10

Adjudicating Transnational Solidarity Conflicts

Can Courts Ban the Destructive Potential?

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10.1 INTRODUCTION

This chapter focuses on transnational solidarity conflicts as a specific type of conflict in the EMU that has been aggravated by the Eurozone crisis but persists also in current debates about how to share the economic costs of both the COVID-19-pandemic and climate change. This new type of distributional conflict encompasses both quarrels about the adaptation of domestic welfare systems to EMU requirements and the distribution of costs and benefits between Member States. As EMU governance is largely executive driven and as distributive decisions in one Member State also affect other Member States, accountability for distributive decisions in the EMU gains new salience. The goal of this chapter is to understand how legal accountability and, more specifically, constitutional accountability may contribute to a constructive management of transnational solidarity conflicts. In addressing this question, the chapter will focus specifically on the accountability goods of openness and publicness, as developed in the introductory chapter.

10.2 TRANSNATIONAL SOLIDARITY CONFLICTS AS A CORE FEATURE AND PERIL OF THE EMU

The transformation of the EMU during and after the Eurozone crisis not only resulted in an aggravated deficit of accountability and legitimacy (1), but also provoked new types of conflicts within and between the Member States,

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which shall be described in this chapter as transnational solidarity conflicts (2). Transnational solidarity conflicts yield a potential for destabilising the EMU. The core question to be addressed in this chapter, therefore, is how legal, and more specifically constitutional accountability mechanisms, may contribute to mitigate the disintegrative potential of transnational solidarity conflicts in the EU (3).[1]

10.2.1 *Responsible Instead of Responsive Government: The Increasing Lack of Accountability and Legitimacy in the EMU*

Progressive economic integration in the EU has reinforced the legitimacy issues of European governance. Decisions taken at the supranational level increasingly affect the design of national distribution regimes or have otherwise far-reaching distributional effects for the Member States. Moreover, the EMU increases political and economic interdependencies among Euro Member States. The measures taken to rescue the common currency and counter the financial crisis have further restricted national scope for distributional policy as the political and economic costs of comprehensive welfare state regulation have become ever higher. This led to a deep legitimacy and accountability crisis: The Eurozone Member States lose the capacity and political space for implementing distributive policies, but at the same time often have to bear the consequences of decisions made by other national legislators.[2] This *problematique* is exacerbated by the fact that fiscal and economic policy recommendations on the European level can now also be enacted in the absence of majority decisions. Together these developments contribute to further political imbalance among the Member States.[3] In addition, decisions with far-reaching distributional effects within the EMU are today mostly dominated by executive bodies and thus undermine the idea of democratic-parliamentary self-legislation.[4] Even if one accepts an increasing need to

[1] The following section is based on research and thoughts that have already been presented in earlier texts (Farahat, *Transnationale Solidarität: Eine vergleichende Analyse verfassungsgerichtlicher Konfliktbearbeitung in der Eurokrise* (Mohr Siebeck, 2021) pp. 41–50 and 50–90), Farahat/Arzoz, 'Contestation and Integration in Times of Crisis: The Law and the Challenge of Austerity', in id. (eds.), *Contesting Austerity: A Socio-Legal Inquiry* (Hart, 2021), pp. 1–23, but have significantly been updated, adapted, and further developed for the purpose of this volume.

[2] Tuori/Tuori, *The Eurozone Crisis: A Constitutional Analysis* (Cambridge University Press, 2014), pp. 207f., 209ff.

[3] Menéndez, 'A European Union in Constitutional Mutation', 20 *European Law Journal* (2014), pp. 127–141, 135, 137.

[4] Enderlein, 'Das erste Opfer der Krise ist die Demokratie', 54 *Politische Vierteljahresschrift* (2013), 714–739, Wöhl, 'Machtverschiebungen vom Parlament zur Exekutive', in Hentges

allow for competing expressions of the public will,[5] parliamentary legislation by democratically elected representatives is still an irreplaceable mechanism of responsiveness in a democratic polity.[6]

In the context of the Eurozone crisis, this post-democratic *problematique* becomes even more salient, since political decision-makers have long proven to be largely ignorant to alternative ways of dealing with conflicts and negative social impacts of the measures taken.[7] This reflects a general shift from responsiveness to responsibility in democratic governance.[8] Governments and their supporting parties are increasingly compelled to act responsibly towards markets in terms of risk minimisation.[9] The yardstick for such responsibility is formed by international and supranational guidelines or standards, which have become more detailed and comprehensive, especially during the Euro crisis. The dominance of responsibility is also expressed in the rhetoric of 'no alternative', which tends to discredit any discussion of alternative response options as inadequate, inefficient, or even counterproductive.[10] In this context, responsiveness to citizens' political preferences is increasingly difficult to realise for political parties. There is a risk that open debate about alternative visions of the common good, and the appropriate measures to achieve it, is replaced by a managerial mindset of optimising governance goals through technocratic administration. Citizens in the EU Member States are thus exposed to political and economic decisions that are neither legitimised through parliamentary-democratic decision-making at the European level nor through responsive democratic procedures at the Member State level.[11] This constellation results in a new quality of conflicts about EMU governance, about the consequences of the European monetary policy for the distributive regimes of the Member States and about the democratic accountability of EMU institutions. The question therefore arises to what extent accountability

(ed.), *Krise der Demokratie. Demokratie in der Krise?* (Wochenschau Wissenschaft, 2020), pp. 92–100, 97.

[5] Rosanvallon, *Democratic Legitimacy: Impartiality – Reflexivity – Proximity* (Princeton University Press, 2011), p. 243f.

[6] Crouch, *Post-Democracy* (Polity Press, 2004), focusing on the aggravation of this *problematique* during the Euro zone crisis see Streeck, 'The Crises of Democratic Capitalism', in id., *How Will Capitalism End? Essays on a Failing System* (Verso, 2016), pp. 73–94.

[7] Dawson, 'Opening Pandora's Box?', in id. et al. (eds.), *Beyond the Crisis: The Governance of Europe's Economic, Political and Legal Transformation* (Oxford University Press, 2015), pp. 85–93, 85, 92.

[8] Mair, 'Representative versus Responsible Government', 8 *MPIfG Discussion Paper* (2009), 13ff.

[9] Ibid., at p. 12.

[10] On the rhetoric of the state of emergency Séville, *There Is No Alternative: Politik zwischen Demokratie und Sachzwang* (Campus, 2017), p. 271ff.

[11] Tuori/Tuori, *supra* note 2, at p. 210.

mechanisms beyond parliamentary-democratic decision-making may compensate for the lack of responsiveness by enhancing openness and publicness of executive decision-making.

10.2.2 *Transnational Solidarity Conflicts: A New Type of Conflicts and Their Potential for Destabilising the EMU*

The Eurozone crisis has created a new dynamic of conflict that can be described as transnational solidarity conflicts. Conflicts arise not only over the extent to which the adjustment burdens caused by the common currency should be borne jointly by the members of the Eurozone but also over how social security can be secured for those population groups that do not directly benefit from freedom of movement within the EU. Today, solidarity between and within the Member States can no longer be shaped and developed independently, thereby increasingly producing conflicts between societal groups that cut across the boundaries of the national welfare state.

