

TONY PROSSER, *THE ECONOMIC CONSTITUTION*,
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Tony Prosser's *The Economic Constitution* is in my view a seminal reading for anyone interested in the constitutional dimension of public intervention into the economy.

The concept of economic constitution adopted in the book, on which the author declares in the foreword being inspired by Sabino Cassese's *La nuova costituzione economica* (2005), has a different meaning from the one which is usually found in the literature: here the author, rather than questioning the foundation of public intervention in the economy, explores the constitutional arrangements which preside over direct economic management by central government, therefore challenging from a different point of view the legitimacy of government's decision-making powers and actions.

The author has already deployed this concept of the economic constitution and regulation in an article on *Spending Review as Regulation* [*Public Law*, 596 (2011)], but here the whole management of the economy is taken into consideration and carefully assessed.

Such an attempt is unique in the existing literature and therefore particularly valuable.

In his previous books, *Law and the Regulators* (1998), *The Limits of Competition Law* (2005), and *The Regulatory Enterprise* (2010¹), the author has extensively analysed the relationship between public powers and the market, exploring its different dimensions (particularly the European one) and focusing on the essence, the different goals and limits of regulation and regulatory authorities, hereby dealing with the economic constitution seen more as the way to find an harmonic composition between social

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¹ Other books include *Nationalised Industries and Public Control* (1986), not to mention book chapters and articles, among which see for example *Models of Economic and Social Regulation*, in D. Oliver, T. Prosser and R. Rawlings (eds.) *The Regulatory State. Constitutional Implications* (2010).

values, such as that of public service, and the principle of free market and economic initiative [see f.e. *The Limits of Competition Law* (2005), where the author writes that "the world described in this book...has a complex mixture of competitive markets, competition law, and public service values" and highlights the development of a public service law in the United Kingdom]. These previous works challenged from different perspectives what might be called a more traditional idea of economic constitution, such as the one given by the ordoliberalist theories, and were focused on the external limits of state action in the economy, especially through the use of regulatory powers, of which he extensively examined and critically assessed the legitimacy, tasks, way of operating and accountability.

Here, the focus shifts to the other side of the spectrum, which is the way public powers manage the economy, resting on the premise that the "idea that the state could withdraw from the economy had already been proved illusory"(2), but rather neglected had been the fact that, especially in recent years, "governments have been called on to intervene in ways which are far deeper, and far more costly" [on the "great regenerative power of the state", see for example C. Harlow, *The "Golden Paw" of the State*, in *A Simple Common Lawyer. Essays in honour of M. Taggart*, (2009)]. Hence, the need to explore the "internal" dimension of the economic constitution, which is perhaps less ideology-oriented and does not question the rightness of public intervention in the economy, but rather, moving from its necessity and/or strong presence, critically analyses its various forms, principles and constitutional foundations and constraints.

The meaning of economic constitution is, thus, extremely far-reaching and yet a challenging one, since it leads the author to undertake an assessment of how the government uses its economic powers by getting, managing and spending money: in a word, employing its "dominion" capacity.

The importance of Prosser's analysis emerges even more when we move to the contents of the analysis, which is exceptionally rich, since it covers taxation, monetary policy, public borrowing, share-holding and investment powers, state aids, public expenditure, procurements and the regulation of financial markets, thus offering an all-encompassing and tightly sealed

study of areas which are rarely put together, and are rather left to single, sector-specific studies.

I think this is one of the main merits of the book: the attempt to offer a comprehensive overview of the different areas of public action which affect the role of the government as an economic actor and still are subject to constitutional constraints and accountability duties.

A second remarkable aspect of Prosser's analysis is its methodology: each chapter explores an area of government management of the economy by using the constitutional parameters in a very broad meaning. First of all, the author takes into consideration not only the national (and sometimes the local) legal context, but also the international and especially the European one, as fundamental parts of the overall legal framework of public decision-making powers in the economy.

Although dealing with a distinctive area of economic management, each chapter follows a similar methodological pattern, whose common feature is the adoption of some key constitutional "indicators", the most remarkable of which are: institutional design, form and intensity of parliamentary scrutiny, consultation and participation procedures, balance between legislative and soft-law measures, accountability instruments and amenability to judicial review. In the way the chapters develop, there is always a right balance between an accurate description of how each sector works, and the critical assessment of its constitutional "fitness", which is then conveniently summarised in the conclusions of each chapter.

These examples clearly show how here the word "constitution" is given a broad meaning, as a complex set of principles, rules, practices and even relationships which shape economic decision-making, therefore spanning from the overarching public law and human rights principles (which are very often taken into consideration by the author) to administrative procedures and practices, or to auditing systems aimed at assessing good value for money (f.e. there is an extensive coverage of Memorandums of Understanding and a focus on formal and informal relationships between the government and other public actors).

This methodological choice seems to me particularly successful, since it gives the book a coherent structure, and allows

the reader first to get acquainted with the main institutional aspects and legal framework, and then to be guided into a critical evaluation of its dynamics.

The book ends with a short conclusive chapter on the "plural constitution", where the author argues that the complex system of economic management which has hitherto been described points to a plural array of instruments rather than to a single constitutional pattern.

Moreover, the author stands for a less ideologically oriented vision of the economic constitution, which deploys procedural more than substantive instruments, quite differently from what both ordoliberalism and the "new constitutionalism" have been bringing forward, by depicting the constitution as a substantive constraint, a sort of straitjacket aimed at limiting the economic intervention of the state in the market.

The concept of the constitution as a point of arrival, rather than a starting point, and the idea of an economic constitution, which encompasses a political, a legal and an administrative dimension is an interesting achievement, which well deserves being further developed.

I find it extremely useful especially when it describes the aim of the economic constitution as a final and collective goal, to which the different instruments of management and accountability can contribute. This idea, which can also be found in other recent studies on the constitution [see f.e. N. Bamforth and P. Leyland (eds.), *Accountability in the Contemporary Constitution* (2013)], should be taken more seriously by Italian scholars.

The Italian system (and legal scholarship) tends to rely heavily on judicial review and on the courts as the main guardians of public accountability, even in the field of public management of the economy. Interestingly, our author does not overlook the importance of judicial scrutiny, and highlights important areas where judicial review has been (and can be) used as a means to put under scrutiny the use of "dominion power" by public-interest-spirited associations of taxpayers and citizens (as in the *Pergau Dam* case). Yet, the analysis clearly shows how judicial control - which has an important role to play, especially when fundamental rights are at stake - must be complemented, and sometimes replaced, by other instruments, such as parliamentary

committees, fair procedures and - or may be first of all - by better institutional design and relationships. This is in my view the most important lesson we can learn from the book, and I am sure that it paves the way to further research achievements in the field.