenrechtsverletzungen durch Massenausweisungen (a) und in der Betonung des besonderen Unrechtsgehalts indirekter Ausweisungen (b).

### a) Menschenrechtsverletzungen durch Massenausweisungen

Auch wenn Doehring in der Massenausweisung selbst keine Menschenrechtsverletzung sah, erkannte er an, dass (Massen-)ausweisungen eine Verletzung von Menschenrechten, insbesondere des Rechts auf Eigentum und auf Familieneinheit, mit sich bringen können.[104] Wie bereits dargelegt, wertete Doehring solche Menschenrechtsverletzungen als potenzielle Verletzungen des völkergewohnheitsrechtlichen *jus cogens*, die jedoch „im äußersten" Fall dennoch hinter Sicherheitsinteressen des Staates zurücktreten müssten. Auf vertraglich gewährleistete Menschenrechte oder gar die gerichtlich auch 1985 schon mögliche Durchsetzung von Menschenrechten insbesondere vor den regionalen Menschenrechtsgerichtshöfen ging Doehring indes nicht ein.

Interessant ist vor diesem Hintergrund, dass Doehring zwar anerkannte, dass selbst bei gerechtfertigten Massenausweisungen etwaige Menschenrechtsverletzungen durch Drittstaaten berücksichtigt werden müssten.[105] Menschenrechtsverletzungen durch den Heimatstaat nahm er dagegen nicht

103 Dazu: Farahat, *Progressive Inklusion* (Fn. 56), 100 ff., 117 f.
104 Doehring, 'Massenausweisung' (Fn. 12), 382.
105 Doehring, 'Massenausweisung' (Fn. 12), 378.

in den Blick, sondern insistierte stattdessen darauf, dass dieser eine Wiederaufnahmepflicht für eigene Staatsangehörige habe, die im Zweifelsfall auch mit Repressalien eingefordert und durchgesetzt werden könne. Doehrings konsequent zwischenstaatlicher Blick auf das Thema Massenausweisung überrascht vor dem Hintergrund seiner eigenen Pionierarbeit im Recht des diplomatischen Schutzes. Nicht zuletzt seinem Werk ist es zu verdanken, dass Rechtsverletzungen gegenüber Individuen im Ausland heute eben nicht mehr nur als Verletzung der Rechte des Heimatstaates verstanden werden, sondern je nach Schutzrichtung auch eine Verletzung von Individualrechten beinhalten.[106] Überlegungen, die an diese Erkenntnisse anschließen, sucht man in seinem Beitrag zu Massenausweisungen vergeblich. Der Vorgang der Massenausweisung selbst war für ihn kein individualrechtliches Thema und das Verbot derselben rein zwischenstaatlich ausgerichtet. Dass die Durchsetzung etwaiger Rechtsverletzungen dabei von ihm nur zwischenstaatlich gedacht wurde, ist zumindest insofern konsequent als Doehring auch im Bereich des diplomatischen Schutzes das Recht zur Durchsetzung einer Rechtsverletzung weiterhin allein beim Heimatstaat und nicht bei dem in seinen Rechten verletzten Individuum sah.[107] Das Individuum wurde völkerrechtlich konsequent durch den Heimatstaat mediatisiert.[108]

### b) Der besondere Unrechtsgehalt indirekter Massenausweisungen – Ansätze rechtstaatlicher Anforderungen

Doehring unterschied in seinem Text zwischen direkter und indirekter Massenausweisung. Während die direkte Ausweisung sich nach seiner Vorstellung aus einer klaren staatlichen Anweisung zum Verlassen des Staatsgebiets ergab, trat die indirekte Form als „Druckausübung" in Erscheinung.[109] Dies könne insbesondere durch Verbote der Freizügigkeit, der Arbeitsaufnahme, der Religionsausübung oder der Familiengründung erfolgen. Zwar sei nicht jede dieser Maßnahmen für sich genommen schon als völkerrechtswidrig zu qualifizieren. Dennoch liege in dieser indirekten Form der Vertreibung ein besonderer Unrechtsgehalt.[110] Dieser ergab sich für Doehring vor allem daraus, dass anders als bei einer expliziten und veröffentlichten Ausweisung im Falle der indirekten Ausweisung deren Ausmaß und das intentionale Zusammenwirken unterschiedlicher Maßnahmen nicht klar er-

106 Doehring, 'Fremdenrecht' (Fn. 101), 53 ff., 107 ff.
107 Doehring, 'Fremdenrecht' (Fn. 101), 110 ff.
108 Doehring, 'Fremdenrecht' (Fn. 101), 23.
109 Doehring, 'Massenausweisung' (Fn. 12), 384.
110 Doehring, 'Massenausweisung' (Fn. 12), 384.

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kennbar sei. Es entstehe eine spezifische Rechtsunsicherheit, für die die Staatsgewalt des Aufnahmestaats verantwortlich sei und die dazu führe, dass die indirekte Massenausweisung nicht unter den gleichen Bedingungen zulässig sei wie die direkte.[111] Während nämlich die direkte Massenausweisung nur bei entsprechender Begründung gerechtfertigt sei, sei eine solche Begründungspflicht bei der indirekten Massenausweisung per definitionem nicht möglich, weil das eigentliche Ziel der kombinierten Vertreibungsmaßnahmen nicht offen kommuniziert werde. Der Heimatstaat der Betroffenen habe daher effektiv keine Reaktionsmöglichkeit und könne die Rechtfertigungsgründe auch nicht überprüfen. Indirekte Massenausweisungen seien daher „prima facie eine Verletzung des Völkerrechts", sofern damit gerade die Ausreise von Individuen bezweckt werde.[112]

Diese Argumentation wurde von Doehring zwar nicht mit rechtstaatlichen Verfahrensanforderungen begründet, lässt sich aber leicht in diesem Sinne deuten. Doehring kam es hier gerade auf eine transparente, formalisierte und im konkreten Fall begründete Ausweisungsentscheidung an, damit die betroffenen Heimatstaaten entsprechend zugunsten der betroffenen Individuen einschreiten könnten. Wenn man von der heimatstaatlichen Mediatisierung des Individuums absieht, ist diese Argumentation erstaunlich nah an der bereits dargelegten Argumentation der EKMR zu Art. 4 ZP 4 EMRK. Ob Doehring bei genauerer Kenntnisnahme dieser Rechtsprechung jede individuelle Ausweisungsentscheidung ohne entsprechende prozedurale Würdigung des Einzelfalls als rechtswidrig eingestuft hätte, bleibt Spekulation. Sein Insistieren auf einer Begründungspflicht und einer formalisierten Entscheidung ist aber für ein solches Normverständnis jedenfalls anschlussfähig.

Die Argumentationsfigur der indirekten Massenausweisung hat sich in den heutigen Auseinandersetzungen über das Verbot der Kollektivausweisung bislang nicht niedergeschlagen. Entsprechende Argumente wurden vom EGMR sogar explizit abgelehnt.[113] Vor dem Hintergrund zunehmender Versuche, Migrationskontrolle durch Sanktionen beim Sozialleistungsbezug oder Beschränkungen der Leistungen auf Sachleistungen und Bezahlkarten durchzusetzen,[114] bietet die Figur aber durchaus Potenzial auch für heutige Konfliktlagen. Wann tatsächlich die Schwelle zu einer indirekten Massenausweisung durch gezielte Deprivation erreicht ist, ließ Doehring offen. Die aktuelle

111 Doehring, 'Massenausweisung' (Fn. 12), 385.

112 Doehring, 'Massenausweisung' (Fn. 12), 385.

113 EGMR, *Berdzenishvili* (Fn. 60), Rn. 81 und, etwas ausführlicher EGMR, *Shioshvili* (Fn. 60), Rn. 70-72. Zur Thematik der indirekten Kollektivausweisungen siehe Riemer (Fn. 16), 95-99.

114 Dazu Bast, von Harbou und Wessels (Fn. 32), 208 ff.

Praxis der „planned destitution“[115] im europäischen Migrationsrecht ist im Lichte sozialer Menschenrechte und dem Schutz der Menschenwürde problematisch.[116] Der EGMR hat zudem festgestellt, dass die Lebensbedingungen in den Lagern („Hotspots“) an den europäischen Außengrenzen mitunter gegen Art. 3 EMRK verstoßen.[117] Doehrings Überlegungen zur indirekten Ausweisung könnten Anlass bieten, diese Praktiken auch im Lichte des Verbots der Kollektivausweisungen zu diskutieren, soweit sie auf informelle Weise die Ausreise der betroffenen Personen erzwingen.

## IV. Migration zwischen Menschenrechten und staatlicher Souveränität – wo stehen wir heute?

Noch vor 20 Jahren wurde das Migrationsrecht als „the last bastion of sovereignty“[118] bezeichnet. Heute lässt sich nicht mehr bestreiten, dass staatliche Migrationskontrolle am normativen Maßstab der Menschenrechte zu messen und damit erheblich eingeschränkt ist. Der Rechtsprechung des EGMR kam in diesem Prozess der „Vermenschenrechtlichung“ eine zentrale Rolle zu.[119] Ungeachtet dessen wird der staatliche Anspruch, souverän über die Inklusion und Exklusion von Ausländer:innen zu entscheiden, weiter formuliert. Der Gerichtshof, der diesen Anspruch in ständiger Rechtsprechung ausdrücklich anerkennt,[120] bewegt sich in Migrationsfragen stets im Spannungsfeld zwischen Menschenrechten und staatlicher Souveränität und sieht sich Kritik von beiden Seiten ausgesetzt.[121]

Vergleichsweise neu ist die Vehemenz, mit der Kritik unmittelbar gegen die Institution des Gerichtshofs und seine Legimität und/oder die menschenrechtliche Bindung als solche formuliert wird.[122] Zugleich streiten Staaten

115 Dieser Begriff geht zurück auf Eve Lester, *Making Migration Law* (Cambridge University Press 2018), 235. Zu ‘planned destitution’ als Strategie der Abschreckung von Migrant:innen Lieneke Slingenberg, *The Reception of Asylum Seekers Under International Law: Between Sovereignty and Equality* (Bloomsbury 2014), 2.

116 Bast, von Harbou und Wessels (Fn. 32), 215 ff.

117 EGMR, *R. R. and Others v. Hungary*, Urteil v. 2. März 2021, Nr. 36037/17; EGMR, *J. A. and Others v. Italy*, Urteil v. 30. März 2023, Nr. 21329/18; EGMR, *A. D. v. Greece*, Urteil v. 4. April 2023, Nr. 55363/19.

118 Catherine Dauvergne, ‘Sovereignty, Migration and the Rule of Law in Global Times’, M. L. R. 67 (2004), 588-615 (588).

119 Bast et al. (Fn. 3), 2; Bast (Fn. 3), 210 f.

120 Siehe o. Fn. 17 m. w. N.

121 Dembour, *When Humans Become Migrants* (Fn. 90), 302 ff.; Marc Bossuyt, ‘Judicial Activism in Strasbourg’ in: Karel Wellens (Hrsg.), *International Law in Silver Perspective* (Brill Nijhoff 2015), 31-56 (37 ff.).

122 Exemplarisch: Alice Donald und Philip Leach, ‘The UK vs the ECtHR’, Verfassungsblog, 5. Mai 2023, doi: 10.17176/20230505-204527-0.

innerhalb des Menschenrechtsdiskurses um souveräne Handlungsspielräume in Bezug auf Migration und wirken dabei auf deren (Re-)Interpretation ein (1.).[123] Es lassen sich aber auch Tendenzen der „Verzwischenstaatlichung" erkennen, mit denen die EU-Mitgliedstaaten ihrer menschenrechtlichen Verantwortung zu entkommen versuchen (2.).

## 1. Die neuere EGMR-Rechtsprechung zum Kollektivausweisungsverbot: zwischen eigenständigem Verfahrensrecht und akzessorischer Logik

Es ist keine Überraschung, dass insbesondere das Kollektivausweisungsverbot besonders umstritten ist, denn gerade die Staatsgrenze ist der Ort, an dem der Konflikt zwischen Souveränität und Menschenrechten die weitreichendsten Folgen nach sich zieht – sowohl in symbolischer als auch in rechtlicher Hinsicht. Doehring gestand Staaten explizit das Recht zu „Abwehrmaßnahmen" zu ergreifen, indem sie ihre Grenzen schließen und Nicht-Staatsangehörigen pauschal die Einreise verweigern.[124] Im Gegensatz dazu vermittelt Art. 4 ZP 4 EMRK heute im Ergebnis ein Recht auf (vorläufige) Einreise zum Zweck der Durchführung eines (minimalen) Verfahrens zur individuellen Statusbestimmung.

In der Entscheidung *Hirsi Jamaa gegen Italien*[125] (2012) war der EGMR erstmals mit der Frage konfrontiert, ob auch die Ausübung extraterritorialer Migrationskontrolle auf hoher See – konkret die unmittelbare Zurückschiebung von auf Booten aufgegriffenen Personen nach Libyen – an den Verfahrensstandards des Kollektivausweisungsverbots zu messen ist. Der Gerichtshof stellte zunächst fest, dass die Beschwerdeführenden sich zwar nicht auf italienischem Staatsgebiet, jedoch unter der „continuous and exclusive *de jure* and *de facto* control"[126] italienischer Behörden und folglich unter italienischer Hoheitsgewalt (jurisdiction) befunden hatten. Der Anwendungsbereich der EMRK war damit eröffnet. Darüber hinaus bejahte die Große Kammer auch den sachlichen Schutzbereich von Art. 4 ZP 4 EMRK, indem sie die extraterritoriale Zurückweisung als „Ausweisung" im Sinne der Norm

123 Mikael Mask Radsen, Pola Cebulak und Micha Wiebusch, 'Backlash Against International Courts: Explaining the Forms and Patterns of Resistance to International Courts', International Journal of Law in Context 14 (2018), 197-220 (201); Anuscheh Farahat, 'Human Rights and the Political: Assessing the Allegation of Human Rights Overreach in Migration Matters', NQHR 40 (2022), 180-201 (191 ff.); Wessels (Fn. 5), 215.

124 Doehring, 'Massenausweisung' (Fn. 12), 388.

125 EGMR, *Hirsi* (Fn. 2).

126 EGMR, *Hirsi* (Fn. 2), Rn. 81.

qualifizierte. Der EGMR betonte dabei den Gleichlauf zwischen dem Anwendungsbereich der EMRK (Art. 1 EMRK) und dem Schutzbereich des Kollektivausweisungsverbots. Damit erteilte der Gerichtshof einer migrationsspezifischen Ausnahme von der grundsätzlichen menschenrechtlichen Bindung eine Absage. Im Gegenteil: Durch den engen Zusammenhang zwischen dem Kollektivausweisungsverbot und Maßnahmen der Migrationskontrolle ist es nur folgerichtig, wenn die Verfahrensrechte aus Art. 4 ZP 4 EMRK überall dort gelten, wo solche Maßnahmen stattfinden.[127]

Gegen die Konsequenzen dieser Entscheidung wehren sich Staaten der Europäischen Union systematisch und koordiniert vor dem EGMR. Die jüngere Forschung zum strategischen Verhalten von Staaten vor dem EGMR zeigt, dass diese über verschiedene Techniken darauf Einfluss nehmen, welche Fälle es vor den Gerichtshof schaffen, z. B. durch gezielte Erledigung von Fällen.[128] Als „repeat player" koordinieren die Staaten auch ihre Begründungsstrategien in strategisch wichtigen Fällen.[129] In der Rechtssache *Khlaifia u. a.* gelang es Italien, eine von der Kammer[130] des EGMR festgestellte Verletzung von Art. 4 ZP 4 in der Beschwerdeinstanz vor der Großen Kammer[131] aufheben zu lassen. Die Kammer hatte persönliche Interviews mit den Beschwerdeführenden für notwendig erachtet, um eine ordnungsgemäße und individuelle Prüfung jedes Einzelfalles sicherzustellen.[132] Die Große Kammer hielt hingegen die bloße Möglichkeit für ausreichend, die Aufmerksamkeit der Behörden auf Umstände zu lenken, die gegen die eigene Abschiebung sprechen.[133]

Während diese Entscheidung den Inhalt der Verfahrensgarantien des Kollektivausweisungsverbotes empfindlich beschränkte, gelang es Spanien wenige Jahre später sogar eine Schutzbereichsausnahme zu erwirken, welche die Anwendbarkeit der Vorschrift in bestimmten Konstellationen gänzlich ausschließt: Der Fall *N. D. und N. T. gegen Spanien*[134] hat die Praxis der „heißen Zurückweisungen" (devoluciones en caliente)[135] an der Grenze zwischen

127 Die gilt umso mehr, als sich Staaten anderenfalls durch Strategien der Externalisierung ihrer menschenrechtlichen Verpflichtungen entziehen könnten, siehe Farahat, 'Human Rights and the Political' (Fn. 123), 195.

128 Dazu ausführlich Wessels (Fn. 5), 216-217.

129 Wessels (Fn. 5), 217.

130 EGMR, *Khlaifia and Others v. Italy*, Urteil v. 1. September 2015, Nr. 16483/12.

131 EGMR (Große Kammer), *Khlaifia and Others v. Italy*, Urt. v. 15. Dezember 2016, Nr. 16483/12.

132 EGMR, *Khlaifia* (Fn. 130), Rn. 156.

133 EGMR (GK), *Khlaifia* (Fn. 131), Rn. 248 f.

134 EGMR, *N. D. und N. T. v. Spain*, Urteil v. 3. Oktober 2017, Nr. 8675/15 und 8697/15.

135 Illustrativ zu dieser Praxis und ihrer Geschichte im Spanischen Recht siehe Clara Bosch March, 'From Melilla to Strasbourg. Unpacking the Spanish Inspiration in the ECtHR's volteface on Article 4 of Protocol No. 4 ECHR at the Moroccan-Spanish Border', Peace & Security-Paix et Sécurité Internationales 12 (2024), 6 ff.

Marokko und der spanischen Enklave Melilla zum Gegenstand. Die Beschwerdeführenden hatten als Teil einer größeren Gruppe die gesicherten Grenzzäune überwunden, wurden jedoch auf der spanischen Seite der Grenze unmittelbar aufgegriffen und in Handschellen zurück nach Marokko gebracht.[136] Da diese Rückschiebung ohne jegliches Verfahren erfolgte und die betroffenen Personen – anders als die Beschwerdeführenden in *Khlaifia* – nicht einmal identifiziert wurden, stellte eine Kammer des EGMR einen Verstoß gegen das Kollektivausweisungsverbot fest.[137]

Auch hier hatte die Beschwerde gegen die Kammerentscheidung Erfolg. Die Große Kammer bestätigte zwar die *Hirsi*-Rechtsprechung insofern sie den Sachverhalt als Ausweisung bewertete.[138] Allerdings sei diese nicht als Kollektivausweisung zu qualifizieren, da das Fehlen einer individuellen Prüfung der persönlichen Umstände der Beschwerdeführenden auf ihr eigenes Verhalten (own conduct) zurückzuführen sei. Dieses liege darin begründet, dass sie die Grenze irregulärerweise, unter Ausnutzung der großen Anzahl von Personen, sowie unter Anwendung von Gewalt überquert hätten und dabei von vorhandenen legalen Zugangsmöglichkeiten keinen Gebrauch gemacht hätten.[139] Der letztgenannte Aspekt nimmt den größten Raum in der Subsumtion des Gerichtshofs ein. Insbesondere die faktischen Feststellungen, die der EGMR diesbezüglich trifft, werden heftig kritisiert.[140]

Die Argumentationslinie, die der Gerichtshof in *N. D. und N. T.* wählt, stand von vornherein nur deshalb offen, weil eine Verletzung des Refoulementverbots nicht Gegenstand des Verfahrens vor der Großen Kammer war. Soweit Schutzsuchende sich darauf berufen können, sich im Falle einer Rückschiebung der Gefahr unmenschlicher Behandlung im Heimat- oder Transitstaat ausgesetzt zu sehen, verstoßen Pushbacks nach wie vor gegen Art. 3 EMRK, ohne dass ein etwaiges „schuldhaftes" Verhalten der betreffenden Person Beachtung finden darf.[141] Der zentrale Mehrwert des Kollektivaus-

136 EGMR, *N.D und N. T.* (Fn. 134), Rn. 12.

137 EGMR, *N.D und N. T.* (Fn. 134), Rn. 107.

138 EGMR (GK), *N. D. und N. T.* (Fn. 4), Rn. 191.

139 EGMR (GK), *N. D. und N. T.* (Fn. 4), Rn. 201-231.

140 Exemplarisch: Hanaa Hakiki, 'N.D. and N. T. v. Spain: Defining Strasbourg's Position on Push Backs at Land Borders?', Strasbourg Observers, 26. März 2020.

141 Zum absoluten Charakter des Refoulementverbots und der Unbeachtlichkeit sogar schwerer Straftaten siehe die st. Rspr.: EGMR (Große Kammer), *Chahal v. UK*, Urteil v. 15. November 1996, Nr. 22414/93, Rn. 79; EGMR (Große Kammer), *Saadi v. Italy*, Urteil v. 28. Februar 2008, Rn. 37201/06, Rn. 127; zum Verhältnis der N. D./N. T.-Rechtsprechung zum Refoulementverbot: Constantin Hruschka, 'Hot Returns Remain Contrary to the ECHR: ND & NT Before the ECHR', EU Immigration and Asylum Law & Policy Blog, 28. Februar 2020, der zudem darauf hinweist, dass das Anküpfen an den irregulären Grenzübertritt im Anwendungsbereich der Genfer Flüchtlingskonvention auch gegen deren Pönalisierungsverbot (Art. 31 Abs. 1 GFK) verstoße.

weisungsverbots gegenüber dem Refoulementverbot besteht jedoch gerade darin, dass es verfahrensrechtlichen Schutz auch dann vermittelt, wenn beim Erscheinen an der Grenze (noch) keine Gründe erkennbar sind, die einen Anspruch auf internationalen Schutz begründen würden.[142] Weder die Beschwerdeführenden in *Khlaifia*, noch diejenigen in *N. D. und N. T.*, konnten – ex post betrachtet – einen entsprechenden Schutzbedarf geltend machen. Aus Sicht des Gerichtshofs diene die durch das Kollektivausweisungsverbot gewährleistete Einzelfallprüfung jedoch explizit dem mittelbaren Schutz vor Refoulement.[143]

Tatsächlich hat Art. 4 ZP 4 das Potenzial, den Zugang zu einem individuellen Verfahren menschenrechtlich abzusichern, sodass diejenigen, die schutzbedürftig sind, ihren Schutzbedarf auch vorbringen können. Die paradoxe Konsequenz der jüngeren EGMR-Rechtsprechung ist jedoch, dass die Notwendigkeit einer individuellen Prüfung des Schutzbedarfes davon abhängt, ob der Schutzbedarf im Ergebnis besteht: „Spanien hatte schlicht Glück, dass unter all den ungeprüft und eilrechtsschutzlos zurückgeschobenen Personen gerade die beiden Beschwerdeführer im Nachhinein keinen Abschiebeschutzbedarf plausibel machen konnten."[144] In Abweichung von seiner bisherigen Rechtsprechung untergräbt der Gerichtshof damit den verfahrensrechtlichen Charakter des Kollektivausweisungsverbots. Vergleichbar mit Doehrings Konzeption der Massenausweisung sieht der EGMR die Menschenrechtsverletzung nicht in der Willkür der Ausweisung per se, sondern fragt danach, ob durch die Ausweisung weitere Menschenrechte (hier: das Refoulementverbot) verletzt wurden.

Es ist offen, wie sich die Rechtsprechung des EGMR in dieser Thematik weiterentwickeln wird. In jüngsten Entscheidungen hat der Gerichtshof zwar einerseits für zahlreiche Abweisungen an der Grenze Verletzungen des Kollektivausweisungsverbots festgestellt.[145] Andererseits hat er die Schutzbereichsausnahme bei eigenem „schuldhaften" Verhalten dahingehend ausgeweitet, dass die irreguläre Einreise als solche – ungeachtet der Anwendung von Gewalt – den Schutz von Art. 4 ZP 4 entfallen lässt, solange legale Zugangsmöglichkeiten bestanden.[146] Im zuletzt entschiedenen Fall *M. A. und Z. R. gegen Zypern* handhabt der EGMR diese Ausnahme zwar eng, macht

142 Thym, 'Menschenrechtliche Trendwende?' (Fn. 33), 993 ff.

143 EGMR (GK), *N. D. und N. T.* (Fn. 4), Rn. 198.

144 Anna Lübbe, 'Pushbacks? Egal, wir machen das jetzt so', Verfassungsblog, 21. Januar 2022, doi: 10.17176/20220121-163207-0.

145 Nicht abschließend: EGMR, *M. K. and Others v. Poland*, Urteil v. 23. Juli 2020, Nr. 40503/17 u. a.; EGMR, *Shahzad* (Fn. 62); EGMR, *M. H. and Others* (Fn. 63); EGMR, *J. A.* (Fn. 117); EGMR, *M. A. and Z. R. v. Cyprus*, Urteil v. 9. Oktober 2024, Nr. 39090/20.

146 EGMR, *A. A.* (Fn. 4), Rn. 114 ff. Kritisch zur faktischen Feststellung legaler Zugangsmöglichkeiten in diesem Fall Wriedt (Fn. 4).

dies jedoch erneut von der Situation der Beschwerdeführenden als Asylsuchende abhängig und vertieft damit implizit die geschilderte Aushöhlung des Kollektivausweisungsverbotes.[147] Die eingangs genannten Verfahren zur Situation an den EU-Außengrenzen zu Belarus werden der Großen Kammer des EGMR die nächste Gelegenheit geben, die Grenzen der Souveränität neu auszuloten.

## 2. Praktiken der Zwischenstaatlichkeit als Antwort auf die Vermenschenrechtlichung

Jenseits gerichtlicher Auseinandersetzungen versuchen die Mitgliedstaaten der EU zunehmend den durch Art. 4 ZP 4 EMRK gewährleisteten absoluten Verfahrensanspruch dadurch zu beschränken, dass sie Migration als Strategie geopolitischer Interessensdurchsetzung thematisieren (a). Praktiken der Zwischenstaatlichkeit dienen zugleich dazu, die Anwendbarkeit der Verfahrensgarantie zu umgehen (b). Hier zeigt sich, dass die grundlegende zwischenstaatliche Struktur, die Doehrings Verständnis von Migration zugrunde lag, nicht vollständig von einem individualrechtlichen Verständnis abgelöst wurde.

### a) „Instrumentalisierung" als Rechtfertigung für Verfahrenseinschränkungen

Ein erstes Beispiel für das zwischenstaatliche Verständnis von Migration ist die Thematisierung von Fluchtmigration als Form der hybriden Kriegsführung in geopolitischen Auseinandersetzungen. Das Konzept der „Instrumentalisierung" von Migrant:innen geht zurück auf die Ankündigung der Türkei im Februar 2020, die Weiterwanderung von schutzsuchenden Migrant:innen nach Griechenland nicht mehr zu unterbinden. In der Folge strandeten tausende Schutzsuchende an der EU-Außengrenze zu Griechenland, weil Griechenland, unterstützt von der Europäischen Kommission, die Grenzen zur Türkei schloss und Asylverfahren für einen Monat aussetzte. Zuletzt wurde der Vorwurf der „Instrumentalisierung" von Migrant:innen von Politiker:innen aus Polen, Litauen und Lettland erhoben, nachdem die belarussische Regierung in Reaktion auf EU-Sanktionen gegen Belarus Tou-

147 EGMR, *M. A. and Z. R.* (Fn. 145), Rn. 118; Isabel Kienzle und Jonathan Kießling, 'Evidently Unlawful, Yet Difficult to Evidence: M. A. and Z. R. v. Cyprus Advances Strasbourg's Case Law on Pushbacks', Strasbourg Observers, 22. Oktober 2024.

ristenvisa für schutzsuchende Migrant:innen ausstellte und diese im Anschluss an die EU-Außengrenze transportierte.[148] Die Kommission sprach gar von einer „weaponisation" von Migration.[149] Zwischen August und Dezember 2021 kamen mehrere zehntausend Schutzsuchende unter anderem aus dem Nahen Osten und Nordafrika an der polnischen, lettischen und litauischen Grenze zu Belarus an. Vorangegangen waren verbale Drohungen des belarussischen Präsidenten Lukashenko, die EU mit „Migranten zu fluten".[150] In Reaktion auf diese Ereignisse riefen alle drei EU-Mitgliedstaaten den Notstand aus.[151] Die Situation an der polnisch-belarussischen Grenze steht exemplarisch für die destruktiven Folgen dieser Reaktion. Die polnische Regierung setzte Wasserwerfer ein, um Migrant:innen vom Grenzübertritt abzuhalten, wies Schutzsuchende ohne Verfahren an der Grenze zurück[152] und beschnitt schließlich auch den Zugang von Journalist:innen und Menschenrechtsorganisationen zur Grenzregion massiv. Zudem kündigte sie den Bau einer neuen Grenzbefestigung zur Abwehr von Migration an.[153] Als Folge dieser Maßnahmen mussten die schutzsuchenden Migrant:innen an der Grenze unter zum Teil unwürdigen Bedingungen ausharren. Die Einreise in die EU wurde ihnen verweigert, die Rückkehr nach Belarus war nach der Aufkündigung eines Rücknahmeübereinkommens durch Präsident Lukashenko ebenfalls nicht mehr möglich.[154] Der EGMR erlegte Polen und Litauen daher bereits im August 2021 in einer vorläufigen Maßnahme nach Art. 39 der Verfahrensordnung auf, den an der Grenze zwischen Polen bzw. Litauen und Belarus festsitzenden Migrant:innen eine angemessene und menschenwürdige Unterbringungen und Versorgung zu

148 Charlotte Bruneau, Joanna Plucinska und Yara Abi Nader, 'Insight: How Minsk Became a Destination for Migrants Travelling as Tourists', Reuters, 16. November 2021.

149 Communication from the Commission to the European Parliament and the Council on countering hybrid threats from the weaponisation of migration and strengthening security at the EU's external borders, COM/2024/570 final. Dazu: Marlene Stiller, 'How the EU Commission Backs up Pushbacks at the EU-Belarussian Border', Verfassungsblog, 1. Januar 2025, doi: ; Daniel Thym, 'Does the Commission Cross the Rubicon? Legalising Pushbacks on the Basis of Art. 72 TFEU', EU Migration Law Blog, 10. Januar 2025.

150 Joe Evans, 'Belarus Dictator Threatens to Flood EU with Drugs and Migrants', The Week, 28. Mai 2021, <https://theweek.com/news/world-news/europe/952979/belarus-dictator-threatens-flood-eu-with-drugs-migrants-avoid-sanctions>, zuletzt besucht 20. Mai 2025.

151 Dazu und zu den weiteren Reaktionen: Maciej Grześkowiak, 'The Guardian of the Treaties Is No More? The European Commission and the 2021 Humanitarian Crisis on Poland-Belarus Border', Refugee Survey Quarterly 42 (2023), 81-102 (83).

152 Anna Iasmi Valliantou, 'The Poland-Belarus Border Crisis Is What Happens When Humans Are Treated as Weapons', The Guardian 16. November 2021; zur rechtlichen Bewertung dieser Maßnahmen Grześkowiak (Fn. 151), 84-89.

153 Grześkowiak (Fn. 151), 89 (m. w. N.).

154 Siehe dazu die Sachverhaltsschilderung in EGMR, Pressemitteilung, 25. August 2021, ECHR 244 (2021) und Pressemitteilung 28. September 2021, ECHR 283 (2021).

gewährleisten.[155] Es sind zahlreiche Fälle anhängig, in denen die Beschwerdeführer:innen geltend machen, dass sie nach Belarus zurückgeschoben wurden, ohne dass ihnen Gelegenheit gegeben wurde, ein Asylgesuch zu stellen und ohne dass ihre Schutzbedürftigkeit geprüft worden sei.[156]

Die EU-Kommission hat die Mitgliedstaaten in diesen Konstellationen stets unterstützt und von einem Vertragsverletzungsverfahren auch dort abgesehen, wo die Zurückweisungen an der Grenze und die Unterbringungsbedingungen mit Unionsrecht nicht vereinbar waren.[157] Stattdessen hat die Kommission die „Instrumentalisierung" von Migrant:innen zum Zwecke der Destabilisierung der EU als Problem identifiziert und im Rahmen der Reform des Gemeinsamen Europäischen Asylsystems die Konstellation „Instrumentalisierung" in die Verordnung zur Bewältigung von Krisensituationen und Situationen höherer Gewalt im Bereich Migration und Asyl (Krisen-VO)[158] aufgenommen. Die Verordnung ist gemäß Art. 1 Abs. 1 Krisen-VO auf Situationen der „Instrumentalisierung" anwendbar. Eine solche liegt nach Art. 1 Abs. 4 lit. b Krisen-VO vor, wenn

> „ein Drittstaat oder ein feindseliger nichtstaatlicher Akteur Reisen von Drittstaatsangehörigen der Staatenlosen an die Außengrenzen oder in einen Mitgliedstaat fördert oder erleichtert, mit dem Ziel, die Union oder einen Mitgliedstaat zu destabilisieren, wenn solche Handlungen wesentliche Funktionen eines Mitgliedstaats, einschließlich der Aufrechterhaltung der öffentlichen Ordnung oder des Schutzes seiner nationalen Sicherheit, gefährden könnten".

In der Sache ermöglicht die Verordnung den Mitgliedstaaten in diesem Fall unter anderem die ausnahmsweise Verlängerung der Registrierungsfrist für Asylanträge sowie eine Verlängerung des Grenzverfahrens (Art. 10 und 11 Krisen-VO), wobei alle ergriffenen Maßnahmen die Verhältnismäßigkeit sowie das Recht auf internationalen Schutz, die Rechte aus der Grundrechtecharta und den EU Asyl Acquis wahren müssen (Art. 1 Abs. 2 Krisen-VO).

Die Thematik der „Instrumentalisierung" illustriert, wie Migration im Kontext neuer geopolitischer Konflikte wieder stärker als Teil zwischenstaatlicher Beziehungen wahrgenommen wird. Ganz im Einklang mit der Rheto-

155 EGMR, *R. A. and Others v. Poland*, Urteil v. 25. August 2021, Nr. 42120/21; *H. M. M. and Others v. Latvia* Nr. 42165/21, dazu: Pressemitteilung, 25. August 2021, ECHR 244 (2021).

156 Gegen Litauen, Polen und Lettland ist jeweils ein Fall vor der Großen Kammer anhängig: EGMR, *C. O. C. G.* (Fn. 8); EGMR, *R. A.* (Fn. 8); EGMR, *H. M. M.* (Fn. 8).

157 Grześkowiak (Fn. 151), 84-94.

158 VO 2024/1359 zur Bewältigung von Krisensituationen und Situationen höherer Gewalt im Bereich Migration und Asyl und zur Änderung der Verordnung (EU) 2021/1147, 22. Mai 2024, ABl. L 1/24.

rik, die Doehrings Beitrag von 1985 durchzieht, werden hier staatliche Souveränität und Sicherheitsinteressen der EU und ihrer Mitgliedstaaten stark gemacht. Hinter diese Wahrnehmung von Migration als orchestrierte Strategie der Destabilisierung treten die individuellen Schutz- und Verfahrensansprüche jedenfalls teilweise zurück und werden in der öffentlichen Debatte als weniger legitim wahrgenommen. Für die Schutzbedürftigkeit der Migrant:innen macht es freilich keinen Unterschied, wie und über welche Transportwege sie an die Grenze der EU gelangt sind.[159] Die bloße „Instrumentalisierung" in einem geopolitischen Konflikt ist als Rechtfertigung für Menschenrechtseinschränkungen jedenfalls ungeeignet. Es spricht für die Stabilität der „Vermenschenrechtlichung" des Migrationsrechts, dass die neue Krisen-VO zwar Verfahrensverzögerungen erlaubt, nicht aber ein Versagen der Prüfung der Schutzbedürftigkeit.

### b) Zwischenstaatliche Kooperation als Strategie der Auslagerung und Umgehung von Menschenrechtsverantwortung

Auch in anderen rechtpolitischen Auseinandersetzungen lebt die Idee einer „Verzwischenstaatlichung" von Migration weiter und fordert die Vermenschenrechtlichung des Migrationsrechts heraus. So lassen sich die Debatten um eine Verlagerung der Asylverfahren in Drittstaaten, kaum anders verstehen als eine Flucht aus dem Anwendungsbereich des Gemeinsamen Europäischen Asylsystems.[160] Menschenrechtsorganisationen haben diese Praxis kritisiert und warnen davor, dass die Inhaftierung von Schutzsuchenden entgegen geltenden EU-Rechts ausgeweitet wird und Verfahrensgarantien und Rechtsbeistand in externalisierten Verfahren nur schwer zu gewährleisten sind.[161] Neben der Frage nach der Zulässigkeit von Haft und anderen Freiheitsbeschränkungen,[162] mit denen die Unterbringung sowohl in Grenzverfahren als auch Drittstaatsverfahren typischer Weise einhergeht, bringt die Auslagerung von Asylverfahren weitere menschenrechtliche Herausforderungen mit sich. Die Bedingungen in Bezug auf Versorgung und Unterbringung müssen menschenrechtlichen Anforderungen entsprechen. Darüber hinaus stellt sich bei externalisierten Verfahren die Frage nach der

159 Zu diesem Argument auch Ziebritzki (Fn. 6).

160 Jeniffer Rankin und Angela Giuffrida, 'Von der Leyen to Ask EU Leaders to Explore Using "Return Hubs" for Migrants', The Guardian, 15. Oktober 2024.

161 Pro Asyl, 'Italiens Deal mit Albanien: Kein Modell für Deutschland', 12. Oktober 2024; Amnesty International, 'The Italy-Albania Agreement on Migration: Pushing Boundaries', Threatening Rights, 19. Januar 2024, EUR 30/7587/2024.

162 Hierzu Bast, von Harbou und Wessels (Fn. 32), 75-87, 101.

Gewähr effektiven Rechtsschutzes und die Gefahr einer Rückschiebung in die Herkunftsstaaten durch den kooperierenden Drittstaat (Kettenrückschiebungen).

Die geschilderten Kooperationsformate sind Praktiken der Zwischenstaatlichkeit, durch die die EU-Mitgliedstaaten die Vermenschenrechtlichung des Migrationsrechts zu umgehen versuchen. Zugleich sind diese Verfahren typischerweise mit einer zunehmenden Kollektivierung von Migrant:innen verbunden. Sie werden, ähnlich wie im Kontext der „Instrumentalisierung", weniger als schutzbedürftige Individuen, denn als potenziell gefährliches Kollektiv wahrgenommen.[163] Auch in das Asylverfahrensrecht erhalten Kollektivierungselemente Einzug, wenn etwa die neue EU-Asylverfahrensverordnung die Anwendung von Grenzverfahren oder beschleunigten Verfahren an die Einreise aus sicheren Dritt- oder Transitstaaten oder pauschal an die Schutzquote aus den betreffenden Herkunftsländern anknüpft.[164] Obgleich im Einzelfall eine Widerlegung der gesetzlichen Vermutung oft möglich bleibt, laufen diese Tendenzen der menschenrechtlichen Einzelfalllogik zuwider. Hierzu stellt das Kollektivausweisungsverbot „geradezu einen Gegenentwurf dar: Dass Personen Gruppen angehören […] ist nicht Anlass, ihre Rechte zu beschränken, sondern vielmehr Anlass, ihre Rechte in besonderem Maße abzusichern".[165]

Die Praktiken der Zwischenstaatlichkeit und der Externalisierung von Schutzverantwortung sind vor allem insofern bemerkenswert, als sich gerade in der staatstragenden Migrationsrechtswissenschaft zunehmend Vertreter finden, die für eine engere Interpretation der menschenrechtlichen Garantien streiten, um entsprechende Politiken zu legitimieren. Dabei bleibt die bereits bei Doehring zu findende Ausblendung der frühen Praxis von EGMR und EMRK zu Art. 4 ZP 4 EMRK wirkmächtig. Daniel Thym kritisiert etwa die vermeintliche Ausweitung der EGMR-Rechtsprechung im Fall *Hirsi* und verweist für ein enges Verständnis des Schutzes vor Massenausweisungen auf Doehrings Beitrag.[166] Der Autor wirbt insgesamt für ein „Zurück zu den Ursprüngen" im Asylrecht und tritt für eine intensivierte zwischenstaatliche Zusammenarbeit und eine Auslagerung von Asylverfahren in Drittstaaten und an den Grenzen ein.[167] Auch 40 Jahre nach dem Erscheinen von Doeh-

163 Dana Schmalz, 'Gruppen, Massen, Kollektive: Perspektiven des Flüchtlingsrechts auf "Migration im Plural"', Kritische Justiz 53 (2020), 348-363 (354); zu dieser Diskursverschiebung auch Frank Wolff und Volker Heins, *Hinter Mauern* (Suhrkamp 2023), 76 f.

164 Art. 42 Abs. 1 lit. j VO 2024/1348 establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, 22.5.2024, ABl. L 1/76.

165 Schmalz (Fn. 163), 356.

166 Thym, 'Menschenrechtliche Trendwende?' (Fn. 33), 994.

167 Daniel Thym, 'Zurück zu den Ursprüngen', FAZ 2. September 2024, 6.

rings Aufsatz fordert die Persistenz der zwischenstaatlichen Regulationslogik im Migrationsrecht die individualrechtliche Logik der Menschenrechte immer wieder heraus.

## V. Zusammenfassung

Im Kontext der EMRK war das Kollektivausweisungsverbot ein früher Versuch, die zuvor als unbeschränkt wahrgenommene staatliche Souveränität im Ausweisungsrecht einzuhegen. Bereits in den 1970er Jahren operationalisierte die Straßburger Menschenrechtskommission Art. 4 ZP 4 EMRK als Mindestgarantie auf ein individuelles Verfahren. Doehrings Auseinandersetzung mit dem Phänomen der Massenausweisung zeigt, wie fremd dem völkerrechtswissenschaftlichen Mainstream der 1980er Jahre der Gedanke an Menschenrechte im Ausweisungsrecht war. Migration war für ihn ein Sachverhalt, der das Verhältnis von Staaten untereinander betrifft; das Individuum soll zwar nicht schutzlos bleiben, seine Rechte werden jedoch stets durch den Heimatstaat mediatisiert.

Es ist ein Beleg für die Vermenschenrechtlichung des Migrationsrechts, dass sich staatliche Souveränität auch in migrationsrechtlichen Sachverhalten heute selbstverständlich an den normativen Vorgaben der Menschenrechte messen lassen muss. Die neuere Rechtsprechung des EGMR zum Kollektivausweisungsverbot zieht Teile dieser Errungenschaften jedoch in Zweifel. Auch darüber hinaus stellen aktuelle Maßnahmen und rechtspolitische Forderungen der menschenrechtlichen Einzelfalllogik eine Logik der Kollektivierung gegenüber, die mit einer erneuten „Verzwischenstaatlichung" von Migration einher geht.

Der vorliegende Beitrag zeigt, wie weit sich der rechtliche aber auch der gesellschaftliche Diskurs seit der Zeit Doehrings entwickelt haben, auch wenn die Menschenrechte von Migranten weiterhin umstritten bleiben. Mit Jürgen Bast lässt sich dieser Streit als „typical back-and-forth" mit unvorhersehbarem Ausgang verstehen. Das Kollektivausweisungsverbot steht sinnbildlich für diese Auseinandersetzung und die Zukunft wird zeigen, ob Basts optimistische Einschätzung zutrifft: „It seems humanrightization is here to stay."[168]

168 Bast (Fn. 3), 213.

## Summary: From State Sovereignty to Human Rights – and Back? Revisiting the Prohibition of Collective Expulsion in the European Convention on Human Rights from a Historical Perspective

This article examines the tension between state sovereignty, human rights, and migration law, focusing on the prohibition of collective expulsion under Article 4 of Protocol 4 of the European Convention on Human Rights (ECHR). Recent cases from the European Court of Human Rights (ECtHR), including over 30 complaints against Latvia, Lithuania, and Poland, highlight the importance of this provision in migration issues. These cases involve asylum seekers who have been pushed back at EU borders, often under life-threatening conditions.

The article revisits Karl Doehring's 1985 analysis of mass expulsions, which emphasised state sovereignty and largely overlooked the significance of human rights in these situations. Doehring's classical international law perspective stands in contrast to modern universalist approaches. With the 100th anniversary of the Max Planck Institute for Comparative Public Law and International Law – where Doehring served as director – this is an opportune moment to reassess his arguments in the context of current migration debates.

The analysis unfolds in three steps: First, we compare the international law perspective on mass expulsion with the human rights framework governing collective expulsion. Next, we place Doehring's state-centric arguments in their historical context. Finally, we connect these insights to contemporary discussions regarding collective expulsion and exclusionary practices at Europe's borders. The article underscores the ongoing conflict between state sovereignty and the universal principles of human rights within European migration law. It argues that human rights have gained significant traction in migration law over the last few decades – a development that began during Doehring's time but has not been sufficiently acknowledged in his research.



## Keywords

mass expulsion – prohibition of collective expulsion – Art. 4 Protocol 4 ECHR – state sovereignty – human rights –'instrumentalisation' of migration

# Abhandlungen

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

Andrej Lang, Kriszta Kovács and Mattias Kumm*



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

* PD Dr. Andrej Lang is Visiting Professor of Public Law at Chemnitz University of Technology, Chemnitz; Dr. Kriszta Kovács is Senior Research Fellow at the WZB Berlin Social Science Center and Associate Professor at ELTE University, Budapest; Mattias Kumm is the Inge Rennert Professor of Law at New York University Law School. He also holds a Research Professorship on 'Rule of Law in the Age of Globalization', heads the Global Constitutionalism Group at the WZB Berlin Social Science Research Center, and is a Professor of Law at Humboldt University of Berlin.

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.

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.

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.

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.

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.

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

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

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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# *Solange I* in the Mirror of Time and the Divergent Paths of Judicial Federalism and Constitutional Pluralism

Andrej Lang*
Chemnitz University of Technology, Chemnitz, Germany
*andrej.lang@wiwi.tu-chemnitz.de*



## Abstract

*Solange I* embodies a pivotal juncture in European constitutionalism. The German Constitutional Court faced a foundational choice between a judicial federalist vision in which national courts unconditionally accept the supremacy of European Union (EU) law and a constitutional pluralist vision in which constitutional courts review EU law in exceptional cases because limits on power and accountability are deemed more important than legal unity. The decision set the Court on the path of constitutional pluralism. It is very much in dispute whether this is the path of virtue or vice. Two competing constitutional narratives have emerged. According to the first narrative,

* PD Dr., visiting Professor of Public Law at Chemnitz University of Technology.

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*Solange I* marks a virtuous path. It compelled the Court of Justice of the European Union (CJEU) to recognise fundamental rights as part of EU law, constituting a prime example for building constitutionalism from the bottom up. Conversely, the counter-narrative views *Solange I* as a parochial and backward decision that committed the original sin in European constitutionalism of subjecting EU law to the constitutional demands of a single national constitutional order. But narratives in constitutional theory about landmark cases can take on a life of their own that is detached from the original case. This is why this Article goes back to the original case and assesses the plausibility of the central narratives about *Solange I* from a historical perspective. It concludes that the Court's skepticism towards the CJEU's unconditional supremacy claim without adequate fundamental rights protection on the EU level was not predominantly driven by concerns about preserving its institutional role, but instead deeply rooted in constitutional thought, offering a vision for European integration deeply embedded in normatively dense structures of constitutional legitimacy.

## Keywords

constitutional pluralism – fundamental rights – national constitutional courts – Court of Justice of the European Union – *Solange* – federalism – supremacy – European integration – Internationale Handelsgesellschaft – Costa – Pescatore – Hauer – accountability

## I. Introduction

It is undisputed that the *Solange I*-decision of the German Federal Constitutional Court (GFCC/BVerfG) embodies a pivotal juncture in European constitutionalism.[1] The justices sitting on the Second Senate faced a foundational choice between two competing visions: on one hand a judicial federalist vision in which national courts unconditionally accept the supremacy of Community law and fundamental rights (FR) are protected against legal acts of the Community by the Court of Justice of the European Union, and, on the other hand, a constitutional pluralist vision in which national constitutional courts ought to review Community law in exceptional cases because limits on power and accountability are deemed more important than the avoidance of unresolved norm conflicts to ensure legal unity.

1 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 (268).

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For the first and last time, the two visions openly clashed inside the GFCC in a 5-3 split decision and the question of whether the Court should exercise constitutional judicial review over Community law was debated as a matter of principle. What followed has attained canonical status in European constitutionalism: The Court's majority chose to review the conformity of Community law with the Basic Law (BL)'s FR guarantees '*so long as* the integration process has not progressed so far that Community law receives a catalogue of fundamental rights decided on by a parliament and of settled validity, which is adequate in comparison with the catalogue of fundamental rights contained in the Basic Law'.[2] As a consequence, it settled the dispute for the GFCC for good and set the Court on the path of constitutional pluralism. Today, many national constitutional courts self-evidently reserve to themselves the power to occasionally review Community law against important national constitutional principles.[3]

It is very much in dispute though whether this is the path of virtue or vice. Two competing constitutional narratives have emerged. According to the first narrative, *Solange I* marks a virtuous path. It goes something like this: Fundamental rights were absent from the original European treaties and only 'of secondary importance at that (early) stage of European development'.[4] This absence became a stumbling block for European integration when the radical doctrines of direct effect of EU law and supremacy provided the European Economic Community with the unfettered capacity to intrude FR positions. It is not surprising against the background of the strong constitutional commitment to fundamental rights in Germany and in Italy established in reaction to their fascist pasts that national courts chose to voice their resistance rather than to acquiesce to the unconditional supremacy of EU law.[5] Stone Sweet has summed up the ensuing dilemma succinctly: '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]

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2 BVerfGE 37, 271 (para. 56) – *Solange I*. Emphasis added.

3 Andrej Lang, Die Verfassungsgerichtsbarkeit in der vernetzten Weltordnung (Springer 2020), 427-522.

4 Joseph H. H. Weiler, 'Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights within the European Legal Order of the European Communities', Wash. L. Rev. 61 (1986), 1103-1142 (1106, 1113).

5 Ulrich Haltern, Europarecht. Dogmatik im Kontext. Band II: Rule of Law. Verbundsdogmatik, Grundrechte (Mohr Siebeck 2017), 592.

6 Alec Stone Sweet, *The Judicial Construction of Europe* (Oxford University Press 2004), 89. Similarly Joseph H. H. Weiler, 'The Transformation of Europe', Yale L. J. 100 (1991), 2403-2483 (2417-2418).

*Solange I* is credited for offering a resolution to the dilemma: It made domestic judicial review of Community law conditional upon adequate FR protection on the EU level and compelled the CJEU to recognise fundamental rights as part of EU law. It is thus viewed as a prime example for building constitutionalism from the bottom up and for the constructive judicial engagement between the CJEU and the GFCC, illustrating the virtues of the non-hierarchical theory of constitutional pluralism.[7]

Conversely, the counter-narrative views *Solange I* as a parochial and backward decision that ultimately precluded the realisation of a more radical and truly supranational European integration project, capable of overcoming deep-rooted notions of sovereignty and the nation-state.[8] According to this view, the narrative that the CJEU neglected fundamental rights and underestimated the impact of its supremacy doctrine on them is a 'founding myth'.[9] Quite to the contrary, after the Court had initiated the constitutionalisation of the EU legal order in *van Gend en Loos* and *Costa*, it quickly followed-up by introducing fundamental rights as 'general principles of law' into the EU legal order in *Stauder*, *Internationale Handelsgesellschaft*, and *Nold*,[10] even though they were hardly affected at this stage of European integration.[11]

The German court nevertheless dismissed these meaningful developments and instead perpetrated, primarily out of reasons of institutional self-interest, a 'frontal attack on the Costa doctrine of the European Court of Justice'.[12] In doing so, the GFCC committed the original sin in European constitutionalism of subjecting EU law to the constitutional demands of a single national constitutional order, compromising the uniform application of EU law and asserting the ultimate authority of the German Constitution over EU law.[13]

But narratives in constitutional theory about landmark cases tend to take on a life of their own that is detached from the original case. A narrative may,

7 Neil Walker, 'Constitutional Pluralism Revisited', ELJ 22 (2016), 333-355 (340); Mattias Kumm, 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty', ELJ 11 (2005), 262-307 (266); Miguel Poiares Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action' in: Neil Walker (ed.), *Sovereignty in Transition* (Hart Publishing 2003), 501-538 (509).

8 Perju (n. 1), 266.

9 Giacomo Delledonne and Federico Fabbrini, 'The Founding Myth of European Human Rights Law: Revisiting the Role of National Courts in the Rise of EU Human Rights Jurisprudence', E. L. Rev. 44 (2019), 178-195 (180).

10 Perju (n. 1), 294.

11 Ulrich Scheuner, 'Der Grundrechtsschutz in der Europäischen Gemeinschaft und die Verfassungsrechtsprechung', AöR 100 (1975), 30-52 (46 f.).

12 Perju (n. 1), 269.

13 Perju (n. 1), 284.

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in other words, be grounded in a case that does not truly support the narrative. This is why this article goes back to the original case and assesses the plausibility of the central narratives about *Solange I* from a historical perspective in light of the factual and legal background, providing fresh historical insights based on archival research.[14] The article proceeds by combining recounting step by step the story of *Solange I* with analysing central pieces of the contrasting narratives.

Part II delves back into the complex facts of the case originating from the Common Agricultural Policy of the European Community to assess whether and to what extent fundamental rights were truly at stake at this stage of European integration. It finds on one hand that Community policies did not, at this stage, pose a real threat to undermine national fundamental rights, and, on the other hand, that the CJEU's superficial and one-sided FR analysis in *Internationale Handelsgesellschaft* was not suitable to dispel concerns about a protection vacuum resulting from the Court's unconditional supremacy doctrine. Part III analyses the broader institutional background of *Solange I*, looking into the role of other actors such as the CJEU, the lower courts, and the German Federal Government preceding the GFCC's ruling to see which influence they exerted on the *Solange*-saga. It argues that the prevailing narrative that a self-confident GFCC emphatically reasserted its authority in *Solange I* is oversimplified and overlooks the key roles and judicial activisms by the CJEU and the referring Frankfurt Administrative Court. Part IV juxtaposes the competing viewpoints of the majority decision and the dissenting opinion in *Solange I* to learn where the fault lines are situated, and summarises the damning criticism in German legal scholarship. It finds that the depiction of *Solange I* as backward and parochial is unjustified and identifies elements of a modern understanding of the role of constitutional courts in multi-level governance. Part V explores the impact of *Solange I* on the development of EC fundamental rights, inferring that *Solange I* arguably had a lasting impact on the European FR governance. The article concludes with a skeptical view towards the judicial federalist narrative, asserting that constructive judicial conflict between the GFCC and the CJEU likely contributed to the development of normatively denser structures of constitutional legitimacy in EU governance.

14 The author filed a request for all available files in the *Solange I*-case with the federal archive (Bundesarchiv) and received, amongst others, the Submissions of the Federal Government and the Federal Administrative Court as well as the original referral of the Frankfurt Administrative Court to the GFCC. The most precious historical material, however, the personal files of the justices in the case will only be released after 60 years. Hence, we will have to wait for ten more years for more answers about the history of *Solange I*.

## II. The Facts: Were Fundamental Rights Under Threat or Barely at Stake?

An issue at the heart of the debate about the legacy of *Solange I* between judicial federalists and constitutional pluralists is the question whether fundamental rights were truly at stake when the GFCC ruled in *Solange I*. This issue was disguised in 'an archetype "European" case': a preliminary ruling request by the Frankfurt Administrative Court (FAC) to the CJEU under the Article 177 procedure concerning the Common Agricultural Policy (CAP).[15] The CJEU's ruling on the preliminary request is the *Internationale Handelsgesellschaft*-decision. But because the FAC refused to accept the CJEU's decision, it referred to the GFCC the same question it had submitted to the CJEU. As a result, the facts of the case are the same for *Internationale Handelsgesellschaft* and for *Solange I*.

They are the following: The claimant – Internationale Handelsgesellschaft Limited – was an import-export-undertaking seated in Frankfurt am Main and specialised in trading in grain. In August 1967, the claimant had obtained a license to export 20,000 metric tons of maise meal until the end of 1967. The license required the claimant to pay a deposit that became non-refundable when the exports approved in the export license were not carried out. In October 1967, however, the Federal Ministry of Finance had reimposed a levy on grain by-products remaining in the Community market, creating an unexpected financial burden for continued exporting. The claimant ultimately exported just over half of the amount of maise meal set forth in the export license (specifically 11,486.764 metric tons), and the German Einfuhr- und Vorratsstelle für Getreide und Futtermittel – a national agency entrusted with the task of implementing the CAP – consequently declared DM 17,026.47 of the claimant's export license deposit to be forfeited. The claimant brought the case before the Administrative Court Frankfurt am Main and requested to set aside the relevant Community provision concerning forfeiture of an export license deposit, arguing that the deposit scheme for agricultural products constituted a disproportionate intervention in the company's freedom of occupation guaranteed by German constitutional law.

The legal dispute must be viewed against the backdrop of the specific characteristics of the CAP's highly subsidised and interventionist price support regime, aimed at ensuring a fair standard of living for the European grain producers. As a result, Community prices are generally higher than world

15 Bill Davies, '*Internationale Handelsgesellschaft* and the Miscalculation at the Inception of the ECJ's Human Rights Jurisprudence' in: Fernanda Nicola and Bill Davies (eds), *EU Law Stories* (Cambridge University Press 2017), 157-177 (159-160).

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prices, and the Community monitors, restricts and subsidises international trade with agricultural products to exercise adequate price control. The deposit system serves the monitoring dimension: The threat of forfeiture of the deposit creates strong economic incentives to actually effect the export transaction set forth in the license, putting the Commission in the position to determine adequate prices in real-time rather than ex-post. A system not based on deposits but on 'mere declaration of exports effected and of unused licences' would, by contrast, 'lack of any guarantee of application, be incapable of providing the competent authorities with sure data on trends in the movement of goods'.[16]

The facts of the case are hardly the stuff of headlines. However, it is one of the dualities of European integration that hidden underneath the technical niceties of the CAP, or various other policy fields for that matter, there lies a profound constitutional dimension that the FAC detected and elucidated in its referral to the GFCC. The FAC perceived the described legal state of Community law to be unacceptable. It contended that this type of deposit scheme is unconstitutional 'because it violates the freedom of development, economic freedom and the principle of proportionality'.[17] It saw 'a *blatant disproportion* between the achievement of the Community objective of market monitoring and the means used for this purpose, that is, the deposit system',[18] suggesting that 'the same goal can be achieved by less drastic means that are within the scope of the principle of proportionality (including notification of non-importation)'.[19] It further characterised the deposit payment as 'a fine or penalty' that contradicted a 'legal principle rooted in German law' according to which a fine 'presupposes culpability',[20] implicitly suggesting that Internationale Handelsgesellschaft did not culpably fail to export the entire amount of maise meal. This principle

16 ECJ, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, judgment of 17 December 1970, case no. 11/70, ECLI:EU:C:1970:114, para. 10; see also Advocate-General Dutheillet de Lamothe, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, judgment of 17 December 1970, case no. 11/70, ECLI:EU:C:1970:100, 1149: 'Without the latter information the Community action in external trade would develop in the dark.'

17 Verwaltungsgericht Frankfurt a. M., decision of 14 July 1971, case no. II/2 – E 228/69, Außenwirtschaftsdienst des Betriebs-Beraters November 17 (1971), 541-546 (545).

18 Verwaltungsgericht Frankfurt a. M., decision of 14 July 1971, case no. II/2 – E 228/69, Außenwirtschaftsdienst des Betriebs-Beraters November 17 (1971), 541-546 (545). Underlined emphasis in orginal.

19 Verwaltungsgericht Frankfurt a. M., decision of 14 July 1971, case no. II/2 – E 228/69, Außenwirtschaftsdienst des Betriebs-Beraters November 17 (1971), 541-546 (545).

20 Verwaltungsgericht Frankfurt a. M., decision of 14 July 1971, case no. II/2 – E 228/69, Außenwirtschaftsdienst des Betriebs-Beraters November 17 (1971), 541-546 (545).

'cannot be overridden' simply to remedy the 'poor administrative organisation' of the CAP.[21]

Does the Court's argument indicate that fundamental rights were undermined by the CAP? I think not. The harsh criticism overstates the FR stakes of the case and overlooks the idiosyncratic regulatory context of the CAP. This is confirmed by the GFCC's swift FR examination in *Solange I* that found no rights violation in the case. The GFCC designated the deposit scheme only as a 'pure regulation of trade practice'[22] (reine Berufsausübungsregelung) that 'merely affected the manner in which a trade could be practiced',[23] and concluded that the Community interests underlying the price support regime justified this low-level of infringement.

All legal actors ruling or submitting an opinion on the case – GFCC, CJEU, Advocate-General Dutheillet de Lamothe, the Commission in its submission written by its legal adviser *Claus-Dieter Ehlermann*, and the German Ministry of Justice – agreed that the deposit is an indispensable tool for the functioning of the price support regime. Dutheillet de Lamothe argued that the deposit was 'the minimum ransom, the indispensable ransom for the freedom of action that has been conceded',[24] constituting 'probably the least restraining measure that could be imagined to guarantee a correct functioning of that market'.[25] A simple notification of non-importation, as the FAC proposed as less restrictive alternative, is clearly less effective in ensuring – for the purpose of receiving reliable data – that the amounts of grain set forth in the licences mirror the amounts actually traded, for – as Ehlermann laid out – the license only actually leads to an export transaction if non-utilisation of the license entails a disadvantage for the license holder.[26]

When the FAC alleges a violation of economic freedom, it overlooks the highly subsidised nature of the CAP, pretending as if traders were operating in a purely market economic context. But without Community subsidies, the business of grain trading would likely not be profitable in the first place, likely justifying a more interventionist regulatory system geared at protecting the budgetary interests of the Community and the member states. Against this background, it is not adequate to characterise the deposit as a fine. The

21 Verwaltungsgericht Frankfurt a. M., decision of 14 July 1971, case no. II/2 – E 228/69, Außenwirtschaftsdienst des Betriebs-Beraters November 17 (1971), 541-546 (545).

22 BVerfGE 37, 271 (para. 45) – *Solange I*.

23 Justin Collings, Democracy's Guardians: A History of the German Federal Constitutional Court. 1951-2001 (Oxford University Press 2015), 146.

24 Advocate-General Dutheillet de Lamothe, *Internationale Handelsgesellschaft* (n. 16), 1149.

25 Advocate-General Dutheillet de Lamothe, *Internationale Handelsgesellschaft* (n. 16), 1147.

26 See Submission by the Commission in the Case 11/70 (JD/9715/70/D), dated 12 June 1970, 17-18 (available via the Historical Archives of the European University Institute, at <archives.eui.eu>, last access 28 April 2025).

GFCC instead made the more plausible analogy, characterising the deposit as security for a risk transaction in which 'the businessman concerned knows what risk he is taking and is free to decide'.[27] Internationale Handelsgesellschaft Ltd. made an economic calculation that did not add up due to the reimposition of the levy by the Ministry of Finance, resulting in the economic unprofitability of continued maise meal exports. But such changes in the regulatory landscape fall into the sphere of risk of companies and considerations of purely economic profitability hardly constitute force majeure. In sum, these considerations suggest that the deposit regime of the CAP did not pose a real threat to undermine fundamental rights. And when viewed from a broader perspective, European integration arguably only began to intrude fundamental rights more seriously with the explosion of secondary legislation through the Single European Act of 1986.[28]

It does not follow from this conclusion, however, that concerns about FR protection in light of the CJEU's unconditional supremacy doctrine were entirely unwarranted in 1974 when *Solange I* was rendered. Although *Solange I* is not a 'hard' FR case, the infringement imposed by the deposit scheme is not negligible either. The fact that import and export companies can only conduct their business if they receive a licence and pay a deposit, thereby carrying the economic risk for exporting less than agreed in the licence, significantly impairs their freedom to conduct a business.

More importantly, the CJEU's FR examination in *Internationale Handelsgesellschaft* was far from reassuring. While the Court emphatically proclaimed at the outset of the judgment that 'respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice', it subsequently did not put its money where its mouth is. More specifically, the Court failed to conduct a structured rights review geared towards assessing potential flaws of the scrutinised Community regulation and the harm imposed on the rights holder.[29] It predominantly sought to defend the Community regime, failing both to outline the fundamental rights at issue and the negative impact of the deposit regime on the claimant. For example, the CJEU emphasises 'the voluntary nature of requests for licences',[30] even though it is not exactly voluntary to request a license if the economic activity is subject to a license requirement.

27 BVerfGE 37, 271 (para. 43) – *Solange I*.

28 I thank Daniel Halberstam for this insight.

29 For a defense of structured rights review: Mattias Kumm, 'The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review', Law & Ethics of Human Rights 4 (2010), 141-175.

30 ECJ, *Internationale Handelsgesellschaft* (n. 16), para. 9.

Of course, placed into its broader historical context, *Internationale Handelsgesellschaft* is a bold step for a supranational court at a time when the Community lacked FR guarantees and judicial FR protection was only emerging in member states such as France, Belgium, and the Netherlands. To expect the CJEU as a court originally strongly influenced by the concise, if not terse French judicial style of reasoning to undertake a German style proportionality analysis is arguably too much.[31] Still, *Internationale Handelsgesellschaft* nevertheless confirmed existing concerns about the CJEU's institutional self-understanding as a federal supreme court preoccupied with ensuring the functioning of the internal market against restrictions imposed by the member state rather than as a constitutional court determined to protect fundamental rights against Community organs. It is therefore understandable when national courts were concerned that the CJEU's unconditional supremacy doctrine would lead to more serious FR infringements in the foreseeable future.

## III. The Conversation: Was the Court Driver or Driven?

On its face, the factual and legal background of *Solange I* hardly provides the expected ground for a canonical clash between EU law and German law. As shown above, the case did not raise serious FR issues and even the GFCC agreed unequivocally that the deposit regime was in conformity with the Basic Law. But if all agree that the regulation in question does not in any way violate fundamental rights, neither under Community law nor under German law, it does not seem necessary to decide whether FR protection against Community law is exercised on the Community level or the national level, and the case arguably could have been disposed of on a less foundational basis.

The commanding narrative in legal scholarship about why the GFCC nevertheless rendered its *Solange I*-ruling is that 'a self-confident and mission-minded [German Federal Constitutional] court […] wanted to shape European law actively',[32] reassert its 'ultimate authority',[33] and 'extend[…] its influence in the process of European integration'[34]. This narrative finds support in the increasingly activist role of the GFCC during the 1970s when

31 I thank the anonymous reviewer for this point.

32 Cross-reference to article in Symposium Issue: 'Promoting European Constitutionalism? The Ambivalent Role of National Constitutional Courts from Solange I to Solange IV', 4.

33 Karen Alter, Establishing the Supremacy of European Law. The Making of an International Rule of Law in Europe (Oxford University Press 2003), 94.

34 Alter (n. 33), 94.

the Court struck down several key legislative pieces of the governing Social-Liberal coalition such as a law in support of women's right to have an abortion and a law relaxing the requirement for compulsory military Service.[35]

A look into the archives suggests, however, that this narrative is oversimplified. It is not at all clear that the GFCC actively aspired to adjudicate on the relationship between EU law and German law. There are, to the contrary, indications that an activist Frankfurt Administrative Court and an activist CJEU put the GFCC in a position from which it was difficult to avoid a clarifying ruling. This section indicates that the GFCC was propelled, if not cornered by two activist courts: the CJEU and the FAC. On one side, the CJEU – buoyed by 'the lack of negative reaction to its 1963-64 jurisprudence and by the influx of a new generation of self-confident, federalist leaning judges'[36] – sought to consolidate its supremacy doctrine with its bold decision in *Internationale Handelsgesellschaft*. On the other side, the FAC, overstating the constitutional stakes, painted a scenario in which fundamental rights, democracy, and the rule of law were gambled away for an unsecure economic union, appealing to the institutional role of the GFCC as guardian of the German Constitution. The uncompromising and mutually exclusive standpoints of the CJEU and the FAC rendered an avoidance strategy by the GFCC difficult.

While the GFCC hence chose not to duck the issue on procedural grounds but to take a stance on the merits, *Solange I* is not a sweeping constitutional assertion. It is, by contrast, visibly an attempt to compromise between the competing camps. Ulrich Haltern has demonstrated that the GFCC uses various angles to keep the holding narrow.[37] In terms of substance, the Court limits itself to the collision between German fundamental rights (not German constitutional law as a whole) and European secondary law (not Community law as a whole); in terms of time, it limits itself to the moment, the current phase of transition, so long as, assuming that the Community's current FR deficit will soon be remedied; procedurally, it limits the review of Community law to referrals by lower courts applying community law in a concrete case pursuant to Art. 100 para. 1 BL (not constitutional complaints by affected individuals); and jurisdictionally, it monopolises review of Community law within the GFCC (not other German courts).[38] At the very least, the

35 BVerfGE 39, 1 – *Abortion I*; BVerfGE 48, 127– *Conscription Law Amendment*. For this argument, see Collings (n. 23), 109-110; Ulrich Haltern, '50 Jahre Solange I', JURA 46 (2024), 449-462 (456).

36 Davies (n. 15), 176.

37 Haltern (n. 35), 457.

38 See Haltern (n. 35), 458.

GFCC is as much driver as driven, indicating that *Solange I* does not stand alone, but is fully appreciated only as part of a broader conversation with several key actors, including the CJEU (1.), lower German courts, especially the Administrative Court Frankfurt (2.), and the German Federal Government, especially the Ministry of Justice (3.).[39]

## 1. European Court of Justice

The decision of the CJEU in *Internationale Handelsgesellschaft* was extraordinarily bold. As is well known, the Court powerfully reaffirmed and extended the supremacy of Community law over all national law, even 'the principles of a national constitutional structure'.[40] Otherwise, Community law would be 'deprived of its character' and the 'legal basis of the Community itself [would be] called in question'.[41] Put differently, the Court declared 'that Community law must not be tested by national courts against their own Bill of Rights, else it would lose its character as law common to the Community'.[42] To assure national courts that this unconditional supremacy doctrine would not result in a constitutional vacuum, the CJEU pledged that fundamental rights formed 'an integral part of the general principles of law protected by the Court of Justice',[43] and were 'inspired by the constitutional traditions common to the Member States'.[44]

This bold decision must be seen against the background of substantial personnel changes in the composition of the CJEU prior to the ruling. In 1967, Robert Lecourt became President of the Court, and Pierre Pescatore was appointed as a judge. Both were highly influential figures on the Court and fervent believers in European integration. Lecourt's influence on the Court is compared to that of Chief Justice Marshall on the US Supreme Court in the first decades of the 19th century[45] and he is considered having 'helped to tip the balance in favour of accepting the direct effect and supremacy doctrines' as a regular judge, 'viewed the Court as a bulwark against vacillating political will for integration and used his control of the docket to

39 Haltern (n. 35), 449.

40 ECJ, *Internationale Handelsgesellschaft* (n. 16), para. 4.

41 ECJ, *Internationale Handelsgesellschaft* (n. 16), para. 3.

42 Bernard Rudden and Diarmuid Rossa Phelan, *Basic Community Cases* (Oxford University Press 1997), 60.

43 ECJ, *Internationale Handelsgesellschaft* (n. 16), para. 4.

44 ECJ, *Internationale Handelsgesellschaft* (n. 16), para. 4.

45 William Phelan, 'The Role of the German and Italian Constitutional Courts in the Rise of EU Human Rights Jurisprudence: a Response to Delledonne and Fabbrini', E. L. Rev. 46 (2021), 175-193 (193).

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employ particular judges in cases that served the end of pushing for greater integration'.[46] Pescatore is characterised as 'one of the most vocal and articulate of the European federalists', emphasising 'Pescatore's charisma and expertise',[47] and as 'the ECJ's storm trooper in terms of "European integration through law and ECJ case law" convictions'.[48] As the Judge Rapporteur in the case, Pescatore played a critical role in *Internationale Handelsgesellschaft*. Davies suggests that 'Pescatore's intellectual fingerprints are all over the ruling' and that he was a 'dominant force on the Court'.[49] This claim is supported by the fact that Pescatore had published an article on fundamental rights and European integration in 1968,[50] in which he proposed 'that the Court itself could protect fundamental rights within the context of the "general principles of law"',[51] largely '[f]oreshadowing the Internationale ruling in language and in spirit'.[52]

What motivated the Court, influenced by Pescatore and Lecourt, to render such a bold ruling? The decision in *Internationale Handelsgesellschaft* was not forced upon the CJEU by the preliminary request of the Administrative Court Frankfurt (Main). The two preliminary questions did not address the relationship between Community law and national fundamental rights. They basically asked whether the provisions about the lodging and the forfeiture of a deposit are legal.[53] They did not specify whether the legality of the regulations should be reviewed against the higher-ranking primary law of the Community or against the German Basic Law. Only in its underlying order did the Administrative Court indicate that in its view, the illegality of these provisions was based on contradicting fundamental rights guaranteed by the German Constitution.[54] Hence, the CJEU could have 'chosen to simply answer the two questions posed directly by FAC in its referral', but it instead preferred 'to freely to engage with the FAC's reasoning in the referral beyond the direct questions asked and expand on its constitutionalisation doctrine'.[55]

46 Davies (n. 15), 166.

47 Davies (n. 15), 168.

48 Vera Fritz, 'Tessili vs. Dunlop 1976: The Political Background of Judicial Restraint' in: Fernanda Nicola and Bill Davies (eds), *EU Law Stories* (Cambridge University Press 2017), 357-368 (359).

