

Book reviews

The Economic Constitution, by TONY PROSSER.

Oxford: Oxford University Press, 2014, xviii + 277pp (£60 hardback). ISBN: 9780199644537.

Six years after the beginning of the financial crisis, there is an abundance of literature exploring its origins and consequences. An important part of this literature has been produced by financial economists and corporate lawyers, who often look at the financial and legal technicalities of the financial products involved.¹ Tony Prosser's *The Economic Constitution* approaches the financial crisis from a different perspective, that of public law. The book explores different aspects of the British economy by looking at how the institutions responsible for its management are designed, how they interact with each other and how they can be held accountable for their actions.

The book should be approached carefully. Its title may lead the reader to expect a deep theoretical discussion about how different constitutional principles could inform economic policy and regulation. However, the book has a different purpose: it provides an overview of some of the most critical elements of the economic management of the UK from the perspective of legitimacy and accountability. In doing so, Prosser pays particular attention to the government's actions and regulatory reforms within the past decade, a time period that has been dominated by the preamble and aftermath of the 2007–8 financial crisis.

In ch 1, Prosser lays out the theoretical framework that he is going to use to examine several fields of economic management in the UK throughout the following eight chapters. He first defines the object of his study by exploring the concept of 'economic management' and differentiating it from the broader concept of regulation.² He then provides a succinct theoretical analysis of the 'economic constitution', a rather unusual term in the UK, but widely used in the context of the EU.³

Prosser warns that his interpretation of the 'economic constitution' differs from that of other theorists, mainly those from the ordoliberal and 'new constitutionalism' schools. These scholars regard the economic constitution as a set of principles that are used to promote a particular set of social values in the process of economic management.⁴ As a result, they believe that the economic constitution imposes substantive constraints on economic policy. In Prosser's view, however, constitutions 'set out the key principles of how we can expect government to conduct itself in its organization

1. See eg G Gorton *Misunderstanding Financial Crises: Why We Don't See Them Coming* (Oxford: Oxford University Press 2012); HS Scott *Scott's The Global Financial Crisis* (St Paul, MN: Foundation Press, 1st edn, 2009).

2. Prosser considers that the broadening concept of regulation has lost its former emphasis on important elements such as the use of rules, the work of regulatory agencies distanced from central government and a hierarchical relationship between the regulators and those regulated. Moreover, it does not include direct economic management by central government, particularly through the use of financial resources. See T Prosser *The Economic Constitution* (Oxford: Oxford University Press, 2014) p 3.

3. *Ibid*, pp 11–14.

4. *Ibid*, pp 10–11.

and relations with others (including its own agencies)'.⁵ Thus, his normative approach does not focus on the substantive limitations those norms may apply to economic policy but, rather, on the institutional and process values embedded in those norms. The tension between these two different interpretations is present throughout the book.

The following eight chapters have two objectives. First, they aim to map and document the network of different institutions involved in the management of the UK's economy. Secondly, they try to assess the legitimacy and accountability of these complex arrangements as they work in practice.⁶

Chapters 2 and 3 provide an institutional map to help the reader navigate some of the crucial episodes of economic (mis)management in the UK. The former focuses on key domestic institutions. An important part of the chapter is dedicated to the major institutions of economic governance (eg HM Treasury, the Bank of England, the regulator of financial services, the Cabinet Office and the Department for Business, Innovations and Skills), as well as what he terms 'arm's length bodies', or areas of extended government, which he classifies depending on their degree of independence from the central government. The chapter also includes an overview of the scrutiny and accountability mechanisms applicable to most of the institutions mentioned above. Chapter 3 explores the key institutions in the international context whose decisions affect the management of the UK economy. It places particular emphasis on institutions within the EU, the World Trade Organisation (WTO) and the General Agreement on Trade and Services (GATS).

The next six chapters provide a comprehensive description of the main areas of economic management. Chapters 4 and 5 focus on how public money is sourced and spent. Chapter 4 explores the scrutiny mechanisms applicable to institutions responsible for taxation and government borrowing. This analysis of taxation begins with the unquestionable requirement of parliamentary scrutiny of the raising of funds by government and then moves on to explore different scrutiny mechanisms at different stages of the taxation process, including those mechanisms with an EU constitutional dimension and the role of the European Court of Human Rights (ECHR). With regard to taxation, Prosser concludes that the requirement of parliamentary scrutiny is not effective in practice. He adds that a bigger gap exists in relation to public borrowing, 'which escapes the parliamentary and judicial forms of scrutiny applicable to taxation'.⁷

Chapter 5 explores four main mechanisms through which public expenditure is scrutinised: parliamentary scrutiny, judicial scrutiny, mechanisms for planning public expenditure and auditing. In Prosser's opinion, the scrutiny of spending itself has improved overall, particularly at the local level, whereas the scrutiny of the process of expenditure planning, despite the introduction of thorough mechanisms such as the Spending Review, has not. In this latter sense, he explores the more satisfactory experience in Scotland, but he warns that part of the success may be due to the easier coordination of institutions in a smaller jurisdiction.⁸

Chapter 6 explores the role of the Bank of England in greater detail, as well as its action in response to the financial crisis and the most recent regulatory changes affecting its internal structure. Chapter 7 presents a more thorough analysis of the

5. Ibid, p 8.

6. Ibid, p 2.

7. Ibid, p 109.

8. Ibid, pp 124–125.

main institutions involved in the regulation of financial services at an international, European and national level. This chapter puts a particular emphasis on the response of the Financial Services Authority (FSA) during the financial crisis and explores the main regulatory changes in the UK after the crisis, some of which led to the extinction of the FSA and the transfer of some of its competences to the newly created Financial Conduct Authority (FCA).

