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Kaarlo Tuori and Klaus Tuori

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PART I

Setting the scene

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1 Introduction: framework of the analysis

The Eurozone crisis possesses many aspects. Most conspicuously, it has manifested itself as an economic, financial and fiscal crisis; as increasing unemployment and laggard economic growth; as bottlenecks in the financial system as well as liquidity and solvency problems of financial institutions; and as mounting public debt and threatening state insolvency. But at issue is also a constitutional crisis. The crisis has shaken the foundations of what we shall term the second, macroeconomic layer of the European economic constitution. The Maastricht principles of the European economic constitution are teetering, with implications reaching out beyond the economic dimension and extending to the national level, too. A constitutional analysis of the crisis must adopt a broad perspective and a comprehensive analytical framework.

Our discussion of the constitutional implications of the Eurozone crisis is based on a specific understanding of what constitutions in general and the European constitution in particular are about. In the nation-state context, especially in the revolutionary French and American traditions, constitutions are seen as unified normative entities which result from the exercise of constituent power – *pouvoir constituant* – by the people – the demos – at a clearly definable constitutional moment. This tripartite conceptual apparatus – ‘constituent power’ – ‘demos’ – ‘constitutional moment’ – is not applicable to the European constitution: there is no unified European constitution to which the European citizenry would have given birth as an expression of its constituent power at a particular constitutional moment. When discussing the European constitution, revolutionary constitutional concepts must be replaced by an evolutionary counterpart; namely constitutionalisation. Characteristic of the European

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constitution is its process-like nature; it is not a temporarily and substantively clear-cut normative entity but, rather, a continuous process of constitutionalisation. Of course, this process includes such high profile constitutional events – constitutional speech acts, we could also say – as new Treaties and Treaty amendments, such as the Treaty of Rome and the Treaty of Maastricht, which have played a crucial role in the development of the economic constitution. But it also includes much else, speech acts by other constitutional actors, such as the ECJ, the Commission and the Council, the ECB, constitutional scholars, national constitutional courts ...

We also maintain that the European process of constitutionalisation contains a number of dimensions which evolve pursuant to diverging temporal paces; at issue is a multi-dimensional and multi-temporal process. We employ a relational concept of law and constitution, which has affinities with the institutional theory of law, with Carl Friedrich Savigny as an early precursor and Neil MacCormick as perhaps the most prominent twentieth-century exponent.¹ We propose examining the constitution through the relation – constitutional relation, we could also say – that constitutional law maintains with its object of regulation, the constitutional object. The relational concept of constitution facilitates distinguishing between diverse dimensions of the European constitution in accordance with the respective constitutional object – the object of constitutional regulation. Our tentative proposal for identifying what we call the many constitutions of Europe is the following:

- the economic constitution (with the economy as the main constitutional object);
- the juridical constitution (the reflexive constitution having the legal system as the constitutional object);
- the political constitution (with the European polity as the constitutional object);
- the security constitution (with security risks as the constitutional object);
- the social constitution (addressing the social welfare of European citizens).

¹ See MacCormick's contributions in N. MacCormick and O. Weinberger (1986), as well as N. MacCormick (2007). The French institutional school of the early twentieth century, with León Duguit and Maurice Hauriou as the main representatives, should be kept in mind as well.

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A relational and multi-dimensional approach can be fruitful in the nation-state setting, too,² although the tacit understanding usually is that all the aspects of constitution go together and that, say, juridical and political constitution emerge and develop in parallel to each other. But at the European level, due to the process character of the constitution, no guarantees exist that the various dimensions develop at a similar pace; on the contrary, temporal diversity has been a key character of European constitutionalisation. So we claim that the European constitution is both an evolutionary and, at the same time, a differentiated process: the putative European constitutions have not emerged simultaneously but, rather, successively, following a certain order; nor have they evolved at the same pace. Typical of European constitutionalisation is – to borrow Ernst Bloch's expression – *Gleichzeitigkeit des Ungleichzeitigen*.³

According to our (hypo)thesis, distinct periods can be discerned in European constitutionalisation, which receive their particular colouring from a particular constitution. Reflecting the temporal and functional primacy of economic integration, the first wave, initiated by the Treaty of Rome or even earlier by the Treaty of Paris establishing the European Steel and Coal Community, proceeded under the auspices of economic constitution.⁴ The landmark decisions of the ECJ defining the basic principles characterising Community law as an independent legal system manifested the significance of the juridical constitution. The Maastricht Treaty epitomised at least the temporary dominance of the political constitution. The Amsterdam Treaty (1998), with its new provisions on the Area of Freedom, Security and Justice, inaugurated the prominence of the security constitution, which was further reinforced by 9/11.⁵ Finally, the Eurozone crisis has again catapulted the economic

² In fact, as we will make clear below, the concept of economic constitution was first introduced in a nation-state context.

³ On the multi-dimensional and multi-temporal process of European constitutionalisation, see K. Tuori (2010).