49 Davies (n. 15), 168.

50 Pierre Pescatore, 'Les Droits de l'Homme et L'Intégration Européenne', C.D.E. 4 (1968), 629-673.

51 William Phelan, 'Internationale Handelsgesellschaft, 1970 – Protection of Fundamental Rights' in: William Phelan (ed.), *Great Judgments of The European Court of Justice* (Cambridge University Press 2019), 197-220 (210).

52 Davies (n. 15), 168.

53 ECJ, *Internationale Handelsgesellschaft* (n. 16), 1127.

54 ECJ, *Internationale Handelsgesellschaft* (n. 16), 1128.

55 Davies (n. 15), 177.

The constitutional background informing *Internationale Handelsgesellschaft* was that the transformative judgments in *Van Gend en Loos* and *Costa* had received a largely positive reception in German legal scholarship and surprisingly little critical responses from national courts.[56] Karen Alter notes that 'national courts had taken pains to avoid open confrontation and contradiction' in order not to 'undermine the fragile authority of the ECJ and detract from the goal of creating a uniform interpretation of European law'.[57] In their decisions in 1965 and 1967,[58] the Italian and the German constitutional court had engaged Community law only cautiously and to a very limited extent, yet they had also chosen 'not to discard all control where a Community act was claimed to be in violation of the freedoms guaranteed by their national constitutions'.[59] The GFCC had even affirmed that Community law is 'autonomous and independent'[60] and deemed constitutional complaints against judgments of the CJEU inadmissible.[61] At the same time, lower national courts were increasingly articulating concerns that the CJEU's supremacy doctrine would weaken FR protection at the end of the 1960s.

There are good reasons to assume that *Internationale Handelsgesellschaft* was a preemptive strike by the CJEU. President Lecourt explained that 'it made sense for the Court of Justice to take precautions [se prémunir] against the risk either that Community law might breach fundamental rights protected by national constitutions or that the unity of Community law might be ruptured'.[62] It appears that the Court sought to consolidate and extend its supremacy doctrine while the reception of its case-law was still friendly, and before the critical voices would grow louder. The strategic calculus seems to have been to take the first word on the relationship between Community law and national fundamental rights to raise the stakes for a conflicting interpretation by national constitutional courts. Since the latter had proved careful not to fracture the fragile process of European integration and accepted, at least in principle, the supremacy doctrine, they may also swallow *Internationale Handelsgesellschaft* – not least because the extension of the supremacy doctrine to national constitutional law followed logically from the autonomy of Community law.[63] To increase the prospects of acceptance, the CJEU

56 Davies (n. 15), 162.

57 Alter (n. 33), 97.

58 Italian Constitutional Court, *Societe Acciaierie San Michele v. European Coal and Steel Community*, judgment of 27 December 1965, case no. 98/1965, CML Rev. 4 (1967), 83; BVerfGE 22, 293 – *EC-Regulation*.

59 Phelan, 'Internationale Handelsgesellschaft' (n. 51), 211.

60 BVerfGE 22, 293 (para. 12) – *EC-Regulation*.

61 BVerfGE 22, 293 (para. 20) – *EC-Regulation*.

62 Phelan, 'Internationale Handelsgesellschaft' (n. 51), 211.

63 See Davies (n. 15), 158.

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buttressed the stick with a carrot, proclaiming to protect itself fundamental rights as part of general principles of Community law.[64]

*Solange I* indicates that the CJEU's plan didn't pan out. Alter argues that '[t]he ECJ's Internationale Handelsgesellschaft had gone too far when it asserted the supremacy of European law over national constitutions', stepping 'onto the Constitutional Court's own jurisdictional turf'.[65] *Davies* sees 'a strategic miscalculation on the part of the Court', prompting 'significant resistance in the Member States'.[66] At the core of this miscalculation lies an imbalance between stick and carrot: If we assume that the unconditional supremacy doctrine is the stick and the announcement that the CJEU would protect fundamental rights on the Community level the carrot, it is obvious that from the perspective of national constitutional courts the stick is strong and the carrot is weak. To entrust a court entirely unproven as an FR guardian with the very task for which a constitutional court has been established in the first place is not an easy request.

## 2. Frankfurt Administrative Court

The academic debate about the relationship between EU law and national law and multi-level judicial dialogue is, as the term Verfassungsgerichtsverbund indicates, typically centered around national constitutional courts and the European Court of Justice (ECJ). An exclusive focus on those highest courts neglects, however, the critical role of lower courts. The *Solange I*-case exemplifies this claim. The Frankfurt Administrative Court is a key driver in the *Solange*-Saga:[67] Both the decisions of the GFCC in *Solange I* and the ECJ in *Internationale Handelsgesellschaft* originate from the same dispute, both decisions are based on references by the administrative court. After the court had supplemented the preliminary reference to the CJEU under Article 267 Treaty on the Functioning of the European Union (TFEU) (then Art. 177) with barely disguised criticism of the CJEU's primacy-doctrine, its subsequent reference to the GFCC pursuant to Article 100(1) BL stated – in clear contrast to the ECJ's holding in *Internationale Handelsgesellschaft* – that EC law may be reviewed for its conformity with the Basic Law because EC law does not prevail over all national law.[68] In other words, the constitutional

64 For this characterisation of *Internationale Handelsgesellschaft*, see Paul Craig, *EU Administrative Law* (3rd edn, Oxford University Press 2018), 485: 'mixture of stick and carrot'.

65 Alter (n. 33), 91.

66 Davies (n. 15), 177.

67 Alter (n. 33), 88.

68 More specifically, the reference to the GFCC was signed by judges Kramer, Achtmann, Boettger of the FAC's second chamber. See original reference of the Verwaltungsgericht Frankfurt a. M., Az. II/2 – E 228/9, dated 23 December 1971, 26 (on file with author).

judicial dialogue between the CJEU and GFCC is enabled and framed by the FAC.[69]

It is disputed in legal scholarship whether the FAC had planned from the outset to send a preliminary reference to the GFCC after receiving the CJEU's response to its preliminary questions or whether the Court was genuinely surprised and disappointed that the CJEU had not declared the challenged provisions of the deposit regime invalid and not excluded national fundamental rights from the scope of the supremacy doctrine. Davies assumes that 'the FAC was interested in fetching the ECJ's opinion before it could refer the case again within its own domestic hierarchy'.[70] Alter draws the conclusion from the text of the FAC's reference that it 'expected the ECJ to agree that European law could not violate German Basic Law protections, and that thus the licence forfeiture scheme was invalid'.[71] Unfortunately, we will likely not be able to gain more clarity on the FAC's judicial behaviour because the archival documents relating to the case in the Hessian State Archive have apparently been lost.[72]

What we do know from other FAC decisions is, however, that the Court was a staunch critic of the deposit regime for agriculture products. It apparently had 'constantly refused to apply the deposit regulations'.[73] In 1977, the FAC was responsible for another reference to the GFCC challenging the validity of a CJEU decision, resulting in the GFCC's *Vielleicht*-decision,[74] in which the Court 'suggested that "in view of political and legal developments in the European sphere occurring in the meantime", its *Solange* decision might no longer apply to regulations and directives'.[75] The repeated challenges against the deposit regime that did not persuade the CJEU to change its case-law and the repeated preliminary references to the GFCC suggest that the FAC acted strategical and did not truly expect the CJEU to accommodate its concerns. At the latest when the FAC referred the case to the GFCC on 23 December 1971, it was determined to prompt

69 See Alter (n. 33), 88.

70 Davies (n. 15), 161.

71 Alter (n. 33), 88.

72 Davies (n. 15), 160. Davies notes that a letter exchange between the FAC and the European Commission that he found in the historical archives of the European Union indicates that the FAC only referred to the CJEU reluctantly and was scolded by the Commission's Legal Service representative in the case, Claus Dieter Ehlermann, for a delayed response. How to interpret this delayed response and what it may mean for the FAC's judicial behaviour remains unclear.

73 Manfred Zuleeg, 'Fundamental Rights and the Law of the European Communities', CML Rev. 8 (1971), 446-461 (448).

74 BVerfGE 52, 187 – *Vielleicht*.

75 Alter (n. 33), 94.

the GFCC to impose limits on the supremacy doctrine and on the loathed deposit regime.

The FAC states at the outset of the reasons of its referral: 'The Chamber cannot concur with the decision of the CJEU; it considers the cited EEC provisions to be unconstitutional.'[76] The Court warns that if 'Community law is given precedence over any deviating constitutional norm […], this would lead to a constitutional and legal vacuum' and 'constitutional law would be eliminated […] for increasingly expansive European legislation without equivalent guarantees of legal protection'.[77] The constitutional reasoning leads to a dramatic citation: 'Anyone who unhinges the rigid normative structure of constitutional law and offers it as a sacrifice on the altar of a Eurocratic economic union will ultimately have to take responsibility if the United Europe is won, but the secure form of democratic and rule-of-law decision-making is gambled away.'[78] The FAC concludes that '[b]ased on the assessment of the legal situation described above, the Chamber has no doubt as to the jurisdiction of the BVerfG'.[79] An avoidance approach barely appears as a feasible option for the GFCC against this background and would have risked losing acceptance of lower courts.[80] It certainly would have been easier to pursue for the CJEU in *Internationale Handelsgesellschaft* than for the GFCC in *Solange I*.

## 3. Federal Ministry of Justice

One of the reasons for the lasting legacy of *Solange I* is its dramatic 'So long as-language'. The (incomplete) view into the archives suggests that the Federal Ministry of Justice may not only have been the originator of this passage but may also have presented the GFCC a way out of the dilemma into which the Court was put by virtue of the activist approaches of the CJEU and the FAC. The Constitutional Court was caught between two stools. On the one hand, the GFCC did not intend to damage the nascent

76 Verwaltungsgericht Frankfurt a. M., decision of 14 July 1971, case no. II/2 – E 228/69, Außenwirtschaftsdienst des Betriebs-Beraters November 17 (1971), 541-546 (541).

77 Verwaltungsgericht Frankfurt a. M., decision of 14 July 1971, case no. II/2 – E 228/69, Außenwirtschaftsdienst des Betriebs-Beraters November 17 (1971), 541-546 (543).

78 Verwaltungsgericht Frankfurt a. M., decision of 14 July 1971, case no. II/2 – E 228/69, Außenwirtschaftsdienst des Betriebs-Beraters November 17 (1971), 541-546 (543).

79 Verwaltungsgericht Frankfurt a. M., decision of 14 July 1971, case no. II/2 – E 228/69, Außenwirtschaftsdienst des Betriebs-Beraters November 17 (1971), 541-546 (543).

80 But see Alter (n. 33), 90, suggesting that '[t]he BVerfG could have relied on its 1967 jurisprudence, reasserting its incompetence to assess the validity of acts not emanating from German authorities and by extension asserting the administrative court's incompetence'.

and vulnerable process of European integration and understood well the significance of the uniform application of Community law in the member states for the smooth functioning of the highly regulated European internal market. On the other hand, the CJEU's unconditional primacy doctrine according to which any Community regulation would take precedence over domestic FR guarantees was unacceptable to the GFCC.

While the Federal Government (Bundesregierung) had generally taken a supportive and permissive approach towards European integration, the 60-pages long submissions for the *Solange I*-proceedings prepared by the Ministry of Justice on behalf of the Federal Government, co-signed by the Ministry of Economics and the Ministry of Food, Agriculture and Forestry, and submitted on 15 February 1973, suggested that the fundamental rights of the German Basic Law constituted limits to the transfer of powers to the European Communities. The Submission argued: 'In light of the central importance of the guarantees of freedom in our constitutional value system, Article 24(1) BL cannot be understood as permitting the transfer of sovereign rights with a general waiver of the guarantee of constitutional guarantees of freedom, as laid down as a value system in the fundamental rights of the Basic Law. Insofar as – and so long as – ("Soweit – und so lange –") an intergovernmental institution such as the European Communities […] lacks fundamental rights that correspond in principle to those of the Basic Law, the legislature is bound by the national system of fundamental rights when applying Article 24(1) of the Basic Law.'[81]

Of course, I have no idea whether the justices sitting on the Second Senate took the famous *Solange*-formula from the 'Soweit und so lange'-passage in

81 See Submission by the Federal Minister of Justice (1oo4 E (2186) – 6/73), co-signed by the Federal Minister of Economics (E2 – 110116/6) and the Federal Minister of Food, Agriculture, and Forestry (III A 2 – 3604.11 – 25/70) addressed to the Vice-President of the Federal Constitutional Court, dated 15 February 1973, 24 (on file with author). To be sure, the earlier preliminary reference of the Frankfurt Administrative Court of 24 November 1971 already contains a *Solange*-sentence, but it is more hidden and much less pronounced than the passage in the Submission of the Federal Government. In its order, the FAC briefly summarises the competing camps on the relationship between EU law and German law in legal scholarship before it sets forth its own position. In its summary, the Court, implicitly referencing the constitutional pluralist position, notes in German that 'the others do not want to completely forgo the safeguards that the existing 'traditional' institutions provide for citizens, *so long as* newly written legal protection guarantees have been created'. Emphasis added. See Verwaltungsgericht Frankfurt a. M., decision of 14 July 1971, case no. II/2 – E 228/69, Außenwirtschaftsdienst des Betriebs-Beraters November 17 (1971), 541-546 (542). The translation of this passage in the Common Market Law Reports does not accurately reflect this nuance. See Verwaltungsgericht Frankfurt a. M., Order of 24 November 1971, Case II/2 E 228/69, Common Market Law Reports (1972), 177: 'the national fundamental principles must be observed so long as there is no written constitutional law of the Community'. I thank the anonymous reviewer for drawing my attention to this passage.

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the Submission of the Ministry of Justice or whether they had already thought of this specific terminology independently of the Submission. In any event, the *Solange*-formula does not appear to be used in German legal scholarship on the relationship between Community law and national law prior to *Solange I*.

Beyond semantics, the Submission of the Ministry of Justice also had a political dimension from the perspective of the Court. The fact that the integration-friendly Federal Government opposed a general waiver of national FR guarantees so long as the European Communities lacked equivalent fundamental rights likely validated the GFCC's position and eased its concerns regarding the potential consequences for European integration of contesting the CJEU's primacy doctrine. To be sure, the Ministry of Justice did not develop this doctrinal construction 'out of the blue'. Although the Memorandum refrained from citing any literature, this viewpoint was likely based on an emerging mainstream position in German legal scholarship referred to as 'structural congruence', arguing that a certain degree of constitutional equivalence between national and European legal orders is necessary for the supremacy of EU law to be deemed legitimate and acceptable.[82] Moreover, the views of the GFCC and the Federal Government in *Solange I* diverged regarding two central issues: the admissibility of the Administrative Court's referral and the equivalence of FR protection. In contrast to the GFCC, the Ministry of Justice argued that the referral was inadmissible and 'the Court of Justice of the Communities has granted comparable protection of fundamental rights in the present case [Internationale Handelsgesellschaft]'.[83] The argument set forth here is therefore not that the GFCC and Ministry of Justice were on the same page,[84] but that the latter had roughly sketched a position, or perhaps only a formula ('so long as'), that was acceptable not only to those who advocated for the supremacy of the national constitution, but also to those who favored deeper European integration.

82 Davies (n. 15), 172; Haltern (n. 35), 451. The theory of structural congruence was originally founded by Herbert Kraus, 'Das Erfordernis struktureller Kongruenz zwischen der Verfassung der Europäischen Verteidigungsgemeinschaft und dem Grundgesetz (Gutachten)', in: Institut für Staatslehre und Politik e. V. in Mainz (ed.), *Der Kampf um den Wehrbeitrag. Band 2: Das Gutachtenverfahren (30.7.-15.12.1952)* (Institut für Staatslehre und Politik e. V. in Mainz 1953), 545-554.

83 Submission by the Federal Minister of Justice (n. 81), 30.

84 After *Solange I*, the Minister of Justice even wrote a letter to the President of the GFCC, asserting that the decision questioned Germany's membership in the European Community. See Haltern (n. 35), 456.

# IV. The Decision: Modern Conception or Parochial Backlash?

One of the controversies in the debate between judicial federalists and constitutional pluralists goes to the heart of the legacy of *Solange I*: Is the decision best characterised as backward and parochial or as a modern and forward-looking understanding of the role of constitutional courts in multi-level governance? In search for answers to this question, this Section analyses the competing visions between majority and minority opinion, demonstrating that the default lines are whether the constitutional court has jurisdiction to review European Community (EC) regulations to protect the basic structures of the Constitution and which developments in European integration are required to relinquish this review (1.). It subsequently argues that the characterisation of the GFCC as backward-turned disregards the modern and innovative doctrinal elements in *Solange I* (2.).

## 1. Legal Background and Clash Between Majority and Minority Opinion

The central issue in *Solange I* is the relationship between EU law and German law. To better understand the dispute, it is helpful to look at the constitutional provision in the German Basic Law that implicitly regulated this relationship, and around which the judicial debate was centered. At the time of the decision, the legal basis for opening up the German legal order to EU law was Article 24 (1) of the Basic Law. The provision stipulates: 'The Federal Republic may, by legislation, transfer sovereign rights to intergovernmental institutions.' On its face, Article 24 directly only sets forth the conditions for the transfer of sovereign rights, on which it places two restrictions: i) substantively, the beneficiary must be an intergovernmental institution, and the European Communities were unanimously considered as such, and ii) procedurally, the transfer must be enacted in the form of a federal statute. The provision does not, by contrast, directly address the question raised in *Solange I*, namely whether and to what extent the GFCC may exercise constitutional judicial review of sovereign rights that have already been transferred to the EU.

As laid out in the Introduction, the justices sitting on the Second Senate were profoundly split on this issue.[85] According to the Senate majority composed of justices Geiger, Rinck, Schlabrendorff, Rottmann, and Seuffert,

85 They were noticeably not split along party lines. See Haltern (n. 35), 455.

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there are constitutional limits to the transfer of sovereign rights beyond the wording of Article 24(1), and those limits apply in the same way to the control of exercised sovereign powers. Drawing implicitly on the interpretative principle of unity of the constitution according to which the interpretation of an individual provision in a codified text must not contradict the fundamental concerns of the text as a whole, the justices assert that Article 24 'must like any constitutional provision of a similarly fundamental nature, be understood and interpreted in the context of the overall constitution', and, accordingly, does not allow 'the identity of the current constitution of the Federal Republic of Germany to be abolished by breaking into its constituent structures'.[86] These limits for the transfer of sovereign rights by Germany would apply in the same way to the control of exercised sovereign powers by the EU,[87] for if the legislature did not have the right to abrogate 'the identity of the constitution in force' when transferring sovereign rights,[88] then now the European Union cannot have the right to abrogate 'the identity of the constitution in force' through its legislation.[89]

According to the majority, fundamental rights 'form […] part of the constitutional structure of the Basic Law',[90] and it is the job of the GFCC to protect those rights 'within the framework of the powers granted to it by the Basic Law'.[91] If it failed to perform this 'constitutional task', 'a serious gap in judicial protection might arise precisely for the most elementary status rights of the citizen'.[92]

Although the justices in the minority, Rupp, Hirsch, and Wand, concur that the 'basic structures of the Constitution'[93] set limits to the transfer of sovereign rights to the EU, they disagree that these constitutional limits should equally apply to the application of EU law in the German legal order. They argue instead that Article 24(1) of the Basic Law would state 'on a proper interpretation, not only that the transfer of sovereign rights to intergovernmental institutions is permissible at all, but also that the sovereign acts of intergovernmental institutions are to be recognised by the Federal Republic of Germany'.[94] This 'excludes from the outset the possibility of subjecting them to national control',[95] for the Federal Republic of Germany had 're-

86 BVerfGE 37, 271 (para. 25) – *Solange I*.
87 BVerfGE 37, 271 (para. 43) – *Solange I*.
88 BVerfGE 37, 271 (para. 43) – *Solange I*.
89 BVerfGE 37, 271 (para. 43) – *Solange I*.
90 BVerfGE 37, 271 (para. 26) – *Solange I*.
91 BVerfGE 37, 271 (para. 32) – *Solange I*.
92 BVerfGE 37, 271 (para. 32) – *Solange I*.
93 BVerfGE 37, 271 (para. 43) – *Solange I*.
94 BVerfGE 37, 271 (para. 63) – *Solange I*.
95 BVerfGE 37, 271 (para. 63) – *Solange I*.

nounced this [possibility] by joining the European Economic Community (EEC), its consent to the establishment of Community institutions and its participation in the establishment of autonomous sovereignty'.[96]

Accordingly, they posit that the referral of the Frankfurt Administrative Court is 'inadmissible',[97] and any review of the applicability of Community law would constitute 'inadmissible trespass into competence reserved to the European Court of Justice'.[98] Furthermore, the Senate minority fears that there would be 'legal fragmentation in the area of Community law' if the protection of fundamental rights against European legal acts were not guaranteed solely by the ECJ.[99] 'To open up this possibility [of national control] would mean exposing a part of European legal unity, endangering the existence of the Community and denying the very idea of European unity.'[100]

The disagreement about whether the GFCC is entitled to review the applicability of EU law – as opposed to the transfer of sovereign rights to the EU – has far-reaching consequences for the scope of FR protection by the GFCC. It concerns the object of review: it is either only EU primary law (minority view) or additionally EU secondary law (majority view). Having constitutional limits to the transfer of sovereign rights effectively means constitutional review of a founding treaty prior to its ratification, or EU primary law for that matter. Review of applicability, by contrast, encompasses EU secondary law enacted on the basis of the treaty. Excluding all those legal acts from the purview of review and limiting review to the treaty itself largely depletes judicial FR protection (by the GFCC) because it is often impossible to know years in advance which EU policies are created based on the lawmaking institutions, competences, and procedures laid down in the treaty. In addition, review of primary law may preclude the ratification of a founding treaty, which likely exceeds the political-institutional limits of a national constitutional court, especially if it ultimately thwarts the entire treaty project or renders continued membership of that member state in the EU impossible. Review of a specific secondary legal act, by contrast, is phenomenologically exactly what courts do: An FR intrusion has already occurred, and the court examines the FR issue in an individualised and retrospective manner. And if the court deems the legal act to violate an FR, the legal consequence seems limited and manageable, for it is only this single legal act that is disapplied in the legal order of the member state.

96 BVerfGE 37, 271 (para. 63) – *Solange I*.
97 BVerfGE 37, 271 (para. 70) – *Solange I*.
98 BVerfGE 37, 271 (para. 69) – *Solange I*.
99 BVerfGE 37, 271 (para. 67) – *Solange I*.
100 BVerfGE 37, 271 (para. 67) – *Solange I*.

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Finally, the opinions of the Senate majority and minority differ on the question of the extent to which the 'basic structures of the Constitution' are impaired by the transfer of sovereign rights to the Community in the relevant phase of European integration and under what conditions the GFCC is required to relinquish national control. The Senate majority sees a risk of relativisation of the FR section of the Basic Law due to the considerable deficits in the level of FR protection provided by the Community. The latter would not only lack 'a directly democratically legitimised parliament resulting from general elections', but also 'a codified catalog of fundamental rights whose content is as reliable and unambiguous for the future as that of the Basic Law'.[101] Against this background, the majority concludes that 'so long as' this 'current phase of transition' within 'the ongoing process of Community integration' was still in progress, domestic constitutional limits would continue to apply.[102] The Senate minority, by contrast, contends that the 'fundamental structure of the Constitution […] is not at stake',[103] the requirements of the Basic Law for the 'renunciation of the exercise of sovereign power' are 'fulfilled in the European Economic Community',[104] and FR protection through the case law of the CJEU constituted a sufficient substitute for the missing FR catalogue within the Community.[105]

## 2. Elements of a Modern Understanding of the Role of Domestic Constitutional Courts in Multi-Level Governance

The characterisation of *Solange I* as backward-turned disregards the modern and innovative doctrinal elements in the decision. I identify three such elements in this section: First, the establishment of a graduated accountability mechanism that is well-suited to address structural norm conflict between EU law and national law (a); second, the use of the domestic implementation act as reference point for judicial review, which furthers the autonomy of EU law (b); and third, a relative notion of constitutional identity that seems to leave open the possibility for integration-friendly amendments by the constitution-amending legislature (c).

To be sure, *Solange I* also contains less progressive elements such as, in part, sovereigntist language, the failure to submit a preliminary reference to

101 BVerfGE 37, 271 (para. 44) – *Solange I*.
102 BVerfGE 37, 271 (para. 44) – *Solange I*.
103 BVerfGE 37, 271 (para. 83) – *Solange I*.
104 BVerfGE 37, 271 (para. 81) – *Solange I*.
105 BVerfGE 37, 271 (para. 82) – *Solange I*.

the CJEU in the case even though the GFCC had generally stipulated such a requirement in *Solange I*, and the excessively demanding and unrealistic demand for an FR catalogue. I nevertheless contend that all things considered *Solange I* formulated a surprisingly modern understanding of the relationship between European Community law and domestic law for its time. A possible explanation are the virtues of the judicial deliberative process: The disagreement between the majority and minority and the judicial deliberations and reflections it triggered may have proved to be productive.[106] The following archival finding may support this assumption: According to an order dated 28 July 1972, the reporting judge in *Solange I* changed for unknown reasons from Justice Rudi Wand to Justice Martin Hirsch.[107] Interestingly, both justices were in the minority, which is rare but not unusual in constitutional court practice because the reporting judge is assigned prior to the judicial decision-making process. The fact that one of the dissenting judges was responsible for preparing the majority opinion may have reinforced the conciliatory and integration-friendly elements in *Solange I*.

### a) *Solange* as a Graduated Accountability Mechanism

First and foremost, *Solange I* sets forth an innovative and productive doctrinal construction to facilitate cooperation between 'interconnected but autonomous legal orders'.[108] It achieves this by offering a mechanism to resolve a profound and intricate normative conflict between EU law and German law – the conflict between the primacy of EU law designed to ensure the functioning of the internal market on one hand and a high level of FR protection established in response to the terrors of the Nazi regime on the other hand. Both paradigms are defining for the EU and the German legal order, respectively. The GFCC did not seek to damage European integration and the internal market, but it also adamantly insisted that EU law needs to satisfy the fundamental principles of the German Constitution.

106 On the deliberative character of the decision-making processes inside the GFCC: Gertrude Lübbe-Wolff, 'Why is the German Federal Constitutional Court a Deliberative Court, and Why Is That a Good Thing?' in: Birke Häcker and Wolfgang Ernst (eds), *Collective Judging in Comparative Perspective* (Intersentia 2020), 157-179.

107 See Order by the Chairman of the Second Senate of the GFCC in the matter '2 BvL 52/51' dated 28 July 1972 (on file with author).

108 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), also for a useful conceptualization of the *Solange* doctrine.

The conditionality of *Solange* is the way to reconcile this dilemma: By using the *Solange*-formula, the Court signals its willingness to relinquish its domestic constitutional judicial review – indicated by the wording 'so long as' – dependent on certain constitutional developments within the EU, namely on the level of FR protection guaranteed by European institutions. This conditionality contains two modern elements that contradict a characterisation of *Solange I* as backward-turned and parochial. First, the GFCC is manifestly motivated by the concern that European integration may lead to 'a manifest gap in judicial protection […] for the most elementary status rights of the citizen'.[109] In other words, the Court effectively makes a rights foundationalist claim. It is skeptical about the CJEU's claim for unconditional supremacy of EU law without sufficient structures of constitutional legitimacy and maintains that the choice for a certain layer of governance must not diminish the level of FR protection provided to individuals. We should not confuse this deep commitment to FR with parochialism.

Second, this rights foundationalism is in many ways supportive of European integration as exemplified by the conditional institutional control waiver included in the *Solange*-formula. The GFCC does not parochially insist on maintaining its judicial powers but instead holds out the prospect of a centralisation of FR review in EU matters in the hands of the CJEU. It permits the CJEU to exclusively carry out FR review so long as the *Solange I*-conditions are observed. This conditionality suggests that the GFCC cares less about ensuring that FR review is carried out at the national level and more about robustly protecting fundamental rights at all – regardless of whether this site is the EU or the national level.[110] Otherwise, it would not offer to relinquish national for the benefit of European constitutional judicial review.

The GFCC outlines why decentralised review is necessary at this moment in time considering the 'current transitional phase'[111] of integration to ensure adequate FR protection, but it also indicates that things could soon be different in 'the ongoing process of Community integration'.[112] It is only because the CJEU's case law on fundamental rights is still developing and lacks a codified normative basis that the GFCC needs to exercise decentralised national constitutional review.[113] Put differently, the *Solange I*-mechanism is not a static, but dynamic and forward-looking. It is predominantly concerned with the proper allocation of competencies and the proper concern

109 BVerfGE 37, 271 (para. 32) – *Solange I*.
110 Haltern (n. 35), 458.
111 BVerfGE 37, 271 (para. 44) – *Solange I*.
112 BVerfGE 37, 271 (para. 40) – *Solange I*.
113 Haltern (n. 35), 457.

for basic constitutional principles in the entire European multi-level order. *Solange I* is, in other words, the quintessential composite governance decision.[114]

The *Solange*-mechanism is best characterised as a graduated accountability mechanism. By making the exercise of national constitutional review conditional upon the due respect for fundamental rights, it establishes an accountability relationship vis-à-vis the CJEU and the political EU institutions. The basic idea of the concept of accountability is that the prospect for the accountee of having to provide an accounting on the basis of which the accountor may, upon a negative evaluation, impose sanctions provides ex ante incentives for the accountee to give appropriate consideration to the interests of the accountor in his decision-making process.[115] In the *Solange I*-situation, the GFCC is the accountor and its interests lie in adequate FR protection, the CJEU is the accountee whose decisions are subjected to domestic constitutional review. This decentralised review by the accountor is a form of sanction for two reasons: It undermines the CJEU's supremacy doctrine and threatens the uniform application of EU law because it may result in the disapplication of EU law in the German legal order. Both, supremacy and uniform application, is of essence to the CJEU as accountee. The prospect of continued judicial constitutional review by the GFCC provides ex ante-incentives to take into account the GFCC's foundational FR concerns to avoid this form of review. Not only is there a threat of 'negative' sanctions but, conversely, the requested equivalent FR protection is rewarded with the GFCC restraining itself from exercising jurisdiction. In other words, the *Solange*-mechanism uses a carrot and stick approach:[116] Depending on the response by the accountable institutions, the GFCC gives negative feedback (the stick) by exercising judicial constitutional review with the threat to find EU law inapplicable in Germany, or positive feedback (the carrot) by renouncing its review, effectuating a shift from decentralised to centralised FR review and strengthening the CJEU's judicial authority. The stick poses a harsh threat and the carrot contains a major concession.[117]

Consequently, the *Solange*-mechanism creates strong incentives and high pressure to intensify the EU's FR protection and to consolidate it at a high

114 Haltern (n. 35), 449.

115 See Richard Stewart, 'Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness', AJIL 108 (2014), 211-270 (246).

116 Alter (n. 33), 97; Haltern (n. 35), 459.

117 Haltern (n. 35), 459. Of course, contemporary national judicial constitutional review mechanisms such as ultra-vires-review and identity review also use a carrot-and-stick approach. The carrot is less appealing, however, because these mechanisms provide no prospect that national constitutional courts will decrease the intensity of their review in future cases if the CJEU takes their concerns seriously.

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level.[118] It thereby sets in motion a legal and political process that may result in the development of a normative basic consensus on common constitutional principles and harmonise the competing paradigms of a functioning internal market and a robust FR protection. Conceptualised more broadly, the *Solange*-mechanism is a promising effective means against the fragmentation tendencies in multi-level contexts, for it creates incentives for institutions closely attached to the logic and self-image of their respective legal orders to observe the constitutional concerns of the incorporating legal orders and thus may have an integrating effect on divergent rationalities (e. g., internal market vs fundamental rights). This may help to reduce the occurrence of norm conflicts in multi-level orders by lowering the discrepancy between the constitutional principles of different legal orders.

### b) The Act of Incorporation as Reference Point

A specific doctrinal challenge for the GFCC was how to review the compatibility of EU law with the FR guarantees of the Basic Law to ensure structural congruence between EU and national law, but without undermining the validity of EU law. As mentioned, the Court was worried about damaging the nascent European integration process. In *Solange I*, it accordingly accepted the claim to autonomy of EU law, upholding its previous case law according to which 'Community law […] forms an independent system of law flowing from an autonomous legal source'.[119] It drew the logical conclusion that 'the competent Community organs, including the European Court of Justice, have to rule on the binding force, construction and observance of Community law' and that the GFCC is not entitled to 'rule on whether, and with what implications, a rule of secondary Community law is compatible with primary Community law'.[120] But if the Court is not entitled to rule on the validity of Community law, how is it supposed to ensure that German fundamental rights are protected against Community law?

The judicial federalist position is that national courts ought to accept the supremacy of EU law and thus may not review EU law – neither directly nor indirectly. This viewpoint was shared by the dissenting opinion in *Solange I*, in which the three justices in the minority argued: 'The Federal Constitutional Court possesses no jurisdiction to examine provisions of Community law against the criteria of the Basic Law, in particular its FR

118 Haltern (n. 35), 458.
119 BVerfGE 37, 271 (para. 22) – *Solange I*.
120 BVerfGE 37, 271 (para. 23) – *Solange I*.

section, in order to answer the question of their validity.'[121] The consequence of this standpoint is, of course, that EU law is out of reach for national constitutional law and is not subject to review by national constitutional courts. This consequence was, as we have seen, not acceptable for the Senate majority.

The GFCC developed a doctrinal construction that solved the conundrum and that has been adopted by many courts in Europe and beyond in multilevel contexts for the review of the secondary law of supranational and international organisations. In *Solange I*, the Court does not directly review the EU regulation, but the decisions of German customs authorities that apply the EU regulation.[122] In other words, it choses the act of incorporation of the German legal order as reference point for its judicial constitutional review, adapting to the CJEU's autonomy claim. For it does not rule on the validity of EU law, but on the compatibility of an exercise of German state authority with higher-ranking German fundamental rights. If the incorporation act is deemed unconstitutional and hence invalid, the application of the EU norms in Germany is blocked. EU law's validity, however, remains intact.

*Solange I* also preserves the autonomy of EU law in one other way. The decision refrains from disassociating the act of incorporation from the incorporated EU regulation. Although the GFCC formally reviews domestic law, it does not simply review an act of German state authority against the standard of the superior German constitution. Because the domestic legal act serves the implementation of Community law and a declaration of inapplicability would hence call into question the fulfillment of Germany's obligations under EU law, provoking a norm conflict with EU law, it needs to be treated differently to reflect the special character of Community law. As a result, the Court limits its control to the 'inalienable, essential feature[s]', which 'form […] part of the constitutional structure of the Basic Law': fundamental rights[123] – constitutional principles of undeniable value.

One of the criticisms against *Solange I* is that the distinction between invalidity and inapplicability is meaningless.[124] The dissenters objected that this 'distinction exhausts itself in the use of different words', arguing that '[i]f a court declares a legal norm generally inapplicable because of a violation of superior law, it is thereby stating that the norm does not apply, that is, that it

121 BVerfGE 37, 271 (para. 69) – *Solange I*.

122 BVerfGE 37, 271 (para. 53) – *Solange I*.

123 BVerfGE 37, 271 (para. 26) – *Solange I*.

124 Alter (n. 33), 91, citing Reinhard Riegel, 'Das Grundrechtsproblem als Kollisionsproblem im europäischen Gemeinschaftsrecht', Bayerische Verwaltungsblätter 12 (1976), 354-360 (360), who characterises the distinction as a mere euphemism.

is invalid'.[125] It is true that the content of the national incorporation act and the incorporated EU norm is, for the purposes of indirect review of EU law, essentially the same. The GFCC effectively reviews the EU regulation in *Solange I*. It does not follow, however, that invalidity and inapplicability are virtually identical.[126] For an EU regulation deemed inapplicable in Germany by the GFCC is still applicable in all other member states. This would not be the case if the EU regulation was invalid, or if a declaration of inapplicability had the same legal effect as a declaration of invalidity. If the GFCC deems an EU regulation inapplicable, it only makes a bipolar claim that exclusively concerns the relationship between the EU and the German legal order. It contends that the EU regulation violates the specific FR standards of the German constitution. This claim does not extend to other member states.[127]

### c) A Relative Notion of Constitutional Identity

Finally, *Solange I* sets forth a notion of constitutional identity that is less static and more promising than the notion that solidified in German constitutional law after the *Lisbon*-decision.[128] Today, constitutional identity is anchored in the eternity guarantee of Art. 79(3) BL that 'even prevents a constitution-amending legislature from disposing of the identity of the free constitutional order'.[129] It imposes 'an absolute limit on the transfer of sovereignty rights'.[130] The rationale behind this is that if Article 79(3) BL marks limits that are beyond even the constitution-amending legislature's power of disposition, then logically these boundaries must also apply to the

125 BVerfGE 37, 271 (para. 69) – *Solange I*.

126 On the basic distinction between precedence in application ('Anwendungsvorrang') and precedence in validity ('Geltungsvorrang'), see Franz C. Mayer, 'Supremacy – Lost? – Comment on Roman Kwiecień', GLJ 6 (2005), 1497-1505 (1498).

127 This is different for ultra vires-review where a national constitutional court interprets the legal bases laid down in EU treaty law, which constitutes the law of the land for all member states, and thus makes a claim that goes beyond the bipolar relationship between its own and the EU's legal order. Due to its institutional bias as a representative of its national legal order, however, a national constitutional court lacks the required legitimacy to interpret the legal competency provisions agreed upon in the European treaties and to unilaterally challenge the validity of EU legal acts in a way that goes beyond its own legal order. Lang (n. 3), 500-501. See also Franz C. Mayer, *Kompetenzüberschreitung und Letztentscheidung* (C. H. Beck 2000), 115.

128 Cross-reference to article in Symposium Issue: Freeing Constitutional Identity from Unamendability: *Solange I* as a Constitutional Identity Judgment.

129 BVerfGE 123, 267 (para. 216) – *Lisbon*.

130 Monika Polzin, 'Constitutional Identity, Unconstitutional Amendments and the Idea of Constituent Power: The Development of the Doctrine of Constitutional Identity in German Constitutional Law', I.CON 14 (2016), 411-438 (427).

legislator transferring powers to the EU based on Art. 24(1) BL.[131] But this strict constitutional rigidity creates several normative problems that have been outlined in detail in constitutional legal scholarship.[132]

When the GFCC first introduced the concept in *Solange I* to underline that the transfer of sovereign powers was subject to constitutional limits, however, it proposed a relative and less static notion of constitutional identity. Although the Court also used language of inalterability in *Solange I*, noting the 'inalienable, essential feature[s]' of the German Constitution and holding that Article 24(1) BL 'does not open the way to amending the basic structure of the Basic Law, which forms the basis of its identity', it does not refer to Art. 79(3) BL. The Court also specifies that the identity of the Basic Law may not be amended 'without a formal amendment to the Basic Law',[133] inviting to the *argumentum e contrario* that the constitutional identity may be changed by virtue of a formal constitutional amendment. But this is precisely what Article 79(3) BL does not permit, indicating that the Court's notion of *Solange I* was not based on the eternity guarantee. It is argued in legal scholarship that the reference to constitutional identity in *Solange I* amounts to the Court's thunderous proclamation that fundamental rights '– will not […] be surrendered to the supranational level'.[134] But this reading contradicts the conditional institutional control waiver offered by the Court as outlined above. While the *Solange*-formula insists on an inalienable basic FR standard that is not to be compromised through European integration, it is open to the possibility that fundamental rights are protected through the EU.

## V. The Aftermath: Lasting Impact or Superfluous Interference?

How we assess the legacy of *Solange I* hinges critically upon its impact on the development of EU fundamental rights. The two competing narratives about *Solange I* outlined in the Introduction differ especially in this regard. While proponents credit *Solange I* with spurring the development of fundamental rights in the Community, critics contend that the CJEU had already

131 The constitution-amending legislator has imposed these constitutional limits to transfers of sovereign powers to the European Union in 1992 by introducing Art. 23(1) sentence 3 into the Basic Law.

132 Cross-reference to article in Symposium Issue: Freeing Constitutional Identity from Unamendability: *Solange I* as a Constitutional Identity Judgment.

133 BVerfGE 37, 271 (para. 43) – *Solange I*.

134 Perju (n. 1), 289.

been well in the process of doing so before and independently of *Solange I*. Most scholars who have commented on this issue and the genesis of EU fundamental rights assume that *Solange I* had a decisive impact, but they do so without substantiating their assessment.[135]

In a recent debate, *Delledonne* and *Fabbrini* on one side and William Phelan on the other side have exchanged important and intriguing arguments about the impact of national courts and *Solange I* on the CJEU's early fundamental rights case law. The former contend the 'conventional narrative' that the CJEU developed its fundamental rights jurisprudence predominantly in response to pressures by the German and the Italian constitutional courts is 'very simplistic' and a 'founding myth'.[136] In support of their argument, they challenge, amongst others, the prevailing understanding of the chronology between national and European court judgments,[137] arguing instead that 'by the time the Italian and West German constitutional courts voiced their concerns against the supremacy of EU law on human rights grounds, the ECJ had already recognised the importance of human rights in the European legal order – for almost half a decade'.[138]

A very similar argument had already been put forward by former CJEU judge Ulrich Everling long ago who argued that the narrative that the CJEU

135 See only Jason Coppel and Aidan O'Neill, 'The European Court of Justice: Taking Rights Seriously?', CML Rev. 29 (1992), 669-692 (670-671); Kumm (n. 7), 294-295; Frank Schimmelfennig, 'Competition and Community: Constitutional Courts, Rhetorical Action, and the Institutionalization of Human Rights in the European Union', Journal of European Public Policy 13 (2006), 1247-1264 (1252); Dieter Grimm, *The Constitution of European Democracy* (Oxford University Press 2017), 205; Anne Peters, 'Rechtsordnungen und Konstitutionalisierung: Zur Neubestimmung der Verhältnisse', ZÖR 65 (2010), 3-63 (62); Albert Bleckmann, *Europarecht. Das Recht der Europäischen Gemeinschaft* (Carl Heymann 1985), 400; Hans Peter Ipsen, 'Zehn Glossen zum Maastricht-Urteil', EuR 29 (1994), 1-21 (9); Nikolaos Lavranos, 'Das So-Lange-Prinzip im Verhältnis von EGMR und EuGH', EuR 41 (2006), 79-92 (79); Jutta Limbach, 'Das Bundesverfassungsgericht und der Grundrechtsschutz in Europa', NJW 54 (2001), 2913-2918 (2916).

136 Delledonne and Fabbrini (n. 9), 195.

137 The other central claim made by them is that FR protection only became a true priority for the Italian and German courts when the CJEU had already taken on its role as a guardian of fundamental rights in the European Communities, noting that those courts only regularly started to actively strike down major legislative initiatives contravening constitutional fundamental rights provisions in the 1970s. Delledonne and Fabbrini (n. 9), 189-190. Without delving into the details of this claim, this is – at least with regard to the fundamental rights jurisprudence of the GFCC with which I am familiar – an overly reductionist account that neither sufficiently accounts for numerous landmark decisions in the area of fundamental rights beyond the annulment of federal legislation nor for the sweeping and intrusive fundamental rights analysis with the proportionality principle at its heart elaborated by the GFCC. For a similar criticism of Delledonne's and Fabbrini's account, see Phelan, 'Role of the German and Italian Constitutional Courts' (n. 45), 189.

138 Delledonne and Fabbrini (n. 9), 181.

developed its FR jurisprudence under the Damocles' sword of the *Solange I*-decision was a widespread legend,[139] pointing to the chronology of the ECJ's jurisprudence who, in an act of bold judicial lawmaking, had already recognised fundamental rights as unwritten general principles of Community law in *Stauder* in 1969, in *Internationale Handelsgesellschaft* in 1970, and in *Nold* on 14 May 1974, before the GFCC's *Solange I*-decision of 29 May 1974 was even announced. As these FR decisions were rendered much earlier than *Solange I*, Everling argues that the assertion of a causal linkage is historically false.[140]

Phelan, by contrast, responds that 'any explanation of the rise of EU human rights jurisprudence' would need to account for 'the centrality of the ECJ's concern to respond to the German and Italian constitutional courts'.[141] In support of his claim, he refers to the above-mentioned 1965 and 1967 judgments of the Italian and German constitutional courts,[142] which had reserved the issue of conformity of Community law with national fundamental rights guarantees for subsequent decisions, and the writings of judges Pescatore and Lecourt who had justified the need for the CJEU to protect fundamental rights itself as general principles of Community law with reference to national court challenges.[143]

I agree with Phelan's assessment that the role of national court contestations and especially *Solange I* was central to the development of fundamental rights in the EU. Although the CJEU had already recognised FR as 'general principles of law' in *Stauder* and *Internationale Handelsgesellschaft* years before *Solange I*, the CJEU's reasoning in those decisions amounted to nothing more than vague proclamations and an abstract commitment without any meaningful rights analysis.[144] The CJEU's rights reasoning subsequently became more serious and committed in *Nold* and especially in *Hauer*, but

139 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), 57-76 (74). See also Ulrich Everling, 'The Maastricht Judgement of the German Constitutional Court and Its Significance for the Development of the European Union', YBEL 14 (1994), 1-19 (14).

140 Everling, 'Bundesverfassungsgericht und Gerichtshof' (n. 139), 74. See also Brun-Otto Bryde, 'The ECJ's Fundamental Rights Jurisprudence – a Milestone in Transnational Constitutionalism' in: Miguel Poiares Maduro and Loïc Azoulai (eds), *The Past and Future of EU Law. The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010), 119-130 (120): 'Unfortunately, this narrative does not fit with the sequence of events.' Perju (n. 1), 282.

141 Phelan, 'Role of the German and Italian Constitutional Courts' (n. 45), 191.

142 See above at III. 1.

143 Phelan, 'Role of the German and Italian Constitutional Courts' (n. 45), 192.

144 See above at III. 1.

there is considerable evidence that those two decisions were decisively influenced by *Solange I*.

The following parts of this section seek to enrich the debate about *Solange I*'s impact by outlining three considerations neither addressed by Delledonne and Fabbrini nor Phelan. First, it seeks to demonstrate based on informal conversations between justices of the GFCC and the CJEU that the anticipated ruling in *Solange I* likely influenced the CJEU's *Nold*-judgment (1.). Second, it argues with reference to the CJEU's decision in *Hauer* in 1979 that *Solange I* spurred the CJEU's FR case-law (2.). Third, it shows that *Solange I* contributed to an attitude shift regarding the importance of fundamental rights among several political Community actors beyond the CJEU (3.).

## 1. The Temporal Dimensions of *Nold*

A simple reference to the chronology between *Nold* and *Solange I* does not suffice to discharge the narrative that the *Solange I*-decision had a substantial impact on the CJEU's FR case-law. In fact, *Solange I* likely had an effect already on *Nold* even though that decision was delivered roughly two weeks before *Solange I*. It seems though that the *Nold*-decision was already drafted under the shadow of the expectation of the GFCC's imminent *Solange I*-decision. Indeed, it is conceivable that the CJEU scheduled the pronouncement of the *Nold*-judgement purposely on a date before the expected decision of the GFCC to preempt the GFCC from reviewing the conformity of EU law with German FR provisions.

There were growing signs of a negative evaluation by the GFCC on the eve of the *Solange I*-decision. It must have already alarmed the CJEU that the Frankfurt Administrative Court referred the case – and implicitly the decision in *Internationale Handelsgesellschaft* in the same matter – to the GFCC for review, not least because the criticism of the FR protection by European institutions (or the lack thereof) had noticeably intensified in German courts and legal scholarship.[145] But given that the GFCC had employed a 'delay tactic'[146] in its first decisions regarding the relationship between EU law and German law to survey the academic literature for orientation, there was time to appease the GFCC.

145 See, e. g., Hans Rupp, 'Die Grundrechte und das Europäische Gemeinschaftsrecht', NJW 23 (1970), 353-359.

146 Clarance J. Mann, *Function of Judicial Decision in European Economic Integration* (Martinus Nijhoff 1972), 184, 420-421.

More importantly, there were informal conversations between Pierre Pescatore and Walter Seuffert during the *Solange I*-proceedings. Both were important figures in their respective courts. Pescatore was, as demonstrated above, one of the most charismatic and influential judges on the CJEU during his tenure and the rapporteur in *Internationale Handelsgesellschaft*,[147] Walter Seuffert was the Vice-President of the GFCC and the presiding justice of the Second Senate. In a recorded interview in 2003, Pescatore recalled that in the run-up to *Solange I*, he had, at the request of the President of the CJEU Robert Lecourt, a lengthy conversation with Seuffert at a 'réunion de magistrats', an event with judges from different legal orders, to persuade Seuffert of the CJEU's position.[148] According to Pescatore, however, it became clear during the meeting that this attempt would not be successful.[149] This is not surprising because Seuffert had published a contribution to a Festschrift in 1972 in which he emphasised the GFCC's monopoly in matters of national fundamental rights and hinted at the existence of limits to the supremacy claim of EU law.[150]

We do not know the substance of this conversation, but it is noteworthy that the CJEU in *Nold* based fundamental rights as general principles of law – in addition to the national constitutional traditions – for the first time on the European Convention of Human Rights. This may have been a preemptive attempt to dispel the GFCC's concerns about the lack of a FR catalogue in the EU prominently articulated in *Solange I*. Against this background, it seems plausible to view the CJEU's *Nold*-ruling as a final attempt to appease the GFCC. In Davies' view at least, *Nold* 'was an obvious olive branch to the BVerfG'[151] and 'a peace offering by the CJEU to its German counterpart just weeks before the BVerfG delivered its *Solange* decision'.[152]

## 2. The Impressionability of the CJEU

A second argument put forward by Everling against the impact of *Solange I* on the CJEU's fundamental rights jurisprudence is that it would run counter the institutional role and ethos of CJEU judges to be impressed by

147 See above III. 1.

148 CVCE, 'Interview de Pierre Pescatore: les arrêts marquants de la Cour de justice (1967-1985)', CVCE of 12 November 2003, at <https://www.cvce.eu>, last access 28 April 2025.

149 CVCE (n. 148). *Pescatore* mentions that his interlocutor had already taken a preconceived stance, 'une idée préconçue dans la tête'.

150 Walter Seuffert, 'Grundgesetz und Gemeinschaftsrecht' in: Adolf Arndt, Horst Ehmke, Iring Fetscher und Otwin Massing (eds), *Konkretionen Politischer Theorie und Praxis* (Klett 1972), 169-187 (175).

151 Davies (n. 15), 164.

152 Davies (n. 15), 165.

threats.[153] As representatives of EU interests who are responsible to all member states, they would not give special consideration to the constitutional court of a single member state.[154] In his experience, the CJEU had never reacted frightened or intimidated to the GFCC.[155] To the contrary, announcements of obstinate refusal would rather have a counterproductive effect.[156]

But Everling's claim that the CJEU is not impressionable to contestations by national constitutional courts risks to create a legend itself.[157] Several indicators suggest that *Solange I* influenced and spurred the CJEU's FR case-law. The history of judicial dialogue between the CJEU and national constitutional courts, for example, demonstrates that the former has repeatedly accommodated the latter's demands to avoid open judicial conflict and damage to European integration.[158] *Solange I* itself is a prime example. This does not mean that the CJEU was frightened or intimidated and disregarded broader EU interests by developing more robust FR standards. In fact, it seems likely that the CJEU, in doing so, did not act against but rather in line with its own institutional self-interest. *Solange I* instead provided the CJEU with a strong justification vis-à-vis the political Community organs to further develop FR.[159] The decision legitimised the building of supranational constitutionalism.

153 Everling, 'Bundesverfassungsgericht und Gerichtshof' (n. 139), 74.

154 Everling, 'Bundesverfassungsgericht und Gerichtshof' (n. 139), 74.

155 Everling, 'Bundesverfassungsgericht und Gerichtshof' (n. 139), 74.

156 Everling, 'Bundesverfassungsgericht und Gerichtshof' (n. 139), 75.

157 See only Alec Stone Sweet, *Governing with Judges. Constitutional Politics in Europe* (Oxford University Press 2000), 171: '[T]he move [to FR protection], however, was not voluntary. An incipient rebellion against supremacy, led by national courts, drove the process.'

158 For example, the CJEU's more restrictive interpretation of the scope of the Charter of Fundamental Rights according to Art. 51(1) CFR in ECJ, *Julian Hernández and Others*, judgment of 10 July 2014, case no. C-198/13, ECLI:EU:C:2014:2055, compared to the more extensive understanding set forth in ECJ, *Åkerberg Fransson*, judgment of 26 February 2013, case no. C-617/10, ECLI:EU:C:2013:105, was likely a reaction to BVerfGE 133, 277 (para. 91) – *Counter-terrorism database*, where the GFCC explicitly held with regard to *Åkerberg Fransson* that '[a]s part of a cooperative relationship, this decision must not be read in a way that would view it as an apparent ultra vires act or as if it endangered the protection and enforcement of the fundamental rights in the member states in a way that questioned the identity of the Basic Law's constitutional order'. Other examples suggesting that the CJEU was receptive and accommodating to contestations by national constitutional courts are the *Taricco* saga between the CJEU and the Italian Corte Costituzionale and the judicial dialogue between the CJEU and the GFCC concerning the *European Arrest Warrant*. On *Taricco*, see Matteo Bonelli, 'The *Taricco* Saga and the Consolidation of Judicial Dialogue in the European Union', MJ (Antwerp) 25 (2018), 357-373; on *Aranyosi*, see 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.

159 Haltern (n. 35), 458.

In addition, the intensity of review by the CJEU in FR cases changed substantially before and after the *Solange I*-decision in 1974. The *Hauer*-decision of 1979 displays a unique intensity in terms of FR review.[160] The procedural set-up likely incentivised the CJEU to demonstrate to the GFCC that it took its fundamental rights concerns articulated in *Solange I* very seriously. The preliminary reference in *Hauer* was submitted by the Neustadt Administrative Court,[161] which did not only express its critical stance towards the CJEU's FR case-law so far but also announced that it would subsequently send the case to the GFCC.[162] As a result, portions of the decision read like a direct response to the concerns articulated in *Solange I*. On the one hand, the CJEU warns that '[t]he introduction of special criteria for assessment stemming from the legislation or constitutional law of a particular Member State would, by damaging the substantive unity and efficacy of Community law, lead inevitably to the destruction of the unity of the Common Market and the jeopardising of the cohesion of the Community'.[163] On the other hand, the Court, explicitly referencing the Joint Declaration, emphasises the progress in EU FR protection and affirms emphatically that 'measures which are incompatible with the fundamental rights recognised by the constitutions of those States are unacceptable in the Community'.[164]

## 3. The Reaction of European Institutions to the GFCC's *Solange I*-Decision

Finally, the *Solange I*-decision added new momentum to the nascent European FR protection after it was announced. It triggered a remarkable wave of activity by political actors and made European FR protection a priority of several European institutions, thereby also enlarging the room of maneuvering of the CJEU in developing fundamental rights through its case-law. In the words of Bill Davies, *Solange I* had 'a lasting and formative impact on European governance'.[165] He provides a detailed account of how the

160 Rudolf Streinz, Bundesverfassungsgerichtlicher Grundrechtsschutz und europäisches Gemeinschaftsrecht (Nomos 1989), 65.

161 Verwaltungsgericht Neustadt, decision of 14 December 1978, case no. 2 K 205/76, EuGRZ 6 (1979), 341-344 (342).

162 Haltern (n. 5), 601.

163 ECJ, *Liselotte Hauer v. Land Rheinland-Pfalz*, judgment of 13 December 1979, case no. 44/79, ECLI:EU:C:1979:290, para. 14.

164 ECJ, *Liselotte Hauer v. Land Rheinland-Pfalz*, judgment of 13 December 1979, case no. 44/79, ECLI:EU:C:1979:290, para. 15.

165 Bill Davies, Resisting the European Court of Justice. West Germany's Confrontation with European Law, 1949-1979 (Cambridge University Press 2012), 182.

*Solange I*-decision resulted in 'a year-long inquiry by the European Parliament on the consequences of the *Solange* decision'[166] and even prompted German chancellor Helmut Schmidt to intervene behind the scenes. According to him, the reaction of the European institutions was surprisingly 'timid' and characterised by a 'willing[ness] to reach important compromises'.[167] It appears that these reactions were caused by real concerns about the future of the European integration project that found itself in a difficult period of stagnation at that time.[168]

In reaction to *Solange I*, the European Parliament, the Council, and the Commission adopted the 1977 Joint Declaration concerning the protection of fundamental rights and the ECHR, stressing 'the prime importance they attach to the protection of fundamental rights' and, in particular, to the ECHR.[169] The story behind the drafting process of the Joint Declaration is especially instructive of the effects of the *Solange*-method: Davies shows that a reason for the adoption of the Joint Declaration was to meet the GFCC's request for a parliamentary FR catalogue. Although the impression created in the outside world was that the Joint Declaration was initiated by the European Parliament, documents reveal that, in reality, the idea originated in a conversation between Chancellor Schmidt and the German Advocate General Gerhard Reischl,[170] in which both men had considered various measures to appease the GFCC.

## VI. Conclusion

*Solange I* is not parochial and backward, but in many regards a modern and forward-looking decision. Although the analysis set forth in this article surely does not put the case for judicial federalism in the EU to rest, nor seeks to do so, it suggests that the judicial federalist narrative about *Solange I* discounts three key justifications for the decision emerging from the historical analysis of the decision.

First, the combination of the CJEU's unconditional supremacy doctrine and the absence of robust FR protection by Community institutions, including the CJEU itself, raised valid constitutional concerns, despite Community policies not posing a real threat to undermine national FR in this phase of

166 Davies (n. 165), 194.

167 Davies (n. 165), 7.

168 Haltern (n. 35), 455, referencing the recent crisis of the empty chair policy, the weakend role of the Commission, and the paralysing effect of the Luxembourg compromise.

169 Davies (n. 165), 183.

170 Davies (n. 165), 192-196.

European integration. But this combination arguably created an FR protection vacuum that was likely to lead to more serious FR infringements in the foreseeable future without adequate countermeasures. The lack of a structured FR review in *Stauder*, *Internationale Handelsgesellschaft*, and *Nold* further cast reasonable doubts whether the CJEU was truly poised to become a true judicial guardian of FR that would render national FR review against Community measures redundant or whether it was not more driven by instrumental considerations of safeguarding the supremacy doctrine and the Community market. More generally, the structural obstacles of collective action in supranational policy-making have led the CJEU to conduct more rigid judicial review against member state laws than against EU laws. Even today, it is rare that the CJEU invalidates EU regulations or directives for FR violations.[171] Suggesting against this background that judicial contestations by the GFCC are predominantly driven by concerns about preserving its institutional role therefore dismisses the Court's reasonable constitutional concerns too lightly. Quite to the contrary, it seems fair to say that the GFCC's skepticism towards the CJEU's unconditional supremacy claim without sufficient structures of constitutional legitimacy is deeply rooted in constitutional thought.

Second, *Solange I* arguably had a decisive impact on the European governance of FR, while the counterfactual assumption that the CJEU would have developed FR for the Community without the decision in the same way overlooks its effect on political EU institutions. Even if we assume hypothetically that the CJEU was determined to build robust FR guarantees from the outset, we should acknowledge that the CJEU does not act in a political vacuum but critically relies upon the support or acquiescence by other Community organs to effectuate profound constitutional change. *Solange I* assumed a valuable legitimising and enabling function: It did not only create leverage and strong justifications for the CJEU vis-à-vis the political Community organs to develop FR, but it also contributed to a more permissive political environment by inducing an attitude shift among political actors concerning the importance of fundamental rights.

Third and finally, it is highly speculative to assume that *Solange I* precluded the realisation of a more radical and truly supranational European integration project. It seems more plausible to assume, by contrast, that constitutional pressures would have steadily increased with further integration and that deficient structures of constitutional legitimacy would have continued to plague the Community even if the GFCC had unconditionally

171 One of the few instances is ECJ, *Digital Rights Ireland*, judgment of 8 April 2014, case nos C-293/12 and C-594/12, ECLI:EU:C:2014:238.

accepted the supremacy of Community law. This is illustrated by the *Maastricht* decision of 1993 that followed only seven years after the GFCC had largely relinquished the *Solange*-reservation in its *Solange II*-decision of 1986. This sequence of events indicates that the transformation of the Community from a supranational economic integration project to a political union through the Maastricht Treaty promptly resulted in more intense national judicial contestations and would have likely done so regardless of how the Court decided *Solange I*.

If this connection between European integration and constitutional legitimacy is necessary, then supremacy and uniform application of EU law must be embedded in normatively dense structures of constitutional legitimacy. *Solange I* can be viewed as offering a vision for a European Union that embraces principles of constitutionalism. The decision's significant impact on the EU governance of FR suggests that 'checks and balances' between the legal orders of the EU and the member states, opening up possibilities for contestation and for constructive inter-order judicial dialogue, may contribute more to this vision than the judicial federalist vision.

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# A Parallel Legal Universe – The *Solange I* Dissent and Its Legacy

Franz C. Mayer*
University of Bielefeld, Bielefeld, Germany
*franz.mayer@uni-bielefeld.de*



## Abstract

This article takes the dissenting opinion of the German Constitutional Court's 1974 *Solange I*-decision as a starting point to explore legal paths not taken. Based on an analysis of the majority and the minority opinions in *Solange I*, the article presents a reflection about what a parallel universe would look like in which the dissenting minority was not the minority and suggests some lessons that follow from this reflection. This is done against the background of the broader question of the consistency of dissenting opinions in European integration related cases before the German Constitutional Court.

* Professor, Dr. jur., LL. M. (Yale), Chair of Public Law, European Law, Public International Law, Comparative Law and Law & Politics at Bielefeld University. The following article is based on my contribution to the Solange 50th Anniversary Conference, 30 May 2024, at the Wissenschaftszentrum Berlin. I am grateful for comments at the conference and from Mattias Wendel, Paul Pustelnik and others on an earlier version of the text. I wish to thank in particular Florian Eichstädt, Alice Mathieu, Sophia Meier and Marie Berens for their assistance in finalising this article.

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European integration Politics – European Law – Fundamental Rights – German Constitutional Law – Constitutional Courts – German Constitutional Court – Dissenting Opinions – European Court of Justice – Multiverse – European Constitutional Law – Constitutional Pluralism – *Solange* Cases – *Lisbon* Case – *Maastricht* Case – *Nold* Case – Constitutional Identity – Ultra Vires-Acts

## I. Introduction

In '*Doctor Strange in the Multiverse of Madness*', one of the more recent movies in the Marvel Cinematic Universe,[1] the protagonist, Doctor Stephen Strange, travels through a number of parallel universes that differ more or less significantly from his original universe. In one of the parallel universes, for example, you have to stop at traffic lights when the light is green and cross the road when it is red.[2] Parallel universes are the subject of scientific theory-building and pop culture narratives. In law, dissenting opinions to a decision of a supreme or constitutional court open a window to a parallel universe. To another legal world. A world that could be – but isn't or isn't yet.

What might a parallel universe look like in which the defeated judges from *Solange I* were in the majority? I would like to explore possible answers to this question. I will first outline the content of the majority opinion (II.) and of the dissenting opinion (III.). I will then turn to some considerations about what a parallel universe would look like in which the dissenting minority was not the minority and the lessons that follow from this reflection (IV., V.).

## II. The *Solange I* Majority Opinion

In the *Solange I* decision of 29 May 1974,[3] a 5 to 3 majority of the Second Senate of the German Constitutional Court stipulated constitutional limits on the primacy of European law and claimed a right of judicial review of European action in order to safeguard the German fundamental rights guar-

1 Doctor Strange in the Multiverse of Madness, Marvel Studios 2022, 126 min.

2 At 00:40:27 (Earth-838).

3 BVerfGE 37, 271 (282) – *Solange I*. There are two English translations of *Solange I*: One is published in *Common Market Law Reports* 1974, 540 and was reprinted in Andrew Oppenheimer, *The Relationship between European Community Law and National Law: The Cases, Volume I* (Cambridge University Press 1995), 419. Another translation – albeit without the dissenting opinion – may be found in Bundesverfassungsgericht (ed.), *Decisions of the Bundesverfassungsgericht – Federal Constitutional Court, Volume 1 Part I: International Law and Law of the European Communities 1952-1989* (Nomos 1993), 182. This book is out of print, but the text is available at <https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=588>, last access 6 May 2025.

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anteed under the German Constitution by the German Constitutional Court, '*as long as*' (hence '*solange*', the respective German term) fundamental rights protection at the European level did not correspond to the level of protection under the German Constitution.[4]

The central argument of the majority of the Court is that Germany joining the European Communities did not open the way to amending the basic structure of the German constitution (Basic Law), which forms the basis of its identity,[5] without a formal amendment to the Basic Law. The Court acknowledges ('*certainly*') that the competent Community organs can make law which the competent German constitutional organs could not make under the Basic Law and which is nonetheless valid and is to be applied directly in Germany.[6]

The majority insists that the section of the Basic Law dealing with fundamental rights is an inalienable, essential feature of the valid Basic Law of the Federal Republic of Germany and one which forms part of the constitutional structure of the Basic Law. This assessment is presented as a preliminary and a temporary one, '*the present state of integration of the Community is of crucial importance*'.[7]

The majority judges point to the fact that the '*Community still lacks a democratically legitimate parliament directly elected by general suffrage which possesses legislative powers and to which the Community organs empowered to legislate are fully responsible on a political level*'.[8] This was written in 1974, five years before the introduction of direct elections to the European Parliament. A full responsibility of the European institutions participating in legislation taken literally would mean a full responsibility of the Commission and the Council. This is not even established today and considering the Council as a sort of second chamber, this request is either evidence of a misunderstanding of the *modus operandi* of European legislation or wilfully established as a requirement impossible to fulfil.

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4 For the details of the actual case, see in this issue the contribution by Andrej Lang, '*Solange I* in the Mirror of Time and the Divergent Paths of Judicial Federalism and Constitutional Pluralism', HJIL 85 (2025), 411-449.

5 See for the identity-argument and the Solange-saga the contribution in this issue by Julian Scholtes, 'Freeing Constitutional Identity from Unamendability: *Solange I* as a Constitutional Identity Judgment', HJIL 85 (2025), 547-568.

6 BVerfGE, *Solange I* (n. 3), 279: 'Gewiss können die zuständigen Gemeinschaftsorgane Recht setzen, das die deutschen zuständigen Verfassungsorgane nach dem Recht des Grundgesetzes nicht setzen könnten und das gleichwohl unmittelbar in der Bundesrepublik Deutschland gilt und anzuwenden ist.'

7 BVerfGE, *Solange I* (n. 3), 280: 'Dabei ist der gegenwärtige Stand der Integration der Gemeinschaft von entscheidender Bedeutung.'

8 BVerfGE, *Solange I* (n. 3), 280: 'Sie entbehrt noch eines unmittelbar demokratisch legitimierten, aus allgemeinen Wahlen hervorgegangenen Parlaments, das Gesetzgebungsbefugnisse besitzt und dem die zur Gesetzgebung zuständigen Gemeinschaftsorgane politisch voll verantwortlich sind.'

The majority then points to the fact that the European Economic Community (EEC)

> 'still lacks, in particular, a codified catalogue of fundamental rights, the substance of which is reliably and un-ambiguously fixed for the future in the same way as the substance of the Basic Law and therefore allows a comparison and a decision as to whether, at the time in question, the Community law standard with regard to fundamental rights generally binding in the Community is adequate in the long term measured by the standard of the Basic Law with regard to fundamental rights'.[9]

The majority insists that the transfer of public authority to supranational institutions be subject to constitutional limits: there is no authorisation to give up the identity of the German constitutional order by means of transferring competences to supranational institutions with the result of an '*intrusion into the fundamental architecture, the constituting structures*' of the Constitution.[10]

Then comes the famous '*Solange*'-sentence: As long as there is not the legal certainty that would come with a codified catalogue of European fundamental rights – the fundamental rights-friendly decisions of the European Court of Justice (ECJ) are not enough –, the reservation derived from Art. 24 Basic Law applies, meaning German fundamental rights apply, under the jurisdiction of the German Constitutional Court.[11]

The reference to identity of a constitution sounds familiar nowadays, as it resonates with Art. 4 para. 2 Treaty on European Union (TEU) that stipulates that the European Union '*shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional […]*'. In 1974, the only reference point for identity language in German constitutionalism was Carl Schmitt's 1928 reflection in his *Verfassungslehre* (Constitutional theory) about an

9 BVerfGE, *Solange I* (n. 3), 280: '[…] sie entbehrt insbesondere noch eines kodifizierten Grundrechtskatalogs, dessen Inhalt ebenso zuverlässig und für die Zukunft unzweideutig feststeht wie der des Grundgesetzes und deshalb einen Vergleich und eine Entscheidung gestattet, ob derzeit der in der Gemeinschaft allgemein verbindliche Grundrechtsstandard des Gemeinschaftsrechts auf die Dauer dem Grundrechtsstandard des Grundgesetzes, unbeschadet möglicher Modifikationen, derart adäquat ist, dass die angegebene Grenze, die Art. 24 GG zieht, nicht überschritten wird.'

10 BVerfGE, *Solange I* (n. 3), 275 et seq.: '[Art. 24 GG] eröffnet nicht den Weg, die Grundstruktur der Verfassung, auf der ihre Identität beruht, ohne Verfassungsänderung, nämlich durch die Gesetzgebung der zwischenstaatlichen Einrichtung zu ändern. […] Art. 24 GG begrenzt diese Möglichkeit, indem an ihm eine Änderung des Vertrags scheitert, die die Identität der geltenden Verfassung der Bundesrepublik Deutschland durch Einbruch in die sie konstituierenden Strukturen aufheben würde.'

11 BVerfGE, *Solange I* (n. 3), 280/281: 'Solange diese Rechtsgewissheit, die allein durch die anerkanntermaßen bisher grundrechtsfreundliche Rechtsprechung des Europäischen Gerichtshofs nicht gewährleistet ist, im Zuge der weiteren Integration der Gemeinschaft nicht erreicht ist, gilt der aus Art. 24 GG hergeleitete Vorbehalt. Es handelt sich also um eine rechtliche Schwierigkeit, die ausschließlich aus dem noch in Fluss befindlichen fortschreitenden Integrationsprozess der Gemeinschaft entsteht und mit der gegenwärtigen Phase des Übergangs beendet sein wird.'

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identity of the Weimar constitution that would be out of reach for constitutional amendment.[12] This idea, initially clearly designed to limit the powers of parliament out of the Schmittian anti-parliamentarian resentment, was codified in the 1949 Basic Law in Art. 79 para. 3 Basic Law, but this time as a safeguard against German backsliding into '*dictatorship and barbarism*'.[13]

Note that there is no reference to Art. 79 para. 3 Basic Law at all in *Solange I* which indicates Arts 1 and 20 Basic Law as elements of the constitution which can never be modified (the '*eternity clause*') and which later would be the basis for the German Constitutional Court to identify the national constitutional identity (see Art. 4 para. 2 TEU) of the German Constitution, which would include the human dignity (Art. 1 Basic Law) core of any fundamental right of the German Constitution.[14] The majority of *Solange I* does not limit the reach of German fundamental rights protection in that way, also in the latter part of the decision, the judges simply apply Art. 12 Basic Law. The missing reference to Art. 79 para. 3 Basic Law is particularly intriguing as Art. 1 Basic Law could have helped the line of reasoning of the majority not only with respect to the human dignity-argument. According to Art. 1 para. 2 Basic Law, the '*German people acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world*'.[15] 'Human rights' as opposed to 'fundamental rights' is the Basic Law code for the public international law dimension, it is a reference in 1949 to the 1948 United Nation General Declaration of Human Rights. This could have opened the door to a universalist argument underlying *Solange I*.

A reference to Art. 1 Basic Law would have helped the majority argument also for another reason. Art. 1 para. 3 Basic Law also stipulates that the '*following fundamental rights [sic!] shall bind the legislature, the executive and the judiciary as directly applicable law*',[16] which could have been used as

12 Carl Schmitt, *Verfassungslehre* (Duncker & Humblot 1928), 23 et seq., 103.

13 See on dictatorship and barbarism Gertrude Lübbe-Wolff in a dissenting opinion in 2005, BVerfGE 113, 273 (336) – *Europäischer Haftbefehl I*: 'Art. 79 Abs. 3 GG als verfassungsrechtliche Grenze der europäischen Integration ist in diesem Urteil zu Recht mit Vorsicht gehandhabt worden, denn Sinn dieser Bestimmung ist es, einen Rückfall unseres Landes in Diktatur und Barbarei auszuschließen, und nichts dient diesem Ziel mit höherer Wahrscheinlichkeit als Deutschlands Integration in die Europäische Union.'

14 'Identity control', as the Court calls it, not to be confused with 'Ultra vires-control', see on that Franz C. Mayer, 'Rashomon in Karlsruhe. A Reflection on Democracy and Identity in the European Union: The German Constitutional Court's Lisbon Decision and the Changing Landscape of European Constitutionalism', ICON 9 (2011), 757-785.

15 'Das Deutsche Volk bekennt sich darum zu unverletzlichen und unveräußerlichen Menschenrechten als Grundlage jeder menschlichen Gemeinschaft, des Friedens und der Gerechtigkeit in der Welt.'

16 'Die nachfolgenden Grundrechte binden Gesetzgebung, vollziehende Gewalt und Rechtsprechung als unmittelbar geltendes Recht.'

a justification to uphold German fundamental rights scrutiny, as this provision cannot be altered by constitutional amendment, it probably cannot be undermined by Germany participating in European integration.

