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Finance and Constitutionalism

A paradox of parliamentary constitutionalism is that parliaments do not control public finance.

Despite enacting gargantuan tax and appropriation statutes, the financial powers of parliaments are ceremonial and passive, while executives' are practical and potent. Executive organs carry out all financial planning, possess a veto over all financial legislation, exercise broad delegated statutory power over public expenditure, determine when and how to issue sovereign debt, supervise the wider executive's use of economic resources and dictate the form and content of public accounts. Parliaments ratify the financial legislation developed by executives and exercise a weak form of ex post review of public spending. Judiciaries occupy no systemic position in public finance, lacking any meaningful jurisdiction over the legality of public spending, debt or monetary finance, while only intervening sporadically in taxation disputes and not invariably in support of parliaments. Central banks have stringent public financing powers which are exercised infrequently and, usually, via coordination with treasuries. Since the mid nineteenth century, that distribution of financial power has prevailed in the nation-states which grew from the British Empire, both republics and constitutional monarchies.

Much of the foregoing chafes against orthodoxy. Since the late Victorian era, mainstream jurists have assumed that executives are subordinate to parliaments, including where finance is concerned. That public money is governed by a 'system of parliamentary control'[1] has been assumed as mostly accurate, and no dedicated study has questioned parliaments' supposed constitutional superiority. Compared to the attention given to the clash of political and judicial authority in twentieth-century constitutional

[1] Dicey (1885), *Introduction to the Study of the Law of the Constitution*, 171–175 (references to Dicey are to the 1885 first edition, republished in: Allison (2013), *A.V. Dicey, The Law of the Constitution*).

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affairs, the financial aspect of constitutionalism has been left to languish in obscurity.

This book brings public finance out from the constitutional shadows for examination. It argues that an historical and contemporary analysis of the legal practices governing public finance places the executive at the financial apex of the parliamentary tradition. That argument unfolds in the following structure.

Chapters 2–5 provide an historical account of the development of a model of parliamentary public finance which distributed the bulk of authority to executives, rather than parliaments or judiciaries, beginning in the UK, before widening to account for the imperial spread of parliamentary government. Chapters 6–8 provide a detailed case-study analysis of the contemporary operation of public finance law in varying economic circumstances: Australia and the UK between 2005 and 2016. Those case studies provide concrete examples of the complex interplay of legal authority, governmental behaviour and economic conditions, each of which contributes to the distribution of constitutional authority over public finance. Chapters 9 and 10 close the book by consolidating the ramifications of the foregoing historical and contemporary analyses for core doctrines of anglophone constitutional theory. Chapter 9 presents a detailed critique of the idea of 'parliamentary control of public finance' and explores alternative formulations of the balance of financial power between parliaments, executive and judiciaries. Chapter 10 moots a number of future avenues of intellectual enquiry on the topics of constitutionalism and public finance.

This introductory chapter surveys the intellectual and institutional background, clarifies critical ideas and summarises the book's central claims. It commences by explaining how public finance has been understood through the idea of 'parliamentary control'. Like many bedrock constitutional ideas, it traces to A. V. Dicey, and this book opens by reviewing Dicey's influence on prevailing thinking about finance and parliamentary government. After dealing with Dicey, the background literature and institutional practice necessary to appreciate this book's contribution are surveyed. Thereafter, the chapter introduces and explains the core concepts necessary to engage with public finance from a constitutional perspective, particularly the functions of fiscal, debt management and monetary activities. That explanation should be helpful for readers outside the financial *cognoscenti*. The chapter closes by summarising the book's central claims.

Dicey's System of Parliamentary Control

From the first edition of the *Law of the Constitution*, in his treatment of '[t]he Revenue',[2] Dicey wrote of the 'system of parliamentary control'[3] which governed 'the collection and expenditure of the revenue, and all things appertaining thereto'.[4]

Dicey's focus was novel. Other constitutional jurists had not allocated a totalising position of control to parliament over finance but had devoted their intellectual energies to explaining the constitutional functions of the Crown (Monarch and executive), while recognising, almost as subsidiary, the role played by parliament in the annual processes of supply and taxation.[5] Dicey swept aside the Crown's financial role and placed Parliament in a position of predominance in relation to tax, expenditure and audit.

