

TONY PROSSER AND THE NORMATIVE APPROACH TO THE
STUDY OF THE “*ECONOMIC CONSTITUTION*”

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Although the concept of “economic constitution” is relatively new in legal studies, given that it has been introduced at the beginning of last century’s third decade, it has become an increasingly important concept in legal and economic studies. It could be said, therefore, that there is nothing novel about the choice of this concept for an analysis of the interaction between law and economics (it ought to be stated at the outset that, for current purposes, in use of these terms there is no reference to the school of thought known as “law and economics”, which has obtained consent but has also met criticism on both sides of the Atlantic). But this would not be true and the first step of this review will be, therefore, to explain the novelty of the approach followed by Professor Prosser. As a second step, this review will focus on the controversial nature of the “economic constitution”, especially after the greatest economic and financial crisis - after that of the 1930’s - hit Europe. Not only the discontents of certain public policies, but also some of the more relevant political and social forces would agree that the economic constitution, particularly with regard to the Economic and Monetary Union, must be substantially revised. Prosser’s book is thus very timely.

The book is based on the author’s previous studies, but it is important as a whole. It is at the same time an institutional analysis of the legal framework that governs the economy, a theoretical analysis, and a critical analysis. From the first point of view, after the introductory chapter in which Prosser clarifies his theoretical framework, the following eight chapters examine a number of policy areas that are particularly relevant from the perspective of public law, including taxation and public borrowing, public expenditure and monetary policy, the regulation of financial services and government contracts.

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From the theoretical point of view, Prosser's analysis differs from others, first, in that he identifies the object of this study by using the concept of 'economic management', as distinct from that of 'regulation', that is generally and sometimes generically used in scholarly literature and, second, because his study focuses on the 'economic constitution'. This requires some clarification not only because this concept is "rather unusual in the UK" (Javier Solana, *Review of Tony Prosser, The Economic Constitution*, 2014, 35 *Legal Studies*, 2015, 186), but also because of the author's explicit choice of a normative approach. In the first chapter, Prosser stresses that he "will be adopting a normative approach to economic management on constitutional grounds rather than simply describing the nature of the arrangements which are in operation" (p. 16). The importance of this choice becomes still more evident when Prosser notes that other accounts of the same facts, in particular those of Dantith and Page, deny that such a normative constitutional task is meaningful. Their underlying assumption, he continues, is that the principles and values may not form part of the '*positive constitution*'.

For the sake of clarity, it ought to be said that Prosser does not follow other social scientists, such as Buchanan and Hayek, both concerned with the protection and promotion of specific "substantive" values or interests. Indeed, he observes that the constitutionalization – and, *a fortiori*, the prioritization – of such values or interests raises serious issues from the viewpoint of democratic legitimacy. Suppose, for example, that a choice must be made between keeping a certain level of public deficit or financing some policies. This is neither a technical nor a neutral decision about the allocation of public resources. It is, rather, a decision which gives a particular direction to a set of interests which emerge from the economic and social sphere: a decision that is intrinsically political and depends on value judgments. According to Prosser, such judgments, which impinge on the collective welfare, are for the political process, where public officials are elected and accountable to the public, at least within liberal democracies. This brings us to the author's main concern. It regards another type of values or interests, which he calls "process values". Such values include "legitimacy, deliberation, and

accountability” (p. 17). These are – together with due process - traditional values of public law in the whole European legal space.

It is on the basis of such values, for example, that some decisions taken by the Commission with regard to Greece public debt and deficit have been criticized by the EU Court of Auditors on grounds of lack of accuracy and due process for all the Member States involved. These are important critical remarks, that should be taken into consideration at least by public lawyers, while they are less easily known by the general public than the ideological critique to the asserted “neo-liberal” bias of EU institutions. It is precisely because of his choice of an approach that is not centered on the principles and standards that are used in order to promote certain economic or social values, but emphasizes ‘process values’ that Prosser does not follow that widespread opinion that the economic Constitution of the EU systematically aims at protecting the property and power of some economic groups, frustrating the democratic will of legislative majorities. It is on the basis of the same values that Prosser looks at how the national institutions perform the functions and exercise the powers that have been attributed to them, interact with each other, and can be held accountable for action or inaction. In particular, he devotes very interesting remarks to the uses and misuses of the financial resources allocated by the UK budget. For examples, his analysis of the *Pergau Dam* case are very reasonable and deserve attention by those public lawyers who study public finances.

In this respect, the book is an interesting example of the growing literature on the interconnection between the economic constitution of the European Union and that of its Member States and, in so doing, draws attention to several legal institutions that are of common interest, including privatizations, public expenditure and monetary policy. “Common interest”, obviously, does not mean sameness of approach, because scholars working in different contexts may accord a different role or significance to the same legal institutions. However, the use of the same terminology – “economic constitution” in this case – can be viewed as a significant manifestation of the emergence of a European debate. Whether such debate will be affected by *Brexit* and, if so, how is another question and by no means an unimportant one.