But a reference to Art. 1 Basic Law is missing. Something else is missing, too: The *Solange I* majority does also not bother to explain how its claim of jurisdiction is compatible with Art. 219 EEC (today Art. 344 Treaty on the Functioning of the European Union (TFEU)), which stipulates that '*Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein*'. They do acknowledge for the first time, though, that in principle the German Constitutional Court is also bound to submit preliminary references to the ECJ. It still took another 40 years until the first preliminary reference of the German Constitutional Court was submitted.[17]

*Solange I* in Karlsruhe was the sequel to a legal dispute that led the ECJ to unequivocally clarify the primacy of European law over the national constitution in 1970 in the case *Internationale Handelsgesellschaft*.[18] The Administrative Court of Frankfurt had submitted the case that would later become *Solange I* as a preliminary reference to the ECJ in 1970.[19] There is evidence that the ECJ used *Internationale Handelsgesellschaft* to respond to a provocative presentation by a German constitutional scholar, Hans Heinrich Rupp,[20] in which the primacy of European law, as it had been developed by the ECJ since the *Costa v. E. N. E. L.* judgment, was roundly dismissed.[21]

17 BVerfGE 134, 366 – *OMT* (Vorlage).

18 ECJ, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, judgment of 17 December 1970, case 11/70, ECLI:EU:C:1970:114.

19 Verwaltungsgericht Frankfurt am Main, preliminary reference (Vorlagebeschluss) of 18 March 1970, case II/2 E 228/69), *Common Market Law Reports* 1970, 294. The reference submitted to the German Constitutional Court after the ruling of the ECJ in 1971 can be found at Außenwirtschaftsdienst des Betriebs-Beraters 1971, 541.

20 Professor of Law at the University of Mainz, not to be confused with the dissenting judge Hans Georg Rupp in *Solange I*.

21 The presentation took place in January 1970 at the German Academy of Law, Trier, which is not far away from Luxemburg, which explains how ECJ judges got note of Rupp's critique. Karen Alter, *Establishing the Supremacy of European Law* (Oxford University Press 2001), 88 et seq. describes how Rupp's presentation possibly triggered a response by the ECJ, *Internationale Handelsgesellschaft* (n. 18), which openly demands the primacy of European law over national constitutional law. The presentation was later published in the widely read Neue Juristische Wochenschrift, Hans Heinrich Rupp, 'Die Grundrechte und das Europäische Gemeinschaftsrecht', NJW 23 (1970), 353-359. Rupp remained unconvinced for the rest of his life, see Hans Heinrich Rupp, 'Anmerkungen zu einer Europäischen Verfassung', JZ 58 (2003), 18-22; see in that context Hans-Peter Ipsen, *Europäisches Gemeinschaftsrecht* (Mohr Siebeck 1972), 260 on German inward-looking ('Haltung grundgesetzlicher Introvertiertheit').

*Solange I*, which was clearly directed against the ECJ and the claim of an unconditional primacy of European law, was the subject of fierce criticism and debate, not only in Germany.[22] The European Commission considered

22 See Gert Meier, 'Anmerkung zu dem Beschluss des BVerfG vom 29. Mai 1974', NJW 27 (1974), 1704-1705; Hans Paetow, 'Blick in die Zeit', MDR 7 (1974), 986-987; Christian Pestalozza, 'Sekundäres Gemeinschaftsrecht und nationale Grundrechte', DVBl 89 (1974), 716-719; Heribert Golsong, 'Kommentar und Kritik', EuGRZ 1 (1974), 17-18; Jean-Victor Louis, 'Kommentar und Kritik', EuGRZ 1 (1974) 20-21; Hans Peter Ipsen, 'BVerfG versus EuGH re "Grundrechte"', EuR 10 (1975), 1-19; Meinhard Hilf, 'Sekundäres Gemeinschaftsrecht und deutsche Grundrechte', HJIL 35 (1975), 51-66; Eckart Klein, 'Stellungnahme aus der Sicht des deutschen Verfassungsrechts', HJIL 35 (1975), 67-78; Albert Bleckmann, 'Zur Funktion des Art. 24 Abs. 1 Grundgesetz', HJIL 35 (1975), 79-84; Konrad Feige, 'Bundesverfassungsgericht – Grundrechte – Europa', JZ 30 (1975), 476-479; Manfred Zuleeg, 'Das BVerfG als Hüter der Grundrechte gegenüber der Gemeinschaftsgewalt', DÖV 28 (1975), 44-46; Ulrich Scheuner, 'Der Grundrechtsschutz in der Europäischen Gemeinschaft und die Verfassungsrechtsprechung: Zum Beschluss des Bundesverfassungsgerichts vom 29. Mai 1974', AöR 100 (1975), 30-52.

The President of the German Constitutional Court, Chairman of the First Senate of the Court and thus not involved in the proceedings, as the case was decided by the Second Senate, intervened as a defender of the decision, Ernst Benda, 'Das Spannungsverhältnis von Grundrechten und übernationalem Recht', DVBl 10/11 (1974), 389-396; see also Hans Heinrich Rupp, 'Zur bundesverfassungsgerichtlichen Kontrolle des Gemeinschaftsrechts am Maßstab der Grundrechte', NJW 27 (1974), 2153-2156; Hans-Georg Crone-Erdmann, 'Grundrechtsschutz und Europäisches Gemeinschaftsrecht', Gewerbe Archiv (1974), 371-372; Detlef Schumacher, 'Die Konkordanz des nationalen mit dem Gemeinschaftsrecht in der Rechtsprechung', Der Betrieb (1975), 677-680.

With *Solange II* in 1986, the academic focus shifted to the newer decision. More recent academic reflections on *Solange I* include Peter M. Huber, 'Bundesverfassungsgericht und Europäischer Gerichtshof als Hüter der Gemeinschaftsrechtlichen Kompetenzordnung', AöR 116 (1991), 210-251 (231); Robert Chr. van Ooyen, *Die Staatstheorie des Bundesverfassungsgerichts und Europa – Von Solange über Maastricht und Lissabon zur EU-Grundrechtecharta und EZB* (Nomos 2022), 23-28; Ulrich Haltern, '50 Jahre Solange I', Jura 46 (2024), 449-462. For academic reactions outside Germany see for example in France in the immediate aftermath of the judgment Michel Fromont, 'Note sur l'arrêt de la Cour constitutionnelle fédérale du 29 mai 1974', RTDE 11 (1975), 333-336 (333); Michel Fromont, 'République fédérale d'Allemagne – les événements législatifs et jurisprudentiels survenus en 1974', RDP 92 (1976), 188-224 (199 et seq.); Claus Dieter Ehlermann, 'Primauté du droit communautaire mise en danger par la Cour constitutionnelle fédérale allemande', R. M. C. 181 (1975), 10-19 (14 et seq.); Gérard Cohen Jonathan, 'Cour constitutionnelle allemande et règlements communautaires, observations sur Cour constitutionnelle fédérale allemande, 2e chambre 29 mai 1974', C. D. E. nos 1-2 (1975), 173-206 (176 et seq., 186, 190 et seq., 194, 204); Jean Darras and Olivier Pirotte, 'La Cour constitutionnelle fédérale allemande a-t-elle mis en danger la primauté du droit communautaire?', RTDE 12 (1976), 415-438 (425 et seq.). For an overview see Bill Davies, *Resisting the European Court of Justice: West Germany's Confrontation with European Law 1949-1979* (Cambridge University Press 2012), 78-88; Bill Davies, '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* 21 (2012), 417-435; Bill Davies, 'Resistance to European Law and Constitutional Identity in Germany: Herbert Kraus and *Solange* in its Intellectual Context', ELJ 21 (2015), 434-459.

introducing a treaty infringement case against Germany, but the case never made it to the ECJ.[23]

Twelve years later, in the 1986 *Solange II*[24] decision, in a unanimous decision, the German Constitutional Court gave up *Solange I*. After an extensive assessment of the development of European law the German Constitutional Court held, that '*as long as*' ('*solange*') an effective protection of fundamental rights was guaranteed at the European level, with a level of protection substantially equivalent to the inalienable minimum level of protection of fundamental rights under the German Constitution, including a general guarantee of the essential substance ('*Wesensgehalt*') of the fundamental rights, the German Constitutional Court '*will no longer exercise its jurisdiction to decide on the applicability of derived Community law, that may constitute the legal basis for acts of German courts or authorities in the Federal Republic*'.[25]

This article focusses on the dissenting opinion, but it is still worth noting that in hindsight, certain elements of the *Solange I* majority opinion appear more nuanced than the decision's reputation as an anti-European landmark case indicate.

The majority has no problem at all to refer to a European constitution, when it speaks of '*the Community and its constitution*'.[26] Later, the Second Senate will be much more anxious to stress the public international law nature of the European construct, e. g. in the 1993 Maastricht decision by

23 Files of the German Federal Government indicate that the case was closed with a letter from Commission President Ortoli to the Federal Minister of Foreign Affairs dated 21 November 1975, expressing the expectation that the danger created by the decision of the German Constitutional Court for the European legal order would never materialise, Aufzeichnung des Bundesministeriums der Justiz, 28 January 1976, 390/75, Auswärtiges Amt Politisches Archiv (1975), 410.424.50 (*EG-Grundrechte – Reischl-Vorschlag*).

24 BVerfGE 73, 339 – *Solange II*.

25 BVerfGE, *Solange II* (n. 24). The question left open in *Solange II* was what exactly could re-activate the German Constitutional Court in matters of fundamental rights protection. This was clarified in the *Banana market decision* in 2000, BVerfGE 102, 147 – *Bananenmarktordnung*: The threshold was a structural decline of the fundamental rights protection standard at the European level, see on that in more detail Franz C. Mayer, 'Grundrechtsschutz gegen europäische Rechtsakte durch das BVerfG: Zur Verfassungsmäßigkeit der Bananenmarktordnung', EuZW 11 (2000), 685-689. The Court declared this a matter of admissibility, which meant that any case brought to the Court as constitutional complaint or as a reference from a lower court would be thrown out as inadmissible unless it did show that there was systematic failure of fundamental rights protection. It is only in 2015 that the German Constitutional Court found a way to be able to look at individual cases where fundamental rights protection was at stake by shifting the issue to the realm of 'identity control', see BVerfGE 140, 317 – *Europäischer Haftbefehl II*.

26 BVerfGE, *Solange I* (n. 3), 282: 'der Gemeinschaft und ihrer freiheitlichen (und demokratischen) Verfassung'.

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means of insisting on the Member States as the '*masters of the Treaties*' ('*Herren der Verträge*').

The majority also has no problem continuing[27] to refer to – which in the present context means: endorse – the description of the European construct suggested by the ECJ in *Van Gend en Loos*[28] and in *Costa v. E. N. E.L.*[29]:

> 'This Court – in this respect in agreement with the law developed by the European Court of Justice – adheres to its settled view that Community law is neither a component part of the national legal system nor international law, but forms an independent system of law flowing from an autonomous legal source.'[30]

It is also worth noting that with its statement on a clear separation of spheres of jurisdiction the majority states unambiguously that it is not the task of the German Constitutional Court to rule on the compatibility of European secondary law with the European treaties:

> 'It follows from this that, in principle, the two legal spheres stand independent of and side by side one another in their validity, and that, in particular, the competent Community organs, including the European Court of Justice, have to rule on the binding force, construction and observance of Community law, and the competent national organs on the binding force, construction and observance of the constitutional law of the Federal Republic of Germany. The European Court of Justice cannot with binding effect rule on whether a rule of Community law is compatible with the Basic Law, nor can the Federal Constitutional Court rule on whether, and with what implications, a rule of secondary Community law is compatible with primary Community law.'[31]

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27 See already BVerfGE 22, 293 (296) – *EWG-Verordnungen*; BVerfGE 31, 145 (173) – *Milchpulver*.

28 ECJ, *N. V. Algemene Transport- en Expeditie Onderneming Van Gend & Loos v. Netherlands Inland Revenue Administration*, judgment of 5 February 1963, case 26/62, ECLI:EU:C:1963:1.

29 ECJ, *Flaminio Costa v. E. N. E.L.*, judgment of 15 July 1964, case 6/64, ECLI:EU:C:1964:66.

30 BVerfGE, *Solange I* (n. 3), 277 et seq.: 'Der Senat hält – insoweit in Übereinstimmung mit der Rechtsprechung des Europäischen Gerichtshofs – an seiner Rechtsprechung fest, dass das Gemeinschaftsrecht weder Bestandteil der nationalen Rechtsordnung noch Völkerrecht ist, sondern eine eigenständige Rechtsordnung bildet, die aus einer autonomen Rechtsquelle fließt.'

31 BVerfGE, *Solange I* (n. 3), 278: 'Daraus folgt, dass grundsätzlich die beiden Rechtskreise unabhängig voneinander und nebeneinander in Geltung stehen und dass insbesondere die zuständigen Gemeinschaftsorgane einschließlich des Europäischen Gerichtshofs über die Verbindlichkeit, Auslegung und Beachtung des Gemeinschaftsrechts und die zuständigen nationalen Organe über die Verbindlichkeit, Auslegung und Beachtung des Verfassungsrechts der Bundesrepublik Deutschland zu befinden haben. Weder kann der Europäische Gerichtshof verbindlich entscheiden, ob eine Regel des Gemeinschaftsrechts mit dem Grundgesetz vereinbar ist, noch das Bundesverfassungsgericht, ob und mit welchem Inhalt eine Regel des sekundären Gemeinschaftsrechts mit dem primären Gemeinschaftsrecht vereinbar ist.'

The Ultra vires-control that the German Constitutional Court introduces in the *Maastricht* judgment 1993[32] and that it even activates in 2020 in the *PSPP* case[33] is not in line with that statement.[34]

## III. The *Solange I* Dissenting Opinion

Unlike the majority of the Second Senate, the three dissenting judges Rupp, Hirsch and Wand considered the submission from the Administrative Tribunal Frankfurt to be inadmissible in their joint dissenting opinion.[35]

According to them, the German Constitutional Court did not have the power to review secondary Community law for its compatibility with the fundamental rights provisions of the German Constitution. The dissenting judges explain that, by ratifying the EEC Treaty, Germany transferred sovereign rights to the Community, as foreseen by Art. 24 Basic Law. What follows is a reasoning reminiscent of the ECJ's landmark constitutional cases *Van Gend en Loos* and *Costa v. E. N. E.L.* and the wording of Art. 164 EEC Treaty, today Art. 19 TEU: The Treaty created an independent legal system in a limited sector which has its own institutions and its own system of legal protection. Community institutions are vested with legislative powers, and the legal provisions adopted by them are neither part of the national legal order nor of international law. The Court of Justice of the European Communities (CJEU) ensures that the law is observed in the interpretation and application of the Treaty. This Community legal order is autonomous and independent of the national legal system.

Then, the dissenting judges stress that both legal systems recognise – each for its own area – fundamental rights norms and a legal protection system suitable for their enforcement. They claim that fundamental rights are not only guaranteed by the Basic Law within the national legal system of the Federal Republic of Germany, but also by the legal system of the European Communities. This claim is then supported by reiterating a number of decisions of the ECJ such as the 1969 *Stauder* case[36] or the 1974 *Nold* case[37],

32 BVerfGE 89, 155 (188) – *Maastricht*.

33 BVerfGE 154, 17 – *PSPP*.

34 This is why it is not accurate to construe a continuity of the case-law of the German Constitutional Court since the 1960s in the sense of a dialectical approach with supportive and limiting elements towards European integration.

35 BVerfGE, *Solange I* (n. 3), 291-305.

36 ECJ, *Erich Stauder v. City of Ulm – Sozialamt (Stauder)*, judgment of 12 November 1969, case 29/69, ECLI:EU:C:1969:57.

37 ECJ, *J. Nold Kohlen- und Baustoffgroßhandlung v. Commission of the European Communities (Nold)*, judgment of 17 December 1970, case 4/73, ECLI:EU:C:1974:51.

where the Court considers fundamental rights a part of the general principles of law whose observance it must ensure. This part of the dissenting opinion reveals that the *Nold* case, the core argument in the 1986 *Solange II* case for the case law of the ECJ, being on track in terms of fundamental rights protection,[38] was already known in Karlsruhe in May 1974.

According to the dissenters, with the preliminary reference procedure, the legal order of the European Communities already has a system of effective legal protection suitable for the enforcement of European fundamental rights.

As to the question of which law prevails in the case of conflict between Community law and national law, the dissenting judges consider this question settled by Art. 24 Basic Law. They stress that Art. 24 Basic Law, properly interpreted, states not only that the transfer of sovereign rights is possible at all, but also that the sovereign acts of a supranational entity[39] must be recognised by the Federal Republic of Germany. This, the judges write, excludes from the outset the possibility of national control of the legal acts of the Community. Community law takes precedence over national law. This extends to fundamental rights provisions of the national constitution.

For the dissenters, the majority's concern with safeguarding 'the basic structure of the Constitution, on which its identity is based' is misguided. The judges acknowledge, though, that the primacy of Community law over domestic law can only apply to the extent that the Basic Law authorises the transfer of sovereign powers. And they also stress that the Basic Law does not authorise the transfer of sovereign rights without any limits. The commitment to a united Europe in the Preamble of the Basic Law, on the one hand, and the preservation of a liberal and democratic order, as expressed in numerous constitutional provisions, on the other hand, must both be taken into account. Thus, the supranational community needs to be subject to the same obligations under its legal system as arise for domestic law from the fundamental and indispensable principles of the Basic Law; this includes in particular the protection of the core of fundamental rights.

The dissenting judges consider this requirement fulfilled with the EEC: They argue that the protection of fundamental rights guaranteed within the Community does not differ in its nature and structure from the fundamental rights system of the national constitution. The core of fundamental rights is recognised and protected in both legal systems. The fundamental rights that

38 BVerfGE, *Solange II* (n. 24).

39 In German: 'zwischenstaatliche Einrichtung'.

apply within the legal system of the European Communities are essentially the same as those guaranteed by the Basic Law; they are based on the common constitutional traditions of the Member States – their recognition is based on the same values and concepts. And that, the judges say, is sufficient. It follows from this that provisions of Community law are only subject to the fundamental rights standards that apply at Community level, but do not also have to fulfil the fundamental rights standards of the national constitution.

The dissenters stress that the approach of the majority of the Senate leads to unacceptable results as it would lead to legal fragmentation, giving up European legal unity.

And the majority would violate the ECJ's established case law on primacy from *Flaminio Costa v. E. N. E.L.*[40] to *Internationale Handelsgesellschaft*[41]. This is where the dissenting judges state that the German Constitutional Court has no competence to scrutinise provisions of Community law. The majority opinion appears as an inadmissible encroachment on the jurisdiction reserved to the ECJ, in contradiction with Art. 24 Basic Law, jeopardising the Community legal order with the possible consequence of a treaty infringement case against Germany.

The dissenting opinion then goes on to make another, more technical inadmissibility argument, this time based on procedural concerns related to the path chosen by the Frankfurt Administrative Court, a reference under Art. 100 para. 1 Basic Law.[42] According to the dissenting judges, measures of a non-German public authority cannot be brought to the German Constitutional Court under that procedure. The provisions of secondary Community law, as norms of an independent legal system that flow from an autonomous source of law, are not acts of German public authority, thus, Art. 100 para. 1 Basic Law cannot apply to provisions of Community law. The task of the Federal Constitutional Court to be the guardian of the Constitution cannot lead to an extension of its jurisdiction, no matter how urgent the legal policy need may appear.

40 ECJ, *Flaminio Costa v. E. N. E.L.* (n. 29).

41 ECJ, *Internationale Handelsgesellschaft* (n. 18).

42 Art. 100 para. 1 Basic Law: 'Hält ein Gericht ein Gesetz, auf dessen Gültigkeit es bei der Entscheidung ankommt, für verfassungswidrig, so ist das Verfahren auszusetzen und, wenn es sich um die Verletzung der Verfassung eines Landes handelt, die Entscheidung des für Verfassungsstreitigkeiten zuständigen Gerichtes des Landes, wenn es sich um die Verletzung dieses Grundgesetzes handelt, die Entscheidung des Bundesverfassungsgerichts einzuholen. Dies gilt auch, wenn es sich um die Verletzung dieses Grundgesetzes durch Landesrecht oder um die Unvereinbarkeit eines Landesgesetzes mit einem Bundesgesetze handelt.'

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Finally, the dissenters insist that a decision of the full court, meaning a plenary decision of both Senates, should have been brought about because the Senate deviates in several respects from decisions of the First Senate.

That was the bottom line of the first comprehensive decision of the German Constitutional Court on European integration: a split court. This is even more intriguing as the majority ultimately did not find a fundamental rights problem. The dissenters would have thrown out the case as inadmissible, the majority held that the fundamental claims were unfounded. But clearly, this is not only a disagreement on technicalities.

## IV. What Is This All About?

First of all, there is not much to say about the internal background of the cases and the judges. The files of the case will be released after 60 years, 10 years from now.[43] The biographies of the dissenting judges do not explain why they insisted on a dissenting opinion in this European integration case. Apart from the fact that none of them was a *Staatsrechtslehrer*, a constitutional law professor, the three did not have much in common: Rudi Wand was a conservative career judge, Martin Hirsch was a politician, a former member of parliament for the Social Democrats. Hans Georg Rupp, who served 24 years on the Court, came from the ministerial bureaucracy. He had the strongest academic background, having studied at Harvard Law School and being close to Carlo Schmid, a former law professor and one of the influential drafters of the German Constitution in 1949. None of the dissenters had any European integration background, though, which could explain why they insisted on the arguably most pro-European interpretation of the Basic Law ever – until today.

### 1. Dissenting Opinions in German Constitutional Law

It should be noted that dissenting opinions are not uncommon at the German Constitutional Court.[44] They were only introduced in 1970.[45] Since then, however, this possibility has been used regularly. In Volume 37 of the

43 Then, it will also be revealed whether the judge rapporteur who wrote the majority opinion was actually Judge Hirsch, who also dissented. It is not uncommon to have the assigned judge rapporteur draft the majority opinion even if he or she dissents. But in *Solange I*, such a double role would have been particularly difficult to master. Hirsch was initially assigned as judge rapporteur (information confirmed to the author by the registrar of the German Constitutional Court in 2009).

44 On dissenting opinions at the German Constitutional Court see Matthias K. Klatt, *Das Sondervotum beim Bundesverfassungsgericht* (Mohr Siebeck 2023), passim.

45 § 30 para. 2 BVerfGG.

court's cases, the volume that contains *Solange I*, there are four further special votes, some of which written by the same judges as in *Solange I*.

## 2. Dissenting Opinions in European Integration Related Cases

### a) The Veil of Ignorance: the Difficulty to Identify Consensus and Dissent

Coherence and authority of the German Constitutional Court's decisions are arguably higher in decisions taken unanimously, whereas one or more dissenting opinions reveal that the majority of the Court remained unconvincing even to one or more of their colleagues. To annex a dissenting opinion to a decision is just an option for judges who do not agree with the majority, the dissenting opinion is not mandatory in case of a split court. The decisions do not always reveal whether there was a split court or unanimity. The absence of a dissenting opinion does not always mean that the decision was taken unanimously. Some decisions emphasise that the decision was taken unanimously, some indicate that there was a split court, even where there is no dissenting opinion, which will typically lead to speculations on who dissented without writing a dissenting opinion. And some decisions remain completely silent on the question of unanimity or majority, which will typically lead to speculations on whether there was a split court or not. A systematic analysis of the cases related to European integration (Table 1) reveals that there was more dissent on these cases than dissenting opinions. Only five out of 35 cases state clearly that the decision was taken unanimously.

Table 1: Majorities and Unanimities in European Integration Related Decisions of the BVerfG

| | *No indication on unanimity/ majority* | *Unanimity confirmed* | *- No unanimity and no dissenting opinion - Vote ratio* | *- No unanimity, dissenting opinion - Vote ratio - Dissent* |
|---|---|---|---|---|
| **BVerfGE 22, 293 (*Constitutional complaint against EC regulations*)** | X | | | |
| **BVerfGE 31, 145 (*Milk powder*)** | | X | | |
| **BVerfGE 37, 271 (*Solange I*)** | | | | X<br>- 5:3 on B I and II, unanimous on B III<br>- Rupp/Hirsch/Wand |

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| | *No indication on unanimity/ majority* | *Unanimity confirmed* | *- No unanimity and no dissenting opinion - Vote ratio* | *- No unanimity, dissenting opinion - Vote ratio - Dissent* |
|---|---|---|---|---|
| **BVerfGE 52, 187 (*Vielleicht*)** | X | | | |
| **BVerfGE 58, 1 (*Eurocontrol I*)** | X | | | |
| **BVerfGE 73, 339 (*Solange II*)** | | X | | |
| **BVerfGE 75, 223 (*Kloppenburg*)** | | X | | |
| **BVerfGE 85, 191 (*Night work*)** | X | | | |
| **BVerfGE 89, 155 (*Maastricht*)** | X | | | |
| **BVerfGE 92, 203 (*TV Directive*)** | X | | | |
| **BVerfGE 97, 350 (*Euro*)** | X | | | |
| **BVerfGE 102, 147 (*Banana market*)** | | X | | |
| **BVerfGE 113, 273 (*European arrest warrant I*)** | | | | X - no indication on vote ratio Broß; Lübbe-Wolff; Gerhardt |
| **BVerfGE 118, 79 (*Emissions trading*)** | X | | | |
| **BVerfGE 123, 267 (*Lisbon*)** | | | X - unanimous on the result, - 7:1 on the grounds | |
| **BVerfGE 125, 260 (*Data retention*)** | | | - 4:4 regarding incompatibility vs. invalidity | X - unanimous on the result, in particular regarding questions of EU law and formal constitutionality |

| | *No indication on unanimity/ majority* | *Unanimity confirmed* | *- No unanimity and no dissenting opinion - Vote ratio* | *- No unanimity, dissenting opinion - Vote ratio - Dissent* |
|---|---|---|---|---|
| | | | | - 7:1 on the result regarding the unconstitutionality of §§ 113a, 113b TKG - 6:2 regarding 'further substantive questions, as far as can be seen from the dissenting opinions' - Schluckebier; Eichberger |
| **BVerfGE 126, 286 (*Honeywell*)** | | | | X - 7:1 on the result, - 6:2 on the grounds - Landau |
| **BVerfGE 129, 124 (*EFSF*)** | | | X - 7:1 on admissibility of the constitutional complaint | |
| **BVerfGE 129, 300 (*5 per cent threshold EP*)** | | | | X - 5:3, - Di Fabio/Mellinghoff |
| **BVerfGE 130, 318 (*ESM Act*)** | | X | | |
| **BVerfGE 131, 152 (*Duty to inform*)** | | X | | |
| **BVerfGE 132, 195 (*ESM interim decision*)** | X | | | |
| **BVerfGE 134, 366 (*OMT preliminary reference*)** | | | | X - 6:2 - Lübbe-Wolff; Gerhardt |
| **BVerfGE 135, 317 (*ESM Fiscal Treaty*)** | X | | | |

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| | *No indication on unanimity/ majority* | *Unanimity confirmed* | *- No unanimity and no dissenting opinion - Vote ratio* | *- No unanimity, dissenting opinion - Vote ratio - Dissent* |
|---|---|---|---|---|
| **BVerfGE 135, 259 (*3 per cent threshold EP*)** | | | | X - 5:3 - Müller |
| **BVerfGE 140, 317 (*European arrest warrant II*)** | X | | | |
| **BVerfGE 142, 123 (*OMT*)** | X | | | |
| **BVerfGE 143, 65 (*CETA I*)** | X | | | |
| **BVerfGE 144, 1 (*CETA II*)** | X | | | |
| **BVerfGE 146, 216 (*PSPP preliminary reference*)** | X | | | |
| **BVerfGE 149, 346 (*European schools*)** | X | | | |
| **BVerfGE 151, 202 (*Banking union*)** | X | | | |
| **BVerfGE 152, 152 (*Right to be Forgotten I*)** | | X | | |
| **BVerfGE 152, 216 (*Right to be Forgotten II*)** | | X | | |
| **BVerfGE 153, 74 (*Unified Patent Court I*)** | | | | X - 5:3 - König/Langenfeld/ Maidowski |
| **BVerfGE 154, 17 (*PSPP*)** | | | X - 7:1 | |
| **BVerfGE 156, 182 (*European arrest warrant III*)** | X | | | |
| **BVerfGE 157, 1 (*CETA interinstitutional*)** | X | | | |

| | *No indication on unanimity/ majority* | *Unanimity confirmed* | *- No unanimity and no dissenting opinion - Vote ratio* | *- No unanimity, dissenting opinion - Vote ratio - Dissent* |
|---|---|---|---|---|
| **BVerfGE 157, 332 (*NGEU interim measures*)** | | | X - 7:1 with regard to grounds in C.I.2. and C.II.1.a - result unanimous in favour | |
| **BVerfGE 158, 1 (*Ecotox data*)** | X | | | |
| **BVerfGE 158, 51 (*Greece – Duty to inform Parliament*)** | X | | | |
| **BVerfGE 158, 210 (*Unified Patent Court II*)** | X | | | |
| **BVerfGE 163, 165 (*ESM amendment*)** | X | | | |
| **BVerfGE 164, 193 (*NGEU*)** | | | | X - 6:1 - Müller |
| **BVerfG 168, 372 (*Direct elections act 2018, EP threshold*)** | X | | | |
| *45* | *24* | *8* | *4* | *9* |

## b) Why the *Solange I*-Dissent Stands Out

*Solange I* stands out among the dissenting opinions relating to European integration: three dissenting judges are extremely rare in European matters. The first major case on the European arrest warrant in 2005 had three dissenters, albeit with conflicting criticisms of the majority. The *Unified Patent Court* case of 2020 also had three dissenters, but this was not strictly speaking EU law, and the dissent was on a procedural issue, the limits of standing under Art. 38 Basic Law. Three judges dissenting is significant.

### c) A European Integration Multiverse?

Dissenting opinions in cases related to European integration are no exception. There was no dissent in the *Solange II*, the *Maastricht*, and the *Lisbon* cases, although *Lisbon* was not decided unanimously, with one judge not supporting the majority decision, without writing a dissenting opinion, the same thing happened in *PSPP*. But apart from the *Solange I*-dissenting opinion, there are other important dissenting opinions in European integration cases: Gertrude Lübbe-Wolff's dissent to the *European Arrest Warrant* decision in 2005[46] and to the very first preliminary question in the *OMT* case 2014[47]; the dissenting opinions to the *EP electoral law (minimum threshold)* cases by Udo Di Fabio and Rudolf Mellinghoff in 2011[48] and Peter Müller in 2014[49].

Table 2: Dissenting Votes in European Integration Cases:

| *Date* | *Reference* | *Dissenting judges* | *Orientation of the dissent* |
|---|---|---|---|
| **29 May 1974 (order)** | **BVerfGE 37, 271 (*Solange I*)** | Hans G. Rupp/ Martin Hirsch/ Walter R. Wand | **Progressive** *(European law cannot be reviewed for compatibility with fundamental rights; Art. 100 para. 1 Basic Law is not [analogously] applicable to European secondary law)* |
| **18 July 2005 (judgment)** | **BVerfGE 113, 273 (*European arrest warrant I*)** | Siegfried Broß | **Critical** *(violation of the subsidiarity principle of Art. 23 para.1 Basic Law)* |
| | | Gertrude Lübbe-Wolff | **Progressive** *(Art. 79 para. 3 Basic Law should not prevent integration)* |
| | | Michael Gerhardt | **Progressive** *([effective] European law implementation is mandatory; [allegedly] unconstitutional transposition laws shall apply temporarily)* |

46 BVerfGE, *Europäischer Haftbefehl I* (n. 13).
47 BVerfGE, *OMT* (n. 17), 419 et seq.
48 BVerfGE 129, 300 (346 et seq.) – *Fünf-Prozent-Sperrklausel EuWG*.
49 BVerfGE 135, 259 (299 et seq.) – *Drei-Prozent-Sperrklausel EuWG*.

| *Date* | *Reference* | *Dissenting judges* | *Orientation of the dissent* |
|---|---|---|---|
| **6 July 2010 (order)** | **BVerfGE 126, 286 (*Honeywell*)** | Herbert Landau | **Critical** *(democratically non-legitimised obvious overstretch of competence is ultra vires)* |
| **9 November 2011 (judgment)** | **BVerfGE 129, 300 (*5 per cent threshold EP*)** | Udo Di Fabio/ Rudolf Mellinghoff | **Progressive** *(Member States bear joint responsibility for the functioning of EP)* |
| **14 January 2014 (order)** | **BVerfGE 134, 366 (*OMT*)** | Gertrude Lübbe-Wolff | **Progressive** *(BVerfG is not entitled to a general comprehensive European law scrutiny)* |
| | | Michael Gerhardt | **Progressive** *(there is no general German constitutional supervision)* |
| **26 February 2014 (judgment)** | **BVerfGE 135, 259 (*3 per cent threshold EP*)** | Peter A. Müller | **Progressive** *(against the majority's interference with the functioning of EP)* |
| **13 February 2020 (order)** | **BVerfGE 153, 74 (*Unified Patent Court*)** | Doris König/ Christine Langenfeld/ Ulrich Maidowski | **Progressive** *(no standing for individuals to invoke procedural requirements of Art. 23 para. 1 sentence 2, 3 and Art. 79 Basic Law)* |
| **6 December 2022 (judgment)** | **BVerfGE 164, 19 (*NGEU*)** | Peter A. Müller | **Critical** *(insisting on stricter scrutiny of EU action)* |

A systematic analysis of the dissenting votes in European integration cases does not result in a clear picture. Dissenting opinions are most of the time more Europe-friendly than the majority, but there are also counterexamples with Herbert Landau's angry dissent in *Honeywell* 2010 or, most recently, Peter Müller's dissent in *NGEU* in 2022.

Another Peter Müller dissent is the only example of a dissent becoming a majority opinion. In the case of *European electoral law and the minimum threshold* issue, the 2014 dissent is the blueprint for the *European electoral law* decision of February 2024.

The analysis of the dissenting votes in European integration cases reveals that there is no single alternate constitutional law universe, where the more

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or less coherent case law of the BVerfG in European law matters has a more or less coherent counterpart. There is a multiverse of dissents, as the dissents are neither coherent, nor are they built on the *Solange I*-dissent. The *Solange I*-dissent is absent from the reasonings of dissenting judges. It has not acquired the role of the leading reference for any European law related dissent.

## 3. Paths Not Taken

What would have happened, if the minority had been a majority? What could that legal universe look like, would it be tantamount to a universe where you cross the street at red? Any attempt to answer this question needs to assess what divides the majority from the minority in *Solange I*. It is not the outcome of the case. It is not the assessment of the European construct as a new legal order. It is not the existence of constitutional law limits to participating in European integration. On all these points, the judges agree. The conflict is about whether the German court has jurisdiction over European law. According to the dissenters it has not.

### a) European Fundamental Rights Evolution in an Alternate Universe

Would European law have taken another direction, if *Solange I* had been decided along the lines of the dissent? Conventional German constitutionalist wisdom has it that the development of fundamental rights at the European level was triggered or at least enhanced by *Solange I*. According to that reading, the conditionality of *Solange I* – '*as long as*' there is no adequate fundamental rights protection at the European level – forced the ECJ to establish the required level of protection and, more generally speaking, EU law to become a fundamental rights oriented legal order with a legally binding European Union (EU) Charter of Fundamental Rights as the ultimate evidence.

It's a nice story, but there is not much solid evidence for it. The dissenting opinion reveals that the ECJ decision that twelve years later in *Solange II*[50] is

50 BVerfGE, *Solange II* (n. 24). See in that context the view from an insider of the Court in 1986, Rainer Hofmann, 'Deutsches Verfassungsrecht und europäisches Gemeinschaftsrecht. Die „Solange-Rechtsprechung" des Bundesverfassungsgerichts' in: Juristische Fakultät der Universität Heidelberg (ed.), *Die Direktwirkung europäischer Richtlinien – L'effet direct des directives européennes. 25. Gemeinsames Seminar der Juristischen Fakultäten von Montpellier und Heidelberg, 23. Juni – 5. Juli 1993* (1994), 21-33.

praised as the decisive step in the fundamental rights jurisprudence of the ECJ, the 1974 *Nold* case,[51] was already out before *Solange I*, they had it on their desks in Karlsruhe when drafting *Solange I*.[52] That means that the European law development towards more fundamental rights sensitivities was on track already with or without *Solange*.[53]

It is true that *Solange I* had repercussions also in the political world with a political declaration on fundamental rights by the European Parliament.[54] But there is no direct line that led to today's Charter of Fundamental Rights. The Fundamental Rights Charter that was proclaimed in December 2000 as a political declaration was a German idea, based on the political promise of the red-green government that came to power in 1998 to pursue a new European project.[55] This political project was totally disconnected from the development of the ECJ's and the German Constitutional Court's fundamental rights conversation, which, by the time, was at the *Solange II*-stage.

There is also a much darker answer to the question whether the outcome of *Solange I* mattered. The starting point here is scepticism about European fundamental rights protection and the success story narrative. This is not a conceptual objection. EU fundamental rights are unique. The EU is the only non-statal entity that offers fundamental rights protection against its own acts – the United Nations (UN) does not have that, no International Organisation has that. But the very first case which started all this, well before *Solange I*, the 1969 *Stauder* case,[56] might still be paradigmatic: At all costs, Erich Stauder from Ulm wanted to avoid becoming known as a recipient of social welfare. The result: Generations of EU law students learn that Erich Stauder from Ulm was a recipient of social welfare. The principle of protecting fundamental rights is upheld, but in the reality, somehow fundamental rights do not prevail in the specific case. There are almost no cases where the ECJ declares European legislation or action void because of fundamental

51 ECJ, *Nold* (n. 37).

52 BVerfGE, *Solange I* (n. 3), 293, referring to an advance copy ('hektographierter Text').

53 There is also the question of the impact of the German *Solange*-decision on other courts in other Member States, see on that the contribution to this issue by 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.

54 Joint Declaration of 27.4.1977, OJEC no. C 103/1. See on the context Bill Davies, 'Integrity or Openness? Reassessing the History of the CJEU's Human Rights Jurisprudence', Am. J. Comp. L. 64 (2016), 801-814.

55 Aufbruch und Erneuerung – Deutschlands Weg ins 21. Jahrhundert. Koalitionsvereinbarung zwischen der Sozialdemokratischen Partei Deutschlands und Bündnis 90/Die GRÜNEN (Bonn 1998), 42: Chapter XI, 1: 'Die neue Bundesregierung wird die Initiative ergreifen, um den europäischen Verträgen eine Grundrechtscharta voranzustellen.'

56 ECJ, *Stauder* (n. 36).

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rights violation. There are notable exceptions such as the case concerning the data retention directive.[57] But this case might be motivated by very specific circumstances.

However one may assess the effectiveness of the European fundamental rights protection: There is not much convincing evidence to argue that the development of fundamental rights protection at the European level would have been dramatically different, had the dissenters view been the view of a majority.

### b) The German Constitutional Court in an Alternate Universe

With a *Solange I*-ruling without the claim to jurisdiction over European secondary law the German constitutional court's case law on European integration would have taken a different path. It is impossible to say whether, in the long run, that path would have led to a completely different universe where, in legal terms, you cross the street at a red light. After all, the dissenting opinion also sees limits to European law.[58] It could well be that at some point, the alternate German Constitutional Court would have started to claim jurisdiction in some limited, very exceptional cases. And with the actual German Constitutional Court's case law becoming more and more nuanced, the difference, in the long run might become smaller and smaller. But with the dissenters prevailing some key elements of the actual German Constitutional Court's case law on European integration after May 1974 would just not have happened.

*No Solange II*

The *Solange II*-decision would not have happened because it was a decision reacting to and correcting the *Solange I*-majority opinion. The standard account here is that *Solange II* is the pro-integration opposite of *Solange I*. This is however not accurate. There is a continuity between *Solange I* (majority opinion) and *Solange II* as far as the concept of a constitutional law reserve of control that restricts the European law claim for primacy is concerned. Unlike the dissenting opinion in *Solange I*, *Solange II* does not refuse jurisdiction over European law. It's just that *Solange II* in 1986 and the

57 ECJ, *Digital Rights Ireland and Seitlinger and Others,* judgment of 8 April 2014, cases C-293/12 and C-594/12, ECLI:EU:C:2014:238.

58 See in that context the contribution to this issue by 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 who understands the *Solange* method as the sum of the GCC's push-back against European integration – arguably, some kind of push-back was/is inevitable.

*Banana* decision in 2000[59] set the bar for activating the court's jurisdiction much higher than *Solange I*, but all along these cases, there is one constant: the German court claims jurisdiction over European law – which is exactly what the dissenters in *Solange I* deny.

*A different Article 23 Basic Law?*

Without *Solange II*, the new Art. 23 Basic Law, introduced in 1992,[60] after German reunification, codifying elements of the *Solange*-formula would have looked different. Paragraph 1 of that provision reads as follows:

> 'With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social and federal principles, to the rule of law and to the principle of subsidiarity *and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law*. […]' (emphasis added).

This means that it is not necessary to have identical fundamental rights protection at the European level, but that essentially comparable fundamental rights protection is sufficient, which can mean less fundamental rights protection. The idea goes back to the *Solange*-cases.

The dissenting opinion in 1974 held that

> 'despite the lack of a catalogue of fundamental rights, the protection of the fundamental rights guaranteed in the Constitution is also guaranteed in the legal system of the European Communities – though to some extent in modified form – through the case law of the European Court of Justice.'[61]

For the dissenters, there was no need to codify the equivalence of fundamental rights protection at the European and the national level as they considered it as already given. The alternate German Constitutional Court would not have given cause for a revision of the constitution and the codification of constitutional limits of Germany's participation in European integration in that new Art. 23 Basic Law. But it is also true that the revision of the constitution was ultimately a political decision and part of a recalibration of the constitutional foundations of the Federal Republic after German reunification. With Rupert Scholz – the chairman of the committee in charge

59 BVerfGE, *Bananenmarktordnung* (n. 25).

60 38. Gesetz zur Änderung des Grundgesetzes, 21 December 1992, BGBl. I 1992, 2086. See also the final report of the joint commission that prepared constitutional amendments after reunification, 'Bericht der Gemeinsamen Verfassungskommission', BT-Drs. 12/6000.

61 'Trotz des Fehlens eines Grundrechtskatalogs ist somit der Schutz der im Grundgesetz gewährleisteten Grundrechte auch in der Rechtsordnung der Europäischen Gemeinschaften – wenn auch teilweise in modifizierter Form – durch die Rechtsprechung des Europäischen Gerichtshofes gewährleistet.', BVerfGE, *Solange I* (n. 3), 294.

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of preparing that revision[62] who was also a *Staatsrechtslehrer* – a conservative constitutional law scholar[63] points to the fact that there were forces beyond the court that wanted to emphasise limits of European integration. These forces might have prevailed in the alternate legal universe as well.

*From divided responsibility to shared responsibility in fundamental rights protection?*

The fundamental rights development leading to the *Right to be forgotten*-cases in 2019[64] is not easy to assess in the present context, as these cases are about the use of EU fundamental rights by the German Constitutional Court, and at least on paper, a commitment to cooperation with the ECJ.

*No jurisdiction – no Ultra vires-control*

With a firm commitment of the alternate German Constitutional Court not to encroach on the ECJ's turf as the guiding line of European integration cases, it would have been much more difficult to establish the Ultra vires-control, that began with the 1993 *Maastricht* decision[65] and culminated in the 2020 *PSPP*[66] fiasco plus treaty infringement proceedings against Germany.[67] The Ultra vires-argument is the ultimate encroachment on the ECJ's turf.

*National constitutional identity in an alternate legal universe*

What about the German Constitutional Court's defence of national constitutional identity? It's one of the central arguments of the *Solange I*-majority that there is something such as national constitutional identity that constitutes the ultimate barrier against European law primacy. The dissenters seem to agree with that and confirm that there are limits to Germany's participation in European integration. This seems to be the point where the majority's legal universe and the minority's legal universe differ the least. The dissenters insist that as far as fundamental rights protection is concerned, the limits are not reached, though, because they consider the fundamental rights protection at the European level to be sufficient.

62 See 'Bericht der Gemeinsamen Verfassungskommission', BT-Drs. 12/6000.

63 Scholz went on to feed his view on the new constitutional provisions dealing with European integration into academic discourse by means of a commentary of Art. 23 Basic Law, Rupert Scholz, 'Art. 23' in: Günter Dürig et al. (eds), *Grundgesetz-Kommentar* (C. H. Beck 2024).

64 BVerfGE 152, 152 – *Recht auf Vergessen I* and BVerfGE 152, 216 – *Recht auf Vergessen II*.

65 BVerfGE, *Maastricht* (n. 32).

66 BVerfGE, *PSPP* (n. 33).

67 See on that Franz C. Mayer, 'The Ultra Vires Ruling: Deconstructing the German Federal Constitutional Court's PSPP decision of 5 May 2020', Eu Const. L. Rev. 16 (2020), 733-769, with further references.

*The relationship between German constitutional law and the European legal order in an alternate legal universe*

The underlying question to all the points raised until here is the question of how to explain the relationship between German constitutional law and the European legal order. This is probably where the most important conceptual feature of the minority legal universe can be detected: in that universe, it is the constitution itself that opens the domestic legal space to European law. This is a constitutional pluralism approach.[68]

The actual German Constitutional Court has developed a different view, and although not explicitly addressing the issue, the *Solange I* majority opinion already paves the path for this restrictive view. According to this explanation, European law enters the domestic legal order through the bridge of the ratification statute, which determines the inferior legal rank of European law in the German legal order: the rank of ordinary parliamentary legislation. This quite orthodox '*Brückentheorie*' (*theory of the bridge*)[69] underestimates the fact that European law is able to swim, meaning it does not need a bridge to be relevant in the domestic legal order. Above all, however, the downgrading of European law to the status of a simple federal law is hard to reconcile with the 1949 constitutional commitment to a unified Europe.

This of course leads back to the 1993 constitutional amendment introducing Art. 23 Basic Law with all that red tape for Germany's participation in European integration. Maybe the commitment to European integration before 1989 was first and foremost a functional commitment of a country that did not have full sovereignty before German reunification. Arguably it's easier to give up sovereignty if there is no sovereignty.

Assuming that reunification also occurred in the parallel legal universe of the *Solange I* dissenters, it is simply impossible to say how reunification would have played out in that parallel legal universe.

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68 See on that Franz C. Mayer, 'Verfassung im Nationalstaat: Von der Gesamtordnung zur europäischen Teilordnung?', *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 75 (2016), 7-63 (28 et seq.); Franz C. Mayer, 'Konstitutionalisierung der Europäischen Union und Souveränität der Mitgliedstaaten', in: Matthias Friehe (ed.), *Zur Verfassung der Europäischen Union. Görres-Gesellschaft, Jahrestagung 2024. Rechts- und Staatswissenschaftliche Sektion der Görres-Gesellschaft*, forthcoming; Claudio Franzius, *Recht und Politik in der transnationalen Konstellation* (Campus 2014), 15. See in that context also the concept of permeability of the constitution, Mattias Wendel, *Permeabilität im europäischen Verfassungsrecht* (Mohr Siebeck 2011), 7 and passim.

69 See on that Paul Kirchhof, 'Die Gewaltenbalance zwischen staatlichen und europäischen Organen', JZ 53 (1998), 965-974, who has helped establish this approach as the central paradigm on the relationship between EU law and domestic law in Germany from the bench of the German Constitutional Court and in his academic writings.

# V. Conclusion

In Doctor Strange and the Multiverse of Madness, catastrophic things happen if different universes interact too much. Thus, I will leave imagining hypothetical parallel legal universes to others and turn to one insight that seems hard to contest: The randomness of appointments to the bench can have far-reaching consequences. One more vote alongside Rupp, Hirsch, and Wand, and things would have turned out differently.

## 1. A Categorical European Constitutional Law Imperative

One conclusion that may be drawn from this: Far-reaching court decisions on European integration must be supported as comprehensively as possible, not only by a more or less random majority of judges.

Far-reaching decisions are particularly those that could only be corrected by a completely new constitution. In the German context, this concerns the possible reasoning with national constitutional identity rooted in an absolute integration-proof core of the constitution (Art. 79 para. 3 Basic Law).

A categorical European constitutional law imperative for German Constitutional Court judges could read as follows: Never support a decision that cannot be corrected even by amending the constitution if you are not sure that all judges before and after you would decide the same way.

## 2. Plenary Responsibilities

In this context, the point of the *Solange I*-dissenting vote and the question of consent between the two Senates comes into view. So far, there has been not a single European law-related decision that has been issued as a plenary decision by both Senates. But perhaps some questions of European integration are of such great importance that they cannot be left to one Senate alone to decide.

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# '*Solange*', '*Fintantoché*', '*Tant que*': On the Local Remodelling of a Canonical German Decision in French and Italian Constitutional Debates

Niels Graaf*
University of Amsterdam, Amsterdam, The Netherlands
*n.graaf@uva.nl*



## Abstract

The German *Solange* jurisprudence is an integral component of the European constitutional republic of letters. However, this article contends that a singular European '*Solange* story' does not exist. Drawing on references to the *Solange*-jurisprudence in Italian and French public law journals published between 1989 and 2012, this article reveals that the way these German decisions are understood and applied differ along national lines. As the *Solange* judgments crosses borders, the meaning ascribed to these decisions change. Karlsruhe's *Solange* was not Italy's *Fintantoché* nor similar to the

* The author is assistant professor of constitutional law at the University of Amsterdam. All the translations from Italian and French are by the author of this article. I am deeply grateful to Kriszta Kovacs, Andrej Lang, and Mattias Kumm for their insightful and thought-provoking critiques. My thanks also go to Alexandra Kemmerer, Elaine Mak, and Jerfi Uzman for engaging discussions that helped shape the research underpinning this article. I also gratefully acknowledge Andrea Zanotti and the hospitality of the Collegio dei Fiamminghi in Bologna for providing a stimulating environment for this work.

French *Tant que*. Contextual constitutional factors are largely responsible for this divergence.

Nevertheless, a common underlying narrative emerges: the narrative that when EU law is applied domestically, constitutional courts bear the capacity to review these laws on their conformity with the national constitution. While French and Italian scholarly engagement with *Solange* differed in form and contents, the *Solange* judgment functioned as a banner imbued with the message that it is possible to make reservations towards the primacy of EU law. In this way, the *Solange* jurisprudence provided the glue that pasted together divergent constitutional communities. While this article pertains to the meta-level of *Solange*-studies, the analysis holds broader implications and advances existing research on the migration of constitutional ideas. Specifically, it shows how the development of French and Italian domestic doctrine is accompanied, justified, criticised and, sometimes, triggered by scholarly references to a German judgment.

## Keywords

*Solange* – migration of constitutional ideas – Conseil Constitutionnel – Corte Costituzionale – legal transfer – legal journals

## I. Introduction

Sometimes judgments by constitutional courts wield nicknames. Remarkably few of these judicial sobriquets receive translations. There is a good possibility that there exists only one example of such: the German Federal Constitutional Court's *Solange* judgment. This nickname for case *BVerfGE 37, 271*, claiming the capacity to review European Union (EU) law on its conformity with German constitutional law for so long as the Community had not received a comparable catalogue of fundamental rights, is translated in Italian as '*Fintantoché'*, and in French as '*Tant que*'. This is not to say that the German byname '*Solange'* ['as long as'] has no popularity outside Germany.[1] On the contrary, its invocation is probably one of the most visible uses of German in non-German scholarship. From this perspective, the translation of the judgment's nickname to French and Italian is only further

[1] See in this special issue for the spread of *Solange I* doctrine beyond the EU Eyal Benvenisti, 'When *Solange I* Met *Neubauer*: National Court Protecting Global Interests When Reviewing Decisions of International Organisations', HJIL 85 (2025), 627-648.

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proof that the *Solange* decision is part of a European constitutional republic of letters, an immaterial realm of legal professionals and legal scholars, exercising dominion over thoughts and deeds.[2]

Yet, if the *Solange* judgment is 'integrated' in European legal orders such as the Italian and the French ones, a pressing question presents itself: can we speak of a single European 'Solange story'?[3] Is it a legal transplant?[4] Or does the way the canonical German decision is understood and applied differ along national lines?[5] This article claims the latter. As the *Solange* judgment crosses borders, the meaning ascribed to it changes. Inspection of Italian and French scholarly uses of the *Solange*-jurisprudence reveals that Karlsruhe's *Solange* was not Italy's *Fintantoché* nor similar to the French *Tant que*. Contextual factors are largely responsible for this divergence. A shared core narrative, however, is visible: the narrative that when EU law is applied domestically, constitutional courts bear the capacity to review these laws on their conformity with the respective national constitution.

The above presented claim about the existence of a European *Solange* story, but one with several versions, is relevant not only to our understanding of the legacy of *Solange* outside Germany. Rather, it also contributes to the literature on the migration of constitutional ideas beyond the English-speaking world.[6] Specifically, by looking at scholarly references to *Solange*, it approaches the flow of constitutional ideas from a new angle. While existing literature focuses almost exclusively on the use of foreign law by judges and legislators, this article focuses on scholarly engagement with a foreign judgment.[7]

It is important to deepen our knowledge on this category of transnational connectivity. Previous studies have convincingly argued that legal academia is among the main 'protagonists in the circulation of foreign constitutional

2 Lorraine Daston, 'The Ideal and Reality of the Republic of Letters in the Enlightenment', Science in Context 4 (1991), 367-386.

3 Wojciech Sadurski refers to the story of courts resisting the primacy of EU law, see Wojciech Sadurski, '"Solange, Chapter 3": Constitutional Courts in Central Europe – Democracy – European Union', ELJ 14 (2008), 1-35 (1).

4 Alan Watson, *Legal Transplants: an Approach to Comparative Law* (Edinburgh Scottish Academic Press 1974).

5 See also: Gunther Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Differences', M. L. R. 61 (1998), 11-32.

6 I. e. Günter Frankenberg, Order from Transfer: Comparative Constitutional Design and Legal Culture (Edward Elgar Publishing 2013).

7 For an exception: Ugo Mattei, 'The Cold War and Comparative Law: A Reflection on the Politics of Intellectual Discipline', Am. J. Comp. L. 85 (2017), 567-607.

law'.[8] Alan Watson even held that 'at most times, in most places, borrowing from different jurisdictions has been the principal way in which law has developed'.[9]

This is significant because legal scholarship does not only have purely academic consequences; it influences legal systems.[10] Jan Smits emphasised that by invoking foreign law, legal academics make foreign law part of a national discourse, bring it to the notice, and ultimately influence (judicial) decision making.[11] Much the same, Rodolfo Sacco, for that matter, claimed that if we want to understand the functioning of courts, we should not only study how judiciaries act, but also look into the variety of influences by which judges are affected. Such influences, or in the words of Sacco 'legal formants', include academic commentaries.[12] Indeed, many fundamental legal concepts are born in the realm of legal scholarship and maybe we should think of the scholarly use of foreign examples as a collection of templates to which judges and other legal professionals are invited to conform.[13]

While it is crucial to move beyond a simplistic positivistic view that frames legal scholarship merely as an exercise in rationalising, studying, and systematising case law and legal acts, it is equally important to recognise that legal scholarship is not the primary driver of legal systems. This article argues for a more reciprocal understanding. Scholarly use of foreign law might influence judicial and legal decision-making, but it is also informed and accelerated by legislative and judicial developments.

From a substantive perspective, this inquiry joins the 'contextual turn' in research on the flow of legal ideas transcending national borders. In this way,

8 Tania Groppi, 'Bottom up Globalization? Il ricorso a precedenti stranieri da parte delle Corti costituzionali', Quad. Cost. 1 (2011), 199-207 (203); Russel A. Miller, 'Introduction: Comparative Law as Transnational Law' in: Russel A. Miller and Peer C. Zumbansen (eds), *Comparative Law as Transnational Law: A Decade of the German Law Journal* (Oxford University Press 2011), 12; Monica Claes, 'Constitutional Law' in: Jan M. Smits (ed.), *Elgar Encyclopedia of Comparative Law* (Edward Elgar Publishing 2012), 223.

9 Alan Watson, *Society and Legal Change* (Temple University Press 2001), 98; Alan Watson, *Legal Transplants*: *an Approach to Comparative Literature* (University of Georgia Press 1993), 95; for a continental European perspective: Massimo Brutti, 'Per la scienza giuridica europea (riflessioni su un dibattito in corso)', Riv. Trimestr. Dir. Pubbl. 4 (2012), 905-932 (907).

10 Armin von Bogdandy, 'Comparative Constitutional Law: A Contested Domain' in: Michel Rosenfeld and Andras Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012), 26-37 (26-27).

11 Jan M. Smits, 'Comparative Law and Its Influence on National Legal Systems', in: Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press 2006), 477-512.

12 Rodolfo Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)', Am. J. Comp. L. 39 (1991), 1-34 (24).

13 Von Bogdandy (n. 10), 26-27; Groppi (n. 8), 203; Miller (n. 8), 12; Claes (n. 8), 223.

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it proceeds from Ran Hirschl's *cri de cœur* that 'the scope and nature of engagement with the constitutive laws of others in a given polity at a given time cannot be meaningfully understood independent of the concrete socio-political struggles, ideological agendas, and "culture wars" shaping that polity at that time'.[14] At the same time, this article takes local uses of *Solange* seriously and, as such, connects to the idea presented by Afroditi Marketou that reflective research based on traditional legal material can offer a legal 'counterpart' to ethnographic approaches.[15] More to the point: it studies the meaning of references to Solange 'as the significance attributed to them by the relevant local legal community'.[16] However, this study is not merely about engaging with foreign law, nor is it solely an exercise in the subdiscipline I coin as 'comparative comparative law'.[17] By shedding light on the development of scholarly ideas through the lens of the *Solange* judgment, it is as much a contribution to the field of EU legal history which focuses on how member states 'received' EU legal doctrine.

This article is organised as follows. The next part (II.) elucidates the methodology employed in the research underlying this article. Part three (III.) presents a modest typology of normative scholarly uses of the *Solange* judgment. Part four (IV.) sheds light on invocations of the *Solange* judgment in Italian constitutional law scholarship. Subsequently, in part five (V.), the French uses of *Solange* is described. Finally, in part six (VI.), some concluding thoughts are shared on the local use of *Solange* and what it tells us about the world of European constitutional law and ideas.

## II. Methodology

This article is based upon an in-depth comparative analysis of explicit references to the *Solange*-jurisprudence in Italian and French public law scholarship. There is a simple explanation for this selection of countries. Italy and France form, together with Germany, the big three of 'the Carolingian Europe of the six founding states'.[18] As founding members of the EU they all

14 Ran Hirschl, Comparative Matters. The Renaissance of Comparative Constitutional Law (Oxford University Press 2015), 6.

15 Afroditi Marketou, *Local Meanings of Proportionality* (Cambridge University Press 2021).

16 Jacco Bomhoff, 'Comparing Legal Argument' in: Maurice Adams and Jacco Bomhoff (eds), *Practice and Theory in Comparative Law* (Cambridge University Press 2012), 74-95, (77, 83).

17 A. Roberts et al., *Comparative International Law* (Oxford University Press 2018).

18 Thomas Oppermann, 'Von der Gründungsgemeinschaft zur Mega-Union: Eine europäische Erfolgsgeschichte?', DVBl 122 (2007), 329-336 (332).

faced more or less identical constitutional problems with regard to the functioning of EU law.

## 1. Legal Journals as a Source

Invocations to *Solange I* and *II* are traced in a selection of influential public law journals, published between 1989 and 2012. For France: *Les Nouveaux Cahiers du Conseil constitutionnel, Revue française de droit constitutionnel,* and the *Revue du droit public de la science politique en France et à l'étranger.* For Italy*: Rivista trimestrale di diritto pubblico, Giurisprudenza costituzionale,* and the *Quaderni costituzionali.* The selection is based on the presumption that these journals form, as Bruno de Witte would say, a 'thriving and lively scholarly community within their language area'.[19] These flagship journals may be ignored by most of the English-speaking world, but are regarded as scholarly strongholds of the Italian and French academic communities.

Obviously, legal journals are by no means the only category of legal scholarship, but they offer unique insights in the explicit scholarly use of the *Solange* judgment. These journals can be seen as a continuous publication of narratives that have circulated over time throughout Italian and French scholarly communities.[20] Yet, a caveat is in order. In these public law journals, a *nationalist constitutional law* perspective is usually common. This means so much as that most scholars publishing in these journals take for granted that a national constitution is the theoretical pivot point of a legal system.[21] Although it is widely acknowledged that the world of constitutional law is going through 'an era of great changes',[22] this approach is still far from peripheral in continental Europe.

In the objective of tracking down most of the references to *Solange* in the selected journals, a selection procedure was applied. Included in this selection were all articles addressing the relationship between the legal order of the EU and the legal orders of its Member States. Such a broad selection strategy was needed, because selection could not be made on the basis of titles alone.

19 Bruno de Witte, 'European Union Law: A Unified Academic Discipline' in: Antoine Vauchez and Bruno de Witte (eds), *Lawyering Europe – European Law as a Transnational Social Field* (Hart Publishing 2013), 101-116 (114).

20 Noël Carroll, 'Interpretation, History and Narrative', The Monist 73 (1990), 134-166.

21 Kim Lane Scheppele, 'Constitutional Ethnography: An Introduction', L. & Soc. Rev. 38 (2004), 389-406 (392).

22 Sabino Cassese, 'Alla ricerca del Sacro Graal. A proposito della Rivista diritto pubblico', Riv. Trimestr. Dir. Pubbl. 43 (1995), 789-800 (790).

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Sometimes an article about a seemingly different matter brought up a *Solange* reference.

In the process of searching for references to *Solange*, the approach followed is one of close analysis of all the selected articles.[23] Studying references to *Solange* necessitates an understanding of uses of the judgment in the invocators' terms and of the relevant contextual particularities. Drawing on a coding method developed for analysing newspapers, the analysis of *Solange* invocations consisted of two phases of deductive coding in which both the form and aims of the invocations were taken into account.[24] The coding was done by hand as many of the selected journal issues were not accessible for digitised research. At the same time, search queries for specific words easily miss out relevant references. How could one, for instance, know that French and Italian scholars translate the name of the *Solange* decision as '*tant que*' and '*fintantoché*'?

## 2. Time Period

The time period under study is not accidental. The period between 1989 and 2012 has been called a new stage in the history of the EU[25] and is formed by the decisive years in which the EU changed dramatically through institutional deepening and geographical enlargement.[26] These decades of major transformations were selected to enable the analysis of the reception of the *Solange* judgment in a time frame different than when it was issued. In this way, this analysis is about the *Nachleben* of *Solange*. There are two reasons why this period is of special interest. First, this period is about the legacy of *Solange* in a period when the EU was no longer the sole 'province of the closed circle of Community law experts',[27] but became more and more studied by constitutional law scholars – not least because the Maastricht Treaty formed an 'embryo of a European

23 Kenneth D. Aiello and Michael Simeone, 'Triangulation of History Using Textual Data', Isis: A Journal of the History of Science Society 110 (2019), 522-537 (523).

24 Ruud Koopmans and Paul Statham (eds), *The Making of a European Public Sphere: Media Discourse and Political Contention* (Cambridge University Press 2010).

25 Luuk van Middelaar, *The Passage to Europe: How a Continent Became a Union* (Yale University Press 2013), 131.

26 Andre W.M. Gerrits, 'Time, Fortuna and Policy – or How to Understand European Integration?', BMGN -Low Countries Historical Review 125 (2010), 67-73 (72).

27 Joseph H.H. Weiler, 'Journey to an Unknown Destination: A Retrospective and Prospective of the European Court of Justice in the Arena of Political Integration', JCMS 31 (1993), 417-446 (431).

Constitution'.[28] Furthermore, the relation between the national state and the EU was debated with 'renewed vigour' in this time period.[29] The 2004 presentation of a draft European constitution, its rejection in 2005, the troubled ratification of the Lisbon Treaty in 2007 and various judgments by constitutional courts made sure that this discussion remained alive. Secondly, and building on above transformations, this period allows us to see to what extent fundamental constitutional moments affected, or did not, the use of the *Solange* judgment in Italy and France.

In this study, 2012 has been established as the terminus ad quem. The decision to exclude more recent years stems from a wish to concentrate on a period characterised by treaty revisions. This focus on treaty revisions also justifies why the study does not commence in 1984, which saw the birth of the Italian *Granital* judgment.[30] Why, then, not simply focus on the period from 1992 to 2007? Extending the time period under study from 1989 to 2012 is crucial for achieving a comprehensive overview of the scholarly debate on conditional primacy in EU constitutionalism during these years. By including approximately 2.5 years before the signing of the Maastricht Treaty in 1992 and 2.5 years after the Lisbon judgment in 2009, we ensure that we capture the discussions that intensified due to these constitutional events, both before and after they occurred.

## III. Towards a Typology of Scholarly Uses of Foreign Law

To understand what non-German scholars possibly do *by* invoking the *Solange*-jurisprudence, this section presents a modest typology. Without downplaying situations in which the *Solange* decision opened the eyes of legal scholars to new possibilities without making reference to their source of inspiration,[31] the following focuses on the whys and wherefores of the explicit use of the *Solange* judgment in non-German doctrinal scholarship.

No typology of the scholarly use of foreign law exists, although a number of typologies have been created that focus on how and why judges invoke

28 Raoul C. van Caenegem, *An Historical Introduction to Western Constitutional Law* (Cambridge University Press 2020), 295.

29 Bruno de Witte, 'Sovereignty and European Integration: The Weight of Legal Tradition', Maastricht J. Eur. & Comp. L. 2 (1995), 145-173 (161).

30 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.

31 Esin Örücü, The Enigma of Comparative Law Variations on a Theme for the Twenty-First Century (Springer 2004), 38.

foreign law.[32] Scholarship also engages with the use of foreign perspectives in legislative drafting.[33] Taking into account the specific nature of legal scholarship, this section aims, through the prism of the *Solange* case, to set the stage for studying scholarly uses of foreign law by introducing the building blocks of a typology of scholarly references to foreign law.[34] Such a new typology is necessary because legislators and judges have less methodological freedom than legal scholars.[35] Indeed, while legislation, judicial decisions and doctrine from one specific jurisdiction mostly function as the legal scholars' core 'data', references to foreign law are also part of the legal scholar's tools of the trade, next to textual, systematic and teleological and historical methods.[36]

This typology does not aim to elaborate on all possible uses of scholarly use of *foreign law.* Rather, it outlines two normative forms that become visible in this study of scholarly use of the Solange judgment in Italy and France. Both categories of normative Solange invocations function as a way to validate certain claims by emphasising similarities or differences, subdivided into either supporting or criticising the domestic legal order.[37] These types could share also a rhetorical purpose to add glamour to a claim.[38]

The first form of 'normative' usage of *Solange,* entails cases in which the *Solange* judgment is invoked to show that domestic doctrine is in line with foreign standards.[39] The second form harbours cases in which the *Solange*

32 Michal Bobek, *Comparative Reasoning in European Supreme Courts* (Oxford University Press 2013), 19-34; Ganesh Sitaraman, 'The Use and Abuse of Foreign Law in Constitutional Interpretation', Harv. J. L. & Pub. Pol'y 32 (2009), 653-693 (693); Mads Andenas and Duncan Fairgrieve, *Courts and Comparative Law* (Oxford University Press 2015), 25-51 (43-45).

33 Nicola Lupo and Lucia Scaffardi, Comparative Law in Legislative Drafting: The Increasing Importance of Dialogue amongst Parliaments (Eleven 2014).

34 Alexander L. George 'Integrating Comparative and Within-Case Analysis: Typological Theory' in: Alexander L. George and Andrew Bennett (eds), *Case Studies and Theory Development in the Social Sciences* (MIT Press 2005), 232-262 (234).

35 See Jan B. M. Vranken, *Exploring the Jurist's Frame of Mind* (Kluwer Law International 2006).

36 *Peter Häberle, Rechtsvergleichung im Kraftfeld des Verfassungsstaates: Methoden und Inhalte, Kleinstaaten und Entwicklungsländer (Duncker & Humblot 1992);* Fulco Lanchester, 'Il Metodo nel Diritto Costituzionale Comparato: Luigi Rossi e i suoi Successori', Riv. Trimestr. Dir. Pubbl. 4 (1993), 959-997 (970); Jan M. Smits, 'What is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research' in: Rob van Gestel, Hans W. Micklitz, Edward L. Rubin (eds), Rethinking Legal Scholarship: A Transatlantic Dialogue (Cambridge University Press 2017), 207-228.

37 Örücü (n. 31), 19.

38 John Bell, 'The Argumentative Status of Foreign Legal Arguments', Utrecht Law Review 8 (2012), 8-19 (11).

39 Thomas Kadner Graziano, 'Is it legitimate and Beneficial for Judges to Compare?' in: Duncan Fairgrieve and Mads Andenas, *Courts and Comparative Law* (Oxford University Press 2015), 25-53.

judgment is used to outline a possible future. In both forms, a reference to *Solange* sometimes functions as an appeal to authority.[40] Such appeals to authority could sometimes be less about the contents of the *Solange* judgment, but more about its institutional birth place. Sometimes certain foreign courts or legal systems have some (scholarly) force independent of the content of its particular decisions or laws.[41] This means so much as that arguments such as 'because court X also said so' have weight because court X is a source with a high authority.[42]

This probably applies to the German Constitutional Court. In the Europe-wide debate on the relationship between the EU legal order and the legal orders of its Member States, the German Constitutional Court is widely regarded as having 'a role model or, at least, an orientation function'.[43] Applied to the scholarly use of *Solange*, the argumentation works as follows: constitutional review of EU legislation is acceptable because Karlsruhe is doing it already. In addition, appeals to authority can function as a 'substantive reason': claim X is right because of [main argument] and the German Constitutional Court shares this line of thinking.[44]

Above presented normative use aligns with what Lang describes in this special issue as the constitutional narrative of 'Solange I as a virtuous path'.[45] All of this could also work the other way around: the invocation of *Solange* – the original sin of resistance to EU law primacy – as a counter-narrative, an example of what not to do. Such a '*contrario argument*', a way to distinguish a claim from the German example, builds on a 'bad' foreign legal example.[46] In addition, as a legal blue print,[47] references to the *Solange* judgment could

40 Oran Doyle, 'Constitutional Cases, Foreign Law and Theoretical Authority', Global Constitutionalism 5 (2016), 85-108 (91).

41 Matthias Jestaedt, 'Zitat und Autorität' in: Steffen Detterbeck, Jochen Rozek and Christian von Koelln (eds), *Recht als Medium der Staatlichkeit: Festschrift für Herbert Bethge zum 70. Geburtstag* (Duncker & Humblot 2009), 513-533.

42 Jeremy Waldron, Partly Laws Common to All Mankind: Foreign Law in American Courts (Yale University Press 2012), 21.

43 Franz C. Mayer, 'Wer soll Hüter der europäischen Verfassung sein?', AöR 2 (2004), 411-435 (422).

44 Robert S. Summers, 'Two Types of Substantive Reasons: The Core of a Theory of Common-Law Justification', Cornell Law Review 63 (1978), 707-788.

45 See in this special issue Andrej Lang, '*Solange I* in the Mirror of Time and the Divergent Paths of Judicial Federalism and Constitutional Pluralism', HJIL 85 (2025), 411-449.

46 Tania Groppi and Marie-Claire Ponthoreau, 'Conclusion. The Use of Foreign Precedents by Constitutional Judges: A Limited Practice, an Uncertain Future' in: Tania Groppi and Marie-Claire Ponthoreau (eds), *The Use of Foreign Precedents by Constitutional Judges* (Hart Publishing 2013), 411-431 (424).

47 See in this special issue on Solange I as a blue print of constructive constitutional conflict Ana Bobić, 'Constitutional Courts in the Face of the EU's Reconfiguration', HJIL 85 (2025), 523-545.

be seen as camouflaged theory. Because of the strong doctrinal component in continental European legal scholarship, hiding behind the veil of a foreign judgment is a way to operate within the rules of the doctrinal game.[48]

## IV. *Solange* all'italiana

This section presents how the engagement with *Solange* played out in practice in Italian constitutional law scholarship. Notwithstanding phrases such as '*del famoso adagio So lange* [*sic*]'[49] or scholars stating that 'Karlsruhe's intransigence' in its *Solange* rulings encouraged the protection of fundamental rights in EU law,[50] *Solange* (in Italian written as: '*fintantoché*'[51]) was merely invoked to show that Italian doctrine was in line with European standards.[52]

### 1. European Standards

There is a quite simple explanation for this use of *Solange* among Italian scholars. Although the *Corte Constituzionale (Corte)* did not use 'so long as' reservations, it did something more consequential. In 1973, just a year before the *Solange I*-decision, the *Corte* paved the way for Karlsruhe in its *Frontini* ruling. In this judgment, the *Corte* reserved the right to review the compatibility of the EU Treaty and – since its *Fragd* judgment (1989) – EU legislation against 'the fundamental principles of our constitutional order or the inalienable human rights'.[53] In doing so, and unlike Karlsruhe in its *Solange II*-judgment, the *Corte* did not accept a (possible) existence of a 'suspension'

48 Armin von Bogdandy, 'The Past and Promise of Doctrinal Constructivism: A Strategy for Responding to the Challenges Facing Constitutional Scholarship in Europe', I.CON 7 (2009), 364-400 (399); Smits, 'What is Legal Doctrine?' (n. 36), 207-228.

49 Filippo Fontanelli and Giuseppe Martinico, 'Alla ricerca della coerenza: le tecniche del "dialogo nascosto" fra i giudici nell'ordinamento costituzionale multi-livello', Riv. Trimestr. Dir. Pubbl. 2 (2008), 351-387 (374).

50 Pietro Faraguna, 'Da Lisbona alla Grecia, passando per Karlsruhe', Quaderni Costituzionali 4 (2011), 935-938.

51 Daria de Pretis, 'La tutela giurisdizionale amministrativa europea e i principi del processo, Riv. Trimestr. Dir. Pubbl. 3 (2002), 683-738.

