# BOOK REVIEW

## TONY PROSSER, THE ECONOMIC CONSTITUTION, OUP, OXFORD, 2014, 304 PP.

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If one needed to prepare a programme for an advanced course of *Diritto pubblico dell'economia* in an Italian University he or she could easily wonder why there is not in Italy a book like *The Economic Constitution*. By dealing with the relationship between constitutional law, public law and economics, it offers an economically well informed constitutional analysis, looking at theoretical and epistemological concepts useful both for analysing law and economics, and so on. What seems most relevant in Prosser's analysis, in this book as in many other articles and essays, is his focusing mainly on methodological issues. One merit of the book is, indeed, its critical approach to the analysis, which is the very questions the author deals with.

In the short space of this review I will not be able to consider all the issues the book deals with, such as taxation and borrowing, public expenditure, regulation of financial services, government shareholdings and industrial policy, public procurement, and so on. I shall limit myself to just a few critical comments on those issues which let us see in the best light some of the methodological perspectives I find theoretically outstanding: 1) the concept of "economic constitution" as recently elaborated in the British legal culture; 2) the monetary question, that is to say the role of currency and monetary policies within the economic constitution; 3) spending review as a form of regulation. In fact, my specific aim is to show that Prosser's critical approach is extremely useful in setting out a perspective which we could call, borrowing some words by Terence Daintith, a "legal analysis of economic policies" [*Legal Analysis of Economic Policy*, in *Journal of Law & Society*, 9/2 (1982), 191].

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Let us start from the title of the book: "*The Economic Constitution*". This is truly a key concept. As we know, this expression gained wider currency in scholarly discourse outside Germany only at the beginning of the 90's [K. Tuori, K. Tuori, *The Eurozone Crisis. A Constitutional Analysis*, (2014), 13]. The original term "economic constitution", very important in the Italian legal culture too, stems indeed from the particular legal-political culture which upheld the Weimar Constitution of 1919, thanks to the Freiburg's School and the ordoliberal school of legal and economic thinking. As we are immediately going to see, in Prosser's analysis this term is used with more neutral connotations, which distances his approach from the market-liberal economic thought. Prosser does not use this concept as synonymous of "decision", as a voluntarism approach does (*Gesamtentscheidung*, as in Carl Schmitt and Franz Böhm *Wirtschaftsverfassung*). To be fair, in the British legal culture this term is not very popular, as a search for bibliography in which this term is employed confirms. British scholars are more familiar with such expressions as "public regulation", "regulation and the Constitution", possibly even "Constitutional regulation", especially dealing with the British Constitution and economic issues, which is also becoming more rule-bound or, as they use to say, more and more jurified during the last few years.

Hence, the expression "economic constitution" in Prosser's book is detached from any link to a specific model or doctrine about economics, because on the contrary it seeks the more interesting interrelation between constitutional law and economics. We could probably not say the same about a notion such as the European economic constitution [again K. Tuori, K. Tuori, *The Eurozone Crisis*, cit. 13] where the market economy based on free competition is the very constitutional model and where the so-called Fiscal Pact seems to impose "a particular model of economic management on European member States".

I suggest that in Prosser's approach the use of the expression is more neutral because the British constitution does not seem to reflect a distinctive model of economic doctrine. His analysis, then, appears to be focused on the role of the UK Government as an actor of the economic management, "the way in which the modern UK government manages the economy" being at stake. This is why he takes on important questions such as legitimacy, accountability, transparency and distributional justice, namely to understand "how regulation should seek to achieve constitutional legitimacy" (7). In this sense the author embraces a "normative analytical approach" – especially by dealing with institutional and procedural values after the decline of constitutional scrutiny on governmental action by the Parliament – based on constitutional grounds and not on brute facts.