On taxation, Dicey counselled 'putting the hereditary revenue out of our minds' and restyled the 'extraordinary' revenue as 'the Parliamentary revenue of the nation'.[6] He canvassed the distinction between annual and standing taxes to make the 'main point . . . that all taxes are imposed by statute, and that no one can be forced to pay a single shilling . . . which cannot be shown to the satisfaction of a judge to be due from him under Act of Parliament'.[7] On expenditure, he refuted the 'mediaeval notion' that money 'granted' by Parliament was 'the King's property', explaining that, 'at the present day', the 'whole of the public revenue is treated . . . as public income'.[8] The 'details of the methods according to which supplies are annually voted and appropriated' were glossed over en route to Dicey's salient point that 'each item of expenditure' is 'directed and authorised' by 'some permanent Act' or 'by special Acts passed prior to the appropriation Act and enumerated therein'.[9]

[2] Ibid., 171.
[3] Ibid., 171–175.
[4] Ibid., 171.
[5] E.g., May (1851), *A Practical Treatise on the Law, Privileges, Procedures and Usage of Parliament*, chapter 21; Hearn (1886), *The Government of England*, chapters 8 and 9; Todd (1887), *Parliamentary Government in England*, volume 1, chapters 16 and 17; Todd (1889), volume 2, chapter 1; Palgrave and Bonham-Carter (1893), *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, chapter 22; Anson (1907), *The Law and Custom of the Constitution*, volume 1, 230–237; Anson (1907), volume 2, 284–335.
[6] Dicey (1885), 172.
[7] Ibid., 173. Chapter 3 examines some of the complications which attended that statement in 1885.
[8] Ibid., 173.
[9] Ibid., 174.

Dicey described the system of public audit and accounts as a '*security* . . . for the due appropriation of public revenue . . . for its being expended in the exact manner which the law directs'.[10] The *Exchequer and Audit Departments Act 1866* was singled out for special mention,[11] particularly those parts which conferred powers on the Comptroller and Auditor-General as 'comptroller' (to permit a withdrawal of money) and 'auditor' (to scrutinise the accounts of departments to ensure that expenditure occurred lawfully). Both powers, Dicey wrote, completed the system of providing 'parliament [with] complete control over the national expenditure'.[12]

Dicey included the judiciary in that system of parliamentary control, but trod cautiously. Full-throated approval was given to the judiciary's position as a protector of property rights, with Dicey stating that a public official trying to collect tax without statute would 'expose himself to actions or prosecutions'.[13] Far more circumspect language was used to describe the judiciary's positions vis-à-vis public expenditure: officials spending money without legislative approval 'would find it difficult to avoid breaches of definite laws which would expose them to appear before the Courts'.[14] That delicate language was surely intentional, as Dicey knew first-hand that the judiciary had no jurisdiction to enforce appropriation legislation against the Treasury, having successfully argued the point as counsel two years before publishing his lectures on constitutional law.[15]

Dicey's Legacies

Of course, Dicey did not design the UK's system of public finance, but his intellectual positioning of the constitutional principles concerning public finance left three intellectual legacies, which were passed down to later generations of constitutional jurists. The first was framing those principles within the language of 'parliamentary control' rather than available alternatives like: '[t]he Crown demands money, the Commons grant it

[10] Ibid., 171 (original emphasis).
[11] (29 & 30 Vict, c 39).
[12] Ibid., 174.
[13] Ibid., 200.
[14] Ibid.
[15] In *R* v. *Inland Revenue* (1884) 12 QBD 461 the Court of Appeal upheld Dicey's submission that earlier authority permitting the issue of mandamus against the Treasury for breach of an appropriation Act could not 'be maintained on any ground' and was 'wrong': at 476, 480. Chapter 3 explains the episode in greater detail.

and the Lords assent to the grant' or the 'executive's financial initiative'.[16] The language of 'parliamentary control' was not unknown before Dicey. It was tossed about in the House of Commons in relation to public expenditure from (at least) the 1840s and was invoked in relation to Gladstone's financial reforms of the 1860s.[17] Building on those artefacts of Victorian political culture, Dicey elevated the idea that parliament controlled public finance to a position of constitutional predominance.