Transnational solidarity conflicts illustrate the unprecedented politicisation that European economic governance witnessed during the Eurozone crisis.[12] Politicisation can be understood as comprising three interrelated elements: raising awareness for a specific issue, mobilising around this specific issue, and polarising the debate about this issue.[13] The Eurozone crisis has raised public awareness of the fact that European governance has significant distributional effects between Member States and within national distributional regimes.[14] The handling of the crises has laid bare the distributional effects of monetary policy and highlighted the inextricable link between economic policy choices and monetary policy. It revealed a multiplicity of political conflicts in terms of the distribution of costs and benefits built into a highly interdependent transnational polity. With transnational solidarity conflicts flaring up, different policy preferences regarding the appropriate answer to major economic shocks have once more shown their divisive potential by splitting the European Union, yet again, into 'southern' and 'northern' blocks. The result was increasingly polarised political spaces, with new salience for and mobilisation around European issues at both the national and the supranational levels.[15]

[12] See generally de Wilde/Zürn, 'Can the Politicization of European Integration be Reversed?', 50 *JCMS* (2012), 137–153.

[13] Ibid., 139f.

[14] See also Cramme/Hobolt, 'A European Union Under Stress', in id. (eds.), *Democratic Politics in a European Union Under Stress* (Oxford University Press, 2014), pp. 1–18, 8.

[15] In a study of public debate in six Western European countries, Kriesi and Grande have shown that issues concerning the Euro have been exceptionally present in public discourse and

In the context of intensifying transnational solidarity conflicts, European issues became a pivotal point of reference and mobilisation in the construction of political identities. The consensual nature and relative sobriety of European integration were suddenly permeated by the political logic of antagonism. Measures of crisis reaction and the future of the single currency have become a central issue in national election campaigns and in the political positioning of individual parties.[16] There is a serious risk, however, that the destructive dynamic of such polarised conflicts may not stop at the level of disagreement about specific policies. Rather, when institutions face serious critique because of their decision-making, politicisation may spill over from the conflictual issue itself into the 'conflict frame',[17] that is from the policy level to the polity level. Once the political and legal infrastructure (i.e. the 'conflict frame') of a political order is perceived by a significant part of the citizenry as allowing for no alternatives to currently dominant political projects, institutions themselves might come under attack. Polarisation therefore carries a destructive threat for the political structure of the EMU and the EU as a whole.

10.2.3 *Constitutional Accountability as a Tool to Mitigate Adverse Effects of Transnational Solidarity Conflicts?*

In the light of intensified and potentially divisive transnational solidarity conflicts, the role of accountability of EMU institutions gains new salience. If effective accountability mechanisms are in place, it may be possible to channel the destructive potential of transnational solidarity conflicts in a way that allows not only to enhance responsiveness of EMU institutions towards the citizenry but also to prevent a spill-over of policy conflicts to the level of the polity. Against this backdrop, I will focus in this chapter on how legal accountability can contribute and in fact has contributed to mitigate the divisive potential of transnational solidarity conflicts in the EMU. The idea is that constitutional review may provide a suitable tool to articulate alternative visions of the common good that have not been taken into

have significantly increased the visibility and awareness of European economic and monetary policy. See Kriesi/Grande, 'The Europeanization of the National Political Debate', in Cramme/Hobolt (eds.), *Democratic Politics in a European Union Under Stress* (Oxford University Press, 2014), pp. 67–86.

[16] See Hobolt/Wratil, 'Public Opinion and the Crisis: The Dynamics of Support for the Euro', 22 *Journal of European Public Policy* (2015), 238–256, 241f.

[17] For the conceptual differentiation of conflicts and conflict frames and their interplay, see Fehmel, 'Konflikte erster und zweiter Ordnung in Europa', 42 *Leviathan* (2014), 115–136.

account in previous, crisis-driven decision-making. It may thereby contribute to enhancing publicness of an executive decision, as it allows clarifying in the first place which common goods are legitimate or ought to be considered according to the normative (constitutional) framework. Moreover, by forcing decision-makers to justify their decisions and to reveal the considerations behind a given decision, legal accountability may also enhance the openness of decisions. In the following, I will concentrate on the specific role constitutional law has played for the accountability of the EMU during and in the aftermath of the eurozone crisis considering both domestic and EU constitutional law.

Constitutional accountability merits closer inspection for at least two reasons: First, in many polities in the EMU, constitutional law serves as a major benchmark for legal accountability of political institutions and decision-makers. Second, while theoretical approaches to conflict teach us that social conflicts have the potential for destructive and disintegrative effects, they have also highlighted the potentially integrative effect of conflicts for political communities. Such integrative effects, however, presuppose mechanisms of conflict resolution that allow for the (re)articulation of a normative framework.[18] Constitutional law, as a core infrastructure for the resolution of political conflict and normative orientation in modern societies, lends itself as a natural candidate to channel social conflicts in a way that reduces their destructive tendencies to a minimum. Constitutions aim to serve as 'normative scripts'[19] for political actors, guiding and limiting political action not only in times of seeming consensus but also in times of crisis and open conflict. The core challenge for constitutionalism in times of fundamental crises is to ensure both reliable normative continuity and sufficient flexibility to adapt normative concepts to new crisis-driven societal demands.[20] It is precisely through these interpretative processes in which limits and adaptations are negotiated that constitutions may serve to productively channel social conflicts. They thereby provide a space to negotiate and ultimately determine the common goods which can legitimately or sometimes even ought to be taken into account in a political order.

[18] Pathbreaking see Simmel, 'Der Streit', in Rammstedt (ed.), *Soziologie. Untersuchungen über die Formen der Vergesellschaftung* (Suhrkamp, 1992), pp. 282–384, also Weber, *Wirtschaft und Gesellschaft* (Mohr Siebeck, 1922), p. 398, on the productive potential of conflicts, see also Fehmel, *supra* note 17, 134.

[19] Brito Vieira/Carreira da Silva, 'Getting Rights Right: Explaining Social Rights Constitutionalization in Revolutionary Portugal', 11 *ICON* (2013), 898–922.

[20] See Contiades/Fotiadou, 'The Resilient Constitution: Lessons from the Financial Crisis', in Herwig/Simoncini (eds.), *Law and the Management of Disasters: The Challenge of Resilience* (Routledge, 2017), pp. 187–207.

