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Book review of K. Tuori, K. Tuori,
The Eurozone Crisis – A
Constitutional Analysis

(Cambridge University Press 2014)

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1. Introduction: the economic constitution

The book by Tuori and Tuori on the Eurozone crisis is a clear and exhaustive account of the legal and economic developments following the outburst of the 2008 financial crisis. The particular originality of this scholarly effort is due, first of all, to the authors' several insights into the historical and conceptual evolution of the so-called 'economic constitution'. For example, they discern a microeconomic layer (laid down in the Treaty of Rome) and a macroeconomic layer (established by the Treaty of Maastricht), interrelated with each other but also at times contradicting each other. In other words, the macroeconomic layer, characterized by the aggregate level of economy, presupposed full implementation of the microeconomic layer, which focuses on the behavior of individual consumers.

* Articolo sottoposto a referaggio.



According to Tuori and Tuori, the crisis has shaken the premises of the macroeconomic layer, and therefore substantially altered some of the constitutional innovations of the Treaty of Maastricht. In this sense, to give some examples, the principle of price stability has been replaced with the broader principle of financial stability; the principles of Member States' fiscal sovereignty and corresponding liability in fiscal policy (expressed by the no-bailout clause) have been modified.

The theoretical premises of the book rely on the so-called 'Many Constitutions' approach, i.e. the idea that the European constitution is plural and should be conceived not merely as a stand-alone document, but as the relationship between constitutional law and its object of regulation (i.e. the constitutional object). It would be thus possible to distinguish the economic, juridical, political, security and social constitution. These constitutions would have emerged gradually in different stages of integration of the European Union.

Interestingly, while the authors are careful to point out that the concept of 'economic constitution' should be considered neutral, they emphasize the visible traces of ordoliberal thought in the process of European integration. The Treaty of Rome itself was the result of a compromise between social-democratic policies (pushed by France, Italy and the Benelux countries) and German ordoliberals, as can be seen in the balance between provisions on common agricultural policy and other common policies and provisions on market freedoms and undistorted competition. The European Court of Justice (ECJ) has played a key role in this context, as it has been the *locus* where the economic freedoms of individuals could be invoked: it was therefore mostly the ECJ case law that developed gradually the 'microeconomic constitution'. This phenomenon has emerged in stark contrast with the unfolding of the 'macroeconomic constitution', which was largely the result of legal and institutional experimentalism by the domestic constitutional courts, the European Central Bank (ECB), the European Commission and other political actors, and only within certain limits by the ECJ.

As far as price stability is concerned, it was to be guaranteed by Member States and the Bretton-Woods system was designed to keep both the inflation and exchange-rate under control. However, when the Bretton-Woods system collapsed, plans for an economic and monetary union began and led initially to the establishment of the European Monetary System (EMS) at the end of the '70s. The Treaty of Maastricht subsequently set up a common monetary policy. Price



stability became the primary objective of monetary policy, although the principles of an open market economy and free competition (the 'microeconomic constitution') were still considered prevalent. This was the institutional setting before the beginning of the crisis.

However, in Tuori and Tuori's view the crisis has not been merely financial, but has had broader effects. According to their approach, it has not merely altered the macroeconomic constitution, but also the political and social constitution. Moreover, the adoption of rescue packages and the enhancement of European economic governance has affected not only the supranational level, but also the national level, as it has contributed to relativizing State sovereignty. The scope of monitoring has been enlarged and its mechanisms have been turned partially from peer review and soft-law (i.e. the open method of coordination) into formal sanctions. The role of the European Commission has been strengthened.

2. The ECJ ruling on the Pringle case

A substantial part of the book is devoted to the interpretation of the famous judgment of the CJEU, C-370/12 *Thomas Pringle v. Government of Ireland*, as well as the amendment to Article 136 TFEU¹, which formalized Member States competence to set up a stability mechanism to face the economic and financial crisis.

The authors are well aware of the significance of these two steps as part of the series of rescue packages, mechanisms and exceptional measures adopted by the Member States of the EU during the crisis, including the Greek loan facility in May 2010 and the European Stability Mechanism (ESM) in October 2012.