52 Fulco Lanchester, 'I costituzionalisti italiani tra Stato nazionale e Unione europea', Riv. Trimestr. Dir. Pubbl. 4 (2001), 1079-1104 (1097); Ilaria Carlotto, 'Il riparto delle competenze tra stati membri ed Unione Europea alla luce della giurisprudenza della Corte di Giustizia', Riv. Trimestr. Dir. Pubbl. 57 (2007), 107-133 (119, 120).

53 Corte costituzionale, *SpA Fragd v. Amministrazione delle finanze dello Stato*, decision no. 232/89 of 21 April 1989; Corte costituzionale, *Frontini v. Amministrazione delle finanze dello Stato*, decision no. 183/73 of 27 December 1973.

of its review capacity in the 1990s and 2000s. In other words: its review capacity was never put on hold.[54]

But there was more. The German Constitutional Court also stressed in all its decisions that fundamental rights could be guaranteed by the European Court of Justice (ECJ). In contrast, the *Corte* focused only on the national fundamental right protection, offered by the Italian Constitution, and highlighted the importance of 'the fundamental principles of our constitutional order'.[55] In short: the German *Solange* judgments and the Italian decisions differed in nature and possible consequences. The German *Solange* story focuses on the protection of fundamental rights – defending the German constitution was only a means to this end. The Italian version, in contrast, did not accept an alternative in the form of an effective EU fundamental rights regime. It was and is specifically about defending the fundamental principles of the Italian constitution.

Yet, these doctrinal differences in keeping up a defence line against EU law did not mean that the German example was not invoked. In Italian public law scholarship, for instance, the decisions coming from Rome concerning the relationship between the EU legal order and the Italian legal order were grouped together with mainly German rulings, including the *Solange* judgment. The Italian judgments were framed as part of 'the ancient Italian and German decisions',[56] the 'significant decisions by the German Federal Constitutional Court and our own Constitutional Court'[57] and as the general '*cammino comunitario*' (European path) of European constitutional courts.[58]

The message that these 'groupings' provided for was the claim that the Italian reservations towards the primacy of EU law were also happening elsewhere, in particular in Germany. Sometimes the difference between the Italian and German judgments was acknowledged, but the Italian and German rulings were still grouped together. One example:

54 See in this special issue for the potential consequences of this approach through the prism of the Portuguese example Anuscheh Farahat and Teresa Violante, 'Promoting European Constitutionalism? The Ambivalent Role of National Constitutional Courts from *Solange I* to *Solange IV*', HJIL 85 (2025), 569-597.

55 Corte costituzionale, *SpA Fragd* (n. 53); Corte costituzionale, *Frontini* (n. 53).

56 Fausto Vecchio, 'La decisione SK 45/09 del giudice costituzionale polacco: ritorno a Solange II o nuova ridefinizione degli equilibri tra gli ordinamenti?', Quaderni costituzionali 2 (2012), 441-443 (433).

57 Fausto Cuocolo, 'L'Europa del mercato e l'Europa dei diritti', Giurisprudenza costituzionale 1 (2000), 587-610 (596).

58 Luisa Azzena, 'Corte costituzionale e corte di giustizia CEE a confronto sul tema dell'efficacia temporale delle sentenze', Riv. Trimestr. Dir. Pubbl. 3 (1992), 687-724 (722).

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'In Germany, after the introduction of the direct election of the European Parliament and the affirmation of the protection of fundamental rights at Community level, Solange I became Solange II. In our country, after decision 170/84 [*Granital*], the Constitutional Court lost control of the relationship between Community law and domestic law.'[59]

## 2. *Controlimiti* and *Solange* as Pan-European Concepts

Yet, the invocation of *Solange* was not just a matter of grouping Italian constitutional decisions with the German ones. Sometimes the *Solange* judgment was used to 'Europeanise' the Italian *controlimiti* concept, the idea that the '*fundamental principles of the [Italian] constitutional order* and inalienable human rights' serve as 'counterlimits' to EU and international law.[60] At first sight, the application of the *controlimiti* concept to the *Solange* decision does not seem well chosen. Originally, the concept referred to the limits of Italian sovereignty as listed in Article 11 of the Italian Constitution. As such, the application of the *controlimiti* device to foreign systems without such an article is, to put it mildly, out of context. But Italian public law scholars did so and applied the *controlimiti* concept to the *Solange* judgment and changed the meaning of the *controlimiti* concept with it.[61]

In the 1990s and 2000s, the *controlimiti* concept was mainly seen as an instrument to constitutionalise *national* fundamental rights.[62] It was regarded as 'the pivot point, the hinge of the relationship between the EU and member states'.[63] According to Italian scholars, it functioned as a '*pistola sul tavolo*',[64] an incentive for both the *Corte* and the ECJ to maintain some kind of

59 Federico Sorrentino, 'La Costituzione Italiana di fronte al processo di integrazione Europea', Quaderni costituzionali 1 (1993), 71-112.

60 See for a more elaborate study on this concept: Marta Cartabia, *Principi inviolabili ed integrazione europea* (Giuffré 1995).

61 Francesco Palermo, 'La sentenza del Bundesverfassungsgericht sul mandato di arresto europeo', Quaderni costituzionali (2005), 897-904 (901); Daniele Piccione, 'L'inemendabilità della legge di autorizzazione alla ratifica della Costituzione europea e il falso mito del "principio di non regressione"', Giurisprudenza costituzionale 50 (2005), 2255-2282 (2266); Francesco Palermo, 'Il Bundesverfassungsgericht e la teoria "selettiva" dei controlimiti', Quaderni Costituzionali 1 (2005), 181-188.

62 Chiara di Seri, 'Controlimiti o contro la pregiudiziale comunitaria?', Giurisprudenza costituzionale 50 (2005), 3408-3419 (3412); Giovanna Montella, 'Il convegno dell'associazione Italiana costituzionalisti', Riv. Trimestr. Dir. Pubbl. 4 (1993), 1151-1155 (1154).

63 Silvio Gambino, 'Identità costituzionali nazionali e primauté eurounitaria', Quaderni costituzionali 3 (2012), 533-562 (536).

64 Giuseppe Martinico, L'integrazione silente, La funzione interpretativa della Corte di Giustizia e il diritto costituzionale europeo (Jovene 2009), 198.

dialogue. Yet, it had also another kind of role to play: the *controlimiti* concept functioned as a tool to translate foreign constitutional judgments in the (conceptual) world of Italian public law. The example hereunder, for instance, shows how, through the prism of the *controlimiti* concept, the Italian 1973 *Frontini* judgment was placed on the same footing as the German *Solange* ruling:

> 'As we all know, the counter-limits doctrine was actually invented by the Bundesverfassungsgericht in the famous Solange I judgment and by the Italian Constitutional Court in judgment No 183/1973 [*Frontini*].'[65]

In this example, the *controlimiti* concept is disconnected from Article 11 of the Italian Constitution. At the same time, the idea of the existence of *controlimiti* is framed as a broadly accepted firewall against incoming European law that conflicts with certain fundamental domestic legal principles. This way of applying the *controlimiti* notion is not without consequences: it disconnects the *Solange* judgment from its role as defender of fundamental rights. In the following example, a comparable frame is visible. Here, the *controlimiti* concept is portrayed as a defence of state sovereignty to explain the 1986 *Solange II*-judgment:

> 'If the decisions coming from European constitutional courts on the subject of counter-limits were intended as a defence of the historic sovereignty of the states, facilitated through the defence of a constitutional review competence, the Karlsruhe judge duly acknowledged in Solange 2 that at least in principle that defence no longer had any reason to exist.'[66]

Similarly, as visible in another example, the Italian-German tandem was used to explain the origins of the concept and point out to a German-Italian constitutional path:

> 'Once again the doctrine of the controlimiti comes to mind – a doctrine developed by the Italian and German courts, at least until the Solange II judgment and followed by other constitutional courts, which deny the primacy of EU primary law with regard to the principles and fundamental rights enshrined in national constitutions'.[67]

In this example from 2012 it is remarkable that the *controlimiti*-concept is connected to the *Solange* decision and not to the German *Lisbon* judgment of

65 Sergio Bartole, 'Costituzione e costituzionalismo nella prospettiva sovranazionale', Quaderni costituzionali 1 (2009), 569-590 (581).

66 Montella (n. 62), 1153.

67 Gambino (n. 63).

2009, in particular its invention of an 'identity review', a device much more similar to the Italian *controlimiti doctrine*.[68]

## V. *Solange* à la Française

How, then, did French public law scholars invoke the *Solange* decision? Compared to the Italian case, it was not a stable story. Rather, the application of the *Solange* judgment changed substantially after the invention of a capacity to review EU legislation by the *Conseil constitutionnel*, the French Constitutional Court sui generis. Before presenting some examples of this new outlook of the scholarly use of *Solange* in French public law scholarship, let us first turn to the period between 1989 and the summer of 2004. In these years the *Conseil* did not regard itself capable to review EU legislation on its conformity with the French Constitution.

An insightful example of a pre-2004 variant of a *Solange* invocation can be found in the first issue of the *Cahiers du Conseil constitutionnel,* published in 1996. In one article, Jacques Robert, at the time member of the *Conseil* (1989-1998) and a professor at Paris 2 Panthéon-Assas University, claimed that the *Conseil* should introduce the competence to carry out some form of constitutional review of EU legislation. He underpinned this claim by referring to German and Italian constitutional court rulings. The first function of Robert's use of the German and Italian example was to explicitly highlight the introduction of a constitutional review competence of the *Conseil* as a way to defend the French Constitution. 'There are two advantages of such a system', we are told,

> 'Firstly, to anticipate the occurrence of a conflict in which Community law would, instead of enriching the constitution, impose the removal of provisions (for example, those on secularism).
>
> Secondly, to align with the decisions by foreign courts, in particular the Italian and German ones.'

In support of this claim, Robert explained the German and Italian position:

> 'The Constitutional Court in Karlsruhe has always declared itself competent to review secondary Community legislation on its conformity with German fundamental rights […] In 1986, however, the Court acknowledged the existence of such protection [on a European level], and no longer exercises its review capacity […]

68 Jo Eric Khushal Murkens, 'Identity Trumps Integration. The Lisbon Treaty in the German Federal Constitutional Court', Der Staat 48 (2009), 517-534 (517).

> although it is still theoretically possible! Just as the German Court, the Italian Court acknowledges the satisfactory nature of the protection of fundamental rights provided by the Community legal order, but it reserves the option to review the compliance of Community law with the fundamental principles of the Italian constitutional order and the inviolable rights of man.'[69]

What is striking in this recourse to *Solange I* and *II* is the way in which German and Italian perspectives are linked. By using the phrase 'Just as the German court', Robert highlighted common ground between these European constitutional courts and suggested that we can agree on an uncontested idea. By pointing out such European common-ground through the invocation of *Solange*, Robert made the German decision part of a European story. Secondly, in his comparative analysis Robert did not fail to notice that both the German and Italian Constitutional Courts accept the protection of fundamental rights ensured by the ECJ. Thus, in this case, the specific use of *Solange II* and the Italian example also supports the claim that the competence to carry out constitutional review of EU legislation does not endanger the European project.

Another example of such scholarly use of the *Solange II*-decision can be found in an article with the provocative subtitle: '*la possibilité d'une jurisprudence Solange II*'. In this article, the point was made that the *Conseil* should 'join the jurisprudence of the *Bundesverfassungsgericht*. A '*Tant que'* reservation could 'avoid, possibly, a revision of the *Constitution* that would have harmful consequences for the development of the Community'.[70]

## 1. The 2004 Judicial Revolution

Above presented doctrinal world suddenly came to an end on 10 June 2004, with the *Conseil's* decision on an appeal against a French law implementing an EU directive.[71] This judgment was a 'jurisprudential revolution' as it acknowledged the capacity to review national laws implementing Euro-

69 Jacques Robert, 'Le Conseil constitutionnel en Europe', Les Cahiers du Conseil constitutionnel 1 (1996), 25-32.

70 Thomas Meindl, 'Le contrôle de constitutionnalité des actes de droit communautaire dérivé en France. La possibilité d'une jurisprudence Solange II', R. D. P. 113 (1997), 1665-1692 (1691).

71 Jan-Herman Reestman, 'Conseil Constitutionnel on the Status of (Secondary) Community Law in the French Internal Order. Decision of 10 June 2004', Eu Const. L. Rev. 1 (2005), 302-317 (317); Conseil constitutionnel, *Loi pour la confiance dans l'économie numérique*, decision no. 2004-496 DC of 10 June 2004.

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pean legislation on 'explicit constitutional provisions'.[72] The scope of a review capacity based on 'explicit contrary constitutional provisions' became more clear during the summer and autumn of 2004. In July, again faced with French legislation implementing a directive, the *Conseil* explained this phrase as the competence to strike down directives, violating constitutional principles protected in the French legal order but not in the union's legal order. To put it shortly: if a certain French constitutional principle is unknown in the European legal order, it is up to the *Conseil* to provide protection.[73]

But the year 2004 even knew a third 'EU decision'. Now, the *Treaty establishing a Constitution for Europe*, signed in Rome on 29 October 2004, triggered a ruling. The then-president Jacques Chirac asked the *Conseil* whether the ratification of this Treaty was to be preceded by a revision of the French Constitution. In preparing an answer to this constitutional question, members of the *Conseil* studied the German Constitutional Court's *Maastricht* decision.[74] In the *dossier documentaire*, a documentary record provided by the *Conseils* documentation service to the members of the *Conseil*, one of the articles focused on this (in)famous judgment.[75] Although we do not know the exact role of this document, the *Conseil* ruled, in its decision of 19 November 2004,[76] that the supremacy clause in the *Treaty establishing a Constitution for Europe* has no effect on the Constitution's place at the top of the internal legal order.[77]

Some scholars argue that in through ruling the *Conseil* extended its review capacity to EU regulations, by pointing out that the *Conseil* referred to the decisions of June 10 and subsequent as containing 'Secondary Union law'.[78] The explanation of Pierre Mazeaud, president of the *Conseil*, corroborates this view. In January 2005, during a speech at the Élysée Palace, Mazeaud stated that 'notwithstanding the reach of the primacy and direct effect of

72 Reestman (n. 71), 305.

73 Conseil constitutionnel, *The Bioethics Act*, decision no. 2004-498 DC of 29 July 2004, paras 4-7; Comment, Les Cahiers du Conseil constitutionnel 17 (2005), 28-29.

74 Joseph H. H. Weiler, Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision', ELJ 1 (1995), 219-258.

75 Hugo J. Hahn, 'Décision de la Cour constitutionnelle fédérale d'Allemagne, 12 octobre 1993, "Maastricht"', R. G. D. I.P. 1 (1994), 107-126, in Services du Conseil constitutionnel, Dossier documentaire, on Decision n. 2004-505 DC of 19 November 2004.

76 Conseil constitutionnel, *The Treaty establishing a Constitution for Europe*, decision no. 2004-505 DC of 19 November 2004.

77 See i. a. Guy Carcassonne, 'France Conseil Constitutionnel on the European Constitutional Treaty. Decision of 19 November 2004, 2004-505 DC', Eu Const. L. Rev. 1 (2005), 293-301.

78 Jérôme Roux, 'Le Conseil constitutionnel, le droit communautaire dérivé et la Constitution', R. D. P. 120 (2004), 912-933 (916); Conseil constitutionnel, *The Treaty establishing a Constitution for Europe* (n. 76), para. 13.

European law, it cannot call into question what is expressly embedded in our constitutional texts and what is peculiar to us. I am referring here to everything that is inherent to our constitutional identity'.[79]

Above portrayed speech fragment of Mazeaud was probably the first time that the notion of constitutional identity was used publicly. Two years later, the *Conseil* officially used the concept in a judgment.[80] In this decision, the *Conseil* traded the 'express contrary provision of the Constitution' for a 'principle inherent to the constitutional identity of France'.[81] This meant that the implementation of an EU directive cannot run counter to a constitutional provision or principle, which is part of French constitutional identity. Speaking at the plenary session of the Venice Commission, president Mazeaud stressed that such a review capacity meant European alignment: 'This reservation of fundamental constitutional principles is in line with the approach taken in the Solange ('tant que') decisions by the German Constitutional Court and the Fragd judgment of the Italian Constitutional Court'.[82] Former member of the *Conseil* Georges Abadie confirmed this reading.[83]

Yet, the concept had more to offer than the protection of fundamental rights as guarded through the *Solange* clause. As such, it could be seen as, on the one hand, following the German *Solange* doctrine, and on the other hand, quickly unfollowing the German example. Indeed, some commentators, including Mazeaud, understood the 'constitutional identity' notion as encompassing the provisions and principles '*essentiel à la République*', a broader category than fundamental rights. An example of such a provision is formed by Article 89 of the *Constitution*: 'the Republican form of government shall not be the object of any amendment'.[84]

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79 Pierre Mazeaud, 'Voeux du président du Conseil constitutionnel, M. Pierre Mazeaud, au président de la République', 3 Januar 2006, Cahiers du Conseil Constitutionnel 20 (2006).

80 Conseil constitutionnel, *Copyright and related rights in the information Society*, decision n. 2006-540 DC of 27 July 2006.

81 Hubert Alcaraz, Chloé Charpy, Sophie Lamouroux and Loïc Philip, 'Jurisprudence du Conseil constitutionnel. 1er juillet-31 août 2006', Rev. Fr. Dr. Const. 69 (2007), 79-122; Phillippe Blachèr and Guillaume Protière, 'Le Conseil constitutionnel, gardien de la Constitution face aux directives communautaires', Rev. Fr. Dr. Const. 69 (2007), 123-144 (123, 132, 135); Bertrand Mathieu, 'Les rapports normatifs entre le droit communautaire et le droit national. Bilan et incertitudes relatifs aux évolutions récentes de la jurisprudence des juges constitutionnel et administratif français', Rev. Fr. Dr. Const. 72 (2007), 675-693 (675).

82 Pierre Mazeaud, 'L'évolution de la jurisprudence du Conseil constitutionnel sur les lois de transposition des directives', Cahiers du Conseil Constitutionnel 20 (2006).

83 Georges Abadie, 'Satisfaction, non sans questions …', Cahiers du Conseil constitutionnel 25 (2009).

84 Édouard Dubout, 'Les règles ou principes inhérents à l'identité constitutionnelle de la France: une supra-constitutionnalité?', Rev. Fr. Dr. Const. 83 (2010), 451-482 (455).

Mazeaud, however, was not a neutral president. In 1993, this prominent Gaullist, the then vice-président of the *Assemblée nationale*[85], presented a proposal introducing an *a posteriori* constitutional review in France, including secondary EU legislation.[86] But this was only the beginning. In 1996, Mazeaud contributed again to the debate with an article in *Le Monde*[87] and a publication in the *Revue française de droit constitutionnel*. His message? The growth of EU legislation could 'from the viewpoint of domestic law, best be described as cancerous'.[88] Eight years down the line, and appointed as president of the *Conseil*, Mazeaud was given the opportunity to see his ideas put into practice. At the same time, Mazeaud could rely on existing – German – ideas about the primacy of EU law within the *Conseil* because one of his predecessors, Roland Dumas, had already visited the German Constitutional Court for some inspiration. During this visit, the German *Solange* decision was taken home to Paris. In the words of George Abadie:

> 'I wanted the vagueness to be removed, maybe inspired by the German position about which President Roland Dumas and I spoke with the Karlsruher Constitutional Court in 1998 and which could be explained as follows: European law applies as long as, the title of its 1974 decision, it does not conflict with the fundamental rights and principles expressed in Articles 1 to 20 of the German Constitution.'[89]

## 2. Invoking *Solange* to Highlight Similarity

The above presented 'summer' and 'autumn' judgments by the *Conseil* formed a watershed moment and gave the scholarly use of *Solange* a new cast. Why? From then on, the preferred future was already there, with the argumentative function of the scholarly use of *Solange* changing from a prescriptive to a descriptive tool so as to get a grip on the new constitutional situation. More to the point: scholarly recourse to *Solange* to argue that constitutional review of EU legislation exists successfully elsewhere became less popular after the summer decisions of 2004. Rather, the scholarly invocation of *Solange* to highlight a certain similarity became visible. The French

85 John Bell, 'French Constitutional Council and European Law', ICLQ 54 (2005), 735-743 (737).
86 Meindl (n. 70), 1677.
87 Pierre Mazeaud, 'L'Europe et notre Constitution', Le Monde, 20 January 1996, 13.
88 Pierre Mazeaud, 'L'Europe et notre Constitution', Rev. Fr. Dr. Const. 28 (1996), 702.
89 Abadie (n. 83).

case, as such, tells us something of how changes in the constitutional present prompt scholars to look at *Solange* in new ways.

The judicial introduction of the capacity to review EU legislation raised the possibility of highlighting similarities by invoking the *Solange* judgment. Two 'geographical' sub-types of scholarly use of *Solange* can be distinguished in this respect: 1) national, i. e. references to German law, and 2) a European school of thought, i. e. references to German and Italian law.

A prime example of this 'reshaped' scholarly use of *Solange* can be found in a special issue of the *Cahiers* dedicated to the *Constitution et Europe* and published just after the *Conseil* judgments of 2004. In this example, the *Solange* judgment was invoked not in order to outline a possible future, but instead with the aim of positioning the reasoning of the *Conseil* in the framework of the German Constitutional Court. After coming out in favour of the November ruling issued by the *Conseil*, it was stressed that 'the analysis of the *Conseil constitutionnel* can thus only be interpreted as 'une décision so lange à la française [*sic*]'.[90]

In portraying the French judgment as a '*Solange à la française*', the *Conseil* was placed firmly in a tradition of resisting the European Court of Justice, dating back to Karlsruhe 1974.[91] Other scholars took a middle position and explicitly referred to a German-Italian school of thought ('*les juridictions allemande et italienne*'),[92] or a '*communauté d'esprit*'[93]. In another article the claim was made that the *Conseil* could build on the *Solange I*-decision:

> 'The Conseil can usefully rely on the related case law of the constitutional courts of neighbouring countries, which also seeks to introduce a limit on the transposition of secondary legislation […] This reservation of constitutionality is based on the same technique as that used by the Karlsruhe Court concerning fundamental rights. In fact, the reasoning was established by the latter with the "So lange I" decision of 29 May 1974.'[94]

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90 Anne Levade, 'Constitution et Europe ou le juge constitutionnel au cœur des rapports de système', Cahiers du Conseil constitutionnel 18 (2005).

91 See also: Anne Levade, 'Le conseil constitutionnel aux prises avec le droit dérivé et la constitution', R. D. P. 120 (2004), 889-912 (910-911).

92 Paloma Requejo Rodriguez, 'Conseil constitutionnel français et Tribunal constitutionnel espagnol, si éloignés, si proches', Rev. Fr. Dr. Const. 83 (2010), 639-672 (646).

93 Sébastien Martin, 'L'identité de l'État dans l'Union européenne: entre "identité nationale" et "identité constitutionnelle"', Rev. Fr. Dr. Const. 91 (2012) 13-44 (13-44); Armel Le Divellec, Anne Levade and Carlos Miguel Pimentel, 'Le contrôle de constitutionnalité des lois constitutionnelles – Avant-propos', Cahiers du Conseil constitutionnel 27 (2010), 4-8; Anne Levade, 'Contrôle de constitutionnalité des lois constitutionnelles et droit européen – l'intuition d'une piste à explorer', Cahiers du Conseil constitutionnel 27 (2010), 48-51.

94 Jean Pierre Camby, 'Le Conseil constitutionnel, l'Europe, son droit et ses juges', R. D. P. 124 (2009), 1216-1244 (1216).

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Yet, in these years, the *Solange* judgment sometimes was also used to illustrate a contrast. An example in which it was applauded that the review capacity of the *Conseil* was disconnected from the *Solange* path and its protection of human rights reads as follows:

> 'Concerning the method of French constitutional review, the Conseil constitutionnel does not seem inclined to transpose mutatis mutandis the German constitutional decisions subordinating the applicability of Community norms in national law to the existence of a Community protection of fundamental rights which is "effective" and "in essence comparable" to the constitutional guarantee in force.'[95]

After the 2006 decision by the *Conseil* and the invention of a French 'constitutional identity', this latter type of scholarly use of *Solange* became visible again.[96] The claim, for instance, was made that, by not focusing solely on the protection of fundamental rights, the *Conseil* went further than the German *Bundesverfassungsgericht*:

> 'The constitutional court does not seem to be willing to focus its control exclusively on the defence of fundamental rights, as the German Federal Constitutional Court does […]. This does not mean that it refuses, in accordance with the logic underlying Karlsruhe's So Lange case law [sic], to verify that the protection provided by the Court of Luxembourg provides guarantees equivalent to those arising from its own supervision.'[97]

## VI. Concluding Remarks

Drawing on references to the *Solange*-jurisprudence in Italian and French public law scholarship published between 1989 and 2012 this article aimed to shed light on the local scholarly engagement with a German judgment that appears to be part of a European constitutional republic of letters. There are three conclusions that may be drawn from this exercise in 'comparative comparative law'.

First, while this investigation pertains to the meta-level of *Solange*-studies, the analysis holds broader implications and advances the research agenda on the migration of constitutional ideas. Specifically, it shows how the development of French and Italian domestic doctrine is accompanied, justified, criticized and, sometimes, triggered by *Solange* invocations. These scholarly

95 Le Divellec, Levade and Pimentel (n. 93).
96 Roux (n. 78), 1184.
97 Blachèr and Protière (n. 81), 123-144.

references to a foreign judgment affirm that the transfer of legal ideas is not only about judges and legislators watching each other.

Secondly, references to *Solange* are not made in a vacuum. Local contexts and demands shape the way the judgment is understood and applied. Furthermore, the picture emerging from the exploration of Italian and French scholarly uses of the *Solange* judgment over almost a quarter of a century adds some factual evidence to the idea of Michael Stolleis. He argued that 'the conjunctures of comparative law are always phases of internal reorganisation and external orientation'.[98] This idea becomes clearly visible in the French case. While the *Solange* judgment was typically invoked to criticise the absence of constitutional review of EU legislation, the French *Conseil Constitutionnel* summer and autumn judgments of 2004 cast the use of *Solange* in a new light. From then on, instead of recourse being sought to *Solange* in order to outline a possible future, we see engagement with the German judgment as a means to show similarity and to favour the *Conseil's* judicial invention of a review capacity.

Such a 'local' understanding and use of *Solange* is also visible in Italy. Especially the application of the *controlimiti* concept to the *Solange* judgment suggests that Italian public law scholars were not seeking merely to copy the German *Solange* interpretation. Rather, the *Solange* judgment was remodelled to the needs of the Italian constitutional context. Indeed, the *Solange* judgment was typically used as a tool for substantiating claims about the necessity of constitutional limits with regard to the primacy of EU law – it was not about defending fundamental rights. To put it differently: Karlsruhe's *Solange* was not Italy's *Fintantoché,* but the German judgment could function as a way to show that the Italian path was in line with foreign standards.

This brings us to the third claim. The existence of 'local' understanding of *Solange* makes clear that it makes little sense to talk about a European *Solange* narrative as if it were a single entity. Rather, it is a European story, but one told in various versions. These local understandings are shaped by contextual constitutional circumstances and debates and connected to already existing domestic concepts such as the *controlimiti* or the notion of an 'express contrary provision of the [French] Constitution'.

These narratives, however, share a storyline. While the French and Italian invocations of *Solange* differed in form and contents, traces of the *Solange I* dissent, stating that the German Constitutional Court did not have the

98 Michael Stolleis, 'Nationalität und Internationalität: Rechtsvergleichung im öffentlichen Recht des 19. Jahrhunderts', in: Stefan Ruppert and Miloš Veç (eds), *Michael Stolleis. Ausgewählte Aufsätze und Beiträge* (Vittorio Klostermann 2011), 379-402.

power to review EU law for its compatibility with the fundamental rights provisions of the German Constitution, are notably absent.[99] Both Italian and French scholarship present the idea that the *Solange* judgment functions as a banner imbued with the message that it is possible to make reservations towards the primacy of EU law. From this perspective, it was not the example of the US Constitution and its Bill of Rights,[100] but the *Solange* decision that provided the glue that pasted together divergent European constitutional communities. With an eye towards this practical relevance as a frame of reference, the *Solange* judgment is evidently on the path to becoming canonised.[101] A return to the *Solange* strategy to address contemporary challenges posed by over-globalisation and anti-globalism will likely further cement its status.[102]

99 See in this special issue Franz C. Mayer, 'A Parallel Legal Universe – The *Solange I* Dissent and Its Legacy', HJIL 85 (2025), 451-477.

100 See in this special issue Matej Avbelj, '*Solange I* Between Constitutional Mimesis and Originality', HJIL 85 (2025), 503-522.

101 Michaela Hailbronner, 'Kanon, Verfassung, Steuerung – Ein Einwurf zur Bedeutung von Martin Drath', in: Nikolaus Marsch, Laura Münkler und Thomas Wischmeyer (eds), *Apokryphe Schriften: Rezeption und Vergessen in der Wissenschaft vom Öffentlichen Recht* (Mohr Siebeck 2019), 191-198 (192).

102 See in this special issue 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.

# *Solange I* Between Constitutional Mimesis and Originality

Matej Avbelj*
New University, Ljubljana, Slovenia
*matej.avbelj@nova-uni.si*



## Abstract

Seizing the opportunity of the 50th anniversary of the *Solange I* decision, this paper examines its legacy après demi-siècle, raising the following question: other than contributing to the development of fundamental rights protection in the EU, which has been thoroughly described and analysed elsewhere, what, if anything, has been an original theoretical and institutional contribution of this decision, perhaps even beyond the immediate environment of European Union (EU) law? In search of the answer, the paper consists of three parts. First, it engages with the arguments sceptical of the theoretical and institutional originality of Solange I and its aftermath. Finding these arguments less persuasive, the second part proceeds by outlining the rationale in favour of the originality thesis. The last part concludes by noting that while often misunderstood, even rejected from the conventional theoretical premises, the originality of the *Solange I* decision goes way beyond the similarities that it shares with the traditional federalist and monist, statist constitutional accounts.

* Professor of European Law, Jean Monnet Chair, New University, Ljubljana. The author would like to acknowledge the support of the following grants in preparation of this article: ARIS grants J5-60087 Reformed Constitutionalism for Fair and Sustainable Algorithmic Society (ConAlgo); J5-50171 Corporate accountability, human rights, and climate change: Towards coherent and just domestic and international legal order; P6-0380 Violations of human rights and fundamental freedoms on the Slovenian territory in the 20th century as well as the Jean Monnet Chair (JMC) on Pluralism in the European Union (PluralEU).

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## Keywords

*Solange I* – federalism – constitutional pluralism – EU law – human rights protection

## I. Introduction

On 29 May 1974, the German Federal Constitutional Court (GFCC) handed down its decision in the *Solange I*-Beschluss.[1] Wittingly or not, the case has made history in EU law, so much so that, without exaggeration, generations of students have learned by heart the famous '*as long as*' dictum, according to which:

> 'as long as the integration process has not progressed so far that Community law also receives a catalogue of fundamental rights decided on by a parliament and of settled validity, which is adequate in comparison with the catalogue of fundamental rights contained in the Basic Law, a reference by a court in the Federal Republic of Germany to the Federal Constitutional Court in judicial review proceedings, following the obtaining of a ruling of the European Court under Article 177 of the Treaty, is admissible and necessary if the German court regards the rule of Community law which is relevant to its decision as inapplicable in the interpretation given by the European Court, because and in so far as it conflicts with one of the fundamental rights in the Basic Law.'[2]

In short, after *Solange I*, the landscape of EU law has never been the same. Nevertheless, the merits of the ruling and its exact implications for the development of EU law were bitterly contested at the time of its adoption and, to a certain extent, remain so till the very present day. Not unlike the recent *PSPP* decision of the Federal Constitutional Court (FCC),[3] *Solange I* was also met with heavy criticism in Brussels; with a disapproval and political headache by the national executive branch as well as with an almost unanimous condemnation by EU-minded academics.[4] Similarly, as the history has

1 Federal Constitutional Court (FCC), Order of 29 May 1974, 2 BvL 52/71, BVerfGE 37, 271 (*Solange I*). The article acknowledges the very rich German theoretical discussion of the *Solange I* jurisprudence, which is, however, not analysed here in any great detail as the article is limited to the discussion of the international theoretical reactions to this case-law and its developments.

2 FCC, *Solange I* (n. 1), 271.

3 FCC, Jugdment of 5 May 2020, 2 BvR 859/15, BVerfGE 154, 17 (*PSPP*).

4 Compare the historical analysis of the reactions to the *Solange I* ruling and the *Weiss* decision as analysed by: Bill Davies, *Resisting the European Court of Justice* (Cambridge University Press 2012), 180-200; Mattias Wendel, 'Constructive Misunderstandings – How the PSPP Conflict Was Eventually Settled and How it Reflects Constitutional Pluralism?' in: Matej Avbelj (ed.), *The Future of EU Constitutionalism* (Hart 2023), 53-70.

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attested, the *problematique* raised by the FCC in the 1970s has been addressed, perhaps even resolved, through a combination of carefully calibrated judicial, legislative, political as well as diplomatic measures that have, especially the latter, not infrequently played out also behind the scenes.[5] All this sufficed to talk the FCC into the *Solange II* ruling.[6] As a result, since the adoption of the Treaty of Lisbon in 2009, whose constitutive part is also the Charter of Fundamental Rights,[7] the EU is indeed endowed with a comprehensive system of fundamental rights protection as required by the FCC in 1974.

Against this backdrop and seizing the opportunity of the 50th anniversary of the *Solange I* decision, this paper examines its legacy *après demi-siècle.* In so doing, the following question is raised: other than contributing to the development of fundamental rights protection in the EU, which has been thoroughly described and analysed elsewhere,[8] what, if anything, has been an original theoretical and institutional contribution of this decision, perhaps even beyond the immediate environment of EU law? In search of an answer, the paper is, in what follows, broken down into three parts. First, the paper engages with the arguments sceptical of the theoretical and institutional originality of *Solange I* and its aftermath. Finding these arguments less persuasive, the paper proceeds by outlining the rationale in favour of the originality thesis. The last part concludes.

## II. *Solange I* as Nothing New Under the Federal Sun

Looking back to the emergence of the *Solange I* decision and the ensuing developments both under national and EU law, the argument could be made that they fail to exhibit anything novel, anything that could not be subsumed under the well-known federal script.[9] Following this non-originality thesis, the tensions between the FCC and the European Court of Justice (ECJ), encapsulated in *Solange I*, are indistinguishable from the dynamics in any composite federal regime, in which the federal and federated level search for

5 Davies (n. 4); Wendel (n. 4).

6 FCC, Order of 22 October 1986, 2 BvR 197/83, BVerfGE 73, 339 (*Solange II*).

7 For the genesis of the Charter, see, for example Giacomo di Federico (ed.), *The EU Charter of Fundamental Rights: From Declaration to Binding Instrument* (Springer 2011).

8 For an overview, see, Lorenza Violini and Antonia Baraggia (eds), *The Fragmented Landscape of Fundamental Rights Protection in Europe* (Edward Elgar 2018).

9 Robert Schütze, 'Federalism as Constitutional Pluralism: Letter from America' in: Matej Avbelj and Jan Komarek (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart 2012), 185-212.

the appropriate federal equilibrium. What is more, according to this rationale, not just a similar, but in fact the same scenario could be observed almost 200 years earlier in the development of the American federalism.

There too, like the founding Treaty of the European Coal and Steel Community, the federal Constitution did not contain a catalogue protecting human rights and fundamental freedoms.[10] It was widely believed that as the scope of competences of the federal government was so limited it posed no threat to human rights; there was simply no need to protect these rights on the federal level.[11] Supplementing the just adopted United States (US) Constitution with human rights protection was thus perceived as 'an unnecessary political expedient, of little constitutional importance'.[12] In short, to amend the Constitution by including human rights protection would simply be a 'waste of time'.[13] To recall, a roughly similar rationale existed in the then European Communities, that were also due to their narrow economic remit considered to have nothing to do with human rights protection. Instead, human rights were to be a sphere reserved for the Member States and for the emerging Council of Europe, conceived of as a regional human rights organisation.[14]

Nevertheless, the fact that in the US human rights were not protected at the federal level, but did exist in many of the constitutions of the former colonies, now federated states, created a discrepancy, a gap in the federal constitutional order, triggering a federal disequilibrium, leading to tensions between the two levels of government. These tensions, one could argue, were tamed down by eventually amending the US Constitution and adding to it the first ten amendments containing, what is presently known as, the Bill of Rights.[15] Hence, like the FCC's *Solange I* concern regarding the lack of human rights protection on the supranational level led to the establishment of human rights protection in the EU by way of preserving the federal equilibrium in the Union, a similar demand of the representatives of federated states in the US Convention and the Congress contributed to the adoption of the Bill of Rights in the American federal system. On this account, the FCC strode an already well-trodden path. Its *Solange I* decision did not

10 Library of Congress, *Creating the United States: Demand for a Bill of Rights*, available at: <https://www.loc.gov>, last access 15 April 2025.

11 Library of Congress (n. 10).

12 Kenneth R. Bowling, '"A Tub to the Whale": The Founding Fathers and Adoption of the Federal Bill of Rights', Journal of the Early Republic 3 (1988), 223-251 (224).

13 Bowling (n. 12), 224.

14 See, Antonio Cassese, Andrew Clapham and Joseph Weiler (eds), *Human Rights and the European Community: Methods of Protection* (Nomos 1991).

15 Michael J. Douma, 'How the First Ten Amendments Became the Bill of Rights?', Georgetown Journal of Law & Public Policy 15 (2017), 593-614.

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amount to anything new, let alone original. It only mimicked what other constitutional actors in federal regimes, most notably in the US, have been doing for decades, namely struggling to find and maintain a fitting federalist balance around, *inter alia*, human rights protection.

However, it turns out that the just sketched comparison between the US and the EU federal experience regarding human rights protection is convincing only at the first glance. A closer study of the two jurisdictions reveals major differences between them. These are to be attributed, foremost, to the vast temporal gap, setting the Bill of Rights and the *Solange I* events almost 200 years apart. Consequently, the two human rights protection episodes took place in a completely different socio-political, economic and cultural setting. They evolved against an entirely diverging background rationale. They were based on fundamentally different underlying normative premises and deployed a deeply contrasting, even if nominally similar, federal object and purpose.

Beginning with the latter, it is clear that the trigger behind the FCC's *Solange I* ruling was a genuine dissatisfaction with the lack of so-called 'structural congruence'[16] between the German constitutional order and the then Community law. On the one hand there was this new post-World War II (WWII) German constitutional order, replete with human rights protection, considered 'as an objective scale of values',[17] which was portrayed as pervading the entire polity situated in a robust and functional parliamentary democracy.[18] On the other hand, the then European Communities lacked any directly elected parliamentary body and there was a complete absence of written standards of human rights protection. It was because of this yawning gap between EU law and national law, and with an ambition of closing it, that the FCC conditioned a full and unconditional primacy of EU law by requiring that the EU too develops its own system of human rights protection.

The *Solange I* ruling was thus an example of a constructive critique of EU law and the integration built on it.[19] It was an attempt of improving the

16 Davies (n. 4), 49. For an early discussion in German, see Hebert Kraus, *Der Kampf um den Wehrbeitrag*, Institut für Staatslehre und Politik e. V. Mainz 1953; Gerhard Konow, 'Maastricht II und die "föderativen Grundsätze"', DÖV 49 (1996), 845-852; Bernd Grzeszick, 'Art. 20' in: Günter Dürig/Roman Herzog/Rupert Scholz, *Grundgesetz-Kommentar* (C. H. Beck 2024), para. 160.

17 FCC, judgment of 15 January 1958, 1 BvR 400/51, BVerfGE 7, 198 (*Lüth*): 'eine objektive Wertordnung, die als verfassungsrechtliche Grundentscheidung für alle Bereiche des Rechts gilt.'

18 Davies (n. 4), 28.

19 Compare this with Ana Bobić, *The Jurisprudence of Constitutional Conflict* (Oxford University Press 2022), 59-71, who also distinguishes between 'constructive' and 'destructive' constitutional conflicts. Also in this issue Ana Bobić, 'Constitutional Courts in the Face of the EU's Reconfiguration', HJIL 85 (2025), 523-545.

quality of EU law, turning it into a fuller, denser legal order, which could, provided it effectively protected human rights in a way functionally paralleling domestic jurisdiction, possess sufficient legitimacy to claim primacy in application over national law. *Solange I* was thus not concerned with curbing the federal power, or with shielding the national sovereignty of the Member States against the incursions on behalf of EU law. In the same vein, the FCC did not question the object and purpose of EU law, but it insisted that to achieve this object and purpose the integration shall qualitatively shift into a higher gear by incorporating human rights protection in its body of law. Eventually, the EU took this initiative seriously and followed suit.

The US story of the Bill of Rights is markedly different. Unlike the FCC which acted with genuine normative resolute to improve the functioning of EU integration by taking human rights seriously, the considerations of the American proponents of codifying human rights protection on the federal level were almost exclusively strategic. The federalisation of human rights was used as a pretext, as a means of upending the constitutional settlement achieved during the Philadelphia constitutional convention.[20] The project of instituting the federal protection of human rights was thus part of the anti-federalist political agenda. Behind the ostensibly virtuous insistence on protecting personal freedoms against the government, there lurked a desire 'to change the structure and curtail the power of the new federal government'.[21] The Bill of Rights that was eventually adopted was a compromise between the divergent interests of federalists and anti-federalists, a measure that, like 'a tub to the whale',[22] distracted both camps, to neither's satisfaction, but with an ultimate effect of averting the second constitutional convention that could have undermined the nascent US federal state.[23] The human rights in the Bill of Rights, in a glaring contrast to the *Solange I* episode, were thus not an end in and of itself. They were instrumental for keeping or undermining, depending on the perspective, the federal balance.

However, beyond the instrumental use of the Bill of Rights in the US there is even a more important difference between the two jurisdictions. This resides in a completely different socio-political, economic, and cultural setting. The *Solange I* doctrine is, indirectly at least, a reflection of Germany's catharsis after the horrors committed during the WWII. It is a remedial attempt for the mass violations, indeed extinction of human rights protection, underlined by a commitment of 'never again'. It is against this backdrop that

20 Library of Congress (n. 10).
21 Bowling (n. 12), 225.
22 Bowling (n. 12), 224.
23 Bowling (n. 12), 224.

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the *Lüth* jurisprudence,[24] its *Austrahlungswirkung*,[25] the objective order of values, from whose perspective the European Communities of the 1960s and 1970s not only appeared to be, but were indeed lacking in human rights protection, engendered the *Solange I* constitutional doctrine.

In comparison to the just presented European, in particular German, normative backdrop, the background rationale of the proponents of human rights protection on the federal level in the US could not be more different. As argued by Brest, Levinson, Balkin, and Amar almost all constitutional law cases prior to 1865 in the US involved slavery.[26] The process of adoption of the Bill of Rights was no exception. However, what was exceptional, indeed perverse, at least from the contemporary normative point of view, was the motivation of the anti-federalist proponents of the protection of human rights on the federal level. This mechanism was proposed as a means of curbing federal power, to win more room to manoeuvre in preserving the slave-holding social order in the south. In other words, and to put it bluntly, the southern anti-federalists insisted on the creation of federal human rights protection to preserve slavery in their federated states. By any means their ambition was not about improving the nature of the American union.[27] In this way it becomes clear that the Bill of Rights and the *Solange I* episodes unfolded in a completely different historical context, relying on an entirely incompatible set of normative premises, pursuing adverse social and federal objectives. It is on this basis that the *Solange I* jurisprudence is completely at odds with its US counterpart and therefore stands for a unique, indeed original legal theoretical and practical achievement. It is to its exact contours that the next section turns to.

## III. Institutional Innovations Spurred by *Solange I*

Fifty years on, with the benefit of hindsight, it can be confidently argued that the *Solange I* decision has brought about a number of institutional innovations in practice, which have in due course also led to original developments in the field of legal theory. These innovations have echoed beyond the law of the European Union, that the FCC initially sought to improve, and have also surpassed the limits of federalism. Admittedly, the central

24 FCC, *Lüth* (n. 17).

25 FCC, *Lüth* (n. 17), 207.

26 Paul Brest, Sanford V. Levinson, Jack M. Balkin and Akhil Reed Amar, *Process of Constitutional Decisionmaking: Cases and Materials* (4th edn, Aspen Law & Business 2000), 1.

27 Akhil Reed Amar, 'The Bill of Rights as a Constitution', Yale L. J. 100 (1991), 1131-1210.

practical novelty consisting of the insistence of 'structural congruence' between two different levels of government was initially deployed in what could be described as a proto-federal regime. As the ECJ developed the doctrines of autonomy, direct effect and primacy of EU law,[28] national highest courts following the lead of the *Solange I* rationale have been willing to acquiesce to them provided that the new body of autonomous EU law, now effective side by side with national laws on the national territory, complies at least with similar, functionally parallel substantive standards of human rights protection. To the extent that the EU exhibits the features of a composite federal regime, that it at least to a certain extent arguably does, the *Solange I* decision has thus made an original contribution to the theory and practice of federalism, whereby the two federal levels engage in mutual collaboration through, in a way, competition with regard to the common acceptable standards of human rights protection. The *Solange I* decision can be thus seen as a stimulus for improving the quality of a federal regime by a substantive race not to the bottom, but to the top.

This can be explicated with a reference to a couple of national and supranational landmark cases that have ensued following the *Solange I* ruling, first on the vector pointing from the Member States to the EU; then inside the Member States, and very soon and very interestingly also on the vector travelling from the EU to the Member States. On the Member States – EU vector, the FCC's *Solange I* jurisprudence first found approval in the Italian Constitutional Court. The latter in fact preceded the *Solange I* case with its *Frontini*[29] ruling, that has been in the following years reaffirmed in the *Granital*[30] and *Fragd*[31] cases.[32] In all these cases, like the GFCC, the Italian Constitutional Court insisted on the importance of fundamental rights protection, but, unlike the FCC, its Italian counterpart posited the

28 ECJ, NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration, judgment of 5 February 1963, case no. 26-62, ECLI:EU:C:1963:1; ECJ, Flaminio Costa v. ENEL, judgment of 15 July 1964, case no. 6-64, ECLI:EU:C:1964:66.

29 Constitutional Court of Italy, *Frontini v. Ministero delle Finanze*, judgment of 18 December 1973, case no. 183/73. For an English translation of the judgment, see Andrew Oppenheimer (ed.), *The Relationship Between European Community Law and National Law: The Cases: Volume 1* (Cambridge University Press 1994), 629-642.

30 Constitutional Court of Italy, *SpA Granital v. Amministrazione delle Finanze dello Stato*, judgment of 8 June 1984, case no. 170/84. For English: Oppenheimer (n. 29), 643-652.

31 Constitutional Court of Italy, *SpA Fragd v Amministrazione delle Finanze dello Stato*, judgment of 21 April 1989, case no. 232/89. For English: Oppenheimer (n. 29), 653-662.

32 For a very informative, more in-depth discussion of 'the local remodelling' of *Solange I*, see 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.

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national standards of human rights protection as a limit to EU integration and as an exception to the primacy of EU law. While the two courts thus proceeded from the same normative standpoint of expressing concern for the existing national standards of human rights protection, their normative direction was different. The German FCC's '*as long as*' worked as stimulus for the EU legal order to develop its own system of human rights protection, while the Italian Constitutional Court's '*contro limiti*' doctrine[33] was foremost a defensive national constitutional measure, which acted not as a stimulation, but much more like an irritation of the supranational level. Nevertheless, it can be argued that in due course the dual reliance on national human rights protection, on the one hand as a stimuli for the EU to develop its own human rights standards, on the other as a shot across the bow, has eventually merged into a single doctrine, so to present the two sides of the same medal pushing the EU to qualitatively deepen its legal order with human rights protection.

This doctrine has been almost universally espoused by the Member States, be it on the level of their constitutional texts or in the jurisprudence of their highest judicial authorities and typically both.[34] Especially in the new Member States that joined during the 2004 enlargement the *Solange I* doctrine was also used in a somewhat mutated sense, not just externally towards the EU, but also internally against other domestic political authorities. As *Sadurski* convincingly demonstrated, the, on its face paradoxical, reliance on the *Solange I* rationale by the Central European constitutional courts in the early 2000 s, when structural congruence could arguably be seen as long achieved, and if certain gaps were left in the European human rights mosaic their existence was much more likely in the new Member States than in the EU, could be best explained as a self-serving attempt of those countries' constitutional courts to preserve their elevated institutional position in the national constitutional and political ordering. In short,

> 'deciding on the status of the European supremacy rule [was] therefore a valuable and effective asset for Constitutional Courts to enhance their position vis-à-vis other domestic political actors,'[35] as 'these are very powerful and skilled political actors, used to playing a strong role in the political and legislative game'.[36]

33 Marta Cartabia, 'The Italian Constitutional Court and the Relationship between the Italian Legal System and the European Community', Mich. J. Int'l L. 12 (1990), 173-203 (182).

34 Stefan Griller, Lina Papadopoulou and Roman Puff (eds), *National Constitutions and EU Integration* (Hart 2022).

35 Wojciech Sadurski, '"Solange, Chapter 3": Constitutional Courts in Central Europe – Democracy – European Union', EUI Working Paper LAW No. 2006/40, 33.

36 Sadurski (n. 35), 34.

The above discussion has thus disclosed that the *Solange I* rationale has been capable of wearing and producing different faces. One of them, existing on the vector running from the EU to the Member States, was certainly not intended for when the FCC issued its ruling in 1974. The FCC wanted to prompt the EU to develop its own standards of human rights protection, but it did not take long for the ECJ, following its proverbial hermeneutic expansionism, to turn those freshly minted EU human rights, developed under the pressure of national constitutional courts, against those very courts and other national institutions. The newly developed EU human rights thus became the standards for measuring the compliance of the Member States with EU law, when their institutions were charged with implementing EU law (*Wachauf* line of cases)[37] or when the Member States sought to avail themselves of one of the Treaty derogations from the four fundamental freedoms (*ERT* line of cases).[38] While the Charter of Fundamental Rights in Art. 51/1, admittedly, circumscribed the scope of this case-law, by excluding the *ERT* doctrine, the ECJ circumvented the Charter's textual limits and has continued to subject the national measures to compliance with EU law's autonomous standards of human rights protection whenever the Member States act within the scope of EU law.[39]

Furthermore, due to the process of constitutional and democratic backsliding that has pestered the EU since 2010,[40] the use of the *Solange I* doctrine has received yet another, unexpected turn. Already in 2012, a team of scholars pleaded in favour of the so-called reverse *Solange*.[41] This doctrine would enable individuals to rely qua EU citizenship on fundamental rights as protected under EU law against their Member States even beyond the scope of application of EU rights if their Member States were proven to have engaged in a systemic violation of the fundamental values contained in Article 2 Treaty on European Union (TEU). In other words, echoing the *Solange*

37 ECJ, *Hubert Wachauf v. Bundesamt für Ernährung und Forstwirtschaft*, judgment of 13 July 1989, case no. C-5/88, ECLI:EU:C:1989:321.

38 ECJ, Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v. Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others, judgment of 18 June 1991, case no. C-260/89, ECLI:EU:C:1991:254.

39 ECJ, *Åklagaren v. Hans Åkerberg Fransson*, judgment of 7 May 2013, case no. C-617/10, ECLI:EU:C:2013:105.

40 *Miklós Bánkuti, Kim Lane Scheppele, Gábor Halmai*, 'Hungary's Illiberal Turn: Disabling the Constitution' Journal of Democracy 23 (2012), 138-146; *Wojciech Sadurski*, *Poland's Constitutional Breakdown*, (Oxford University Press 2019); Matej Avbelj, Jernej Letnar Černič, Gorazd Justinek, *The Impact of European Institutions on the Rule of Law and Democracy: Slovenia and Beyond* (Hart Publishing 2020).

41 Carlino Antpöhler, Johanna Dickschen, Simon Hentrei, Matthias Kottmann, Maja Smrkolj and Armin von Bogdandy, 'Reverse Solange – Protecting the Essence of Fundamental Rights against EU Member States', CML Rev. 49 (2012), 489-519.

doctrine, albeit now applied from the EU to the Member States. As long as the Member States do not systemically threaten to violate human rights, the latter remain within their national autonomy immune to the EU's interference. In the opposite case, EU law will step in to safeguard the common body of human rights that all EU citizens, irrespective of their domicile in a particular Member State, should be entitled to.[42]

Almost a decade later this academic proposal planted roots also in the actual jurisprudence of the ECJ. In *Repubblika*[43] the Court formally developed a principle of non-regression according to which the Member States are bound in virtue of Art. 2 TEU to refrain from undermining the already existing standards of the rule of law and human rights protection as its constitutive part. In Cases C-156/12 and C-157/21 in 2022 the ECJ made its position even stronger, by arguing

> 'that the values contained in Article 2 TEU, among them human rights, have been identified and are shared by the Member States. They define the very identity of the European Union as a common legal order. Thus, the European Union must be able to defend those values, within the limits of its powers as laid down by the Treaties […]'.[44]

The discussion of the three vectors of *Solange I* (inside the Member States and between the Member States and the EU, and vice versa) is an example of how this FCC doctrine affected the EU integration's 'federal' dynamics. However, as indicated above, the implications of the *Solange I* jurisprudence gradually stretched beyond proto-federal analogies and also served as a normative point of orientation for the EU with its external environment. This came most strikingly to the fore in the protracted *Kadi* saga.[45] In this case,[46] Mr. *Kadi* was subject to targeted sanctions imposed on him by the United Nations (UN) Security Council, which were effectuated through the EU Council's regulations. It was undisputed that, due to the EU regulation implementing the UN Security Council Resolution, Mr. *Kadi* was put under

42 Antpöhler, Dickschen, Hentrei, Kottmann, Smrkolj and von Bogdany (n. 41), 491.

43 ECJ, *Repubblika v. Il-Prim Ministru*, judgment of 20 April 2021, case no. C-896/19, ECLI:EU:C:2021:311, para. 64.

44 ECJ, *Hungary v. European Parliament and the Council of the European Union*, judgment of 16 February 2022, case no. C-156/12, ECLI:EU:C:2022:97, para. 127; ECJ, *Poland v. European Parliament and the Council of the European Union*, judgment of 16 February 2022, case no. C-157/12, ECLI:EU:C:2022:98.

45 For a book length discussion of this case, see Matej Avbelj, Filippo Fontanelli and Giuseppe Martinico (eds), *Kadi on Trial: A Multifaceted Analysis of the Kadi Trial* (Routledge 2016).

46 ECJ, Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities, judgment of 3 September 2008, case no. C-402/05 P and C-415/05 P, ECLI:EU:C:2008:461.

a travel ban and all his funds and other assets were frozen in the absence of any judicial protection and the right to be heard. After the case had been brought to the EU General Court, it was dismissed for not having amounted to the violation of *jus cogens* that was, according to the General Court, the only standard against which the supreme UN Security Council resolution could be reviewed. The potentially scandalous outcome in which an individual in the EU would be deprived of basic human rights due to the need to comply with 'supreme' international law was avoided thanks to the ECJ which confirmed the primacy of the Charter of the United Nations and the entire body of international law developed under it, but it effectively conditioned it on the existence of an appropriate protection of human rights on the international level.

In so doing, the ECJ effectively transposed the *Solange I* rationale, which the FCC developed to incentivise the EU to develop its own standards of human rights protection, to the realm of international law. The ECJ insisted that the effective protection of human rights in the EU:

> 'requires from the Community judicature [to conduct] in principle the full review of the lawfulness of all EU acts in the light of the fundamental rights forming an integral part of the general principles of Community law, including review of Community measures which, like the contested regulation, are designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations'.[47]

While this judicial move, similar to the one by the FCC in the national context on behalf of EU scholars, was received with a great degree of scepticism by scholars of international law,[48] it has indeed, like *Solange I* inside the EU, led to an improvement of human rights protection in the context of the specific Security Council mechanism on the level of international law.[49]

In this way, the *Solange I* mechanism was freed from its specific EU law context and started to be used beyond the EU, as a principled regulatory mechanism in pursuit of 'structural congruence' between different sites of legal and political authorities within the framework of multilevel governance

47 ECJ, *Kadi* (n. 45), para. 326.

48 See, for example, Antonios Tzanakopoulos, 'The *Solange* argument as a justification for disobeying the Security Council in the *Kadi* Judgments' in: Matej Avbelj, Filippo Fontanelli and Giuseppe Martinico (eds), *Kadi on Trial: A Multifaceted Analysis of the Kadi Trial* (Routledge 2016)121-134 (133-134), who has indicatively of the prevailing sentiment among public international lawyers at the time claimed that 'the disobedience of SC decisions […] is no doubt dangerous and hugely destabilizing'.

49 See, Matej Avbelj and David Roth-Isigkeit, 'The UN, the EU, and the Kadi Case: A New Appeal for Genuine Institutional Cooperation', GLJ 17 (2016), 153-178.

in a global context. The *Kadi* case is an example of a *Solange I* interaction between EU law and international law. The *Bosphorus* case,[50] on the other hand, is an example of the employment of the *Solange* doctrine by a regional international organisation, the Council of Europe,[51] in rapport with the EU. There the European Court of Human Rights (ECtHR) had to adjudicate the actions of the Irish authorities which were interfering with the plaintiff's right to private property by executing an EU regulation which did not leave any discretion to the national authorities. In this way the ECtHR was, in fact, invited to pronounce on the compatibility of the EU regulation with the European Convention on Human Rights (ECHR). The Court avoided a potential clash with EU law again by resorting to the *Solange I* formula and its sequel, stressing that as long as an international organisation, the EU in this case, in substantive and procedural terms ensures human rights protection which is at least equivalent, without the need to be identical, to the Convention, the interests of international cooperation dictate a presumption, rebuttable in case of manifest deficiencies, of compliance of the challenged EU legal acts with the Convention.[52] In other words, as long as the EU protects human rights in a way structurally congruent and equivalent with the ECHR, so long the ECtHR will, in principle, not judicially interfere with its actions.

The same logic was applied to the North Atlantic Treaty Organisation (NATO)[53] and when faced with cases of the Security Council's targeted sanctions, as implemented by the UN Member States, the ECtHR relied, even if indirectly, on the *Solange I* doctrine also within the ambit of broader international law. To accommodate the primacy of the UN-Charter and its objectives with the Member States' ongoing obligations under the ECHR, the ECtHR established a presumption that the Security Council, unless when using clear and explicit language to the contrary, does not intend to induce the Member States into human rights violations. The presumption, albeit rebuttable, like in relation with the EU, therefore is that, in principle, the UN Security Council is a human rights compliant institution and that it is, consequently, for the Member States when adopting concrete implementing measures to adapt their international obligations to the standards of the

50 ECtHR (Grand Chamber), *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, judgment of 30 June 2005, no. 45036/98, paras 155-156.

51 For earlier similar cases, see, ECtHR (Grand Chamber), *Waite and Kennedy v. Germany*, judgment of 18 February 1999, no. 26083/94, paras 67-73; ECtHR (Grand Chamber), *Beer and Regan v. Germany*, judgment of 18 February 1999, no. 28934/95, paras 57-63.

52 ECtHR, *Bosphorus* (n. 50), paras 155-156.

53 ECtHR, *Gasparini v. Italy and Belgium*, judgment of 12 May 2009, no. 10750/03.

Convention. While the ECtHR, eventually,[54] in practice several times[55] refused to employ the *Bosphorus* equivalence test[56] and thus to pass a verdict on the compliance of concrete UN Security Council resolutions with the Convention, its *Solange* message to the UN could not be stated in clearer terms:

> 'The Court emphasises that it is not its role to pass judgment on the legality of the acts of the UN Security Council. However, where a State relies on the need to apply a Security Council resolution in order to justify a limitation on the rights guaranteed by the Convention, it is necessary for the Court to examine the wording and scope of the text of the resolution in order to ensure, effectively and coherently, that it is consonant with the Convention.'[57]

In other words, as long as the UN Security Council does not explicitly and directly require the ECHR Member States to fall below the requirements of the Convention, so long the ECtHR will assume that the UN regime in a manner is equivalent with the Convention protects human rights and its acts will not be subject to the ECtHR's review. The same or very similar jurisprudence in rapport to international law has also been developed in the chambers of the highest courts in several European states.[58]

The preceding discussion has demonstrated that the *Solange I* formula travelled way beyond the national – supranational legal relationship in which it was originally developed. Its institutional-normative reach thus exceeds the ambit of federalism. The rationale, underlying the *Solange I* doctrine, has

54 In ECtHR (Grand Chamber), *Al-Dulimi Montana Management Inc. v. Switzerland*, judgment of 21 June 2016, no. 5809/08, the first instance Chamber did, however, decide to subject the UN Security Council to the *Solange I*, equivalence test review, which a concrete Resolution failed to pass. However, upon appeal the Court found the equivalence test inapplicable in this case and thus avoided a potentially resounding clash and controversy with the UN.

55 ECtHR (Grand Chamber), *Al-Jedda v. The United Kingdom*, judgment of 7 July 2011, no. 27021/08; ECtHR (Grand Chamber), *Nada v. Switzerland*, judgment of 12 September 2012, no. 10593/08.

56 Sébastien Platon, 'The "Equivalent Protection Test": From European Union to United Nations, from Solange II to Solange I', Eu Const. L. Rev. 10 (2014), 226-262.

57 ECtHR, *Al-Dulimi* (n. 54), para. 139.

58 See, for example, the decision of the UK Supreme Court, *Her Majesty's Treasury v. Mohammed Jabar Ahmed and others*, judgment of 27 January 2010, UKSC/2009/0016; *Her Majesty's Treasury v. Mohammed al-Ghabra,* judgment of 17 March 2009, UKSC/2009/0015*; R (on the application of Hani El Sayed Sabaei Youssef) v. Her Majesty's Treasury*, case no. UKSC 2009/0018, and the decision of the Swiss Federal Tribunal, *Rukundo v. Federal Office of Justice*, judgment of 3 September 2001, case no. 1A. 129/2001 and 1A 130/2001, ILDC 348 (CH 2001). For an overview see: Antonios Tzanakopoulos, 'Judicial Dialogue in Multi-Level Governance: The Impact of the Solange Argument' in: Ole Kristian Fauchald and André Nollkaemper (eds), *The Practice of International Law and National Courts and the (De-)Fragmentation of International Law* (Hart 2012), 185-215.

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been applied as a judicial formula to regulate or at least shape multilevel governance in a global realm. The existing plurality of legal orders of territorial and functional character clearly requires 'structural congruence' and 'equivalence' in human rights protection to prevent the regression of the achieved substantive value standards; to ensure the protection of individual rights[59] and through that foster the functionality and viability of a pluralist structure of contemporary global law.[60] It goes without saying that the FCC, when it delivered its ruling in 1974, did not anticipate, let alone deliberately pursue the institutional developments which would ensue fifty years on, and neither was its jurisprudence informed by a coherent theoretical account.[61] This has emerged only later. While the *Solange I* practice has thus preceded theory, it is undisputable that beyond the institutional innovations described above, the FCC's *Solange I* doctrine has also had a strong impact on constitutional theory, eventually leading up to the establishment of a whole new theoretical branch that has since been known as constitutional pluralism.

## IV. Theoretical Innovations Spurred by *Solange I*: A Theory of Constitutional Pluralism

Admittedly, the birth of a theory, or more accurately theories,[62] of constitutional pluralism is typically not associated with the *Solange I* decision. To the contrary, according to the conventional narrative the intellectual roots of constitutional pluralism date back to the Treaty of Maastricht. This treaty could only be ratified in Germany after the FCC had given a green light. The thus adopted *Maastricht*-Urteil,[63] delivered in 1993, drew even heavier academic criticism[64] than its *Solange I* predecessor two decades earlier. The only

59 See also in this issue Eyal Benvenisti, 'When *Solange I* Met *Neubauer*: National Court Protecting Global Interests When Reviewing Decisions of International Organisations', HJIL 85 (2025), 627-648.

60 Neil Walker, *Intimations of Global Law* (Cambridge University Press 2015); Matej Avbelj, *The European Union Under Transnational Law* (Hart 2018); Rafael Domingo, *The New Global Law* (Cambridge University Press 2010); William Twining, *Globalisation and Legal Theory* (Cambridge University Press 2000); Matej Avbelj, 'Global Constitutionalism as a Grammar of Global Law?', KritV 3 (2016), 217-233.

61 Davies (n. 4).

62 For an overview, see, Matej Avbelj and Jan Komarek (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart 2012); Gareth Davies and Matej Avbelj (eds), *Research Handbook on Legal Pluralism and EU Law* (Edward Elgar 2018).

63 FCC, judgment of 12 October 1993, 2 BvR 2134, 2159/92, BVerfGE 89, 155 – *Maastricht*.

64 For an overview (and a response), see, Peter L. Lindseth, 'The "Maastricht Decision" Ten Years Later: Parliamentary Democracy, Separation of Powers, and the Schmittian Interpretation Reconsidered', Robert Schuman Centre Working Paper 2003/18.

notable exception was *Neil MacCormick* who defyingly argued that the FCC's *Maastricht* decision '*after all has a sound basis in legal theory*'.[65] This legal theory was initially marked by some nominal ambiguity, being qualified as normative, legal or juridical pluralism, but gradually the name constitutional pluralism has prevailed. This denomination, as well as the profound conceptual deepening of the theory, is to be credited to the 2002 seminal article by *Neil Walker* on '*The Idea of Constitutional Pluralism*'.[66]

If the central concept of the *Solange I* decision was 'structural congruence', the *Maastricht* decision was about sovereignty. The focus of the two rulings and, consequently their main thrust too, was notably different. As sovereignty is about the locus of the ultimate legal and political authority,[67] the stakes, not just legal, but also political, were much higher in the *Maastricht* decision, and the overall approach of the FCC was less friendly and more confrontational than in *Solange I*. In that case the FCC was, in a way, prescribing the standards that could bring the two legal orders closer together, making them more compatible. By contrast, in the *Maastricht* decision the FCC was drawing the jurisdictional boundaries that EU law and its highest Court should not cross.[68] Nevertheless, despite their uneven focus and main thrust the *Maastricht* and the *Solange I* decisions are directly related, because the underlying theoretical basis of the *Maastricht* decision anticipates *Solange I*, which had, somewhat paradoxically, chronologically come first.

The normative requirement of 'structural congruence' namely only makes sense in an environment of plurality of legal orders containing (and being an expression of) different polities as distinct epistemic sites.[69] The FCC's *Solange I* ruling assumed that EU law and national law are distinct, making up two different autonomous legal orders which are, however, integrated into a larger, overarching common whole whose viability, as well as the identity of the insular parts of which this common whole is formed, requires the demanded 'structural congruence' and 'equivalence', but not identity of substantive standards between and across legal orders and polities inside the common whole.[70] Therefore, what the *Solange I* decision had assumed, was

65 Neil MacCormick, 'The Maastricht Urteil: Sovereignty Now', ELJ 1 (1995), 259-266 (265).

66 Neil Walker, 'The Idea of Constitutional Pluralism', M. L. R. 65 (2002), 317-359.

67 Matej Avbelj, 'Theorizing Sovereignty and European Integration', Ratio Juris 27 (2014), 344-363.

68 See, Mattias Kumm, 'Who is the Final Arbiter of Constitutionality in Europe?: Three Conceptions of the Relationship between the German Federal Constitutional Court and the European Court of Justice', CML Rev. 36 (1999), 351-386.

69 Walker, 'The Idea of' (n. 66), 338.

70 Matej Avbelj, 'Theory of European Union', E. L. Rev. 36 (2011), 818-836.

eventually articulated in the *Maastricht* decision.[71] One presupposed the other, but neither was easily accepted by the then theoretical mainstream.

Here constitutional pluralism,[72] in particular as developed by *Neil Walker*, has made an important difference. *Walker*, writing ahead of the described *Solange I* migration beyond EU law to other areas of multi-level governance, demonstrated already in 2002 that constitutional pluralism is not just a persuasive descriptive, explanatory, and normative account of European integration, but that it might lend itself as a, in a way, universal theoretical framework for a global post-national realm[73] of late sovereignty.[74] An old one-dimensional Westphalian world has evolved into a pluralist, multi-dimensional constellation in which old and new, territorial and/or functional forms of legal and political communities can be found on the sub-state, trans-state, supra-state, and on other non-state levels.[75] Not only can this development be accurately captured (only) by constitutional pluralism, the latter moreover also disposes of normative tools for maintaining the necessary degree of coherence, indeed 'structural congruence' through a whole plethora of bridging mechanisms[76] between different territorial and functional sovereigns, without their authority claims, when conflicting, always being susceptible to harmonious reconciliation.[77]

It is easily identifiable how the migration of *Solange I* beyond the EU fits nicely in this theoretical framework, as well as how *Solange I*, as initially articulated by the FCC, paved the path to the theory of constitutional pluralism. There would have been no need for the theory of constitutional

71 Situating the *Solange I* decision yet into a broader context of the FCC jurisprudence, which is however beyond the scope of this article, makes this point even more evident. See, in particular, BVerfGE 73, 339 *Solange II* and BVerfGE 152,152 and 152, 216 *Right to be Forgotten I and II*, discussed in Matej Avbelj, 'The Federal Constitutional Court Rules for a Bright Future of Constitutional Pluralism', GLJ 21 (2020), 27-30.

72 For a critical approach within German legal theory to the pluralist characters of EU integration, see, in particular, Ingolf Pernice, 'Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited', CML Rev. 36 (1999), 703-750 and Ingolf Pernice, 'Multilevel Constitutionalism in the European Union', E. L. Rev. 27 (2002), 511-529; Ingolf Pernice, 'European v. National Constitutions', Eu Const. L. Rev. 1 (2005), 99-103; Matthias Ruffert, Nach dem Lissabon-Urteil des Bundesverfassungsgerichts – zur Anatomie einer Debatte, ZSE 7 (2009), 381-398. On the compatibility between multilevel constitutionalism with constitutional pluralism see, in particular, Franz C. Mayer and Mattias Wendel, 'Multilevel Constitutionalism and Constitutional Pluralism' in: Matej Avbelj and Jan Komarek (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart 2012).

73 Walker, 'The Idea of' (n. 66).

74 Neil Walker, 'Late Sovereignty in the European Union' in: Neil Walker (ed.), *Sovereignty in Transition* (Hart Publishing 2003), 3-32.

75 Walker, 'The Idea of' (n. 66), 320.

76 Walker, 'The Idea of' (n. 66), 347.

77 Walker, 'The Idea of' (n. 66), 338.

pluralism if the FCC had simply acquiesced to the unconditional supremacy of EU law. If the latter had happened, the good old conventional statist federalism could have served as a theoretical matrix for describing, analysing, and normatively evaluating the developments inside the process of European integration. As this was not the case, statist federalism turned out to be an inadequate theory to capture the complexity of legal and political relationships inside the EU. As a consequence, the theory of EU law avoided the binary pitfall between choosing the federal statist nature of the EU or the confederal international character of the Union.[78] Beginning with the *Solange I* saga, it has been undisputed that EU law and politics were sui generis, neither national nor international, but something in-between that ought to be filled in with theoretical substance lest to be devoid of content.

This theoretical gap has been gradually closed through the development of constitutional pluralism. The *Solange I* ruling and its aftermath, which was definitely not theoretically premeditated, practically prompted the growth of a fresh theory to guide the complex web of relationships between autonomous legal and political sites. At the same time, as the contours of this theory became more precise and its normative predicaments more robust, the *Solange I* doctrine benefited from constitutional pluralism and has been, as a result and as described above, used as a normative model for multilevel governance in the global realm. The unique practices that the *Solange I* case consisted of have thus given rise to a new theory that has, in return, informed these unique practices to be upgraded inside the EU and expanded beyond it.

## V. Conclusion

The story of *Solange I* is thus a paradigmatic example of social constructivism[79] at play in the field of law and politics beyond the state. New practices have given rise to a new theory, that has reshaped those practices in return, leading to further sophistication and differentiation of the theory to fit other jurisgenerative environments and their practices that had initially not even been thought of.[80] Furthermore, the meta-theory of social constructivism

78 Avbelj, 'Theory' (n. 70).

79 Peter L. Berger and Thomas Luckmann, *The Social Construction of Reality: A Treatise in the Sociology of Knowledge* (Penguin University Books 1971).

80 For an alternative reading according to which Solange is a parochial and backward decision, see 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 (268). For a critique of this view, see in this issue Andrej Lang, '*Solange I* in the Mirror of Time and the Divergent Paths of Judicial Federalism and Constitutional Pluralism', HJIL 85 (2025), 411-449.

also helps us to understand the resistance the novel practices spearheaded by *Solange I* have been confronted with. To paraphrase Feyerabend, the *Solange I* decision simply went against method,[81] demonstrating that the prevailing theoretical approaches no longer suffice to capture the new legal and political reality begotten by the process of European integration. Those with federal credo, judging by the conventional American federal experience, found the FCC's opposition to the supreme supranational law of the EU unacceptable. It was simply not part of their theoretical matrix for the EU. Similarly, some in the national statist strand of the German scholarly elite were also not entirely satisfied with the reconciliatory language of *Solange I*. It was not strong enough.[82]

As the same debate was elevated to the level of international law, playing out between the EU and the Council of Europe as well as the UN, the conventional international lawyers, long wedded to the idea of the supremacy international law, were also taken aback by the reticence of the ECJ and even the ECtHR.[83] Like their EU counterparts, the internationalists too feared an irreparable fragmentation of international law,[84] which is going to be torn into bits and pieces by the judicial authorities ruling over many insular legal orders of the global constellation, furthering their particular interests.