Dicey's second legacy was to selectively rank the financial activities of government: taxation first, expenditure second, audit third, while sovereign borrowing and the Bank of England's public financing role were wholly ignored.[18]

Dicey's concentration on tax is understandable. Tax is constitutionally significant because it is the revenue-generating activity uniquely possessed by the state in virtue of its monopoly on lawful coercion. Everyone can *bargain* to raise funds; only the state can *command* people to fund it. But, even in Dicey's time, tax was neither the sole nor the most potent method of raising public money. In the decade before *The Law of the Constitution*, large sums were routinely advanced from the Bank of England to the Treasury. In 1877, the Bank advanced the Treasury £1 million, representing 1 per cent of total public receipts and 19 per cent of income tax receipts. In 1885, that number rose to £2.5 million (1 per cent total tax and 21 per cent of income tax receipts).[19] Between the 1850s and the 1880s, the annual average of outstanding Treasury debt stood at ~£18 million, representing ~22 per cent of total receipts and ~200 per cent of income tax receipts.[20] Both the advances from the Bank of England and the debt issued by the Treasury were authorised by legislation ignored by Dicey.

Dicey's attention to the constitutional practices surrounding public expenditure is equally understandable, particularly his focus on the annual process of parliamentary appropriation. Annual appropriation legislation has an obvious constitutional significance by tethering the

[16] May (1851), 411.
[17] HC Deb 11 August 1848, cc 93–100, and again following Gladstone's financial reforms of the 1860s (e.g., HC Deb 08 June 1875, cc 1522–60) about which more is said in Chapter 2.
[18] Inconsequential references to the charging of the 'National Debt' on the 'consolidated fund' and the location of public revenue 'in the Bank of England to the account of the Exchequer' exhaust Dicey's treatment of those aspects of public financial management: Dicey (1885), 175–176.
[19] Wormell (1999), *National Debt in England,* volume VI, 120; *BHS*, 582–583.
[20] *BHS*, 582–583, 602.

executive's budget to parliamentary will expressed through statute. Once again, however, the story is more complicated than depicted by Dicey.

When Dicey wrote, Britain's expenditure on debt-servicing costs was authorised under legislation which stood outside the annual parliamentary processes: *standing appropriation legislation*.[21] The amount of interest paid, and principal repaid, under that legislation was enormous. Between 1875 and 1885, public debt repayment averaged 35 per cent of total public spending, while non-debt military and civil expenditure averaged 32 per cent and 21 per cent respectively.[22] The proportion of public expenditure authorised by standing appropriation legislation would only increase as Dicey penned the latter editions of his tome. By the publication of his eighth edition in 1915, standing legislation had been enacted providing authority for early welfare state spending.[23] The large, and increasing, share of public expenditure authorised outside the annual appropriation process sat awkwardly with Dicey's ideas on parliamentary control of expenditure.

Dicey's third legacy was locating the idea of parliamentary control of public finance within the twin pillars of 'parliamentary sovereignty' and the 'rule of law'. His conclusion that public finance was 'governed by law, or, what is the same thing, may become dependent upon the decision of the judges upon the meaning of an Act of Parliament',[24] is exemplary of his broader project to model the English constitution within the confines of the rule of law and parliamentary sovereignty.[25] Thereby, Dicey framed the issue of the constitutionality of public money as one concerning parliament and the judiciary.

Notably underplayed was the executive's role, as well as the massive legal and administrative power held by the Treasury. Notwithstanding Dicey's famous antipathy to the growing British bureaucracy,[26] that is a curious omission. He acknowledged select parts of the *Exchequer and Audit Departments Act 1866* but omitted those which delegated vast financial authority to the Treasury: to determine how departmental

[21] Notably the *Act of 1787* (27 Geo III, c 33) which created the Consolidated Fund.
[22] *BHS*, 588, 602.
[23] *National Insurance Act 1911* (1 & 2 Geo, c 55).
[24] Dicey (1885), 178.
[25] Ibid., 180.
[26] Dicey attacked the 'administrative methods' of early welfare state legislation, such as the *National Insurance Act 1911* (1 & 2 Geo V, c 55), on the basis that they 'harmonise with the principle or the sentiment of collectivism', and called the combination of universal adult suffrage and old-aged pensions 'evil': Dicey (1917), *Law and Public Opinion in England During the Nineteenth Century*, xxxv, xxxix.

accounts would be prepared, to refuse a department's request for funds granted by parliament, to direct the Comptroller and Auditor-General to carry out audits and to determine the terms of public borrowing (from the Bank of England) to make up shortfalls in tax revenue.[27] When Dicey wrote, those provisions bolstered the Treasury's, rather than Parliament's, control over the administration of public expenditure. Unaltered in all material respects, they endure today.

Parliamentary Control of Public Finance

For constitutional jurists, the Diceyan idea of parliamentary control of finance became a basic unit of thought, even though interest in the legal and constitutional dimensions of public finance waned throughout the twentieth century.

