Chapter 1 Transnational Solidarity in Crisis

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1 Introduction

Crises are "both a threat to and an opportunity for solidarity".[1] The two concepts are in a mutual relationship of tension. On the one hand, solidarity is an important means for overcoming a crisis and thus repeatedly invoked in crisis contexts. In this respect, solidarity should serve to cushion or compensate for the disintegrative moments of crisis-ridden developments. On the other hand, solidarity-based mechanisms and institutions are at issue in times of crisis. This happens when they come under pressure to adapt to crisis imperatives of necessity, exceptionality, and urgency or when their socio-moral foundations erode as a result of critical developments. In crises, solidarisation and desolidarisation processes intertwine in an often-paradoxical manner. A particularly impressive case in point is the so-called migration crisis of 2015 which gave birth to both: immediate, spontaneous popular support for refugees on one side and the upswing of a communitarian, anti-solidaristic closure cultivated by right-wing populist movements. In a similar vein, European solidarity and the struggle over its meaning took centre stage during the Eurozone crisis,[2] while the consensual and permissive logics underlying the integration project was severely challenged in an unprecedented way.[3]

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1 Sebastian Koos, 'Crises and the Reconfiguration of Solidarities in Europe – Origins, Scope, Variations' (2019) 21 European Societies 629, 629.
2 Stefan Wallaschek, 'Mapping Solidarity in Europe: Discourse Networks in the Euro Crisis and Europe's Migration Crisis' (Dr. phil thesis, University of Bremen 2019).
3 For the much-cited idea of a permissive consensus, its politicisation, and successive replacement by a constraining dissensus see Liesbet Hooghe and Gary Marks, 'A Post-functionalist Theory of European Integration: From Permissive Consensus to Constraining Dissensus' (2009) 39 British Journal of Political Science 1; for the politcisation of European governance see Swen Hutter, Edgar Grande, and Hanspeter Kriesi (eds), *Politicising Europe: Integration and Mass Politics* (Cambridge University Press, 2017); Pieter de Wilde and Michael Zürn, 'Can the Politicization of European Integration Be Reversed?'(2012) 50 Journal of Common Market Studies, 137.

After more than a decade of consecutive crises, it is not surprising that solidarity features prominently in social scientific, legal, philosophical, and transdisciplinary research.[4] Despite their different methodological perspectives, research objects and knowledge interests, the manifold contributions to the topic of solidarity allude to the fact that crises act as critical junctures for solidaristic regimes. Crises are privileged moments for the "reconfiguration of solidarity"[5] on a national and a transnational level. Such processes put political and legal institutions in which the scope and the conditionality of solidarity are explicitly or implicitly negotiated under pressure. Crisis-induced polarisation processes put them at risk of losing their legitimacy as impartial, reflexive, responsive or compromise-centred institutions.[6] The frequently stated multiplicity, seriality, and permanence of the crisis lends this relationship a particular virulence.[7] In addition to economic and migration policy issues, climate change and the age of the pandemic, in particular, represent pressing challenges whose consequences impact law and politics for the upcoming decades with acute crisis moments recurring again and again.

In view of the cascade of crisis events of global proportions since 2007, this volume aims to examine the tensional relationship between crisis and solidarity with a particular focus on the role of law therein. Empirically, it focuses on three crises with a global or at least supranational range: the

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4 Recent publications in the field include: Andrea Biondi, Eglė Dagilytė, and Esin Küçük (eds), *Solidarity in EU Law: Legal Principle in the Making* (Edward Elgar 2018); Jürgen Gerhards and others, *European Solidarity in Times of Crisis* (Routledge, 2020) Christian Lahusen, Ulrike Zschache, and Maria Kousis (eds), *Solidarity in Times of Crises: Citizen Organisations and Collective Learning in Europe* (Palgrave MacMillan 2021); Helle Krunke, Hanne Petersen, and Ian Manners (eds) *Transnational Solidarity: Concept, Challenges and Opportunities* (Cambridge University Press 2020); Katsanidou, Alexia, Ann-Kathrin Reinl, and Christina Eder. 'Together we stand? Transnational solidarity in the EU in times of crises' (2022) 23 European Union Politics 66. The interest in the relationship of solidarity and crisis also manifests itself in ongoing or recently completed research projects such as SOLID (https://solid-erc.eu), TRANSSOL (https://transsol.eu) or EUSOL (https://eusol.eui.eu/2019/05/28/solidarity-nature-value/).

5 Koos (n 1) 629.

6 Vivien A. Schmidt, *Europe's Crisis of Legitimacy: Governing by Rules and Ruling by Numbers in the Eurozone* (Oxford University Press 2020); Poul F. Kjaer and Niklas Olsen, *Critical Theories of Crisis in Europe. From Weimar to the Euro* (Rowman & Littlefield 2016).

7 Myriam Revault d'Alonnes, *La Crise sans Fin. Essai sur l'expérience moderne du Temops* (Seuil, 2012); Andrew Gamble, *Crisis Without End? The Unravelling of Western Prosperity* (Palgrave MacMillan 2014).

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European economic and financial crisis, the so-called migration crisis, and the COVID-19 crisis. Our primary observation is that, despite their different nature, we are witnessing an intensification of transnational solidarity conflicts in all three crises. Political and legal controversies revolve around the mode and the scope of solidarity relations. They refer to the conditions of solidarity, the distribution of costs and benefits and the allocation of scarce resources across and beyond the nation state, but also relate to questions of inclusion in and exclusion from solidarity. Thus, transnational solidarity conflicts also comprise processes of desolidarisation which challenge established institutional arrangements of solidarity, block their further development and adjustment to crisis-induced demands, and jeopardise the authority of conflict management enshrined in political and legal orders. The three crises analysed in this volume provide a diverse spectrum of solidarity conflicts characterised by diverging scopes, different key actors and distinct legal frameworks. However, the three crises also share critical features. Most notably, all of them are transnational by nature, ie they concern not only solidarity between states, but also across states, thereby also involving solidarity with individuals outside a given state or between the citizens of multiple states. However, they differ in terms of the concrete mode of transnationalism: The pandemic provoked conflicts about solidarity not only in the EU but also on a global scale involving issues of solidarity both between states and between states and individuals abroad. By contrast, solidarity conflicts in the financial crisis are conflicts about solidarity between and within EU Member States and between EU citizens in the context of the (often) constringent legal framework of the treaties. The migration crisis is also marked by a strong though often dysfunctional EU legal framework but it combines issues of solidarity between EU Member States with questions about solidarity between the EU and third countries and their nationals. In addition to their transnational dimension, all three crises were perceived as contagious crises in the sense that it is difficult, if not impossible, to contain their effects in one country or region. For the pandemic and the financial crisis, this is intuitively plausible, but also, in the case of migration, the fear of secondary movement within the Schengen area increased the perception of a contagious crisis. Contagiousness fuelled the perception that there was a need to react immediately to the crisis and paved the way for emergency rhetoric. Finally, all three crises were characterised by a strong external shock. Despite numerous internal problems also contributing to the concrete crisis constellation, all three crises were – to varying degrees – perceived as triggered by external and unexpected events

beyond the control of a single nation-state (the breakdown of Lehman Brothers, the war in Syria, the outbreak of COVID-19).

As an introduction, the following considerations are not meant to propose a narrow analytical framework the single contributions are bound to apply. It rather aims at a shared problem awareness that not only insists on the functional significance of a transnational understanding of solidarity but also sensitises to the problems of creating and maintaining solidaristic relationships in situations of crisis and the role of law therein. The idea is to identify through the various chapters' different modes of solidarity in crises and to understand what drives the different dynamics of these crises. This includes a strong interest in the differences and commonalities of the three crises regarding the relation between law and solidarity, the role of law in crisis and conflict management, and the impact of the crisis on the law itself. Moreover, this volume seeks to better understand what distinguishes or unites the three crises in terms of modes of solidarity and transnationalism that are under discussion and contestation. With this objective, we first approach the concepts of solidarity and transnational solidarity. In doing so, we underline, in a first step, that solidarity in general and transnational solidarity, in particular, should be conceived not only as a functional complement for the disintegrative effects of modernity, capitalism, interdependence, or globalisation but also and even primarily, as a controversial issue that is shaped and often also constrained by law (1). In the second step, we combine these considerations with a conceptual-historical approach to 'crisis' to show how our key concept of *transnational solidarity conflicts* allows us to analytically account for the crisis-induced politicisation of transnational solidarity issues (2). On this basis, we examine how the crisis-related proliferation and intensification of transnational solidarity conflicts challenge political and legal institutions (3). Finally, we derive from this a number of research interests that are pursued by the contributions to this volume (4).