In all truth, none of those feared scenarios of a legal and political Armageddon came into existence because of the *Solange I* decision.[85] To the contrary, it turns out, with the benefit of hindsight that this ruling with its ingenious pursuit of structural congruence (but not homogeneity or identity!),[86] between legal and political orders worked as a cohesive force that, rather than pushing the global pluralist landscape further apart, brought the plurality of legal and political orders closer together by integrating them

81 Paul Feyerabend, *Against Method* (4th edn, Verso 2010).

82 Davies (n. 4), 180-200.

83 Tzanakopoulos, 'Judicial Dialogue' (n. 58), 185-215.

84 Tzanakopoulos, 'Judicial Dialogue' (n. 58), 185-215.

85 Of course, there are also less favorable, much more critical views of the contemporary developments that could be at least indirectly traced back to the Solange I decision, see in particular, Daniel Sarmiento, 'Requiem for Judicial Dialogue – The German Federal Constitutional Court's judgment in the Weiss case and Its European Implications', EU LAW LIVE 16 (2020), 9-20; Daniel R. Kelemen, Piet Eeckhout, Federico Fabbrini, Laurent Pech and Renáta Uitz, 'National Courts Cannot Override CJEU Judgments: A Joint Statement in Defense of the EU Legal Order', Verfassungsblog, 26 May 2020, <https://verfassungsblog.de/national-courts-cannot-override-cjeu-judgments/>, last access 15 April 2025.

86 Following the adoption of Art. 4(2) TEU the constitutional resistance to ECJ began to build around the concept of national constitutional identity. This line of jurisprudence is, however, distinct, neither directly related nor anticipated by the Solange case-law. For an alternative view, however, see in this issue Julian Scholtes, 'Freeing Constitutional Identity from Unamendability: *Solange I* as a Constitutional Identity Judgment', HJIL 85 (2025), 547-568.

under the common pluralist vault of shared values, principles, and practices. In the absence of any potential emergence of a global government which, leaving its normative undesirability aside, could, as a unifying, universalist force create or even impose top-down a just legal and political order over the globe,[87] the better, perhaps the only alternative, is to follow the *Solange I* rationale. The latter in a pluralist way recognises the distinctiveness of different sites of regulation and socio-political-epistemic existence, but insists that they in their mutual interaction, which is inevitable in a globalised world, commit at least to the principle of non-regression of the existing standards of human rights protection, and beyond that engage in the exchange of good practices; borrowing of the higher standards of human rights protection, being thus entangled in a virtuous circle of a race to the top. If anything, this has been the original, both institutional and theoretical, contribution of the *Solange I* doctrine to the modern legal and political thought and practice beyond the state. Often misunderstood, even rejected from the conventional theoretical premises, the originality of *Solange I* goes way beyond the similarities that it shares with the traditional federalist and monist, statist constitutional accounts.

87 For the relevance of the *Solange I* jurisprudence at the current stage of (anti-)globalisation, see in this issue 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.

# Constitutional Courts in the Face of the EU's Reconfiguration

Ana Bobić*
Hertie School, Berlin, Germany
*bobic@hertie-school.org*



## Abstract

To this day, constitutional courts across the European Union (EU) use the structure of *Solange I* for challenging the primacy of EU law. Its legacy may be seen as that of a blueprint of constructive constitutional conflict: its logic introduces the idea that the principle of primacy of EU law is conditional. An important contribution of *Solange I* as a device structuring constitutional conflict is the commitment of the German court to observe the development of the EU and its law. This contribution engages with the EU's reconfiguration in respect of the EU's constitution broadly understood and explores constitutional courts' engagement with it, introduced by *Solange I*. These considerations are then tested in two areas of reconfiguration in the EU's constitutional settlement: the Euro crisis and criminal law. With that analysis in mind, the paper concludes by unveiling further areas of reconfiguration and by reflecting on the role to be played by constitutional courts in contemporary constitutional conflict in the EU.

* Senior Research Fellow at the Jacques Delors Centre and Adjunct Faculty, Hertie School, Berlin. This research is funded by the DFG Eigene Stelle Grant No 532657320 'Judicial control and the reconfiguration of control in the EU constitutional order'.

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## Keywords

*Solange I* – constitutional conflict – EU's reconfiguration – the Euro crisis – equality of Member States – budgetary sovereignty – criminal law – mutual recognition – admissibility of evidence

## I. Introduction

Reservations to the principle of primacy of EU law by national constitutional courts[1] are, perhaps not a fully embraced, but at the very least an acknowledged reality in EU constitutional theory. The judgment that may be viewed as the original constitutional conflict – *Solange I*[2] – is today seen by EU constitutional scholars not as a one-hit-wonder, but instead as the starting point of a complex and sometimes difficult relationship between EU and national courts claiming ultimate authority. The conditionality of *Solange I* has inspired other national courts[3] as well as scholars[4] in formulating how to manage conflicts between the EU and national level.

1 I will be using the term constitutional court as a shorthand for all courts with the power of constitutional review and against whose decisions there is no legal remedy. I borrow the definition of constitutional review from *de Visser*: '[The] actor conducting the assessment of constitutional conformity is empowered to attach consequences to a finding that the acts of other State organs do not comport with the relevant constitutional yardsticks; and is thus legally able to impose its position on a constitutional issue on other State organs.' Maartje de Visser, *Constitutional Review in Europe. A Comparative Analysis* (Hart Publishing 2014), 2.

2 FCC, order of 29 May 1974, 2 BvL 52/71, BVerfGE 37, 271 (*Solange I*). One should not forget, of course, that six months earlier the Italian Constitutional Court published its *Frontini* judgment, where it introduced the *controlimiti* doctrine: Italian Corte costituzionale, *Frontini v. Ministero delle Finanze*, judgment of 18 December 1973, no. 183/1973. While both judgments impose limits to the principle of primacy of EU law, *Frontini* resembles instead the *Solange II* logic: the Italian Constitutional Court retains for itself the right to an ultimate say in fundamental rights protection solely in the event of a violation of the fundamental principles of the Italian constitutional order or the inalienable rights of man. FCC, order of 22 October 1986, 2 BvR 197/83, BVerfGE 73, 339 (*Solange II*).

3 Jacques Ziller, 'The German Constitutional Court's Friendliness Towards European Law. On the Judgment of Bundesverfassungsgericht over the Ratification of the Treaty of Lisbon', European Public Law 16 (2010), 53-73 (68).

4 Wojciech Sadurski, '"Solange, Chapter 3": Constitutional Courts in Central Europe – Democracy – European Union', ELJ 14 (2008), 1-35; Armin von Bogdandy, Carlino Kottmann and Johanna Antpöhler, 'Reverse Solange: Protecting the Essence of Fundamental Rights against EU Member States', CML Rev. 49 (2012), 489-519; Iris Canor, 'My Brother's Keeper? Horizontal Solange: "An Ever Closer *Distrust* Among the Peoples of Europe"', CML Rev. 50 (2013), 383-421; Armin von Bogdandy and Luke D. 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.

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To this day, constitutional courts across the European Union use the structure of *Solange I* for challenging the primacy of EU law.[5] Its legacy may be seen as that of a blueprint of constructive constitutional conflict:[6] its logic introduces the idea that the principle of primacy of EU law is conditional[7] and that constructive critique of EU law leads to its improvement.[8] An important contribution of *Solange I* as a device structuring constitutional conflict on which I want to focus in this paper is the commitment of the German court to observe the development of the EU and its law. In its judgment, the German court stated that 'the Community is not a state, in particular not a federal state, but "a community of its own kind in the process of progressive integration"'.[9] It further stated that the current state of integration is 'of crucial importance' for determining its relationship to the protection of fundamental rights enshrined in the Basic Law.[10]

The EU changes much more quickly and more frequently than its Member States. Unlike the latter whose constitutional settlements remain more or less stable, the EU has gone through numerous changes, formally through treaty amendments, but also due to its recurring enlargement, and responses to internal[11] and external shocks and crises. The Lisbon Treaty in 2009 is the last formal change of the treaties; still, the transformations the EU is otherwise undergoing appear to take shape with greater speed than what was the case in its first few decades.[12] Without entering into the reasons behind each of the integration's critical junctures, what interests me here is to think about what this means for the commitment of national constitutional courts to accord crucial importance to such changes when they contemplate the principle of primacy of EU law.

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5 Paolo Mazzotti, '(European) Multilevel Constitutionalism to Govern Transnational Public Goods? A Reply to Petersmann', HJIL 84 (2024), 141-157 (148).

6 This paper deals only with constructive constitutional conflict. I therefore make the assumption that constitutional courts are independent and operate in states which overall comply with the rule of law; I do not engage with captured constitutional courts (such as the Polish Constitutional Tribunal). The latter courts are, in my opinion, unable to engage in constructive constitutional conflict at all. The relationship of captured courts is therefore outside the scope of the *Solange I* legacy in terms of tracking the EU's reconfiguration.

7 The logic persists to this day. See, for example, Rui Tavares Lanceiro, 'The Portuguese Constitutional Court Judgment 422/ 2020: A "Solange' Moment?"', EU Law Live (24 July 2020).

8 See also in this issue the contribution of Matej Avbelj, '*Solange I* Between Constitutional Mimesis and Originality', HJIL 85 (2025), 503-522.

9 FCC, *Solange I* (n. 2), para. 40.

10 FCC, *Solange I* (n. 2), para. 44.

11 An example is the significant expansion of the qualified majority voting in the Single European Act in 1986.

12 The enlargement process as adding to the 'discontinuity in territorial focus' should also not be disregarded in this respect. See, Neil Walker, 'The Place of European Law' in: Gráinne de Búrca and Joseph H. H. Weiler (eds), *The Worlds of European Constitutionalism* (Cambridge University Press 2012), 57-104 (80).

This inquiry is different from conflict resolution through incrementalism:[13] the question is not which methods national courts use to resolve conflicts, but whether they take into account the state of the EU's development in the moment of determining whether there is a constitutional conflict in the first place. Against the Bundesverfassungsgericht's claim to take account of the EU's progressive integration, the question asked in this paper is simply: do constitutional courts take note of the EU's reconfiguration? Whether constitutional courts take these changes of the EU seriously into account is under researched, in particular against the background of the emergence of the EU's constitutional identity as articulated in Article 2 Treaty on European Union (TEU). 50 years seems to me as an excellent stretch of time to test precisely how *Solange I* aged when it comes to its commitment to acknowledge progressive integration. This contribution therefore engages with the concept of the EU's reconfiguration in respect of the EU's constitution broadly understood and explores constitutional courts' approach to respecting it, introduced by *Solange I*.

To do so, I proceed in three steps. First, in section II., I conceptualise the notion of the EU's reconfiguration as a consideration in constitutional review. The examples of reconfiguration I discuss represent changes in the EU's normative or ideological preferences, a shift in the balance of powers between EU institutions and/or the Member States, as well as EU action that cannot be easily reconciled with what the text of the treaties might reasonably allow. Next, I explore two areas of reconfiguration in the EU's constitutional settlement and reactions from national courts: the Euro crisis and criminal law (section III.). Looking at national case law through the lens of the commitment in *Solange I* to observe the EU's changes, I place them in the broader context of constitutional conflict and its role in the EU's constitution. With those lessons in mind, in the last section I offer further areas of reconfiguration and conclude on the role to be played by constitutional courts in the contemporary constitutional conflict in the EU.

## II. The EU's Reconfiguration

The EU's fundamentals were arguably formed until the Maastricht Treaty, after which a cumbersome route led to today's Lisbon Treaty. Lisbon's entrenchment is fortified thanks to external events that currently make grand

13 On incrementalism in constitutional conflict, see Ana Bobić, 'Constitutional Pluralism Is Not Dead. An Analysis of Interactions Between the European Court of Justice and Constitutional Courts of Member States', GLJ 18 (2017), 1395-1428 (1423-1426).

reforms with unanimous Member State support difficult to imagine.[14] However, a focus on the treaties and their iterations obscures the continuous changes the EU is undergoing: a significant reconfiguration of the EU is taking shape regardless of (or despite) the lack of a treaty reform.[15] And yet, much, if not all of the integration literature on the EU analyses it through the lens of more or less integration,[16] whereas legal scholarship focuses on the Court of Justice arguably ever expanding its powers, or on actions of the EU[17] or the Member States going outside of EU law proper to integrate.[18] Unlike those takes, this paper looks at the EU's reconfiguration as a polity, meaning significant changes in its setup, regardless of whether we might assess such reconfiguration as positive or negative, or as resulting in more or less integration[19] (although some examples will most certainly involve an increase in EU's powers). The examples of reconfiguration that I turn to below exhibit changes in the EU's normative or ideological preferences that

14 Hungary's rapprochement with Russia and its reluctance in supporting Ukraine is but one example. This might be countered however with the eagerness with which all the Member States rushed to support the EU's ReArm programme.

15 Changes arising without a formal treaty reform is what Majone called 'integration by stealth'. Giandomenico Majone, *Dilemmas of European Integration: Ambiguities and Pitfalls of Integration by Stealth* (Oxford University Press 2005). More generally on the omnipresence of unwritten constitutional changes in polities with a written constitution, see Aileen Kavanagh, 'The Ubiquity of Unwritten Constitutionalism', I.CON 21 (2023), 968-975.

16 Ernst B. Haas, *The Uniting of Europe. Political, Economic, and Social Forces 1950-1957* (3rd edn, University of Notre Dame Press 2004); Tanja A. Börzel, 'Mind the Gap! European Integration Between Level and Scope', Journal of European Public Policy 12 (2005), 217-236; Andrew Moravcsik, 'Preferences, Power and Institutions in 21st-Century Europe', J. Common Mkt. Stud. 56 (2018), 1648-1674. Even when it fails, the EU does so in a forward-moving motion: Erik Jones, R. Daniel Kelemen and Sophie Meunier, 'Failing Forward? The Euro Crisis and the Incomplete Nature of European Integration', Comparative Political Studies 49 (2016), 1010-1034. For a critique, see Mark Gilbert, 'Narrating the Process: Questioning the Progressive Story of European Integration', J. Common Mkt. Stud. 46 (2008), 641-662.

17 The very name of the approach, 'integration through law' suggests that law is a vehicle for expanding EU's powers. Mauro Cappelletti, Monica Seccombe and Joseph H. H. Weiler (eds), *Integration through Law: Europe and the American Federal Experience* (De Gruyter 1986). See also, Loïc Azoulai, 'The Court of Justice and the Social Market Economy: The Emergence of an Ideal and the Conditions for Its Realisation', CML Rev. 45 (2008), 1335-1355 (1340); Editorial Comment, 'The Scope of Application of General Principles of Union Law: An Ever Expanding Union?', CML Rev. 47 (2010), 1589-1596.

18 Nicole Scicluna, 'Integration Through the Disintegration of Law? The ECB and EU Constitutionalism in the Crisis', Journal of European Public Policy 25 (2018), 1874-1891.

19 Less integration as a development might lead to an interesting dynamic: national constitutional courts would arguably find themselves in a position of greater legitimacy to review EU law, from the perspective of the focus in *Solange I* on progressive integration. I discuss such a scenario further in the conclusion in relation to the EU's external powers. I am grateful to Krisztina Kovács for raising this point.

are not mediated in the public sphere,[20] a shift in the balance of powers between EU institutions and/or the Member States, as well as EU action that cannot be easily reconciled with what the text of the treaties might reasonably allow.

What interests me, therefore, is the extent to which national constitutional courts register the EU's reconfiguration and how they reckon with it. Taking the perspective of reconfiguration will help us avoid existential questions (what is the EU?),[21] and instead focus on its specific features and characteristics as they develop over time.[22] Regardless of whether the EU's changes take the form of a treaty change or not, they significantly reconfigure the European Union in a manner that should, according to *Solange I*, be crucial for constitutional review at the national level. Here is how the Bundesverfassungsgericht assessed the state of the (then) European Community in 1974:

> 'The Community still lacks a democratically legitimate parliament directly elected by general suffrage which possesses legislative powers and to which the Community organs empowered to legislate are fully responsible on a political level; it still lacks, in particular, a codified catalogue of fundamental rights, the substance of which is reliably and unambiguously fixed for the future in the same way as the substance of the Basic Law and therefore allows a comparison and a decision as to whether, at the time in question, the Community law standard with regard to fundamental rights generally binding in the Community is adequate in the long term measured by the standard of the Basic Law with regard to fundamental rights (without prejudice to possible amendments) in such a way that there is no exceeding the limitation indicated, set by Article 24 of the Basic Law. As long as this legal certainty, which is not guaranteed merely by the decisions of the European Court of Justice, favourable though these have been to fundamental rights, is not achieved in the course of the further integration of the Community, the reservation derived from Article 24 of the Basic Law applies. What is involved is, therefore, a legal difficulty arising exclusively from the Community's contin-

20 Paul Linden-Retek, *Postnational Constitutionalism. Europe and the Time of Law* (Oxford University Press 2023), 5-6.

21 For a summary of those debates, see Walker (n. 12), 78-79. Much of the literature on constitutional courts in the EU dealt with how they see the EU as a polity and how that in turn influences their approach towards EU law. For example, Jiri Pribán, 'The Semantics of Constitutional Sovereignty in Post-Sovereign "New" Europe: A Case Study of the Czech Constitutional Court's Jurisprudence', I.CON 13 (2015), 180-199; Henrik P. Olsen, 'The Danish Supreme Court's Decision on the Constitutionality of Denmark's Ratification of the Lisbon Treaty', CML Rev. 50 (2013), 1489-1503.

22 *Bast* and *von Bogdandy* in that respect rightly see the treaties as a living instrument and argue there is a dynamic function of the EU's constitutional core. Jürgen Bast and Armin von Bogdandy, 'The Constitutional Core of the Union: On the CJEU's New Constitutionalism', Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No. 2024-06, available at SSRN: https://ssrn.com/abstract=4740888, 21.

uing integration process, which is still in flux and which will end with the present transitional phase.'[23]

The main finding of *Solange I*, namely that the EU does not provide for a satisfactory level of protection of fundamental rights, no longer applies. It is well-known that the Bundesverfassungsgericht reversed its position in *Solange II*, where it found that then, in 1986, the Community of the time indeed *did* have a proper catalogue of fundamental rights protection.[24] By so doing, the German court directly complied with its commitment to respect progressive integration. On a very general level, then, we may say that the Bundesverfassungsgericht expressly acknowledged the EU's reconfiguration when it comes to the protection of fundamental rights.[25]

Differently from the rosy fundamental rights story of the mid-eighties, the European Union followed a tumultuous path marred by external and internal crises. It is no longer obvious that its original *finalité* aligns with its contemporary integration trajectory.[26] The narrative of the EU as a peace project receded from the collective memory of the younger generation.[27] At the same time, the welfare state logic[28] virtually disappeared from mainstream economic policy after the fall of the Bretton Woods system,[29] giving rise instead to the dominance of neoliberal policies, a technocratic regulatory orientation,

23 FCC, *Solange I* (n. 2), para. 44.

24 FCC, *Solange II* (n. 2). This was specified further in FCC, order of 7 June 2000, 2 BvL 1/97, BVerfGE 102, 147 (*Banana Market Order*), para. 54, whereby the two systems should generally be comparable as to their level of protection of fundamental rights. The standard of review has over the years developed also to include the Charter of Fundamental Rights in fields where the EU fully harmonised an area. See FCC, order of 6 November 2019, 1 BvR 276/17, BVerfGE 152, 216 (*Right to be Forgotten II*). For a critique, 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 (21).

25 Ana Bobić, 'Developments in the EU-German Judicial Love Story: The Right to Be Forgotten II', GLJ 21 (2020), 31-39.

26 On the EU's overall lack of engagement with its contemporary and future purpose, see Linden-Retek (n. 20).

27 Peter J. Verovšek, 'Collective Memory and the Stalling of European Integration: Generational Dynamics and the Crisis of European Leadership', J. Common Mkt. Stud. Early View 63 (2025), 369-384. Although the very narrative of the EU as a peace project is today also put into question. See Aurélie D. Andry, *Social Europe, the Road not Taken* (Oxford University Press 2022) (showing how economic forces, mainly from the US, pushed the creation of the EU as an anti-communist bloc in the run-up to the Cold War); Signe R. Larsen, 'European Public Law After Empires', European Law Open 1 (2022), 6-25 (arguing that the creation of the EU was a way for failed European empires to establish a new set of external relations between Europe and its former colonies).

28 John G. Ruggie, 'International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order', IO 36 (1982), 379-415 (392).

29 Wolfgang Streeck, 'European Social Policy: Progressive Regression', MPIfG Discussion Paper 18/11, available at SSRN: https://ssrn.com/abstract=3303811.

and a fixation on price stability.[30] The EU faithfully followed global economic developments, with the formal separation of economic and monetary policy buttressing these developments, culminating in new unconventional modes of governance developed during the Euro crisis, thereby irrevocably transforming the EU's constitutional balance[31] and ideological focus.[32]

Despite having a fundamental rights catalogue on paper, the EU is again under pressure to justify its own human rights record, be it in relation to Frontex's actions at the EU's borders[33] or its increased outsourcing of migration control to third countries in return for hard cash.[34] Looking ahead, geopolitical pressures, thanks to the revived Trump-Putin friendship and a tariff-based muscular United States (US)-imperialism,[35] is pushing the EU into ramping up its defence spending[36] and wrestling with the need to succumb to the anti-competitive wishes of US tech giants.[37] The outlook is grim and the choices that will need to be made are without a doubt of great constitutional significance, regardless of the form in which they come about. What should constitutional courts do?

The German court's view in *Solange I* that the progress of EU integration is central to constitutional review should, in my view, lead constitutional courts to bear the responsibility of providing a public stage for deliberating matters concerning the EU's development and its future. It is not just that the EU lacks the traditional state-anchored democratic legitimacy, which thus

30 Kanad Bagchi, 'Depoliticizing Money: How the International Monetary Fund Transformed Central Banking', JIEL 27 (2024), 166-185; Anna Peychev, 'The Primacy of the European Central Bank: Distributional Conflicts Between Theory and Practice in the Pursuit of Price Stability', European View 22 (2023), 48-56 (50).

31 Mark Dawson and Floris de Witte, 'Constitutional Balance in the EU After the Euro-Crisis', M. L. R. 76 (2013), 817-844.

32 Bojan Bugaric, 'Europe Against the Left? On Legal Limits to Progressive Politics', LSE 'Europe in Question', Discussion Paper Series 61/2013, available at SSRN: https://ssrn.com/abstract=2215158.

33 See the pending appeal, ECJ, *WS and Others v. Frontex*, case no.C-679/23 P, seeking the annulment of EGC, *WS and Others v. European Border and Coast Guard Agency*, judgment of 6 September 2023, case no. T-600/21, EU:T:2023:492, where that court dismissed the action seeking to establish the non-contractual joint and several liability of Frontex.

34 Violeta Moreno-Lax, 'EU Constitutional Dismantling Through Strategic Informalisation: Soft Readmission Governance as Concerted Dis-Integration', ELJ 30 (2024), 29-59.

35 On these changes forming part of a more global turn away from neoliberalism, see Rune M. Stahl, 'The End of Economics Hegemony? Studying Economic Ideas in a Post-Neoliberal World', Review of International Political Economy 32 (2025), 1-18.

36 '"Watershed Moment": EU Leaders Agree Plan for Huge Rise in Defence Spending', Guardian, 6 March 2025, at <https://www.theguardian.com/world/2025/mar/06/watershed-moment-eu-leaders-close-to-agreeing-800bn-defence-plan-ukraine>, last access 15 April 2025.

37 'EU Assesses Big Tech Cases Ahead of Trump Arrival', Reuters, 14 January 2025, at <https://www.reuters.com/technology/eu-says-it-is-assessing-tech-cases-not-impacted-by-new-us-administration-2025-01-14/>, last access 15 April 2025.

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needs to be supplemented by an additional layer of control at the national level. It is rather that the EU relies on (supposedly neutral) law as the dominant method of making significant political (and constitutional) choices. But the examples of the EU's reconfiguration mentioned above are neither necessarily made through (hard) law, nor free from ideological and normative direction. Constitutional courts, also speaking the language of the law, are empowered to expose the misleadingly static character of EU law and highlight topics worthy of further deliberation, if necessary, by taking it outside the legal and into the political realm.

## III. National Constitutional Courts Dealing with the EU's Recent Reconfiguration

If my reading of *Solange I* is correct, it would mean that national constitutional courts actively use the substantive and procedural means at their disposal to track the EU's development and expose its dynamic trajectory. Why should they do this? The common account of the history of constitutional courts in the EU is that, faced with the principles of primacy and direct effect and the preliminary reference procedure, these institutions found their position and their authority over ordinary national courts jeopardised. To maintain their relevance, constitutional courts one after another imposed limits to the principle of primacy in judgments starting with *Solange I*.

Besides attempting to preserve their authority in a purely rational actor fashion, the assertiveness of constitutional courts willing to engage in constitutional conflict holds (indirect) deliberative potential.[38] Litigation that directly or indirectly concerns the EU's reconfiguration is thereby given, to some extent,[39] a public forum. Strategic litigation is in this context not a surprising phenomenon: courts are important political actors before which questions of political importance may be brought and discussed.[40] They are, in the words of Farahat, a 'forum for constitutional self-reflection'.[41] Aside

38 Ana Bobić, *The Individual in the Economic and Monetary Union. A Study of Legal Accountability* (Cambridge University Press 2024), 73-80.

39 Delineated by the respective constitutional powers of constitutional courts. For an overview of those powers of constitutional courts in the EU, see Ana Bobić, *The Jurisprudence of Constitutional Conflict in the European Union* (Oxford University Press 2022), 17-18.

40 Pola Cebulak, Marta Morvillo and Stefan Solomon, 'Introduction to the Special Issue: "Strategic Litigation in EU Law"', GLJ 25 (2024), 797-799.

41 Anuscheh Farahat, 'Re-Imagining the European (Political) Community Through Migration Law', Verfassungsblog, 4 March 2024, at <https://verfassungsblog.de/re-imagining-the-european-political-community-through-migration-law/>, last access 15 April 2025.

from the courtroom as a public space, courts exert influence on political institutions, who might be compelled to ensure deliberative processes. In that respect, their responsibility for tracking the EU's development should not be underestimated.

Traditionally, constitutional courts in the EU have broadly followed the German typology of review of EU acts.[42] *Solange I* is a decision where the Bundesverfassungsgericht performed fundamental rights review of secondary EU law. In addition to this type of review, the German court added to its arsenal also *ultra vires* review[43] and *identity* review.[44] The three heads of review differ according to their admissibility standard and the object of review;[45] however, my view is that the commitment to take account of the EU's reconfiguration extends to all situations when EU action is under review before national constitutional courts. Indeed, the Bundesverfassungsgericht, in its recent review of the *Own Resources* Decision that formed part of the Next Generation EU programme (where it carried out *ultra vires* and *identity* review), also focused on the progress and development of the EU:

> 'Over time, the European Union has transitioned from the classic model of financing international organisations, which rely on state party contributions, to a financial architecture based on own resources – although it is submitted that, in terms of financial economics, the EU's own resources are basically still 'camouflaged member contributions' ([…]). It is incumbent upon the Member States to provide financing to the European Union, and the former have the final say over the allocation of financial resources to the latter. The Member States have refrained from conferring upon the European Union direct taxation or levying powers.'[46]

The obligation to observe the EU's reconfiguration in my view pervades all constitutional review of EU action at the national level. To begin with, not every constitutional conflict neatly falls into one of the three heads of review as a matter of objective truth. Rather, it does so as a matter of

42 For a detailed presentation of the three types of constitutional review before constitutional courts in the EU, see Bobić, *Jurisprudence of Constitutional Conflict* (n. 39).

43 First mentioned in its judgment concerning the German ratification of the Maastricht Treaty (FCC, order of 12 October 1993, 2 BvR 2134, 2159/92, BVerfGE 89, 155 – *Maastricht Treaty*) and elaborated upon in Honeywell (FCC, order of 6 July 2010, 2 BvR 2661/06, BVerfGE 126, 286-311 – *Honeywell*).

44 Introduced in its judgment concerning the German ratification of the Lisbon Treaty (FCC, judgment of 30 June 2009, BVerfGE 123, 267 – *Lisbon Treaty*).

45 Philip M. Bender, 'Ambivalence of Obviousness: Remarks on the Decision of the Federal Constitutional Court of Germany of 5 May 2021', European Public Law 27 (2021), 285-304 (292-295).

46 FCC, judgment of 6 December 2022, BVerfGE 164, 193-347 (para. 166) – *Own Resources*.

construction. Put simply, choosing to engage in constitutional conflict is as much of a (small p) political decision as it is to decide to review it under one or another head of review. By constructing the case as pertaining to one category or another, constitutional courts pick their battle arena, aware of the features that each of them holds. In keeping within the parameters of constructive constitutional conflict – based on mutual respect and sincere cooperation between national constitutional courts and the Court of Justice – the commitment to take into account the EU's reconfiguration should remain a 'crucial consideration' regardless of the head of review chosen by the constitutional court.[47] The merits and pitfalls of each specific head of review generated a veritable cottage industry of academic commentary,[48] myself included.[49] In this paper, however, the choice of the head of review will be treated only tangentially: not as the central criterion of assessment of the state of the EU's constitution, but rather as one consideration among many.

In the subsections ahead I look at two examples of the EU's reconfiguration and to what extent they feature in the reflections of national constitutional courts when they decide on situations involving EU matters. The first concerns the change that took place after the Euro crisis, shifting from a rights-based focus on the individual to the Member States and the protection of their budgets. That reconfiguration should intuitively have been welcomed by constitutional courts as it moves control back to the national level. The second is a policy that pertains to core State powers and yet is increasingly regulated by the EU: criminal law. Here, EU regulation gradually moves from a paradigm of judicial cooperation and mutual recognition towards the regulation of criminal law. Again, one would expect constitutional courts to guard this area as their prerogative. What in fact happened at the EU and national level will be explored in the following subsections.

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47 Or, of course, by the parties, who will have framed their case as one or another type of limit to the principle of primacy.

48 On identity review, see in this issue the contribution of Julian Scholtes, 'Freeing Constitutional Identity from Unamendability: *Solange I* as a Constitutional Identity Judgment', HJIL 85 (2025), 547-568.

49 Ana Bobić, 'Constructive Constitutional Conflict as an Accountability Device in Monetary Policy' in: Mark Dawson (ed.), *Towards Substantive Accountability in EU Economic Governance* (Cambridge University Press 2023); Ana Bobić, 'Forging Identity-Based Constructive Constitutional Conflict in the European Union' in: Mark Dawson and Markus Jachtenfuchs (eds), *Autonomy Without Collapse in a Better European Union* (Oxford University Press 2022); Ana Bobić and Mark Dawson, 'Making Sense of the "Incomprehensible": The PSPP Judgment of the German Federal Constitutional Court', CML Rev 57 (2020), 1953-1998.

## 1. From Individual-Oriented to Member State-Oriented in the Economic and Monetary Union (EMU)

The EU's economic constitution has, at least until the Maastricht Treaty's inclusion of EU citizenship into primary law, been the dominant source of and rationale for granting and expanding the rights of individuals.[50] Free movement rights have been elevated to the status of fundamental rights, placing cross-border economic activity at the centre of the individual rights discourse.[51] On this view, individuals were instrumental to the greater aim of legitimising the EU as an autonomous system of law and governance.[52] With the formal introduction of EU citizenship and the subsequent decisions of the Court of Justice,[53] EU citizenship has arguably acquired a self-standing quality moving beyond its original economic mover paradigm.[54]

Even this market-oriented focus on the individual significantly changed during the Euro crisis through the application of strict conditionality in granting financial assistance to Member States in financial distress. Judicial review of measures of economic governance on both the national and EU level endorsed that logic, to the detriment of the focus on the social rights of

50 Bast and von Bogdandy, 'The Constitutional Core of the Union' (n. 22), 19; Joana Mendes, 'Taking on the Structural Weakness of EU Law's General Principles', European Law Open 2 (2023), 693-696 (694).

51 Augustín J. Menéndez, 'Which Citizenship? Whose Europe? – The Many Paradoxes of European Citizenship', GLJ 15 (2014), 907-933 (908).

52 Marco Dani, 'The Subjectification of the European Citizen' in: Loïc Azoulai, Ségolène Barbou des Places and Etienne Pataut (eds), *Constructing the Person in EU Law. Rights, Roles, Identities* (Hart Publishing 2016), 55-88 (61); Joseph H. H. Weiler, 'Van Gend en Loos: The Individual as Subject and Object and the Dilemma of European Legitimacy', I.CON 12 (2014), 94-103 (102).

53 For example, ECJ, *Mary Carpenter v. Secretary of State for the Home Department*, judgment of 11 July 2002, case no. C-60/00, EU:C:2002:434; ECJ, *Gerardo Ruiz Zambrano v. Office national de l'emploi*, judgment of 8 March 2011, case no. C-34/09, EU:C:2011:124. However, the Court has backtracked from this progressive trend in ECJ, *Elisabeta Dano and Florin Dano v. Jobcenter Leipzig*, judgment of 11 November 2014, case no. C-333/13, EU:C:2014:2358 and ECJ, *Jobcenter Berlin Neukölln v. Nazifa Alimanovic and Others*, judgment of 15 September 2015, case no. C-67/14, EU:C:2015:597. A similar trend is proposed to the Court in the Opinion of Advocate General Richard de la Tour in ECJ, *E. K. v. Staatssecretaris van Justitie en Veiligheid*, opinion of Advocate General Richard de la Tour on 17 March 2022, case no. C-624/20, EU:C:2022:194. See also Rui Lanceiro, 'Dano and Alimanovic: the Recent Evolution of CJEU Caselaw on EU Citizenship and Cross-Border Access to Social Benefits', UNIO – EU Law Journal 3 (2017), 63-77.

54 Eleanor Spaventa, 'From Gebhard to Carpenter: Towards a (Non-)Economic Constitution', CML Rev. 41 (2004), 743-773 (744). For a convincing critique of this narrative, see Charlotte O'Brien, 'Civis Capitalist Sum: Class as the New Guiding Principle of EU Free Movement Rights', CML Rev. 53 (2016), 937-977.

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individuals.[55] Specifically, the logic of conditionality is at its core an insurance that the Member States receiving assistance will continue to pursue a sound budgetary policy. This in turn means that it would not become necessary for Member States to cover the liabilities of others in contravention of the prohibition of monetary financing under Article 125 Treaty on the Functioning of the European Union (TFEU).[56] As a result, strict conditionality that features in Article 136(3) TFEU, endorsed both in financial assistance and as a relevant consideration in designing the quantitative easing programmes of the European Central Bank (ECB), had different outcomes across the EU, with little ability for the affected citizens to contest them.

By the same token, the Court of Justice in its press release following the *Weiss* judgment of the Bundesverfassungsgericht put the equality of Member States at the heart of its argument. It restated the jurisprudence concerning the primacy of EU law, concluding: 'That is the only way of ensuring the equality of Member States in the Union they created.'[57] In the context of the EMU, this resulted in an emphasis on conditionality and a disregard of the major re-distributive effects of such decisions for citizens across different Member States and different socio-economic groups across the EU.

The way that the Court of Justice previously applied and interpreted the principle of equality of Member States differs from its current approach. First, equality of Member States was used to ensure the uniform and effective application of EU law across its territory and, importantly, to all its citizens.[58] In *Commission v. Italy*, the Court stressed that Member States' equality before EU law ensures the equal treatment of their citizens.[59] Second, the Court

55 The literature has shown that austerity permanently changed the social fabric of debtor Member States. In respect of Greece, see Margot E. Salomon, 'Of Austerity, Human Rights and International Institutions', ELJ 21 (2015), 521-545 (523-527); Manos Matsaganis, *The Greek Crisis: Social Impact and Policy Responses* (Friedrich Ebert Stiftung 2013), 12-13; Aristea Koukiadaki and Lefteris Kretsos, 'Opening Pandora's Box: The Sovereign Debt Crisis and Labour Market Regulation in Greece', ILJ 41 (2012), 276-304.

56 ECJ, *Thomas Pringle v. Government of Ireland and Others*, judgment of 27 November 2012, case no. C-370/12, EU:C:2012:756, paras 143-147.

57 ECJ, *Press Release Following the Judgment of the German Constitutional Court of 5 May 2020*, press release of 8 May 2020, press release no. 58/20, at <https://curia.europa.eu>, last access 15 April 2025. The logic seems to be picked up from Federico Fabbrini, 'After the OMT Case: The Supremacy of EU Law as the Guarantee of the Equality of Member States', GLJ 16 (2015), 1003-1023. For a critique of the press release, see Justin Lindeboom, 'Is the Primacy of EU Law Based on the Equality of the Member States? A Comment on the CJEU's Press Release Following the PSPP Judgment', GLJ 21 (2020), 1032-1044.

58 See also, Lucia S. Rossi, 'The Principle of Equality Among Member States of the European Union' in: Lucia S. Rossi and Federico Casolari (eds), *The Principle of Equality in EU Law* (Springer 2017), 3-42 (15-16).

59 ECJ, *Commission of the European Communities v. Italian Republic*, judgment of 7 February 1973, case no. 39/72, EU:C:1973:13, para. 24.

stated that equal treatment of Member States does not apply where differentiated circumstances exist. In consequence, the Court distinguished between formal and substantive equality: '[an] appearance of discrimination in form may therefore correspond in fact to an absence of discrimination in substance'.[60] Third, the principle of equality may be overridden if concerns of market unity so require.[61] The rationale is simple: the application of differentiated measures will ultimately result in homogeneous conditions across the market. Ever since the conflict between the Court of Justice and the Bundesverfassungsgericht in respect of the quantitative easing programmes of the ECB, equality of Member States is now firmly at the centre of the former court's jurisprudence concerning the primacy of EU law, which follows a standardised formula: primacy is a tool for ensuring the equality of Member States.[62]

Have constitutional courts in any way acknowledged or reacted to this reconfiguration? We may observe two opposing dynamics, and it is of course no coincidence that the different reactions follow the debtor-creditor lines among the Member States. First, constitutional courts might take an individual rights-oriented approach, given their traditional role as guardians of fundamental rights (a role that also led the Bundesverfassungsgericht to the *Solange I* outcome). In this scenario, we would therefore expect constitutional courts defying the turn towards (almost unconditionally) protecting the budgetary sovereignty of Member States. This is what we have seen unfold in Portugal,[63] where the Constitutional Court declared unconstitutional several provisions of the 2012 State Budget Law[64] enacted as part of

60 ECJ, *Italian Republic v. Commission of the European Economic Community*, judgment of 17 July 1963, case no. 13/63, EU:C:1963:20, para. 4.

61 ECJ, *Jean-François Deschamps and others v. Office national interprofessionnel des viandes, de l'élevage et de l'aviculture*, judgment of 13 December 1989, case nos C-181/88, C-182/88 and C-218/88, EU:C:1989:642, para. 21.

62 ECJ, *Proceedings Brought by RS*, judgment of 22. February 2022, case no. C-430/21, EU:C:2022:99, para. 55; ECJ, *Criminal Proceedings Against PM and Others*, judgment of 21 December 2021, case nos C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034, para. 249.

63 For a thorough report about legal changes and the relevant case law of the Portuguese Constitutional Court, see Rita De Brito Gião Hanek and Daniele Gallo, *Constitutional Change Through Euro Crisis Law: Portugal*. (European University Institute 2015), at <https://eurocrisislaw.eui.eu/country-reports>, last access 15 April 2025, Annex I.

64 Portuguese Tribunal Constitucional, *Suspension of the Christmas-Month and Holiday-Month Payments of Annual Salaries*, judgment of 5 July 2012, no. 353/12. The relevant provisions included a measure under which the Christmas-month (13th month) and holiday-month (14th month), or any equivalent, payments were suspended in 2012-2014, both for persons who receive salary-based remunerations from public entities and for persons who receive retirement pension via the public social security system. The same was decided in respect of the State Budget Law of 2013 in Portuguese Tribunal Constitucional, *Review of the Constitutionality of Norms Contained in the State Budget Law for 2013*, judgment of 5 April 2013, no. 187/13.

the austerity measures agreed with the Troika, and which according to that court disproportionately disadvantaged public sector employees and pensioners, as opposed to private workers, thereby breaching the principle of just distribution of public costs. The Portuguese government of the time ultimately found a way to align the austerity obligations it undertook with constitutional requirements as interpreted by the Constitutional Court, and the case law just mentioned stands as the lone example of an attempt to resist the turn away from the individual during the Euro crisis.[65]

The second dynamic we witnessed is that of constitutional courts endorsing a shift in the focus from the individual to the Member States, under which logic the national level is the one to make crucial budgetary decisions. In the context of the litigation concerning the Public Sector Purchase Programme (PSPP) of the ECB, equality of Member States was re-emphasised as a matter of central concern: the Bundesverfassungsgericht insisted that a risk-sharing programme could not find its place under the Treaties as it would breach the prohibition of monetary financing. This is so because it would otherwise remove from the Member States their equal sovereign right to determine their budgetary policy.

It appears that the approach taken in national case law depends on whether we are looking at these issues from the perspective of a debtor or a creditor Member State. In other words, because the Euro crisis did not in fact lead to a situation where fundamental rights of German citizens were breached, the Bundesverfassungsgericht did not oppose the reconfiguration of the normative focus from the individual to the Member States that took place during the Euro crisis. And while the Portuguese Constitutional Court did take steps to oppose such a reconfiguration, courts in debtor states were ultimately not the decisive decision-makers during the crisis.[66] Reconfiguration therefore proceeded to take shape.

Another difference between the two examples is the head of review: while the Portuguese court performed a fundamental rights review, the German counterpart was instead carrying out *ultra vires* and *identity* review. While of course the respective strengths of each head of review depend heavily on the national (historical) context, one may conclude that fundamental rights review, due to significant steps taken at the EU level to demonstrate its own

65 Mariana Canotilho, Teresa Violante and Rui Lanceiro, 'Austerity Measures Under Judicial Scrutiny: the Portuguese Constitutional Case-Law', Eu Const. L. Rev. 11 (2015), 155-183.

66 See also, for example, Greek Council of State, Decision of 20 February 2012, decision no. 668/2012, at <https://www.dsanet.gr/Epikairothta/Nomologia/668.htm>, last access 15 April 2025. For further information, see Afroditi Marketou and Michail Dekastros, *Constitutional Change Through Euro Crisis Law: Greece* (European University Institute 2015), at <https://eurocrisislaw.eui.eu/country-reports>, last access 15 April 2025, Section X.8.

capacity to protect fundamental rights, is the least 'dangerous' head of review. Likewise at the national level, it seems it is the easiest for political institutions to remedy, either by superficial changes to the relevant policy, or by providing more convincing justifications, grounded partly in their obligations under EU law. *Ultra vires* and *identity* review, conversely, directly place obligations on the political institutions to change course, even if contrary to what EU law requires.

## 2. From Cooperation to Regulation in Criminal Law

The idea that the monopoly of coercion belongs to states was established already by thinkers such as Bodin, Hobbes, and ultimately Weber, who called it the fundamental characteristic of statehood. Criminal law is traditionally a core State power,[67] and was in fact explicitly proclaimed part of Germany's constitutional identity by the Bundesverfassungsgericht.[68] The field is however also witnessing a slow but steady rise of EU regulation.[69] The abolition of the pillar structure in the Lisbon Treaty and today's Title V, Chapter 4 of the TFEU[70] empower the EU to pass minimum harmonisation rules concerning judicial cooperation in criminal matters based on mutual recognition, the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension. The EU may also enact measures supporting Member State action in crime prevention. Besides, the Treaty authorises the establishment of Eurojust, and the possibility to establish the European Public Prosecutor's Office.

In a borderless internal market, judicial cooperation in criminal matters is an important way of ensuring criminal justice. Naturally the EU made ample use of the above listed provisions of the TFEU and continued the logic of mutual recognition to sovereign acts of coercion, such as criminal convictions and arrest warrants.[71] Yet, mutual recognition in criminal matters raised a new set of issues for fundamental rights protection and mutual trust between

67 Philipp Genschel and Markus Jachtenfuchs, 'More Integration, Less Federation: the European Integration of Core State Powers', Journal of European Public Policy 23 (2016), 42-59.

68 FCC, *Lisbon Treaty* (n. 44), para. 252.

69 Irene Wieczorek, *The Legitimacy of EU Criminal Law* (Bloomsbury Publishing 2020); Christopher Harding and Jacob Öberg, 'The Journey of EU Criminal Law on the Ship of Fools – What Are the Implications for Supranational Governance of EU Criminal Justice Agencies?', Maastricht J. Eur. & Comp. L. 28 (2021), 192-211.

70 Articles 82 to 86 TFEU.

71 Communication from the Commission to the Council and the European Parliament – Mutual Recognition of Final Decisions in Criminal Matters of 26 July 2000, COM (2000) 495.

the Member States.[72] These issues triggered a regulatory need at the EU level. For example, in addition to judicial cooperation in criminal matters by way of the European Arrest Warrant, the EU is increasingly regulating the criminal procedure in the Member States themselves.[73] A further integration step is the creation of the European Public Prosecutor's Office, as an enhanced cooperation mechanism.[74] The logic behind this mechanism is partially to regulate also substantive criminal law, where financial interests of the EU are at stake.[75] EU regulation in other fields, such as data protection, also applies to areas traditionally in the criminal law competence of Member States.[76]

This is a new dynamic that I argue represents another reconfiguration of the EU. The EU's initial activity in criminal matters was confined to mutual recognition of decisions that were still autonomously made by the Member States. To enhance such recognition further, the EU moved towards regulation, thereby influencing not only the free movement of sovereign acts of coercion,[77] but also under what conditions such acts can be made by the Member States. At first, this concerned minimum standards of human rights in the criminal procedure. In this context, it is important to keep in mind that criminal law has a high path-dependency and is based on diverse traditions of

72 Kalypso Nicolaïdis, 'Trusting the Poles? Constructing Europe Through Mutual Recognition', Journal of European Public Policy 14 (2007), 682-698 (685); Markus Möstl, 'Preconditions and Limits of Mutual Recognition', CML Rev. 47 (2010), 405-436 (412-420). Evidence that this is a concern of national constitutional courts may be seen in the number of preliminary references asking for a fundamental rights based exception to the execution of a European Arrest Warrant. See, for example, ECJ, *E. D. L. (Motif de refus fondé sur la maladie)*, judgment of 18. April 2023, case no. C-699/21, EU:C:2023:295; ECJ, *GN (Motif de refus fondé sur l'intérêt supérieur de l'enfant)*, judgment of 21. December 2023, case no. C-261/22, EU:C:2023:1017.

73 See, for example, Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, OJ 2012 L 142/1; Directive 2016/343/EU of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, OJ 2016 L 65/1.

74 Council Regulation 2017/1939/EU of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office, OJ 2017 L 283/1.

75 See Directive 2017/1371/EU of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, OJ 2017 L 198/29.

76 See for example, based on the EU competence in data protection, Directive 2016/680/EU of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA, OJ 2016 L 119/89.

77 Steve Peers, 'Mutual Recognition and Criminal Law in the European Union: Has the Council Got It Wrong?', CML Rev. 41 (2004), 5-36 (24).

procedural and substantive criminal law across Member States.[78] That means that each directive regulating an aspect of the criminal procedure 'lands' into a very different legal system, producing a diversity of effects across the Member States. Faced with such immense changes, national courts are arguably using the preliminary reference procedure to invite the Court of Justice to extend harmonisation in this area further.

The admissibility of evidence in the criminal procedure is an area clearly demonstrating this dynamic. According to Article 82(2)(a) TFEU, the EU may establish minimum rules concerning mutual admissibility of evidence between Member States. This has not happened, which means that the Member States retain the regulation of evidence collection and appraisal in the criminal procedure. At the same time, the EU does regulate matters such as the right to information in the criminal procedure or the right to be assisted by a lawyer. These directives provide that for breaches of rights provided therein, Member States should provide effective remedies,[79] but without specifying what those are. Is this obligation met with a simple right of appeal against the criminal conviction? Or would it be necessary that evidence collected through such breaches be automatically dismissed by the trial judge? What if national legislation regulates the admissibility of evidence in the pre-trial stage? Overall, what consideration should be given to the fact that Member States have significantly different approaches to the use of evidence in the criminal procedure?[80]

National courts were not oblivious to this problem and submitted a number of preliminary references asking whether EU law now essentially requires national judges to dismiss evidence collected in breach of the minimum harmonisation directives, regardless of their powers under national

78 Martin Böse, Frank Meyer and Anne Schneider (eds), Conflicts of Jurisdiction in Criminal Matters in the European Union. Volume I: National Reports and Comparative Analysis (Nomos 2013). In the same vein, see also, FCC, Lisbon Treaty (n. 44).

79 For example, Article 19 of Directive 2016/800/EU of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, OJ 2016 L 132/1; Article 8(2) of Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, OJ 2012 L 142/1; Article 12 of Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, OJ 2013 L 294/1; and Article 10 of Directive 2016/343/EU of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, OJ 2016 L 65/1.

80 See Katalin Ligeti, Balázs Garamvölgyi, Anna Ondrejová, and Margarete von Galen, 'Admissibility of Evidence in Criminal Proceedings in the EU', eucrim 3 (2020), 201-208.

law.[81] At first, the Court was more or less clear in its approach that admissibility of evidence is a matter regulated exclusively by national law, to the extent that Articles 47 and 48 of the Charter are complied with.[82] It then expanded its approach somewhat, by mirroring[83] what the European Court of Human Rights (ECtHR) does when it comes to admissibility of evidence and Article 6 European Convention on Human Rights (ECHR). More specifically, the ECtHR is of the view that admissibility of evidence remains a matter for national law, while the role of the ECtHR is to assess whether the overall fairness of the procedure has been prejudiced when determining compliance with Article 6 ECHR.[84]

While acknowledging its case law described in the previous paragraph, the Court of Justice took a remarkable turn from this case law and proclaimed, in the context of the Directive concerning the European Investigation Order (EIO),[85] that if evidence is collected in breach of the rights of defence and procedural fairness, national judges *must* dismiss such evidence. To appreciate fully the innovation that took place, it is crucial to note that the EIO Directive itself is an instrument of mutual recognition, therefore an act adopted under Article 82(1)(a) of the TFEU. It therefore does not in any way touch upon the regulation of the criminal procedure itself, but merely sets up an instrument of evidence sharing across the EU. Similarly to the previously mentioned minimum harmonisation directives concerning specific rights in the criminal procedure, Article 14(1) of the EIO Directive imposes an obligation for the Member States to provide for effective remedies. The second sentence of Article 14(7) of the same directive further states: 'Without prejudice to national procedural rules Member States shall ensure that in criminal proceedings in the issuing State the rights of the defence and the fairness of the proceedings are respected when assessing evidence obtained through the EIO.'

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81 See ECJ, *Criminal Proceedings against AB*, judgment of 7 September 2023, case no. C-209/22, EU:C:2023:634; ECJ, *Criminal Proceedings against M. N.*, judgment of 30 April 2024, case no. C-670/22, EU:C:2024:372; ECJ, *Criminal Proceedings against M. S., J. W., M. P.*, judgment of 5 September 2024, case no. C-603/22, EU:C:2024:685. The criminal law literature is critical of the lack of harmonisation of rules on evidence. See, Michele Caianiello, 'To Sanction (or Not to Sanction) Procedural Flaws at EU Level? A Step Forward in the Creation of an EU Criminal Process', European Journal of Crime, Criminal Law and Criminal Justice 22 (2014), 317-329 (321, 324).

82 ECJ, *Criminal Proceedings against AB* (n. 81) [58], [61].

83 ECJ, *Criminal Proceedings against K. B. and F. S.*, judgment of 22 June 2023, case no. C-660/21, EU:C:2023:498, para. 48.

84 For example, ECtHR, *Habran and Dalem v. Belgium*, judgment of 17 January 2017, case nos 43000/11 and 493380/11, CE:ECHR:2017:0117JUD004300011, para. 94.

85 Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, OJ L 130/1.

The Court of Justice focused on that provision, taking it to mean 'that evidence on which a party is not in a position to comment effectively must be excluded from the criminal proceedings'.[86] The Court did not find it necessary to connect this to any of the minimum harmonisation directives which regulate the criminal procedure. It also did not refer at all to the ECtHR case law it previously endorsed.[87] This finding will inevitably influence divergent national rules on the use of evidence in the criminal procedure.[88] It might also raise questions as to whether it applies only to situations where an EIO is used or in all criminal law cases. The magnitude of the reconfiguration at play here is hidden behind detailed which Member States could, but did not, harmonise.

Is this the sort of reconfiguration that should fall under the scope of progressive integration that national constitutional courts should acknowledge? Or should criminal law remain among those areas of law where EU law has but a limited bite? Two decisions of constitutional courts seem to mitigate in favour of the latter approach, while relying on *identity* review. This seems to me only natural given that we are speaking about the fundamental characteristic of statehood, to recall Weber. The Italian Constitutional Court, in *MAS and MB*, concluded that substantive criminal law is not regulated by EU law and that it will continue to review it against possible encroachments into the 'supreme principles of the constitutional system'.[89] The Bundesverfassungsgericht also used *identity* review in its encounter with the European Arrest Warrant: it declared that the right to a fair trial is inextricably linked to human dignity, part of the unamendable core of the Grundgesetz.[90] To this we may add the German court's statement from its *Lisbon Treaty* judgment: 'In this important area for fundamental rights any transfer of sovereign rights beyond intergovernmental cooperation may only lead to harmonisation for specific cross-border situations on restrictive con-

86 ECJ, *Criminal Proceedings against M. N.* (n. 81), para. 130.

87 See n. 81.

88 For a detailed presentation of differences in Member State regulation of rules on admissibility and exclusion of evidence, see Elodie Sellier and Anne Weyembergh, *Criminal Procedural Laws Across the European Union – A Comparative Analysis of Selected Main Differences and the Impact They Have Over the Development of EU Legislation* (European Parliament 2018), 48-52.

89 Italian Corte Costituzionale, *MAS and MB*, judgment of 10 April 2018, Decision 115/2018, para. 8. For a further analysis of the litigation, including the two preliminary references that were submitted to the Court of Justice, see Clara Rauchegger, 'National Constitutional Rights and the Primacy of EU Law: MAS', CML Rev 55 (2018), 1521-1547.

90 FCC, order of 15 December 2015, 2 BvR 2735/14, BVerfGE 140, 317 (*Identitätskontrolle*), para. 34.

ditions; in principle, substantial freedom of action must remain reserved to the Member States here.'[91]

The Member States regulate their criminal procedures in a complete and coherent manner, which might mean that procedural safeguards are provided at different stages of the criminal procedure, such as the pre-trial or the trial stage.[92] Introducing piecemeal solutions that deal with specific parts of the criminal procedure risk intervening into the overall logic of fairness envisaged in a specific national system. *Solange* there is no harmonisation of admissibility of evidence at the EU level which addresses the regulatory differences between the Member States and takes account of the coherence of national criminal procedures, national constitutional courts should continue to review EU law that poses risks for fundamental rights protection in the criminal procedure.

## IV. The Relevance of Reconfiguration for Constitutional Conflict in the Future

In this paper my aim was to show the lasting legacy of *Solange I* in shaping contemporary constitutional conflict: by committing to take account of the EU's reconfiguration (called progressive integration by the German court) as crucial for the review of EU action, the judgment created conditions for dialogue between EU and national courts in respect of its development. It also, importantly, opened up space for testing the less formal, but no less important, reconfigurations of power and competence that slowly but surely change the EU. I would like to close this paper with a brief flagging of two further areas of EU action where an important reconfiguration may be taking place and that might prove as areas where further constructive constitutional conflict might emerge.

First, the EU's external relations appear to be at an important crossroad. The Court of Justice decided in *KS and KD*[93] that its power of reviewing the EU's external action against fundamental rights standards in the Common Foreign and Security Policy stops only when it comes to reviewing 'political

91 FCC, *Lisbon Treaty* (n. 44), para. 253.

92 Silvia Allegrezza and Anna Mosna, 'Cross-Border Criminal Evidence and the Future European Public Prosecutor: One Step Back on Mutual Recognition?' in: Lorena Bachmaier Winter (ed.), *The European Public Prosecutor's Office. The Challenges Ahead* (Springer 2018), 141-164 (146).

93 See, ECJ, *KS and KD v. Council of the European Union, European Commission, European External Action Service and European Commission*, judgment of 10 September 2024, case nos C-29/22 P and C-44/22 P, EU:C:2024:725, paras 116-117.

and strategic choices'. It therefore found that the Treaty limit to its jurisdiction in Article 24(1) TEU and Article 275 TFEU in the Common Foreign and Security Policy (CFSP) applies only to this elusive category, which only the Court itself is entitled to interpret. On the one hand, constitutional courts may find this contrary to the text of the treaties and see it as a sign of encroachment they should resist. On the other hand, external EU action takes place – as its name suggests – outside the EU's borders. This means that it is highly unlikely that any national court would find itself with jurisdiction to decide on possible fundamental rights breaches outside its borders.[94] While it is true that national courts might mandate its own authorities to comply with fundamental rights also when acting abroad, it is less clear whether this will be possible situations in which they act with EU agencies such as Frontex; or in situations where fundamental rights jurisdiction is increasingly blurred.[95] In that respect, constitutional courts may welcome this development as one demonstrating the EU's commitment to protect fundamental rights.

A similar dynamic seems to be taking shape in relation to the economic policies of Member States. The new Stability and Growth Pact (SGP), besides placing a strong emphasis on the ideology of austerity, appears to move, slowly but surely, beyond economic coordination into a genuine regulation of the way in which national economic policy is done. The Council is able to issue non-binding recommendations concerning national net expenditure paths, but such a recommendation then plays a strong role in the corrective arm of the SGP. Coupled with the conditionality[96] embedded in the Next Generation EU programme, economic policies of Member States seem destined to follow the trajectory of criminal law: considered a core state power (again explicitly proclaimed part of constitutional identity by the Bundesverfassungsgericht),[97] economic policy is increasingly regulated by the EU despite a formal treaty change that would explicitly confer such a competence to the EU.

94 On this point extensively, see ECJ, *KS and KD v. Council of the European Union, European Commission, European External Action Service and European Commission*, opinion of Advocate General Ćapeta on 23 November 2023, case nos C-29/22 P and C-44/22 P, EU:C:2023:901, paras 134-144.

95 Giulia Raimondo, 'Beyond Progress: Interrogating the Limits of Jurisdiction and Migrant Rights Through Negative Dialectics', HJIL 84 82024), 815-842.

96 The conditionality in the NGEU is not as 'existential' as the one that we witnessed in respect of financial assistance, but the size and interest of the Member States in using NGEU funds shows that it remains an important element for the Commission to monitor and disburse funds.

97 FCC, *Lisbon Treaty* (n. 44).

Are constitutional courts under the *Solange I* commitment to progressive integration always supposed to non-critically accept the EU's reconfiguration? I would think not. National constitutional courts are to keep in mind the progress of European integration when the possibility of a constitutional conflict arises. In line with their role as the Court of Justice's interlocutor and 'challenger', their role is continuously to track and monitor the EU's developments. Although politically salient issues will inevitably arise before courts,[98] they are also in an important position to reroute discussions about political choices horizontally, i. e., to the political branches of power,[99] and steer the EU's reconfiguration towards a more formal, deliberative setting.

98 This results from the new constitutionalism that we witnessed in the European Union from its very beginnings. More generally, see Ran Hirschl, *Towards Juristocracy. The Origins and Consequences of the New Constitutionalism* (Harvard University Press 2007).

99 If we are to take seriously the criticism in the literature that courts problematically reduce the deliberative potential offered by legislative institutions. See, Nik de Boer, *Judging European Democracy. The Role and Legitimacy of National Constitutional Courts in the EU* (Oxford University Press 2023); Martijn van den Brink, 'Justice, Legitimacy and the Authority of Legislation within the European Union', M. L. R. 82 (2019), 293-318.

# Freeing Constitutional Identity from Unamendability: *Solange I* as a Constitutional Identity Judgment

Julian Scholtes*
University of Glasgow School of Law, Glasgow, United Kingdom
*julian.scholtes@glasgow.ac.uk*



## Abstract

Despite prominently featuring the concept of constitutional identity throughout its reasoning, the relevance of *Solange I* to the German Federal Constitutional Court's doctrine of constitutional identity has been all but eclipsed by the Court's judgment on the Lisbon Treaty 35 years later. This article makes the case for recovering *Solange I*'s relevance as a constitutional identity judgment. The conception of constitutional identity in *Solange I* is fundamentally distinguished from that in *Lisbon* by a near lack of references to the eternity clause of Article 79(3) Basic Law. *Solange I* bases itself on a notion of constitutional identity that seems explicitly susceptible to constitutional amendment. This article will use the window that *Solange I* offers to a conception of constitutional identity untethered from unamendability in order to challenge both the plausibility and normative desirability of linking the two. Constitutional identity, especially where it is used to set limits to the primacy of EU law, does not need to be linked to unamendability. Understanding the former as intrinsically linked to the latter gives rise to three problems: First, the problem of the hollow legitimacy of constitutional

* The author is a Lecturer in Public Law at the University of Glasgow.

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identity claims ostensibly grounded in the 'higher legitimacy' of acts of constituent power; second the problem of the democratic costs imposed by an increased mobilisation of amendment limits against the power of other constitutional orders, and finally, the problem of the normative mismatch between the normative considerations informing constitutional amendment limits and those informing limits to the reach of EU law. 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.

## Keywords

Solange – constitutional identity – unamendability – eternity clause – identity review – constitutional amendment

## I. Introduction

Even though *Solange I* contains one of the earliest references of the German Federal Constitutional Court (GFCC) to the concept of constitutional identity, it is often seen at a distance to that concept. Its relevance to constitutional identity has since been eclipsed by the GFCC's later pronouncements on the concept in *Lisbon* and beyond. Rather than asserting a particularistic sense of constitutional identity, *Solange* may be better understood as a defence of universal principles of constitutionalism against a legal order that had not yet sufficiently internalised these principles.[1] The commonly conjured triptych of the GFCC's review powers vis-à-vis EU law – fundamental rights review, *ultra vires* review, and constitutional identity review – also attests to a fundamental distance between the gist of *Solange* and the idea of constitutional identity.

However, this article makes the case that we should take *Solange I* seriously as a constitutional identity judgment. Doing so allows us to fundamentally question the way in which we have later come to construe constitutional identity as a normative resource. One of the most striking aspects of

1 For such a 'cosmopolitan' conception of national constitutional challenges to transnational legal authority, see Mattias Kumm, 'The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State' in: Jeffrey L. Dunoff and Joel P. Trachtman (eds), *Ruling the World?: Constitutionalism, International Law, and Global Governance* (Cambridge University Press 2009), 258-324.

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*Solange I*, this contribution argues, is its lack of references to the eternity clause of Article 79(3) of the Basic Law, and indeed a conscious rejection of the link between constitutional identity and amendment limits, in stark contrast to the Court's subsequent constitutional identity jurisprudence since *Lisbon*.

This contribution will use the window that *Solange I* offers to a conception of constitutional identity untethered from unamendability to challenge both the plausibility and normative desirability of linking the two. Constitutional identity, especially if it is understood as a concept primarily used to set limits to the primacy of EU law, does not need to be linked to unamendability. Understanding the former as intrinsically linked to the latter gives rise to three problems, which the contribution will discuss: First, the problem of the *hollow legitimacy* of constitutional identity claims ostensibly grounded in the 'higher legitimacy' of acts of constituent power; second the problem of the *democratic costs* imposed by an increased mobilisation of amendment limits against the power of other constitutional orders, and finally, the problem of the *normative mismatch* between the normative considerations informing constitutional amendment limits and those informing limits to the reach of EU law. 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.

## II. Constitutional Identity in *Solange I*

Decided in the 1970s, one might think that it would be anachronistic to regard *Solange I* as a 'constitutional identity judgment'. The latter only truly spawned as a genre with the genesis of the 'identity clause' in the draft Constitutional Treaty and, later, the Treaty of Lisbon, which was by many interpreted as referring to the concept of constitutional identity.[2] Many of the fundamental features of the German Federal Constitutional Court's 'constitutional identity' doctrine only emerged in the *Lisbon* judgment of 2009 and seem to be fundamentally absent in *Solange*. This contribution argues that, despite all of this, *Solange* should be taken seriously as a constitutional

2 Mattias Kumm and Victor Ferreres Comella, 'The Primacy Clause of the Constitutional Treaty and the Future of Constitutional Conflict in the European Union', I.CON 3 (2005), 473-492 (473); Barbara Guastaferro, 'Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause', YBEL 31 (2012), 263-318 (263); Bruno de Witte, 'The Lisbon Treaty and National Constitutions: More or Less Europeanisation?' in: Carlos Closa (ed.), *The Lisbon Treaty and National Constitutions: Europeanisation and Democratic Implications?* (University of Oslo 2009).

identity judgment. Before we turn to *Solange*, let me briefly recall the GFCC's 'constitutional identity' doctrine as we know it from *Lisbon.*

In the *Lisbon* judgment, the GFCC closely tethered constitutional identity to the limits posited to constitutional amendment by the eternity clause in Article 79(3) of the Basic Law. That provision declares as inadmissible any constitutional amendment that would affect the federal structure of the German state and the 'principles laid down in' Articles 1 and 20 of the Basic Law – such as the protection of human dignity and human rights, Germany's character as a democratic and federal state, the principle of popular sovereignty, and the rule of law.[3] The reasoning of the Court stated that, since the substance of Articles 1 and 20 of the Basic Law is protected against constitutional amendment[4], that substance also needs to be equally protected against being undermined by implicit constitutional change brought about by European integration – in the Court's words, constitutional identity is 'non-transferable and "integration-proof"'.[5] The legitimacy of identity review is tied to and derived from the supposedly higher legitimacy of the act of the constituent power that brought the of the Basic Law into existence. In the Court's own words, 'the violation of the constitutional identity codified in Article 79(3) of the Basic Law is at the same time an encroachment upon the constituent power of the people […] the constituent power has not granted the representatives and bodies of the people a mandate to dispose of the identity of the constitution'.[6]

*Solange I* is notably less densely reasoned than the *Lisbon* judgment, and the reasoning justifying fundamental rights review of the European institutions is nowhere near as drenched in *Staatsrecht*[7] and foundational language as the *Lisbon* and *Maastricht* judgments were. But we can still find the idea of constitutional identity in the judgment – in fact, notions such as 'the basic structure of the constitution, upon which its *identity* rests', 'the identity of the constitution', 'the essential [*wesentlich*] structure of the *Grundgesetz*' or 'constituent structure of the state' are integral to the judgment's reasoning.[8] The key question at issue in the judgment – namely, the scope of Article 24 of the Basic Law, which permits the transfer of sovereign rights to international organisations by simple legislation, is indeed decided with reference to some

3 Paul Kirchhof, 'Die Identität der Verfassung' in: Paul Kirchhof and Josef Isensee (eds), *Handbuch des Staatsrechts*, Band II: Verfassungsstaat (3rd edn, C.F. Müller 2004), 261-316 (307-315).

4 FCC, judgment of 30 June 2009, BVerfGE 123, 267 (para. 218) – *Lissabon*.

5 FCC, *Lissabon* (n. 4), para. 235.

6 FCC, *Lissabon* (n. 4), para. 218.

7 See Jo Eric Khushal Murkens, 'Identity Trumps Integration', Der Staat 48 (2009), 517-534.

8 FCC, order of 29 May 1974, 2 BvL 52/71, BVerfGE 37, 271 – *Solange I*, para. 43.

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notion of constitutional identity. Notably, the Court argued in *Solange I* that the scope of that Article was limited by the context of the constitution as a whole.[9] This implied that Article 24 of the Basic Law cannot be understood as permitting treaty changes and acts of European institutions that would 'overturn the identity of the valid constitution of the Federal Republic of Germany, by breaking into its constituent structure'.[10] All of this seems to suggest that *Solange* is, in fact, a 'constitutional identity judgment' *par excellence.*

However, this does not mean that *Solange* must be understood as the spiritual precursor of the constitutional identity doctrine in *Lisbon.* In fact, a close reading of *Solange* suggests a different version of constitutional identity from the one that was proffered 35 years later. Two aspects fundamentally distinguish the constitutional identity of *Solange I* from that of *Lisbon.* First, the eternity clause of Art. 79(3), which later came to play the key role in construing constitutional identity in *Lisbon*, does not seem to play a role in the court's reasoning. Despite the seemingly similar logic, Article 79(3) of the Basic Law does not find a single mention within the judgment.

Second, and more perplexingly, the Court does not even seem to consider this 'basic' or 'constituent' structure of the constitution to be *per se unamendable.* Indeed, the Court seems to suggest that 'the basic structure of the constitution, on which its identity rests' constitutional identity could be changed by way of constitutional amendment. The Court writes:

> '[Article 24 of the Basic Law] does not open the path to changing the basic structure of the constitution, on which its identity rests, *without a constitutional amendment*, namely on the basis of the legislation of an international institution [zwischenstaatliche Einrichtung].'[11]

Implicit in *Solange I* seems to be a differentiation between explicit constitutional amendment, on the one hand, and the legislation of international (or supranational) institutions, on the other: While the basic structure of the constitution may be changed by way of constitutional amendment, it may not be changed by supranational legislation. Whereas, in the *Lisbon* judgment, constitutional identity is altogether placed beyond the reach of the constitutional legislator, in *Solange,* the Court takes a view of constitutional identity that renders it open to change from within while protecting it against modification from the outside.

9 FCC, *Solange I* (n. 8), para. 43: 'Art. 24 GG muß wie jede Verfassungsbestimmung ähnlich grundsätzlicher Art im Kontext der Gesamtverfassung verstanden und ausgelegt werden.'

10 FCC, *Solange I* (n. 8), para. 43.

11 FCC, *Solange I* (n. 8), para. 43.

One key difference between *Solange I* and *Lisbon* accounts for the reference to constitutional amendments in this passage: While Article 24 of the Grundgesetz, subject of *Solange I,* allowed for the transfer of sovereign rights by simple legislation and did not require a constitutional amendment, the amended Article 23, the current constitutional basis for European integration and subject of the *Lisbon* judgment, explicitly links the ratification of treaty changes to the constitutional amendment procedure under Article 79. *Solange I* clarified that, for the purposes of Article 24, where the 'basic structure of the constitution' is concerned, simple legislation does not suffice and a constitutional amendment is necessary.[12]

What this difference does not account for, however, is the relative lack of references to constitutional unamendability: Despite the lack of an explicit reference to the eternity clause in Article 24, the 'prevailing opinion' among constitutional scholars already prior to *Solange I* considered that article to be constrained by the amendment limits in Article 79(3).[13] The court's jurisprudence on unconstitutional constitutional amendments was already developed at the time: Already in the 1950s had the court discussed the possibility of unconstitutional constitutional amendments based on Article 79(3) in ways which indeed seem to mirror the logic employed by the Court in *Solange.* In the *Südweststaat* judgment, the Court insisted that constitutional provisions must be interpreted in line with the 'inner unity' of the constitution; the 'constitutional principles and fundamental decisions to which constitutional provisions are subordinated'. This does not only mirror the logic employed in *Solange*, which similarly invokes the necessity of reading Article 24 of the Basic Law in the overall context of the constitution – rather, in *Südweststaat* the Court explicitly refers to the eternity clause of Article 79(3) of the Basic Law as the indicator of such 'constitutional principles and fundamental decisions' and approvingly cites a judgment of the Bavarian Constitutional Court that pondered the existence of amendment limits.[14] By 1974, in any case, the court's power to review constitutional amendments had been well established.[15] Elsewhere in the *Solange* judgment, the Court does indeed speak of the fundamental rights part of the Basic Law as an '*indispensable*

12 See Wolfgang Fischer, 'Die Europäische Union im Grundgesetz: der neue Artikel 23', ZParl 24 (1993), 32-49 (40).

13 See Georg Erler, 'Das Grundgesetz und die öffentliche Gewalt internationaler Staatengemeinschaften', VVDStRl 18 (De Gruyter 1960), 7-49 (40 f.); Ulrich Scheuner, 'Der Grundrechtschutz in der Europäischen Gemeinschaft und die Verfassungsrechtsprechung', AöR 100 (1975), 30-52 (45).

14 FCC, judgment of 23 October 1951, 2 BvG 1/51, BVerfGE 1, 14 – *Südweststaat* (paras 76-79).

15 See FCC, judgment of 18 December 1953, 1 BvL 106/53, BVerfGE 3, 225 – *Gleichberechtigung*.

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[*unaufgebbar*], essential part of the constitutional structure',[16] which seemingly suggests a connection to unamendability.

Why does the Court, then, distinguish so explicitly between constitutional amendment and transnational legislation in *Solange I*? Would it not have been easier to simply flatten the distinction, as the Court eventually did in *Lisbon*? After all, if the 'basic structure of the constitution, on which its identity rests' is affected, it surely should not matter whether the law in question was passed based on simple legislation or based on a constitutional amendment. Was the Court suggesting that its *Solange* competence could have been removed by way of constitutional amendment without necessarily reaching the scope of the eternity clause?

