

# „Transnational Solidarity Conflicts: Constitutional Courts as Fora for and Player in Conflict Resolution“

**Emmy-Noether-Research Group funded by the German Research Foundation between March 2017 and August 2024**

Co-hosted by: Goethe-University of Frankfurt; Friedrich-Alexander-Universität (FAU) Erlangen-Nürnberg and MPIL

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## I. Vision

The research project aimed to investigate why national constitutional courts become involved in transnational solidarity conflicts, how they use procedural law to control their involvement, and whether this involvement can be justified in terms of democracy and the separation of powers. The project contributed new insights to constitutional theory, essential for understanding the integrative role of national constitutional jurisdiction in the European multi-level system.

## II. Research Program

The project was divided into four work packages:

**Work package 1** was dedicated to developing a theory of transnational solidarity conflicts. This implied defining transnational solidarity in the context of the European Union and developing a deeper understanding of what we mean by conflicts. The ultimate goal was to develop a conflict-prone theory of transnational solidarity that allows us to analyze interactions between solidarity, conflict and crisis.

**Work package 2** was dedicated to analyzing the case law of national constitutional courts in the context of the Eurozone crisis through our concept of transnational solidarity conflicts. The aim was to map different doctrinal and procedural techniques and assess the case law in light of the challenges posed by transnational solidarity conflicts.

**Work package 3** then focused on the European level and sought to analyze the approach developed by the European Court of Justice and other EU institutions (European Central Bank, Parliament, Commission) to transnational solidarity conflicts in the Eurozone.

**Work package 4** was dedicated to exploring the broader potential of our approach to transnational solidarity conflicts in other major societal and political crises in the EU (pandemic, migration, etc.). Our main interest was understanding the dynamic interplay between crises and transnational solidarity. Moreover, we aimed to explain under which conditions constitutional law can provide a means to integrate a political community in times of crisis.

## III. Research Concept

### *Conceptual framework and adaptations*

The concept of transnational solidarity conflicts provided a valuable tool for analyzing political divisions and conflicts in European politics. We refined our initial framework, understanding transnational solidarity as a reciprocal relationship between states and

citizens aiming to distribute the costs and benefits of promoting the common good. We based this approach on Andrea Sangiovanni's work on transnational solidarity. This allowed us to explore conflicts over distribution issues in the euro crisis and subsequent political developments, such as disputes over refugee protection and financial aid distribution during the coronavirus pandemic. Taking a conflict-theoretical approach, we were able to better understand conflict dynamics and identify conditions for integrative conflict management by constitutional courts.

#### *Expansion of the scope of the research*

The adjustments to the project's conceptual framework resulted in an expansion of the solidarity conflicts under study. Additionally, changes had to be made to the project's institutional scope. Initially, the focus was on investigating national constitutional courts, but we expanded it to include the European Court of Justice (ECJ) due to its increasing case law activity in transnational solidarity conflicts. The ECJ was considered a supranational constitutional court during the project, and its case law was included in the comparative study. However, the planned program to investigate the case law practice of five national constitutional courts proved unfeasible for various reasons, particularly due to the complex nature of the euro crisis conflicts in Spain and Ireland. As a result, we focused our empirical research on the ECJ, the German Federal Constitutional Court, the Portuguese Tribunal Constitucional, and the Greek Council of State.

## IV. Methods and Results

### *Methods*

The project applied an interdisciplinary and comparative approach to studying the legal mechanisms of conflict resolution in transnational solidarity conflicts. Our theoretical and conceptual work was heavily influenced both by philosophical work and political theory on transnational solidarity, whereas our understanding of integration through constitutional law built much on political science literature. The team members undertook empirical research through semi-structured background interviews with politicians, public lawyers, constitutional judges, and legal clerks in Spain, Portugal, and Greece. These interviews helped us employ a contextual comparison method that valued the historical and institutional specificities of the various constitutional orders under review. Due to the pandemic, some planned fieldwork had to be postponed or replaced by remote interviews.