Chapter 8 delves into the controversial field of industrial policy. It examines different mechanisms through which the government typically supports certain industries (eg government shareholding and targeted financing) within the context of the EU state aid regime, which plays a central role given the absence of relevant domestic constitutional norms.⁹ Chapter 9 examines an area of economic management that was not so relevant to the financial services industry during the crisis: procurement. Although this may seem tangential to the financial crisis, the chapter describes some worrisome and pressing problems of transparency in defence contracting that threaten to have as big an impact on public funds as the crisis did.

In the final chapter, Prosser picks up the theoretical discussion he presented in the very first chapter. He rejects the idea of an economic constitution 'acting as a straight-jacket on economic management which does not fit a particular socio-economic model'.¹⁰ Instead, he affirms that domestic law and international law (in particular, EU law) impose procedural rather than substantive constraints, and points to political decisions and internal arrangements as the main factors behind any substantive constraint.¹¹

Moreover, he reiterates an important idea that is present throughout the book: that there is a lack of institutional coherence in economic governance, which amounts to an unclear allocation of responsibilities and to ineffective communication between institutions. Unsurprisingly, he concludes that more developed constitutional thought in this context would be helpful.¹² Prosser closes the book with a description of his idea of the UK's constitution as a plural constitution based on several grounds: it has space for different political and ideological approaches, it involves a great number of different institutions and it leaves room for a plurality of different means of accountability.¹³

The recent financial crisis has been one of the most severe and most expensive for the public. In this regard, *The Economic Constitution* sheds a lot of light on what went wrong in the management of the crisis and what measures have been taken to avoid a similar situation in the future. Prosser's emphasis on the need to strengthen institutional coherence is supported by numerous examples in different industries, through which he explores the informal networks and personal relations that often underpin institutional interactions. However, a lot of important questions remain open.¹⁴ Perhaps the most important one is: will the current economic constitution improve

9. Ibid, p 184.

10. Ibid, p 241.

11. One of the arguments he presents to support his affirmation is the 'rapid, far-reaching and costly responses by national governments' during the financial crisis. Ibid.

12. Ibid, p 246.

13. Ibid, pp 250–253.

14. Prosser himself identifies some of these questions in the Preamble of the book, eg a full theoretical development of the constitutional and regulatory approach and a comparative analysis of economic constitutions in other jurisdictions. Ibid, p vi.

institutional response in the event of a future crisis? The answer is clearly no. Yet, the book offers very few reflections, let alone suggestions, as to what better economic institutions might look like.¹⁵

Nevertheless, the reader has been warned. The book expressly aims at raising awareness about the importance of examining the economic management of the UK from a public law perspective and it is very successful in fulfilling this aim. Prosser's account of institutional coherence in the UK before, during and after the financial crisis is exceptional and opens the door to numerous research questions. In the future, Prosser himself intends to tackle a few.¹⁶ Hopefully, this book will entice other public lawyers to follow suit.

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Justice among Nations: A History of International Law, by STEPHEN C NEFF.
Cambridge, MA: Harvard University Press, 2014, ix + 628pp (£33.95 hardback).
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The history of international law begins in 1648 at the Peace of Westphalia, or so most introductions to international law will tell you. More recent attempts to chart the origins of international law have started in Europe in the 1500s,¹⁷ a time of trade and exploration that witnessed interactions between growing nation-states. In *Justice among Nations: A History of International Law*, Stephen C Neff goes further still in his account and starts with the Greeks and Romans, travels through China and India, to bring the narrative up to the present day.¹⁸ Histories of international law are often criticised for focusing on the European role in creating international law, but *Justice among Nations* promises a thorough history, spanning both time and the globe. The introductory chapters to *Justice among Nations* inspire hope for a survey of international law from all continents.

Beginning with Livy's report on the murder of four Roman envoys by Lars Tolumnius, ruler of Veii, in c. 438 BC and ending in 1564 with the disputed ownership of the Adriatic Sea, part I of the book is a story of trade and war. Weaved between tales of the power of the papacy and the power of empires, is a narrative about the role of natural law in early thinking on international law and the debate on the relationship between natural law and *ius gentium*. Covering these earlier periods in depth provides the 'roots' for discussions on extraterritoriality and consular jurisdiction that come later.¹⁹ Neff shows how, in the Middle Ages, European countries had resident communities in trading cities, which provided the need for treaties that granted extraterritorial privileges. Starting from here, he can then trace the trend for these treaties to

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15. The absence of such a reflective exercise is particularly acute in the context of the institutional interrelations in the tripartite system between the Bank of England, HM Treasury and the now extinct FSA during the financial crisis. The reader is left wondering whether the new twin peaks model will provide a more effective protection. Ibid, pp 22–36.

16. Ibid, p vi.

17. B Fassbender et al (eds) *The Oxford Handbook of the History of International Law* (Oxford: Oxford University Press, 2012).

18. Ibid; Fassbender et al ends its particular history at the Second World War.

19. SC Neff *Justice among Nations: A History of International Law* (Cambridge, MA: Harvard University Press, 2014) p 316.