⁴ Arguably, though, in the early 1950s, economic integration was at least partly an *ersatz* solution when political integration proved not to be reachable. See, e.g., Chapters 1 and 2 in Gilbert (2012).

⁵ Although too much should not be made of the provisions on the values and objectives of the EU, it is worth mentioning that in the present list of objectives in Art. 3 TEU, the provision on the area of freedom, security and justice precedes that on the internal market and other economic (and social) aims. According to Art. 3(2), "the Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime".

constitution back to the pacemaker role.⁶ However, if the emphasis in the Rome Treaty and the subsequent case law of the ECJ lay on what we call the microeconomic constitution, the crisis has highlighted the role of the second, macroeconomic layer of the European economic constitution. The pacemaker role of the macroeconomic constitution entails that ongoing ‘constitutional mutation’⁷ is not restricted to the economic aspect and that, accordingly, the present constitutional crisis should not merely be conceived of in economic terms. It extends to the political and social dimensions; it also affects democracy and transparency, as well as social values and rights. In our constitutional analysis, we shall emphasise the risk that changes in the economic dimension may be allowed to dictate development in the political and social dimensions so that the particular constitutional aspects of the latter are not sufficiently heeded.

According to our understanding, constitutional law as the legal pole of the constitutional relation develops through specific constitutional speech acts, making up constitutional discourse. An important task for EU constitutional scholarship is to identify the relevant constitutional actors and assess the weight of their respective interventions. The two primary actors, whose contributions provide our discussion with the most important institutional support, are the constitutional legislator issuing Treaties and their amendments, and the Court of Justice (ECJ), the constitutional court of the EU, issuing constitutionally relevant case law. Yet, constitutional law should not be conceived of solely in terms of surface-level normative material, such as explicit constitutional provisions and precedents. Constitutional law also comprises a legal cultural level through which individual constitutional provisions or precedents are read and interpreted and which also lends surface-level normative material a certain kind of coherence. This legal cultural level also involves – so we claim – a particular view of the constitutional object: a hidden social theory, as it were. Without such legal-cultural underpinnings, scattered individual

⁶ Such a *temporal succession* should not be interpreted in the sense of an emerging constitutional aspect replacing or supplanting the previous one; rather, the constitutional dimensions complement each other. Thus, the history of the economic constitution did not end with the first period of constitutionalisation. Emphasis on the juridical constitution should not be taken as signifying a standstill or an eclipse of the economic constitution; the latent and manifest development of the economic constitution continued, and the economic constitution has always retained its functional primacy.

⁷ E. Chiti *et al.* (2012), pp. 418 ff.

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provisions in the formal constitution or fragmentary constitutional case law would hardly give rise to a distinct constitutional dimension. Constitutional law should be examined, not only in its relation to the constitutional object, but also as an interplay between surface-level normative material and its legal-cultural underpinnings. The relations between the layers of (constitutional) law manifest the second aspect of the relational analytic we try to apply in our discussion. These relations include

- relations of sedimentation – the formation and development of (constitutional) legal culture through individual (constitutional) speech acts by legislators, judges and scholars;
- constitutive relations – (constitutional) legal culture constituting the very possibility of (constitutional) legal speech acts through its normative, conceptual and methodological resources; as well as
- relations of justification, criticism and limitation – (constitutional) legal culture providing the yardsticks and means for both justifying and criticising surface-level normative material, as well as imposing limitations on the contents of (constitutional) legal speech acts.⁸

Making sense of the European economic constitution, too, requires attention to the relationship between, on the one hand, surface-level constitutional law as formulated in, first of all, individual Treaty provisions and constitutionally relevant case law of the ECJ, and, on the other hand, underpinning constitutional principles and implicit economic assumptions – the ‘hidden social theory’ of the economic constitution. Miguel Poiars Maduro’s discussion of the three rival models of the European economic constitution and their manifestations in the case law of the ECJ is a good example of such an approach to the first, microeconomic layer of the European economic constitution.⁹ A similar approach must be applied in examining the macroeconomic constitution. Thus, to lay foundations for our treatment of the current crisis as a constitutional crisis, we shall try to reconstruct the central principles underlying the individual provisions of the Maastricht Treaty on EMU – the Maastricht principles – and the economic assumptions on which they rely. Our multi-level view of the macroeconomic constitution

⁸ Kaarlo Tuori has presented his view on the multilayered nature of law in K. Tuori (2002) and (2011).

⁹ M. Poiars Maduro (1998).

leads us to discuss the crisis at two levels. The major part of academic and general public debate has assessed the crisis and the European responses to it in the light of individual Treaty provisions, such as the no-bailout clause in Art. 125(1) and the prohibition of central-bank financing in Art. 123(2) TFEU. Yet, focusing on separate doctrinal issues and discussing them in the context of individual Treaty provisions may entail losing sight of the other level of constitutional analysis: the level of principles. Indeed, although we shall discuss the main individual doctrinal issues which the European rescue measures and efforts to tighten European economic governance raise, the emphasis in our conclusions lies on the fate of the Maastricht principles. We claim that the crisis has invalidated or at least questioned many of the economic assumptions implicit in these principles and that a major aspect of the current constitutional crisis lies in the consequent shaking of many of the central Maastricht principles. In turn, this has – so our analysis continues – had important ramifications within the political and social constitution.