By the same token, individuals and social groups may integrate into a political community through discursive practices in which they – at least in their majority – accept and refer to the constitution as the relevant normative framework. Although they may interpret concrete constitutional norms in different or even divergent ways, they nonetheless refer to the same document and thereby implicitly or explicitly accept it as the dominant normative symbol of the political community.[21] In this sense, the constitution becomes indiscriminate towards the various visions of the collective self-perception. Such an understanding fits well with Claude Lefort's idea of the empty place of power in modern democracies.[22] The constitution itself symbolises this empty place if its concrete meaning remains open to reinterpretation and to differing, even diverging, meanings that are given to its provisions. 'Emptiness' in this sense does not equal arbitrariness but rather results from reiterative discursive processes in which the respective provisions are identified with different meanings by different actors.[23] It is precisely this form of emptiness through discursive and reiterated re-interpretation that allows a constitution to both channel the destructive potential of major social conflicts and provide a meaningful normative benchmark for accountability.

In light of these theoretical considerations, constitutional accountability mechanisms need to fulfil two conditions in order to allow for a productive conflict management: On a procedural level, they need to be inclusive in order to allow a variety of actors to bring their case to court and thus to construct the societal conflict as a constitutional conflict. On a substantive level, constitutional provisions need to preserve a certain emptiness in their interpretation to allow different political actors to continuously identify with constitutional provisions and make the constitution the core normative point of reference. For constitutional courts as the most authoritative interpreters of constitutional norms, this means that they should refrain from an overly saturated interpretation that injects specific economic concepts or policy choices into constitutional norms. Likewise, to guarantee that a broad variety of constitutional actors can indeed participate in the discursive and iterative process of opening and emptying the meaning of constitutional norms, constitutional courts need to make sure that the process of political will-formation and

[21] Brodocz, 'Chancen konstitutioneller Identitätsstiftung. Zur symbolischen Integration durch eine deutungsoffene Verfassung', in Vorländer (ed.), *Integration durch Verfassung* (Westdeutscher Verlag, 2002), pp. 103–120, 106.

[22] Lefort, 'La dissolution de repères et l'enjeu démocratique', in id., *Le temps présent: Écrits 1945–2005* (Belin, 2007), pp. 551–568, 560f.

[23] Brodocz, *Die symbolische Dimension der Verfassung. Ein Beitrag zur Institutionentheorie* (Westdeutscher Verlag, 2003), p. 233ff.

decision-making remains open. More specifically, this requires power asymmetries not to become too much entrenched and political decision-making not to be permanently captured and constrained by arguments of necessity or market responsibility.

If constitutional norms on EU level become a shared reference point for negotiating and managing transnational solidarity conflicts, they may contribute to enabling polity building also on EU level. At the same time, this would also enhance the conditions for improving the accountability infrastructure on the supranational level as regards to the 'publicness' dimension developed in the introductory chapter of this volume. According to this dimension, accountability serves to ensure that official action is oriented towards the common good. While the common good might be defined differently by different actors in a polity, a collectively acceptable definition of a common good may be facilitated if it echoes principles enshrined in a shared constitutional framework. Moreover, constitutional law serves as an institutionalised framework to ensure the responsiveness of political actors towards the citizenry as opposed to responsibility towards markets or private interest. Transnational solidarity conflicts, however, are governed not only by EU constitutional law but also by domestic constitutions. The following two sections of this chapter will therefore assess the role of constitutional accountability for the management of transnational solidarity conflicts in the EMU on the domestic level and on the EU level in turn.

10.3 LEGAL ACCOUNTABILITY BEFORE DOMESTIC COURTS

This section will analyse in how far constitutional accountability of EMU decision-makers before domestic courts during and after the eurozone crisis contributed to minimising the destructive threats of transnational solidarity conflicts in the EMU. It asks in how far domestic constitutional courts have delivered the goods identified with accountability in the introductory chapter. A specific focus will be on 'publicness' as the good seeking to ensure that political action is geared towards common, in this case constitutional goods. The core interest therefore is in how far domestic and European constitutional principles have been taken into account and in how far the requirements of procedural inclusiveness and substantive emptiness developed in the previous section of this chapter have been fulfilled. The analysis will focus on two prominent examples of domestic constitutional accountability, namely cases before the Portuguese Tribunal Constitucional (PTC) and the German Federal Constitutional Court (GFCC) representing one side of transnational solidarity conflicts, respectively.

10.3.1 *From Restrained to Resistive Constitutionalism: The Austerity Case Law of the Portuguese Tribunal Constitucional*

During the economic and financial crisis, the PTC emerged as a 'lone hero against austerity'.[24] In its early judgements of 2010 and 2011, however, the court adopted a restrained position towards the austerity plans of the liberal-conservative government. In its first decision on crisis measures (acórdão 399/2010), the PTC had to decide whether a tax increase in the current year and for the entire income of that year was compatible with the principle of the protection of legitimate expectations as an expression of the principle of the rule of law (Article 2 PC). The court denied a violation of the principle of the protection of legitimate expectations. It basically argued that taxpayers could not have expected that taxes would remain unchanged in the current year, given the tight budget situation resulting from the current economic and financial crisis.[25] In light of the specific weight of these budgetary constraints,[26] the court granted legislative bodies particularly large discretion.

The PTC maintained this general line in Acórdão 396/2011 declaring cuts in public service allowances and salaries at issue to be constitutional. Once again, the court resorted to the logic of the economic state of emergency and the resulting need for quick reactions and far-reaching decisions.[27] The court argued that even if the principle of equality in general requires that all citizens had to contribute equally to the public finances, this does not imply a priority of budget consolidation through tax increases over public salary cuts but leaves the choice of measures to the legislative bodies.[28] According to the court, the principle of equality only precludes arbitrary unequal treatment which imposes an unjustified and disproportionate burden on a particular societal group. On the one hand, this line of jurisprudence left the political-parliamentary process as open as possible by granting the legislator wide discretion. On the other hand, it led to the constitution almost completely taking a back seat to economic rationality and crisis exceptionalism. Rather than defining effective criteria of constitutional accountability, the court

[24] Pereira Coutinho/Violante, 'Um erro histórico?', Observador, 29.03.2018. Accessed via https://observador.pt/opiniao/um-erro-historico/ (20.01.2022).

[25] Acórdão N.º 399/2010, Tribunal Constitucional, para 12.1.

[26] Ibid., para 12.2.

[27] For the relevance of the argument of exceptionalism during the Eurozone crisis, see White, 'Emergency Europe', 63 *Political Studies* (2015), 300–318, 302ff.

[28] Acórdão N.º 399/2010, Tribunal Constitucional, para 9.

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emphasised that, considering the 'absolutely exceptional economic development',[29] the overriding public interest pursued with the cuts was paramount. It was 'a situation of emergency' in which the measures taken were 'absolutely necessary'.[30] Both decisions illustrate that the court did not develop any substantial standard of constitutional accountability but was rather satisfied with a procedural safeguard, namely that the legislator demonstrated that it had indeed considered alternative options before taking the respective measures.