The underlying assumption is that both *Pringle* and Article 136 amendment did not merely give constitutional blessing to measures derogating from the no-bailout clause and the principle of exclusive Member State fiscal liability. They also codified sweeping changes in the macroeconomic European constitution. These changes are, according to the book, three. The first major change is the constitutionalization of the requirement of strict conditionality, imposed on the recipient state when financial assistance is granted. The second innovation is the constitutionalization of crisis management, which now complements crisis prevention: as the

¹ European Council Decision 2011/99 of 25 March 2011 on the amendment to Article 136 TFEU OJ L 91.



CJEU also pointed out at par. 59 of *Pringle*, while the TFEU provisions on economic policy (especially Articles 123-125) mainly aim to reduce the risk of public debt crises (and therefore act as preventive fiscal policy constraints), the function of a stability mechanism is that of managing financial crises (and, as a result, State insolvency) which emerge despite the preventive action undertaken by the governments. In such cases, bailout measures are permissible. The third turning point is the postulation of a second-order *telos*, represented by the financial stability of the euro area as a whole (replacing the previous objective, price stability). This meta-objective would justify measures derogating from the bailout prohibition. However, two important consequences stem from this operation: the first one affects State sovereignty and the second one the process of European integration.

In the first place, due to the considerable amount of liabilities involved, the outcome of the constitutional transformation illustrated above is a restriction of the fiscal sovereignty of both assisted and assisting State, especially their budgetary autonomy. This would be confirmed by the fact that in the context of European economic governance, as mentioned earlier in this note, Articles 121 and 126 TFEU as well as the Stability and Growth Pact have established monitoring procedures, formal sanctions and voting based on reversed majorities, which has increased the role of the European Commission.

In the second place, the authors analyze in detail the hermeneutic consequences of the *Pringle* decision. They maintain that the interpretation of Article 125 (1) TFEU (principle of fiscal liability of Member States) by the CJEU is of two types: substantive and methodological. The former, concerning the personal and substantive scope of application of the no-bailout clause (respectively, *ratione personae* and *ratione materiae*), would not be particularly problematic: Tuori and Tuori believe that the bailout prohibition would cover not only obligatory, but also voluntary financial assistance to a Member State in fiscal distress. The methodological interpretation, which is further distinguished in literal and teleological interpretation, prompts instead a more complex analysis. The reasoning of both the Court and Advocate-General Kokott is carefully examined and the conclusion is that, while the principle of fiscal liability was conceived as an incentive for a cautious fiscal policy, it also expressed excessive confidence in the capability of the credit market to contain cases of insolvency. In other words, a fundamental contradiction lies at the heart of the dialectic between the first-order objective (compliance with budgetary discipline) and the second-order objective (the financial stability of the euro area as a whole) of the economic and

monetary provisions of the TFEU, as eluding the bailout prohibition through the meta-*telos* might compromise the latter by encouraging moral hazard and irresponsible behavior by Member States. This observation is complemented by the remark that Member States lacked textual support when they adopted rescue packages and stability mechanisms immediately after the crisis broke out.

3. Financial stability

The authors' critique however goes even further. They emphasize how the exact meaning of 'financial stability' was not specified, again demonstrating excessive confidence in the financial institutions' ability to face a crisis. Indeed, during the negotiations leading to the adoption of the Maastricht Treaty, the solution found was that, although bailout would be banned, financial assistance would be permitted both to non-euro and to euro states. They put forward the argument that one of the practical consequences of the changes in the macroeconomic constitution may be that a separate Eurozone area of deeper economic and political integration is created.

These legal reflections are well supported and their sound theoretical underpinnings are generally convincing. However, despite its comprehensive analysis, the book fails at times to look at the bigger picture and leaves aside the implications that the constitutional conundrum of the euro crisis may have for the development of the internal market. In addition, some arguments are not very clear. For example, when the book examines the two-order *telos* of the no-bailout clause, it does not address exhaustively the question of emergency-law reasoning. It claims that the approach of the CJEU – literal and teleological interpretation- aims *inter alia* to avoid resorting to unwritten emergency laws. However, at the same time, the authors decry the risk of enacting constitutional provisions, which lack support in the Treaties. They add that when the crisis erupted the prevailing view was that there existed “an imminent danger (...) of contagion and spread of the debt crisis to other euro states”. They refer to the Preamble to Regulation 407/210 establishing the European Financial Stability Mechanism (EFSM), which recalls the existence of a serious threat to the financial stability of the EU as a whole. One may wonder whether it is precisely by employing vague and open-ended terminology, such as 'financial stability', that unwritten emergency legislation may be passed.

