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On the Local Remodelling of a Canonical German Decision in French and Italian Constitutional Debates

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

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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.

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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.

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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).

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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).

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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.

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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.

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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.

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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.

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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.

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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).

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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).

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> 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.

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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).

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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).

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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]

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.

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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.

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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.

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