This restrained position of the PTC changed in the second phase of its Euro-crisis jurisprudence. As of 2012, the court no longer accepted the reference to the economic crisis as a free ticket for permanently broad legislative discretion. Instead, it started interpreting the principles of equality and proportionality in a way that set a limit for long-term and structural shifts in economic burden sharing. The core instrument for this shift was the 'invention' of the principle of proportional equality in acórdão 353/2012. The question at issue was whether cancelling the 13th- and 14th-month salaries for public sector employees as foreseen under the Budget Law of 2012 was in breach of the principle of equality by placing the burden exclusively on public employees. In stark contrast to the broad discretion granted to the legislator in earlier decisions, the PTC now declared the cuts unconstitutional for violating the principle of equality in conjunction with the principle of proportionality.[31] While the court still held that a different treatment of public and private sector employees in terms of their respective burdens is permissible in times of crisis, it clarified that the extent of the unequal treatment must itself be proportionate to remain within '*limites do sacrifício*'.[32] In the eyes of the court, this was no longer the case. The new cuts hit public sector workers unilaterally so that the unequal burden sharing of the exceptional fiscal situation reached a point, where it was disproportionate regarding the constitutional principle of equality.

The principle of proportional equality structured the austerity case law of the PTC from thereon leading to a number of public pay cuts considered to

[29] Acórdão N.º 396/2011, Tribunal Constitucional, para 8.

[30] Ibid.

[31] For a critique of this crucial shift, see Pereira, 'Igualdade e proporcionalidade: um comentário às decisões do Tribunal Constitucional de Portugal sobre cortes salariais no sector público', 98 *Revista Española de Derecho Constitucional* (2013), 317–370, de Brito, 'Medida e intensidade do controlo da igualdade na jurisprudência da crise do Tribunal Constitucional', in Ribeiro/Coutinho (eds.), *O Tribunal Constitucional e a crise* (Almedina, 2014), pp. 105–121, de Brito/Coutinho, 'A "Igualdade Proporcional", novo modelo no controlo do Princípio da Igualdade?', 1 *Direito & Política* (2013), 182–191, 186ff.

[32] Acórdão N.º 353/2012, Tribunal Constitucional, para 5.

be one-sided and unconstitutional.[33] Despite some harsh political and doctrinal criticism,[34] the concept of proportional equality strengthened the benchmark for constitutional accountability. Moreover, the PTC combined this benchmark with a duty on part of the legislature to properly justify austerity measures in the light of the rights and principles enshrined in the Portuguese Constitution. Hence, domestic constitutional rights need to be 'properly' taken into account by the government and the legislature when implementing measures of crisis reaction in the EMU context.[35] It thereby combined a procedural understanding of accountability with a more 'substantiated' version of constitutional accountability. By requiring 'proportional equality', the court developed a benchmark that not only enabled a 'resilient constitutionalism'[36] by setting perceptible limits to political crisis management but also reactivated the socially progressive aspiration of the constituent moment in Portuguese constitutional law with its strong emphasis on social rights.[37] In a political constellation characterised by a strong power asymmetry between creditor and debtor countries and a dominant rhetoric of emergency and no alternatives, the adjudication of the PTC thereby allowed to effectively articulate alternative policy options in the language of constitutional law. Consequently, the political debate started to centre on the Constitution and its 'adequate' interpretation against the backdrop of a profound crisis.[38] In this sense, the accountability standard applied by the court is focused on binding political action to the common constitutional good (publicness) while at the same time leaving room to negotiate politically how this common good ought to be interpreted and realised.

At the same time, however, this line of constitutional interpretation effectively made the transnational dimension of the underlying conflicts invisible. The crucial parameters of accountability, deduced from constitutional principles of proportionality, equality, and protection of trust, framed the crisis-induced conflicts as an ideological issue between liberal, market-oriented and progressive, welfare state-oriented ideas of order and as a national redistributive

[33] See Acórdão N.º 187/2013, Tribunal Constitucional; acórdão N.º 413/2014, Tribunal Constitucional; acórdão N.º 574/2014, Tribunal Constitucional.

[34] For a doctrinal criticism of the concept of 'proportional equality', see Pereira, *supra* n. 31, de Brito, *supra* n. 31; de Brito/Coutinho, *supra* n. 31; for a critique of this phase of the PTC's jurisprudence more generally see de Brito, 'Putting Social Rights in Brackets?', 4 *European Journal of Social Law* (2014), 87–103, 98f., and the various contributions in Ribeiro/Coutinho (eds.), *O Tribunal Constitucional e a crise* (Almedina, 2014).

[35] Acórdão 575/2014, Tribunal Constitucional, para 19f.

[36] Contiades/Fotiadou, *supra* note 20.

[37] Vieira/da Silva, *supra* note 19.

[38] Brito Veira/Carreira da Silva/Pereira, 'Waiting for Godot? Welfare Attitudes in Portugal Before and After the Financial Crisis', 65 *Political Studies* (2017), 535–558, 539.

conflict between public servants and private sector employees. Despite strong arguments in favour of submitting the question of the compatibility of the conditionalities with the fundamental rights of the Union to the ECJ,[39] the PTC has not yet submitted any question from the crisis case law to the ECJ for a preliminary ruling. While the court thereby may have prevented an open conflict between national constitutional principles and European constitutional law, it missed the opportunity to renegotiate the social content and the social formative power of the Union's constitutional law and to concretise it in the context of the crisis.[40] Instead, the question of the mode and measure of solidarity and the distribution of any adjustment costs was nationalised and the mode of accountability remained largely deductive.

10.3.2 *'Lost in National Democracy?': The Aporias of the Eurozone Crisis Case Law of the German Federal Constitutional Court*

At first glance, similar considerations apply to the German Federal Constitutional Court. Like the PTC, the Bundesverfassungsgericht has set important limits to crisis management, and like the PTC, it has nationalised the crisis-induced conflict by emphasising the constitutional necessity of an autonomous choice of means at the national level. However, this type of 'nationalisation' turns out to be even more ambivalent as it harbours a strong disintegrative potential as the court largely ignores the transnational horizontal effects of its own decisions.

Already in its early decisions on the eurozone crisis measure, the GFCC insisted on the requirement of parliamentary participation in all measures with budgetary impact.[41] Building on its earlier jurisprudence in *Maastricht*[42] and *Lisbon*,[43] the court ruled that the Bundestag must always hold plenary sessions when 'essential decisions which affect the overall budgetary responsibility of the German Bundestag' are involved.[44] The court thereby blocked a delegation of decisions on crisis management to a smaller committee and insisted that the Bundestag must retain a 'continuing influence'[45] and must not be relegated to merely nodding through executive measure of

[39] See Kilpatrick, 'Are the Bailouts Immune to EU Social Challenge Because They Are Not EU Law?', 10 *EuConst* (2014), 393–421, 401.

[40] See also Violante/André, 'The Constitutional Performance of Austerity in Portugal', in Ginsburg et al. (eds.), *Constitutions in Times of Financial Crisis* (Cambridge University Press, 2019), pp. 229–260.

[41] BVerfGE 129, 124 – *EFS*; BVerfGE 130, 318 – *Rat der 9*; BVerfGE 131, 152 – *ESM/Euro-Plus-Paket*.