To be sure, 'stability' is a fundamental concept not only for ordoliberalism, but also for systems theory, as it can be interpreted as a Luhmannian structural coupling between law and economy. The authors explain how we can have multiple 'stability' concepts, but perhaps it might have been useful to devote a few more pages to the implications that structural coupling has in times of crisis.

4. The political dimension of the social constitution

It is worth mentioning the chapter entitled “democracy and social rights”. It illustrates the paradoxes and tensions between technocracy and democracy and particularly how the first has prevailed over the second. This part of the book addresses questions that should be taken into account in order to have a full picture of the book. The main question is: how can a social constitution emerge if decision-making is influenced by highly specialized interests rather than democratic choice? This is a conundrum that many theories fail to answer.

The social constitution is labeled in the book the eternal loser. We dare add that it is very difficult for it to be on the same footing as the economic one, due to the increasing distance between the European institutions and the European citizens. The European project has always been criticized for its democratic deficit, which not only has not been overcome despite the commitment to democracy in article 2 TFEU, but has even increased as a result of the European economic crisis. The *intergovernmental* method has often been employed during the financial and economic crisis.

We should not forget that the polymorph structure of the European Union shows many contradictions, which undermine the possibility to channel decision-making in a fully democratic way. The complexity and specific knowledge required to handle the crisis widen the distance between citizens and decision-makers. Hence, the transparency principle, intended as a concept broader than mere openness, assumes an even more important role than in the past, since it should contribute to bridging the gap mentioned above.

In our view, without a proper implementation of political rights, social rights cannot be negotiated during the policy-making process. This lack of voice has several ideological underpinnings that are well illustrated throughout the book, and in the chapter. For example, the social constitution has been unable at the EU level to deal with the problem of inequality.

The chapter stresses how the financial crisis increased the number of independent/ semi independent/official/unofficial bodies.

As Larson well explains, technocracy has two major features: one is structural and includes "the



new forms of domination which result, directly and indirectly from bureaucratization and from the impact of technology on the distribution of power in advanced capitalist societies". The other one "is ideological: it concerns the new bases of legitimacy claimed for the transformed power structures."²

In fact, as Tuori and Tuori argue, "Expert bodies have played a central role in implementing and further elaborating the European economic constitution. Realisation and development of the microeconomic constitution has, to great extent, relied on the Commission as the European Antitrust Authority and the ECJ as a constitutional court vis-à-vis both EC/EU institutions and - in the context of free movement, even primarily - Member State legislatures." Then the authors well stress how the role of the ECJ has been weakened in the field of the macroeconomic constitution, whereas the Commission has played a key role in European economic governance. The authors express their concern as regards the ECB, which was originally conceived as an independent body, but became a stakeholder. The concern is expressed in the following sentence: "the more expert bodies acquire characteristics of a stakeholders or politician, the more the justification warranting their independence loses its pertinence". As the authors explain, "independent expert bodies are exempted from the coverage of democratic input legitimation" because of their specific knowledge, which allows them to perform their task in a scientific or quasi-scientific way.

Nevertheless, in our view in situations of crisis or emergency no a-political rationale can be preserved. Political, hence value oriented choices, will influence all actions aimed to tackle an emergency situation. We would argue, unlike the authors, that it should not come as a surprise that, although such bodies claim to be distant from political discourses, their decisions are politically oriented. The promise that technocracy bears as regards the independence of the decisions adopted by highly specialized institutions is false. The problem with these bodies is not that they are influenced by political decisions, but that they seem to be acting far away from the citizens' level.

Concluding, this book represents an informative and timely reflection on a very complex topic, which touches upon law, politics and economics. The reader will have a historical and philosophical insight into the impact of the financial crisis not only on everyday life, but also on the nature of the EU.

² M. Sarfatti Larson, 'Notes on technocracy: some problems of theory, ideology and power' *Berkeley Journal of Sociology*, Vol. 17, 1972-1973, pp. 1-34 at 6.