2 Solidarity: Approaching an ultimately contested concept

The attempt to provide a definition of solidarity that is both comprehensive and precise is akin to "nailing a pudding to the wall".[8] The difficulty stems

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8   Gerhards and others (4) 18.

not only from the fact that the last decade has seen a variety of publications on the topic of solidarity offering different approaches and conceptions of the term. Finding a valid definition is also complicated by the fact that solidarity – like many other key concepts in Humanities and Social Sciences – is familiar in an everyday sense and thus used in a fluctuating, imprecise and often suggestive way. Furthermore, in the political sphere, solidarity appears as a deeply contested concept.[9] It is frequently addressed in competing discourses and thus constructed in a different and often antagonistic manner. To disentangle the complex notion of solidarity and understand its transnational dimension, we will first clarify that solidarity is not a given resource but is rather a social relationship created through joint action that also allows for a transnational scope (a.). On this basis we can further clarify the relationship between law and solidarity and illustrate the law's role in transnational solidarity conflicts (b.).

2.1 Solidarity as joint action and the possibility of transnational solidarity

Solidarity was a crucial concept in utopian socialism where it was conceived as a means not only for compensating for the disintegrative effects of modernity but also for the struggle for a more egalitarian, 'justly' organised society.[10] In the international labour movement, the term was meant to leave behind religious, ethnic, and national ideas of belonging and cohesion and to create a class-based conception of identity and mutual support to overcome a joint experience of poverty and exploitation.[11] During the economic boom years in Western Europe that followed World War II, the expanding welfare state compensating for the inequalities produced by

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9 We deliberately avoid the concept of „essentially contested concepts" developed by Walter Bryce Gallie since 'essentially', for Gallie, is not a mere intensifier, but alludes to an irreducible contingency, undecidability, and contestedness that is essential and specific to certain concepts – but not to others (see Walter Bryce Gallie, 'Essentially Contested Concepts' in *Philosophy and the Historical Understanding* (Chatto & Windus 1964). We reject this kind of conceptual essentialism. Instead, our formulation is meant to point to the mere fact, that solidarity has become a concept that is both central and contested in modern societies.

10 See Steinar Stjernø, *Solidarity in Europe: The History of an Idea* (Cambridge University Press 2004) 26ff.

11 Seminal for a pragmatic commitment see of course: Karl Marx and Friedrich Engels, 'Manifesto of the Communist Party', in Lewis S. Feuer (ed), *Basic Writings on Politics and Philosophy. Karl Marx and Friedrich Engels* (Doubleday and Company 1959).

capitalism and rebalancing the disintegrative effects of individual rights of liberal provenience was perceived as the institutional realisation of solidarity.[12] At the same time, the term became a fundamental value animating European integration as a political project aiming to transgress a nation-state-based design of solidarity.[13]

In all these domains, 'solidarity' functions not only as a given resource for redistributive and integrative policies within and beyond political communities but also as an *appel* to mobilize for certain positions and to reject alternative positions for lacking solidarity or for presupposing an overly narrow understanding of solidarity, and thus for being egocentric, unjust, immoral, parochial, nationalistic, or short-sighted. The picture becomes even more complicated since many academic approaches to solidarity implicitly link to this politico-normative dimension of solidarity and the appellative function it enshrines.

Broadly defined, the term 'solidarity' designates an idea of order that manifests itself in mutual obligations and aims at tackling common challenges or realizing common goods.[14] Irrespective of whether solidarity is primarily understood as a matter of joint action, a socio-moral resource, or a principle of order institutionalised in redistributive mechanisms, it is mostly framed as an "inner cement"[15] holding together a political entity by compensating for the inequalities and power asymmetries.[16] Solidarity relates to ideas of interaction, relatedness, belongingness, togetherness, sympathy, sameness, similarity, interdependence, a common idea of order, or a shared experience of vulnerability between members of a group. The varying enumeration alludes to the fact that solidarity refers to some sort of *common ground* as its condition. Since this common ground is constructed distinctively in different approaches to solidarity, the issue of claiming a

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12 For a concise overview, which also deals with the different party-political and national-specific understandings of solidarity in Western Europe, see again Stjernø (n 10) 91ff.

13 Andrea Sangiovanni, 'Solidarity in the European Union: Problems and Prospects' in Julie Dickson and Pavlos Eleftheriadis (eds) *Philosophical Foundations of European Union Law* (Oxford University Press 2012), 384ff.

14 Karel Wellens, 'Solidarity as a Constitutional Principle: Its Expanding Role and Inherent Limitations' in Ronald St. Macdonald and Douglas M. Johnston (eds), *Towards World Constitutionalism: Issues on the Legal Ordering of the World Community* (Brill 2005).

15 Kurt Bayertz, 'Four Uses of "Solidarity"', in Kurt Bayertz (ed.), *Solidarity* (Kluwer 1999) 9.

16 See Geoffrey M. Hodgson, *Liberal Solidarity* (Edward Elgar 2021).

basis or foundation of solidarity is also where the conceptual difficulty of theorising the term stems from. Furthermore, the issue of finding or constructing a common ground for solidarity directly links to the (potential) scope of solidarity since the debate over the origins of solidarity comes along with competing ideas of inclusiveness and exclusiveness of solidarity as well as divergent conceptions of conditions for solidarity.[17]

As a first step, it makes sense to approach the term etymologically. The concept originates from the Roman Law of obligations. The *obligatio in solidum* designated a legal principle according to which each individual member of a group was liable for common debts.[18] In the aftermath of the French Revolution, the term began to supersede the concept of fraternity and featured prominently alongside freedom and equality as the two central concepts of the revolutionary imaginary. In the same development, the once concrete and precise legal term experienced a generalisation and became a core concept in discourses on politics and society.[19] The term, meant to compensate for the erosion of the traditional bonds related to the society of estates, took centre stage in the early classics of sociology. Framed as an indispensable prerequisite for restoring, continuing, and improving a societal order, in Auguste Comte's and Emile Durkheim's classic sociologies, solidarity appears as a *bottom-up* phenomenon, ie the result of shared norms and values between different parts of a society.[20]

Unlike in classical sociology – and very much in contrast to freedom and equality as the animating ideas of the emerging liberal democratic order – solidarity remained a peripherical concept in politico-theoretical and legal thought for a long time.[21] In these primarily *top-down* oriented disciplines, the relative peripherality of the term can be attributed to the idea of imposing positive obligations to commit an individual for a particular group is difficult to integrate into mainstream liberal political and legal philosophies. Dominated by the paradigm of warding off illegitimate encroachments on individual freedoms and the grounding of universalisable norms, it seemed difficult to attribute a collectively binding character to solidaristic institutions based on particular characteristics or mere polit-

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17 See Stjernø (n 10) 85.
18 See Bayertz (n 15) 3.
19 Stjernø (n 10) 26ff.
20 ibid 30ff.
21 Bayertz (n 15) 4.

ical will.[22] From radical libertarian and liberal-conservative perspectives, solidarity is at odds with liberal culture and the core idea of individuality, insofar as any politicisation aiming at top-down obligations to act in solidarity beyond allegedly natural micro-communities seems to undermine the universal principles of individual freedom, personal responsibility, and the right to property.[23]

However, in recent years, the "freedom-solidarity issue"[24] has received new attention in political and legal philosophy. Against the backdrop of the global rise of solipsistic individualism disdainful of solidarity and right-wing nativism reserving solidarity for an ethnically defined in-group, authors like Richard Rorty, Craig Calhoun, or Fred Dallmayr have felt the need to bridge the gap between social obligations and individual freedom. New origins for solidarity include a "radically plural" notion of the public sphere, in which people realize that they are "bound to one another by promises that are explicit or implicit in their lives together",[25] an "ability to see more and more traditional differences (of tribe, religion, race, customs, and the like) as unimportant when compared to pain and humiliation",[26] and "a bond of mutual ethical responsibility" that is inextricably linked to our existence as "human-being[s] in the world".[27] In his attempt to develop a conception of solidarity that is adequate for understanding and supporting international integration processes, Andrea Sangiovanni has underlined, in a similar vein, that solidarity should not be grounded in "identity or fellow feeling", but in the recognition and endorsement of "reciprocity" and "joint action".[28] In a similar way, Juri Viehoff and Kalypso Nicolaïdis stress that solidarity creates a social bond that allows one to overcome a purely self-interested rationale without presupposing a consensually integrated community in which anyone would identify with the in-

22 ibid 4ff.

23 For such a radical politicisation of liberal pradigms of order see Nicholas Capaldi, 'Whats's Wrong with Solidarity?', in Kurt Bayertz (ed.), *Solidarity* (Kluwer 1999).

24 Fred Dallmayr, *Freedom and Solidarity: Toward New Beginnings* (University Press of Kentucky 2016) 190.

25 Craig Calhoun, 'Imagining Solidarity: Cosmopolitanism, Constitutional Patriotism, and the Public Sphere' 14 (2002) 14 Public Culture 147, 159.