As *Polzin* highlights, the lack of references to Art. 79(3) in *Solange I* led to significant debate about whether the 'basic structure' the Court had referred to was limited to Art. 79(3) or extended beyond these confines – if the latter was the case, then some aspects of constitutional identity could indeed be considered susceptible to constitutional amendment.[17] However, irrespective of whether constitutional identity is tethered to or extends beyond Art. 79 (3), one could also understand the Court as differentiating between a complete abrogation of constitutional identity, on the one hand, and the mere modification of principles belonging to constitutional identity in the context of European integration, on the other. Certain aspects of constitutional identity outlined by Article 79(3) may indeed be 'unamendable' and indispensable, but this was not what mattered for the *Solange I* case. There may well be a point at which a constitutional amendment crosses the threshold of Article 79(3), but for the purposes of *Solange I,* this threshold could be left in abeyance. What mattered, rather, was *who had the capacity of changing* certain aspects of constitutional identity, even if such changes did not violate or destroy constitutional identity altogether. This is reminiscent of a distinction the Court had made four years prior in the *Abhörurteil* ('eavesdropping case'), where the Court argued for a highly restrained understanding of the eternity clause – it must be understood as an attempt to deprive attempts to install authoritarian or totalitarian rule of the veneer of legality that constitutional amendment could otherwise provide.[18] For the operationalisation of the limits imposed by Art. 79(3), the Court distinguished between the mere 'internal [*systemimmanent*] modification' of principles protected by the eternity clause, and their 'fundamental abandonment'. 'Internal modifications'

16 FCC, *Solange I* (n. 8), para. 44.

17 Monika Polzin, *Verfassungsidentität* (Mohr Siebeck 2018), 43-47.

18 FCC, judgment of 3 March 2004, 1 BvR 2378/98, 1084/99, BVerfGE 30, 1 (para. 99) – *Abhörurteil.*

could be brought about by constitutional amendment – only a 'fundamental abandonment' of these principles could not.[19] The Court argued that the eternity clause must not preclude the ability of the legislator to internally modify even fundamental constitutional principles through constitutional amendments.[20]

The majority in *Solange* had no reason to think that the situation was of sufficient gravity to bring considerations of a 'fundamental abandonment' of principles protected by the eternity clause into play. The accompanying dissenting opinion signed by three judges firmly argued that the European Communities in fact had *already* been providing fundamental rights protection on a level functionally equivalent to the Grundgesetz.[21] The dissenters suggested that 'the "basic structure of the constitution, on which its identity rests" is not at stake […] The question of whether Art. 24 […] permits a transfer of sovereign rights that gives Community organs the opportunity to enact norms free from any fundamental rights constraints no longer arises today'.[22] The suggestion that leaving fundamental rights to the European institutions would have signalled a 'fundamental abandonment' of principles protected by the eternity clause would have seemed extremely heavy-handed and far-fetched.

The fact that *Solange I* does not directly tether constitutional identity to unamendability, but indeed seems to reserve the option of constitutional amendment of constitutional identity to the legislator, provides a stark contrast to the Court's hardened identity jurisprudence as it arose especially since *Lisbon*. Reasoned to its conclusion, such a conception of constitutional identity might have left room for a more dialogical relationship between Court and Parliament in determining the constitutional limits of European integration.

However, already by the time *Solange II* was decided (and notably before Article 23 replaced Article 24 as the constitutional basis of European integration), the reference to amendment present in *Solange I* had all but disappeared. Where *Solange I* argued that Art. 24 could not authorise a 'change' to the basic structure 'without a constitutional amendment', *Solange II* subtly changed this to arguing that Art. 24 did not allow a 'surrender' (*Aufgabe*) of that basic structure and no longer made reference to constitutional amend-

19 FCC, *Abhörurteil* (n. 18). For a highly critical discussion of this judgment, see Peter Häberle, 'Die Abhörentscheidung des Bundesverfassungsgerichts vom 15.12.1970', JZ 26 (1971), 145-156.

20 FCC, *Abhörurteil* (n. 18), para. 100.

21 On the dissenting Opinion see in this issue the contribution of Franz C. Mayer, 'A Parallel Legal Universe – The *Solange I* Dissent and Its Legacy', HJIL 85 (2025), 451-477.

22 FCC, *Solange I* (n. 8), para. 83.

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ment.[23] While the constitutional identity of *Solange I* was more flexible and malleable, already *Solange II* was closer to the 'make-or-break' variety that we have been familiar with since *Maastricht* and *Lisbon*.

*Solange I*, for its part, seemed to give room to a more dynamic and responsive picture of constitutional identity. It suggests a much stronger sense of agency of the constitutional legislator (rather than the Constitutional Court) over the limits of European integration. Especially with the benefit of hindsight, this makes *Solange I* a fascinating judgment that offers a window into an alternative vision of German constitutional identity.

## III. Constitutional Identity and Unamendability

*Solange I*, as I interpret it, provides an alternative approach to the concept of constitutional identity – one that is not focused on constitutional identity as the definitive marker of political closure, but as an assertion of agency of the national polity over the meaning of certain constitutional fundamentals. In what follows, I would like to use the window that *Solange I* offers us in order to take a critical look at the normative connection between constitutional identity and unamendability that predominates the German Federal Constitutional Court's approach to the concept.

The association of constitutional identity with unamendability turns the latter into a concept that foregrounds the *closure* of a constitutional order: The ways in which a polity has been somehow conclusively defined and accordingly needs to be protected from change. Just as explicit limits on amendment powers within an existing constitution are seen as constitutive of a form of constitutional identity,[24] conversely, an otherwise contingently constructed notion of constitutional identity can also itself serve as the skeleton for a theory of constitutional unamendability.[25] Whether explicit or not, any constitution is seen as resting on a 'foundational structure' that must be protected from amendment.[26] Amendments that impinge on that foundational structure and lead to a change of constitutional identity are, in fact, not amendments, but rather should be seen as bringing about a new constitution

23 FCC, order of 22 October 1986, 1BvR 197/84, BVerfGE 73, 339 – *Solange II*, para. 104.

24 Richard Albert, 'The Expressive Function of Constitutional Amendment Rules', McGill Law Journal 59 (2013), 225-281; Silvia Suteu, *Eternity Clauses in Democratic Constitutionalism* (Oxford University Press 2021), 89-124.

25 See Supreme Court of India, *Kesavananda Bharati Sripadagalvaru and Ors. v. State of Kerala and Anr.*, judgment of 24 April 1973, 1973 4 SCC 225.

26 Yaniv Roznai, Unconstitutional Constitutional Amendments: The Limits of Amendment Powers (Oxford University Press 2017), 141.

altogether. Constitutional identity, in this sense, marks the boundary between constituent and constituted power; between admissible forms of constitutional amendment and forms of 'constitutional revolution',[27] 'dismemberment',[28] or 'annihilation'.[29]

When constitutional identity arguments are leveraged against other legal orders, most notably the EU, the logic of unamendability is extended to limit the reach and authority of other legal orders on one's own. Just as matters of constitutional identity are protected against amendment from within, they also demarcate the outer limit of the authority of other legal orders within one's own. Respecting the primacy of EU law cannot *de facto* amount to a form of constitutional replacement unsanctioned by an act of constituent power.[30] The German Federal Constitutional Court's identity jurisprudence is the most prominent example for this type of constitutional identity-based reasoning[31], but other constitutional courts, like the Italian Constitutional Court, similarly link the limits to European integration (albeit only lately explicitly labelled by that court as 'constitutional identity') to the unamendable core of the Italian Constitution.[32]

The idea of constitutional identity as fundamentally grounded in unamendability occupies much real estate in our constitutional imagination. The outsized influence of the GFCC's identity jurisprudence within the EU certainly plays a significant role in reinforcing this association.[33] But comparative constitutional scholars have also more generally been infatuated with liminal moments of constitutional transformation[34] as the still burgeoning

27 Gary Jeffrey Jacobsohn and Yaniv Roznai, *Constitutional Revolution* (Yale University Press 2020).

28 Richard Albert, 'Constitutional Amendment and Dismemberment', Yale J. Int'l L. 43 (2018), 1-84.

29 Carl Schmitt, *Constitutional Theory. Translated by Jeffrey Seitzer* (Duke University Press 2008), 151.

30 Diarmuid Rossa Phelan, Revolt or Revolution: The Constitutional Boundaries of the European Community (Round Hall Sweet & Maxwell 1997).

31 See also Monika Polzin, 'Constitutional Identity, Unconstitutional Amendments and the Idea of Constituent Power: The Development of the Doctrine of Constitutional Identity in German Constitutional Law', I.CON 14 (2016), 411-438.

32 Pietro Faraguna, 'Unamendability and Constitutional Identity in the Italian Constitutional Experience', European Journal of Law Reform 3 (2019), 329-344. On the Italian engagement with *Solange* and constitutional identity more generally see also in this issue the contribution of 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.

33 Armin von Bogdandy, 'German Legal Hegemony?', Verfassungsblog, 5 October 2020, doi: 10.17176/20201005-124814-0, at <https://verfassungsblog.de/german-legal-hegemony/>, last access 23 April 2025.

34 See Jacobsohn and Roznai (n. 27); Albert, 'Constitutional Amendment' (n. 28); Schmitt (n. 29).

literature on eternity clauses and unconstitutional constitutional amendments demonstrates.[35] In times of increasing constitutional erosion and backsliding, many scholars project hopes onto doctrines of unconstitutional constitutional amendments as a way of safeguarding the liberal, democratic character of constitutions.[36] However, the close connection of constitutional identity to unamendability and eternity clauses does not come without problems. In many ways, it plays into and resonates with the illiberal misappropriations of constitutional identity we have witnessed in past years in ways that more flexible, dynamic, and responsive concepts of constitutional identity do not. Three problems with the association will be discussed in the following: I have respectively labelled them the problems of *hollow legitimacy*, *democratic costs,* and *normative mismatch.*

## IV. The Problem of Hollow Legitimacy

The first problem facing conceptions of constitutional identity grounded in unamendability is the problem of *hollow legitimacy.* This problem harks back to the ideational underbelly of this particular conception of constitutional identity and the answer it provides to the question of constitutional legitimacy.

Assertions of constitutional identity that rely on constitutional unamendability, ultimately, ground their authority in the allegedly higher legitimacy of an act of constituent power that established the constitution. In doing so, they ultimately hark back to *Carl Schmitt* and his conception of constitutional identity and constituent power. To *Schmitt*, the identity of a constitution is grounded in the 'fundamental political decision by the bearer of the constitution-making power'.[37] Any change of that decision, *Schmitt* argues, is

35 To name but a few recent book-length treatments, Yaniv Roznai, *Unconstitutional Constitutional Amendments* (n. 25); Richard Albert and Bertil Emrah Oder (eds), *An Unamendable Constitution? Unamendability in Constitutional Democracies* (Springer 2018); Richard Albert, *Constitutional Amendments. Making, Breaking, and Changing Constitutions* (Oxford University Press 2019); Suteu (n. 24); Rehan Abeyratne and Ngoc Son Bui, *The Law and Politics of Unconstitutional Constitutional Amendments in Asia* (Routledge 2021).

36 For examples, see Yaniv Roznai, 'The Straw That Broke the Constitution's Back?: Qualitative Quantity in Judicial Review of Constitutional Amendments' in: Alejandro Linares Cantillo (ed.), *Constitutionalism. Old Dilemmas, New Insights* (Oxford University Press 2021), 147-165; Rosalind Dixon and David Landau, 'Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment', I.CON 13 (2015), 606-638; more critically see Silvia Suteu, 'Friends or Foes: Is Unamendability the Answer to Democratic Backsliding?', Hague Journal on the Rule of Law 16 (2024), 315-338.

37 Schmitt (n. 29), 77.

not possible from within the constitutional order – overturning it from within would amount to an 'annihilation' of the constitution.[38] Any change of the identity of the constitution requires a renewed exercise of the people's constituent power.[39]

The problem with such a conception of constitutional identity, grounded in an exercise of constituent power, is that it provides no argument as to what makes that constitutional identity legitimate. *Schmitt* does not answer the question of how a people, vaguely conceived of as 'formless formative capacity'[40] could meaningfully acquire any form of constituent agency. As *David Dyzenhaus* points out, the 'pure fiat' of constituent power does not, in and of itself, provide an authoritative reason for its legitimacy.[41] Why such a 'formless formative' decision of the constituent power ought to be more legitimate than concrete exercises of institutionalised democratic agency is not clear.

Attempts to infuse this account of constitutional identity with some notion of constitutional legitimacy usually stand and fall with a theory of what *Lars Vinx* has labelled 'strong popular sovereignty'. Such a conception of popular sovereignty regards constitutions as legitimate because they give expression to the pre-legal, political identity of an already formed, homogeneous, people.[42] The German Federal Constitutional Court can be read as espousing such a conception both in its *Maastricht* and *Lisbon* judgments: In *Maastricht*, by arguing that democracy is tied to national peoples on the basis of their 'relative homogeneity';[43] in *Lisbon,* by painting a picture of Europe as composed of pre-constitutional sovereign peoples that would have to decide on their own dissolution if a European federal state was ever to legitimately emerge.[44] In both judgments, an idea of 'strong popular sovereignty' that identifies constitutional legitimacy with a pre-existing political collective possessing a homogeneous identity shines through. But rather than answer the question of constitutional legitimacy, such a conception of popular sovereignty avoids questions of legitimacy, as *Vinx* points out. By assum-

38 Schmitt (n. 29), 151.

39 Schmitt (n. 29), 144.

40 Schmitt (n. 29), 129.

41 David Dyzenhaus, 'Constitutionalism in an Old Key: Legality and Constituent Power', Global Constitutionalism 1 (2012), 229-260 (259).

42 Lars Vinx, 'The Incoherence of Strong Popular Sovereignty', I.CON 11 (2013), 101-124; Lars Vinx, 'Ernst-Wolfgang Böckenförde and the Politics of Constituent Power', Jurisprudence 10 (2019), 15-38.

43 FCC, order of 12 October 1993, 2 BvR 2134, 2159/92, BVerfGE 89, 155 (para. 101) – *Maastricht*.

44 On the prevalence of strong popular sovereignty in the *Lisbon* judgment, see also Vinx, 'The Incoherence of Strong Popular Sovereignty' (n. 42).

ing a substantively homogeneous political identity of the people, 'strong' popular sovereignty elides the inescapable 'heteronomy' of public life within constituted polities: the inevitability of deep and entrenched disagreements among the people themselves.[45] Sovereignty is turned from a political capacity whose exercise is subject to internal contestation into a set of substantive properties.[46]

Liberal constitutional orders that rely on a sense of 'political closure' often do so out of a militant-democratic concern for preventing 'democratic autophagy'[47] that constitutionalists might, intuitively, find commendable. In doing so, they are often willing to gloss over the hollow legitimacy that comes with invocations of constituent power, and overlook the problematic implications of strong popular sovereignty. However, the fact that the same sense of political closure can also be channelled into a diametrically opposed direction – one that tilts illiberal and authoritarian rather than liberal and democratic – should render us inherently suspicious of centring unamendability in formulating constitutional identity.[48]

A sense of 'strong popular sovereignty' is, at best, incidental to liberal democracies, which can dispense with it and content themselves with a 'democracy defined in procedural terms'.[49] However, it is *integral* to illiberal and authoritarian constitutional projects. Organically identifying *the people* with a set of normative commitments derived from a presumedly settled identity justifies eroding, undermining, or altogether dispensing with procedural democracy.[50] This is not to say that the German conception of constitutional identity, based on strong popular sovereignty and unamendability, is *per se* illiberal: The GFCC turned the language of strong popular sovereignty and constituent power into a muscular defence of the liberal constitutional order established by the Basic Law. However, its conception of constitutional identity rests on assumptions that also cater to illiberal constitutional projects.[51]

45 Vinx, 'The Incoherence of Strong Popular Sovereignty' (n. 42), 103.

46 Hans Lindahl, 'The Purposiveness of Law: Two Concepts of Representation in the European Union', Law and Philosophy 17 (1998), 481-507 (488-489).

47 Melissa Schwartzberg, *Democracy and Legal Change* (Cambridge University Press 2007).

48 To that end, see Suteu (n. 24).

49 Andrew Arato, *Post Sovereign Constitution Making. Learning and Legitimacy* (Oxford University Press 2016), 281; see also Hans Kelsen, *The Essence and Value of Democracy* (Rowman & Littlefield 2013).

50 Vinx, 'Ernst-Wolfgang Böckenförde and the Politics of Constituent Power' (n. 42); Arato (n. 49), 275.

51 See also Vinx, 'Ernst-Wolfgang Böckenförde and the Politics of Constituent Power' (n. 42).

This illiberal potential of strong popular sovereignty shows in the Hungarian politics of constitutional identity. The Hungarian Constitutional Court insists that the Hungarian Fundamental Law 'merely acknowledges' constitutional identity. Instead of being based in a written constitution, it resides outside of the Fundamental Law, to be found in Hungary's 'historical constitution' and other normative resources outside of the space of institutionalised democratic agency.[52] The Hungarian Fundamental Law identifies popular sovereignty with a set of immutable substantive commitments. As *Renáta Uitz* points out, the Hungarian Constitution comes with thick 'anthropological presuppositions about a proper Hungarian'.[53] *Viktor Orbán* defended the Hungarian government's resistance against the relocation of refugees on grounds of constitutional identity as a matter of maintaining social homogeneity[54] and posits a fundamental difference between the basic social models of Hungary and countries in Western Europe – whereas the former are 'multicultural' societies, Hungary is homogeneous and wants to stay that way.[55] This illiberal conception of strong popular sovereignty is, ultimately, what underlies the Hungarian government's resistance against the EU's refugee relocation scheme on grounds of 'constitutional identity' in 2016. All of this speaks the same language of 'strong' popular sovereignty.

The precepts of strong popular sovereignty underlying the connection of constitutional identity and unamendability suggest that constitutional identity is fixed at the moment of constitution-making, as it rests on the decision of the constituent power, which cannot be overturned. However, dynamic conceptions of constitutional identity highlight how the former can only truly evolve *within* a constituted order, where the constituted organs have a bearing on the meaning and content of that identity and can provide the basis

52 Petra Bárd, Nora Chronowski and Zoltán Fleck, 'Inventing Constitutional Identity in Hungary', MTA Working Papers 6 (2022), 1-31.

53 Renáta Uitz, 'Reinventing Hungary with Revolutionary Fervor: The Declaration of National Cooperation as a Readers' Guide to the Fundamental Law of 2011' in: János Mátyás Kovács and Balázs Trencsényi (eds), *Brave New Hungary: Mapping the 'System of National Cooperation'* (Lexington Books 2019), 9-28 (16).

54 In 2015, Orbán argued that 'we regard it to be a value that Hungary is a homogenous country and that it shows a very homogenous face in its culture, way of thinking and customs of civilization'. See Eurologus Peszto, 'Orbán: sosem voltunk multikulturális társadalom', Index of 19 May 2015, at <https://index.hu>, last access 23 April 2025.

55 Asked whether he still wanted to have a 'Western society' in Hungary, Orbán responded: 'Because of the migration, now it is more complicated. Migration changed our understanding of the West, because we would not like to have multicultural, parallel societies based on migration'. <https://twitter.com/EuroSandor/status/1284794093181304834>, last access 23 April 2025.

for their legitimacy.[56] Constitutional identity is not 'eternal' and unchanging, but contingently constructed within the constituted order, and only as such can it be considered legitimate.

## V. The Problem of Democratic Costs

Basing assertions of constitutional identity upon unamendability turns constitutional rigidity into a normative resource. The more rigid, eternal, unamendable an element of a national constitution is, the more it seemingly requires other authorities to yield to that element. After all, why should the idea that something forms part of a state's constitutional identity induce respect or recognition on the part of overlapping legal orders if that constitutional identity is inherently flexible and changeable? The elasticity of constitutional identity, if anything, speaks to its capacity to change, also through a state's interaction with the influence of transnational and supranational legal orders.

There is some sense to this logic. Pre-commitment, after all, is seen as a, if not *the,* core virtue of liberal constitutionalism, constraining political actors from acting on irrational passions in heated moments and ensuring the stability of a liberal constitutional framework.[57] Unamendability is the strongest form of pre-commitment – it strives to make attempts to override fundamental constitutional commitments legally impossible. If we value liberal constitutionalism in a world of overlapping constitutional orders, we would do well to structure the boundaries between constitutions in a way that allows us to heed each other's pre-commitments.

However, we must be aware of the democratic costs that come with this normative logic. The pre-commitments covered by eternity clauses and other forms of unamendability, after all, most frequently take the shape of vague and ill-defined principles. It would be naïve to think that unamendability prevents change of unamendable principles altogether – rather, as *Melissa Schwartzberg* points out, it 'shifts the locus of this change away from legislatures and toward the judiciary'.[58] It is in the hands of constitutional judges to flesh out what unamendable principles entail, and to define the

56 Hans Lindahl, 'Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood' in: Neil Walker and Martin Loughlin (eds), *The Paradox of Constitutionalism. Constituent Power and Constitutional Form* (Oxford University Press 2008), 9-24.

57 See Stephen Holmes, Passions and Constraint: On the Theory of Liberal Democracy (University of Chicago Press 1997); Jon Elster, *Ulysses Unbound: Studies in Rationality, Precommitment, and Constraints* (Cambridge University Press 2000).

58 See Schwartzberg (n. 47), 4.

boundaries of unamendability. Tying constitutional identity to unamendability, then, runs the risk of driving litigants and constitutional judges towards petrifying ever larger parts of their constitutional order as a means of gaining leverage over the demands of overlapping legal orders. Making the eternity clause the focal point for litigious mobilisation against European institutions means that, every time a provision of EU law is challenged on grounds of constitutional identity, the Court is also invited to expand the scope of things that are outside the scope for democratic agency of the constitutional legislator. This also threatens to foreclose the ability of democratic processes of resolving constitutional conflict by asserting a different interpretation of constitutional identity.[59]

The extensive fashion in which the German Federal Constitutional Court interprets the German Constitution's eternity clause in the context of constitutional identity is illustrative of this. The Court not merely protects these principles themselves, but many facets springing from them. Two much-discussed examples are particularly salient: First, the court's interpretation of the principle of democracy in *Lisbon* specifies a number of 'state tasks' which the court considers at the core of national democracy and, accordingly, may never be transferred to the EU – criminal law, police and military powers, public expenditure and tax policy, welfare, and culture and religion.[60] There is little rhyme or reason to the list; *Halberstam* and *Möllers* call it 'the leftovers of European integration recycled as necessary elements of state sovereignty',[61] while *Schönberger,* noting the conspicuous absence of the power to coin currency from the list, concludes that it is, at best, a result of 'political expediency'.[62]

In the *OMT* case, the strategic mobilisation of the eternity clause goes arguably even further. While most of the Court's reasoning underlying the Court's preliminary reference to the ECJ pertains to *ultra vires* questions, the Court also pondered the possibility of a violation of constitutional identity resulting from the European Central Bank's Outright Monetary Transactions programme. In particular, it considered the possibility that an excessive financial burden resulting from central bank losses as part of the OMT programme might be considered a violation of the German Parliament's

59 Jan Komarek, 'The Place of Constitutional Courts in the EU', Eu Const. L. Rev. 9 (2013), 420-450 (447).

60 FCC, *Lissabon* (n. 4), para. 252. See also Daniel Halberstam and Christoph Möllers, 'The German Constitutional Court Says "Ja Zu Deutschland!"', GLJ 10 (2009), 1241-1258 (1250).

61 Halberstam and Möllers (n. 60), 1251.

62 Christoph Schönberger, 'Lisbon in Karlsruhe: Maastricht's Epigones at Sea', GLJ 10 (2009), 1201-1218 (1209).

budgetary autonomy, resulting in a financial burden that unacceptably limits the *Bundestag*'s scope for democratic action.[63]

This normative expansion of the scope of the eternity clause[64] gives the GFCC increased leverage in its ongoing dialogue with the Court of Justice of the European Union about the boundaries of the powers of the EU: the more expansive, rigid, and concrete one's constitutional identity, the more it can seemingly be cashed in in terms of normative value. This, however, also slims the discretion of the legislator to concretely make sense of the principles underpinning German constitutional identity. The assertion and defence of constitutional identity thus comes at the cost of collective democratic agency. This manner of asserting constitutional identity comes with the profound irony that the only way the Court seems able to defend the collective autonomy of the German people is to petrify that autonomy within a sole iteration of it.

The democratic costs that come with the politics of constitutional identity are very much a form of collateral damage, and something that the Court seems mindful of, since the GFCC has, to this day, not found the constitutional identity of Germany violated by the EU. But where constitutional identity becomes a weapon for the vindication of authoritarian politics, like it has in Hungary, this 'collateral damage' is very much the point: an expansive mobilisation of constitutional identity also serves the *internal* closure of the polity. As discussed previously, the Hungarian Constitutional Court understands Hungary's constitutional identity as residing *beyond* constitutional text – in its own words it is 'a fundamental value not created by Fundamental Law [but] merely acknowledged by [the latter]'.[65] Constitutional identity is unchangeable, immutable, and beyond political agency.

At the same time, however, the Hungarian government has actively (and paradoxically) employed constitutional amendments to clarify and expand the content and scope of this immutable constitutional identity. Having secured a two-thirds majority in Parliament for almost the entirety of its time in power,[66] it can modify the constitution at will. The Seventh Amendment, passed in 2018, introduced a ban on the settlement of foreign population on the territory of Hungary alongside a general duty of 'every organ of state' to

63 FCC, order of 14 January 2014, BVerfGE 134, 366 (para. 102) – *OMT-Program*.

64 See also Albert Ingold, 'Die verfassungsrechtliche Identität der Bundesrepublik Deutschland. Karriere – Konzept – Kritik', AöR 140 (2015), 1-30 (14).

65 Hungarian Constitutional Court, *AB on the Interpretation of Article E) (2) of the Fundamental Law*, judgment of 30 November 2016, decision no. 22/2016 (XII.5), para. 67.

66 Between 2015 and 2018, following the loss of two by-elections, Fidesz had fallen two votes short of a supermajority.

protect Hungary's constitutional identity.[67] The Ninth Amendment of 2021 constitutionally enshrined transphobic views on gender and the concept of the traditional family, establishing the right of every child to be raised in accordance with Hungary's constitutional identity.[68]

Paradoxically, the Hungarian government is instrumentalising its supermajority to expand and concretise the scope of a constitutional identity that is said to be located in a space outside of the constitution. Doing so allows the Hungarian government to effectively craft a particular set of commitments that seem unchangeable from within the polity. This is not only a way of closing Hungary off from the EU's influence but also a way of rendering very particular views about society and the family beyond contestation from within. The internal entrenchment of an authoritarian constitutional vision goes hand in hand with its assertion vis-à-vis the EU.

Just as Eurosceptic litigants encourage the German Federal Constitutional Court to read ever more detailed substantive limitations into the constitutional provisions making up Germany's 'eternal' constitutional identity, the Hungarian government concretises and fleshes out what it sees as Hungary's immutable constitutional identity through ever more detailed constitutional amendments. This is not to say that the GFCC and the Hungarian government are doing the same thing in relying on constitutional identity. But the dynamics unleashed are similar: whatever becomes a matter of constitutional identity becomes petrified and placed beyond democratic agency. This can, as in the German case, be the collateral damage of a strategic mobilisation of the eternity clause in order to challenge the authority of the EU. But it can also, as in the Hungarian case, be part and parcel of an authoritarian logic.

## VI. The Problem of Normative Mismatch

A final problem leads us directly to an alternative way of thinking about constitutional identity, and brings us back to *Solange I*. This problem is one of normative mismatch: Presenting assertions of constitutional identity as a matter of unamendable constitutional principles suggests that the normative considerations arising from constitutional unamendability are

67 The Government of Hungary, *Seventh Amendment to the Fundamental Law of Hungary*, bill no. T/322, see <https://helsinki.hu/en/>, last access 23 April 2025.

68 Venice Commission, *Ninth Amendment to the Fundamental Law and Explanatory Memorandum*, opinion of 3 June 2021, opinion no. 1035/2021, CDL-REF(2021)045, at <https://www.venice.coe.int/>, last access 23 April 2025.

identical with the considerations arising from advancing constitutional identity in a transnational setting. Ultimately, however, assertions of unamendability and assertions of constitutional identity vis-à-vis other constitutional orders ask different normative questions: One is about the absolute and unshakeable limits of constitutional agency, the other is about the boundaries of political and constitutional agency in a world of overlapping constitutional authority.[69]

Eternity clauses, basic structure doctrines and other forms of unamendability seem, primarily, targeted at posing substantive constraints within one's own constitutional order. Their goal is to constrain the *constituted power* in its ability to fundamentally change the constitution from within. But such internal constitutional constraints call to task different normative questions than external impacts on one's own constitution. Assertions of constitutional identity vis-à-vis other constitutional sites do not necessarily speak to the absolute boundaries of democratic action within the constituted order. Rather, they may address *who* has the authority of affecting or modifying aspects that are considered to be at the core of a polity's given constitution.

In this sense, assertions of constitutional identity vis-à-vis overlapping legal orders should be seen as a particular iteration of what democratic theory calls the 'boundary problem'[70]: In a world of overlapping constitutional orders, does one unit have the legitimate authority to decide on questions that affect another unit's constitutional core? Rather than necessarily being a peremptory assertion of an immutable constitutional substance, assertions of constitutional identity vis-à-vis other constitutional sites may also simply mark a claim to constitutional and democratic agency.

Such a description of the politics of constitutional identity also better tracks the realities on the ground. After all, the bulk of contestation that takes place in the name of constitutional identity in the EU is about the interpretation of principles that are often common to both the national and the transnational constitutional order, rather than actual threats of constitutional 'revolution' or 'annihilation'. Nobody would seriously suggest, for instance, that in the *Taricco* case, the republican form of government, which is at the core of the Italian concept of constitutional identity,[71] was existentially

69 Neil Walker, 'Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders', I.CON 6 (2008), 373-396.

70 Frederick G. Whelan, 'Prologue: Democratic Theory and the Boundary Problem', Nomos (New York) 25 (1983), 13-47.

71 As Martinico notes, the Italian Constitutional Court's interpretation of the 'republican form of government' protected from amendment by the Italian constitution is broad, encompassing 'the entirety of supreme principles that represent the essence of the post-WWII constitutional experience'. See Giuseppe Martinico, *Filtering Populist Claims to Fight Populism: The Italian Case in Comparative Perspective* (Cambridge University Press 2021), 47.

threatened by waiving the limitation period in the particular case at hand. Nor would Germany have stopped being a democracy had it suffered financial consequences from the ECB's OMT programme. More often than not, the politics of constitutional identity concern the meaning of principles that are broadly shared across the boundaries of overlapping constitutional orders, but which have contingently come to mean different things or take different shapes across different constitutional orders – be it human dignity[72] or the protection of fundamental rights.[73] Constitutional identity claims remind us that these contingent differences are not always simply 'foibles',[74] merely waiting to be harmonised, but concretely speak to the way in which a polity imagines its own legitimacy.[75] What is at stake in these cases is *who has a say* in concretely shaping and protecting these principles – not whether they are irredeemably violated.

Tethering constitutional identity to unamendability presumes that the only changes a constitutional identity is capable of undergoing are 'make-or-break' changes, rather than slow evolutions or transmutations generally capable of being accommodated but occasionally in need of contestation and negotiation through dialogue. It implies that the only plausible way in which a polity can protect a constitutional core against external override is by also denying itself agency over the meaning of that core. It makes unnecessary concessions to a static view of constitutional identity that caters to authoritarian misappropriations.

*Solange I*, in distinguishing between constitutional amendment and transnational legislation, appears mindful of this normative mismatch. Yielding power over fundamental rights enforcement to the European Communities was *not* a question of whether fundamental rights would have been *fundamentally abandoned* – it was a matter of continued agency over the meaning of such rights. The latter is not a less compelling reason for asserting authority than the former.

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72 ECJ, *Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn*, judgment of 14 October 2004, case no. C-36/02, ECLI:EU:C:2004:614; FCC, order of 15 December 2015, 2 BvR 2735/14, BVerfGE 140, 317 – *Identitätskontrolle*.

73 Italian Constitutional Court, *Taricco I*, order of 23 November 2016, no. 24/2017.

74 Joseph H. H. Weiler, 'In Defence of the status quo: Europe's Constitutional Sonderweg' in: Marlene Wind and Joseph H. H. Weiler (eds), *European Constitutionalism Beyond the State* (Cambridge University Press 2003), 7-26 (14).

75 See also Joseph H. H. Weiler, 'Fundamental Rights and Fundamental Boundaries: On the Conflict of Standards and Values in the Protection of Human Rights in the European Legal Space' in: Joseph H. H. Weiler (ed.), *The Constitution of Europe: 'Do the New Clothes Have an Emperor?' and Other Essays on European Integration* (Cambridge University Press 1999), 102-129.

## VII. Conclusion

*Solange I* offers a glimpse into a conception of constitutional identity that is quite different from the one we have gotten used to. Unlike *Lisbon*, *Solange I* espouses a conception of constitutional identity that is not directly bound to the eternity clause. *Solange I* does not address the question of which principles in the German constitution may *never* change so much as it addresses *who may effect change* in the meaning and shape of these fundamental principles. By distinguishing between change through constitutional amendment and change through transnational legislation, it presents matters of constitutional identity as questions of democratic agency rather than constitutional closure. This article has used this reading of *Solange I* as an opportunity to challenge the connection between constitutional identity and unamendability that the German Federal Constitutional Court has made since *Lisbon*, and which is predominant in academic discourse. Three problems plaguing that connection were discussed:

First, the *problem of hollow legitimacy* highlights that tethering identity to amendment limits ties the latter to an allegedly higher legitimacy of acts of constituent power that can only be accepted if one accepts the idea of 'strong popular sovereignty', which posits the existence of pre-legal political collectives with an already settled sense of identity. This idea strongly plays into the hands of authoritarians, as it can serve to fundamentally devalue an institutionalised democratic process to the benefit of an already formed substantive vision of 'the people'. Unless one accepts such a conception of popular sovereignty, the legitimacy of constitutional identity claims grounded in unamendability is hollow.

Second, the *problem of democratic costs* highlights that, where constitutional identity is tethered to unamendability, every substantive invocation and concretisation of that identity comes at the expense of democratic agency, imposing democratic costs on the legislator. While such democratic costs may be seen as 'collateral damage' of the politics of constitutional identity in liberal democracies, illiberal authoritarians openly embrace and utilise these democratic costs in order to impose a substantive vision of the polity.

Finally, the *problem of normative mismatch* highlights that constitutional amendment limits and assertions of constitutional identity vis-à-vis other constitutional sites answer fundamentally different questions that should not be confused with one another. While one is about the limits of constitutional agency altogether, the other is about the boundaries of constitutional agency in a world of overlapping constitutional orders. Eliding the difference between the two casts more shadow on the politics of constitutional identity than it sheds light.

Understanding *Solange I* as a constitutional identity judgment allows us to think more critically about the connection between constitutional identity and unamendability. Notably, *Solange I* is not alone in not eschewing the connection. The Irish Supreme Court has recently advanced a concept of constitutional identity that in fact encompasses the *unfettered ability of the people to amend the constitution*,[76] while the (pre-2015) Polish Constitutional Tribunal also advanced a conception of constitutional identity that was explicitly susceptible to amendment.[77]

At least in the context of its normative deployment in the EU context, the connection of constitutional identity to unamendability is not intrinsic to the concept and can be dispensed with. Indeed, questioning that connection may provide us with a more accurate picture of the normative concerns conveyed by the language of constitutional identity in the conflict between national constitutional orders and the EU.

Understanding constitutional identity claims as the assertion of contingently evolved constitutional understandings, rather than immutable constitutional substance, rightly relativizes the authority of constitutional identity claims and the confidence with which they can be advanced.[78] It clarifies the degree to which such claims can and need to be, and indeed are, negotiated and compromised over. It sheds some of the conceptual baggage that has made the idea of constitutional identity so attractive to illiberal misappropriation. While none of this prevents the abuse of constitutional identity,[79] untethering constitutional identity from unamendability nonetheless provides a healthy adjustment of our perspective on the concept.

76 Supreme Court of Ireland, *Heneghan v. Minister for Housing*, Judgment of Justice Gerard Hogan, judgment of 31 March 2023, [2023] IESC 7, para. 38.

77 Polish Constitutional Tribunal, *Poland's Membership in the European Union (The Accession Treaty)*, judgment of 11 May 2005, case no. K 18/04, para. 13.

78 Bosko Tripkovic, *The Metaethics of Constitutional Adjudication* (Oxford University Press 2017), 191-222.

79 Even the advocates of 'abuse-proofing' constitutional concepts seem sceptical about the ability of conceptual shifts preventing the abuse of concepts: Rosalind Dixon and David Landau, *Abusive Constitutional Borrowing. Legal Globalization and the Subversion of Liberal Democracy* (Oxford University Press 2021), 200.

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

Anuscheh Farahat*
University of Vienna, Vienna, Austria
*anuscheh.farahat@univie.ac.at*

Teresa Violante**
Friedrich-Alexander University, Erlangen-Nuremberg, Germany
*tv.cedis@novalaw.unl.pt*; *teresa.nunes.violante@fau.de*



* The author holds a Chair in Public Law in European Context at the University of Vienna.
** Phd Candidate FAU Erlangen-Nuremberg. Research Associate at the Nova Center for the Study of Gender, Family and the Law, Nova School of Law, Lisbon.

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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.

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.

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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.

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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*.

# So Long as We Are a Constitutional Democracy: The *Solange* Impulse in a Time of Anti-Globalism

Karen J. Alter*
Northwestern University, Evanston, United States
*Kalter@northwestern.edu*



## Abstract

What is the role of constitutional courts in protecting rights and democracy in age of anti-globalism? This essay identifies how the German Constitutional Court's (GCC) *Solange* pushback historically reinforced individual rights and German democracy. The article defines the *Solange* method as the sum of the GCC's legally questionable push-back against European integration, contestation that this push-back generates, changes undertaken to address GCC concerns, followed by de-escalation but not retreat. After summarising fifty years of Solange pushback, the author calls for more *Solange* type pushback to deal with the threats of over-globalisation and anti-globalism. Alter defines the task for German legal scholars. Do not follow the

* Norman Dwight Harris Professor of International Relations, Professor of Political Science and Law, Northwestern University and ICourts.

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GCC's recent framing of the problem. Return instead to the *Solange* strategy of calling for political change and demanding that politicians and judges protect individual rights and national democracy.

## Keywords

European Integration Politics – European Law – Democratic Politics – International Law – Constitutional Law – Constitutional Courts

This special issue is convened for the 50th anniversary of the German Constitutional Court's (Bundesverfassungsgericht, GCC) *Solange* ruling wherein the GCC inserted itself as an intermediary protecting essential element of the German constitutional order from the European integration process. In 1974, the *Solange* decision appeared rather far-fetched. European integration was stuck in political doldrums, thus it seemed highly unlikely that European integration and European law was or soon would undermine German basic rights, let alone German democracy. When I first confronted the *Solange* ruling during my PhD research, I found it unsurprising that encroachments into national autonomy would reflexively generate resistance and I explained the *Solange* and *Maastricht* pushback as efforts to protect the GCC's turf and its own pre-eminence.[1] Even if I was right in part, I surely underappreciated the constitutional issues at play. From today's vantage the conversations surrounding the *Solange* and *Maastricht* decisions appear prescient.

This article embeds the *Solange* approach into the changing political context, exploring how the GCC's *Solange*-type rulings responded to and transformed German and European politics and European Court of Justice (ECJ) decision-making. As the conclusion explains, I am interested in the *Solange* method because I think the GCC developed the gold standard strategy to deal with the expanding and intrusive nature of international law. This essay argues that we need more, not less, *Solange* type engagement.

My argument is that the *Solange* ruling matters because of the way the GCC resisted the ECJ's assertion of European law supremacy. *Solange* is the German word for 'as long as'. The *Solange* method of push-back has the GCC defining conditions for the European Union (EU), the ECJ, and the German government. Until and as long as the set of conditions are not met, the GCC opens its jurisdictional doors to receive complaints about the

[1] Karen J. Alter, 'The European Court's Political Power', W. Eur. Pol. 19 (1996), 458-487. Karen J. Alter, *Establishing the Supremacy of European Law* (Oxford University Press, 2001).

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constitutionality and legal appropriateness of specific European acts and ECJ interpretations, threatening to find them inapplicable in Germany. The various *Solange* iterations are deeply controversial, partly because they imply limits to the supremacy of European law, but also because each iteration advances novel and rather questionable legal arguments to generate legal leverage. The rulings engender contestation, which in my view is a good thing. What I dub the *Solange* method is the sum of the GCC's often quite problematic push-back, contestation this push-back generates, behavioural changes undertaken to address GCC concerns, followed by de-escalation but not retreat.[2] The upshot of the analysis is that the *Solange* method is productive, especially when the GCC names deeply felt concerns and forces political bodies and the legal community to take these concerns more seriously. I explain why the latest GCC contestations are unproductive, arguing that there is no discernible rights or democracy-enhancing objective within. That said, it is too soon to say how the most recent *Solange* moment will play out. This essay sets a challenge for legal and political minds of how to protect constitutional democracies in an age of anti-globalism. The *Solange* method is, I argue, the approach that we should repurpose for this moment.

Part I defines the *Solange* method by tracing its origin and iterations covering from 1974-2010. Uniting the iterations is the primary objective to create constitutional limits for the process of European integration, at least insofar as European integration impacts the German legal and democratic political order. Part II focuses on GCC pushback after 2010 where European integration and the ECJ are the putative targets, yet really what is happening is that European states are realising that a collective response will be more effective, so that the EU has become the level where states are creating solutions to new global challenges. This part develops the argument that we need a new set of constitutional expectations and justifications. I define the goal as striking a balance that includes helping citizens and groups protect Germany's constitutional identity in the face of over-globalisation, while defending democracy and resisting rights-compromising nationalist anti-globalisation. Part III concludes by asking what might be done to support and update the *Solange* impulse and method?

Let me presage some unusual elements in this analysis. First, this article's long-durée perspective suggests greater judicial foresight than might be warranted. I do think that the constitutional concerns are sincerely felt, and the

[2] My use of the '*Solange* method' term differs from German scholars who use the term to mean the specific doctrine developed in the *Solange* decision (review of EU law using the yardstick of German fundamental rights) as distinguished from identity control and *ultra vires* review.

political scientist in me finds it unproblematic that judges consider political factors. Yet my historic situating and the focus on the productive developments that then follow surely give too much credit and validity to in-the-moment judicial determinations that have for good reasons been highly criticised.

Second, I will not belabour how problematic the GCC's legal argumentation has been. Others have done this, and my goal is different. Yes, I will argue that the legal justifications employed by the GCC were always questionable, and they have become even more problematic over time. I will also point out that judicial activism abounds. Yet if one considers the bigger picture, activism is not per se a problem and the GCC may be partially right in naming concerns that are deeply felt, even if the concerns are hard to translate into compelling constitutional legal argumentation. I encourage wise German legal minds to help constitutional judges develop better legal argumentation and strategies grounded in constitutional law. Contestation in the wake of *Solange*-type rulings helps accomplish this task.

Third, in asking the GCC to keep defending constitutional democracy, I am advancing an argument that is the opposite of an endorsement of global constitutionalism and global democracy. A global democracy wherein entire nations and populations can be overruled is highly likely to generate political backlash. In my view, it is politically better for European and international law, and better for democracy, if national level democracies stand up for themselves. Constitutional courts have a role to play as they are best able to protect individuals from the harms that majoritarianism and laissez-faire global capitalism inevitably generate. Their role is even more important when politicians are failing to do their part and democracy is itself under threat. That said, the GCC's *Solange* approach needs an update. We can wonder why Eurosceptic push-back tends to drive *Solange* moments, and map out a way for Constitutional Courts to promote citizen-efforts that call on governments to better protect rights and democracy. We may need to think harder about how appointment politics drive constitutional review, and how to ensure that *Solange* efforts do not become a counter-democratic form of minority rule.

## I. The First Generation of *Solange* Rulings: Protecting Germany from the Process of European Integration

This section overviews with the benefit of hindsight the first three *Solange* iterations where the goal was to influence the European integration process.

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By explaining the valid impulse behind the rulings, and what then happened, the discussion demonstrates how the *Solange* method allows the GCC to insert a greater constitutional sensibility in European and German law and politics. For brevity sake, I skip over the details of how the various *Solange-type* rulings were received. As a general rule, each *Solange* iteration generated vocal public critique that spilled into speeches and newspapers, critical legal commentaries, formal complaints by the European Commission to the German foreign ministry, discussions and roundtables throughout the German legal academy and more. Contestation identified areas of consensus among the dissensus, and it generated political responses to address valid concerns. These developments repeatedly led the GCC to retreat by promising and practicing forbearance, thereby avoiding protracted conflicts with European institutions. Reviewing the *Solange* progression underscores the expansionist and activist nature of the GCC's pushback, before and especially via its *Lisbon* and post-*Lisbon* rulings (2009-present).

## 1. The *Solange* Method: *Solange I* Focuses on Insufficient European Human Rights Protections

The *Solange* story has its origins in 1967, when the GCC's First Senate rejected the claim that the European Economic Community's (EEC) Treaty of Rome was unconstitutional.[3] The GCC's endorsement was welcomed by supporters of European integration, yet German public opinion was becoming increasingly hostile to European integration.[4] Because the First Senate's ruling left important legal issues unaddressed, the ruling amplified the concerns of constitutional patriots.[5] In the 1960s, an important constitutional concern was the need to clarify Article 24 of the German constitution, the legal basis of European Community (EC) membership, which seemed to transfer the German legislative and political authority in an all or nothing way. Working through Europe could then become a means to circumvent the

3 FCC, order of 5 July 1967, 2 BvL 29/63, BVerfGE 22, 134 – *EEC law*, discussed in Alter, *Establishing the Supremacy of European Law* (n. 1), 71-80.

4 Bill Davies, '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 21 (2012), 417-435 (423).

5 *Jan-Werner Müller* defines constitutional patriotism as 'the idea that political attachment ought to center on the norms and values of a liberal democratic constitution rather than a national culture or the "global human community"'. At a time when nationalism was associated with Nazism and thus feared, constitutional patriotism was widely embraced as a positive form of German pride. See Jan-Werner Müller, *Constitutional Patriotism* (Princeton University Press 2007).

German constitution, which in light of Germany's Nazi past, was alarming. For others, the pressing issue was that the European legal system lacked any basic rights protections. Back then, European integration was an executive-led process and the only possible check on the European integration process would be if the ECJ started to find European legal acts to have limits.[6] This wasn't happening. The ECJ was issuing rulings that went well beyond the text of the Treaty of Rome, including declaring the direct effect and supremacy of Community law in national legal orders. Pro-European integration lawyers were championing the ECJ's iconoclastic legal interpretations,[7] and national governments appeared willing to use the Treaty of Rome's 'necessary and proper' and 'implied powers' provisions (Article 235 Treaty of Rome) to enable European level action wherever states so desired.[8] Then, in 1970, the ECJ declared in its *Internationale Handelsgesellschaft* decision that European law was even supreme to national constitutions.[9]

What is today called the *Solange I* ruling was a 1974 GCC decision reviewing a Frankfurt Administrative court's questioning the ECJ's *Internationale Handelsgesellschaft* decision. The Frankfurt court saw the ECJ's claim that European law supersedes even national constitutions unacceptable. The GCC agreed insofar as it found that 'Only the Bundesverfassungsgericht is entitled, within the framework of the powers granted to it in the Constitution, to protect fundamental rights guaranteed in the Constitution. No other court can deprive it of this duty imposed by constitutional law.'[10] The decision finessed the question of whether the GCC had the competence to invalidate European law, arguing that German implementation rendered European law an act of German state power. The GCC argued that it could find that European law is 'inapplicable' in Germany, which – the judges argued – is different than finding that European law is 'invalid'. At the time, legal commentators (and the authors of the legal dissent) saw the distinction between 'inapplicable' and 'invalid' as bogus.[11] That this distinction is now

6 At the time, the European Court of Human Rights could not receive direct appeals and most complaints were being blocked by the Commission that served as a gatekeeper. Henry G. Schermers, 'Acceptance of International Supervision of Human Rights', LJIL 12 (1999), 821-831.

7 Karen J. Alter, 'Jurist Advocacy Movements in Europe: The Role of Euro-Law Associations in European Integration (1953-1975)' in: Karen J. Alter (ed.), *The European Court's Political Power* (Oxford University Press 2009), 63-91.

8 *Joseph Weiler* discusses this issue in terms of concerns about usage of the implied powers doctrine. Joseph Weiler, 'The Transformation of Europe', Yale L.J. 100 (1991), 2403-2483 (2444-2447).

9 ECJ, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, judgment of 17 December 1970, case no. 11-80, ECLI:EU:C:1970:114.

10 FCC, order of 29 May 1974, 2 BvL 52/71, BVerfGE 37, 271 (282) – *Solange I*.

11 Alter, *Establishing the Supremacy of European Law* (n. 1), 91.

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accepted and replicated is testament to how even questionable interpretations can become part of a legal bedrock.

The *Solange* name came from the part of the ruling addressing whether the GCC would conduct regular review of European acts. The majority-ruling said '[a]s long as (*solange*) the integration process has not progressed so far that Community law also receives a catalogue of fundamental rights decided on by a parliament of settled validity, which is adequate in comparison to the catalogue of fundamental rights contained in the Constitution', the German constitutional court would conduct its own review of the constitutionality of European law.[12] Not only did these requirements pose what seemed like insurmountable obstacles, having a democratic EC parliament and an EC catalogue of rights does not ensure that basic rights will be protected. In other words, the *Solange* proviso made little sense.

Meanwhile, much to everyone's surprise, the EU went on to fulfil the set of *Solange* requirements. The ECJ responded with a heralded and welcomed activist construction of a human rights-based jurisprudence.[13] Member states transformed the European Parliament into a directly elected body in 1979, and then repeatedly conferred to it greater legislative and oversight authority.

Well before the *Solange* conditions were met, the GCC retreated. In 1980, the same Frankfurt court tried to provoke the GCC to confront the ECJ, but this time the GCC backed the ECJ's jurisprudence finding the case inadmissible and signalling its willingness to revise its *Solange I* jurisprudence.[14] In 1981, the GCC suggested that a formal catalogue of basic rights and a democratic parliament may no longer be necessary for basic rights to be sufficiently protected.[15] In 1987, a private litigant appealed to the GCC an EC Commission factual determination regarding the EC's mushroom market, arguing that the EC Commission was factually wrong and that incorrect ECJ rulings cannot be binding. The GCC clearly stated that it would not become the appellate body for every disliked European level or ECJ decision. In what became known as the *Solange II* decision, the GCC declared that it

12 FCC, *Solange I* (n. 10), 271, 285.

13 The GCC's pushback was not the only factor pushing towards the development of a human rights jurisprudence (see Grainne De Burca, 'Roads Not Taken: The EU as a Global Human Rights Actor', AJIL 105 (2011), 649-693). Citing the activist nature of the ECJ's human rights jurisprudence, *Alter* and *Helfer* argue that national judges are quite willing to embrace judicial activism (see Laurence Helfer and Karen J. Alter, 'Legitimacy and Lawmaking: A Tale of Three International Courts', Theoretical Inquires in Law 14 (2013), 479-503).

14 German legal scholars dubbed the ruling the *Vielleicht* decision. FCC, order of 25 July 1979, 2 BvL 6/77, BVerfGE 52, 187 – *Vielleicht* discussed in Alter, *Establishing the Supremacy of European Law* (n. 1), 94.

15 FCC, order of 23 June 1981, BVerfGE 58, 1 (40-41) – *Eurocontrol I* discussed in Alter, *Establishing the Supremacy of European Law* (n. 1), 95.

would 'no longer exercise its jurisdiction' to review whether European secondary law was or was not compatible with Germany's constitution, and thus that 'references to the Court under Article 100 (1) for that purpose are therefore inadmissible'.[16] Six months later, the GCC put down a rebellion by the German Federal Tax Court, declaring in its *Kloppenburg* decision that the ECJ is 'legal judge' for the issue. To fail to refer questions or defer to the ECJ regarding European law was to deny a German citizen their constitutional right to their 'legal judge'.[17]

The movement from *Solange I* to *Solange II* to the *Kloppenburg* decision is what I am calling the *Solange* method, a carrot and stick approach that encourages legal and political actors to act to address GCCs concerns. The stick is the threat to find European law inapplicable in Germany, while the carrot involves enhancing the domestic legal obligation to respect the EU law and the ECJ's legal authority. Step by step the GCC's *Solange* method involves: 1) an assertion of the supremacy of the national constitution, and the GCCs role in protecting basic rights and German democracy; 2) a requirement that all domestic actors – including judges – respect the law and authority associated with European (and international) commitments; 3) a specification of what a range of domestic and European legal and political actors must do to render European or international law constitutional within Germany. The GCC never winds back the doctrinal extensions, yet the episodes end with the GCC reinforcing the obligation to respect European law, the construction of guardrails to discourage litigants from raising endless cases, and a promise and practice of forbearance.

## 2. The *Maastricht* Iteration: Can Germany's Political Branches be Trusted to Defend German Democracy?

The next *Solange* iteration – the GCC's *Maastricht* ruling – lacked an explicit 'so long as' clause, yet it was the same mode of contestation. The end of the Cold War brought German reunification. As a quid-pro-quo reassurance that reunification would not portend German nationalism, the twelve existing European member states chose greater European integration. The 1992 Maastricht treaty transformed the EC into the EU, added the Monetary Union project, and authorised greater European-level coordination of state

16 FCC, order of 22 October 1986, 2 BvR 197/83, BVerfGE 73, 339 (340, 387) – *Solange II*. See Alter, *Establishing the Supremacy of European Law* (n. 1), 95-98.

17 FCC, order of 8 April 1987, 2 BvR 687/85, BVerfGE 75, 223 (233-234) – *Kloppenburg* discussed in Alter, *Establishing the Supremacy of European Law* (n. 1), 98-103.

foreign policies (Pillar II) and state justice and home affairs (Pillar III). Expanding European policy-making authority via the Pillar system was a way to distinguish supranational authority (Pillar I, The Common Market) from areas that would remain intergovernmental and beyond the purview of ECJ review (Pillars II and III).

Well before the Maastricht Treaty, however, how to reconcile European integration and the German federal democratic system was a growing concern. When the European Community tried to build a larger media market for European content, Bavaria, a German Land, challenged the effort arguing that regulating broadcasting was a state-level activity. Given that the European law in question – a directive – allows each state to determine the appropriate mode of implementation, one can argue that German constitutional concerns could be adequately addressed at the implementation stage. The GCC, however, wanted constitutional concerns to be addressed at the negotiation stage. Ruling before the issue reached the ECJ, the GCC upheld the directive while instructing the German government to consult and listen to German states as they engaged European policy-making.[18]

Then came the Maastricht Treaty expansions, which amped up concerns about encroachments into the separation of powers in Germany. Distracted by reunification, the negotiation, adoption and the ratification of the Maastricht Treaty may not have respected the consultation requirements the GCC had created. To create a better process going forward, as part of ratifying the Maastricht Treaty the Bundestag created a new Basic Law Article 23 that spelled out the role that Land governments, the Bundesrat and the Bundestag should play in formulating German positions on European-level policies. Article 23 was not the only constitutional change to facilitate European integration.[19] For example, the constitutional provision regarding the Bundesbank (Article 88) was revised to allow for a transfer of the Bundesbank's functions and competences to the yet-to-be established European Central Bank.

For the author of the GCC's *Maastricht* ruling, the constitutional changes did not go far enough. In 1993 I interviewed the author and his legal clerk (to whom the judge conferred one-hundred-percent agreement, and thus an ability to speak on his behalf).[20] Both admitted that if there is a democratic

18 FCC, judgment of 11 April 1989, BVerfGE 80, 74 – *EEC Television Broadcasting Directive* discussed in Alter, *Establishing the Supremacy of European Law* (n. 1), 104-109.

19 The Basic Law's original Article 23 was about German unification. By 1992, Article 23 had served its purpose, and thus it was basically a dead letter provision. Constitutional revisions actually went beyond the changes to Article 23 and 88. See Georg Ress, 'The Constitution and the Maastricht Treaty: Between Co-Operation and Conflict', German Politics 3 (1994), 47-74.

20 Interview with the German author of the *Maastricht* decision and his clerk, Karlsruhe, Germany (8 December 1993).

will to integrate Germany into the EU, the GCC would not stand in the way. Yet they had no faith that members of the Bundestag fully understood the very long and complicated Maastricht Treaty, and thus they were sceptical that there was a German democratic will standing behind the EU's expanding authority. Germany does not permit popular referenda, so there was no way to put the Maastricht Treaty to a vote. Just as the initial *Solange* decision tried to define how basic rights could become part of European law, the GCC tried to define what it would mean for there to be a national level democracy alongside a European level democracy.

The GCC's 1993 *Maastricht* ruling had many legal innovations, including a problematic effort to specify what democracy requires in practice.[21] To facilitate the GCC's greater involvement in European integration, the GCC translated the constitutionally guaranteed 'right to vote' into a right for German votes be substantively meaningful. The decision's author explained that politicians, no matter how democratic they are, cannot turn over German sovereignty without a conscious decision by the people. Yet citizens and the GCC have no direct say in political decisions involving advancing European integration.[22] The GCC's 'right to vote' expansion was a people-powered means for the GCC to be brought into European integration conversations. The GCC also required the relevant German actors to do everything within their power to stop EU actions that run afoul of German separation of powers and the Basic Law's charter of individual rights. Part of the 'do everything' mandate included that the German Government had to raise legal challenges to *ultra vires* European acts by bringing a legal case to the ECJ. It would then be the ECJ's job to ensure that the limits of European authority are respected.[23]

The GCC remained focused on the ECJ as the problematic lynchpin of the European legal system. My notes of the meeting include the following: 'The 1974 message [to the ECJ] was to pay more attention to basic rights. The 1993 message is to stop your activism which undermines state sovereignty. You are not the motor of integration, the states are the masters of the treaty, and the people are the masters of the state.'[24] The GCC insisted that the ECJ lacked a *Kompetenz-Kompetenz*, meaning the legal right to determine the limits of its own authority. The GCC declared its intent to use the German

21 FCC, judgment of 12 October1993, 2 BvR 2134/92, 2159/92, BVerfGE 89, 155 (186-187) – *Maastricht*.

22 Interview with the German author of the *Maastricht* decision and his clerk, Karlsruhe, Germany (8 December 1993).

23 FCC, *Maastricht* (n. 21).

24 Interview with the German author of the *Maastricht* decision and his clerk, Karlsruhe, Germany (8 December 1993).

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act ratifying the Maastricht Treaty as the legal framework defining the limits of European authority. Given that the act of accession reiterated Maastricht Treaty provisions, the GCC was really asserting an authority to interpret European law, and to then find that transgressive European law (ausbrechende Rechtsakte) is inapplicable in Germany.

The opportunity to apply its *Maastricht* criteria arose during the extensive litigation regarding an EU regulation focused on banana imports. The saga is complex. Germany had a longstanding and deep history pertaining to banana imports, which is why the German government opposed the EU banana import regime, challenging it twice in front of the ECJ. German litigants also challenged the regulation, multiple times. Basic rights issues were addressed; the regulation was adjusted, yet ultimately the EU has the competence to regulate the European common market.[25] As with the *Solange II* case, a German importer continued to provoke a constitutional clash hoping to render the EU regulation inapplicable in Germany. The GCC avoided the central issue as long as it could, and it eventually sat on a case for four years, probably waiting for the author of the *Maastricht* ruling to leave the court. Using its *Banana Market Order* ruling to signal peace, the GCC ruled that as long as the ECJ's basic rights protections do not generally sink below a certain undefined level, the GCC will not conduct additional constitutional review of EU law.[26] This proviso made about as much sense as the *Solange I* proviso.

The upshot of this second *Solange* iteration is that the German government became more vigilant in protecting the German constitutional system in its European level actions, and the ECJ and European officials worked to respect basic rights, and the GCC retreated without recanting its controversial legal innovations.

## 3. The *Lisbon* Ruling: Adding the Objective of Protecting Germany's Statehood and 'Constitutional Identity'

Before the next *Solange* iteration, European integration evolved again. The 1997 Treaty of Amsterdam conferred to the EU a greater competence over immigration, civil procedure, and police and justice coordination, and

25 See Karen J. Alter and Sophie Meunier, 'Banana Splits: Nested and Competing Regimes in the Transatlantic Banana Trade Dispute', Journal of European Public Policy 13 (2006), 362-382.

26 FCC, order of 7 June 2000, 2 BvL 1/97, BVerfGE 102, 147 (147, 164) – *Banana Market Order*. See Alter, *Establishing the Supremacy of European Law* (n. 1), 110-115.

it established the European Central Bank (ECB) and the Eurosystem (the governance mechanism for states that have adopted the euro as their currency). The Amsterdam Treaty also addressed some GCC concerns, enhancing the co-decision powers of the Parliament, further defining the subsidiarity rights of states, and creating principles and responsibilities for foreign policy and security coordination.[27] In 2000, the European Parliament, Commission and Council drafted a Charter on Fundamental Rights.[28] The next step was the European Constitution Project, an ambitious effort to define the values, objectives, spheres of action, and institutional governance for a European constitutional polity wherein a Charter of Fundamental Rights and European law would be supreme. The *Draft Treaty Establishing a Constitution for Europe* was signed by all member governments, adopted by the European Parliament, and ratified by 17 European states.[29] When ratification referenda in France and the Netherlands failed, the Constitution project faltered. For Eurosceptics, the ultimate failure of the European Constitution Project settled the question of what the future of the EU would be: The EU would forever be a union of independent European states.

The fallback strategy was the *Treaty of Lisbon on the Functioning of the European Union*, which incorporated the Charter on Fundamental Rights and enacted necessary changes that had been part of the Constitution Treaty.[30] Signed in 2009, EU officials insisted that the Lisbon Treaty conferred 'no additional exclusive competences' to the EU, and it included no references to the supremacy of European law. It did, however, complete 'the absorption of the remaining third Pillar aspects of the area of freedom, security and justice (FSJ), i. e. police and judicial cooperation in criminal matters, into the first Pillar', which means that the ECJ gained competence to rule on EU Pillar III policies.[31] A protocol attached the Lisbon Treaty (Protocol 2) expanded upon the Amsterdam subsidiarity protocol, granting national parliaments a role in European policy-making and the ECJ 'jurisdiction in actions on grounds of infringement of the principle of sub-

27 Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts of 2 October 1997, OJ 1997 C 340/1.

28 Charter of Fundamental Rights of the European Union of 7 December 2000, OJ 2000 C 364/1.

29 *Draft Treaty* establishing a *Constitution* for *Europe of 18 July 2003*, OJ C 2003 169/1.

30 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community of 13 December 2007, OJ 2007 C 306/1.

31 Quotes come from: European Parliament, 'The Treaty of Lisbon. Fact Sheets on the European Union', at <https://www.europarl.europa.eu>, last access 24 April 2025.

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sidiarity by a legislative act'.[32] In sum, Lisbon Protocol 2 instantiated into European law the consultation rights demanded in the GCC's *Maastricht* ruling.

The process of ratifying and reviewing the constitutionality of the Lisbon Treaty was a replay of what had happened in the GCC's *Maastricht* ruling, but in a significantly different context. As they had done with the Maastricht, Amsterdam and Draft Constitution Treaties, the Bundestag overwhelmingly endorsed the Lisbon Treaty. Once again, the Bundestag updated Basic Law Article 23. The 1992 revision of Article 23 mainly instructed German authorities on how they had to proceed regarding issues of European policy-making. A 2006 constitutional revision further specified Länder participation in the European integration process. The Amsterdam Treaty, the defunct Constitution Project, and protocol 2 of the Lisbon Treaty created additional subsidiarity rights and roles for national legislative actors. The 2009 updating of the Basic Law's Article 23 addressed these changes. Under the revised Article 23, German states, the Bundesrat and the Bundestag gained a constitutionally guaranteed consultative role in European policy-making; the Bundesrat and Bundestag were explicitly authorised to defend Germany's subsidiary rights by challenging European legislative acts in front of the ECJ; and Article 23 required consultative, representative and co-governing rights for German states in the matters of school education, culture and broadcasting.[33] In short, the revised Article 23 instantiated into German constitutional law the GCC's 'democracy-protecting' constitutional doctrines.

Peter Gauweiler, a member of the Bundestag who would go on to challenge the Outright Monetary Transactions (OMT) policy (discussed in Part II), invoked the 'right to vote' doctrine, challenging the ratification of the Lisbon Treaty. The GCC seized on the opportunity as a chance to interpret the new Article 23 and cement what the failure of the European Constitution Project meant for the future of European integration.

The GCC's *Lisbon* ruling was a comprehensive restatement of Germany's constitutional engagement in the European Union.[34] My treatment is far too brief, mentioning only two innovations. First, the GCC declared its own competence to find EU law *ultra vires.* The *Solange I* ruling had established the GCC's right to find EU law inapplicable, and the *Maastricht* ruling indicated that the GCC would be interpreting EU Treaties directly. The

32 Consolidated version of the Treaty on the Functioning of the European Union – PROTOCOLS – Protocol (No. 2) on the application of the principles of subsidiarity and proportionality of 9 Mai 2008, OJ 2008 C 115/206. Discussed in Robert Schütze, 'Subsidiarity after Lisbon: Reinforcing the Safeguards of Federalism?', C. L. J. 68 (2009), 525-536.

33 Article 23 para. 1a of the German Basic Law.

34 FCC, judgment of 30 June 2009, BVerfGE 123, 267 – *Lisbon*.

*Lisbon* ruling went further, exchanging the *Maastricht* ruling terminology of 'ausbrechender Rechtsakt' for a broader claim that international institutions have a secondary legal and political status in Germany. This seemingly puts European law on par with all international law. The notion of *ultra-vires* control also goes beyond the idea of subsidiarity rights, in that the GCC will also rule that the EU never had authority for certain issues. This means that any European act could be ruled a transgression of the German constitution, or of EU authority.[35] If the GCC makes the latter determination (which it did in its *PSPP* ruling, discussed in Part II), the GCC would be trespassing into what the GCC has long acknowledged as the ECJ's jurisdictional purview.

Second, the GCC's 'identity control' doctrine is linked to a conception of German statehood and a commitment to uphold fundamental unchangeable principles of the German Constitution, including the inviolable protection of human dignity. Whereas the *Broadcasting Directive* ruling had focused on Land rights, and the *Maastricht* ruling on democratic rights, the *Lisbon* ruling added the notion of an 'inviolable core content' to Germany's constitutional identity that the GCC, and only the GCC, must and will always protect. Identity control also suggests that Germany's identity as a nation must be maintained. The majority opinion argued that 'European unification on the basis of a treaty union of sovereign states may not be achieved in such a way that not sufficient space is left to the Member States for the political formation of economic, cultural, and social living conditions. This applies in particular to areas which shape the citizens' living conditions, in particular the private sphere of their own responsibility and of political and social security, protected by fundamental rights, as well as to political decisions that rely especially on cultural, historical, and linguistic perceptions and which develop within public discourse in the party political and parliamentary sphere of public politics.'[36] Remember this statement, as it creates a means for the GCC to act as the protector of every aspect of German citizenship, the German polity, and human dignity.

Given that the GCC also found the Lisbon Treaty changes to be constitutional, it was not entirely clear what the ruling would mean. Yet the combination of enhanced subsidiarity and proportionality requirements (Lisbon Treaty protocol 2), a 'right to vote' basis for any German voter to challenge

35 Frank Schorkopf, 'The European Union as an Association of Sovereign States: Karlsruhe's Ruling on the Treaty of Lisbon', GLJ 10 (2009), 1219-1240 (1219, 1231-1232).

36 FCC, *Lisbon* (n. 34), 357-358. Quoted in Peter Hilpold, 'So Long Solange? The PSPP Judgment of the German Constitutional Court and the Conflict between the German and the European "Popular Spirit"', The Cambridge Yearbook of European Legal Studies 23 (2021), 159-192 (169). See also Schorkopf (n. 35), 1232-1233.

any European policy, and now *ultra-vires* and identity control created an explosive possibility of more clashes with the European legal order.

As occurred following the *Solange I* and *Maastricht* rulings, the GCC then walked back its *Lisbon* ruling to create guardrails that would avoid a conflict with the ECJ. The case involved a constitutional complaint of a German Federal Labour Court ruling that had applied an ECJ interpretation that some legal minds thought to be a legal stretch.[37] When the employees won their case, the company (Honeywell) brought a constitutional complaint arguing that its freedom to contract and freedom of profession had been impinged upon. The GCC took the complaint as a chance to acknowledge the binding impact of European law in Germany. The GCC acknowledged the ECJ's right to develop general principles of EU law, and it created a threshold criterion that would limit GCC findings that EU is *ultra-vires.* In addition to an 'evident' and 'obvious' *ultra vires* legal act, an expansion of EU power had to generate a structural deficit that shifts the power structure between the EU and its member states.[38] The *Honeywell* decision created a 'friendliness towards European law', adding a *Kloppenberg* type requirement that German judges must first refer a case to the ECJ before ruling an EU act ultra-vires.[39] As the dissenting opinion pointed out, *Honeywell* was a retreat from the *Lisbon* ruling and a return to the *Solange II* and *Banana Market Order* positions. For the authors of the dissent, the retreat made it difficult if not impossible for states to reassert their power as masters of the treaty.[40]

## II. The *Solange* Problem in a Globalised World

The first three *Solange* iterations were GCC reactions to advances in European integration. The latest GCC pushback is different in that it is not really about new EU expansions of authority or activist ECJ interpretations. Instead, the GCC seems to want to turn back time, to reclaim German authority that political leaders long ago transferred to the European level. Also new is that the GCC is letting Eurosceptics usurp the Bundestag,

37 The date to implement a directive barring age discrimination had not passed, and Germany had yet to implement the directive. Yet the ECJ ruled that Germany was already required to disallow age discrimination. See Christoph Möllers, 'German Federal Constitutional Court: Constitutional Ultra Vires Review of European Acts Only Under Exceptional Circumstances; Decision of 6 July 2010, 2 Bvr 2661/06, Honeywell', Eu Const. L. Rev. 7 (2011), 161-167 (163).

38 Möllers (n. 37), 165-166.

39 Franz C. Mayer, 'The Ultra Vires Ruling: Deconstructing the German Federal Constitutional Court's PSPP Decision of 5 May 2020', Eu Const. L. Rev. 16 (2020), 733-769 (757).

40 Möllers (n. 37), 166-167.

Bundesrat, Länder, and German government's authority and discretion vis-à-vis EU actions that do not clearly infringe on German subsidiarity rights. Meanwhile, the GCC seems to have no plan of trying to use push-back to improve procedures or substantive rights protection.

The EU laws and policies discussed in this section reflect decisions by European governments, with the support of national legislative actors, to act collectively rather than having 27 EU countries pursue their own independent policies. Many of the EU's new policies – on migration, asylum, regulating data, COVID protocols, and Russian sanctions – are controversial, which does not mean that they are not democratically adopted. One can reasonably question the legitimacy and legal appropriateness of the GCC actively enhancing the power of cranky Germans to challenge the collective decisions that democratic political institutions across Europe have chosen.

The GCC is not wholly hostile to the ECJ's engagement. It has not resisted ECJ's *Kadi* rulings, where the ECJ adopted the *Solange* method, declaring the supremacy of European law over the UN Charter (which makes acts of the Security Council supreme), and successfully pressuring the Commission, Member States and the UN to create changes to better protect due process rights for individuals flagged as supporters of terrorism.[41] The GCC's First Senate has embraced and collaboratively built on ECJ 'right to be forgotten' jurisprudence.[42] But the GCC's Second Senate is, for now, clinging to the constitutional toolkit it created even where there is no clear *Solange* method solution available. Perhaps the Second Senate is simply stuck in its own doctrine and fixations. Perhaps the GCC is channelling a Brexit drive to turn the clock back to a world in which Germany acts alone, much to Germany's own disadvantage.

In any event, the GCC's effort to pressure the ECJ to reject valid EU policy will not work. Insofar as the EU is exercising powers that member states transferred and insofar as EU level actions follow proper procedure and respect democratic and individual rights, the ECJ has no choice but to engage, uphold, and interpret EU level policy. In this respect, one can question the appropriateness of the GCC blaming the ECJ for seeing a legal issue that falls under its purview differently.

41 Grainne De Burca, 'The European Court and the International Legal Order after Kadi', Harv. Int'l L. J. 51 (2010), 1-49. On the changes the *Kadi* rulings propelled, see: Karen J. Alter, *The New Terrain of International Law* (Princeton University Press 2014), 298-306.

42 Jürgen Kühling, 'Germany: The Right to Be Forgotten' in: Franz Werro (ed.), The Right To Be Forgotten: A Comparative Study of the Emergent Right´s Evolution and Application in Europe, the Americas, and Asia (Springer 2020), 125-140. Ana Bobić, 'Developments in the EU-German Judicial Love Story: The Right to Be Forgotten II', GLJ 21 (2020), 31-39. Paul Friedl, 'A New European Fundamental Rights Court: The German Constitutional Court on the Right to Be Forgotten', European Papers 5 (2020), 447-460.

The unfortunate part of this assessment is that there is so much to be done. Insofar as there is a deeply felt sentiment that globalisation has gone too far, one can reasonably ask why political bodies are not taking advantage of their *Lisbon*-created rights to bring *ultra-vires* suits to the ECJ. EU law also allows plaintiffs to bring 'failure to act' suits. Why not bring more of these suits? I suspect that litigants are holding back because European politicians are struggling with and concerned about the challenge of dealing with illiberal member states and Russian destabilisation of European democracies. Constructive engagement grounded in constitutionalism and individual rights could, however, bolster the courage and ability of European level actors to take bold action. The worst of all worlds involves letting only the Eurosceptics challenge EC actions. In this respect, one might wonder if the GCC is implicitly prioritising Euroscepticism? After reviewing the latest controversial GCC pushback, the next section will discuss the work that needs to be done.

## 1. European Arrest Warrants: The GCC Squanders an Opportunity

European cooperation in justice and home affairs has evolved significantly, as it should given the state of the world today. In the 1992 Maastricht Treaty, EU countries agreed to coordinate their justice and home affairs, and they have adopted a number of framework agreements and created the European Union Agency for Law Enforcement Cooperation (EUROPOL). Originally, the ECJ had no role in this third pillar of European integration, but in 2009 the Lisbon treaty absorbed the third pillar into the first pillar, creating a role for the ECJ in interpreting European justice and police framework agreements. ECJ rulings have established rights for suspects and accused individuals.[43] The sum of these changes is that the European arrest warrant system replaced the interstate system of extradition treaties, and the ECJ has gained a role interpreting these agreements. Of concern to the GCC is that EU Framework Agreements suggest that member states should mutually recognise and trust the decisions of national prosecutors, judges, and police. Yet one can plausibly argue that national constitutional rights can operate alongside an enhanced system of European-wide coordination and cooperation.