Predictably, Wade and Phillips followed Dicey in framing their analysis of finance via 'parliamentary control of expenditure and taxation'.[28] Although they took fleeting notice of sovereign borrowing and observed the 'functions of the Treasury', they stayed within the Diceyan mainstream.[29] Jennings' engagement with public finance was characteristically focused on the legislative and administrative aspects of government,[30] but he still understood 'financial control exercised by the Commons' as a core constitutional principle.[31] His drift away from Dicey was, however, evident, including by recognising the importance of the Treasury and surveying the details of legislation concerning annual and standing appropriations. But public borrowing and banking were not prominent parts of Jennings' 'functionalist-style'[32] analysis of constitutions in the British tradition. Thereby, Jennings remained within the slipstream of Dicey's constitutional modelling of public finance.[33]

At the outset of the third millennium, parliamentary control is established at the intellectual core of the constitutional dimension of public

[27] *Exchequer and Audit Departments Act 1866* (29 & 30 Vict, c 34) ss. 12–14, 21–23.
[28] Wade and Phillips (1931), *Constitutional Law*, 191; (1946), *Constitutional Law*, 155.
[29] Wade and Phillips (1931), 106, 190; (1946), 156. That attitude aligns with Wade's remarks as editor of the ninth edition of Dicey (1939), *Introduction to the Study of the Law of the Constitution*.
[30] Rather than the judiciary: Loughlin (1992), *Public Law and Political Theory*, 168.
[31] Jennings (1939), *Parliament*, 282; (1957), *Cabinet Government*, 283.
[32] Loughlin (1992), 168.
[33] Specialist public finance texts, where they existed, also invoked 'parliamentary control' as the dominant constitutional principle concerning public money: see, e.g., Durrell (1917), *The Principles and Practices of Parliamentary Grants*, 3.

finance. McEldowney expressed 'Parliamentary control of the purse' as a 'basic principle of the [UK's] constitution',[34] and *Halsbury's Laws of England* states, as a 'basic' constitutional principle, that 'Parliamentary control is exercised in respect of (1) the raising of revenue; (2) its expenditure; and (3) the audit of public accounts'.[35]

Throughout the common law world, 'parliamentary control' also features prominently in constitutional actors' own explanations of the principles governing public money. In Dicey's home jurisdiction, the parliament spoke frequently in those terms. The UK's *National Audit Act 1983* (UK) bore the long title '[a]n Act to strengthen parliamentary control ... of public money'. Two decades later, the Commons would explain one of its 'core functions' as exercising 'effective control' over 'government expenditure'.[36] New Zealand's parliament adopted the same verbal formula in s. 22 of the *Constitution Act 1986* (NZ), entitled 'Parliamentary Control of Public Finance'. Executive agencies in Australia, Britain, Canada and New Zealand also frame their institutional relationship over finance through the idea of parliamentary control over 'government spending'.[37]

On the rare occasion that common law judiciaries have considered issues of public finance, they stayed close to the Diceyan shore. In 1912, a judge of the Chancery Division stated that '[b]y the ... Bill of Rights ... it was finally settled that there could be no taxation in this country except under authority of an Act of Parliament'.[38] In 1923, the Privy Council stated that '[a]ny payment out of the consolidated fund made without Parliamentary authority is simply illegal and ultra vires'.[39] The substance of those statements has since been adopted by the common law canon,[40]

[34] McEldowney (2015), 'Public Finance and the Control of Public Expenditure'; and the preceding four editions, (2011), 341; (2007), 364; (2004), 379; (2000), 190; McEldowney (2016), *Public Law*, 464.

[35] Blackburn (2014), 'Constitutional and Administrative Law', [470].

[36] Liaison Committee (2009), 'Financial Scrutiny: Parliamentary Control over Government Budgets'.

[37] HM Treasury, *Alignment (Clear Line of Sight) Project* (2009), 3. Treasury Board of Canada, *Guide on Grants, Contributions and Other Transfer Payments* (2002), 22; New Zealand Treasury, *A Guide to the Public Finance Act* (2005); Commonwealth of Australia Department of Finance, *Is Less More? Towards Better Commonwealth Performance* (2012), 13.

[38] *Bowles* v. *Bank of England* [1913] 1 Ch 57, 84.

[39] *Auckland Harbour Board* v. *The King* [1924] AC 318, 327.