### *Scientific Results in Theses*

- Remember the following text:
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- At the level of constitutional theory, a conflict-oriented theory of integration through constitutional law was developed as part of the project, based on political science considerations by André Brodocz. The core message of this theory is that constitutional courts can help to banish the destructive potential of solidarity conflicts if they succeed in establishing and protecting the constitution's openness to interpretation. The prerequisite for this is a reflexive understanding of democracy in line with Pierre Rosanvallon, according to which proceedings before constitutional courts are understood as a complementary and differentiating form of democratic decision-making. This requires procedures allowing the constitution to be expressed in as many voices and languages as possible and interpreted and used by as many social actors as possible. For integrative judicial conflict resolution in

the context of solidarity conflicts, constitutional courts must make solidarity conflicts visible in their transnational dimension, be procedurally inclusive, i.e. provide many actors with access to the proceedings, argue in a substantively inclusive manner, i.e. take different interpretations seriously and take them into account, and keep the content of the constitution open, i.e. also allow for interpretative changes in the future.

- Measured against this standard, European constitutional jurisdiction (ECJ and ECtHR) has proven ill-equipped for the specific solidarity conflicts in the euro crisis. The ECJ and ECtHR lack the procedural or substantive prerequisites to make the conflicts visible in their breadth and diversity and to deal with them following the criteria of fairness and openness. During the euro crisis, both courts were, therefore, only occasionally able to set meaningful limits to the political discourse on crisis management and to ensure the openness of interpretation of EU constitutional law. In the case of the ECJ, the reasons lie primarily in a restrictive interpretation of procedural law, combined with a strong path dependency of their case law. At the ECtHR, the material possibilities for deciding conflicts are limited from the outset, particularly in the socio-political area, due to the lack of fundamental social rights.
- The national constitutional courts often overlook the transnational aspect of conflicts and focus on nationalizing solidarity conflicts. During the euro crisis, the Federal Constitutional Court aimed to strengthen the integrative power of the Basic Law internally. However, there was also a clear emphasis on a nation-state oriented interpretation when it came to the transnational dimension of the conflicts. According to the case law of the Federal Constitutional Court, the guarantee of national democratic self-determination is ensured by defending or ensuring compliance with the European stability criteria of all euro member states. The court establishes a narrow understanding of solidarity, primarily viewing it as compliance with the law and relying on the principle of responsibility in overcoming economic crises.
- The project made an important and innovative contribution by comparing and analyzing the constitutional discussions in Germany with those in other countries and at the European level. The case law of the Portuguese Constitutional Court was particularly relevant and interesting. The legal conflicts in the court's crisis case law focused on the extent to which the constitution allows for special burdens on public servants during budgetary crises, and whether legislative bodies are constitutionally obligated to consider alternative measures to cut spending. These conflicts were related to EU budgetary policy requirements and the Memoranda of Understanding. However, the European dimension was not heavily reflected in the case law of the Constitutional Court. The conflicts related to the euro crisis were primarily seen as national distribution conflicts by both the political players and the Constitutional Court. During the crisis, the Constitutional Court strengthened its position and made the constitution the central normative point of reference in the crisis debate. This was largely due to key decisions being supported by the center-left government in power since 2015. This delegitimized the tightening of economic and social policy as 'unconstitutional'. The Constitutional Court became the symbol of a social-reformist constitution and created constitutional identification in times of crisis. However, it completely ignored European constitutional law and the transnational dimension of the conflicts.
- In the context of integrative conflict resolution through constitutional jurisdiction, all three individual studies indicate that procedural law partially shapes the ability to identify conflicts and the inclusivity of judicial conflict resolution. Constitutional jurisdiction bodies also play a crucial role by actively using procedural law to control their own involvement.