43 See, e. g.: ECJ, *Dieter Krombach v. André Bamberski*, judgment of 28 March 2000, case no. C-7/98, ECLI:EU:C:2000:164, para. 42; ECJ, *Ordre des barreaux francophones et germanophone and Others v. Conseil des ministers*, judgment of 26 June 2007, case no. C-305/05, ECLI:EU:C:2007:383, para. 29-32; ECJ, *Europese Gemeenschap v. Otis NV and Others*, judgment of 6 November 2012, case no. C-199/11, ECLI:EU:C:2012:684, para. 71.

The GCC once again inserted itself, assuming the role of constitutional arbiter adjudicating appeals of extradition orders that lower courts had reviewed and approved. Frank Meyer argues that the GCC seized on an easily dispatched constitutional complaint, using the appeal as an opportunity to make a major statement regarding the European law governing arrest warrants.[44] That the GCC plays this intermediating review role is not the problem, nor is the ruling's case-specific finding of a lack of due process on the part of Italian and German judges. The problem is that the GCC did not apply its *Solange* method.

Rather than finding that 'as long as there are insufficient due process checks on the issuing of arrest warrants', the GCC's 2015 *European Arrest Warrant* ruling found criminal law to be an inviolable part of Germany's social and cultural identity. The judges grounded German jurisdiction in a need to protect human dignity, defined in such a way that even small procedural blips could be seen as violations of human dignity.[45] At a minimum, the ruling qualifies Germany's participation in the EU-wide cooperative system of police coordination. A maximal interpretation is that the GCC has claimed exclusive, unchangeable, uncompromisable, and ultimate authority over pretty much all criminal law issues. The legal argumentation is such a stretch that Meyer asks why the GCC would bother to invoke identity control and human dignity to challenge European arrest warrant authority? Meyer's answer is that the GCC wants to be very clear that ECJ rulings on arrest warrant issues have no legal relevance in Germany, since German law is all that matters.[46]

One wonders if this pushback is an actual impediment to the smooth operation of the system, or mostly a constitutional tempest in a teapot? One also wonders whether leaving the issue outside of the EU system of review would have made a real difference. The counterfactual to be answered is whether German officials would be able to force all of its extradition partners to adopt the due process review systems that the GCC saw as optimal. In any event, the broad nature of the GCC's pushback appears mostly unhelpful.

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44 Frank Meyer, '"From Solange II to Forever I:" The German Federal Constitutional Court and the European Arrest Warrant (and how the CJEU responded)', New Journal of European Criminal Law 7 (2016), 277-294 (278-279).

45 FCC, order of 15 December 2015, 2 BvR 2735/14, BVerfGE 140, 317 (343) – *European Arrest Warrant*. Discussed in Meyer (n. 44), 281. Critics may argue that the inability of a plaintiff to challenge their guilt or innocence is more than a mere procedural blip. Perhaps, but the more pragmatic question is whether Germany could have instead used an extradition treaty to force all other countries to first allow appeals to the charges before an extradition request would be accepted.

46 Meyer (n. 44), 283-293.

Shouldn't the GCC instead be defending due process and scrutinising EU actions taken during the state of exception generated by September 11?[47]

## 2. Growing European Central Bank (ECB) Authority: Does the Bundesbank and the GCC Want to Turn Back Time?

The most recent GCC pushback is even more worrisome. The creation of the euro required a much deeper level of coordination of the fiscal policies (e. g. taxing and spending) of states in the Eurosystem. The Maastricht Treaty included a set of convergence criteria, but in deference to sovereignty, no tools were created to enforce the criteria. Meanwhile, on the monetary side, upon the creation of the euro in 1999, member states transferred to the ECB the responsibility of currency printing, price stability oversight, and market-related interventions to stabilise and sustain the value of the euro. In recognition of Germany's historic concerns about inflation, the ECB's design followed the German *Bundesbank* model, including the ECB's mandated focus on price stability and the structure of central bank independence.[48] Article 130 of the Lisbon treaty is clear that political and legal bodies cannot review or influence decisions and actions of the ECB.[49] Yet the Lisbon treaty also introduced a confusing and unsustainable distinction wherein economic policy is subject to subsidiarity, proportionality and legal review while monetary policy – a subset of economic policy – is not. This political fudge created an opening for the GCC to insist that certain monetary tools are actually economic policies.

The Greek financial crisis of 2007 tested the euro in new ways. One could blame the Greek government for deficit spending, yet policy-makers recognised that a number of European countries engage in deficit spending. Indeed Spain and Italy are larger economies with problems that are as deep, and even more likely to spread instability across EU member states. In this respect, the Greek sovereign debt crisis was tottering domino that was easier to shore up, and the best way to avoid a full-blown eurozone financial crisis. Moreover,

47 Possible concerns are identified in Kim Lane Scheppele, 'Law in a Time of Emergency: States of Exception and the Temptations of 9/11', U. Pa. J. Const. L. 6 (2004), 1001-1083.

48 The ECB is located in Frankfurt and its governance structure includes an Executive Board appointed by political bodies as well as representatives from national Central Banks.

49 Article 130 states 'When exercising the powers and carrying out the tasks and duties conferred upon them by the Treaties and the Statute of the ESCB and of the ECB, neither the European Central Bank, nor a national central bank, nor any member of their decision-making bodies shall seek or take instructions from Union institutions, bodies, offices or agencies, from any government of a Member State or from any other body.'

one could also blame German and French banks that had profited greatly by issuing loose euro-denominated credit to Greek individuals and businesses. A Greek government default would make repaying private debt impossible, and a failure to repay this debt could compromise French and German banks.

The IMF intervened, creating a package that averted a Greek default. The ECB's role in this crisis-moment was to stabilise the euro and European banks. ECB President Draghi announced a plan to exceptionally purchase government bonds that were deemed too risky for markets, associating conditions with the purchasing promise (the so-called Outright Monetary Transactions (OMT) policy).[50] The new and exceptional OMT policy was intended to calm financial markets, and the strategy worked so well that the ECB never actually purchased OMT bonds. In other words, the announcement of a willingness to act on its own calmed financial markets.

Once again, Peter Gauweiler appealed to the GCC. One senses that Gauweiler was unhappy that the Bundestag had not embraced the active engagement that the GCC's *Lisbon* ruling had invited.[51] He and GCC judges also seemed to be unhappy that the ECB would employ a collective resource to help a country that had practiced fiscal imprudence. The legal challenge was rather audacious. *Gauweiler* was targeting the Bundestag's failure to file a complaint with the ECJ; meanwhile ECB policies are not subject to legal review, the OMT policy had never been implemented, and there was good reason to worry about contagion affecting the entire eurozone. The GCC, following its *Honeywell* mandate, referred to the ECJ the question of whether the OMT was *ultra-vires*. While the reference demonstrated the required 'friendliness' – it was the first-ever GCC reference – the substantive issue was moot and the GCC's reference basically told the ECJ how it must rule.[52]

The ECJ issued its OMT preliminary ruling in June, 2015, following the GCC's direction in part. It controlled to ensure that the OMT policy was adopted following proper procedure and that the policy fell under the powers conferred to the ECB. The ECJ required the OMT policy to be exceptional, limited in time and application, and applied with strict conditions. But the ECJ also defined the legal issue differently, accepting ECB officials' claims

50 ECB, 'Speech by Mario Draghi, President of the European Central Bank at the Global Investment Conference in London 26 July 2012', ECB of 26 July 2012, at <https://www.ecb.europa.eu/>, last access 24 April 2025.

51 See Severin Weiland, 'The German Politician Behind the Lisbon Suit', Der Spiegel of 1 July 2009, at <https://www.spiegel.de>, last access 24 April 2025.

52 The text of the preliminary reference suggested that it was 'likely' that the OMT decision exceeded ECB competences, but the action could be saved if the ECB's action were given a certain interpretation. See Paul P. Craig and Menelaos Markakis, 'Gauweiler and the Legality of Outright Monetary Transactions', E. L. Rev. 41 (2016), 4-24 (7).

that the goal of the ECB policy was to preserve monetary policy and encourage price stability. In other words, the ECJ displayed an appropriate and legally required deference to the ECB's monetary policy expertise and authority.[53]

The case then returned to the GCC. On the one hand, it is truly pointless to prohibit the ECB from working with the IMF or to limit the ECB's use of speech-acts and signalling to calm markets. On the other hand, *Gauweiler* was right that the ECB would continue to make OMT-type pronouncements, and it would continue to help Eurosystem countries in need. A year after the ECJ's preliminary ruling, the GCC issued its own ruling. On the face of it, the GCC agreed with the ECJ ruling. While it did not declare the OMT policy to be *ultra vires*, the GCC undertook its own full review, confirming that the relevant legal authority had been properly transferred to the ECB, conducting 'identity control', and confirming that the ECJ had operated within its delegated authority in validating the OMT policy.[54] Giving its own interpretive spin to the ECJ's ruling, the GCC ruled that the Bundesbank can only participate in ECB collective actions insofar as the purchases are limited from the outset, intervention is stopped when no longer needed, conditions attached are not distorted, and the purchases are not announced (so that the German economy is not then destabilised). The GCC went on to criticise how the ECJ had done its job. The ECJ had, the GCC argued, not sufficiently reviewed the factual assumptions; it had not determined that the policy fit within the definition of monetary policy; and it had not developed a principle wherein democratic legitimacy requirements called for a 'strict judicial review' of the ECB's mandate.[55] The grumpy and arguably *ultra-vires OMT-Programme* decision sent a signal that the GCC was unhappy. Given that the OMT policy had been upheld, the EU did not take formal action and criticism was muted.

Yet the conflict was far from over; the next iteration was already in the queue. The Greek financial crisis was really a microcosm of the global 2007-2008 financial crisis. Quick and radical actions on the part of many governments kept the crisis from spilling into a global depression. For example, the United States created the Troubled Assets Relief Program (TARP), and the United States (US) government stepped in to save the American automobile industry. Central banks and policy-makers then created new monetary tools to be better prepared to act as lenders of last resort in the future. In 2014 the

53 ECJ, *Peter Gauweiler and Others v. Deutscher Bundestag*, judgment of 16 June 2015, case no. C-62/14, ECLI:EU:C:2015:400. For more, see Craig and Markakis (n. 52).

54 FCC, judgment of 21 June 2016, BVerfGE 142, 123 – *OMT-Programme*.

55 FCC, *OMT-Programme* (n. 54), 181-221.

ECB announced a 'non-standard toolkit' it could use to reassure markets that the ECB would protect the stability of Eurozone countries and their banking sectors. The Public Sector Purchase Programme (PSPP) can be used for national central bank and public-sector bonds from specified agencies based in the Eurozone. This tool was opposed by the Bundesbank. Unlike the OMT, the ECB started to use its toolkit in limited ways starting in 2015.[56] It should be underscored that the adoption and implementation of these new tools was subject to collective decision-making by the ECB Governing Council, which includes six members and 20 national central bank governors. While Bundesbank arguments have significant influence in Governing Council deliberations, and along with four other eurozone heavyweights the Bundesbank has a greater voting voice, the Bundesbank can still be outvoted.[57] Political actors have accepted this reality. In 1992, the Bundestag amended the German Constitution to allow for the transfer of authority to the ECB. Especially given that the Bundesbank is not a democratically accountable institution, one can reasonably ask what German right to vote was undermined by the creation of the PSPP programme?

The GCC's *PSPP-Programme* ruling was a repeat of the *OMT-Programme* proceedings, this time with the nightmare scenario outcome. A German citizen brought a charge against the Bundestag for having failed to challenge the ECB's PSPP programme and the GCC referred the case to the ECJ and instructed it on how it should rule. This time, however, the GCC rejected the ECJ interpretation and declared the PSPP programme *ultra-vires*. It then ordered the German government and the Bundesbank not to participate in the programme.[58]

The *PSPP-Programme* ruling outshines all other *Solange* iterations in the magnitude and harshness of the criticism it has received. To name just a few problems: 1) Whereas in the past the GCC criticised the ECJ for having invented and stretched European law, this time the ECJ practiced judicial restraint and the GCC demanded that the ECJ should have been activist in a way barred by the Lisbon Treaty, and prohibited in Germany itself. 2) The GCC is seen as having violated its own *Honeywell* requirements that the ultra vires act be 'evident' and 'obvious', and in ordering to the German government and Bundesbank to violate their European obligations, the GCC

56 For a list of tools, see: ECB, 'Asset Purchase Programmes', at <https://www.ecb.europa.eu/mopo/implement/app/html/index.en.html>, last access 24 April 2025.

57 For an explanation of weighted voting and the rotation on the governing board, see ECB, 'Rotation of Voting Rights in the Governing Council', ECB of 1 December 2014 (updated on 1 January 2023), at <https://www.ecb.europa.eu/ecb-and-you/explainers/tell-me-more/html/voting-rotation.en.html>, last access 24 April 2025.

58 FCC, judgment of 05 May 2020, BVerfGE 154, 17 – *PSPP-Programme*.

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trespassed its own authority;[59] 3) Not only does the GCC lack jurisdiction to review ECB actions, it lacks substantive expertise and its recommendations make no practical sense.

My concern is the democratic and policy elements of the ruling. As in the *OMT-Programme* ruling, the GCC adopted the perspective of Bundesbank critics, seeing the ECB's intervention as designed to stop the 'spread' of interest rates that would 'naturally occur' if fiscally imprudent governments had to pay a higher interest rate on government bonds.[60] According to the GCC, efforts to influence the interest-rate spread fall into the category of economic policy rather than monetary policy. As many have pointed out, the Lisbon Treaty's distinction between economic and monetary governance is unworkable in practice. The relevant point is that the Lisbon Treaty puts ECB decisions outside of judicial and political intervention, for good reason. Central bank independence can go too far, but it exists because voters and politicians are regularly tempted by bad monetary policy decisions.

The GCC worried that the ECJ did not delve sufficiently into the factual basis of the ECB's policy-choices. My worry is that constitutional judges lack the expertise to do so. Political economists recognise that Central Bankers were operating in a context of radical uncertainty, playing what is essentially a confidence game. Because Central Bank market intervention, through the regular tool of buying and selling public-sector bonds, is a confidence game, judicial review and proportionality review are simply not usable tools.[61] This is probably why no Supreme Court has exercised the type of Central Bank oversight that the GCC demands of the ECJ, and that the Lisbon Treaty precludes.

It is reasonable to worry that monetary easing will generate inflation. Presumably this concern is the primary focus of every meeting of the ECB's Governing Council, and is raised in every public-record questioning of the ECB in the European Parliament. The democratic problem is greater. Bundesbank critics see state level fiscal imprudence as the primary reason that private sector bond-buyers might be reluctant to buy the public-sector bonds. This may or may not be true. The critics, however, think that the natural market remedy would be for countries with large deficits to then pay a significantly higher interest rates (creating a natural interest rate 'spread'). Of course charging higher interest rates for some country Eurobonds would create even greater destabilising economic problems, and there is the reality

59 Mayer (n. 39).

60 Craig and Markakis (n. 52), 9.

61 Karen J. Alter, 'When and How to Legally Challenge Economic Globalization: A Comment on the German Constitutional Court's False Promise', I.CON 19 (2021), 269-284 (277-280).

that governments and Central Banks exist to counteract what market actors worry and panic about. In the radical viewpoint, however, it would be better if any of the following options occurred: a) maybe currency management should revert back to states, which would mean that the euro would be rolled back; b) maybe it would be good if high interest rates pushed European states into default, because then Greek-style austerity could be forced on them; c) maybe states should be expelled from the eurozone.[62] I won't bother to point out the pitfalls of options a, b, and c.[63] The relevant point is that even if a subset of German voters agree, these types of policy decisions are above the paygrade of the Bundesbank, average citizens, and the GCC.

With respect to the euro and the ECB, a democratic choice has been made. The EU created the option of a monetary union, and twenty European countries opted in. The Bundestag endorsed the Maastricht Treaty objective of creating a monetary union, changing the German constitution to enable it. Later German political leaders chose to join the Eurozone, and they approved the accountability setup of the ECB. Then, the Bundesrat, the Bundestag, and the German government chose not to raise a legal challenge to the OMT or the PSPP policies.

The sad part of this whole story is that there are serious reasons to question political decision to help banks and not individuals impacted by the 2007-2008 financial crisis. There may even be a legal review role to play. Rather than focusing on the ECJ's actions, shouldn't constitutional courts be asking governments to also help individuals, or to create oversight mechanisms based on the Maastricht convergence criteria? Should German banks be required to more prudently lend monies so as to protect their solvency? It is no small irony that the GCC declared the PSPP programme *ultra-vires* during the COVID-19 pandemic, a moment when European and German leaders prioritised quantitative easing. Should the GCC have the power to stop these exceptional actions too? The ruling was as substantively unhelpful as it was politically outrageous. To symbolically appease the GCC, the ECB confidentially shared with the EU and German parliaments some of the reasoning behind their decisions, after which both declared themselves satisfied that the ECB was acting prudently.[64]

62 Carlo Bastasin, 'Defending The Wolf: The Useful Contradiction of the Bundesbank', SEP Policy Brief No. 1 – 2014, at <https://www.brookings.edu/wp-content/uploads/2016/06/Defending-The-Wolf.pdf>, last access 24 April 2025.

63 See, for example, Barry Eichengreen, 'The Breakup of the Euro Area' in: Alberto Alesina and Francesco Giavazzi (eds), *Europe and the Euro* (University of Chicago Press 2010), 11-51.

64 Mayer (n. 39), 762 f.

## 3. Wither the *Solange* Method?

I argued that the first-generation *Solange* iterations were productive insofar as they named valid and deeply felt concerns; they were about protecting individual rights and national democracy; and they generated contestation about the issues raised by the rulings. The post-*Lisbon* ruling iterations are problematic in that the GCC seems to be stuck in its old battles, seeing the ECJ as the problem when really it is European governments that are falling down on their responsibilities. Entrenched in contesting the ECJ, the risk of the *Solange* method is playing out today. *Solange* iterations intentionally encourage litigants to push their own interests and viewpoints through a constitutional appeal. The GCC regularly walks back its *Solange* assertions because being a tool of provocateurs is not the constitutional role German Constitutional judges want to play. If history is our guide, it is too soon to know what will become of the current GCC pushback, especially after the current set of judges leave office and thereby allow for a return to constructive engagement.

The larger point is that problem is not the *Solange* method per se. Indeed, new *Solange* criteria to protect individual rights and democracy might be warranted to address the set of issues European governments are grappling with. Yet, as I have argued, the GCC is misdirecting its critics, framing the question as being about 'whether Europe can act' and suggesting that the ECJ is both the problem and the solution.[65] German lawyers err insofar as they engage by accepting the GCC's framing. They also err in letting the weakness of the GCC's recent rulings drive their critiques. The real and braver issue to debate and contest is the *Solange* question: what must national and European policy-makers and judges do to better protect democracy, individual rights, and human dignity? How might the *Lisbon* toolkit be constructively deployed towards these ends?[66]

# III. The *Solange* Method in a Time of Anti-Globalism

I am interested in the *Solange* method because the current global capitalist system is seriously out of whack, to the point that democracy is at risk. I

65 Alter, 'Economic Globalization' (n. 61).

66 Right after the *Lisbon* ruling, there was greater optimism and hope that the *Lisbon* criteria could be developed to enhance social democracy. A good question worth investigating is why this hasn't happened. See Andreas Fischer-Lescano, Christian Joerges and Arndt Wonka (eds), *The German Constitutional Court's Lisbon Ruling: Legal and Political Science Perspectives* (ZERP 2010).

have my own views of where the problems lie. Whether mine or a different set of issues are the right ones to reform, it seems undeniable that reasoned minds should be debating how much globalisation to accept or scale back. This conversation is hard to have insofar as anti-globalism is unleashing a 'we want none' nationalism. Now more than ever we need constitutional courts to protect the political process, due process, elections, and individual and minority rights. Judicial intervention may stir contestation, yet so long as constitutional courts are articulating deeply felt rights-based and procedural concerns, the contestation will be productive.

I have focused on the GCC, but it is not alone in using the *Solange* method towards good ends. The Colombian Constitution has incorporated international human rights treaties, and it has created the notion of a constitutional bloc, applying these ideas to both challenge and reinforce the applicability of Andean law and Inter-American Human Rights Law in Colombia.[67] Constitutional courts in South Africa and Brazil have used their constitutions to push back against efforts to use the intellectual property protections of the World Trade Organization to stymie government efforts to provide life-saving AIDS medications.[68] The commonality in these examples is that domestic and international law are not treated as all-or-nothing propositions, and constitutional courts are intervening to protect cherished national values, while recognising that these values exist alongside a presumption that polities should follow their international commitments. In practice this means that international and national judges should work together to render domestic and international law compatible, at least as long as international law is not actually undermining the national constitutional order and the protection of basic rights.

There are two jointly necessary and collectively sufficient permissive conditions that makes the *Solange* method possible, both of which are increasingly at risk. The *Solange* method requires a Western style rule of law, where governments are also held accountable to constitutional limits. This, in turn, requires judicial independence. Second, there must be a national political culture of constitutional obedience where 'judges help define legitimate political action and determine whether specific contested acts are "constitutional"'.[69] Autocratic legalism is how authoritarians undermine judicial inde-

67 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 (254-257).

68 Holger Hestermeyer, *Human Rights and the WTO* (Oxford University Press 2008), 1-17.

69 Karen J. Alter, *The New Terrain of International Law* (Princeton University Press 2014), 290-295.

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pendence.[70] Resigned acquiescence and political cynicism is how political opponents undermine cultures of constitutional obedience. Indeed, a number of countries that had cultures of constitutional obedience are now wavering, and with this wavering comes the undermining of democracy.[71] This means that we cannot take judicial independence, support for a genuine rule of law, or the survival of the *Solange* method for granted.

Here is the bottom line. Voters are indicating their frustration with what globalisation has brought, creating contestation about over-globalisation. Politicians do not know how to respond, and nationalist anti-globalism is becoming a very real threat to democracy. While I don't love the idea of identity control, the desire to protect the national identity is deeply felt. Knowing that the GCC never retrenches its doctrine, German scholars should work on recalibrating the *Lisbon* ruling criteria. We need arguments about how the 'right to vote' must not become a cudgel against reasonable political decisions to *not* assert subsidiarity rights, and legal cases and arguments that render identity control, *ultra vires* review, and human dignity review helpful for the age of globalisation.

While I have argued for more *Solange* method action, German scholars should also be debating when and why the GCC should step back. Part of this conversation must involve a realistic assessment of what the legal process, in comparison to the political process, best achieves. The question, therefore, is not what the constitution allows. If anything, the *Solange* iterations demonstrate the plasticity of any constitution. The issue is that adjudication is inherently a process full of blinders. Judges must be narrowly focused on the factual pattern; legal proceedings inevitably feature only a slice of the valid viewpoints that matter; and there are legal processes and principles to prioritise. Meanwhile judges are not by nature prescient people; they tend to be conservative, insular and myopic. The answer, therefore, is to double down on the *legal process,* meaning iteration, contestation, and correction. Assume that litigants will make tendentious arguments in support of self-interested and political viewpoints. Assume that judges are humans who will at times overreach. Active contestation of problematic rulings alongside a robust discussion of the important role that constitutional review should play in a globalised world and during a populist moment is the antidote.

Finally, we all need to create the conditions that make *Solange* method pushback possible and effective. Legal pluralism is here to stay, and so is international law. In 2014 I argued that the 'international and domestic rule

70 Kim Lane Scheppele, 'Autocratic Legalism', U. Chi. L. Rev. 85 (2018), 545-583.

71 For more, see: Karen J. Alter, 'The Future of Embedded International Law: Democratic and Authoritarian Trajectories', Chi. J. Int'l L. 23 (2022), 26-43.

of law are intertwined and co-dependent, rising and falling in legitimacy and effectiveness together. We will not be returning to the old terrain of international law, just as we will not be returning to the sovereignty of national law. This means that the only way forward is to find a way to reconcile international law and democracy by making international law responsive to its stakeholders, the society of states and peoples who benefit from a rule of law.'[72] The recent GCC pushback will fail because European leaders are right that collective action is the most effective, the ECJ has no choice but to uphold valid EU policies, and autarchy is no solution. Meanwhile, there is so much that constitutional contestation can help accomplish. Judges need good cases, and we all need constructive *Solange* method engagement. The real debate, therefore, should be about when, where, how far, and how constitutional contestation can help defend democracy and rights in an age of over-globalisation and anti-globalism.

72 Alter, *New Terrain* (n. 69), 365.

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# When *Solange I* Met *Neubauer*: National Court Protecting Global Interests When Reviewing Decisions of International Organisations

Eyal Benvenisti*
Lauterpacht Centre for International Law, University of Cambridge, Cambridge, United Kingdom
*eb653@cam.ac.uk*



## Abstract

What is the significance of the *Solange I* judgment for situations when national constitutional courts (NCCs) are called upon to implement or resist the implementation of an act of an international organisation (IO)? May, or even should these courts follow the German Federal Constitutional Court (FCC) and indirectly review the compatibility of the measure with the national constitution? What considerations should shape these courts' approach? In responding to this question, this essay inquires about the positive and negative effects of such an exercise of indirect review on IOs beyond the European Union (EU): could such a review undermine the functionality of the IO or its impartiality? I will present an argument in support of the *Solange I* approach and explain how and why indirect review by NCCs is more likely than not to contribute to an improvement in the functionality

* Whewell Professor of International Law *emeritus*, University of Cambridge.

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and impartiality of IOs. My argument will be partially based on integrating into the *Solange I* framework the FCC's 2021 judgment of *Neubauer*, in which the Court extended the Basic Law's protection also to people living abroad. I contend that such an indirect review by an NCC that pays due regard not only to national interests, but also to the rights of foreigners that may be affected by the NCC's decision to implement or reject the IO measure could improve the functionality of IOs and their adoption of inclusive and accountable outcomes that balance the rights and interests of all affected by the IO.

## Keywords

Domestic judicial review – acts of international organisations – German Federal Constitutional Court – *Neubauer* case – constitutional protection of people living abroad

## I. Introduction

What is the significance of the *Solange I* judgment[1] for situations when national constitutional or supreme courts (NCCs) are called upon to implement, or resist the implementation of an act of an international organisation (IO)? May, or even should these courts follow the German Federal Constitutional Court (FCC) and indirectly review the compatibility of the measure with the national constitution? What considerations should shape its approach? When the *Solange I* judgment was rendered, it was generally assumed that the debate – whether or not the external norm (the relevant European Community [EC] law) was compatible with the national constitution – was an internal matter that the court would resolve from the domestic vantage point, namely by weighing the effects of the IO decision on its citizens. Fifty years later, the constitutional landscape has been transformed, together with the perception about the scope of *jurisdiction* in the context of international human rights law. With global events such as the COVID pandemic and climate change spreading across continents, the scope of state obligations under constitutional and human rights law has significantly expanded. So much so that in 2020[2] and

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

2 FCC, judgment of 19 May 2020, 1 BvR 2835/17, BVerfGE 154, 152 (*Federal Intelligence Service Case*) (paras 87-110).

2021[3] the same court articulated an all-encompassing vision of the remit of human rights protection under the German Basic Law,[4] one that requires the German branches of government – and the Court itself included, particularly in its *Neubauer* judgment – to respect, if not positively protect, certain rights of '*people living abroad*'.[5] Indeed, the very term – '*people living abroad*' – signals that nobody around the world is a '*stranger to the constitution*',[6] absolutely not an '*alien*'[7] to it. In *Neubauer*, individuals living in Bangladesh and Nepal were among those who filed constitutional complaints alleging that Germany's climate action measures were insufficient to protect their fundamental human rights.[8] The FCC accepted the standing of these complainants and held that the rights in the constitution were not limited to German territory.[9] Although the FCC qualified its ruling by suggesting that the level of protection to be afforded to people living abroad might be less than that required for people living in Germany,[10] the implication is clear: the FCC must weigh the effects of its decisions on the constitutional rights of people living abroad. How, then, should the *Solange I* doctrine integrate this outward-looking scrutiny when indirectly reviewing the national implementation of IO measures? Arguably, even if states must as a matter of their international obligation implement IO measures without exercising independent discretion, their doing so will be subject to constitutional limitations that – as *Neubauer* suggests – protect foreigners as well.[11]

3 FCC, order of 24 March 2021, 1 BvR 2656/18 and others, BVerfGE 157, 30 (*Neubauer*).

4 Art. 1 (3) Basic Law for the Federal Republic of Germany ('The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law.').

5 FCC, *Neubauer* (n. 3), para. 175.

6 See Gerald L. Neuman, *Strangers to the Constitution* (Princeton University Press 1996).

7 See Alec Walen, 'Constitutional Rights for Nonresident Aliens: A Doctrinal and Normative Argument', Drexel Law Review 8 (2015), 53-112.

8 FCC, *Neubauer* (n. 3), para. 78.

9 FCC, *Neubauer* (n. 3), paras 90, 173-175. Ultimately the Court found no violation of duties of protection *vis-à-vis* the complainants living in Bangladesh and Nepal.

10 FCC, *Neubauer* (n. 3), paras 175-176; FCC, *Federal Intelligence Service Case* (n. 2), para. 104.

11 In FCC, *Neubauer* (n. 3), para. 141 the FCC noted that the Court was not barred from reviewing the Federal Act that implemented EU law because the challenged provisions were not fully determined by EU law. But that restriction of review is probably a result of the *Solange II* judgment (FCC, order of 22 October 1986, 2 BvR 197/83, BVerfGE 73, 339), which relates solely to EU law and its relations to German law. And it has no bearing on the question of indirect review of an IO other than the EU. Thus it seems that para. 141 supports the claim that even if the challenged domestic act implements an IO measure, the FCC will review the effects of that act on the rights of people living outside Germany.

This is not a question solely for the German Constitutional Court. As much as the *Solange I* doctrine has spread around Europe and beyond,[12] the recognition that constitutional and international human rights obligations extend toward people living abroad have been accepted in other jurisdictions,[13] and it is widely acknowledged that the obligation to protect human rights '*within the jurisdiction*' of a state encompasses acts or decisions that take place within that state's borders, but that affect the rights of people living beyond that state's borders. If NCCs are authorised to indirectly review IO measures against domestic constitutional rights norms, and these norms also protect individuals outside their borders, they therefore have to take into account how the IO measures affect people living abroad. How does this newly assumed global responsibility affect the *Solange I* approach? Does it call for a more deferential attitude toward IO-generated policies? Does it modify NCCs' calculus of rights balancing between the external and the domestic? And who are the relevant people living abroad for the purposes of NCC review of IO measures – only those directly subjected to the IO's authority (i. e. individuals in member states) or also citizens of third parties? Does the *Neubauer* judgment, which recognised the standing of foreigners to demand review of the compliance of German authorities with their constitutional obligations toward those foreigners, imply that the FCC must take account of the effects of EU measures also on people living outside Europe?

In responding to these questions, this essay inquires first about the positive and negative effects of any exercise of indirect review on IOs beyond the EU: could such a review undermine the functionality of the IO? Could it jeopardise the IO's ability to impartially care for the interests of all those subject to its authority? I will present an argument in support of adopting the *Solange I* approach across the board, namely with respect to all IOs whose measures

12 Peter Hilpold, 'Solange I, BverfGE 37, 291, 29 May 1974; Solange II, BverfGE 73, 339, 22 October 1986; Solange III, BverfGE 89, 155, 12 October 1993; and Solange IV, BverfGE 102, 147, 7 June 2000' in: Cedric Ryngaert, Ige F. Dekker, Ramses A. Wessel and Jan Wouters (eds), *Judicial Decisions on the Law of International Organizations* (Oxford University Press 2016), 170-182 (181); August Reinisch, 'Conclusion' in: August Reinisch (ed.), *Challenging Acts of International Organizations Before National Courts* (Oxford University Press 2010), 258-274 (263-265).

13 On '*other-regarding*' constitutions see Eyal Benvenisti and Mila Versteeg, 'The External Dimensions of Constitutions', Va. J. Int'l L. 57 (2018), 515-538. On the expansion of the concept of '*jurisdiction*' in international human rights law see e. g. Inter-American Court of Human Right, Advisory Opinion OC-23/17, 15 November 2017, Advisory Opinion on the Environment and Human Rights, paras 74, 95-103. See also Human Rights Committee, General Comment No. 36 on Article 6: Right to Life, 2019, para. 63; Yuval Shany, 'The Extraterritorial Application of International Human Rights Law', Collected Courses of the Hague Academy of International Law 409 (2020), 9-152 (14); Marko Milanović, *Extraterritorial Application of Human Rights Treaties* (Oxford University Press 2011).

affect constitutional rights, and explain how and why indirect review by NCCs is more likely than not to contribute to an improvement in the functionality of IOs without necessarily undermining their impartial outputs. I will then offer my support for indirect review that takes a broad, '*other-regarding*' view, namely a view which pays due regard not only to national interests but also to the mission of the IO and to the constitutional and human rights of people living abroad. I will argue that such a broad view could improve the functionality of IOs and their adoption of inclusive and accountable outcomes while allowing proper balancing among the rights and the interests of all affected individuals and communities. I argue that other-regarding NCCs, namely those which accept the extraterritorial applicability of constitutional or human rights obligations and the NCC's responsibility to have regard to those obligations when discharging its judicial function, must not shy away from indirectly reviewing IO policies within the domestic constitutional order. Such a review requires NCCs to consider also the interests of persons living beyond the state's borders and ensure that they are not adversely affected beyond what is necessary and proportionate.

In the following I argue, in Part II, that NCCs' intervention in IO policies is necessary to secure their proper functioning, thereby filling a wide gap in contemporary international law, which by and large relieves IOs from basic rule of law requirements. I present several examples for this proposition, showing how NCC interventions prompted IOs to become more accountable and respectful of individuals subject to their jurisdiction by readjusting their decision-making procedures. In Part III I explore the proper limits of indirect judicial review, while discussing several concerns about NCC intervention. Part IV concludes.

## II. Why Subject International Organisations to Judicial Review by National Courts?

A century after the birth of the League of Nations and other IOs set up during the inter-war period, and almost eighty years after the United Nations (UN) was established, it is no longer tenable to propose that IOs contain any inherent qualities that enable them to overcome the impulses of power and passion.[14] Too many examples have shown that IOs are as fallible as any other human endeavour. They, too, embody passion and power – with all the excesses and temptations that these entail – and they often uphold injustice

14 David Kennedy, 'The Move to Institutions', Cardozo L. Rev. 8 (1987), 841-988.

and exacerbate conflict. International law, however, continues to root for IOs, in line with the initial, idealised vision in which IOs were seen as impeccable, heaven-sent actors that were above legal discipline and scrutiny.

This Part is composed of two sections. The first presents the gist of the international law on IOs highlighting its *light touch* on IOs. The second section offers examples of NCCs that have interfered with IO decisions and thereby indirectly prompted the latter to adopt some rule of law obligations.

## 1. The Inherent Failings of the International Law on International Organisations

The Permanent Court of International Justice (PCIJ) and particularly its successor, the International Court of Justice (ICJ), developed a law that expanded the competences, capacities, and freedoms of IOs in general and the UN in particular.[15] In a formative series of Advisory Opinions, the ICJ adopted a deferential legal attitude toward IOs, exuding confidence in the impartiality of IOs,[16] premised on an assumption that their subjection to legal discipline and judicial review would be both unnecessary and counter-productive.[17] The ICJ fleshed-out a doctrine that insulated IOs from any external legal discipline or judicial accountability. Such insulation was achieved by the endorsement of six *freedoms* of IOs: (i) IOs have a legal personality that is independent of their member states; (ii) they have authority to expand their mandate to pursue whatever course of action or policy they deem necessary to achieve their respective (broadly defined) aims; (iii) IOs have the freedom to '*look after number one*' and, essentially, ignore the interests of other IOs; (iv) they are not necessarily bound by the norms of customary international law that are applicable to states; (v) they, as well as the private actors with whom they partner, enjoy immunity from domestic court review and are subject only to forms of review to which they (the IOs) have agreed; (vi) finally, it is only in extreme situations that states

15 David Bederman, 'The Souls of International Organizations: Legal Personality and the Lighthouse at Cape Spartel', Va. J. Int'l L. 36 (1996), 275-378 (366-371).

16 That confidence is reflected also in the UN Secretary General's response to the Soviet leader's critique of the UN: Dag Hammarskjöld, 'The International Civil Servant in Law and in Fact (Lecture delivered to Congregation at Oxford University, 30 May 1961)' reprinted in: Wilder Foote (ed.), *Servant of Peace: A Selection of the Speeches and Statements of Dag Hammarskjöld, Secretary-General of the United Nations, 1953-1961* (Bodley Head 1962), 328.

17 See, e. g., Nigel D. White, *The Law of International Organizations* (2nd edn, Manchester University Press 2005), 4-5; Jan Klabbers, *An Introduction to International Institutional Law* (2nd edn, Cambridge University Press, 2012), 287-291.

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parties operating through IOs will bear responsibility for the acts or omissions of the latter.[18]

Through all these years there was one conspicuous counter-example: the European Union. Beginning as the European Coal and Steel Community (ECSC) in 1951, this IO had an internal judicial review function. The Court of Justice had the authority to review the decisions of other bodies within the ECSC for compliance with their mandate and to annul decisions that were *ultra vires* or constituted a *détournement de pouvoir*.[19] As Maurice Lagrange, the Advocate General of that court explained, the ECSC was a unique *public* body, distinguishable from other IOs because of its legislative powers which directly affected private law within the member states.[20] But that distinction between direct and indirect effects of an IO's decisions does not make much sense if states are bound to implement IO measures in their legal systems. IOs practically determine people's levels of health and safety, influence their political freedoms, delineate their privacy, and in general shape their life opportunities.[21] And indeed, the distinction did not convince Professor James Fawcett, who had been clearly inspired by Lagrange's opinion and the ECSC treaty, when he proposed that agencies of IOs belonging to the UN family could invoke the same doctrine of a *détournement de pouvoir* as a general principle of law seeking an advisory opinion of the ICJ '*upon the validity of a decision by its executive board*'.[22] But Fawcett

18 See Eyal Benvenisti, 'How the Power of the Idea Disempowered the Law: Understanding the Resilience of the Law of International Organisations' (University of Cambridge Faculty of Law Research Paper No. 29/2023).

19 Art. 33 Treaty Establishing the European Coal and Steel Community.

20 Opinion of Mr Advocate General Lagrange delivered on 10 November 1954 in *French Republic v. High Authority of the European Coal and Steel Community*, Case 1-54, ECLI:EU:C:1954:4, 30: '*the Treaty […] makes institutions responsible for seeing that those rules are complied with. […] Quite clearly all of that body of legislation is by its nature public law legislation*').

21 Joseph H. H. Weiler, 'The Geology of International Law – Governance, Democracy and Legitimacy', HJIL 64 (2004), 547-562 (549 f.) (describing the emergence of the latest *'layer'* of international lawmaking – the regulatory layer); Benedict Kingsbury, Nico Krisch and Richard B. Stewart, 'The Emergence of Global Administrative Law', Law & Contemp. Probs. 68 (2005), 15-62 (elaborating on the different modalities of global regulation and the challenges they present). On the public authority of IOs see further Armin von Bogdandy, Matthias Goldmann and Ingo Venzke, 'From Public International to International Public Law: Translating World Public Opinion into International Public Authority', EJIL 28 (2018), 115-145 (116 f.); Armin von Bogdandy, Rüdiger Wolfrum, Jochen von Bernstorff, Philipp Dann and Matthias Goldmann (eds), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (Springer 2010), 99-268; Michael Zürn, *A Theory of Global Governance: Authority, Legitimacy, and Contestation* (Oxford University Press 2018), 195-216.

22 James E. S. Fawcett, 'Détournement de Pouvoir by International Organizations', BYIL 33 (1957), 311-316 (311).

would soon rescind his proposal, opting instead for inter-state negotiation as the modality for the resolution of inter-state disputes regarding IO performance.[23] The optimistic belief that member states would be able to resolve conflicts within IOs through negotiations without the need to recourse to judicial review, coupled with the hesitation of NCCs to intervene in matters of international law, ensured that either direct review (by the ECSC) or indirect review (*Solange I*) remained confined to the EU context.

## 2. National Courts Rising up to Challenge the International Legal Void

Unfortunately, the formative era for the international law on IOs coincided with a period during which national courts by and large refrained from intervening in their governments' handling of international affairs.[24] In line with their '*misgivings regarding the application of international law*'[25] and their general reluctance to engage with international law, NCCs have shied away from developing domestic restraints on IOs or from questioning the law that the ICJ has prescribed for IOs. National courts endorsed the wide immunities of IOs.[26] Recognising IOs' independent legal personality allowed NCCs to exempt state parties from legal liability for IO failures.[27]

But in the post-Cold War era, the threat to domestic democratic and legal processes from intervening IOs and particularly the Security Council has become palpable. This became an issue in the 1990s when an active Security Council issued resolutions affecting individual rights such as in the context of the international criminal tribunals for the former Yugoslavia and for Rwanda and in the counter-terrorism context. With respect to the first, NCCs were quite hesitant to uphold challenges to the authority of the Security Council

23 James E. S. Fawcett, 'The Place of Law in an International Organization', BYIL 36 (1960), 321-343 (328).

24 Eyal Benvenisti, 'Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts', EJIL 4 (1993), 159-183 (173-175). See also August Reinisch, *International Organizations Before National Courts* (Cambridge University Press 2000), 35-168.

25 Benvenisti, ' Judicial Misgivings Regarding the Application of International Law' (n. 24).

26 Reinisch, *International Organizations Before National Courts* (n. 24), 127-168; Michael Singer, 'Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns', Va. J. Int'l L. 36 (1996), 53-166; Peter H. F. Bekker, *The Legal Position of Intergovernmental Organizations* (Nijhoff 1994), 54-61.

27 *J. H. Rayner Ltd v. Department of Trade and Industry* [1990] 2 A. C. 418 (HL), [1990] 81 ILR 670. See also *International Ass'n of Machinists v. OPEC* 649 F.2d 1354 (9th Cir 1981) (dismissing a suit by a US labour union against OPEC and the individual member States of OPEC under the Sherman Act on procedural grounds).

to set up international criminal tribunals.[28] However, the Security Council resolutions related to counterterrorism faced considerable resistance by NCCs, apparently because these measures overlooked the fundamentals of constitutionally protected individual rights.[29] This IO activism spelled a potential challenge to the very authority of the NCC as the guardian of the domestic legal order and to democracy. Reliance on the executive branch protection through representing the nation's interests within IO decision-making processes was insufficient. Moreover, and perhaps counter-intuitively at first, NCC review through the *Solange I* doctrine would bolster the same executive when representing the national position at the IO: if our concerns are not met, our court will not implement the decision![30] As a result, in what Doreen Lustig and Joseph Weiler termed '*the Third Wave*' of constitutionalism since 1970,[31] several NCCs have asserted their authority to interpret Security Council Resolutions narrowly, in line with the principles of their national constitutions, upholding indirect challenges to the '*targeted sanctions*' regime.[32] In retrospect, those judgments seem to have persuaded the Grand Chamber of the Court of Justice of the European Union (CJEU) to author its own version of indirect review with *Kadi*.[33] The *Kadi* judgment has proven to be, as Devika Hovell noted, a '*game changer*'[34] because it, in

28 On the challenges in NCCs to the authority of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda see Jean d'Aspremont and Catherine Brölmann, 'Challenging International Criminal Tribunals Before Domestic Courts' in: August Reinisch (ed.), *Challenging Acts of International Organizations Before National Courts* (Oxford University Press 2010), 111-136; Erika de Wet and André Nollkaemper, 'Review of Security Council Decisions by National Courts', GYIL 45 (2002), 166-202.

29 Eyal Benvenisti, 'United We Stand: National Courts Reviewing Counterterrorism Measures' in: Andrea Bianchi and Alexis Keller (eds), *Counterterrorism: Democracy's Challenge* (Hart 2008), 251-276.

30 Juliane Kokott, 'Report on Germany' in: Anne-Marie Slaughter, Alec Stone Sweet and Joseph H. H. Weiler (eds), *The European Court and National Courts – Doctrine and Jurisprudence* (Hart 1998), 77-132; Bruno de Witte, 'Direct Effect, Supremacy, and the Nature of the Legal Order' in: Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (Oxford University Press 1999), 187-227.

31 Doreen Lustig and Joseph H. H. Weiler, 'Judicial Review in the Contemporary World – Retrospective and Prospective', I.CON 16 (2018), 315-372.

32 For a review of these and other NCC judgments see Antonios Tzanakopoulos, 'Domestic Court Reactions to UN Security Council Sanctions' in: August Reinisch (ed.), *Challenging Acts of International Organizations Before National Courts* (Oxford University Press 2010), 54-76. See also Benvenisti, 'United We Stand' (n. 29), 251.

33 ECJ, *Kadi and Al Barakaat v. Council of the European Union and Commission of the European Communities*, judgment of 3 September 2008, case no. C-402/05 P and C-415/05 P, ECLI:EU:C:2008:461.

34 Devika Hovell, 'Kadi: King-Slayer or King-Maker? The Shifting Allocation of Decision-Making Power Between the UN Security Council and Courts', M. L. R. 79 (2016), 147-166 (148).

turn, prompted the Security Council to amend its listing and delisting procedures.[35]

Another, less prominent but no less telling example of NCCs successfully reviewing IO decisions and thereby prompting them to improve their decision-making procedures relates to the imposition of labour standards within IOs. Although initially several IOs insulated themselves from any external supervision of their employment conditions, benefitting from the absolute immunity they enjoyed under international law, they eventually had to relent to pressures brought to bear by NCCs. The World Bank established its Administrative Tribunal only after it became clear that the Bank's employment policies could be subjected to challenges in NCCs.[36] In Europe, both NCCs and the European Court of Human Rights (ECtHR) incrementally asserted their authority and their willingness to condition the immunity from suit that the Bank and other IOs had enjoyed (according to the then prevailing norm of international law)[37] on the adoption by the IOs of equivalent protection of labour rights. After initial remarks by the French Court of Cassation in 1995 that raised the concern that such immunity could amount to a denial of justice, a French appellate court in 1997 rejected United Nations Educational, Scientific and Cultural Organization's (UNESCO) plea of immunity by directly invoking the European Convention on Human Rights.[38] In 1999, the ECtHR endorsed this view by suggesting that decisions of domestic courts respecting immunity of international organisations in labour disputes were subject to scrutiny to determine their compliance with European human rights law. According to this court, respect for the immunity of IOs would be conditional on their providing a reasonable alternative means for securing the rights of their employees.[39] In turn, as August Rei-

35 On this see Eyal Benvenisti and George W. Downs, *Between Fragmentation and Democracy* (Cambridge University Press 2017), 157-158. For the impact of *Solange I* on the CJEU's recognition of fundamental rights as part of the general principles of EU law see Nik J. de Boer, *Judging European Democracy* (Thesis, University of Amsterdam 2018), 109-110, 119; Alec Stone Sweet, *The Judicial Construction of Europe* (Oxford University Press 2004), 89.

36 On the events leading up to the establishment of the World Bank Administrative Tribunal see Theodor Meron and Betty Elder, 'The New Administrative Tribunal of the World Bank', N. Y. U. J. Int'l L. & Pol. 14 (1981), 1-28; Chittharanjan Felix Amerasinghe, 'The World Bank Administrative Tribunal', ICLQ 31 (1982), 748-764.

37 On this 'functional immunity' and its rationales see Jan Klabbers, *An Introduction to International Organizations Law* (4th edn, Cambridge University Press 2022), 133-138; Hazel Fox and Philippa Webb, *The Law of State Immunity* (3rd edn, Oxford University Press 2015), 570-579.

38 August Reinisch, 'The Immunity of International Organizations and the Jurisdiction of Their Administrative Tribunals', Chinese Journal of International Law 7 (2008), 285-306 (297).

39 ECtHR (Grand Chamber), *Beer and Regan v. Germany*, judgment of 18 February 1999, no. 28934/95; ECtHR (Grand Chamber), *Waite and Kennedy v. Germany*, judgment of 18 February 1999, no. 26083/94, para. 67.

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nisch demonstrates, this attitude adopted by the ECtHR subsequently '*inspired*'[40] various NCCs in Europe to scrutinise the treatment of employees by IOs situated within their own territory.[41] The 2019 judgment of the United States (US) Supreme Court in *Jam v. International Finance Corp*[42] recognising the limited immunity of IOs from national regulation is likely to inspire similar findings by other NCCs.

The third example involves the legal proceedings instituted by international sporting federations such as the World Athletics (formerly known as the International Association of Athletics Federations, the IAAF) or the International Skating Union (ISU) against athletes who, for example, had failed drug tests. According to the private law regime stipulated by the International Olympic Committee (IOC), these proceedings were brought to arbitration under the auspices of the Court of Arbitration for Sports (CAS). The regulations and the arbitral proceedings were subjected to the indirect constitutional scrutiny of national courts,[43] as well as review by the CJEU[44] and the ECtHR.[45] Specifically, several athletes have levelled serious allegations concerning the likelihood that arbitrators who are appointed from a pool determined by the IOC lack impartiality as a result. This has led to reforms in CAS procedures. CAS has issued a statement in which it outlined the reform it introduced in response,[46] although these have been found still wanting in subsequent litigation.

40 Reinisch, 'Immunity of International Organizations' (n. 38), 295.

41 See Eyal Benvenisti, *The Law of Global Governance* (Brill 2014), 245.

42 US Supreme Court, *Jam v. International Finance Corp*, 139 S. Ct. 759 (2019).

43 Oberlandesgericht München (Munich Higher Regional Court), *Pechstein v. International Skating Union*, 15 January 2015, Az. U 1110/14 Kart (accepting jurisdiction against CAS proceedings), <https://openjur.de/u/756385.html>, (German) last access 24 April 2025, summarised and analysed in English in Thaleia Diathesopoulou, The Aftermath of the Pechstein Ruling: Can the Swiss Federal Tribunal Give the Kiss of Life to CAS Arbitration? (28 May 2015), available at SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2607992>; German Federal Court of Justice, judgment of 7 June 2026, KZR 6/15, BGHZ 210, 292; FCC, order of 3 June 2022, 1 BvR 2103/16, NJW 75 (2022), 2677.

44 In the case of *Meca-Medina and Igor Majcen v. Commission of the European Communities*, the CJEU insisted on the applicability of EU law and particularly standards concerning individual rights to sporting institutions (CJEU, *Meca-Medina and Igor Majcen v. Commission of the European Communities,* judgment of 18 July 2006, case no. C-519/04, ECLI:EU:C:2006:492).

45 ECtHR, *Mutu and Pechstein v. Switzerland*, judgment of 2 October 2018, nos 40575/10 and 67474/10; ECtHR, *Affaire Semanya c. Suisse*, judgment of 11 July 2023, no. 10934/21.

46 Statement of the Court of Arbitration for Sport (CAS) on the Decision made by the Munich Higher Regional Court in the case between Claudia Pechstein and the International Skating Union (ISU), 27 March 2015, <www.tas-cas.org/fileadmin/user_upload/Media_Release_Pechstein_07.06.16_English_.pdf>, last access 24 April 2025.

The final example of indirectly imposing legal obligations on IOs deviates from the *Solange I* model, because the NCC does not invoke the national constitution, but instead interprets *international law* as holding *its state organs* responsible for the acts or omissions of the IO. This is the approach taken by the Supreme Court of the Netherlands, which has found the Dutch forces operating under the UN flag responsible for their failure to protect the Bosnian Muslims they had given refuge to in Srebrenica.[47] In a revolutionary reversal of the traditional concept that IOs are responsible for member states' action – one that is reflected in the International Law Commission's Draft Articles on the Responsibility of International Organisations[48] – this court interpreted international law on *state* responsibility as recognising the state as having responsibility for IO action when the state is in '*factual control of the specific conduct*'.[49] And if the state is responsible, and hence accountable before the Dutch court for the IO's acts and omissions, presumably the state will insist that the IO refrain from harming individuals subject to its control. And if NCCs follow the *Neubauer* approach, the IO would also have to show that it did not infringe the constitutional provisions protecting those individuals.

## III. The Proper Limits of Indirect Judicial Review by National Constitutional Courts

Detractors of the *Solange I* approach raise two types of concerns. First, they denounce the very idea of imposing rule of law obligations on IOs, fearing that this would undermine their functionality, burdening them with unnecessary legal requirements, and hence diminish their appeal for the member states that sacrifice their own resources for the common good. Second, they worry that indirect scrutiny by NCCs will not be aimed at the common good but instead will promote sectarian interests. In this part I first discuss both concerns about indirect review by NCCs (sections 1 and 2) and then outline a course of action for NCCs to limit the risks associated with their review (section 3).

47 Hoge Raad (Supreme Court of the Netherlands), *The Netherlands v. Stichting Mothers of Srebrenica*, 17/04567, 19 July 2019, ECLI:NL:HR:2019:1284, <https://uitspraken.rechtspraak.nl/#!/details?id=ECLI:NL:HR:2019:1284>, last access 24 April 2025.

48 Art. 61 Draft Articles on the Responsibility of International Organizations.

49 Hoge Raad, *Stichting Mothers of Srebrenica* (n. 47), para. 3.5.4.

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## 1. Does Judicial Review of International Organisations Undermine Their Functionality?

There are obvious concerns about indirectly imposing legal obligations on IOs, even by an impartial review body. Subjecting IOs to review might be counterproductive because it would create gridlock within IOs and require state parties to IOs and IO secretariats to take defensive, additional steps to insulate their policies from judicial scrutiny. They will be even less agile to adapt to new circumstances than they currently are. Rule of law demands could generate time-consuming legal disputes before tribunals and courts that are not necessarily more qualified to promote the collective interest. Imposing such burdens on IOs could lower their appeal and dissuade state parties from setting up and supporting IOs, diverting them to seek alternatives to formal IOs that might be even more problematic from the rule of law perspective: better an imperfect IO than none.

There are several responses to this concern, and their elaborate analysis requires a separate discussion.[50] Suffice here to say that there is nothing inherently trustworthy about IOs that somehow elevate them from mundane venues where policies are discussed and rules are adopted to govern the lives of people. They, too, often perpetuate injustice and exacerbate conflict or simply become dysfunctional. Many IOs are created and steered by powerful state parties that use them to promote their interests while obfuscating their agency, or are captured by commercial interests that use them to evade national regulation that seeks to promote the common good. In fact, the EU offers a model that dispels all those concerns. In contrast to the many failings of IOs, the EU example shines as a unique model for world-wide emulation, one that owes much of its relative success to the rule of law model that it adopted.[51]

Beyond the straightforward argument that IOs must be bound by the rule of law and be more inclusive and egalitarian, the strongest case for imposing legal discipline on IOs is the old functional argument: IOs *need* legal discipline, often externally enforced, in order to be functional. This is especially the case once power is no longer concentrated in one party or a few like-minded states. In a multipolar space, IOs are likely to falter, absent enforceable norms. Coordination problems will not be resolved or will remain brittle, while cooperation will fail due to endemic mistrust.

50 See Eyal Benvenisti, 'Power and Passion in the Law of International Organizations' (forthcoming).

51 Joseph H. H. Weiler, 'The Transformation of Europe', Yale L. J. 100 (1991), 2403-2483.

The concern that powerful states would lose interest in IOs they cannot control remains. They can be expected to prefer less formal, less transparent alternatives.[52] However, and where multilateralism is key – such as when global security (the UN Security Council) or health (World Health Organization [WHO]) is concerned – there are not always appealing alternatives to formal IOs. In an increasingly multipolar space that operates like the Rawlsian *veil of ignorance*, perhaps even the relatively powerful would opt for regimes that promise to promote collective interests.

But can *judges* be entrusted with IO affairs? The other functionality concern raises doubts about the capacity of judges, and especially judges of constitutional courts, to review the decisions of IOs: judges have little expertise in the running of IOs. They also lack the authority to determine the proper goals that IOs should pursue and how they should pursue them. This is a variation on the well-rehearsed concerns about the non-democratic, countermajoritarian *gouvernement des juges.* But as George Downs and I argued,[53] judicial review should not be taken only for the specific judgment that an NCC renders but rather, and perhaps more importantly, for the direct and indirect ramifications of the judgment. NCC review promotes deliberations within and outside the IOs by providing diffuse stakeholders with information that can benefit them but to which they otherwise would not have had access. The '*countermajoritarian difficulty*'[54] is based on a rather narrow focus: it assumes that there is a zero-sum game between the court and the political branches and that, without the court's interference, the popular vote will have its way. But that is a misleading proposition because it misses the crucial role of courts in generating information. Courts, in the course of their proceedings, generate reliable information – highly crucial in the age of fake news – and make it widely available to a broad range of political actors, as well as to the public, thereby promoting better accountability and more effective deliberation among stakeholders. The courts serve as venues for public deliberation where conflicting claims are examined in structured proceedings. In reviewing administrative and legislative acts for compatibility with the constitution (or, where relevant, for compatibility with international law), courts require that the relevant decision-makers provide public justifi-

52 For such alternatives see, Joost Pauwelyn, Ramses Wessel and Jan Wouters (eds), *Informal International Lawmaking* (Oxford University Press, 2012).

53 For more see Benvenisti and Downs, *Fragmentation and Democracy* (n. 35), 168-172.

54 Alexander Bickel, *The Least Dangerous Branch* (Bobbs-Merrill 1962). Karen Alter argues that the countermajoritarian difficulty is less pronounced for international tribunals because they seek to co-opt the support of domestic interlocutors to secure compliance with their judgments: Karen J. Alter, *The New Terrain of International Law* (Princeton University Press 2015), 335-365.

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cations for their acts and afford litigants and *amici* opportunities to contest those reasons. The structured and transparent deliberations in court are closely watched by the public, and for the most part the court's reasoned decisions are carefully scrutinised by legal experts who elaborate on the judgments. In the context of IO review, this function has greater impact than in domestic settings because IOs are controlled by the executive branches of – primarily powerful – state parties, and the involvement of legislatures is rather limited. In the age of global governance, the real countermajoritarian difficulty lies in what are too often impoverished domestic democratic deliberations and the continued domination of most IOs by a handful of powerful state executives. In such circumstances, judicial intervention – particularly when it involves several NCCs acting in unison – has a critical democratic role to play. The result from NCC intervention would rarely end the deliberative process. What is more likely to emerge is an informal process of negotiations that will lead to reform in the law of IOs in general and in practical adjustments in the life of specific IOs.

Can NCCs be such skilful organs that could offer a potentially important institutional counterpoint to IOs? NCCs have at their disposal effective legal tools with which they could restrain power and passion within IOs. My positive response is grounded in administrative and constitutional law doctrines that are common to many if not most democratic countries, doctrines designed to ensure accountability and inclusion in decision-making and compatibility with individual human rights, such as the doctrines of *ultra vires*, abuse of discretion, infringement of the requirements of natural justice, and excessive limitations of individual rights. There is much strength to James Fawcett's insight articulated in 1957, that such doctrines (he specifically referred to the doctrine of *détournement de pouvoir*) are general principles of law.[55] As Lustig and Weiler note, it may be preferable for NCCs to promote international-law-based doctrines, thereby promoting uniformity among member states.[56] But in light of the current lax international law on IOs, it may be easier for NCCs to find firmer grounds in their own constitutions and weave together a web of similar obligations inspired by comparative constitutional law. This way or the other, NCCs adopting the *Solange I* approach could incrementally and collectively develop a rule-of-law-based international law for IOs.

55 Fawcett, 'Détournement de Pouvoir' (n. 22), 311.
56 Fawcett, 'Place of Law' (n. 23), 328.

## 2. Can National Courts' Indirect Review Undermine the Independence and Impartiality of International Organisations?

The second concern with the *Solange I* approach focuses on the undue influence that a reviewing national court may have on the independence and impartiality of the IO. As the ECtHR stated, with respect to the immunity of the UN from judicial review, '*[t]he attribution of privileges and immunities to international organisations is an essential means of ensuring the proper functioning of such organisations free from unilateral interference by individual governments*'.[57] Such influence might even be used to undermine the IO's effectiveness by exempting a state party from its obligation to comply with an IO measure.

The concern about the lack of impartiality makes sense under the assumption that IOs are somehow inherently benign or that they already have effective and independent internal review mechanisms. Under such conditions, indirect review might be superfluous and even counterproductive. But such internal mechanisms are rare, and in fact, the availability of indirect, external review might prompt them or strengthen them.[58] Moreover, it rings hollow to cling to the naïve premise of IO impartiality that NCC review might destabilise once one acknowledges how powerful state parties, or strong commercial lobbies, control IOs and shape their policies, without reliable, independent, internal review mechanisms.[59]

There are two reasons to expect NCCs to be more independent and impartial than internal IO mechanisms in reviewing IO measures and rebuffing pressures from powerful actors. First, judges of NCCs often have guaranteed tenure and therefore may be relatively less dependent on the political branches that appoint, renew terms, and promote IO secretariats or adjudicators. Secondly, NCCs' output – norms, backed by the promise of coherence over time – allows others, including other NCCs, to adjust their expectations accordingly. The precedential value of their decisions holds the key for inter-NCC cooperation, which is crucial for national judges wishing to prevent a backlash by the IO that targets only their jurisdiction. NCCs can form a network of constitutional courts that could collectively withstand IO pressure, and they can also support regional courts such as the CJEU or the ECtHR in their own quest to subject IOs to the rule of law.[60]

57 ECtHR, *Stichting Mothers of Srebrenica v. Netherlands*, judgment of 11 June 2013, no. 65542/12, para. 139.

58 Benvenisti, *Global Governance* (n. 41), 230-237.

59 On IO secretariats and expert bodies that serve the powerful see Eyal Benvenisti, 'Power and Passion in the Law of International Organizations' (forthcoming).

60 Eyal Benvenisti, 'Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts', AJIL 102 (2008), 241-274 (272 f.).

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But exercising indirect review also raises complex questions. Obviously, NCCs' indirect review can function as a sword to shape IO policies, and not only as a shield to protect individuals from offensive IO policies.[61] Moreover, such review, typically by those beholden to their executives, might be abused to justify the evasion of the forum state's obligations toward the IO. As we well know from domestic settings, there is, indeed, always the risk that judicial review might be used by those resisting the common interest. Lustig and Weiler acutely point to the dark side of the *Solange I* doctrine, which invites such courts to '*assert one's own values above those of the international community [which] could be seen precisely as the slide from voice to exit*'.[62] These authors note a conspicuous tone that characterises such decisions – an identitarian trope[63] – such as in the Polish judgment of 2010 which celebrated '*the sovereignty of the state and its constitutional identity*',[64] and '*the principle of the Polish Nation's sovereign and democratic determination of the fate of its Homeland*'.[65]

To answer these challenges, I wish to add a normative component that complements the *Solange I* approach. This is the expectation that an indirect NCC review of IOs should be based on a broad view of the NCC's intervention, a view that is '*other-regarding*' in the sense that it requires NCCs to take account of the ramifications of the review on *all* those who are affected by the review, including '*people living abroad*'. I develop this requirement in section 3 below.

## 3. Normative Constraints on Indirect Review – Exploring '*Other-Regardingness*'

As mentioned above, the FCC has in recent years asserted that the German Basic Law requires the German branches of government to respect certain fundamental constitutional rights of '*people living abroad*'[66] and that these rights '*may be invoked as the basis for establishing duties of protection vis-à-*

61 Reinisch, *International Organizations Before National Courts* (n. 24), 325 (contemplating attempts by Member States, third states or private parties attempting to influence policy decisions of IOs via NCCs).

62 Lustig and Weiler (n. 31), 350.

63 Lustig and Weiler (n. 31), 354 et seq.

64 Constitutional Tribunal of the Republic of Poland, Ref no. K 32/09 (*Constitutionality of the Treaty of Lisbon*), 24 November 2010, <https://trybunal.gov.pl/fileadmin/content/omowienia/K_32_09_EN.pdf>, last access 24 April 2025.

65 Constitutional Tribunal of the Republic of Poland, *Constitutionality of the Treaty of Lisbon* (n. 64).

66 FCC, *Neubauer* (n. 3), para. 175.

*vis people living abroad*'.[67] The Court obviously refers to a constitutional duty of German state organs rather than the IO itself. But the constitutional responsibility of a German organ is implicated when it implements the policy adopted by the IO. By extension, the decision of the FCC itself when indirectly reviewing the act of the IO – is subject to the same constitutional obligation toward people living abroad.

Arguably, such an obligation offers the '*antidote*' to the insular approach described in section 2 above as it applies also to the situation in which the court exercises indirect review of IO policies. In other words, the *Neubauer* '*other-regarding*' vision complements the *Solange I* approach by defanging *Solange I*'s main harmful side-effect, namely its apparent invitation to promote national identity and interests over commitment to basic shared values and concerns. The revised – *Solange* cum *Neubauer* doctrine – accepts that NCCs owe, besides their guardianship role toward people living in Germany, also a duty to take account of the impact of the NCC's review on the rights of others, rather than bluntly disregarding them. In other words, NCCs must seek to ensure that the IO policy under scrutiny does not infringe the rights of people living within the jurisdiction, but that in doing so, the rights of those living in other states parties to the IO, as well as the rights of those who live outside the IO member states (to the extent that the latter are affected by the IO measures), are not negatively impacted by the IO measure beyond what is necessary and proportionate. Of course, while the IO is expected to weigh the interests of the constituencies of all member states at par, an NCC is supposed to prioritise the rights of its own citizens, mainly because the constitution would typically be interpreted as protecting them before respecting the rights of others.[68] As a result, the indirect IO review by NCCs would not offer a comprehensive and even-handed remedy to IOs that lack effective direct review mechanisms. The indirect review might enhance the functionality of the IO only as much as the national constitution would permit. But in addition, it could correct severe repercussions visited on people living abroad, such as members of weaker state parties to the IO or citizens of non-member states. Indirectly requiring IOs to consider the effects of their policies on people living within and also beyond the jurisdictions of the IO member states would be a welcome development in the law on IOs.[69]

67 FCC, *Neubauer* (n. 3), para. 175.

68 In *Neubauer* the FCC distinguishes between the level of protection afforded to German citizens and that required for people living abroad, see paras 175-178.

69 On the other-regarding obligations of IOs see Eyal Benvenisti, 'Why International Organizations are Accountable to You' in: Chiara Giorgetti and Natalie Klein (eds), *Resolving Conflicts in the Law: Essays in Honour of Lea Brilmayer* (Brill 2019), 205-221.

To illustrate the gist of the *Solange* cum *Neubauer* approach, imagine a petition against the relevant German agency brought to the FCC seeking stricter pollution prevention standards for ships entering German ports than the standards adopted by the International Maritime Organisation (IMO) because those standards are deemed too lax and were adopted in an opaque manner, heavily influenced by the shipping industry,[70] thereby infringing on the German citizens' constitutional right to life and physical integrity as well as the right to receive information about decisions affecting them. If the FCC, and NCCs of other member states, were to uphold such a petition, this would likely prompt the IMO to adopt more transparent and inclusive procedures. A consequence of such a change in policy might be an increase in the costs of shipping, affecting the access of foreign, poorer producers to remote markets. The '*other-regarding*' approach will require NCCs to pay attention to such adverse effects and accommodate them, for example by ordering the agency to postpone the imposition of the new standards on products from those remote countries. Conversely, in the (unlikely) case where the IMO standards are higher than the German ones (for example, allowing only double hull tankers as opposed to a single hull German standard), the IO-imposed limitation on the freedom of occupation and property rights of the German tanker owners could be justified by the constitutional obligation to take into account the global effects of oil spills when balancing the competing rights at hand.

Another normative ground for instructing courts to adopt an 'other regarding', rather than an insular outlook is to adhere to standards of review that are shared by the other member states. For example, regional or global standards of human rights protection could serve as the basis of reviewing the functioning of the international organisation. One illustration of this approach is the case of the Second Senate of the FCC in the *European Schools* judgment.[71] In that case, the FCC was invited to review the compatibility of an international organisation ('The European Schools') with the rights of German and other students under the German Basic Law. While accepting

70 Alan Khee-Jin Tan, *Vessel-Source Marine Pollution: The Law and Politics of International Regulation* (Cambridge University Press 2005), 347 f. (explaining how the perceived inefficacy of the IMO can cause states to take unilateral action in reaction to growing concerns for ship safety, environmental protection and maritime security); Harilaos N. Psaraftis and Christos A. Kontovas, 'Influence and Transparency at the IMO: The Name of the Game', Maritime Economics & Logistics 22 (2020), 151-172 (166 f.) (investigating the role played by the shipping industry in the lax standards adopted by the IMO); Md Saiful Karim, *Prevention of Pollution of the Marine Environment from Vessels: The Potential and Limits of the International Maritime Organisation* (Springer 2015), 15-20.

71 FCC, order of 24 July, 2018, 2 BvR 1961/09, BVerfGE 149, 346.

this authority to review, the FCC referred also to the standards of the European Convention on Human Rights, including the case-law of the ECtHR, because, the court stated, these must be taken into account when interpreting the Basic Law.

It should be pointed out that this other-regarding approach is not shared by all. The US historical interpretation of the spatial scope of its constitution is rather confined, '*stop[ping] at the border*',[72] even with respect to the acts of state officials that operate abroad.[73] This basic rule still stands[74] even though the Supreme Court extended some constitutional protection to the unique situation in Guantanamo.[75] Having said that, as I have argued elsewhere,[76] the '*other-regarding*', approach à la *Neubauer*, and arguably even a stricter commitment towards people living abroad can be said to emerge from the basic principles of state sovereignty that regards sovereignty as responsibility towards humanity in trusteeship. Ultimately, NCCs might be the sole venues where foreigners can vindicate their rights. Even foreign NCCs could provide an effective venue for protecting their rights, at least under the German Basic Law, since, as *Neubauer* acknowledged, people living abroad have standing to demand accountability from German authorities for the latter's compliance with the constitution, and hence, indirectly, with their compliance with IO policies.[77]

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72 Andrew Kent, 'Citizenship and Protection', Fordham L. Rev. 82 (2014), 2115-2136 (2128). See also Sarah H. Cleveland, 'Embedded International Law and the Constitution Abroad', Colum. L. Rev. 110 (2010), 225-287; see generally Kal Raustiala, *Does the Constitution Follow the Flag?* (Oxford University Press 2009); Neuman (n. 6).

73 US Supreme Court, *United States v. Verdugo-Urquidez*, 494 US 259 (1990) (holding that the Fourth Amendment does not protect foreigners from search and seizure abroad). See most recently *Hernandez v. Mesa*, 589 U. S. ___ (2020) (the '*Bivens*' claim for damages grounded in a violation of constitutional rights is not available in the context of a cross-border shooting by a US Border Patrol Agent).

74 Brendan O. Beutell, 'Hard Cases Make Bad Law: Extraterritorial Application of the United States Constitution', W. Va. L. Rev. 122 (2019), 587-630 (604-605); Cleveland (n. 72); Christina Duffy Burnett, 'A Convenient Constitution: Extraterritoriality after *Boumediene*', Colum. L. Rev 109 (2009), 973-1046 (982-983). For a comparative overview see Galia Rivlin, 'Constitutions Beyond Borders: The Overlooked Practical Aspects of the Extraterritorial Question', B. U. Int'l L. J. 30 (2012), 135-228. See also Chimène I. Keitner, 'Rights Beyond Borders', Yale J. Int'l L. 36 (2011), 55-114; Adam Shinar, 'Israel's External Constitution: Friends, Enemies and the Constitutional/Administrative Law Distinction', Va. J. Int'l L. 57 (2018), 735-768.

75 US Supreme Court, *Boumediene v. Bush*, 553 US 723 (2008), 761-762 (determining that non-citizens detained at Guantanamo Bay have the constitutional privilege of *habeas corpus*).

76 Eyal Benvenisti, 'Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders', AJIL 107 (2013), 295-333 (323-333).

77 FCC, *Neubauer* (n. 3), paras 101, 174-175.

Of course, this intersection between *Solange*'s and *Neubauer*'s other-regardingness leaves many questions open, among them identification of precisely which are the communities whose rights must be taken into account (the '*all affected*' question),[78] whether other-regardingness as part of *Solange*-type indirect review of IOs is similar or different than other-regardingness in the direct review of national standards (what *Neubauer* was about), how to balance the competing claims and interests of the communities whose rights must be taken into account, and whether to altruistically respect the rights of people living in countries whose NCCs refuse to reciprocate in this collective project of securing the rule of law within IOs. These questions are likely to become ubiquitous as the responsibility of national actors for internal decisions that have external effects becomes increasingly dominant in constitutional and international human rights law.

## IV. Conclusion

Lustig and Weiler acutely point to the double-edged sword that is the *Solange I* doctrine: while it can be used by a truly '*other-regarding*' national court that seeks to improve the functioning of an IO, it could at the same time be misappropriated by an NCC relishing the opportunity to '*assert one's own values above those of the international community*'.[79] This essay proposed that the latter concern can and should be met by supplanting *Solange I* with *Neubauer*'s recognition of a constitutional obligation toward people living abroad, be they residents of the member states of the reviewed IO, or people living in other countries.

NCCs have contributed significantly to the development of international law by filling yawning gaps in various fields of international law, ranging from environmental protection[80] and natural resources management[81] to command responsibility in wartime,[82] and immunities of foreign states and state officials.[83] *Solange I* stands out as a model for a unilateral judicial

78 Benvenisti, 'Sovereigns as Trustees' (n. 76), 318.

79 Lustig and Weiler (n. 31), 350.

80 *Trail Smelter Arbitration (United States v. Canada)*, Award, 11 March 1941, UN RIAA Vol. III, 1963-1965 (inspired by US Supreme Court judgments on inter-state disputes).