[40] *In re McFarland* [2004] 1 WLR 1289, 1302; *Steele Ford & Newton Respondents* v. *Crown Prosecution Service (No 2)* [1994] 1 AC 22, 33; *Woolwich Equitable Building Society* v. *IRC*

while an adventurous Australian court has written Dicey's principle of parliamentary control directly into its constitutional jurisprudence.[41]

In the world of mainstream constitutional debates, the position of public finance, and parliamentary control, is less visible. As the 'concept of fundamental law in modern constitutional regimes' skewed towards 'the institution of judicial review',[42] scant attention has been paid to the constitutional dimension of finance. Debates about parliamentary sovereignty focus on the, supposed or real, friction between parliament's legislative sovereignty and the judiciary's law-speaking and law-finding functions.[43] Little ink has been spilt working out where the relationship, financial or otherwise, between parliament and executive fits in that debate. Contemporary rule-of-law debates are typified by a preoccupation with the common law judiciary's intellectual methodology,[44] particularly thick/substantive and thin/procedural/formal conceptions of the rule of law.[45] Similarly, analyses of the separation of powers (outside America) have tended to be conducted by reference to the judiciary's institutional independence from the non-judicial arms of government.[46]

As those debates are presently orientated, there is scarce room to think about the constitutional position of public finance,[47] which, taxation aside, operates almost entirely outside the purview of judges. No meaningful judicial time has been spent thinking about Auditors-General's legislative powers,[48] and annual appropriation legislation falls within the

[1993] AC 70, 177; *Attorney General* v. *Great Southern and Western Railway Company of Ireland* [1925] AC 754, 772; *Attorney-General* v. *Wilts United* (1922) 38 TLR 781.

41 *Pape* v. *Commissioner of Taxation* (2009) 238 CLR 1, [294]; *Williams* v. *Commonwealth (No 1)* (2012) 248 CLR 156, [219]. A less unorthodox adoption appeared in Canada: *Confédération des Syndicats Nationaux* v. *Canada* [2008] 3 SCR 511, [21]; *Re Eurig Estate* [1998] 2 SCR 565, [32].

42 Loughlin (2010), *Foundations of Public Law*, 288.

43 The positions are collected in Knight (2009), 'Bi-Polar Sovereignty Restated'; Goldsworthy (2001), *The Sovereignty of Parliament*. Arguments for a more nuanced perspective on parliamentary sovereignty frame their preferred position in a similar way: see, e.g., Barber (2011), 'The Afterlife of Parliamentary Sovereignty'.

44 A broader understanding of the rule of law, as constituted by 'the constant disposition to act fairly and lawfully' of the 'settled ethical character', has not featured in anglophone constitutional thought: Shklar (1987), *Political Theory and the Rule of Law*, 3, a position attributed to Dicey by Loughlin (1992), 151.

45 Craig (1997), 'Formal and Substantive Conceptions of the Rule of Law'.

46 Allison (2007), *The English Historical Constitution*, chapter 4.

47 Being mentioned only en passant: e.g., Barber (2018), *Principles of Constitutionalism*, 80.

48 The few existing cases have not been important enough to report: e.g., *Bakewell* v. *McPherson* (1992) BC9200236 (Supreme Court of South Australia).

core of subject matter which is not appropriate for judicial digestion: a fortiori legislation providing legal authority for sovereign borrowing and monetary financing.[49]

Given the low visibility of public finance in mainstream constitutional debates, public law scholars interested in public money have begun cultivating greener pastures.[50] Explicitly rejecting any debt to Dicey, Daintith and Page studied the constitutional dimension of finance using 'systems theory' and the idea of 'structural coupling' of parliament and executive.[51] Building on that heritage, Prosser analysed the position of finance within the 'economic constitution' with the assistance of 'the concept of regulation as both an academic discipline and a concern of practical politics', while assuming parliamentary control as a basic constitutional principle concerning 'getting and spending' public money.[52] Both works make significant contributions to scholarly understandings of the workings of public finance in the parliamentary tradition, but neither provides a root-and-branch rethink of the descriptive accuracy or normative power of Dicey's idea of parliamentary control of finance, nor do the few deeply sceptical accounts which follow Bagehot's view that parliamentary control of finance is more constitutional fiction than fact.[53]

[49] E.g., *National Loans Act 1968* (UK) ss. 12(1) and (7), 20A, Sch. 5(4); *Commonwealth Inscribed Stock Act 1911* (Cth), s. 3A; *Financial Administration Act 1985* (Can), s. 43; *Public Finance Act 1989* (NZ), s. 47. Exceptional cases exist at the supra-national level concerning the lawfulness of the European Central Bank's Outright Monetary Transactions Program (*Gauweiler* v. *Deutscher Bundestag* (c-62/14)) and Public Sector Asset Purchase Programme (*Weiss and others* (c-493/17)) under the prohibition on some forms of monetary finance contained in Art. 123 of the *Treaty on the Functioning of the European Union*.