[42] BVerfGE 89, 155, 185 – *Maastricht*

[43] BVerfGE 123, 267, 351ff. – *Lissabon*.

[44] BVerfGE 130, 318, 356ff. – *Rat der 9*.

[45] As already in BVerfGE 129, 124, 186 – *EFS*.

crisis management.[46] In addition, the court also held that the federal government had violated its constitutional duty to provide information to the parliament[47] and stressed the need to ensure that the information forwarded to the parliament was used by the latter to allow for an open and democratic will-formation.[48] This line of reasoning reflects a mostly deductive and procedural approach to constitutional accountability. It concretises the constitutional requirements by highlighting the necessity of procedural safeguards for open parliamentary debate and will formation.

However, other parts of the court's crisis jurisprudence rather led to narrowing the space for constitutionally legitimate definitions of the common good and the measures to its realisation. In the *ESM*-ruling[49] the court build on its earlier case law in *Maastricht*, where it made Germany's participation in the monetary integration conditional to 'German conditions'[50] by linking price stability and budgetary discipline as the supreme objective of the future currency area to the principle of national democratic self-determination.[51] In the *ESM*-ruling the GFCC tightened this standard further and considered the design of the monetary union as a stability community as the 'essential basis' for Germany's participation in the EMU.[52] While the court held the concrete mechanism in this case to be constitutional, it effectively made any solidarity-based aid measures dependent not only on the approval by the Bundestag but also on the parliamentary prerogative to determine conditionalities ensuring that the overriding goal of price stability and balanced budgets is not jeopardised.[53]

Given the dominant executive mode of technocratic 'risk management'[54] during the eurozone crisis, the court can certainly be praised for protecting parliamentary budgetary rights, defending the openness and revocability of

[46] BVerfGE 132, 195, 240 – *ESM/Fiskalpakt I*; BVerfGE 135, 317, 401 – *ESM/Fiskalpakt II*; BVerfGE 131, 152, 203 – *ESM/Euro-Plus-Paket* (referring on BVerfGE 129, 124, 178f.; 130, 318, 344f.); see also BVerfGE 130, 318, 344 – *Rat der 9*.

[47] BVerfGE 131, 152, 215ff.; 223ff. – *ESM/Euro-Plus-Paket*.

[48] BVerfGE 132, 195, 240 – *ESM/Fiskalpakt I*; BVerfGE 135, 317, 401 – *ESM/Fiskalpakt II*; BVerfGE 131, 152, 203 – *ESM/Euro-Plus-Paket* (referring on BVerfGE 129, 124, 178f.; 130, 318, 344f.); see also BVerfGE 130, 318, 344 – *Rat der 9*.

[49] BVerfGE 132, 195, 240 – *ESM/Fiskalpakt I*; BVerfGE 135, 317, 401 – *ESM/Fiskalpakt II*.

[50] On the problematic consequences of this 'integration on German terms', see already Joerges, 'Taking the Law Seriously: On Political Science and the Role of Law in the Process of European Integration', 2 *European Law Journal* (1996), 105–135, 114ff.

[51] BVerfGE 89, 155, 202, 204 – *Maastricht*.

[52] BVerfGE 132, 195, 243 – *ESM/Fiskalpakt I*; previously already in BVerfGE 89, 155, 205 – *Maastricht*; BVerfGE 97, 350, 369 – *Euro*.

[53] BVerfGE 132, 195, 279ff. – *ESM/Fiskalpakt I*.

[54] Chalmers, 'Crisis Reconfiguration in the European Constitutional State', in id. et al., *The End of the Eurocrats' Dream: Adjusting to European Diversity* (Cambridge University Press, 2016), pp. 266–299, 282ff.

democratic legislation against supposed crisis imperatives.[55] While this again strengthened procedural accountability under German constitutional law, the decision also contains a substantial element. The court closed the potential meanings of democracy under the Basic Law by linking it to price stability and frames possible alternatives for shaping transnational solidarity in the Eurozone (e.g. Eurobonds or a transfer union) as breaches of German constitutional law. It thereby significantly narrows the political space for negotiating a European common good. Furthermore, by linking the national principle of democracy to supranational conditionality, the court de facto contributes to depriving the legislatures in the debtor countries of precisely those political options that the court insists on securing on the national level. From a transnational perspective, it thus becomes apparent that given the power asymmetries of the consolidation regime 'more democracy' in Germany is synonymous with 'less democracy' in Greece or Portugal.[56] Rather than critically reflecting transnational power asymmetries enshrined in the crisis-ridden EMU, the court found itself entangled in an aporia of a national state-based understanding of democracy.

Unlike the PTC, however, the GFCC did not ignore the transnational dimension of the underlying conflicts entirely. In its *Outright Monetary Transactions* (OMT) and *Public Sector Purchase Programme* (PSPP) rulings,[57] it referred for the first time to the ECJ and framed the conflicts about crisis management basically as vertical conflicts about competences. The core complaint underlying both the OMT and the PSPP decision was that by buying government bonds of overly indebted eurozone Member States, the European Central Bank (ECB) is de facto violating Article 123 TFEU and thus acting ultra vires. These measures were said to imply potentially unlimited liability on the part of Germany, preventing the Bundestag from exercising its overall budgetary responsibility and thus, violating constitutional identity. In contrast to its *Maastricht* ruling the GFCC now emphasised the constitutional necessity of strengthening the democratic accountability of the ECB and limiting its independence. By referring these two cases to the ECJ, the court created an important opportunity for the transnational dimension of the conflict to be articulated in the language of European constitutional law. The GFCC's referral in OMT was celebrated by some as a 'good day for democracy in

[55] This was also the overall very positive assessment in Kahl, 'Bewältigung der Staatsschuldenkrise unter Kontrolle des Bundesverfassungsgerichts: Ein Lehrstück zur horizontalen und vertikalen Gewaltenteilung', 128 *DVBl* (2013), 197–207.

[56] In this sense also the criticism of Everson/Joerges, 'Who Is the Guardian for Constitutionalism After the Financial Crisis', 63 *LEQUS Paper* (2013), pp. 5–25, 17.

[57] BVerfGE 134, 366 – *OMT I*; BVerfGE 142, 123 – *OMT II*; BVerfGE 154, 17 – *PSPP*.