- When it comes to the material conditions of integrative conflict management, the study of the Federal Constitutional Court demonstrates that, despite strong symbolic foundations, there are deficiencies in procedural inclusivity and transparency of decision-making, which slightly weaken the interpretative power of constitutional jurisdiction. This is evident in the case of the Federal Constitutional Court.
- On the other hand, European constitutional jurisdiction during the euro crisis faced symbolic uncertainty, where the potential unifying impact of European constitutional law on the transnational European political community was unclear. In this scenario, apart from procedural requirements, the ability to address conflicts as constitutional conflicts is crucial, and the available rights catalogues play a significant role. Moreover, there is a certain path dependency observed in the jurisdiction of constitutional courts, making it challenging to adapt to new conflict structures and dynamics. This underscores the importance of constitutional jurisdiction bodies as actors in conflict management. To facilitate integrative conflict management based on constitutional law, these bodies must actively take up cases and consciously highlight the constitutional dimension of political and social conflicts. This is further supported by the analysis of the crisis jurisdiction of the Portuguese Tribunal Constitucional, which operated in a context of symbolic uncertainty but ultimately strengthened the social-reformist constitution of 1976 as a symbolic representation of the political community in collaboration with political actors.
- Based on this study, we developed specific proposals that would improve the chances of European constitutional law having an integrative force:
  - Horizontal constitutional court interaction: One potential improvement could involve enhancing the transnational aspect of managing conflicts in national constitutional courts in terms of procedural law. This could be achieved by introducing *amicus curiae* mechanisms, allowing government and opposition representatives as well as NGOs from other member states to be heard across borders before national constitutional bodies. However, this would only apply to cases with a transnational dimension, which could be determined by an independent ombudsman's office.
  - Transnational democratic theory: The potential for organizing democratic decision-making beyond the nation state, in a way that allows for open resolution of political conflicts, needs to be enhanced. The European Parliament has not been able to fulfill this task yet. Therefore, institutional proposals need to be developed within the framework of a transnational theory of democracy that enable the inclusive resolution of such political conflicts.
  - European constitutional jurisdiction: The European Court of Justice (ECJ), in cooperation with the European Court of Human Rights (ECHR), should take its role as a constitutional court more seriously. It should aim to reformulate major social and political projects using the language of European constitutional law. This approach could increase the recognition of European constitutional law as a central normative framework. For this to happen, political actors such as parties and NGOs need to challenge the current dominant interpretations of European constitutional law more vigorously and incorporate constitutional law into their political and legal strategies.
- The concept of transnational solidarity conflicts developed using the euro crisis and the integrative-conflict-affine constitutional theory have proven effective in analyzing other European conflicts and their constitutional significance. This applies to the solidarity

conflicts in refugees and migration, as well as the conflicts surrounding the ‘Next Generation Europe’ program and pandemic management.

## V. Scientific Highlights

### *Publications*

#### Books

- Farahat, Anuscheh/Hildebrand, Marius/Violante, Teresa (Hg.): *Transnational Solidarity in Crisis: How Law Shapes Critical Transformations of Our Time*, Nomos, Baden-Baden, 2024 (in Vorbereitung)
- Farahat, Anuscheh/Arzoz, Xabier (Hg.): *Contesting Austerity: a socio-legal inquiry*, Hart Publishing (2021)
- Farahat, Anuscheh: *Transnationale Solidaritätskonflikte: Eine vergleichende Analyse verfassungsgerichtlicher Konfliktbearbeitung in der Eurokrise*, Mohr Siebeck (2021)

#### Papers (peer-reviewed)

- Violante, Teresa: “Bring Back the Politics: The *PSPP* Ruling in Its Institutional Context”, *German Law Journal*, 21, 2020, pp. 1045-1057
- Farahat, Anuscheh/Krenn, Christoph: *Der EuGH in der Eurokrise: Eine konflikttheoretische Perspektive*, *Der Staat* 57 (2018), S. 357–385, <https://doi.org/10.3790/staa.57.3.357>.
- Violante, Teresa: *The Eurozone Crisis and the rise of the Portuguese Constitutional Court*, in: Pietro Faraguna, Cristina Fasone, Diletta Tega (Hg.): *Grecia, Irlanda, Portogallo e Spagna dieci anni dopo. Introduzione a uno studio dell'eurocrisi nella prospettiva costituzionalista*, Quaderni costituzionali (special issue), Fascicolo 1, marzo 2019, pp. 208-212