[50] Scattered offerings in the Diceyan mould can be found, but only as piecemeal treatments of discrete cases or statutes, such as Jaconelli's analysis of *Bowles* v. *Bank of England* ((2010), 'The "Bowles Act" – Cornerstone of the Fiscal Constitution') and McEldowney's critique of the Contingencies Fund ((1998), 'Contingencies Fund and Parliamentary Scrutiny of Public Finance'); treatments available elsewhere in the common law world are deeply embedded in local constitutional and statutory regimes; Lawson (2008), 'Re-invigorating the Accountability and Transparency of the Australian Government's Expenditure' 879–921.

[51] Daintith and Page (1998) *The Executive in the Constitution*, 4–5 (but see 105) citing Teubner (1992), 'Social Order from Legislative Noise?'.

[52] Prosser (2014), *The Economic Constitution*, 17–18, 84, 111. An in-depth account of the 'regulatory enterprise' can be found in Prosser (2010), *The Regulatory Enterprise*.

[53] E.g., Harden (1993), 'Money and the Constitution: Financial Control, Reporting and Audit'.

Law and Public Finance in Parliamentary Government

This book steps back from the existing literature and looks directly at the way that authority over public finance is distributed between parliaments, executive governments and judiciaries by legal norms. It seeks to understand how financial authority is distributed in parliamentary systems of government, why that distribution of power arose and how it is affected by the economic/political/administrative context in which government carries out financial activities.

More pedantically stated, this book analyses the financial aspect of *parliamentary constitutionalism* through the prism of *public finance law*; being the legislative and judicial practices which concern the *financial activities* of *central governments*, being *fiscal*, *debt* and *monetary activities*. Each of those terms requires some introduction and explanation.

Fiscal, Debt Management and Monetary Activities

Governments finance their operations through a set of activities which are well understood in non-legal scholarly work and government practice,[54] but are likely to be highly obscure to most constitutional jurists and lawyers.

Fiscal activity describes the collection of public revenue from taxation, fees, fines, rent and royalties, and the expenditure of that revenue. That usage is reflected in the concept of a *fiscal deficit*: the gap between expected receipts and outlays before having recourse to debt markets.[55] *Debt finance* and *debt management activity* describes the sovereign borrowing undertaken by governments, which issue long-term debt (to fill fiscal deficits) and short-term debt (to plug holes in cash-flow from taxation and other fiscal receipts). The practical outworking of debt management activity cannot be isolated from fiscal activity because the extent of a government's debt exposure is assessed by reference to shortfalls in fiscal collection (described in some accounts as the *net cash requirement*). Similarly, a government's ability to service debt repayments is assessed by reference to its fiscal profile, reflected in, both, the

[54] See the general usage throughout Allen, Hemming and Potter (2013), *The International Handbook of Public Financial Management*.

[55] The precise metrics used to measure public debt and deficit are a matter of endless contest: Cf Irwin (2015), 'Defining the Government's Debt and Deficit' and Blejer and Cheasty (1999), *How to Measure the Fiscal Deficit*.

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risk *premia* of its debt securities and sovereign risk rating.[56] Debt management activity also engages with central banks' operations, as sovereign debt securities are vital components of contemporary monetary policy operations.[57]

Monetary activities are the operations of public bodies which exercise *monetary authority*, being the power to issue money on behalf of the state.[58] In most modern economies, central banks exercise that power with the principal objective of achieving stable prices through *monetary policy*. Monetary policy operations have attempted to influence inflation (price stability)[59] by providing short-term loans, and emergency funding, to commercial banks.[60] A range of tools are used by central banks to carry out those operations. From, at least, the 1980s, 'conventional' monetary policy operations used short-term lending to private banks to influence interest rates in the wider economy.[61] More recent 'unconventional' operations of central banks have included the purchase of large amounts of government debt, described as 'quantitative easing'.