Europe' because it revealed the legitimacy problems of the ECB's relevant decisions[58] and was said to provide an effective red line limiting technocratic crisis management.[59]

While the court in the end accepted the ECJ's assessment in OMT that the ECB has not exceeded its competences as the programme had primarily monetary policy character,[60] the controversy about how to hold the ECB accountable also for the transnational economic impact of its decisions continued in the PSPP case. Upon referral, the ECJ again argued that indirect economic policy effects do not call into question the monetary policy character of a measure and emphasised that independence of the ECB precluded a stricter proportionality review. The GFCC insisted on strictly reviewing whether the ECB had proportionally fulfilled its functions or exceeded its competences by acting disproportionately. The GFCC eventually found that the ECB had acted ultra vires.[61] It held that the 'right to democracy' under German constitutional law was violated since the ECB had neither examined nor proven that the measures foreseen in the PSPP were proportionate despite their effects on economic policy.[62] The measures taken by the ECB therefore resulted in a 'structurally significant shift of competences'[63] to the detriment of the Member States. The court also found the ECJ's decisions to 'obviously' transgress its competences as its reasoning was, in view of the GFCC, methodologically 'incomprehensible' and thus 'objectively arbitrary'.[64] On one hand, the decision by the GFCC deserves credit for laying bare the accountability problems of the executive-driven EMU governance and insisting on the centrality of parliamentary will-formation.[65] On the other hand, it also bears the risk of constitutional closure and power shift to courts rather than to the legislator. A strict proportionality review as required by the GFCC would ultimately empower constitutional courts to take a decision on

[58] Murswiek, 'ECB, ECJ, Democracy, and the Federal Constitutional Court: Notes on the Federal Constitutional Court's Referral Order from 14 January 2014', 15 *German Law Journal* (2014), 147–165.

[59] Petersen, 'Karlsruhe Not Only Barks, But Finally Bites – Some Remarks on the OMT Decision of the German Constitutional Court', 15 *German Law Journal* (2014), 321–327. Others were more critical, however: Wendel, 'Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference', 10 *European Constitutional Law Review* (2014), 263–307.

[60] C-62/14, *Peter Gauweiler and Others v Deutscher Bundestag*, ECLI:EU:C:2015:400.

[61] BVerfGE 154, 17, 95ff., 127ff. – *PSPP*.

[62] BVerfGE 154, 17, 94 – *PSPP*.

[63] BVerfGE 154, 17, 117 – *PSPP*.

[64] BVerfGE 154, 17, 96, 116 – *PSPP*.

[65] See also the critique by Wendel, 'Paradoxes of Ultra-Vires Review: A Critical Review of the PSPP Decision and Its Initial Reception', 21 *German Law Journal* (2020), 979–994, 989.

conflicting monetary and economic policy objectives.[66] This would not only undermine the ECB's independence but also increase the risk that particular economic and monetary policy understandings are again constitutionalised. Substantial accountability could eventually be traded for closing the democratic space for constantly (re-)negotiating the common goods in the European constitutional order.

10.3.3 *In Search of a European Common Good: Deductive and National Accountability in a Transnational Context*

The two constitutional courts reviewed in the previous sections largely applied a deductive approach to accountability in the EMU by applying exclusively domestic constitutional standards to transnational solidarity conflicts. In the case of the GFCC, the primary benchmark was national parliamentary sovereignty as well as fiscal stability as enshrined in the German Basic Law. In the case of the PTC, the primary benchmark were the principles of proportionality, equality and equal burden sharing as enshrined in the Portuguese Constitution. Likewise, both courts tended to 'nationalise' transnational solidarity conflicts rather than taking into account horizontal effects (in the case of Germany)[67] or supranational constitutional law (in the case of Portugal). By ignoring the European dimension of decision-making in the EMU, this line of jurisprudence decreased publicness rather than increasing it. It basically reduced the conflict to matters of domestic common goods and excluded the possibility of thinking about transnational, European common goods. To the extent that domestic constitutional courts refer to EU constitutional law, the relationship between domestic and EU constitutional law is characterised by conflict, denial of relevance or a rhetoric of deficit. What is profoundly absent is any vision of a European common good based on EU constitutional values (such as solidarity) that could inform the management of transnational solidarity conflicts and lead to EU constitutional law as a benchmark for 'publicness'. Therefore, domestic case law on transnational solidarity conflicts has at best produced integrative effects for domestic constitutional orders (inwards) but did not contribute to a further development and deepening of a European constitutional order. This is particularly remarkable, given that on a more technical regulatory level the eurozone crisis boosted further integration in the EMU.

[66] Wendel correctly emphasises the limited determinative power of the law with regard to monetary decisions. Wendel, ibid., at p. 990.

[67] For a profound critique of the PSPP-judgement in that respect, see Wendel, *supra* note 65, 993f.

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The two domestic constitutional courts under review addressed transnational solidarity conflicts largely through procedural forms of accountability insisting on the need of an informed parliamentary decision and requiring the legislator to properly justify austerity measures. However, both constitutional courts have also applied some substantive aspects of accountability. The GFCC has stressed the relevance of a 'proportionality review' in the context of ECB decisions and has tried to push the ECJ to apply stricter scrutiny in this respect. However, it applied this standard only to the exercise of competences by the ECB and thereby deprived the principle out of its usual function of providing a yardstick for evaluating interferences with fundamental rights. The PTC has also applied substantive elements of accountability by developing and applying a standard of 'proportional equality' to measures of crisis reaction.

The advantage of domestic constitutional accountability regarding the achievement of integrative conflict management lies in the broad accessibility and procedural inclusiveness of accountability mechanisms. A diverse spectrum of political actors and/or individuals can challenge EMU-related decisions before domestic constitutional court. The procedural requirements are particularly low in the case of the German individual complaint (*Verfassungsbeschwerde*), but also the Portuguese system allows for a broad range of actors to challenge such decisions. Domestic constitutional accountability therefore allows to make transnational solidarity conflicts visible in the first places and channels as well as transforms them into constitutional conflicts. However, substantive emptiness of domestic constitutions remains limited during the management of transnational solidarity conflicts. While at least the GFCC kept an eye on trying to ensure openness of political will-formation in the German Bundestag, it otherwise 'closed' the meaning of several constitutional norms by upgrading economic concepts such as conditionality to constitutional principles. It thereby even enforced the 'no alternative' discourse by giving economic and political preferences the credit of constitutional value. The PTC on the other hand tried to ensure some substantial emptiness by 'opening up' the principle of equality to adapt it to new challenges and to use it as a tool to contest the EMU logic of market responsibility. At the same time, it 'closed' the Portuguese constitutions in the respective cases for interpretations that would require further austerity measures. At the very least, constitutional accountability before domestic courts has made transnational solidarity conflicts and accountability gaps more visible. It may also have partly contributed to enhancing the transparency of decision-making and increased publicness on the domestic level by positioning domestic constitutional principles as a benchmark for ensuring common goods.

10.4 THE UNPREPARED COURT: LIMITATIONS OF LEGAL ACCOUNTABILITY BEFORE THE ECJ

In view of the transnational conflict structure and the lack of domestic courts to take it into account, legal accountability at the supranational level seems to be a promising way to close accountability gaps in the EMU. A closer look, however, reveals that the ECJ was rather unprepared to fulfil this function and to contribute to an integrative role of European constitutional law.