Here we encounter the third relational aspect which an examination of the European constitution as a differentiated process of constitutionalisation should address and which is also relevant for discussion of the present crisis: relations between the various constitutions or constitutional dimensions. A common (internal) market has been the motor of the whole integration process and, correspondingly, the non-economic constitutional dimensions largely owe their emergence to the demands raised or consequences set off by the economic constitution. Thus, juridical constitutionalisation responded to the need to guarantee realisation of the (micro)economic constitution, and the original impetus to the security constitution lay in security concerns deriving from free movement of labour and the opening of internal Community borders. These can be termed relations of implication. Such relations may be specified as relations of support: thus, for instance, development of the juridical constitution has supported realisation of the economic constitution.

The idea of specific periods in the European process of constitutionalisation, characterised by the dominance of a pacemaker constitution, relies on relations of implication, detectable between constitutional dimensions. But the relations between the pacemaker constitution and other constitutional dimensions can also be of a conflictual nature. Though non-economical constitutional dimensions seem to have received their original impetus from the economic constitution, in

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their further development they may acquire a dynamic of their own. This development may also lead to normative results which contradict the demands of the economic constitution. Before the European Court of Justice, such conflicts often assume the guise of contests between different types of rights: between, on the one hand, rights related to market freedoms and, on the other hand, civil and political or social rights. In conflicts with the economic constitution, the social constitution has usually been the loser: the economic constitution has defined the space for social constitutionalism. The present crisis makes exceptionally clear the potentially conflictual relations between constitutional dimensions. Reactions to the crisis which follow the logic of economic constitutionalisation may have implications which contradict basic political or social constitutional values, and jeopardise democracy and transparency or social rights.

The fourth aspect of our analytic concerns relations between the transnational,¹⁰ European constitution and the Member State constitutions. The transnational constitution cannot be examined without paying due attention to its interaction with the national constitutions of the Member States. An analytical conceptual apparatus, at least partly analogous to the one tailored with a view to the interaction between the various dimensions of the transnational constitution, is also needed for dissecting the relationships between the transnational and national levels of constitution. Relationships of support and conflict may be discernible here, too.¹¹ In crucial respects, the European (micro)economic constitution relies on support from Member State constitutions. National constitutions, for instance, guarantee the fundamental rights indispensable for the functioning of the market economy, such as the right to property, freedom of contract and freedom of trade. On the other hand, the European economic constitution, e.g. the subjection of healthcare and social security to free market and competition law, has considerably reduced Member States' leeway in designing their welfare regimes.

The current Eurozone crisis has constitutional implications at both the European and national level, and these two-level implications are closely interrelated. To take an example, Member States' national fiscal sovereignty is a principle of both European and national constitutional

¹⁰ As a terminological choice, we prefer 'transnational' to 'supranational' when referring to EU law's position beyond the dichotomy of national and international law.

¹¹ For a succinct exposition of the relational analytic see K. Tuori (2013).

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law and encroachments on this sovereignty hint at a crisis of both European and national constitutions. And the social consequences of the austerity programmes should be assessed by both European and national constitutional yardsticks. Our focus lies on the transnational, European level, but, as we have argued, an analysis of the European process of constitutionalisation cannot ignore the interaction with national constitutions. Repercussions of the crisis in Member States vary, depending on, first, the division into assisting and receiving states, and, second, national constitutional particularities. Examples are needed, and as regards assisting states, we highlight German developments, especially the renowned rulings of the German Constitutional Court, and compare them with the Finnish constitutional doctrine, as expressed in the Opinions of the Constitutional Law Committee of Parliament. As the case of the German Constitutional Court makes especially clear, rulings of national constitutional courts are not merely speech acts in national constitutional discourse, but intervene in European discourse, as well.

To summarise the general framework of our constitutional analysis of the Eurozone crisis, we understand the European constitution as a multi-dimensional and multi-temporal process of constitutionalisation, where periods of dominance of a particular pacemaker constitution are distinguishable. In our analysis, we rely on the insight into the relational nature of European constitution(alisation) in its four senses, referring to, first, the constitutional relation between constitutional law and constitutional object; second, the relations prevailing between 'surface-level' constitutional material and its legal-cultural underpinnings; third, relationships among the various constitutional dimensions; and, fourth, relationships between the transnational, European constitution and the national, Member State constitutions.

The Maastricht Treaty opened a split in the economic constitution. The economic constitution of the euro area diverges from that applied to non-euro Member States. In our analysis, we concentrate on the euro area. References will be to the Founding Treaties, that is, the Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), such as they are after Lisbon. Although some amendments to the Maastricht provisions were introduced in Lisbon, they were not, as a rule, of a decisive character.

Our analysis proceeds through the following steps. In Chapter 2, we reconstruct the pre-crisis process of European economic constitutionalisation employing the distinction between micro- and macroeconomic