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Global
Constitutionalism
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Call for Papers

Solange 50th Anniversary Conference:
Constitutionalism beyond the state and the role of domestic constitutional courts



Fifty years have almost passed since the German Federal Constitutional Court (GFCC) rendered one of its most widely discussed and influential decisions: *Solange I*. On May 29, 1974, the Court 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. What the decision of *Marbury v. Madison* was for domestic constitutionalism, *Solange I* was arguably for constitutionalism beyond the state.

In *Solange I*, a domestic constitutional court asserted jurisdiction to (indirectly) review the law of a supranational organization based on principles of constitutionalism. As a consequence, constitutional principles became yardsticks for institutions beyond the state and the relationship between the national and the international was no longer a political affair left to the legislative and executive branches. Courts in Europe and beyond have since adopted some version of the *Solange*-approach. And constitutional pluralism, a constitutional theory that embraces the basic tenets of this approach, has become the mainstream account in EU scholarship on the relationship between EU law and domestic constitutional law.

It is not our intention to simply celebrate *Solange I* on the occasion of its 50th Anniversary but to reexamine 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 transformational judicial and political development; to examine the various and partially competing narratives flowing from the decision; and to comparatively analyze receptions and adoptions in other jurisdictions in Europe and beyond.

Recent political and legal developments have rendered the legacy of *Solange I* more complicated and more interesting and provide a new context for reflecting on its relevance. The rise of nationalist political illiberalism, the disintegration of the European Union, and the backlash against international institutions raise the questions whether key domestic constituents such as constitutional courts have a responsibility to be supportive rather than adversarial towards institutions beyond the state given the latter's precarious authority and how harmful deviations from the primacy of EU law are in light of the rule of law crisis in Hungary and Poland. On the other hand, the *Solange* legacy may point to a way of understanding constitutional pluralism and the role of domestic constitutional courts which marks a counterpoint and contrast to the sovereigntist or identity-oriented jurisprudence that has become dominant more recently. In that sense the question is whether *Solange I* should

be read to stand for a particular approach which has later been challenged by more intransigent sovereigntist accounts.

The perception of the decision is very different today compared to 1974. Today, *Solange I* is widely credited in academic literature for spurring the development of fundamental rights protection in the EU. However, this narrative is not beyond dispute. At the time of its enactment, the decision was highly controversial inside and outside the GFCC, attracting scathing critique from pro-European scholars, prompting German chancellor *Helmut Schmidt* to intervene behind the scenes over concerns about the future of the European integration project, and seeing three of the eight justices sitting on the Second Senate dissent, marking the last time of open disagreement in the Court about whether, as opposed to how, to exercise control over EU law.

The reflection about the legacy of *Solange I* gives rise to competing interpretations and narratives. Is it best to interpret its legacy as one of constructive transnational engagement and a plea to extend constitutionalism from its traditional nation state setting to the European constitutional space, or as one of a narrower-minded resistance to European integration? The legacy of *Solange I* significantly depends on how we perceive its trajectory. We may see continuity, or even path dependency, from *Solange I* to the widely criticized judgments of the GFCC on the Maastricht Treaty and recently on the European Central Bank's PSPP-programme, or alternatively we may consider the *Maastricht*-judgment to mark a sharp discontinuity from the path taken by *Solange I*. We may argue that the *Solange*-approach represents a significantly more attractive – because more flexible and graduated form of accountability – model than the doctrines of *ultra vires* and *constitutional identity* relied upon by the GFCC and other domestic courts today, or alternatively that they all may be more or less the same thing.

In any case, it would miss the broader picture to restrict the analysis of the decision to the lens of German constitutional law. Instead, we suggest that *Solange* is an integral part of European constitutional heritage and should be seen as a prism to study European constitutional history. It is deeply tied to the legacy of constitutional pluralism that has come under scrutiny as a result of European disintegration, bringing into question whether *Solange* and alternative approaches to constitutional engagement beyond the state are suitable mechanisms in turbulent times like ours.

We encourage young and experienced scholars working in law and related disciplines interested in one or more of these themes to submit a paper proposal that may revolve around the following possible aspects:

- historical analysis of the *Solange I*-decision and its historical context
- legacies of *Solange* and constitutional pluralism
- *Solange* and European constitutional history
- contrasting different approaches and domains of domestic judicial review over European and international law
- role of domestic constitutional courts beyond the state in turbulent times
- receptions and adoptions of the decision and its approach in other jurisdictions

We plan to discuss these and related issues on two occasions: An online workshop on 12 / 13 January 2023 and an in-person International Conference with prominent speakers at the *Wissenschaftszentrum Berlin für Sozialforschung* on 30 / 31 May 2024. This call for papers is for the online workshop which is to lead to a publication as a special issue in a leading journal.

Interested participants should submit an abstract of not more than 300 words to Solange-Conference@jura.uni-halle.de by 12 June 2022. Please include the following information with your abstract: name, affiliation, email address, CV. We aim at communicating the results of the selection process in July. Those selected are expected to submit preliminary draft papers of around 3,000 to 5,000 words by 31 October 2022. A selection of papers will be considered for publication in a symposium issue and for presentation at the Conference.

Workshop and Conference Conveners: Mattias Kumm & Kriszta Kovács (Wissenschaftszentrum Berlin für Sozialforschung), Andrej Lang (Martin-Luther-Universität Halle-Wittenberg)