The court's decisions in *Pringle*, *Gauweiler* and *Weiss* were paradigmatic of its familiar role in arbitrating vertical conflicts between the EU and its Member States. In *Pringle* the ECJ was asked to rule on the compatibility of the ESM Treaty with the no-bailout clause in Article 125 TFEU and the prohibition of the purchase of bonds under Article 123(1) TFEU. As such, the case concerned a fundamental premise of the EMU, namely that monetary policy (exclusive Union competence) and economic policy (primary competence of the Member States) can be clearly separated. At the core of the case were therefore substantial questions about fundamental constitutional principles governing the Economic and Monetary Union (EMU). In *Pringle*, the ECJ waved through the rescue mechanism so urgently needed to save the euro. It held that the ESM was an instrument that cannot be assigned to monetary but belonged to economic policy, so that the Member States did not violate the EU's order of competences when introducing the ESM on the basis of an international treaty.[68] Thus, the ECJ affirms the so-called separation thesis[69] (*Trennungsthese*), according to which economic policy and monetary policy can be accurately separated even under a common currency. The court thereby deproblematised the constitutional dimension of the ESM rather than engaging in the development of meaningful constitutional benchmarks for crisis reaction. Regarding the no-bailout clause, the court argued that the provision was intended to ensure that the state budgets 'remain subject to the logic of the market'.[70] Mutual financial assistance was therefore permissible as long as it did not threaten the overriding goal of 'maintaining the financial stability of the monetary union'.[71] In the view of the ECJ, this is ensured where the 'granting of financial assistance is tied to conditionalities that should ensure that the recipient states continue to pursue sound budgetary

[68] C-370/12, *Thomas Pringle v Government of Ireland and Others*, ECLI:EU:C:2012:756, paras 56, 58ff.

[69] On this Goldmann, 'Adjudicating Economics? Central Bank Independence and the Appropriate Standard of Judicial Review', in 15 *German Law Journal* (2014), 265–280, 269ff.

[70] C-370/12, *Thomas Pringle v Government of Ireland and Others*, *supra* note 65, para 135.

[71] Ibid.

policies'.[72] Thereby the ECJ – just like the GFCC – upgrades conditionality as a specific regulatory means to a constitutional requirement. By substantiating constitutional accountability with a particular regulatory idea, the ECJ itself contributes to the long-term closure of the political and constitutional discourse. Rather than reducing political discretion and potential interpretations of the common good in such a way, the court could have emphasised the constitutional need for political deliberation and parliamentary decision-making even in times of a financial crisis and could also have considered applying the EU Charter of Fundamental Rights whenever the act in the context of rescuing the common currency. Instead, the ECJ missed an opportunity to update a symbolic constitutional *topos* for a European constitution in times of crisis.

Compared to *Pringle*, the evaluation of the ECJ's Case Law in *Gauweiler* is more ambivalent in terms of accountability. On one hand, the court again confirmed the idea of strict separation between monetary and economic policy,[73] which allowed the court to rule the OMT program to remain within the mandate of the ECB as a purely monetary measure. On the other hand, ECJ now tried to develop more substantial benchmarks for the actions of the ECB by requiring that crisis measures are temporary limited[74] and introducing a proportionality test as a yardstick for assessing the ECB's action.[75] The concrete evaluation by the ECJ boiled essentially down to a mere rationality control and still granted the ECB broad discretion as 'monetary policy issues are usually controversial'.[76] Nevertheless, the introduction of a proportionality test in *Gauweiler* and maintained later on in *Weiss* can be understood as a cautious attempt to tie the ECB's crisis response to general constitutional topoi and to update the concrete meaning in central bank's competences in light of the recent changes in the Eurozone. It thereby introduces a light procedural standard of accountability rather than a substantial requirement. While this prevents the court from narrowing constitutional meaning to economic considerations, it also fails to grasp and address the full dimension of the accountability and legitimation problems that arise from the increasing involvement of the ECB in the political processes of macroeconomic adjustment through conditionality.

[72] Ibid., para 143, also paras 111, 121.
[73] For a critical perspective, see Goldmann, *supra* note 66, 269f., Borger, 'Outright Monetary Transactions and the Stability Mandate of the ECB', 53 *Common Market Law Review* (2016), 139–196, 149, 191.
[74] C-62/14, *Peter Gauweiler and Others v Deutscher Bundestag*, *supra* n. 60, para 12.
[75] Ibid., para 69.
[76] Ibid., para 75.

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In contrast to the classic conflicts of competence, the ECJ proved much more hesitant to accept jurisprudence in conflicts over the legality of Union-induced crisis measures resulting from conditionalities, such as wage and pension cuts.[77] From the very beginning of the crisis, visibility of conflicts over conditionalities before the ECJ was limited for three structural reasons. First, major crisis instruments, such as the ESM, partly took place outside the European Treaties, so that it was difficult to identify contestable acts of the Union institutions. In *Mallis and Malli*, for instance, the General Court of the EU denied attribution of negotiations under the ESM to the European Commission.[78] Second, since the national authorities were left with room for manoeuvre in the implementation, even if the crisis measures were clearly traceable to the action of an EU institution, it was difficult to prove that individuals were directly affected by EU measures in the sense of Article 263(4) TFEU. In *ADEDY* the court held that the applicants were not directly affected because the contested decision of the Council of the EU left Greece with considerable room for manoeuvre in implementing the requirements.[79] Finally, national crisis response measures were only rarely implemented in the form of binding Union legal acts but were often based on Memoranda of Understanding whose legal nature and binding effect were disputed.

This latter problem also affected cases brought to the court under the preliminary reference procedure. In the first phase of the eurozone crisis, the General Court rejected a total of seven references from Portuguese and Romanian courts concerning the compatibility of conditionality-induced wage cuts in the public service with fundamental rights under the EU Fundamental Rights Charter. In all seven cases, the court argued that the referring courts had not sufficiently demonstrated the link between the wage reductions imposed by national laws and Union law.[80] Unlike in other cases, the court refrained from re-interpreting the referrals so as to establish its jurisdiction and did not ask the

[77] The following argument is based on an article that I published together with Christoph Krenn (Farahat/Krenn, 'Der EuGH in der Eurokrise: Eine konflikttheoretische Perspektive', 57 *Der Staat* (2018), 357–385, 366ff.).

[78] T-327/13, *Mallis and Malli v European Commission and European Central Bank (ECB)*, ECLI:EU:T:2014:909, para 39–45.

[79] T-541/10, *ADEDY and others v Council of the European Union*, ECLI:EU:T:2012:626, paras 70f., 76, 78.

[80] C-434/11, *Corpul Naţional al Poliţiştilor v Ministerul Administraţiei şi Internelor (MAI) and Others*, ECLI:EU:C:2011:830, para 16; C-462/11, *Victor Cozman v Teatrul Municipal Târgovişte*, ECLI:EU:C:2011:831, para 15, C-134/12, *Corpul Naţional al Poliţiştilor v Ministerul Administraţiei şi Internelor and Others*, ECLI:EU:C:2012:288, para 13; C-369/12, *Corpul Naţional al Poliţiştilor v Ministerul Administraţiei şi Internelor and Others*, ECLI:EU:C:2012:725, para 15; C-128/12, *Sindicato dos Bancários do Norte and Others v Banco Português de Negócios SA*, ECLI:EU:C:2013:149, para 12; C-264/12, *Sindicato Nacional dos Profissionais de Seguros e*

domestic courts for clarification either. The court thereby failed to provide a meaningful standard of European constitutional accountability and severely restricted access to accountability.