A central bank's monetary activities can directly or indirectly contribute to public finance through *monetary finance*.[62] In a broad sense, monetary financing occurs where the 'central bank expand[s] the money supply (which is a non-debt-creating alternative to domestic borrowing)' in a way that accrues a financial dividend to the central government.[63] That form of financing may be more or less direct. More

[56] For the theory, see Heinemann, Osterloh and Kalbb, (2014) 'Sovereign Risk Premia: The Link Between Fiscal Rules and Stability Culture'; for the practical impact of fiscal deficits on debt management in the UK, see DMO (2017), 'Debt Management Report 2017–18: Annex D', 'The Exchequer Cash Management Remit for 2017–18', 35.

[57] Whether used as collateral for short-term borrowing from central banks, assets for sale and re-purchase operations or purchased outright by central banks. For the complications which arise from the latter use of sovereign debt instruments, see Modern Bank of England and Debt Management Office, *Statement on Gilt Lending* (2009).

[58] Occasionally called 'monetary sovereignty' in other contexts: Proctor (2012), *Mann on the Legal Aspect of Money*, chapter 19.

[59] Central banks' other activities interlock, in varying degrees, with their monetary policy activities: *financial stability* activities (concerning prudential and disciplinary regulation of private banks), *issuing* or *currency* activities (concerning the issue of physical currency) and *settlement* activities (concerning the provision of inter-bank payments settlement facilities).

[60] See generally, Capie, Goodheart and Schnadt (1994), 'The Development of Central Banking'; Bindseil (2014), *Monetary Policy Operations and the Financial System*.

[61] Often called a central bank's 'open market operations': Lastra (2015), *International Financial and Monetary Law*, [2.129].

[62] Hemming (2013), 'The Macroeconomic Framework for Managing Public Finance', 21.

[63] Hemming (2013), 21; Turner (2015), 'The Case for Monetary Finance'.

direct monetary financing occurs when a central bank creates 'money for the government to spend as an alternative to incurring debt' by 'the central bank purchasing bonds directly from the government, extending it credit or printing currency to pay the government's bills'.[64] Less direct monetary financing occurs through the exercise of a central bank's monetary policy operations, which may result in a 'profit transfer' to the government.[65]

Fiscal, debt management and monetary activities are theoretically and operationally 'interdependent',[66] as the lively economic debates regarding the interaction of those activities illustrate. So it goes: too much tax can stifle economic production;[67] too little production can reduce tax receipts;[68] direct government spending can stimulate an increase in production;[69] but too much public expenditure can be inflationary,[70] requiring a central bank's intervention.[71] No final resolution to those economic debates should be expected, and none is attempted here. Parliamentary constitutionalism has endured through many different economic philosophies and should not be shackled to one which is currently voguish.

Central Government

Most parliamentary states contain several tiers of government that each carry out financial activities. Here, the focus is upon *central governments*. To be sure non-central governments, municipalities, states and provinces, engage in financial activities: raising taxes or rates, spending money and issuing debt. But, only central governments have final

[64] Hemming (2013), 22.
[65] Ibid.
[66] Wheeler (2004), *Sound Practice in Debt Management*, chapter 2; Fischer and Easterly (1990), 'The Economics of the Government Budget Constraint'. At a practical level, treasuries (and central banks) give immediate answers to those theoretical debates through macroeconomic models: Office of Budget Responsibility, *The Macroeconomic Model* (2013); Bank of England, *The Bank's Forecasting Platform* (2013); Bank of Canada, 'Analyzing and Forecasting the Canadian Economy through the LENS Model' (Technical Report 102, 2014); Reserve Bank of Australia, 'MARTIN Has Its Place: A Macroeconomic Model of the Australian Economy' (Research Discussion Paper, 2019–07).
[67] Hemming (2013), 18.
[68] Dornbusch and Draghi (1990), *Public Debt Management*, 3.
[69] Keynes (1936), *The General Theory of Employment, Interest and Money*.
[70] Gordon and Leeper (2002), 'The Price Level'.
[71] Lin and Chu (2013), 'Are Fiscal Deficits Inflationary?'; Phelps (1973), 'Inflation in the Theory of Public Finance'.

responsibility for coordinating the interrelated activities of financial management, monetary authority and practical access to sovereign debt markets. Responsibility for the national economy is thereby concentrated in central governments.

