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978-1-107-05655-8 - The Eurozone Crisis: A Constitutional Analysis

Kaarlo Tuori and Klaus Tuori

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The Eurozone Crisis

Topical and timely, this book offers an economically informed constitutional analysis of European responses to the crisis. It discusses the longer-term proposals on the table including rescue measures and stability mechanisms, as well as the tightening of European economic governance. The authors see the European constitution as a multi-dimensional and multi-temporal process of constitutionalisation. They examine how the crisis has catapulted the economic constitution back to the 'pacemaker' position from where it determines developments in the political and social dimension. However, now the key role is not played by the constitution of 'microeconomics', focusing on free movement and competition law, but by the constitution of 'macroeconomics', introduced in Maastricht.

Kaarlo Tuori is Professor of Jurisprudence and Academy Professor at the University of Helsinki. He is also Vice President of the Venice Commission of the Council of Europe and serves as a consulting expert on the Constitutional Law Committee at the Finnish Parliament.

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Series editors' preface

This new contribution from Kaarlo Tuori and Klaus Tuori, offering an innovative constitutional analysis of the Eurozone crisis, is an important addition to the series *Cambridge Studies in European Law and Policy*. Combining expertise on law, theory and economics, the authors are able to open our eyes to the many aspects of the Eurozone crisis and its ramifications for societies and polities. They want to take us beyond thinking about the crisis merely as a financial crisis, a crisis of the banking sector or a threat to public debt, and to give it a broader public order and constitutional perspective. The Eurozone crisis goes to the very heart of the European constitutional order, understood in a multi-perspectival manner to incorporate both the legal order sustained by the EU treaties, and also the systems of the Member States. The Eurozone crisis thus entreats us to consider also issues of democracy and transparency, as well as issues about the values which underpin our societies in the early twenty-first century including issues around security in its widest sense. Tuori and Tuori, through a historically and conceptually grounded analysis, show how these issues are intimately linked to each other. We warmly welcome this volume to the series.

Jo Shaw
Laurence Gormley

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Preface

This is a book about relations: relations between constitutional law and economy, but also between different dimensions of the constitution and different layers of the economic constitution. These relations transfer and transform the effects of shocks introduced by the economic crisis, and, by the same token, testify to the interconnect-edness of the constitutional system. Often enough, relations take the form of open-ended dialogues. We hope to make a modest contribution to these dialogues by pointing to some hitherto neglected connections and repercussions.

The German ordoliberal school has pursued the ambitious project of combining legal and economic scholarship; much more ambitious, we would argue, than the law and economics movement of recent decades. Law and economics have mainly been content with buttressing legal reasoning with policy arguments drawn from an economic assessment of alternative readings of law. In contrast, ordoliberals have sought cooperation between law and economics at a deeper, conceptual level. In this cooperation both partners are supposed to learn from each other. Thus, lawyers are not merely at the receiving end, as is their lot in law and economics.

For ordoliberals, the need of a dialogue between lawyers and economists arose from the perceived necessity of an *ordo* – a legal and institutional framework – for the functioning of the economic system. A central means for facilitating dialogue consisted of common concepts which had their place in both law and economics. One of these key concepts – if not the very key concept – was ‘economic constitution’.

Adhering to the general dialogical style if not the substantive tenets of ordoliberals, our book is a product of cooperation between legal

scholarship and economics. One of us is a constitutional lawyer and legal theorist, the other both an economist and a lawyer with a professional background at the ECB during the years of preparing for introduction of the common currency. To facilitate mutual dialogue and learning, and to guarantee textual coherence, we chose to co-author all the chapters; the reader, though, may, if he or she so wishes, make more or less educated guesses as to who has been responsible for drafting which parts of the manuscript. We present a constitutional scrutiny of the Eurozone crisis which includes economic analyses as well. We justify the place of economic analyses in our constitutional discussion with a theoretical view of constitutions in general and the European constitution in particular. We employ a relational notion of constitution and argue that a constitution must be examined through the interrelation between constitutional law and its object of regulation. Here we find the concept of economic constitution highly relevant.

We acknowledge the ordoliberal origins of this concept, but we do not subscribe to the contents the ordoliberals assigned to it. For ordoliberals the economic constitution signified a fundamental decision in favour of a market economy, based on free competition. We detach the concept from its link to a specific model of the economy and simply define it through the interrelation between constitutional law and economy. In the European economic constitution we distinguish between two layers: the microeconomic constitution, centred around free movement and competition law and introduced by the Treaty of Rome (1958), and the macroeconomic constitution, centred around aggregate economic objectives and economic policies, and introduced by the Treaty of Maastricht (1993). In its constitutional aspect, the Eurozone crisis must be examined primarily as a crisis of the Maastricht macroeconomic constitution. Yet, in our discussion we continually recall the interdependence of the two layers of the European economic constitution.

We follow our programme of mingling economic with legal analysis by, first, reconstructing the economic assumptions which underpinned the Maastricht principles of the macroeconomic constitution; and, second, by examining the economic background of the present crisis, especially how the underlying economic assumptions have stood the test of reality. We conclude that many of the assumptions have been invalidated; that this has led to a teetering of some of the vital principles of the Maastricht macroeconomic constitution; and that this, in turn, has launched a significant constitutional mutation, some aspects

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of which were consecrated in the *Pringle* ruling of the Court of Justice of the European Union in November 2012. The economic analyses do not constitute an external introduction to but, rather, an integral element of the constitutional discussion.

Our notion of constitution, emphasising the interaction of constitutional law and its societal object of regulation, is an important aspect, but not the only aspect, of the general approach we term ‘relational analytic’. We also point to the relationships linking the economic constitution to other dimensions of the European constitution, such as the political and social constitutions. An essential part of the Eurozone crisis as a constitutional crisis consists of its repercussions for democracy and social rights.

Our objective of treating economic analysis as an integral part of constitutional investigation has led us to consult our colleagues not only in law but in economics as well. We have greatly benefited from comments by Joxerramon Bengoetxea, Niilo Jääskinen, Sixten Korkman, Tuomas Ojanen, Allan Rosas, Tuomas Saarenheimo, Suvi Sankari, Jukka Snell, Pedro Teixeira and Vesa Vihriälä. We have learned a lot but, of course, remain solely responsible for the views put forth in this book.

Things in Europe have moved fast, although we have been able to complete our manuscript in a period of relative calm. We have been able to follow developments up to June 2013.

We have received financial support for our work from the Finnish Academy, through the Centre of Excellence ‘Foundations of European Law and Polity’, and the Wihuri Foundation (Klaus Tuori). The quite rapid production of the manuscript would not have been possible without the invaluable help of our research assistants Anna-Maria Rehbinder and Mikko Hakkarainen, and our linguistic adviser Christopher Goddard. During completion of the manuscript, one of us was sitting on the porch of his summer house in Loppi in Central Finland while the other was sailing in the waters between Finland and Sweden; Anna-Maria was fine-tuning the footnotes and the typography in Mumbai; Christopher was checking the language at his forest home near Riga; and our very helpful editor Helen Frances was waiting for the end result in Cambridge. A wonderful example of positive globalisation!

We dedicate this book to the Helsinki CoE ‘Foundations of European Law and Polity’ and to all our colleagues there. The Centre, financed by the Finnish Academy, has provided an extremely stimulating environment for our research.