However, in the course of the crisis, the ECJ cautiously adapted to the new type of conflict. In *Florescu*,[81] the ECJ willingly reformulated the referred questions and held that the measures taken by the Romanian government were in fact implementing the MoU, and thus fell within the scope of application of the EU Charter of Fundamental Rights pursuant to Article 51. In *Ledra Advertising*, the Court activated the rules on the non-contractual liability of the Union. The court clarified that EU institutions were obliged to sign memoranda for the ESM only if they are compatible with Union law, including the EU Charter of Fundamental Rights and that they could otherwise be held liable under Article 268 in conjunction with Article 340 TFEU.[82] The outcome in terms of substantive accountability, however, remained rather meagre also in the case law following *Ledra Advertising*. The court readily accepted that interferences with fundamental rights were justified in the light of the imminent economic risks and raised a high bar for actually activating liability of EU institutions in this respect.[83] By resorting to the rhetoric of the economic state of emergency, the court ultimately refused to concretise a substantive fundamental rights standard. Neither did it specify what the standard would be to return to after the acute crisis phase nor did it introduce a temporal limitation of the crisis-induced interferences.

To sum up, the EU courts allowed only for limited access to constitutional accountability. In terms of accountability goods, the ECJ focused primarily on economic constitutional values but only hesitantly applied other constitutional values such as social rights and solidarity as a benchmark for substantive accountability. It thereby only rarely allowed for contestation of dominant narratives of the understanding of constitutional norms but rather joined domestic courts in upgrading specific economic concepts and political preferences (e.g. conditionality) to constitutional values. Rather European courts primarily engaged in procedural accountability by introducing requirements for justification, thus serving to ensure the effectiveness and transparency of EMU decision-making,

Afins v Fidelidade Mundial – Companhia de Seguros SA, ECLI:EU:C:2014:2036, para 19–21; C-665/13, *Sindicato Nacional dos Profissionais de Seguros e Afins v Via Directa – Companhia de Seguros SA*, ECLI:EU:C:2014:2327, paras 13–15.

[81] C-258/14, *Eugenia Florescu and Others v Casa Judeţeană de Pensii Sibiu and Others*, ECLI:EU:C:2017:448.

[82] C-8/15 P, *Ledra Advertising Ltd and Others v European Commission and European Central Bank* ECLI:EU:C:2016:701, paras 55–64.

[83] See C-8/15 P, ECLI:EU:C:2016:701, para 74; equally scarce T-531/14, *Leïmonia Sotiropoulou and Others v Council of the European Union*, ECLI:EU:T:2017:297, paras 88ff.; T-107/17, *Frank Steinhoff and Others v European Central Bank*, ECLI:EU:T:2019:353, para 116.

but often also to merely rubber-stamping crisis measures. Only to a very limited extent did the ECJ ensure substantive accountability and contribute to the publicness of EMU decisions. In light of this analysis, it seems obvious that European constitutional accountability mechanisms did not yield substantial integrative effects and did not ensure meaningful accountability in the sense of concretising and re-negotiating constitutional common goods.

10.5 LIMITS AND PERSPECTIVES OF LEGAL ACCOUNTABILITY

Instead of a conclusion, the final section of this chapter seeks to address the limits of constitutional accountability of the EMU and to sketch out some perspectives for its future development. We have already seen that the capturing of constitutional accountability by economic policies and limited access to supranational accountability mechanisms pose significant obstacles to develop European constitutional law as a meaningful benchmark for providing publicness. However, the call for courts to play a more active and meaningful role in providing publicness as an accountability good also raises issues. As courts are typically not legitimised to take distributive decisions and likewise often not qualified to substantially review technocratic institutions, a more substantial role of courts in the EMU accountability architecture raises concerns as to the separation of powers.

As a preliminary matter, judicial review in modern societies can be seen as not only ensuring the rule of law but also contributing to democratic will-formation. The historian Pierre Rosanvallon has shown from a conflict-theoretical perspective that every majority decision excludes a part of the democratic people, while normatively the decision of the majority is supposed to represent the general will of the people and thus implicitly carries the ideal of unanimity.[84] The more pluralistic societies become, the less this implicit ideal, according to which the democratic majority also represents society as a whole, is true. It can no longer be claimed that future political decisions are already implied in the electoral decision.[85] The members of a pluralistic demos feel they belong to different social groups simultaneously so that 'the people' sort of becomes a plural of minority.[86] Consequently, parliamentary majorities do not represent the people as a whole.[87]

[84] Rosanvallon, *supra* note 5, p. 35ff.
[85] In detail on the contradiction between the fiction of unanimity and democratic pluralism with regard to the legitimacy of general elections, ibid., p. 53ff.
[86] Ibid.
[87] Ibid., pp. 7ff., 41f.

There is, therefore, an increasing need to allow for competing expressions of the public will.[88] Separation of powers could thus be best understood as an arrangement that gives institutional expression to the plurality of society and represents it in different forms. Constitutional courts lend themselves as a forum where such competing visions of the public will can not only be expressed but need to be taken into account. Using the constitution as a yardstick for accountability, constitutional courts can ensure that a currently dominant vision of the common good always needs to justify itself in the light of all other potential versions of the common good that are embodied in the constitution. In this sense, the accountability good of publicness should not be misunderstood as requiring compliance with a specific common good but rather as ensuring that the open-ended search for a common good remains the reference point of policy choices.

However, parliamentary legislation by democratically elected representatives is still an irreplaceable mechanism of responsiveness in a democratic polity. After all, the open-ended debate about and re-negotiation of the common good cannot take place before courts alone. Not only would this overburden the courts, but it would also ignore that democratic will-formation is not only an individualistic endeavour but rather requires collective processes. In light of these considerations, the primary function of future constitutional accountability mechanisms should be to foster adequate decision-making procedures and ensure sufficient space for open political will-formation and decision-making. It should help make political preferences that are often hidden behind a rhetoric of necessity visible again and challenge not only their necessity but also their compatibility with the normative script embodied in the constitution.[89] Importantly, this also implies making sure that constitutional provisions are not hijacked by political preferences or by economic concepts. In the context of the EMU in particular and the EU more generally, a core function of constitutional accountability should also be to allow for identifying and openly addressing transnational solidarity conflicts. To properly address the transnational dimension of solidarity conflicts and EMU action, both domestic and EU courts need to better reflect the impact of their decisions on other legal orders within the EMU. Only then can they together contribute to rendering European constitutional law into a meaningful normative framework for accountability.

[88] Ibid., at p. 243.

[89] On how the ECJ's procedural and organisational law could be 'democratised' for the Court to be able to better exercise such role, see Krenn, *The Procedural and Organisational Law of the European Court of Justice. An Incomplete Transformation* (forthcoming, Cambridge University Press, 2022) Chapter 5.