81 On the contribution of decisions of the US Supreme Court in apportionment disputes between US states to the crystallisation of the law on freshwater see Stephen McCaffrey, *The Law of International Watercourses* (3rd edn, Oxford University Press 2019), 291.

82 US Supreme Court, *In re Yamashita*, 327 US 1 (1946).

83 UK House of Lords, *In Re Pinochet*, judgment of 15 January 1999, UKHL 17. And see further Odile Ammann, *Domestic Courts and the Interpretation of International Law* (Brill Nijhoff 2020), 143-144; and the various contributions to the symposium on 'Domestic Courts as Agents of Development of International Law', LJIL 26 (2013), 531-699.

intervention that over the years contributed positively to the bolstering of the rule of law in the EU. There is no reason to suspect that NCCs will fail to contribute in a similar way to a robust international law on IOs that enhances the functionality of IOs while securing their inclusivity and accountability.

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# Buchbesprechungen

***Schlößer, Carolin*: Territoriale Gestattungen unter dem Grundgesetz. Zur Zulässigkeit von Sitzabkommen und anderen staatsgebietsbezogenen internationalen Erlaubnissen.** Tübingen: Mohr Siebeck 2023. ISBN 978-3-16-162302-8, XXI, 263 S. € 79,-

**I.**

Deutschland akkreditiert ausländische Diplomaten und erlaubt ihnen damit die Wahrnehmung hoheitlicher, diplomatischer Aufgaben im Inland, namentlich in den Räumen ihrer Botschaft. Oder: Deutschland stimmt der Stationierung ausländischer Streitkräfte im Inland zu und erlaubt ihnen dabei die Ausübung bestimmter hoheitlicher, militärischer Tätigkeiten, insbesondere am Stationierungsort. Oder: Deutschland schließt mit einer internationalen Organisation (IO) ein Sitzabkommen, das der IO unter anderem erlaubt, am deutschen Sitz ihr eigenes Dienstrecht anzuwenden.

Diese Beispiele zieht die Verfasserin der hier besprochenen Dissertationsschrift, *Carolin Schlößer*, als Referenzfälle für „territoriale Gestattungen" im Sinne staatsgebietsbezogener Erlaubnisse zur Ausübung fremder Hoheitsgewalt heran. Eigentlich sollte es sich bei solchen Gestattungen um ein nicht völlig unbekanntes Phänomen im deutschen und im Völkerrecht handeln. Umso bemerkenswerter ist, dass eine systematische rechtswissenschaftliche Aufarbeitung, zumal in monographischer Form, bislang fehlte. Insofern schließt die Schrift von *Schlößer* eine Forschungslücke, was schon deshalb besonders verdienstvoll ist.

**II.**

Die Schrift folgt einem sachgerechten und folgerichtigen Aufbau. Sie hat drei Teile, die ihrerseits in insgesamt acht Kapitel untergliedert sind. Die drei Teile skizzieren gleichsam die „Grobstruktur" der Dissertation: Zunächst werden Grundlagen territorialer Gestattungen erarbeitet (Erster Teil mit den Kapiteln 1 und 2), um danach den für Gestattungsakte beachtlichen verfassungsrechtlichen Rechtsrahmen aufzuspannen (Zweiter Teil mit den Kapiteln 3 bis 5) und sodann die sich daraus ergebenden praktischen Rechtsfolgen herauszuarbeiten (Dritter Teil mit den Kapiteln 6 bis 8).

Nach einer Einführung in Gegenstand und Anliegen der Untersuchung (Erstes Kapitel) definiert *Schlößer* zunächst den Untersuchungsgegenstand, also den „Gestattungsakt" (Zweites Kapitel). Anschließend ermittelt die Verfasserin den verfassungsrechtlichen Prüfungsmaßstab, vornehmlich die sich aus dem Grundgesetz ergebenden Schranken solcher Gestattungsakte (Drittes Kapitel). In einem nächsten Schritt werden diese Schranken inhaltlich, dabei namentlich unter Rekurs auf die Grundrechte, konkretisiert (Viertes

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Kapitel). *Schlößer* kommt dann auf formelle Aspekte zu sprechen, nämlich auf Fragen der Zuständigkeit für den Erlass von Gestattungsakten und der Form, in der Gestattungsakten innerstaatlich zugestimmt werden muss (Fünftes Kapitel). Im nachfolgenden Kapitel untersucht die Verfasserin, welche Inhalte ein Gestattungsakt haben muss, welche Folgeverantwortung Deutschlands sich aus Gestattungsakten ergeben kann und welche Konsequenzen fehlerhafte Gestattungen haben können (Sechstes Kapitel). Dies führt schließlich zu prozessualen Fragen, nämlich zu Fragen des Rechtsschutzes gegen die gestattete Ausübung fremder Hoheitsgewalt wie gegen den Gestattungsakt selbst; außerdem wird geklärt, ob sich die Folgeverantwortung Deutschlands aus Gestattungsakten gerichtlich durchsetzen lässt (Siebtes Kapitel). Die Arbeit schließt mit einer die Erkenntnisse der Arbeit zusammenfassenden Schlussbetrachtung (Achtes Kapitel).

**III.**

Den Begriff der territorialen Gestattung definiert *Schlößer* als eine von der deutschen Staatsgewalt einem fremden Hoheitsträger mit Völkerrechtssubjektivität erteilte Erlaubnis, nach dessen eigenem Recht auf deutschem Staatsgebiet hoheitlich zu handeln. Diese Erlaubnis kann man als eine im Umfang der Gestattung räumlich, zeitlich und sachlich begrenzte Zurücknahme der Anwendbarkeit des deutschen Rechts und damit der deutschen Gebietshoheit in dem betroffenen Teil des deutschen Staatsgebiets begreifen (S. 14 f.).

Diese Begriffsbildung führt notwendig dazu, dass territoriale Gestattungen vor allem von der Übertragung von Hoheitsrechten auf supranationale Organisationen wie die Europäische Union (EU) abgegrenzt werden müssen (S. 25 ff.); denn dadurch öffnet sich das deutsche Recht für das supranationale Recht, z. B. das Unionsrecht, hinter das es im Normkollisionsfall im Wege der Nichtanwendung zurücktritt (aus jüngerer Zeit zur EU z. B. BVerfGE 158, 210 Rn. 73 – *Einheitliches Patentgericht II*). Aus der Sicht des Gerichtshofs der Europäischen Union (EuGH) nehmen die Mitgliedstaaten dabei das Unionsrecht in ihr eigenes Recht auf (EuGH, Rs. 6/64, *Costa/E. N. E. L.*, Slg. 1964, 1251 [1269 ff.]); aus der Sicht des Bundesverfassungsgerichts (BVerfG) erlangt das Unionsrecht durch das Gesetz nach Art. 23 Abs. 1 Satz 2, 59 Abs. 2 Satz 1 GG als Rechtsanwendungsbefehl innerstaatliche Geltung (etwa BVerfGE 123, 267 [400] – *Lissabon*) und nimmt so an der Bindung an „Gesetz und Recht" gemäß Art. 20 Abs. 3 GG teil. Darin liegt der entscheidende Unterschied zur territorialen Gestattung im Sinne von *Schlößers* Schrift. Das fremde Recht, das die fremde Hoheitsgewalt im deutschen Staatsgebiet erlaubterweise zur Anwendung bringt, wird nicht etwa für die deutschen Staatsorgane, Behörden und Gerichte verbindlich, insbesondere verdrängt es auch nicht das deutsche Recht nur im Kollisionsfall, sondern

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kommt schon wegen der Zurücknahme deutschen Rechts mit jenem gar nicht erst in Konflikt. Diese wesensmäßige Differenz von Hoheitsrechtsübertragungen und territorialen Gestattungen hätte noch klarer herausgearbeitet werden können. Prinzipiell hat die Verfasserin den Unterschied aber schon erfasst, wenn z. B. davon die Rede ist, dass keine Berührungspunkte zwischen der deutschen und der fremden Rechtsordnung bestünden (S. 20 f.) oder dass „[d]ie fremde […] an die Stelle der deutschen Hoheitsmacht [tritt]" (S. 77). Immerhin wird später z. B. auch das „Fehlen des Rechtsanwendungsbefehls" genannt (S. 234), womit der eben erläuterte, entscheidende Unterschied aber noch nicht vollständig klar hervortritt.

**IV.**

Für die rechtliche Beurteilung territorialer Gestattungen zieht *Schlößer* nur das Verfassungsrecht, nicht dagegen das Völkerrecht heran. Dass das Völkerrecht selbst territoriale Gestattungen prinzipiell nicht regelt (S. 43 ff.), ist konsequent; denn es ist Sache jedes Staates, ob und in welchem Umfang er seine territoriale Souveränität und Integrität gegenüber fremden Hoheitsträgern einschränkt bzw. zurücknimmt. Als Akt deutscher Staatsgewalt unterliegt der Gestattungsakt damit primär den verfassungsrechtlichen, namentlich den grundrechtlichen Bindungen, wie sie sich aus dem Grundgesetz ergeben (S. 45 ff.). Da territoriale Gestattungen allerdings in einem internationalen Bezug stehen, wirft *Schlößer* die berechtigte Frage auf, ob diese grundrechtlichen Bindungen uneingeschränkt gelten oder wegen des internationalen Bezugs gelockert sind.

Zutreffend nimmt *Schlößer* an, dass die Grundrechte im Ausgangspunkt auch für Sachverhalte mit Auslandsbezug gelten. Allerdings ist die Redeweise von der „universalistischen grundrechtlichen Bindung" (S. 47) doch etwas überschießend. Zu einer solchen Sichtweise hat sich das BVerfG nicht wirklich bekannt, weder in dem von *Schlößer* zitierten *BNDG*-Urteil (BVerfGE 154, 152 – *BNDG*) noch in späteren, von *Schlößer* nicht in Bezug genommenen Entscheidungen (BVerfG, NJW 2021, 2108 – *Kunduz*; BVerfGE 157, 30 – *Klimaschutz*). Vielmehr geht das Gericht von einer differenzierenden Betrachtungsweise aus, wonach sich „Ob" und „Wie" der Grundrechtsbindung nach dem persönlichen und sachlichen Schutzbereich des jeweiligen Grundrechts oder der je beanspruchten Grundrechtsdimension richten.

*Schlößer* untersucht im Weiteren, ob und wie sich in Bezug auf territoriale Gestattungen etwaige Lockerungen der Grundrechtsbindung begründen lassen könnten. Hierzu geht die Verfasserin gleichsam induktiv vor, indem sie grundrechtliche Lockerungen anhand bekannter Fallgestaltungen, in welchen fremde Hoheitsgewalt auf deutschem Staatsgebiet zur Geltung bzw. Anwendung gebracht werden soll, analysiert (S. 48 ff.). Aus einer deduktiven Per-

spektive hätte ergänzend erwogen werden können, welche Bedeutung der verfassungsrechtlichen Grundentscheidung für die „offene Staatlichkeit" bei der Frage nach gelockerten Grundrechtsbindungen konkret im Kontext der herangezogenen Fallgestaltungen und speziell im Rahmen des Dissertationsthemas, also den Fällen territorialer Gestattungen, zukommt.

Die erste der untersuchten Fallgestaltungen bildet die Übertragung von Hoheitsrechten. *Schlößer* verneint in diesem Kontext nebenbei eine Parallelität von Art. 23 Abs. 1 GG und Art. 24 Abs. 1 GG (S. 51 f.), was vor dem Hintergrund der Rechtsprechung des BVerfG fragwürdig ist (s. BVerfGE 163, 363 Rdnr. 118 – *Europäisches Patentamt*, wo das Gericht von einer „strukturelle[n] Vergleichbarkeit beider Vorschriften" spricht, was auch „mit Blick auf die hierfür geltenden Schranken" anzunehmen sei; dieser BVerfG-Beschluss datiert freilich vom 8. November 2022, Literatur und Rechtsprechung konnte die Verfasserin indes prinzipiell nur bis zum Juli 2022 berücksichtigen [s. Vorwort S. VII]).

Zu den weiteren Fallgestaltungen zählt die Verfasserin das internationale Privatrecht, die Anerkennung ausländischer Entscheidungen gemäß dem internationalen Zivilprozessrecht, die Anerkennung ausländischer Schiedssprüche, die Rechtshilfe in Zivilsachen sowie die Rechtshilfe in Strafsachen. Bei der Darstellung der Anerkennung ausländischer Schiedssprüche wird das Internationale Zentrum zur Beilegung von Investitionsstreitigkeiten (ICSID)-Übereinkommen etwas eigen als „Washingtoner Weltbank-Übereinkommen" bezeichnet (S. 62). Dass dieses Übereinkommen nicht in die Betrachtung einbezogen wird, wird etwas kryptisch damit begründet, dass es sich um eine „Sonderkonstellation" mit „absolute[m] Ausnahmecharakter [..]" handele (S. 62 in Fn. 105). Richtigerweise muss ein ICSID-Schiedsspruch mit Rücksicht auf die in Art. 54 Abs. 1 Satz 1 ICSID-Übereinkommen normierten innerstaatlichen (Rechts-)Wirkungen („Vollstreckung […] als handle es sich um ein rechtskräftiges Urteil eines seiner innerstaatlichen Gerichte") als ein (quasi-)supranationaler Rechtsakt aufgefasst werden. Gleichfalls etwas eigen wird hinsichtlich sonstiger ausländischer Schiedssprüche Art. V „UNÜ" (S. 62 f.) in Bezug genommen, das unter der Bezeichnung als „New Yorker Übereinkommen" wesentlich geläufiger ist (was auch im Abkürzungsverzeichnis [s. S. XXI] nicht deutlich wird).

Die Verfasserin zieht jedenfalls aus den untersuchten Fallgestaltungen (ausgenommen die Konstellation der Hoheitsrechtsübertragung) nachvollziehbar den Schluss, dass die Grundrechtsbindung deutscher Staatsgewalt in allen untersuchten Konstellationen gelockert sei, diese Lockerung aber ihre Grenze jeweils in einem *ordre public*-Vorbehalt finde.

Nur einen *ordre public*-Vorbehalt hält *Schlößer* auch bei territorialen Gestattungen für angezeigt. Zur Begründung verweist *Schlößer* auf Gemeinsam-

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keiten von Gestattungsakten mit den zuvor untersuchten Fallgestaltungen (S. 71 ff.). Andererseits sieht die Verfasserin dabei auch wesentliche Unterschiede. Der zentrale Unterschied besteht darin, dass in den beigezogenen Fallgestaltungen deutsche Staatsgewalt im Einzelfall dem fremden Recht bzw. Rechtsakt gleichsam „die Hand reicht", um im jeweiligen Fall innerstaatliche Beachtung zu erlangen. Im Fall territorialer Gestattungen erschöpft sich dagegen das Handeln deutscher Staatsgewalt in einem einmaligen (Gestattungs-)Akt, aufgrund dessen fremde Hoheitsgewalt auf der Grundlage ihres fremden Rechts – autonom – in einer unbestimmten Vielzahl von Fällen im deutschen Staatsgebiet hoheitlich handeln darf. Das liegt in der Tat (S. 78) näher am Bereich der Übertragung von Hoheitsrechten (z. B. auf die EU). Die Hoheitsrechtsübertragung unterscheidet sich andererseits aber auch wiederum wesensmäßig von territorialen Gestattungen, worauf eingangs schon hingewiesen worden ist. Aus alledem zieht die Verfasserin den Schluss, dass nicht die „denkbar weitgehendste Bindungslockerung" (S. 77), wie im Fall der Hoheitsrechtsübertragung, zum Zuge kommen kann, sondern nur eine durch einen *ordre public*-Vorbehalt begrenzte Lockerung der Grundrechtsbindung wie in den anderen untersuchten Fallgestaltungen. Sie sieht sich dabei durch § 7 Abs. 3 Satz 4 Gaststaatgesetz (GastStG) bestätigt. Noch zu ergänzen gewesen wäre, dass das BVerfG die „denkbar weitgehendste Bindungslockerung" im Fall der Hoheitsrechtsübertragung auf die EU bzw. früher die Gemeinschaften allerdings gleichsam kompensatorisch unter einen (theoretisch streng verstandenen) Vorbehalt, den *Solange*-Vorbehalt, gestellt hat.

Insgesamt lassen sich die Schlussfolgerungen der Verfasserin aber hören: Bei territorialen Gestattungen ist die Grundrechtsbindung deutscher Staatsgewalt gelockert bis zur Grenze des *ordre public*-Vorbehalts. Dabei nimmt *Schlößer* auf einer gleitenden Skala (S. 81 f.) eine mittlere Strenge des *ordre public*-Vorbehalts an, wie er im internationalen Privatrecht sowie bei der (Entscheidungs-)Anerkennung im internationalen Zivilverfahrensrecht und von ausländischen Schiedssprüchen gelte.

## V.

Im nächsten Schritt unternimmt *Schlößer* den Versuch, den *ordre public*-Vorbehalt mit Inhalt, nämlich mit Grundrechtssubstanz zu füllen.

Die Grundrechtsrelevanz territorialer Gestattungen wird hierzu ebenso zutreffend angenommen wie die Anwendbarkeit aller Grundrechte hinsichtlich aller ihrer Schutzdimensionen (S. 95 ff.). Allerdings erscheinen die Überlegungen insgesamt etwas umständlich. Der Gestattungsakt ist ein Akt deutscher Staatsgewalt und daher selbst, als solcher, notwendig grundrechtsgebunden. Das sagt Art. 1 Abs. 3 GG, der an eigentlich einschlägiger Stelle

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(S. 95-99) nicht zitiert wird. Im Weiteren kann es deshalb nur darum gehen, ob und inwieweit Deutschland den Geltungsanspruch seiner Grundrechte und damit der grundrechtlichen Wertordnung auf seinem eigenen Territorium bis zur Grenze des nicht hintergehbaren, grundrechtlich geprägten *ordre public* zurücknehmen darf.

Im Ergebnis ist aber der Verfasserin jedenfalls zuzustimmen, dass hinsichtlich territorialer Gestattungen primär die (aus dem Wertordnungsgedanken hergeleitete) Schutzpflichtdimension der Grundrechte in Rede steht (S. 107 ff.). Dabei hätte allerdings schon hier noch etwas genauer differenziert werden können, nämlich nach Schutzpflichten des deutschen Staates bei Gestattung (muss der deutsche Staat schon bei der Gestattung Schutzvorkehrungen treffen?) und Schutzpflichten des deutschen Staates nach Gestattung (muss der deutsche Staat nach Gestattung zum Grundrechtsschutz einschreiten, wenn von der fremden Hoheitsgewalt Grundrechtsbeeinträchtigungen ausgehen oder auszugehen drohen?). Im ersten Fall könnte man von einem vorsorgenden Grundrechtsschutz, im zweiten Fall von einem nachsorgenden Grundrechtsschutz sprechen. Die Verfasserin legt ihr Augenmerk weithin nur auf die zweite Konstellation, also die grundrechtlichen Schutzpflichten nach Gestattung. Dabei gelangt sie konsistent zum Ergebnis, dass die fortbestehenden grundrechtlichen Schutzpflichten erst durch ein solches Handeln der fremden Hoheitsgewalt ausgelöst werden, das *ordre public*-widrig ist (S. 115). Denn bis zu dieser Schwelle ist die Grundrechtsbindung der deutschen Staatsgewalt zunächst einmal gelockert.

Die eigentliche Konkretisierung des Inhalts des *ordre public*-Vorbehalts kommt dann etwas spät (S. 123 ff.). *Schlößer* konkretisiert den *ordre public*-Vorbehalt anhand des Wesensgehalts (Art. 19 Abs. 2 GG) und der „Grundidentität" des jeweils betroffenen Grundrechts, die (durchaus einleuchtend) auch unter Rekurs auf völkervertraglich garantierte Menschenrechte als Auslegungshilfe zu ermitteln sein soll (S. 124 f.). Dann ist die Annahme naheliegend, dass die Verfassung einen etwaigen Völkerrechtsverstoß hinnimmt, wenn zum Schutz des Wesensgehalts bzw. der „Grundidentität" Schutzmaßnahmen gegen den fremden Hoheitsträger ergriffen werden, die gegen völkerrechtliche Verpflichtungen verstoßen, die Deutschland ihm gegenüber im Kontext der territorialen Gestattung eingegangen ist (S. 129). Die Voraussetzungen für die Feststellung einer Schutzpflichtverletzung, wie sie das BVerfG in ständiger Rechtsprechung mit fast stets identischen Formulierungen wiederholt (aus jüngerer Zeit z. B. BVerfGE 160, 79 Rn. 71 – *Triage*), werden an dieser Stelle nicht ausgebreitet (S. 130 ff.), aber die Erwägungen, insbesondere zum weiten Einschätzungs- und Beurteilungsspielraum des deutschen Staates, verdienen Zustimmung. Das gilt auch für das anschließend dargestellte „Anwendungsbeispiel: Kompensatorischer Rechtsschutz bei der

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fremden Hoheitsmacht“ (S. 132 ff.). Dabei handelt es sich (nach hiesiger Terminologie) um einen vorsorgenden Grundrechtsschutz schon bei der Erteilung der territorialen Gestattung, also beim Erlass des Gestattungsaktes selbst; denn die Verfasserin verlangt zur Erfüllung der grundrechtlichen Schutzpflicht bereits eine entsprechende „Konzeption des Gestattungsaktes“ (S. 132).

**VI.**

Die innerstaatliche Verbandskompetenz zur Umsetzung der sich aus einer territorialen Gestattung ergebenden Verpflichtungen sieht Schlößer zutreffend prinzipiell beim Bund. Dass der Bund in einem Sitzstaatsabkommen auch das Gefahrenabwehrrecht der Länder zurücknehmen darf, ist in der Tat von Art. 73 Abs. 1 Nr. 1 GG gedeckt (S. 150 f.). Hier hätte sich aber angeboten, das mit einer Annexkompetenz des Bundes zu begründen. Die Gründe der Verfasserin selbst legen das eigentlich nahe. Es bildet gleichsam den „Klassiker“ und „Schulbuchfall“ einer Annexkompetenz, dass die Gefahrenabwehr einen Annex zu einer dem Bund gem. Art. 73 Abs. 1, 74 Abs. 1 GG zugewiesenen Sachmaterie bildet (s. bereits BVerfGE 3, 407 [433] – *Baupolizeirecht*).

Hinsichtlich der Organkompetenz auf Bundesebene mag man den teleologischen Überlegungen von *Schlößer* nahetreten wollen, wonach einseitige Gestattungsakte der Regierung parlamentarischer Zustimmung bedürfen, wenn andernfalls die Gefahr einer Umgehung des Parlaments besteht, weil die parlamentarische Zustimmung in Gesetzesform gem. Art. 59 Abs. 2 Satz 1 GG ausschließlich an einen völkerrechtlichen Vertrag anknüpft, also an eine Rechtsform, welche die Bundesregierung nicht gewählt hat (S. 166). Die Verfasserin stützt sich dabei aber auf die Wesentlichkeitslehre. Das heißt (was nicht ganz deutlich wird): Wenn Wesentlichkeit, insbesondere Grundrechtswesentlichkeit, der territorialen Gestattung gegeben ist, soll es der konstitutiven Zustimmung des Parlaments zum Gestattungsakt bedürfen, wenn seitens der Regierung die Rechtsform der einseitigen völkerrechtlichen Gestattung gewählt worden ist. Dann aber fragt sich, warum ein (konstitutiver) Parlamentsbeschluss (S. 166) ausreichend, d. h. ein Gesetzesbeschluss gerade nicht erforderlich sein soll. Die Wesentlichkeitslehre konkretisiert und erweitert die überkommene Lehre vom Vorbehalt des Gesetzes. Sie verlangt daher stets gerade nicht nur eine parlamentarische, sondern eine gesetzgeberische Entscheidung (und damit unter dem GG des Bundestags unter Beteiligung *auch* des Bundesrats) über alle wesentlichen Entscheidungen in grundlegenden normativen Bereichen (grundlegend BVerfGE 49, 89 [126] – *Kalkar*; s. auch schon BVerfGE 40, 237 [249] – *Verwaltungsvorschrift*).

Dass es in jedem Fall eines Gesetzes bedarf, wenn der Gestattungsakt die Geltung deutscher Gesetze gegenüber dem fremden Hoheitsträger territorial

begrenzt zurücknehmen will, liegt auf der Hand. Für entsprechende Gestattungsakte in Gestalt eines völkerrechtlichen Vertrags wird dies durch Art. 59 Abs. 2 Satz 1 *Alt. 2* GG (sog. gesetzesgegenständliche Verträge) ohnehin angeordnet, d. h. eine solche völkervertragliche Gestattung bedarf eines Zustimmungsgesetzes, das zugleich die innerstaatliche Geltung der Gestattung herbeiführt und in deren Umfang die Zurücknahme der betroffenen inländischen Gesetze bewirkt (soweit dem Bund wie in der Regel, s. o., die innerstaatliche Verbandskompetenz zur Umsetzung der Gestattung zukommt). Im Fall einseitiger völkerrechtlicher Gestattung greift Art. 59 Abs. 2 Satz 1 *Alt. 2* GG aber nicht. Das wird von Verfasserin nicht thematisiert (vgl. S. 168). Eine analoge Anwendung (des *gesamten* Art. 59 Abs. 2 Satz 1 GG) hatte die Verfasserin vorher schon ausgeschlossen (S. 161 f.). Es hätte insgesamt sehr viel näher gelegen, bei einseitigen völkerrechtlichen Gestattungen im Außenverhältnis zu einem fremden Hoheitsträger vom Erfordernis einer parlamentarischen Zustimmung einheitlich abzusehen, weil sie im GG nicht vorgesehen ist (*arg. e* Art. 59 Abs. 2 Satz 1 GG) und für die Umsetzung der Gestattung im Innenverhältnis ein Gesetz des verbandszuständigen Gesetzgebers (vgl. S. 149 ff.) zu verlangen, sofern Verfassungsgründe ein Gesetz erfordern, sei es wegen der (Grundrechts-)Wesentlichkeit der Gestattung, sei es wegen der in der völkerrechtlichen Gestattung versprochenen Zurücknahme inländischer Gesetze.

Die Verfasserin hätte sich übrigens auf das (von ihr nicht beigezogene) Sondervotum *Mahrenholz* in BVerfGE 68, 1 (127 ff.) – *Pershing 2* stützen können, wonach Art. 59 Abs. 2 Satz 1 GG auf die einseitige Zustimmung der seinerzeitigen Bundesregierung zur Atomwaffenstationierung in Deutschland anwendbar war.

## VII.

*Schlößer* untersucht im Weiteren, welche Konsequenzen sich aus den verfassungsrechtlichen Vorgaben für die Praxis territorialer Gestattungen ergeben (S. 179 ff.). Zunächst geht es um Maßgaben für die Ausgestaltung des Gestattungsakts (S. 181 ff.). Diese Maßgaben werden dann aber nur hinsichtlich der Auswahl des fremden Hoheitsträgers spezifiziert (S. 181 ff.). Die sonstige inhaltliche Ausgestaltung des Gestattungsaktes wird zunächst nicht behandelt. Art und Maß des vorsorgenden Grundrechtsschutzes bleiben an dieser Stelle etwas zu unterbelichtet. *Schlößer* kommt darauf aber an späterer Stelle dann doch noch zu sprechen (S. 192 ff.). Näher geht die Verfasserin dagegen zunächst auf Fragen des nachsorgenden Grundrechtsschutzes ein. In dieser Hinsicht spricht *Schlößer* von einer „begleitenden Folgeverantwortung“ (S. 185 ff.) in Gestalt einer Beobachtungspflicht (ob der *ordre public* gewahrt bleibt) und einer daran anknüpfenden Reaktionspflicht (wenn gegen den *ordre public* verstoßen wird bzw. worden ist). Die Figur der Folge-

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verantwortung soll wohl an die Figur der Integrationsverantwortung anknüpfen, wie sie das BVerfG für den Fall der Hoheitsrechtsübertragung auf die EU entwickelt und immer weiter ausgeformt hat (s. aus jüngerer Zeit z. B. BVerfGE 164, 193 [289 ff.] – *ERatG*). Nach Auffassung von *Schlößer* soll eine mit der völkerrechtlichen Gestattung unvereinbare, mithin zum Völkerrechtsbruch führende Reaktion hinzunehmen sein (S. 191). Vermeiden ließe sich dies, wenn bereits die territoriale Gestattung die fremde Hoheitsmacht auf die Wahrung des *ordre public* verpflichtet und sich Deutschland im Gestattungsakt den Widerruf der Gestattung für den Fall eines *ordre public*-Verstoßes vorbehält (S. 192 f.). „[B]esondere außenpolitische Gründe" sollen andererseits erlauben, von solchen Schutzklauseln abzusehen (S. 193). Hier wäre man für Beispiele dankbar gewesen, zumal es der Verfasserin im betreffenden Kapitel gerade um die Praxis territorialer Gestattungen geht.

Nach Auffassung der Verfasserin soll der Gestattungsakt nachträglich nicht dadurch verfassungswidrig werden können, dass die fremde Hoheitsgewalt den *ordre public* unterschreitet. Verfassungswidrig sein könne nur die unzureichende Wahrnehmung der Folgeverantwortung durch deutsche Staatsorgane. Das ist an sich in sich stimmig, steht aber in einem gewissen Widerspruch zur Rechtsprechung des BVerfG zur Integrationsverantwortung. Denn danach soll das Integrationsgesetz nachträglich verfassungswidrig werden können, wenn die „verfassungswidrige Anwendungspraxis [*sc.* des Integrationsprogramms] auf das Integrationsgesetz selbst zurückzuführen ist und darin ein strukturbedingtes normatives Regelungsdefizit zum Ausdruck kommt" (BVerfGE 149, 346 [362] – *Europaschule Frankfurt*). Diese Rechtsprechung wird von der Verfasserin gesehen, aber gut nachvollziehbar als wenig überzeugend zurückgewiesen; denn eigentlich müsste das Integrationsgesetz wegen des offensichtlich von Anfang an vorhandenen „strukturbedingten normativen Regelungsdefizits" ebenso von Anfang an verfassungswidrig sein (S. 199 f.).

Die Arbeit schließt mit einer wichtigen Fragestellung ab: Besteht die Möglichkeit des Rechtsschutzes gegen die fremde Hoheitsgewalt und deren hoheitliches Handeln? Auch diese Ausführungen gelingen (S. 203 ff.), weshalb nur noch wenig angemerkt sei. Selbst wenn sich das Verfahrenshindernis der Immunität (z. B. einer IO mit Sitz in Deutschland gem. Sitzabkommen) überwinden ließe, würde sich die Frage stellen, nach welchem Recht der Rechtsstreit (z. B. zwischen einem deutschen Stellenbewerber und der IO) durch das angerufene deutsche Gericht zu entscheiden ist (S. 205 f.). Das hätte (zumindest auch) als eine kollisionsrechtliche Frage begriffen und ausgearbeitet werden können. Ferner muss die Unterscheidung zwischen „Immunität" (die auf S. 204 f. behandelt wird) und „[f]ehlender Gerichtsunterworfenheit" des fremden Hoheitsträgers (die auf S. 207 behandelt wird) nicht

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wirklich einleuchten. Immunität bedeutet bereits *per se* Freiheit von fremder Gerichtsbarkeit.

**VIII.**

Die konzise Zusammenfassung der Erkenntnisse (S. 233 ff.) zeigt nochmals, wie sorgfältig und umsichtig *Schlösser* ein bislang kaum beackertes Feld erstmals bestellt hat.

Das gilt durchgehend auch in methodischer Hinsicht. Davon zeugen der üppige Fußnotenapparat, das umfangreich zusammengestellte und sorgsam ausgewertete Schrifttum und die klare Strukturierung der Untersuchung, indem der Untersuchungsgang zu Beginn der einzelnen Kapitel und (Unter-) Abschnitte jeweils vorgestellt wird und die Untersuchungsergebnisse am Ende jedes Kapitels klar und knapp zusammengefasst werden.

Ungeachtet einiger vorangegangener kritischer Anmerkungen bleibt als Fazit, dass *Carolin Schlößer* die verfassungsrechtliche Durchdringung der „territorialen Gestattung" insgesamt sehr überzeugend gemeistert und die Rechtswissenschaft zum „Staatsrecht III" originär und mit hohem Erkenntnisgewinn erweitert hat.

*Hans-Georg Dederer*, Passau

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***Mensching, Enno*: Luftkrieg und Recht. Zur historischen Rolle des Humanitären Völkerrechts in der Einhegung der Luftkriegsführung.** Studien zur Geschichte des Völkerrechts 41. Baden-Baden: Nomos, 2022. ISBN 978-3-8487-8529-2. 583 S. € 149,-

In nahezu allen Konflikten der jüngsten Vergangenheit spielt der Luftkrieg eine erhebliche, oft entscheidende Rolle. Es ist bedauernswert und zugleich bezeichnend für den Stand des humanitären Völkerrechts, dass es bis heute die überragende Bedeutung des Luftkrieges nicht adäquat erfasst. Worin dies begründet ist, erklärt *Enno Mensching* in seiner Dissertation „Luftkrieg und Recht". Die Arbeit, die sich im Schwerpunkt der völkerrechtlichen (Nicht-) Regulierung des Luftbombardements widmet, liefert nicht nur eine dringend erforderliche Übersicht, sondern bereichert die karge Forschungslandschaft mit frischen theoretischen Zugängen.

Das Werk ist untergliedert in Einleitung, Hauptteil und Fazit, ergänzt durch eine konzise Zusammenfassung in 20 Thesen. In den fünf Hauptkapiteln vermisst *Mensching* die historische Entwicklung des Luftkrieges, die Versuche seiner völkerrechtlichen Erfassung und – besonders begrüßenswert – ebenfalls den begleitenden Diskurs. *Mensching* ist es „[n]eben der kritischen und kontextsensiblen Aufarbeitung der Luftkriegsrechtsgeschichte […] ein besonderes Anliegen, die diskursiven Elemente auf analytische Weise zu durchleuchten, die bis heute im Zusammenhang mit dem Luftkriegsrecht reproduziert werden" (S. 27). In beeindruckender Weise gelingt es ihm hierdurch, einen diskursiven Bogen von der Vorkriegszeit (Kapitel I), über Ersten Weltkrieg (Kapitel II), Zwischenkriegszeit (Kapitel III) und Zweiten Weltkrieg (Kapitel IV), hin zur Rechts- und Diskursentwicklung bis zur Gegenwart (Kapitel V) zu spannen. Bereits aus dieser Struktur geht hervor, dass das Luftkriegsrecht von einem überragenden Einfluss *europäischer* bzw. *westlicher* Mächte geprägt ist. *Mensching* betont die Rolle des Luftkriegs im Rahmen der europäischen Expansion und arbeitet explizit rassistisch-koloniales Gedankengut in Rechtssetzung wie -anwendung heraus (insbes. S. 100 ff. und 294 ff.). Gleichwohl wäre die westlich-imperiale Agenda bei den Ausführungen zur genealogischen Methode möglicherweise eine Erwähnung wert gewesen. In Anbetracht der Sensibilität, die *Mensching* für dieses Thema beweist, überrascht es allerdings, das N-Wort – freilich innerhalb eines Zitates – ausgeschrieben zu sehen (S. 298). Die Arbeit ist generell sehr gut lesbar geschrieben, lediglich einige besonders auffällige Flüchtigkeitsfehler hätten vor Drucklegung möglicherweise noch ausgemerzt werden können.

Man mag die Einteilung der Geschichte in Epochen aus verschiedenen Gründen kritisch sehen, für *Menschings* Zwecke bietet sie sich jedoch an: Das

Luftkriegsrecht entwickelte sich in seinem Kernbestand gerade entlang der großen Verwerfungslinien des Ersten und Zweiten Weltkrieges. Der begleitende Diskurs war entsprechend hiervon geprägt. Die Grobeinteilung in Vor-, Zwischen- und Nachkriegszeit ist daher legitim. Sicherlich, in Kapitel V nimmt die Darstellung teilweise den Charakter einer Übersicht an. Ein tieferes Eintauchen würde hier aber den Blick verstellen, hat *Mensching* doch seine These zu diesem Zeitpunkt bereits entwickelt, die er nun noch anhand der hervorgehobenen Punkte, insbesondere den Zusatzprotokollen von 1977, schlüssig belegt: „Die diskursiven Elemente und Topoi legitimierten nicht nur die Stagnation der Rechtsfortbildung und die Rechtsmissachtung, sondern forderten auch den Schutzgehalt etablierter Grundprinzipien heraus" (S. 540). Schade ist jedoch, dass die Arbeit ohne jegliches Archivmaterial auskommen muss, was allerdings „den besonderen Umständen der Corona-Pandemie" (S. 6) geschuldet sein dürfte. Bereits in Anbetracht der beeindruckenden Auswertung von Sekundärquellen hätte *Mensching* hier sicherlich viel Erkenntnisreiches zu Tage gebracht.

Kapitel I behandelt unter dem Titel „Vorkriegszeit" den Zeitraum vom Ende des 18. Jahrhunderts bis zum mexikanischen Bürgerkrieg von 1913. *Mensching* stellt dar, wie der Luftkrieg als Fantasterei à la *Jules Verne* wahrgenommen wurde (S. 114). So mangelte es frühen Fluggeräten wie etwa der Montgolfière an „Lenkbarkeit und mechanischer Antriebskraft" (S. 43), weshalb sie allenfalls als fliegende Beobachtungsplattform von beschränktem militärischem Nutzen erschienen (S. 41). Die Zukunft erblickte man in Artilleriewaffen, die „schon um 1850 […] eine Reichweite von über acht Kilometern erreichen" (S. 43). Gleichwohl würde es nicht lange dauern, bis Militärwissenschaftler „Pläne […] zur Verwendung von Fluggeräten als Bombardierungsmittel" erarbeiteten, worin sie gleich ein zweifaches militärisches Potenzial erblickten: Physisch-destruktiv und psychisch-moralisch (S. 44 f.). Daneben widmet sich Kapitel I der Relevanz der ersten kriegsrechtlichen Kodifikationen für das Luftkriegsrecht (S. 56 ff.), insbesondere der Petersburger Erklärung (auf S. 34 wohl versehentlich „in Straßburg" verortet) und der Brüsseler Konferenz. Einen Schwerpunkt setzt *Mensching* auf die Haager Konferenzen von 1899 und 1907, die er im erforderlichen Maße kontextualisiert. Er legt das Misstrauen und den Unwillen frei, mit dem die teilnehmenden Staaten der russischen Einladung Folge leisteten und präsentiert die Ergebnisse als Folge einer Agenda, „sich einerseits der Öffentlichkeit friedensoffen zu präsentieren und andererseits ihre militärpolitische Stellung nicht zu gefährden" (S. 74 f.). Für den Luftkrieg bekannteste Folge war die „Erklärung, betreffend das Verbot des Werfens von Geschossen und Sprengstoffen aus Luftschiffen oder auf anderen ähnlichen neuen Wegen" vom 29. Juli 1899. Durch die Befristung auf fünf Jahre „war das Moratorium als

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publikumswirksamer Erfolg der Konferenz zu verzeichnen". Gleichzeitig stellte es „keinen endgültigen Verzicht auf ein [sic] erfolgsversprechende Kriegsführungsmethode" dar, zumal die Erklärung mit einer Allbeteiligungsklausel eine strukturelle Schwäche enthielt (S. 82). Bei den Diskussionen über die Verlängerung des Moratoriums auf der Zweiten Haager Konferenz von 1907 verliefen die Verwerfungslinien wenig überraschend entlang den (kleineren) Staaten, die nicht über „die finanziellen und infrastrukturellen Möglichkeiten" zum Aufbau einer Luftwaffe verfügten bzw. den Großmächten, die „hinsichtlich der Luftfahrttechnik in Rückstand geraten waren" (S. 96). Strukturell erinnert dies an die für und gegen die *levée en masse* ausgetauschten Argumente des Landkrieges. Interessanterweise „war ein großer Teil der Militärmächte der Ansicht, dass sich die neue Kriegsführungsart nicht wesentlich von anderen Bombardierungsmethoden unterscheide und sie daher denselben Regeln wie Land- und Seebombardierung zu unterstellen sei" (S. 96 f.). Etwas überraschend ist nur, dass *Mensching* „[i]n den Jahren nach 1907" in Großbritannien noch eine Politik der „splendid isolation" erkennen will (S. 106 f.).

Insgesamt wurde der Luftkrieg als besondere Methode des Bombardements verstanden – was in der einen oder anderen Weise bis heute anhält. Auf dieses Verständnis legt *Menschings* auch den Schwerpunkt seiner Arbeit, wenngleich dies nicht aus dem Titel des Werkes hervorgeht. Folgerichtig war daher 1907 die unmissverständliche Ausweitung des den das Verbot der Beschießung unverteidigter Städte, Dörfer, Wohnstätten und Gebäude festschreibenden Artikels 25 Haager Landkriegsordnung (HLKO) auf das Luftbombardement durch die Einfügung der Worte „mit welchen Mitteln es auch sei" (S. 97 f.). In seinem Fazit zu Den Haag hält *Mensching* u. a. die ernüchternde Erkenntnis fest, dass militärische Interessen den humanitären Erwägungen vorgingen. Entsprechend *Francis Liebers* utilitaristischen Diktums „sharp wars are brief", wurde militärische Effektivität mit einer humanen Kriegsführung gleichgesetzt (S. 105).

Kapitel II widmet sich dem Ersten Weltkrieg. Hier wurde die fortan maßgebliche Praxis von „taktische[n] Luftangriffe[n] im Frontgebiet" als unterstützende Dimension der Luftwaffe praktiziert sowie „strategische Bombardements auf das gegnerische Hinterland" als eigenständiges Kriegsmittel verwendet (S. 121 und 123). Bereits 1914 startete das Deutsche Reich eine Luftoffensive gegen England, obwohl Reichskanzler *Bethmann-Hollweg* eine internationale Bewertung als „Akt der Inhumanität" befürchtete, was das Reich „[g]erade nach der Verletzung der Neutralität von Belgien" noch weiter diskreditieren würde (S. 125). Selbst Kaiser *Wilhelm* „warnte vor […] wirtschaftliche[n] Vergeltungsmaßnahmen, Verlust der neutralen Unterstützung, ungünstige[n] Friedensbedingungen, Reparationen und mi-

litärische[n] Repressalien“ (S. 125) – vergleichbar mit der Diskussion um den uneingeschränkten U-Boot-Krieg. Die Befürworter, die sich schlussendlich durchsetzten, beriefen sich dagegen auf die „psychische Wirkung“ der Luftangriffe (S. 126). Zudem erhoffte man sich eine Entlastung an der Front, wenn feindliche Ressourcen für die Luftabwehr zur Verfügung gestellt werden mussten (S. 129). Die Entente flog ihrerseits taktische und strategische Luftangriffe wie auch die befürchteten Vergeltungsoffensiven. Auf britischer Seite erkannte man ebenfalls den „far-reaching political and moral effect“ des strategischen Luftkriegs (S. 134). Sofern „the visits are constantly repeated at short intervals, so as to produce in each area bombed a sustained anxiety”, käme es auf den materiellen Schaden nicht mehr entscheidend an (S. 134). Leidtragende waren auf Seiten der Mittelmächte wie der Entente Zivilpersonen (S. 135 und 165). In seiner umfassenden Betrachtung hält *Mensching* vor allem drei Dinge fest: Erstens, dass der Luftkrieg „das Kriegsfeld vergrößert und vertieft, von der eigentlichen Front in das gegnerische Hinterland bewegt und dabei die Grenze zwischen Kombattanten und Zivilisten zunehmend erodiert“. Insbesondere die „morale bombings“ (S. 163) ebneten den Weg in die „Totalisierung des Krieges“ (S. 136). Zweitens, die normative Schwäche des Luftkriegsrechts, exemplifiziert an der „mangelnde[n] Geltungskraft des Moratoriums von 1907“ (S. 139). Drittens, die Tendenz, „das eigene Kriegsverhalten als völkerrechtskonform und das des Gegners als völkerrechtswidrig darzustellen“ (S. 161): „Denn wer sich selbst auf die ‚gute Seite‘ stellte, konnte nicht nur auf die Unterstützung der eigenen Bevölkerung hoffen, sondern auch mit der Solidarisierung derjenigen Staaten rechnen, die (noch) außerhalb des Kriegsgeschehens standen“ (S. 161). Gleichzeitigt bedingte dies jedoch auch einen „Kreislauf aus Repressalien und Gegenrepressalien“ (S. 165), was bzgl. des Schutzes von Zivilpersonen ein „race to the bottom“ bedeutete. Die Analyse der Legitimierung der Rechtsverstöße (S. 167 ff.) mit Ausführungen zu Repressalie, Notwehr und Notwendigkeit, utilitaristischen Erwägungen und Argumenten von der „besonderen Natur“ des Luftkrieges ist besonders aufschlussreich. Insgesamt zeigte sich, dass „das Fehlen eines speziellen Luftkriegsregimes zu rechtlichen Unklarheiten und einem diversen Rechtsverständnis [führte], das im Zweifel militärischen Vorteilsinteressen Vorschub leistete“ (S. 160).

Kapitel III betrachtet die Zwischenkriegszeit. Hier herrschte bei allen Beteiligten der traumatische Eindruck vor, den der Erste Weltkrieg hinterlassen hatte. Entsprechend der Erzählung vom „war that will end war“ lag der Fokus – nicht zuletzt durch den Einfluss der internationalen Friedensbewegung – zunächst auf Abrüstung und Abschaffung des (Luft-)Kriegs. *Mensching* arbeitet die relevanten Bestimmungen des Versailler Vertrages

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sowie des Völkerbundregimes heraus und stellt die Gründe des Scheiterns der Genfer Abrüstungskonferenz dar (S. 180 ff.). In gewisser Weise spiegelt sich hier das bereits von den Haager Konventionen bekannte gegenseitige Misstrauen (S. 306). Kein Staat wollte für das Scheitern der Abrüstungsverhandlungen verantwortlich gemacht werden (S. 213). Gleichzeitig war die Luftwaffe als effektives militärisches Mittel unverzichtbar geworden. Zu Recht hebt *Mensching* daher den utilitaristischen Topos von der Luftwaffe als „humanisierendes Mittel" (S. 220) und „Werkzeug des Friedens" (S. 221) hervor, das den luftfahrenden Staaten eine willkommene Ausflucht bot. Aufgrund der gegensätzlichen staatlichen Interessen stand es auch um die Regulierung des Luftkriegs nicht besser. Die Haager Luftkriegsregeln von 1923, die *Mensching* in einer an eine Kommentierung erinnernden Weise analysiert, blieben ein – wenn auch einflussreicher – Entwurf. Die von *Mensching* bei den Verhandlungen ausgemachten Verwerfungslinien entsprachen mit unterschiedlichen nationalen Sicherheitsstrategien denen der Haager Konferenzen von 1899 und 1907, waren aber zudem durch mangelndes Vertrauen in die Wertigkeit von völkerrechtlichen Normen geprägt (S. 260). Schlüsselbegriffe, auf die man sich einigen konnte, wurden „absichtlich offen bzw. auslegungsbedürftig formuliert […], damit die Verhandlungen nicht an den hierdurch hervorgerufenen Meinungsverschiedenheiten scheiterten" (S. 283). Gleichzeitig entwickelte sich in der Zwischenkriegszeit mit dem sog. Douhetismus eine Theorie des totalen Krieges, in dem eine selbstständige Luftwaffe, „den materiellen wie auch moralischen Widerstand des Gegners zu brechen" hatte (S. 285). Dieser Krieg verlange einen „Überfall auf den Gegner", womit eine „schnellstmögliche Vernichtung der feindlichen Luftstreitkräfte sowie ihrer Stützpunkte, Produktions- und Versorgungsstätten auf dem Boden" eingeleitet werden sollte. „Wie könnte unter der dauernden Bedrohung einer baldigen und restlosen Vernichtung die Zivilbevölkerung eines Landes die staatliche und wirtschaftliche Ordnung aufrechterhalten und den ungebeugten Willen zum Durchhalten besitzen", fragte *Giulio Douhet* (S. 285). Einschränkende völkerrechtliche Verträge bezeichnete der italienische General als „wertlose Papierfetzen" und pries etwa die „Luft-Gaswaffe [als] humanste Waffe, weil der Endzweck des Krieges mit einem Kraftminimum und Verlustminimum erreicht werden kann (S. 286). In der Folge setzten die Militärmächte auf Abschreckung anstelle „auf die Einhaltung rechtlicher Grundsätze in einem künftigen Krieg zu vertrauen" (S. 292).

Kapitel IV adressiert den Zweiten Weltkrieg, dessen zunehmende Eskalation *Mesching* in verschiedenen Phasen darstellt. Eindrücklich arbeitet er die Wendepunkte heraus, „in denen das Recht versagte, d. h. vormals anerkannte Grundsätze zu Gunsten militärstrategischer Interessen und zu Lasten der

Zivilbevölkerung missachtet wurden“ (S. 324). Wie in keinem anderen Konflikt war die Art und Weise der Kriegsführung hier reiner Ausfluss politischer Erwägungen. Die deutsche Praxis war in der Luftschlacht um England davon dominiert, den Gegner „moralisch niederzukämpfen“ (vgl. S. 344), indem man die Bevölkerung nicht zur Ruhe kommen ließ (S. 348). Der Luftkrieg gegen England war „als Wirtschafts- und Zermürbungskrieg ausgerichtet. Im Sinne einer Blockade zielte er darauf ab, den Gegner durch Erschöpfung der Ressourcen und seiner Widerstandsfähigkeit zur Kapitulation zu zwingen“ (S. 349). Im Auswärtigen Amt setzte sich im weiteren Verlauf die Überzeugung durch, „dass propagandistische Bedenken gegen Terrorangriffe auf die englische Zivilbevölkerung nicht mehr bestehen“ (S. 351). Die Rechtmäßigkeit dieser Praxis wurde nur noch formelhaft als Repressalien gerechtfertigt und gegen Kriegsende bei den sog. Vergeltungswaffen bereits in deren Bezeichnung aufgegeben (S. 355). Im Osten war die Kriegsführung von Anfang an vom „Vernichtungs- und Entvölkerungsgedanken“ beherrscht (S. 364), sodass die Luftwaffe nicht zur Terrorisierung der Bevölkerung, sondern zum Auslöschen ganzer Städte eingesetzt wurde (S. 356 ff.).

Auf britischer Seite stellte sich im Laufe des Krieges ein strategischer Wandel „of diverting the attack from the enemy's means to fight to the will of the German people to continue the war” ein (S. 375). Dieses „Ausziehen der Samthandschuhe“ (S. 371) beendete den sog. „phoney war” (S. 368 ff.), in welchem man sich noch dem strikten Schutz von Zivilpersonen verschrieben hatte. So erklärte *Churchill*: „[T]he civilian population around the target areas must be made to feel the weight of the war” (S. 375). Die Kriegsführung nahm einen strafenden Charakter an, ähnlich der Kriegsführung der Union im US-amerikanischen Sezessionskrieg. Sie sollte – ursprünglich noch in der Tradition des morale bombing aber bald Formen das massacre bombing annehmend – aufzeigen, dass das NS-Regime nicht in der Lage war, seine Bevölkerung vor den Angriffen der Alliierten zu schützen (S. 383): „Let the Nazis drag you down to disaster with them if you will. That is for you to decide“ (S. 385). Piloten erhielten die Anweisungen, selbst dann nicht mehr mit Bomben zurückzukehren, wenn sie ihre Primär- oder Sekundärziele nicht finden konnten (S. 376). Verzögerungszünder verhinderten nicht nur, dass die von Brand- und Explosionsbomben verursachten Brände unmittelbar gelöscht werden konnten, sodern ermöglichten auch deren Ausbreitung (S. 376). Das Unterscheidungsprinzip wurde zu Gunsten des Flächenbombardements aufgegeben (S. 377). Durch „quantitativ zunehmende […] Bomberoffensiven“ sollte unter der Bevölkerung eine konstante Angst vor Luftangriffen aufrechterhalten werden (S. 378). Heimischer Kritik begegnete das britische Air Ministry mit der Argumentation, nur die Aufgabe der Zerstörung des Feindes zu erfüllen (S. 405). Soweit der Zweite Weltkrieg nicht

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bereits ohnehin zur Negation völkerrechtlicher Grundsätze geführt hatte (S. 414), war es die verbleibende Funktion des Kriegsrechts, die gegnerische Praxis zu diskreditieren (S. 413) und selbst nicht als „Völkerrechtsdelinquent klassifiziert zu werden" (S. 413). Beide Seiten erhofften ein Verhalten des Gegners, das sie selbst zur Rechtfertigung von drastischeren Maßnahmen ausnutzen konnten (S. 430).

Hilfreich sind *Menschings* Ausführungen zur Legitimierung der Luftkriegspraxis (S. 413 ff.), wo er zwischen Exklusion (Ausschluss der Rechtsanwendung) und Negation (fehlende Anerkennung der Existenz rechtlicher Grundsätze) sowie zwischen ontologischen und utilitaristischen Rechtfertigungsmustern unterscheidet. Vor diesem Hintergrund verkümmerten „hergebrachte Rechtsinstitute" zum bloßen Legitimationsinstrument (S. 428). Dass die Alliierten von der Rechtmäßigkeit ihrer eigenen Praxis nicht überzeugt waren, zeigt sich nach *Mensching* darin, dass in den Nürnberger Prozessen „ein expliziter Bezug zur Luftkriegsführung fehlte" (S. 436).

Das finale Kapitel V behandelt überblicksartig die „Rechts- und Diskursentwicklung bis zur Gegenwart". Einen Schwerpunkt legt *Mensching* auf die Zusatzprotokolle von 1977 und die auf den Verhandlungen ausgetragene „Kontroverse zwischen idealists and realists" (S. 462) und anderen Interessengruppen bzw. politischen Blöcken. Bezeichnend für die gesamte Geschichte des humanitären Völkerrechts ist auch hier das „mangelnde Einhegungsinteresse", was *Mensching* an den Atomwaffen und Artikel 51 Nr. 4 ZP 1 festmacht: „Die reine Begrenzung der Kampfmittelwirkung bei zugleich fehlender Konkretisierung der Kampfmittelart […] nutzten die Militärmächte aus, um sich die Einsatzmöglichkeit bestimmter Waffenkategorien offen zu halten" (S. 469). Zwar brächten die Zusatzprotokolle etwas Ordnung ins „baffling chaos" des Luftkriegsrechts, es blieben aber weiterhin „humanitäre Schutzlücken, die sich zu Gunsten von militärischen Vorteilsinteressen manifestierten", insbesondere „in Form von mehrdeutigen Formulierungen sowie flexiblen Auslegungsmöglichkeiten" (S. 487). Großen Militärmächten, wie allen voran den USA, war selbst dies nicht genug: Sie blieben den Zusatzprotokollen unter anderem mit dem Argument fern, dass sich durch Unterstützung des Ostblocks die Interessen der „Third World Nations" durchgesetzt hätten, „die militärische Überlegenheit der Großmächte auf Rüstungsebene zu reduzieren" (S. 486).

Im Kontext moderner Luftkriegsführung stellt *Mensching* sehr wertvolle Überlegungen zur Rechtsentwicklung (S. 503 ff.) und Rechtsmissachtung (S. 515 ff.) an. Gleichermaßen realistische wie ernüchternde Ausführungen zur untergeordneten Rolle des Rechts beschließen das Kapitel. Hier kommt *Mensching* zu dem Ergebnis, dass auch im Zusammenhang mit Drohnen und autonomen Waffensystemen „bestimmte Strategien und Topoi aus dem Dis-

kurs nicht verschwinden, sondern bis heute zur Rechtfertigung der Rechtsstagnation und Rechtsmissachtung Verwendung finden“ (S. 528). Diese identifiziert zu haben (zusammenfassend S. 529), ist ein zentraler Mehrwert von *Menschings* Arbeit – über den Luftkrieg hinaus. Die Studie wurde mit dem Preis der Reinhold-und-Maria-Teufel-Stiftung ausgezeichnet und von der Körber Stiftung auf die Shortlist für den Deutschen Studienpreis gesetzt – völlig zurecht.

*Raphael Schäfer*, Heidelberg

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***Hankings-Evans, Anna*: China-Afrika-BITs im Lichte globaler Machtverlagerungen. Macht- und Gerechtigkeitsnormen in der Investitionsrechtsbeziehung.** Ius Internationale et Europaeum 208. Tübingen: Mohr Siebeck 2024. ISBN 978-3-16-163412-3. XVII, 442 S. € 99,-

Im Vorwort (S. V) wird die von *H. Krieger* betreute, 2022 an der FU Berlin angenommene Dissertation als „Ergebnis jahrelanger Forschungen zu den komplexen Wechselwirkungen zwischen wirtschaftlicher Macht, geopolitischen Wechselwirkungen und der Ausgestaltung von internationalen Investitionsschutzabkommen" gekennzeichnet. Das Thema sei „von besonderer Relevanz in einer Zeit, in der China seine Rolle als globaler Akteur festigt und zunehmend globale Partnerschaften mit Staaten des Globalen Südens – insbesondere in Afrika – vorantreibt". Eine Untersuchung von Bilateral Investment Treaties (BITs) zwischen China und afrikanischen Staaten ermögliche nicht nur Einblicke in die „rechtlichen Strukturen und politischen Absichten hinter diesen Abkommen", sondern trage auch dazu bei, „Legitimitätsverluste des internationalen Investitionsregimes einzuordnen und die breiteren Implikationen für das Wirtschaftsvölkerrecht zu verstehen".

Zwischen kompakter Einleitung und Abschluss (Fazit und Ausblick) finden sich sieben unterschiedlich breite Kapitel. Zunächst erfolgen eine „methodische Einführung" in „Macht- und Gerechtigkeitsdiskurse" und eine weitere „historische und geopolitische" Einführung in Chinas „Wirtschaftsengagement" auf dem afrikanischen Kontinent. Die vier folgenden Kapitel fokussieren sodann auf den Schutz grenzüberschreitender (Direkt-)Investitionen, erst in den jeweils für die Bewertung der Legitimität zentralen Kontexten von „Imperialismus" und „Postkolonialität", was in die Frage mündet, ob „Süd-Süd-BITs" eine „normative Neuausrichtung der internationalen Wirtschaftsordnung" bilden. Sodann werden Strukturen und Inhalt von bilateralen Investitionsschutzabkommen zwischen China und Staaten Afrikas genauer analysiert. In einem weiteren Schritt wird erörtert, ob und wie weit ein „legitimer" Ausgleich von „Macht- und Gerechtigkeitsnormen" in diesen BITs stattfinde bzw. gelungen sei. Vergleichsweise knapp wird schließlich die Investor-Staat-Streitbeilegung (ISDS) in China-Afrika-BITs untersucht. Wie beim fünften Kapitel und einigen Abschnitten ist der Titel des letzten, siebten in Frageform formuliert, inwieweit sich „Neo-Imperialismus" und „hegemoniale Einflusssphären" in China-Afrika-„Wirtschaftspartnerschaften" fänden, auch hier bezogen auf „normative (Neu-)Ordnungen". Am Ende der Arbeit weist die Autorin darauf hin, dass durch eine vorurteilsbehaftete Würdigung chinesischer Investitionstätigkeit selbst legitime Einwände gegen Chinas Wirtschaftsengagement in Afrika „politisch motiviert" wirkten, denn auch westliche (bzw. nördliche) Staaten machten „sich bestehende Strukturen zu-

nutze, um den eigenen staatlichen Interessen gerecht zu werden". Stattdessen sollte Kritik an anderen auf sich selbst angewendet, eigene Motive und Strategien kritisch hinterfragt werden, wobei sich *Hankings-Evans* auf einen indischen Beitrag aus „Süd"-Perspektive (*Chimni*) und mittelbar auf *J. Habermas* bezieht (S. 393, Fn. 13, 14).

Die Arbeit nimmt zwar die wirtschaftlichen Auswirkungen der 2020 ausgebrochenen COVID 19-Pandemie zum Ausgangspunkt (S. 1 f.), jedoch wird dieser Ansatz im Hinblick auf allgemeine Expansionsbestrebungen Chinas auf dem afrikanischen Kontinent und die Diskussion um das Narrativ eines „systemischen Rivalen" im Ringen um globale Einflusssphären modifiziert (S. 7). Postulate einer „Ebenbürtigkeit der Partnerschaft zu afrikanischen Entwicklungsstaaten" könnten auch bloße „Lippenbekenntnisse" darstellen (S. 9). Daher solle im Hinblick auf chinesische Direktinvestitionen (FDIs) der jeweilige völkervertragliche Rechtsrahmen der chinesischen Wirtschaftsdiplomatie in Afrika „kontextualisiert und kritisch beleuchtet werden" (ebd.). Im Vordergrund stehen dabei mit 35 Ländern dieses Kontinents (beginnend 1989 mit Ghana, S. 117) abgeschlossene 37 BITs (24 davon am Ende aufgelistet, S. 395 ff.), die freilich nur teilweise in Kraft getreten sind (S. 192 f.). Als zentrale Fragestellung will die Autorin beantworten, ob China-Afrika-Abkommen als Anwendungsfall von „Süd-Süd-BITs" aus „Sicht der Akteure legitimer erscheinen als BITs zwischen Staaten des Globalen Nordens und Südens (‚Nord-Süd-BITs')" (S. 11). Allerdings sind insoweit die Auswirkungen eines im November 2021 veröffentlichten chinesischen „Weißbuchs" mit fünf gegenüber früher modifizierten Grundsätzen für eine „partnership among equals" (S. 101 f.) noch nicht absehbar. Am Schluss des Werks werden freilich auch weitere Anzeichen von mehr „Pragmatismus" und „Flexibilität" genannt (S. 389 f., 392). Gegenwärtig jedenfalls scheine sich eine politische „Charmeoffensive" auch „jenseits des Völkerrechts als Regelungs- und Ordnungsstruktur" zu bewegen (S. 392).

Zu ihren leider nicht weiter untergliederten Ergebnissen gelangt Verfasserin in methodisch plausibel begründeter Vorgehensweise. In den beiden ersten Kapiteln werden Grundlagen behandelt, zum einen die Akteure, insbesondere China, das als Teil eines Globalen Südens gesehen wird, zum anderen Bedeutung und Inhalt von Gerechtigkeit in der (zunächst eurozentrierten) Entwicklung. Nach 1945 werde diese zunehmend kontrastiert durch „third world approaches to international law" (TWAIL). Schließlich gelange man zu einer „postkolonialen Welt", die über bloße Partizipation an Völkerrechtsetzung hinaus auch verstärkt menschenrechtliche Verbürgungen (S. 71 ff.) als wesentlichen Teil von Verteilungs- und (nachhaltigen) Entwicklungsdiskursen einschließe.

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Weil das globale Wirtschaftssystem „wirtschaftliche Abhängigkeiten zum Vorteil mächtigerer Staaten und ihrer Staatsangehörigen zu forcieren" scheine, könne der „Ausgleich von Macht- und Gerechtigkeitsnormen" als „ergänzender Maßstab" verstanden werden, der auch an China-Afrika-BITs anzulegen sei. Jedoch bedeute das „in Anbetracht der legitimierenden Wirkung ihrer staatlichen Zustimmung als Ausdruck souveräner Macht" nicht, dass Länder des Globalen Südens „von staatlicher Verantwortung und Handlungspflicht vis-à-vis der gaststaatlichen Bevölkerung freigestellt werden" (S. 87).

China wird sodann noch einmal separat betrachtet, als Teil der „Dritten Welt" des 20. Jahrhunderts, aber auch als immer wichtigerer Kapitalexporteur, während die letztlich meist herkömmlichen BITs mit Industriestaaten, wie Schweden oder auch Deutschland, allenfalls gestreift werden (S. 25), abgesehen vom Sonderfall Kanada 2012 (S. 335). In dem relativ knappen zweiten Kapitel werden schließlich einige spezielle Formen wirtschaftlicher Beziehungen dargestellt. Die Belt and Road-Initiative wird aber nur an anderer Stelle erwähnt (S. 2, 369), und sowohl BRICS als auch die Chinese Development Bank bleiben außerhalb der Betrachtung. Jedoch werden einige (der besonderen Geschichte dieses Staates geschuldete) Spezifika des BRICS-Mitglieds Südafrika durchaus einbezogen (S. 292 f., 329 f.).

Das umfangreichste Kapitel widmet sich als Brücke zum Regime der China-Afrika-BITs den verschiedenen Etappen des Völkerrechts grenzüberschreitender Investitionen. Sein Schwerpunkt liegt auf den seit Ende der 1950er Jahre im Kontext der Dekolonisierung zustande gekommenen Verträgen „zur Förderung und zum Schutz von Kapitalanlagen" im jeweils anderen Vertragsstaat. Erörtert wird aber auch das Scheitern multilateraler Lösungsansätze einschließlich einer „new international economic order". Einhergehend mit einer Diversifizierung der Perspektiven (nicht mehr nur Schutz „erworbener Rechte" von Ausländern, S. 146 f.) wird die Neuausrichtung Süd-Süd angesprochen, die jedoch zunächst zu keiner normativen neuen Regelung geführt habe (S. 168, 187 f.). Eine primär politische Motivation (S. 185) liege auch intraafrikanischen BITs zugrunde. Reformansätze seit der Jahrtausendwende, wie sie auch von Staaten des Globalen Südens vorangetrieben wurden, etwa Indien, aber auch Marokko, werden nur punktuell erfasst (S. 99, 171, 195), mehrfach dagegen (und angesichts seiner Bedeutung auch für Investitionsschiedsgerichtsbarkeit zu Recht) Mauritius (etwa S. 93, 254, 278, 293).

Eine detailliertere Analyse relevanter BITs erfolgt getrennt zwischen materiellen Bestimmungen und prozessualen Vorkehrungen; insgesamt macht dies weniger als ein Drittel des Buches aus. Die Autorin geht dabei vom „überkommenen" chinesischen bzw. afrikanischen Souveränitäts- und Ei-

gentumsverständnis aus und unterscheidet mehrere (mindestens drei, S. 216) Generationen einschlägiger Abkommen. Unterstrichen wird die Bedeutung des schon früher (S. 116 f.) skizzierten Forum on China-Africa Cooperation (FOCAC) als institutionalisierte Kooperation (S. 218 ff.). Die Zielsetzung (in minder strikten Präambeln) sowie die drei Dimensionen der je normierten Anwendungsbereiche (sachlich, personell, zeitlich) werden überblicksartig erörtert; hingewiesen wird auch auf die – wie lange Zeit allgemein in BITs üblich – regelmäßig fehlende Eröffnung des Marktzugangs für ausländische Investoren und Investitionen (S. 232, 235). Schließlich werden die klassischen Schutzstandards Schritt für Schritt genauer auf Modifikationen hin untersucht und wird bei „umbrella"-Klauseln das Fehlen eines klaren Trends konstatiert (S. 251 f.). Hingegen werde generell mehr oder weniger europäischen Mustern gefolgt (S. 253). Sodann hebt die Verfasserin hervor, Divergenzen wirtschaftlicher Macht zwischen Vertragsparteien legitimierten die Erweiterung von BIT-Regimes um menschen- und arbeitsrechtliche Schutzvorschriften (S. 261), speziell angesichts von Umsetzungsdefiziten zulasten der Bevölkerung afrikanischer Gaststaaten (S. 274 ff.). Zumindest einige China-Afrika-BITs befassen sich freilich mit „Nachhaltigkeit, Entwicklung und Umweltschutz" (S. 277 ff.). Insofern erlangen auch das „right to regulate" und dessen Grenzen erhebliche Bedeutung. Gerade bei (früher?) sozialistischen Staaten wie China wird auch die Position von öffentlichen Unternehmen bei Auslandsinvestitionen regelungsbedürftig (S. 295 ff.). Allerdings sind „joint ventures"-Bestimmungen (auch in Ländern des Globalen Nordens) keine Neuigkeit und ist zudem das Konzept von „corporate social responsibility" (S. 296 f.) in der Praxis auch für private transnational agierende Unternehmen beachtlich. Das Zwischenergebnis einen „legitimen Ausgleich" betreffend bleibt hier vage (S. 300 f.); am Ende wird dann allerdings BITs insgesamt eine „signifikante Inkohärenz" (S. 392) attestiert.

Im Hinblick auf ISDS werden in Kapitel 6 zunächst diverse „Implikationen für Entwicklungsstaaten" hinterfragt und einige gängige Legitimitätsdefizite aufgezeigt (S. 316 ff.). Diese Mängel werden inzwischen in westlichen Industrieländern, auch der EU ernst genommen und haben schon zu ersten Neukonzeptionen geführt (etwa in CETA im Verhältnis EU – Kanada). Auch hier finden sich Investorenrechte auf internationaler Ebene erst sukzessive in BITs (früher hingegen schon in afrikanischen Ländern und westlichen Industriestaaten, wie etwa das erste Verfahren im Rahmen von ICSID belegt, S. 312). Bislang gibt es freilich nur eine einzige Streitigkeit mit chinesischer Beteiligung in der Praxis (S. 336, 341); offensichtlich werden Dispute außergerichtlich beigelegt (S. 339).

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Auch das Kapitel 7 setzt (wie schon vorher eher zuspitzend formuliert) damit ein, inwieweit China in Afrika neokolonialistisch oder gar neoimperialistisch agiere (S. 343 f.). Daher werden erst einmal Begrifflichkeiten geklärt und wird nach einer Asymmetrie von Wirtschaftspartnerschaften gefragt. Letztlich agiere China jedoch weithin als „soft power" (S. 376 ff.). Dabei werde allerdings – auch auf Seiten afrikanischer Eliten – dem Gemeinwohl der betroffenen Bevölkerung nicht immer Beachtung geschenkt (S. 370, 374, aber auch S. 384). So seien „Wirtschaftspartnerschaften" (S. 23, 30, 127 u. a.) eine Fortentwicklung auch von BITs und deren Inhalten, aber keine generelle Neuausrichtung (S. 375, 386). Da die chinesische Seite einen umfassenden Ansatz verfolge und zumindest verbal „Pragmatismus unter Freunden" übe (S. 384, 389 f., 392), sei auch bei afrikanischen Staaten ein strategisches Vorgehen notwendig (S. 391).

Die Untersuchung bezieht sich immer wieder auf Studien aus dem TWAIL-Bereich, neigt aber keineswegs zu schlichter Übernahme von Bewertungen. Vielmehr werden solche meist im Globalen Süden artikulierte Auffassungen als (nicht außer Acht zu lassender) Gegenpol zu westlich-traditionellen Konzepten zum Schutz von Auslandsvermögen (FDI) eingeordnet. Ab und an sind Formulierungen etwas schief (etwa S. 166: „Rechtskraft" von Resolutionen, S. 304: „transatlantisch" statt „transpazifisch"), und die Fußnoten (in vierstelliger Zahl) hätten teils kompakter gefasst und um manche Redundanzen (wie wörtliche Wiederholungen von Textzitaten, z. B. S. 111 f., 192) bereinigt werden können.

Gewisse Lücken treten bei der Einbindung des Investitionsschutz- in das allgemeine oder auch institutionelle Wirtschaftsvölkerrecht (einschl. Entwicklungsbanken) auf; Kapitaltransaktionen seitens globaler oder regionaler Internationaler Finanzinstitutionen, aber auch die (teils multilaterale, teils staatliche) Absicherung von Auslandsinvestitionen werden nicht erfasst. Auch Querverbindungen zum Welthandelsorganisation (WTO)-Recht (wie im Allgemeinen Abkommen über den Handel mit Dienstleistungen (GATS) oder im Übereinkommen über handelsbezogene Aspekte der Rechte des geistigen Eigentums (TRIPS) werden nicht vertieft. Reizvoll wäre ein breiterer Vergleich mit den zwischen China und diversen Industriestaaten (oder auch lateinamerikanischen oder anderen Entwicklungsländern) geschlossenen BITs oder ähnlichen Investitionsschutzverträgen, ebenso wie Parallelen und Unterschiede zu einer anderen südlichen Macht, Indien, aber auch zu BITs zwischen afrikanischen Staaten und den USA. Von insgesamt bisher neun wurde der letzte Vertrag zwischen diesen Partnern 2008 geschlossen, und wohl alle sind geprägt durch den „US model treaty". Das lohnt freilich eigene, weitere Studien. Näher analysiert werden könnten auch Gründe für die häufig fehlende Inkraftsetzung sowie (generell) für Kündigungen von

BITs auch durch afrikanische Staaten. Ein anderes Thema wäre die Rolle der Rohstoffvorkommen (nicht nur Seltener Erden) bei aktuellen und potenziellen Vertragspartnern, wo (meist schon) von chinesischen Unternehmen geförderte Erzeugnisse dann in China (weiter) verarbeitet werden (sollen); insofern ist das Abkommen mit der Demokratischen Republik Kongo (ex-Zaire) 2016 in Kraft getreten, mit Eritrea besteht hingegen kein BIT.

Insgesamt handelt es sich um ein wichtiges, lesenswertes Buch. Es zeichnet sich dadurch aus, dass es nicht auf spezifische Wirtschafts- oder Entwicklungsperspektiven der herkömmlichen Kapitalexportnationen fokussiert, sondern vor allem auch den Globalen Süden und dessen teils gemeinsame, teils aber auch durchaus divergierende Positionen angemessen einbezieht.

*Ludwig Gramlich*, Münster (He.)

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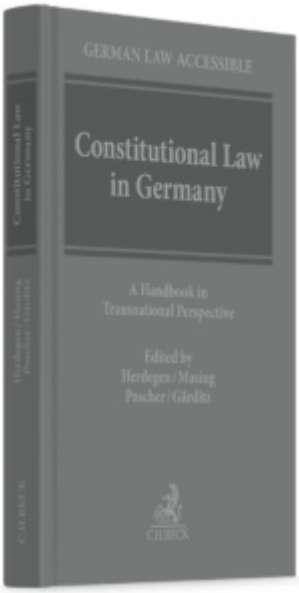


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