

European Constitutionalism

European Constitutionalism redraws the perimeters in the debate on the nature of the European constitution. Offering a fresh approach to both doctrinal and theoretical issues, this book discusses general characteristics of the European constitution under the headings of relationality, perspectivism and discursiveness, and contains forays to sectoral constitutionalization in the micro- and macroeconomic, social and security dimensions. European constitutionalism must be examined in its interaction with Member State constitutionalism, which plays an essential role in channelling democratic legitimacy to the EU. Written by a leading expert in the field, this book will be of great interest to students and scholars alike.

Kaarlo Tuori is Professor of Jurisprudence and Academy Professor at the University of Helsinki. He was formerly 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

We are delighted to welcome this important book by the Finnish jurist Kaarlo Tuori to the series *Cambridge Studies in European Law and Policy*. Tuori is one of a number of legal theorists and jurists who have turned their attention in recent years to the study of the European Union. They have acknowledged that it is a unique polity which is underpinned by a significant body of transnational law which deserves study in its own terms, as well as in comparison to other polities. The work of these jurists has enriched the field of EU legal studies considerably – just as they themselves acknowledge that their own work as legal theorists has required some rethinking in response to the challenges posed by EU law and the EU legal order. In that vein, this book is a must-read summation of Tuori's previous work within the framework of the Helsinki University Centre of Excellence in the Foundations of European Law and Polity which he directed for many years until 2013, and his own work as an Academy of Finland Professor at Helsinki University Faculty of Law.

The book has at its heart two important confrontations which frame the 'many constitutions' of Europe. The first is the more commonly written about confrontation between national constitutionalism and an emergent constitutionalization process at the European Union level. The properties of transnational law in this context represent a significant challenge to conventional legal theories concerning how multiple legal orders can and should coexist. In Part I of his book, Tuori shows how adopting a constitutional perspective which views the constitution as a relational concept (i.e. it has to be understood in terms of its relations with other legal phenomena) helps us to capture the most important features of the EU legal order in a manner which navigates between a discursive approach (describing what is) and a normative approach (postulating what ought to be). In the second part of the book, he engages with a

different confrontation, and that concerns the process of sectoral constitutionalization, acknowledging that the lenses of economics, social policy and security policy could lead to the construction of very different – and competing – visions of 'Europe'.

It is the intersection of those two confrontations that Tuori handles with such dexterity. He recognizes the two simultaneous truths: that the EU is nothing unless it is understood as a transnational legal order which makes certain normative claims, but equally it is nothing unless that order is invested with certain sectoral principles, that do not always coincide effectively, as witness the conflicts between notions of freedom and solidarity which he highlights in the chapters of Part II. Navigating these choppy waters with such a deft hand, Tuori has succeeded in producing what we hope will be a significant contribution not only to the field of EU legal studies, but also to the emergent field of 'transnational law' more generally.

Jo Shaw
Laurence Gormley
October 2014

Preface

To write about European constitutionalism, aspiring to an overall portrayal, is not an easy task. There are many constitutions in Europe, and in at least two senses. First, we have the diversity and pluralism of the transnational European constitution and the national Member State constitutions. Transnational constitutionalism must always be seen in its interaction with national constitutionalism. But, as is another central premise of this book, we should speak of the transnational European constitution too in the plural. The European constitution consists of distinct constitutional dimensions; of the framing juridical and political constitutions, and of the sectoral economic, social and security constitutions. Indeed, multidimensionality is one of the distinctive features of the European constitution that set it apart from the state constitution template.

Sectoral constitutionalization lies at the very heart of European constitutionalism. Comprehensive constitutional analysis must make forays into substantive fields where constitutional scholars do not usually venture and where they may not feel particularly at home either. At the European level, policy issues are constitutionalized which in the state setting are usually left to majoritarian democracy. Even constitutional scholars must familiarize themselves with the doctrine and theory of, say, free movement and competition law. My academic background lies in legal and constitutional theory but not in EU law. I am not interested in internal market law or the social or security dimension of the EU for its own sake. I am interested in EU law and the EU constitution as a legal and constitutional theorist, my starting point being that today relevant legal or constitutional theory cannot be pursued if transnational law in general or European law in particular are not taken seriously. But satisfying my primary research interest has required detours through sectorally differentiated EU law doctrines and theories.

The fundamental policy orientation of the EU has left its mark on European constitutionalism too. A comprehensive discussion of European constitutionalism must move at different levels, which may baffle the reader. Part II of this book examines sectoral constitutionalization and its dimension-specific theoretical foundations. In contrast, the focus in Part I and the Epilogue is on the general theory of the European constitution or general constitutional theory. Readers whose principal interest lies in 'hard-core' European law might feel tempted to skip the discussions in Part I and progress directly to the forays into sectoral constitutions, while more theoretically oriented readers might be inclined to leave Part II for only cursory perusal. I can but hope that my analysis will also be taken as a whole. Although my major ambitions lie at the level of a general theory of the European constitution, it must be constructed on the basis of a preceding scrutiny of sectoral constitutionalization and must also resort to concepts whose domicile lies in general constitutional theory.

The Eurozone Crisis: A Constitutional Analysis (Cambridge University Press, 2014), written together with Klaus Tuori, already tested the relational, multidimensional approach which this book sets out in more detail. In the previous book we also introduced the distinction in the economic dimension between microeconomic and macroeconomic constitutions. The original idea probably was Klaus's. In Chapter 6 of this book, dealing with the mutation of the macroeconomic constitution, I have been able to draw on our common work on the Eurozone crisis.

This book summarizes what I have learned during my adventures in European law, which began in earnest with the launch of the Centre of Excellence in the Foundations of European Law and Polity at the Helsinki Law Faculty in 2008. At the Centre we were able to gather together committed researchers at diverse stages of their academic careers, create an atmosphere of intellectual curiosity and mutual learning, and establish an international network of similarly committed and intellectually curious partners, who have entered European law scholarship through diverse gateways. My greatest gratitude is to the Centre and its partners as a collective who made my research possible and contributed decisively to whatever might be of value in this book. I started the final phase of composing the book in spring 2014 in Florence at the European University Institute. This gave me a unique opportunity to avail myself of the excellent research infrastructure of the EUI and, above all, the intellectual resources of the Law Faculty. Before Florence, I did not know much about, say, internal market law. Now I do; at least I hope so. My stay in Florence

was facilitated by my friend Hans-W. Micklitz, Dean of the Faculty and also a Member of our Centre. Hans has also been an invaluable source of ideas, as the reader may notice from my discussion of the notion of access justice in Chapter 7.

As a novice in European law, I have been dependent on commentators and interlocutors perhaps even more than is usual. I would especially like to express my gratitude to the following colleagues who have had the patience to read and comment on drafts at varying levels of finalization: Loic Azoulai, Gareth Davies, Sabine Frerichs, Samuli Hurri, Niilo Jääskinen, Claire Kilpatrick, Jan Klabbers, Jan Komárek, Emilia Korkea-aho, Petri Kuoppamäki, Mel Marquis, Hans-W. Micklitz, Tuomas Ojanen, Jiri Priban, Suvi Sankari, Martin Scheinin and Heike Schweitzer. Once again, my trusted colleagues Christopher Goddard and Anna-Maria Rehbinder have offered me precious assistance at the very last stage of the project: Christopher in checking the language, and Anna-Maria in checking references and notes and in other editorial work. The Academy of Finland has kindly borne the financial burden, funding both the Centre and my Academy professorship and enabling my focus on research.

Loppi
August 2014