As for monetary policy, it is worth briefly comparing the British situation with the one in the Euro Area. It seems quite clear to me that by speaking about currency and financial stability after the recent financial crisis, we are using the concept of "economic constitution" in a very different way from above. We traditionally refer to the economic constitution in a microeconomic dimension by using words such as regulation, competition, market or free-movement of workers, goods, and so on. But after the Maastricht Treaty entered into force, we have to cope with a "constitution of macroeconomics" and to deal with aggregate economic objectives [I am here in debt to the analysis of K. Tuori, K. Tuori, *The Eurozone Crisis*, cit., but see also the essays collected in M. Fichera, S. Hänninen, K. Tuori, edrs., *Polity and Crisis. Reflections on the European Odyssey* (2014)]. Although the economic constitution of the Euro Area is very different from the non-Euro Member States (like the UK), the macroeconomic dimension of the concept is about the same. We need to handle such notions as anti-inflationary monetary policy, stability of currency, exchange-rate fluctuations, conjunctural policy, economic and financial imbalances to fulfil the convergence criteria, and now about all the consequences of Brexit.

In this context, within the Common Market, the more the system leaves the Member States with the responsibility of the management of financial stability problems caused by asymmetric, country-specific, and economic shocks, the more important the part of the book dedicated by Tony Prosser to "government spending and borrowing" becomes. In so far as the need for fiscal adjustment to manage general government deficit and debt and to fulfil deficit and debt stability within the Single Market arises, and in so far as redistribution targets among member States are at stake, this part of Prosser's analysis becomes relevant and useful. This is especially true when he expounds how revenues (taxes) and expenditures (welfare spending) are to be altered in order to achieve counter-cyclically policies.

A short diversion regarding the extraordinary measures of monetary policies laid down by the ECB is opportune. As to this, very clever remarks are made by Tony Prosser as regards the decision by the German Federal Constitutional Court which requires financial scrutiny of expenditure by the Bundestag's Budget Committee. This should be a relevant form of parliamentary scrutiny in any member State, while it is now lacking, as he notes, in the UK and, I would add, in the Italian system too.

Moving back to the main question and to the UK monetary system, Prosser's analysis deeply looks into the actual role of the Bank of England and the Treasury and stresses how they are able to lay down policies which improve liquidity and boost market confidence. A considerable space remains for flexibility and national discretion on monetary policies by which a distributional impact of the public budget and exchequer bonds can be devised, even though they still have to cope with risks of systemic effects which are derived from developing new financial instruments.

As Prosser notes, in the EU context there are many more restrictions, in the form of constitutional constraints, on economic decision-making powers, as for instance budgetary constraints. And this is an "extreme contrast with UK flexibility" (83), especially after the sovereign debt crisis. Since these restrictions can lead to even more imbalances among member States within the Single Market [see N. Acocella, *Signalling imbalances in the EMU*, in B. Dallago, G. Guri, J. McGowan (eds.), *A Global Perspective on the European Economic Crisis* (2016)] – which the Brexit process can further worsen – they could be seen as "one of the greatest inconsistencies of the Euro as a whole" (243). On the other hand, the new centrality given to the reduction of public deficit, through cuts of public expenditure as the main goal of economic policies, remains a question common to both the EU and the UK (84).

We come now to the final question, "the use of spending review as a means not just of allocating resources but of changing the direction of policies" (6), as a means both of regulation and to reach deficit and debt stability. In Prosser's view, the spending review process is not only important to achieve value for money –

as he puts himself "no area covered in this book is of greater importance than scrutiny and control of public expenditure" (110) – but it is now "at the very centre of British politics". The book contains a detailed historical and technical analysis of rules and procedures of spending review in the British legal system. It should lead, in the end, to achieving measurable effects in the macroeconomic dimension of its implementation. This could be the very conclusion, from a theoretical point of view, of this specific issue, at least speaking about Italy, instead: to consider the effects of expenditure cuts not only to reduce deficit and debt, but to improve the macroeconomic performance of public regulation. As to say to reduce public borrowing, to eliminate structural current deficit, to reduce public sector debt by increasing the gross domestic product through a well oriented spending review. Trying not to reduce any question of spending review to the so-called "expansionary contractions", the well-known "austerity question". While the analysis is also oriented by what Prosser calls "equality duties", moving from the cumulative effects of separate measures of spending review on the same subjects.

But this is a different, important direction of his analysis we cannot deal with in the short space of this review. Neither we will able to discuss the similarly important question of the regulation of financial services, connected to the plan of keeping retail and investment banking separate, in order to avoid the need for State rescue if the latter fails. Focusing once again on the methodological approach of this study, this is another relevant question, as it is looked from a systemic point of view, the macro economical layer of constitutional rules. This just to conclude with the same remark pointed out at the beginning, about the approach of Tony Prosser's analysis.