The concentration of economic responsibility in central governments is reflected in their relative financial impact.[72] Averaged over 2010–2016, central government spending accounted for 95 per cent of total public expenditure in New Zealand and 75 per cent in the UK. Central government tax was over 90 per cent of total tax in both jurisdictions, while central government borrowing was over 99 per cent of total public borrowing. Central governments in federations also occupy a dominant financial position. Over the same six-year period, Australian and Canadian central government spending and taxation stood at around 50–60 per cent of the total, and central government debt exceeded 95 per cent of the total.

Public Finance Law

This work's investigation of the distribution of financial authority concentrates on the design and operation of *public finance law*, an umbrella term which describes the collection of 'legal practices'[73] that govern the financial activities of central governments. Strictly speaking, common law systems recognise two types of law: statute and case law,[74] and this book reflects that strictness. The focus is on legislation and judicial decision-making concerning taxation, appropriation, sovereign borrowing and central banking.[75]

[72] All figures in this paragraph are drawn from the following data sets: *ONS PSF, ABS GFS*, Statistics Canada, *Canadian Government Finance Statistics* (data sets 385–0033 and 385–0042) and StatsNZ, *Government Finance Statistics (General Government): Year Ended June 2016* and *Local Authority Statistics: June 2017 Quarter*.

[73] The use of 'legal practices' is inspired by Hart (1994), *Concept of Law*, 240.

[74] Although customary laws constitute a third type in some jurisdictions: Matson (1993), 'The Common Law Abroad: English and Indigenous Laws in the British Commonwealth'; Paterson (2010), 'South Pacific Customary Law and Common Law: Their Interrelationship'.

[75] Legal rules concerning non-taxation revenue are excluded because of their negligible economic impact, while demands of space require passing over fiscal equalisation and sovereign investment: McLean and McMillan (2002), 'Fiscal Crisis of the United Kingdom'; Broadway and Watts (2004), 'Fiscal Federalism in Canada, the USA and Germany'; Blöchliger and Charbit (2008), 'Fiscal Equalisation'; Fenna (2008), 'Commonwealth Fiscal Power and Australian Federalism'; Bassan (2011), *The Law of Sovereign Wealth Funds*; Balding (2012), *Sovereign Wealth Funds*.

Many legal approaches to constitutional affairs prioritise case law, only turning to statue where the judges are silent. That approach is not adopted here. With the exception of judicially developed principles of tax law, public finance law lives almost exclusively in statutes, none of which are well known outside the *cognoscenti* who advise treasury and finance ministries on their legal rights and obligations. No textbook in Australia, Canada, New Zealand or the UK explains the form or function of the masses of annual and standing appropriation legislation in each jurisdiction,[76] or the statutes under which sovereign borrowing occurs, or the legislation governing the public finance activities of central banks.[77] Hidden within that intellectual void lies most of the law of public finance.

Law (as opposed to politics or economics) is selected as the focus of the constitutional analysis because law *qua* legislation has a foundational primacy in public finance: it provides a basic source for legitimate government behaviour and the structural framework within which financial activities are administered. There may be other ways to legitimate financial activity, including economic efficiency, political popularity or policy effectiveness, but law provides a uniquely authoritative type of legitimacy. Despite that foundational position, no existing work has analysed public finance from a pointedly legal perspective. Other scholarly and popular works have made different choices and broached financial aspects of parliamentary government from political, economic and administrative perspectives.[78]

Because law (mainly legislation) provide the authoritative basis for legitimate financial behaviour, this work takes legislation as the principal means for distributing authority to engage in financial activities between different public institutions. Throughout this book the expression

[76] Scatterings can be found in parliamentary practice manuals and solitary chapters in larger legal treatments: E.g., Jack (2011), *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, Part 5; Bosc and Gagnon (2017), *House of Commons Practice and Procedure*, chapter 18 (Canada); Wright and Fowler (2012), *House of Representatives Practice*, chapter 11 (Australia).

[77] Cf Lastra (1996), *Central Banking and Banking Regulation*; (2015), *International Financial and Monetary Law*, focusing on the legal frameworks governing central banks' monetary policy and prudential regulation, rather than public finance functions.

[78] Einzig (1959), *The Control of the Purse: Progress and Decline of Parliament's Financial Control*; Reid (1966), *The Politics of Financial Control*; White and Hollingsworth (1999), *Audit, Accountability and Government*; Wehner (2003), 'Principles and Patterns of Financial Scrutiny'; Wehner (2006), 'Assessing the Power of the Purse'; Wehner (2010), 'Cabinet Structure and Fiscal Policy Outcomes'; