

implications. If that is at the core of European law and institutions, she asks, on what basis can the allegiance of the most populous “third class” in the EU be presumed? By “third class”, she refers to the “residual” category of people who do not belong to what she calls the “State benefit class” or “the capitalists whom the financial systems rewards” (p. 410). This classification would merit far greater discussion than space allows for here, but she touches on an important point on the conceptual disconnect between the EU and the majority of its “citizens”. Going back to the original context of her study, there are, however, some positive sides to the switching of judicial allegiance. One is the production of an edited collection, which, whilst regrettably lacking an overarching theme, nonetheless brings together a number of high-quality interventions on some of the most important and challenging questions of EU and Irish law.

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*The Economic Constitution.* By TONY PROSSER [Oxford: Oxford University Press, 2014. xviii + 277 pp. Hardback £60. ISBN 978-0-19-964453-7.]

Recent years have witnessed a true explosion with respect to the creation of public bodies of different types: Executive Agencies, Ministerial Departments, Non-Departmental Public Bodies – all of them composing a picture of a diverse and complicated administrative landscape. In this mosaic of different organs and authorities, there is a relatively distinct part which concerns the management of Government’s intervention in the economy. Is the activity of this collection of organs able to develop its own constitutional rules and, if yes, which are the properties of these rules? The answer to this intriguing and highly contemporary question is the aim of Tony Prosser’s book which has the ambitious goal of analysing the “economic constitution”.

There are two dimensions to this work: a descriptive and a normative one. Throughout the descriptive part, Prosser aims to portray the different techniques and institutions which the UK Government uses in its management of the economy. Throughout the normative part, he proceeds into the examination of the legitimacy and accountability of the relevant arrangements associated with the operation of the said techniques and institutions. At a central point of his endeavour attempt, he places the concept of regulation, which he regards the generic term which encompasses the idea of economic management.

Prosser therefore relies on the concept of regulation in his elaboration of the complete structure of the economic constitution as he perceives it. However, his examination of the concept of regulation itself appears narrower than the burden which is placed on that concept by his analysis. Although he notes that the notion of regulation has expanded in recent years, he does not examine in detail the different theories which exist on the subject. A notable omission in this context is a discussion of the theories of Christopher Hood, which are aimed specifically at the systems of regulation inside Government. Equally, there is no discussion of the theories of Michael Power, who is another writer well known for his discussion of the use of audit as a means of regulation.

The theoretical issues associated with the construction of the notion of regulation develop a practical relevance when applied to a further theme of the book: that of complexity in the arrangements of the economic constitution. According to

Prosser, the institutions of the economic constitution are exposed to a significant degree of complexity and this hinders transparency and accountability. Prosser develops his arguments on two levels. On one level, he argues that complexity arises from the associations between the different organs of the economic constitution. In order to substantiate this claim, he attempts to map the institutions. However, the difficulties in constructing a concept of regulation (mentioned earlier) hinder the categorisation of these institutions. Prosser therefore enumerates the organs which are relevant, without systematising or dividing them into categories. This demonstrates complexity, certainly. However, this reviewer would argue that this complexity should be attributed to the weak systematisation of the institutions and not to the operation of the economic constitution *per se* (as the author argues). With a more elaborate theory regarding regulation, the systematisation of the institutions could have been more effective, and the regulatory landscape would look substantially less complicated.

Prosser also discusses the complexity of the economic constitution at a different level. Having mapped the organs of the economic constitution, he explains how particular institutions promote complexity. He begins within the international context. He distinguishes five sources of international influence: the EU, through the legal doctrines of direct effect and supremacy; the World Trade Organisation and General Agreement on Trade in Services (GATS) through the set of liberties and concepts of separations of powers they promote; the Council of Europe and the European Convention on Human Rights through the widespread integration they enjoy in states' legal orders; the Organisation for Economic Co-operation and Development (OECD), through its important facilitative and advisory powers; the World Bank and International Monetary Fund, through their extensive role in international liberalisations. As with the national framework, the international context is exposed to significant complexity, with the associated dangers of accountability and transparency.

Prosser then turns his attention to the mechanisms through which the Government gathers and spends funds. He highlights the default constitutional position, which is the supremacy of Parliament in the gathering and expenditure of funds. Prosser then argues that the existing mechanisms of parliamentary scrutiny, although they are widely accepted in principle, do not operate effectively. The reasons are associated with the operation of multiple constitutional factors, like the limited role of back-benchers, the inadequacy of existing mechanisms of consultation, and the time constraints imposed by parliamentary procedure. Prosser does also identify some institutions which have a positive role in terms of scrutiny of the Government's economic activity, such as the courts, the system of spending reviews, and the generalised use of audit.

With respect to the positive role of the courts, Prosser's position sometimes appears more optimistic than can in fact be justified. The main reason for this is that there are fundamental difficulties in judicial review of government decisions associated with the spending of funds. One of the more conspicuous of these relates to the issue of standing, as provided by s. 31(3) of the Senior Courts Act 1981. The requirement for an applicant to show "sufficient interest" is not normally recognised for citizens with respect to the spending of taxes by the central Government (see *R. v Inland Revenue Commissioners, ex parte National Federation of Self-employed and Small Businesses Ltd.* [1982] A.C. 617). Polycentricity is a further problem. Judicial control of the spending power of the Government in this way would be hindered by the fact that many of the issues associated with the exercise of this power are inherently polycentric, and the courts are not considered the appropriate organs to examine such issues (see *R. v Disciplinary Committee of the Jockey Club* [1993] 2 All E.R. 225; *Law v National Greyhound Racing Club* [1983] 1 W.L.R. 1302).

Prosser also analyses industrial policy. Through this prism, he examines the EU state aid regime. Discussing the effectiveness of Articles 107 and 109 of the Treaty on the Functioning of the European Union (TFEU) (which establish the main EU framework associated with state aid), he discusses the role of the European Court of Justice (ECJ) and the Commission in the shaping of the content and application of these rules. Particular points of his analysis are the Case C-280/00, *Altmark Trans GmbH* [2003] E.C.R. I-7747 with respect to the extent to which public compensation for the delivery of public services would constitute state aid, and the subsequent systematisation of this framework by the Commission through the “Altmark Package” of rules. With respect to the internal dimensions of the subject, Prosser discusses the regulatory framework of public corporations, government shareholding, regional development agencies, and local enterprise partnerships. Crucial themes in his analysis are the possibility of control of the related bodies by the National Audit Office, and the application of company law restrictions which influence the implementation of public policy choices. His analysis highlights that the regulatory construction associated with government industrial policy as a whole, both in the EU and at national level, suffers from considerable accountability deficits relative to a variety of factors, such as the shift from a model of public ownership to a model of government shareholdings.

Prosser then turns his attention to the area of procurement. He first discusses the distinction between the inherent contractual power of the central Government and the statutory contractual power of the local Government and statutory bodies. Further themes include the non-binding nature of a number of government relationships, which, however, are referred to as contracts; the reluctance of the courts to apply public law standards and review procedures to the contractual process; and the importance of value for money as a post-facto mechanism of scrutiny. With respect to the EU aspect of the law of procurement, Prosser discusses Directives 2004/17/EC and 2004/18/EC, highlighting three problems in the existing regime. The first is that these directives do not cover in-house contracts. The second is that they do not cover all kinds of PFI (private finance initiative) procurement. The third is that they do not cover in full a number of essential public procurement lines of service, like some of the services associated with health policy. The internal framework, as Prosser describes it with respect to the UK, is built giving a predominant role to the Treasury, the Cabinet Office, and a number of associated agencies. The model is examined with respect to transparency, with special focus on the role of modern technologies, like the internet, the special challenges posed by PFI as a procurement method, and the dynamics of contracts associated with defence.

With respect to the analysis of the PFI, it needs to be noted that it is predominantly perceived as a means of procurement. However, although the PFI is indeed a means of procurement, there are also other aspects of it which are legally interesting and which are associated with its function as an instrument of regulation in its own right. One example might be the accountability of the organs which affect the tax treatment of these transactions and which impact in this way on the attractiveness of PFI to the Government and investors alike. Again, when looking at PFI as a means of regulation, it would be useful to examine the aspects of these transactions as a means of transfer of expertise among the government organs and the private sector, which acquire legal significance through the central role of their confidentiality clauses. The coverage of subjects of this kind would have enriched the analysis in this particular section of the book. They certainly provide useful points of reference for future research and debate.

The major themes of the book are gathered together and assessed in its final chapter, which focuses on the ideas of institutional coherence and pluralism. From

Prosser's perspective, the framework of the economic constitution, as it has developed over time, is particularly exposed to the complexity of roles exercised by a variety of diverse organs. This reality of institutional pluralism fosters an incoherence which hinders accountability, transparency, and deliberation in the intervention of government in the economy. In this way, the theme of pluralism in government organs and their roles (as set out in the earlier chapters) is presented as the major theme of the economic constitution, which shapes its limits and influences its operation.

Prosser's book thus not only achieves an exposition of the various workings of the organs of the economic constitution, but also provides fertile grounds for future research on the subject. These extend not only across various branches of law, including public, European, and international law, but also across related disciplines like political sciences and public administration. As discussed earlier in this review, Prosser's construction of the idea of regulation is associated with his perception of the properties of the complexity within the economic constitution, and a different approach could lead to a much more flexible picture of it. Given the centrality and importance of the question of regulation within the legal analysis of the economic constitution, this issue is likely to be an important topic for future debate – a debate which has been effectively begun and delineated in this book.

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*Corporate Governance in the Common-Law World: The Political Foundations of Shareholder Power.* By CHRISTOPHER M. BRUNER [Cambridge: Cambridge University Press, 2013. 300 pp. Hardback £69.99. ISBN 9781107013292.]

Anglo-American corporate law scholars have traditionally never shown much regard for socio-political considerations, at least insofar as their academic subject matter is concerned. Whilst the typical English corporate (or “company”) lawyer has tended to earn their crust by dwelling on the internal doctrinal logic and minutiae of the law, the more modern school of US (or US-inspired) scholars have specialised in the application of economic rationality to provide some purportedly “external” normative order to their accounts of the law. Recent decades, however, have witnessed a gradually developing trend in the Anglo-American literature towards greater engagement with relevant social and political empirics. The seminal contribution in this regard was Mark Roe's ground-breaking work in the 1990s on institutional path dependency, exploring the diverse political contingencies that have shaped leading national corporate governance systems. More recent instalments of note include Brian Cheffins's illuminating work on the development of national corporate ownership structures (especially those of the UK) set within a historico-political context; the sophisticated “varieties of capitalism” literature on institutional complementarities; and Martin Gelter's superb recent research on the social-institutional factors supporting the rise of the modern shareholder value movement within corporate governance.

To this important and expanding body of literature, Christopher Bruner's outstanding work represents a highly innovative and influential contribution. Bruner's central thesis is at once both sophisticated and strikingly simple. First, he makes the somewhat counterintuitive descriptive claim that the prevailing degree of shareholder orientation to a national corporate governance system – as measured