#### Papers (not peer-reviewed)

- Farahat, Anuscheh: *Adjudicating Transnational Solidarity Conflicts – Can Courts Ban the Destructive Potential?*, in: Mark Dawson, Adina Maricut-Akbik (Hg.) *Towards Substantive Accountability in EU Economic Governance*. Cambridge: Cambridge University Press, 2023
- Farahat, Anuscheh: *Verfassungsgerichtsbarkeit und Gewaltengliederung im europäischen Rechtsraum: Eine vergleichende Analyse*, in: Armin von Bogdandy/Peter M. Huber/Christoph Grabenwarter (Hg.), *Ius Publicum Europaeum*, Bd. VII, C.F. Müller, § 125 (2021)
- Teresa Violante and Patrícia André, *The Constitutional Performance of Austerity in Portugal*, in: Tom Ginsburg, Mark D. Rosen and Georg Vanberg (Hg.). *Constitutions in Times of Financial Crisis*. Cambridge: Cambridge University Press, 2019, 229-260
- Hildebrand, Marius (2018): *Emanzipation und Demokratie jenseits der Aporien eines anti- soziologischen Egalitarismus. Ernesto Laclaus politische Ontologie als Antwort auf Jacques Rancières Soziologiekritik*, in: Linpinsel, Thomas/Lim, Il-Tschung (Hg.): *Gleichheit, Politik und Polizei: Jacques Rancière und die Sozialwissenschaften*, Wiesbaden, 9-29

### *Conferences*

The project organized three academic conferences. The first workshop was held in Berlin in 2017 with Mark Dawson. Initial ideas and theses were discussed here. This was followed by an interdisciplinary conference at the International Institute for the Sociology of Law in

Oñati (Spain) in cooperation with Prof Xabier Arzoz. Hart Publishing published the results in the volume 'Contesting Austerity'. To conclude the project, a final conference entitled 'Transnational Solidarity in Crisis: How Law Shapes Critical Transformations of Our Time' was held in Erlangen in November 2023, the results of which will be published by Nomos in the MPIL series in the fall of 2024.

### *Career Development*

During the project period, the applicant published a thesis (Habilitationsschrift) on transnational solidarity conflicts and constitutional jurisdiction at Goethe University Frankfurt, the results of which were incorporated into the monograph she published in 2021. Anuscheh Farahat then became a professor of Public Law, Human Rights Law and Migration Law at the FAU Erlangen-Nürnberg. Since March 2024 she has been a professor of Public Law in European Context at the University of Vienna

Unfortunately, external and family circumstances prevented the other two members from completing their theses during the funding period.

Marius Hildebrand intends to do his habilitation in political science under the supervision of Prof. Dr André Brodocz in Erfurt. In his habilitation project 'Constitution and Crisis. Constitutional Discourses of Order in the Context of the European Economic, Financial and Monetary Crisis', Marius is investigating how constitutional discourses relate to crisis discourses. The completion of his thesis has been delayed due to the birth of two children and the additional hurdles caused by the pandemic and related care situation. It is now planned for autumn 2024.

Teresa Violante intends to complete a doctorate on a topic related to constitutional law and democratic theory at FAU Erlangen-Nuremberg under the title 'European Constitutional Courts and Weak Judicial Review: A Comparative Analysis'. The finalization of the thesis has been delayed, in particular, due to the pandemic, the care of two school-age children and the start of a new professional position. Completion of the work is now planned for summer 2025. Teresa Violante is now Director of the Institute for the Global Rule of Law of the European Public Law Organization (<https://www1.eplo.int/igrl>).