26 Richard Rorty, *Contingency, Irony, and Solidarity* (Cambridge University Press 1989), 192.

27 Dallmayr (n 24) 195.

28 Andrea Sangiovanni, 'Solidarity as Joint Action' (2015) 32 Journal of Applied Philosophy 340.

terests of another.[29] Beyond important differences, these approaches share the idea of renewing the common ground on which solidaristic obligations could be built. They aim to transgress traditional ideas of belonging and to catch up with economic, financial, and political transnationalisation processes and their repercussion on social justice issues.

This paradigm of transgression is inherent in solidarity on which the concept of transnational solidarity, as elaborated by Carol Gould in particular, is based.[30] Gould points out that, in contrast to traditional conceptions of solidarity, the notion of transnational solidarity is not reduced to "members of a given community" (whether it is a parochial community, a class, or a nation state) but meant to denote "overlapping networks of relations of individuals or groups and distant others (again, individuals or groups), in which the former aim to support the latter through actions to eliminate repression or reduce suffering".[31] Hence, transnational solidarity does not refer to the challenge of creating and sustaining solidarity within pluralistic polities but to a cross-border endeavour that conflicts with other understandings of solidarity.

At a theoretically more fundamental level, the phenomena of transnational solidarity demonstrate that solidarity is not a superficial expression of an unavailable basis of togetherness or sameness rooted in class-, race-, religion-, ethnicity- or nationality-based identities. The issue of transnational solidarity rather brings to the forefront that solidarity, in general, relates to and depends on a common will to create and maintain bonds of mutuality which react to growing interdependences and mutual vulnerabilities.[32] This means, that solidarity should not be framed as a matter of a pre-discursive essence grounding a common identity, but as a matter of social practices that construct, perpetuate, and defend – or challenge and reduce more or less solidaristic identities.

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29 Juri Viehoff and Kalypso Nicolaïdis, 'Social Justice in the European Union: The Puzzles of Solidarity, Rationality, and Choice', in Dimitry Kochenov, Gráinne de Búrca, and Andrew Williams (eds) *Europe's Justice Deficit?* (Hart Publishing 2015) 284.

30 Carol C. Gould, 'Solidarity between the National and the Transnational: What Do We Owe to "Outsiders"?' in Helle Krunke, Hanne Petersen, and Ian Manners (ed), *Transnational Solidarity: Concept, Challenges, and Opportunities* (Cambridge University Press 2020).

31 ibid 23.

32 See Sangiovanni (n 28).

2.2 The complex relationship between law and solidarity

This perspective on solidarity allows us to see that besides religion, economics, and politics, law is an important practice in which social relations in general and solidaristic relations, in particular, are negotiated. To begin with, the law often expresses (more or less) solidaristic attitudes. In a sense, economic and social rights or rights of refugees can be understood as crystallized solidarity on domestic, supranational[33] or international levels. Likewise, solidarity is today juridified in many legal orders. Art. 2 TEU, Art. 78 III and Art. 80 TFEU are paradigmatic for juridification through which solidarity becomes a legal concept that can be invoked in legal discourses, including court proceedings. However, when engaging with the law, we are not only dealing with a mere representation of social relations in the formal language of law. The law rather also plays a constitutive role for solidarity: on the one hand, law produces structures and institutions that pose obstacles to solidarity between certain groups or beyond borders. Law, for example, shapes the institutional role and the frequent claim for a strong protection of property rights, which is often invoked as an obstacle to solidarity and redistribution in public and legal discourse.[34] Law sometimes also explicitly prohibits solidaristic burden sharing as with the no-bailout clause in Art. 125 TFEU. On the other hand, law creates bonds, institutions and legal tools needed to operationalise solidarity be it in the form of sharing of resources or responsibility. Moreover, by referring to legal norms, solidaristic relations can be constructed, expanded, and defended – or contested and limited. In this respect, legal procedures, rules, and reasonings contribute to the further development of solidaristic relationships. This last aspect reminds us that law can also become the common cause for acting in solidarity with one another and supporting each other. It is in this vein that we may understand the relationship between law and solidarity in political and legal struggles for the realization of human rights or a projected constitutional goal. The relationship between law and solidarity is, thus, a complex one. This illustrates that not only are conflicts over solidarity fought out through the law, its case-by-case application and interpretation, but the law itself can become the point of reference and inspiration for solidaristic action.

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33 See the Chapter on Solidarity in the EU Charter of Fundamental Rights.
34 Katharina Pistor, *The Code of Capital. How the Law Creates Wealth and Inequality* (Princeton University Press 2019).

An illustrative case in point for how the law both shapes (the possibility) of solidaristic action and is itself shaped through conflicts about solidarity is the tense relationship between the no-bailout-clause in Article 125 TFEU and the different rescue mechanisms designed to support and adjust the budget of the economically weaker euro area Member States during the height of the financial crisis in the early 2010s. Whereas Article 125 TFEU was meant to limit or even cut off the further development of solidarity within the European Monetary Union, against the backdrop of the eurozone crisis, the eurozone Member States found a way to stabilise the common currency project by a specific form of transnational solidarity. The crucial idea of conditional financial support can be interpreted as a fundamental transformation of European solidarity. It linked financial support and default guarantees to the restriction of the Member States' budgetary and fiscal sovereignty.[35] At the same time, this mode of conditional support led to a fundamental shift of power in favour of supranational institutions and at the expense of national legislatives, especially in the economically weaker Member States.[36] Meant to stabilise the common monetary project and to compensate for the mutual interdependence of the eurozone Member States, the European Financial Stabilisation Mechanism (EFMS), the European Financial Stabilisation Facility (EFSF) and the European Stability Mechanism (ESM) instituted a form of solidarity that put emphasis on rule compliance and strict reciprocity.[37] These refinements of transnational solidarity in the eurozone were not easy to reconcile with the no-bailout-clause and required quite an interpretative stretch. Moreover, the institutional shifts involved with the crisis measures together with the increasing distributional effects of measures by technocratic institutions such as the European Central Bank (ECB) raised doubts regarding both the principle of separation of powers and the democratic accountability and responsivity of distributive decisions in the eurozone. The institutions addressed to solve these politically and constitutionally sensitive issues, as the European Court of Justice or the constitutional courts of the Member

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35 See Farahat (n 36) 45ff.

36 Damian Chalmers, 'Crisis Reconfiguration in the European Constitutional State', in Damian Chalmers, Markus Jachtenfuchs, and Christian Joerges (eds), *The End of the Eurocrat's Dream: Adjusting to European Diversity* (Cambridge University Press 2016); Federico Fabbrini, *Economic Governance in Europe: Comparative Paradoxes and Constitutional Challenges* (Oxford University Press 2016).

37 See Sabine Frerichs, 'Unravelling the European Community of Debt', (2016) 22 European Law Journal 720.

States, contributed in a predominantly implicit but momentous way to the further (legal) shaping of transnational solidarity in the eurozone.[38] From this perspective, it becomes clear that they participated, whether intentionally or unintentionally, in concretising and defining the contested concept of solidarity and subsequently became the object of contestation themselves.

More recently, the handling of the economic consequences of the COVID 19-pandemic evoked new transnational solidarity conflicts in the EU. The Member States finally agreed upon a large programme entitled "Next Generation EU" (NGEU), the aim of which is "to promote the Union's economic, social and territorial cohesion"[39] to ensure long-term economic and social resilience in the view of potential future pandemics and other major crises. Most notably, NGEU also seeks to make the Union fit for green transition and digital transformation and to enhance crisis preparedness more generally. Thus, it pursues the achievement of common goods of the Union. The core of NGEU are loans and non-repayable sub-sidies to be disbursed through a newly established Recovery and Resilience Facility (RRF) to allow the Member States to fulfil the respective goals. The financial support is linked to a sort of "soft" conditionality mechanism, that is, the Member States are supposed to develop recovery and resilience plans together with the Commission and will receive the financial support only after the Council has endorsed the respective plans. The EU will generate the necessary resources for RRF through borrowing from the financial markets. In practice, this means that the EU will incur a massive debt of over 700 billion euros. As the Member States have not increased their budgetary contributions accordingly, it is still an open question how the EU will generate the necessary resources to repay this debt in the future, even if the political institutions expressed their will to equip the Union with more own resources (e.g., through new taxes on EU level). Therefore, one may also question how far NGEU, in the end, will actually enable solidarity in the sense of sharing of resources.[40] The conflicts surrounding NGEU are paradigmatic transnational solidarity conflicts. At their core, they revolve around the question of how the costs of realising the common good of resilience in the light of durable crises and societal transformations (climate

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38 See for example: Farahat (n 36) 104ff and 181ff; Michelle Everson, 'An Exercise in Legal Honesty. Rewriting the Court of Justice and the Bundesverfassungsgericht' (2015) 21 European Law Journal 474.

39 NGEU Art. 4 (1).

40 On this see the contributions of Hilpold and Menéndez in this volume.

change, digital transformation, age of pandemics, etc.) are to be shouldered and distributed in the Union. The solution that has been found is remarkable as it envisages for the first time that these costs are to be shouldered by all Member States and EU citizens together. It thereby significantly reshapes transnational solidarity in the EU. At the same time, on the legal-technical side, NGEU again raised several constitutional doubts. It increased the risk of using exceptional competencies (Art. 122 TFEU) permanently. It challenged established interpretations of constitutional budgetary rules of the Union, namely the principles of budgetary unity and budgetary balance. Finally, NGEU also bears democratic shortcomings in that it effectively reduced the say of the European Parliament on budgetary issues. In this sense, NGEU also epitomises the challenge of how to allow for constitutional adaptation through interpretation in the light of rigid amendment rules and complex crises.

Transnational solidarity conflicts, however, do not only involve direct financial and budgetary relevance issues. Rather, they also involve how we distribute responsibility for others, ie non-EU-citizens, in the Union. The EU refugee protection crisis illustrates this dimension of solidarity neatly. Member States disagree both on whether and how far the EU should show solidarity to those seeking international protection at its borders, but also on how to distribute the responsibility for the protection of those already inside the Union.[41] Conflicts arise both as to the scope of solidarity and also as to the mode of solidarity. The latter involves questions such as: What would be fair criteria for distribution? What role do the needs and preferences of those seeking protection play in this regard? What does solidarity imply, ie only financial support of other Member States or also admission of refugees and asylum seekers? The asymmetries and dysfunctions of the Dublin system, as well as the continuing number of drowning migrants on the EU's external borders, demonstrate that migration is an issue where solidarity mechanisms are particularly hard to negotiate.[42]

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41 See the underlying conflicts in CJEU, C-646/16, Jafari, ECLI:EU:C:2017:58 and C-490/16, A.S., ECLI:EU:C:2017:585; CJEU, C-643/15 and C-647/15, Slovak Republic and Hungary against Council, ECLI:EU:C:2017:631; CJEU, C-715/17, 718/17 and 719/17, European Commission against Poland, Hungary and Czech Republic, ECLI:EU:C:2020:257.

42 On the difficulties of the latest reform proposal (Proposal for a Regulation of the European Parliament and the Council on Asylum and Migration Management, COM (2020) 610 final): Francesco Maiani, A „Fresh Start" or One More Clunker? Dublin and Solidarity in the New Pact (EU Migration Law Blog, 10 Octo-

Moreover, solidaristic solutions in EU migration governance are often emergency-driven rather than addressing structural imbalances.[43] In this respect, they resemble solidaristic solutions in other fields, although NGEU might in the long run prove to provide an entry into more structural and long-term mechanisms of solidarity.[44] Although the principle of solidarity features prominently in EU migration law (Art. 80 TFEU)[45] as well as in the EU's constitutional core (Art. 2 TEU), the Court of Justice has so far missed the many opportunities to further concretise the constitutional standard that may be derived from these provisions.[46] At the same time, the surrounding political discourse illustrates how especially right-wing populist political actors seek to harness the momentum of crisis in order to push for more parochial and nationalistic scopes and modes of solidarity, thus defying the transnational ambition of solidarity enshrined in international refugee law and also reflected in the Treaties (Art. 78 (1) and 80 TFEU, Art. 2 TEU).

3 Crisis and the intensification of transnational solidarity conflicts

Similar to solidarity, crisis is an eminently political term. To substantiate this assertion, one may refer to the conceptual-history approach proposed

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ber 2020, <https://eumigrationlawblog.eu/a-fresh-start-or-one-more-clunker-dublin-and-solidarity-in-the-new-pact/> accessed 6 January 2023.

43 Lilian E. Tsourdi, 'Solidarity at Work? The Prevalence of Emergency-Driven Solidarity in the Administrative Governance of the Common European Asylum System' (2017) 24 Maastricht Journal of European and Comparative Law, 667, 673.

44 See Peter Hilpold's and Hans Jürgen Bieling's contributions in this volume.

45 On the impact of this provision see Jürgen Bast, 'Solidarität im Europäischen Asyl- und Einwanderungsrecht' in Michèle Knodt and Anne Tews (eds) *Solidarität in Der EU* (Nomos 2014).

46 For a critique see Esin Küçük, 'The Principle of Solidarity and Fairness in Sharing Responsibility: More than Window Dressing?' (2016) 22 European Law Journal, 448, 454f; Violeta Moreno-Lax, 'Solidarity's Reach: Meaning, Dimensions and Implications for EU (External) Asylum Policy' (2017) 24 Maastricht Journal of European and Comparative Law 740, 751ff. In the opinions of the Advocate Generals, the notion of solidarity has, however, been more prominently developed: AG Sharpston, Opinion of 6 July 2017, C-646/16 and 490/16, Jafari and A.S., ECLI:EU:C:2017:443, No. 158; AG Bot, C-643/15 and C-647/15, Slovak Republic and Hungary against Council, ECLI:EU:C:2017:618, No. 17; AG Sharpston, C-715/17, 718/17 and 719/17, European Commission against Poland, Hungary and Czech Republic, ECLI:EU:C:2019:917, No. 246–255.

by Reinhart Koselleck.[47] Etymologically, the term 'crisis' originates from medical discourse. In ancient Greece, it referred to the point at which the fate of a sick person turns either for the better or for the worse. It was not until the 18th century that the term, by "metaphorical extension", transgressed to the "socio-political sphere" to become a basic historical concept (*geschichtlicher Grundbegriff*).[48] Continuing the etymological meaning it had on the medical field, it came to denote a situation of social upheaval that meant a shock for public order. The semantic web surrounding the concept associates 'crisis' with urgency, exceptionality, bifurcation, alternativity, dissociation, dispute, but above all with the notion of decision. As Koselleck points out, 'crisis' is a "concept of progression that [...] leads towards a decision"; it refers to a "period of time when the decision is due but not yet made".[49]

However, the essential point about Koselleck's conceptual history perspective is that it puts us on a constructivist track. 'Crisis' is portrayed as an overdetermined socio-political concept allowing to condense diverse experiences, bundle disparate phenomena, and trigger opposed expectations.[50] Beyond the idea that a fundamental decision is needed, the definition of the meaning of the crisis situation and the concrete decision it needs to overcome this situation is subject to political struggles for interpretation. To put it differently: The politicisation processes coming along with crises are not a mere expression of given interests in crisis-induced conflicts over (solidaristic) redistribution; crises rather entail an interpretative struggle of crisis narratives and discourses that are striving to master the uncertainty related to the critical situation in order to legitimise the decisions made or to frame the future choices of feasible and suitable strategies.[51]

Even if the concept of crisis cannot be reduced to an ensemble of certain conditions or challenges but should be conceived as a discursively

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47 Reinhart Koselleck, 'Krise' in Otto Brunner, Werner Conze, and Reinhart Koselleck (eds), *Geschichtliche Grundbegriffe. Historisches Lexikon zur politisch-sozialen Sprache in Deutschland. Band 3 H – Me*; for a thorough introduction, see Melvin Richter and Michaela W. Richter, 'Introduction: Translation of Reinhart Koselleck's "Krise" in Geschichtliche Grundbegriffe' (2006) 67 Journal of the History of Ideas 343.

48 Koselleck (n 49) 619.

49 ibid.

50 For a similar „pragmatist perspective", see Brian Milstein, 'Thinking Politically about Crisis: A Pragmatist Perspective' (2015) 14 European Journal of Political Theory 141.

51 Colin Hay, 'Narrating the Crisis: The Discursive Construction of the "Winter of Discontent"' (1996) 30 Sociology 253.

constructed phenomenon, what remains is the difference between expected 'normalcy' and 'normativity'[52] and the necessity of urgent, fundamental decisions as the defining logics of crisis. These features make them privileged occasions for exceptionalist and securitising strategies of Neo-Schmittian emergency politics.[53] Based on the conviction that the established procedures of normal law cannot cope with any critical situation, Carl Schmitt required a quasi-theological moment in which an emergent authority *sovereignly* creates new law to restore a vanishing order.[54] However, in a constructivist reading, as recently offered by Christian Kreuder-Sonnen or Jonathan White, Schmitt's objectivist conception of a critical situation, in which applicable law is overridden by the decision of a sovereign authority, is reinterpreted as a contingent result of a "rhetorical power game"[55] in which competing political projects try to win support for their crisis-narratives and build confidence in their countermeasures.[56] This critical perspective highlights the fact that exceptionalism is not a matter of an objective reality but a contingent construction offering a contestable interpretation of reality. It reminds us that crises are not automatically prone to executive-driven emergency logic.

For analytical as well as normative reasons, it is helpful to step back and return to the concept of crisis and its impact on identities and solidarities enshrined therein. First and foremost, a crisis is a point of intersection.[57] In critical moments, mutual trust, predictability, and certainties dwindle; institutionally consolidated tensions break up; the legitimacy of decision-making becomes precarious; dominant self-descriptions of political communities become dislocated; and the belief in a powerful public order is shaken. Under such circumstances, path dependencies and structural conditional factors of social action recede, and the concealed contingency

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52 See Milstein (n 52) 150.
53 Jonathan White, *Politics of Last Resort: Governing by Emergency in the European Union* (Oxford University Press 2019); Christian Kreuder-Sonnen, *Emergency Powers of International Organizations: Between Normalization and Containment* (Oxford University Press, 2019).
54 Carl Schmitt, *Political Theology. Four Chapters on the Concept of Sovereignty* (Chicago University Press 2005).
55 Kreuder-Sonnen (n 55) 56.
56 White (n 55) 88.
57 With a focus on the political consequences of financial crises, see Francisco Panizza, 'Introduction: Crisis as Moments of Truth' in Francisco Panizza und George Philip (eds), *Moments of Truth: The Politics of Financial Crises in Comparative Perspective* (Routledge 2014).

of social and political orders becomes visible.[58] In these phases, windows of opportunity open for political actors to condense manifold discontinuity experiences, to programmatically articulate disparate deprivation experiences and to organise majorities for veritable policy changes in order to overcome the (postulated) imbalances which led to the crisis situation. Thus, crises build an ideal breeding ground for populist politics.[59] Unlike single-issue movements or the traditional, thick-centred ideologies, these projects cultivate an unease that is relatively indeterminate in terms of content but radically challenges epistemic authorities and is thus frequently framed as a reaction to overly expertise-based, "post-democratic" reconfigurations of decision-making.[60]

However, similar to exceptionalism and emergency politics, the upsurge of populism points to a general thrust of crisis developments: It exemplifies that crises and crises' discourses induce politicisation processes, which express the need to reconfigure (transnational) solidarities in order to overcome the crisis and build a new crisis-proof order based on more appropriate and sustainable solidarity mechanisms. From this perspective, the multifaceted, and often overlapping cleavage lines between communitarians and cosmopolitans, supporters of populism and advocates of meritocracy, Global North and Global South, between Member States of a federation, but also between different social groups within these federations, that emerged and intensified against the backdrop of a series of crises since 2008, ultimately refer to the contingent construction of solidaristic relationships. We therefore propose to conceive these conflictual constellations as *transnational solidarity conflicts*.[61] Politically, transnational solidarity conflicts mainly manifest themselves in competing designs of the *scope* and the *mode* of solidarity, with *scope* referring to questions of membership and *mode* referring to the kind of reciprocity on which solidarity is based.[62]

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58 See Giovanni Capoccia und Daniel R. Kelemen, 'The Study of Critical Junctures: Theory, Narrative, and Counterfactuals in Historical Institutionalism' (2007) 59 World Politics 341, 343.

59 For the complex relationship of crisis and populism through a constructivist lens see Benjamin Moffitt, 'How to Perform Crisis: A Model for Understanding the Key Role of Crisis in Contemporary Populism' (2015) 50 Government and Opposition 189.

60 See Jacques Rancière, *Disagreement* (University of Minnesota Press 1998), 95-121; Colin Crouch, *Post-Democracy* (John Wiley & Sons 2004).

61 See also Anuscheh Farahat (n 36) 45ff.

62 With regard to the struggle over the adequate management of the eurozone crisis, Sabine Frerichs aptly differentiate between two modes of reciprocity: Whereas liberal-conservative actors and the euro Member States of the European North insisted

In turn, the different forms that these dimensions can take in solidaristic regimes illustrate that the conditions of solidarity may be shaped in different ways. Once more, these conflicts over the conditions of solidarity refer to the common ground issue, ie they are struggles over constructing foundations, origins, or motivations of solidarity adequate to overcome the crisis at stake. In the context of crisis, it becomes clear that transnational solidarity conflicts cannot be reduced to conflicts over redistribution that are based on purely material interests. Rather, they entail interpretative struggles over the definition of the crisis, adequate coping strategies, and their relation to other basic principles of order, such as democracy, equality, proportionality, or price stability.

This conflict-centred perspective highlights the contested nature of solidarity and allows us to connect the conceptual considerations to the research on political and legal institutions. It enables us to analyse the concepts of (transnational) solidarity that political and legal institutions perpetuate when they decide over crisis-induced conflicts and how these concepts and their argumentative foundations spill back on the interpretative power and the legitimacy these institutions try to build, maintain, and extend. Moreover, a conflict-centred perspective also allows us to identify strategies and ways in which different actors use the law in order to challenge dominant understandings of solidarity and distribution that are deeply entrenched in institutional thinking and political as well as legal structures. It opens the view to analyse such practices of contestation and to understand how they, in turn, impact legal and political structures, whether they push for adaptation and change or more inertia and resistance. In this context, it is also important to stress that not only the potentially disruptive dynamic of crises may produce societal costs. Rather, containing a crisis may also be costly and may often reinforce the unequal distribution of power and resources. A case in point is the financial crisis in the eurozone where the containment of the crisis brought about a new form of conditioned solidarity that reinforced existing power asymmetries between the European

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on "rule compliance" as the necessary conditionality of solidarity; socialist parties and the most crisis-hit Euro countries in the European South pleaded for "burden sharing" based on membership as the manifestation of a crisis-proof solidaristic order (see Frerichs (n 39) 740.

North and South.[63] Given the imbalances in negotiation power, such a conditioned form of solidarity may even be labelled as anti-egalitarian.[64]

3 Crises and transnational solidarity conflicts as challenges for institutional conflict resolution

As we have pointed out, the concept of crisis always refers to an experienced or expected normality. Situations that exceed 'normal' problem situations and overwhelm established problem-solving mechanisms are observed as being crisis-like. Accordingly, social systems communicate 'crises' when their regular mechanism to continuously conceal the basic functions of *adaptation*, *goal attainment*, *integration,* and *latent pattern maintenance* reach their limits.[65] The concept of crisis appears when "the structure of a social system allows fewer possibilities for solving problems than would have to be used to maintain the system".[66] The crisis-related simultaneity of urgency, uncertainty, and politicisation creates a constellation in which the procurement of legitimacy is not keeping pace with the need for legitimacy. This discrepancy can be dangerous for individual political actors, specific institutions, but also entire political orders. In the latter case, we are witnessing a "crisis of public power", in which the "the existing normative grid of society" sedimented in a legally constituted framework of order and authority is fundamentally challenged by different crisis narratives and their conceptions of solidarity.[67]

The general disintegrative logic of crises stems from the fact that crisis contexts make it more difficult for decision-makers to find acceptance for their decision, regardless of the concrete content of the decisions made, since any decision (including the decision to leave everything as it is, or to postpone the decision with regard to the crisis-related uncertainty of their outcomes) will frustrate significant parts of the population affected by the decision. This is how an originally economic or pandemic challenge creates a negative momentum, in which the institutions in charge of deciding

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63 On this see Baraggia, in this volume.
64 Menéndez, in this volume.
65 See Talcott Parsons, *The Social System* (Routledge & Keagan Paul 1967).
66 Jürgen Habermas, *Legitimationsprobleme im Spätkapitalismus* (Suhrkamp 1973) 11.
67 See Poul F. Kjaer and Niklas Olsen, 'Introduction: European Crisis of Public Power from Weimar until Today' in Poul F. Kjaer and Niklas Olsen (eds) *Critical Theories of Crisis in Europe. From Weimar to the Euro*, Rowman & Littlefield 2016).

critical issues run the risk of losing the support and the legitimacy needed to effectively cope with the crisis and to shape acceptable and sustainable solidarity relations.[68]

Against this background, it becomes clear why crises are test cases for the "interpretive power"[69] (*Deutungsmacht*) of the institutions addressed to solve crisis-induced solidarity conflicts. With regard to these constellations, parliaments, governments, and courts find themselves in dilemmatic decision-making situations. From a normative perspective oriented towards a "resilient constitutionalism"[70], they have to balance between maintaining the functional and normative integrity of public order and adjusting to a crisis-driven dynamic which is accompanied by 'urgencies' and 'necessities' but also by new conflict lines and new functional needs for (transnational) solidarity. How should they adapt to powerful crisis demands to sustain the normativity of public order in the medium term? When does the *adaptation* to crisis-driven transformations in extra-systemic environments turn into *submission* to partial interests? In which respect should an institution show *stamina*? And when does an overly rigid form of *stamina* lead to a *breakdown* of the entire public order?[71] To make matters worse, in a crisis context, it is unlikely that the addressees of these decisions will agree on the boundaries between an appropriate, crisis-sensitive *adaptation* and an unacceptable *subordination* of principles of order.[72]

However, crises not only go along with the risk of undermining public institutions, but also provide opportunities for (re-)building a public order and for (re-)gaining interpretative power. It may sound paradoxical, but to ward off the populist, radically oppositional and the exceptionalist, exec-

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68 ibid esp. xii.
69 For the foundation of the term see Hans Vorländer, 'Deutungsmacht – Die Macht der Verfassungsgerichtsbarkeit' in Hans Vorländer (ed.), *Die Deutungsmacht der Verfassungsgerichtsbarkeit* (VS Verlag, 2006); André Brodocz, *Die Macht der Judikative* (VS Verlag 2009).
70 Xenophon Contiades and Alkmene Fotiadou, 'On Resilience of Constitutions. What Makes Constitutions Resistant to External Shocks?' (2017) 9 ICL Journal 3.
71 The italicised terms stem from the ideal-typical differentiation of four crisis reactions on the part of constitutional bodies proposed by Xenophon Contiades and Alkemene Fotiadou (see Xenophon Contiades and Alkmene Fotiadou, 'How Constitutions Reacted to the Financial Crisis' in Xenophon Contiades (ed), *Constitutions in the Global Financial Crisis. A Comparative Analysis* (Ashgate 2013).
72 The same applies to the boundary between subordination and breakdown. What some observe as a regrettable but merely temporary subordination, others already identify as a breakdown of constitutional normativity.

utive-dominated momentum of a crisis the institutions carrying a public order have to find ways to 'routinise' and 'normalise' crisis developments.[73] One way of doing so and accounting for the recurrence and the recidivism of crises, is to find ways to legally contain the emergency situation through the integration of emergency rules in constitutions.[74] Despite the fact that these are promising coping strategies to insist on the difference between crisis and the Neo-Schmittian idea of an unbound state of exception, the disintegrative momentum of solidarity conflicts, that comes along with fundamental crises, cannot be fully tamed by any institutional design, no matter how sophisticated it may be, but remains dependant on political and legal practices. Another practice builds on acknowledging the permanent need for interpretative adaptation of constitutions in times of rapid social, economic and ecologic transformation and in the light of high procedural hurdles for formal constitutional amendments. The requirement of continuous adaptation persists even when crisis rhetoric is not salient, but challenging circumstances remain. This highlights the need to identify methodologically sound justification and limitation of constitutional adaptation to ensure acceptance and to delineate interpretative adaptation from arbitrariness. At the end of the day, it is the agents within constitutional and political institutions that have to find a balance between crises imperatives and established normative principles of public order and to reconcile the *responsibility* towards crisis-needs, the *responsiveness* towards the expectations and demands of the people and the respect for the normativity of constitutional limits.[75]

When the handling of a crisis affects structural principles of public order, it is the constitutional jurisdiction that has a special role to play. Given that many crisis constellations are characterised by the executive-centricity of political decision-making structures and the relative weakening of the

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73 Séville A. 'Why Emergency? Reflections on the Practice and Rhetoric of Exceptionalism' in M Heupel and others, 'Emergency Politics After Globalization' (2021) 23 International Studies Review 1963, 1966.

74 See Anna-Bettina Kaiser, *Ausnahmeverfassungsrecht* (Mohr Siebeck, 2020); John Ferejohn and Paquale Pasquino, 'The Law of Exception: A Typology of Emergency Powers' (2004) 2 International Journal of Constitutional Law 210.John Ferejohn and Paquale Pasquino, 'The Law of Exception: A Typology of Emergency Powers' (2004) 2 International Journal of Constitutional Law 210.

75 For the conceptual pair of *responsibility* and *responsiveness* and the increasing tension between the two see Peter Mair, 'Representative versus Responsible Government' (2009) MPIfG Working Paper 09/8 <https://www.econstor.eu/bitstream/10419/41673/1/615284884.pdf> accessed 15 January 2023.

legislative branch,[76] it does not make sense, to hold on to the idea that
the conflict between majority-based legislation and counter-majoritarian
constitutional review was the primary issue of constitutional democracy
and to be overly rigid with regard to an allegedly 'activist' and tenden-
tially anti-democratic constitutional court.[77] Instead, a normative model
of constitutional review accounting for crisis-induced power imbalances
and allowing to address transnational solidarity conflicts should aim at
opening up interpretations by challenging structural power positions.[78] A
notable example of this contestatory role of constitutional courts in times of
crisis is the austerity jurisprudence of the Portuguese Constitutional Court.
Although the court was vehemently criticised after it's austerity-critical
rulings for privileging public employees at the expense of private-sector
employees, for restricting the legislature's room for manoeuvre in an overly
activist manner, and for putting the country's future viability at risk, it
emerged strengthened from the confrontation with the executive and the
legislature.[79] In its jurisprudence, the court has succeeded in a difficult bal-
ancing act. In the first phase, it highlighted the extraordinary circumstances
of the crisis to which the budgetary legislation under review responded.
The court shielded the crisis-induced adjustment pressures from constitu-
tional imperatives. In a second phase, it insisted on the transient nature
of the crisis and defended the normativity of the welfare state-oriented
constitution.[80] By doing so, it has made marginalised positions visible;
it has recalled the (frustrated) promises of the constitution; and it has
brought alternative interpretations of the crisis and the constitution into
play. It is in this sense that constitutional jurisdiction can be portrayed not
only as a liberal but also a genuinely democratic institution, allowing for

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76 See Chalmers (n 38); Agustín J. Menéndez, 'The Crisis of Law and the European
Crises: From the Social and Democratic Rechtsstaat to the Consolidating State of
(Pseudo-)Technocratic Governance' (2017) 44 Journal of Law and Society 56.

77 Claire Kilpatrick, 'Constitutions, Social Rights and Sovereign Debt States in Europe:
A Challenging New Area of Constitutional Inquiry' in Thomas Beukers, Bruno
de Witte, and Claire Kilpatrick (eds), *Constitutional Change through Euro-Crisis
Law* (Cambridge University Press 2017) esp. 305ff; Kári Hólmar Ragnarsson, 'The
Counter-Majoritarian Difficulty in a Neoliberal World: Socio-Economic Rights and
Deference in Post-2008 Austerity Cases' (2019) 8 Global Constitutionalism, 605.

78 See Farahat (n 36) 68.

79 See Teresa Violante, 'The Portuguese Constitutional Court and Its Austerity Case
Law', in António Costa Pinto and Conceição Pequito (eds)*, Political Institutions and
Democracy in Portugal* (Palgrave MacMillan, 2019).

80 See Farahat (n 36) 257ff.

a pluralisation of competing representations of the public will without presupposing a rational consensus over constitutional interpretations.[81] Such constitutionalism is not limited to the protection of procedural issues and negative liberties but also allows to engage with the issue of positive mutual obligations inherent in solidaristic relations and to play an integrative role in crisis contexts.

4 Research questions, research interests and overall objectives

In light of these theoretical considerations, the contributions in this volume deal with the relationship between crisis and transnational solidarity conflicts and their impact on the institutions deciding on crisis-induced solidarity issues. After engaging conceptually with the notion of solidarity, authors from different disciplines investigate the relationship between crisis and solidarity and their interplay in different in different crisis constellations we witnessed over the last two decades. The following sets of research questions guide their investigations.

First, the contributions address the relationship between crisis and solidarity. How is transnational solidarity reconfigured in times of crisis? Does this reconfiguration change from one crisis to another, and if so, why? Which alternative configurations were dismissed? Which role does the law play in the context of these different forms of solidarity? The descriptive findings that address these research questions lead to normative issues. How could a more adequate reconfiguration of transnational solidarity look like with regard to crisis in general or a specific crisis in particular?

A second set of questions refers to the institutional context and the crisis at stake. How did the institution(s) under study react to crisis demands of necessity and urgency? How did they try to reconcile crisis needs and normative premises of public order? Did they counter an exceptionalist appropriation of the crisis, and if so, how? How did they cope with the crisis-related uncertainties regarding the outcome of the decision? How did they deal with the seeming permanence of crises, ie the recurring outbreak of acute crisis situations relating to a long-term structural crisis? Were the institutions politicised as a result of crisis-induced polarisation processes? How did such politicisation affect the interpretative power of the institution(s)?

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81 Pierre Rosanvallon, *Democratic Legitimacy: Impartiality – Reflexivity – Proximity* (Princeton University Press 2011) 243.

Third, the investigations deal with the interplay between the institutional context, the role of law, and transnational solidarity. An important question refers to the extent to which the institution(s) under study did account for the transnational dimension of the underlying solidarity conflict. How did they relate transnational solidarity issues to other normative and, in particular, legal principles? Which understanding of (transnational) solidarity implicitly informs these articulations and the underlying law? How do legal institutions position themselves with regard to the conflicts between traditional, nation-state-based conceptions of solidarity and transnational solidarity?

A fourth set of research questions focuses on the relationship between law and crisis. How has the law, in particular, constitutional law (national and European) and human rights, been used to react to the various crises? What strategies can be observed to allow for adaptions, ie formal change of rules, defiance or exceptionalism, interpretative adaptation of rules and principles? What specific role was attributed to norms at the constitutional level (national and European)? In how far were constitutional resilience and constitutional change discussed?

Fifth – and finally, how did law entangle solidarity in the crisis under study? Did the law provide guidance or infrastructure to develop and imagine new forms of transnational solidarity? In how far did established legal concepts and interpretations pose an obstacle to the renovation of scopes and modes of transnational solidarity? Was it possible for political actors to use the law to convey new forms of solidarity or to establish new understandings of core norms that support such a development?

The overall aim of this book is to provide a multidimensional analysis of transnational solidarity crises and law through the lens of concrete critical settings provided by the European economic and financial crisis, the migration crisis, and the pandemic crisis. Recent studies on transnational solidarity in critical contexts either adopt a bottom-up perspective dealing with the solidarity attitudes of individual citizens[82] and the involvement of grassroot organisations in solidarity issues[83] or a top-down perspective analysing which understanding of transnational solidarity was implicitly or explicitly

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[82] See Alexia Katsanidou, Ann Kathrin Reinl, and Christina Eder (n 4); Jürgen Gerhards and others (4).

[83] See Donatella della Porta (ed) *Solidarity Mobilizations in the 'Refugee Crisis': Contentious Moves* (Palgrave Macmillan 2018); Christian Lahusen, Ulrike Zschache, and Maria Kousis (n 4).

affirmed by the decisive institution under study.[84] Complementing these approaches, the present book is based on a conflict-centred perspective, which allows to explore a kind of meso-level. While the primary objects of study of the book are still legal and political institutions, conflict-theoretical grounding invites to engage with alternative understandings and competing conceptions of solidarity in order to problematise the choices made in each case. This perspective portrays solidarity regimes as continual, crisis-driven struggles with provisional compromises.

We thereby seek to address gaps that we have observed both on a theoretical and empirical level. On a theoretical level, the book systematically relates the concepts of solidarity and crisis, which have hitherto been loosely connected at best. Recent publications in the field implicitly often presuppose a certain understanding of the crisis at stake in order to ask how key actors, organisations, and institutions substantiated – or how they should have substantiated – the vague principle of solidarity to respond to a crisis defined as an objective set of economic, societal, cultural, and political challenges. Moreover, they rarely pay attention to the role of law in relation to both solidarity *and* crisis. In contrast, the perspective advanced in this volume builds on a social constructivist and pragmatist conception of crisis that highlights the experience of uncertainty and the discursive nature of a crisis as crucial features of the term.[85] It is thereby sensitive to the disputed issues of crisis origins and adequate coping strategies, as well as to the crucial impact of narratives in crisis contexts. Our theoretical basis thereby enables us to disentangle the complex relationship of crisis, solidarity and law. On the one hand, it allows us to reconstruct how economic, social or health problems became crises of order and the inherent solidarity regimes. On the other, it serves to explicate that normative conceptions or future designs of solidarity apply and convey different narratives of a crisis, its root causes, and potential ways out. Against the background of this understanding of crisis, the planned volume reconstructs how crises challenged the solidarity regimes that have been established to normatively stabilise social orders, how these regimes have adapted to the crisis at issue, and how this adaptation has created harmful side-effects with regard to transnational solidarity and other principles of order. It seeks to identify and analyse similarities and differences between the three crises (financial,

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84 See Andrea Biondi, Eglė Dagiltyė, and Esin Küçük (n 4); Helle Krunke, Hanne Petersen, and Ian Manners (n 4).

85 See for seminal perspectives: Hay (n 53); Milstein (n 52).

migration, pandemic) regarding the dynamic of crisis and solidarity conflicts, their handling by the institutions and the role of law. Ultimately, we will also ask how the three regimes under consideration could be designed in a more solidaristic and sustainable way in the future.

These reflections are interwoven with the central concept of *transnational solidarity conflicts.*[86] With its focus on the contested nature of solidarity's scope and content, this concept develops a conflict-centred perspective on solidarity regimes. It catches up with the ambiguity of solidarity, which stems not only from its problematic relationship to individual liberties and strong property rights but also from the issue of conditions of inclusion in and exclusion from a solidaristic community. It allows to analyse how different actors, institutions and organisations contribute to and struggle over defining the scope, the mode, and the conditions of solidarity in various, often interlinked policy fields and how the virulence of the crisis spills back on the legitimacy of the institutions addressed to solve crisis induced conflicts over the reorganisation of (transnational) solidarity.

On an empirical level, the volume brings together three different transnational crises with different scales and institutional frames of conflict resolution (the European economic, financial and currency crisis, the so-called migration crisis in Europe, and the pandemic crisis). The individual contributions aim to carve out the implicit ideas of solidarity built into the relevant institutional arrangements. They trace the historical path dependencies, current crisis-related adaptations, future trajectories and normative designs of solidarity regimes and their relationship with conflicting principles of order. Furthermore, the volume highlights the crucial role of law in transnational solidarity issues but also points to the structural limits and biases of law when it comes to transnational solidarity conflicts and their resolution. The envisaged chapters on the three crises – economic, migration, pandemic – investigate how the applicable legal framework has framed the solidarity conflicts in each case and in how far it facilitated or impeded transnational forms of solidarity. In addition, the volume seeks to provide suggestions of how the law could enable and support more transnational modes of solidarity and thus allow for more inclusive approaches in addressing the underlying societal challenges. At the same time, we critically reflect the relation between law and political discourse and structural conditions of the law (e.g., nation-state structure,

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86 Farahat (n 36) 45ff.

given power relations etc.) with the intention to identify limits of law's potential in supporting and realizing transnational forms of solidarity.

5 Overview of the book

The book is structured in four main parts. With a focus on the EU, in part I, Hans-Jürgen Bieling, Peter Hilpold and Ann-Kathrin Reinl look at how relationships of transnational solidarity are renegotiated and reconfigured in times of crisis. In chapter 1, Hans-Jürgen Bieling contrasts the eurozone crisis and the pandemic crisis. Informed by a hegemony theory perspective, his critical analysis shows how contentious but dominant narratives of the two crises gave birth to two diametrically opposed understandings and regimes of solidarity. Bieling argues that, during the eurozone crisis, it was primarily the over-indebted, 'decadent' southern European Member States who were blamed for the crisis and who deserved solidarity only under hard conditions, according to the dominant narrative. In contrast, during the Covid-19 pandemic, the predominant framing of the crisis as an external shock allowed the political community to reorganise its "moral economy" in a more solidaristic way.

Just like Bieling, Peter Hilpold also compares the eurozone crisis and the Covid-19 pandemic and its impact on the reconfiguration of solidarity in Europe. However, whereas Bieling identifies a sharp contrast between the two types of crisis management and the understandings of solidarity enshrined therein, Hilpold rather observes a conflict-prone but still continuing development of solidarity mechanisms at the EU level trying to keep up with and adapt to the unforeseen series of crises of the last 15 years.

Ann-Kathrin Reinl closes part I with a quantitative study on political parties' positioning towards solidarity during the European Parliamentary Elections of 2019. Whereas most quantitative approaches to solidarity in the EU addressed the demand side, ie citizens' attitudes towards solidarity within the EU, her contribution deals with the supply side, ie how European political parties frame solidarity in their electoral programs. Reinl's assessment exemplifies how solidarity and crisis are intertwined in a tense relationship. Whereas European solidarity was mostly understood as financial support for crisis-ridden countries during the eurozone crisis, in the aftermath of the financial crisis and before the pandemic crisis reached Europe, the issue of financial support for crisis countries no longer features

prominently in the party programs. Instead, solidarity is mostly related to welfare policies at the EU level.

Part II is centred on the eurozone crisis and the establishment of solidarity mechanisms during this critical period of European integration. However, most contributions do not exclusively deal with the eurozone crisis. With a mostly critical impetus, they rather try to contextualise the establishment of the during the so-called sovereign debt crisis of the early 2010s. Antonia Baraggia engages with the fact that conditionality has become one of the crucial 'regulatory' instruments deployed by multilevel systems. In the EU, it has seen a quantitative and qualitative increase since the eurozone crisis. Baraggia argues that conditionality is misunderstood and also misjudged if it is seen merely as a means of reducing the room for manoeuvre of crisis-ridden Member States. Instead, she pleads that, in a 'federal-like' system like the EU, it should instead be conceived as a means to balance the autonomy of the Member States and solidarity within a supranational community. To make this thesis plausible, she compares the concepts of conditionality in the United States and the EU as well as the understandings of solidarity they contain. With regard to the EU, her analysis shows how NextGenEU and the new rule of law conditionality regulation have advanced conditionality as a pivotal mechanism for securing constitutional values and building an increasingly federalized system of solidarity.

Informed by a fundamental examination of the relationship between solidarity and money, Fernando Losada portrays transnational solidarity as a means to compensate for the deeper structural features of European monetary integration and the disbalances it has created. Losada shows how the European monetary regime constructs and reproduces inequalities and power asymmetries at the expense of debtor states. By renouncing the possibility of conducting their own monetary policies, Member States not only made a fundamental decision in favour of the political-economic integration of the EU but also placed themselves, as 'regular debtors', in a subordinated position *vis-à-vis* their creditors. During the eurozone crisis, attempts to limit the effects of the global economic and financial shock on the monetary policy have advanced financial stability as an overriding political objective, mobilizing the whole legal apparatus of the Union.

In a historically and conceptually encompassing contribution, Agustín José Menéndez deals with the development of solidarity in the EU. Based on an understanding of solidarity which highlights the importance of a 'solidum', ie a common fund of resources allowing to operationalise mutual

aid, he argues that the economic crises of the 1970s which materialised in the Maastricht Treaty and especially the eurozone crisis brought about an 'inverted' form of solidarity disadvantaging the weak and favouring the powerful. Based on this assessment, and with regard to the recent developments related to NextGenEU Menéndez, it is critical to an alleged breakthrough for the realisation of a more solidaristic Union. Whereas progressive observers often identify a 'turn towards solidarity' in European integration as a reaction to the pandemic, Menéndez highlights that transnational solidarity requires not only common debt but the development of supranational 'solida' to fund those in need of support. And what is more, for Menéndez, transnational solidarity worth the name requires, above all, that the paradigm of competition between the Member States is replaced by a practice of common interests and mutual aid.

Part III focuses on EU migration governance and the multi-layered transnational solidarity conflicts enshrined therein. Elspeth Guild's critical contribution shows how the framing of a crisis affects the design of transnational solidarity. Guild addresses the shifting meaning of solidarity in the EU's Common European Asylum System by comparing two critical situations: the arrival of asylum seekers from the Afghan, Iraq, and Syrian crises via Belarus and the opening of a Temporary Protection scheme for those fleeing from Ukraine after the Russian invasion. Guild argues that the reactions to the crises were driven by geopolitical considerations rather than international refugee law, with severe consequences for the refugees themselves. With regard to the asylum seekers entering the EU via Belarus in 2021, in official EU documents, the situation was conceived as an illegitimate act of an authoritarian, hostile regime that does not shy away from using migrants to destabilize neighbouring Member States. Whereas Syrians, Afghans or Iraqis fleeing war and persecution were thus 'weaponized' and constructed as a threat to EU internal solidarity requiring inter-Member State solidarity against a criminal policy, the Ukrainian refugees were portrayed as the 'living faces' of solidarity with a neighbouring country. As a result, on the one hand, the problematic policies of the state of emergency that deprived Syrians, Afghans and Iraqis of the right to access the territory to seek asylum and a fair asylum procedure remain unanswered by the EU. On the other hand, Ukrainian refugees benefited from the opening of a temporary protection scheme accompanied by a right of residence to social benefits, healthcare, housing, labour market access and education.

Lieneke Slingenberg's contribution deals with the social rights of refugees in EU law. She maps how EU legislation and case law have created different levels of social rights for refugees and explores the different understandings of solidarity they entail. In a way similar to Elspeth Guild, Slingenberg shows how refugees' social rights are dependent on dominant crisis narratives, creating highly conditional and, at times, even instrumental forms of solidarity. With regard to social rights, she argues that the so-called refugee crisis of 2015 has not increased solidarity with refugees. Primarily framed as a crisis of migration control (and not as a humanitarian crisis), it has led to the opposite. For refugees, it has become harder to reach EU territory. If they nevertheless did, their freedom of movement was limited as much as possible, using access to social benefits as an instrument for that purpose.

Lilian Tsourdi addresses the EU funding of migration policies as a manifestation of intra-EU solidarity in migration issues. Drawing on the concept of transnational solidarity conflicts developed in this introductory chapter and elsewhere,[87] in a first step, Tsourdi critically assesses how the funding of migration policies, which have entered centre stage since the outbreak of the so-called migration crisis, embodies inter-state solidarity. With regard to the new policy instruments in this field, she argues that solidarity through financial sharing in migration is gaining prominence and that the current reforms in the EU migration package on the financing of migration policy could initiate more structural forms of financial solidarity in migration issues.

Part III is closed by Nora Markard's contribution. Her contribution is not interested in state-bound solidarity but in civil society practices of solidarity, which seek to counter a "de facto and de jure rightlessness" created by the Member States' deflection of migration and the outsourcing of border checks. Drawing on Hannah Arendt's reflections on stateless people and especially on Jacques Rancière's paradoxical idea of the demos as "the part of those who have no part"[88], Markard is interested in how civil societal practices of solidarity towards refugees (ie immediate solidarity at the land border, search and rescue at sea, cities of refuge) counter rightlessness by constructing rightless humans in need as legal subjects. By recognizing refugees as rights holders, even where they are *de jure* rightless,

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87 Farahat (n 36) 45ff.
88 Jacques Rancière, 'Who is the Subject of the Rights of Man' (2004) 103 South Atlantic Quarterly 207, 306.

they create a *dissensus* with the order of the 'police', by which those who don't have a part become participants.

Part IV turns to the solidarity issues raised by the pandemic crisis. Daniel Wei Liang Wang engages with the Brazil Supreme Court and the attempt to protect the most marginalized and vulnerable groups of Brazilian society through structural litigation. His assessment is ambivalent. On the one hand, the Court affirmed the solidarity commitments in the Constitution. On the other hand, its progressive and convincing intervention was unable to promote urgently needed policy changes. Despite a court that lived up to the promises of transformative constitutionalism, there was no significant change of policy with regard to the daily lives of prisoners, the *favela* communities and indigenous peoples.

Pedro Villarreal deals with global vaccine distribution through the so-called Covax-Initiative launched by the World Health Organisation and other international institutions. Villarreal analyses why the Initiative, which was meant to counter the nationalistic trend of vaccine hoarding and bring about a fairer distribution of scarce, urgently needed goods, was unable to reach its ambitious goals and realise a strong form of transnational solidarity. In his search for a future alternative, Villarreal is clear about the fact, that a purely "moral appeal to global ideas of solidarity" will not procure robust international law obligations. However, Villarreal still discovers potential mechanisms for a more stringent standard of transnational solidarity in the distribution of critical resources.

Tatiana Andia, Silvia Otero, Juan Sebastián Gómez and Maria Gabriela Vargas provide a case study on vaccine procurement in Latin America. Traditionally, vaccine procurement in the region relied on a collective mechanism organized in solidaristic and non-competitive terms (PAHO Revolving Fund). During the Covid-19 crisis, procurement shifted to COVAX, a philanthropic mechanism, focused on helping the poorest with less emphasis on transparency. Such a shift altered the previous dynamics from collective to individual negotiations, bilateral agreements, and donations. This also resulted in an increase in opacity and difficulties in accessing vaccines. Andia et al. argue that the pandemic caused a shift from cooperative solidarity (PAHO) to self-interested actions and fragmented procurement efforts. Whereas the EU's reaction to the Covid-19 crisis led to the development of a mechanism similar to the PAHO Revolving Fund, Latin America experienced de-solidarisation as a move away from regional solidarity towards self-interested actions as well as fragmentation.

In closing this Introduction, let us circle back to the sentence with which we opened: Crises are "both a threat to and an opportunity for solidarity". The essays collected in this volume open new avenues to explore the intricate relationship between crises and solidarity, as well as the reconfiguration of transnational solidarity conflicts through contemporary processes of global crises. The research explores, through different and multifaceted dimensions, how institutions have navigated crisis demands against the background of principles of public order. Law and legal institutions can be leveraged to support more inclusive forms of transnational solidarity. Still, they can also be employed as tools to exclude communities from the obligation of solidarity. Understanding the dynamics of crisis and transnational solidarity conflicts can better equip legal and political communities to address the multifaceted challenges of a still interconnected world.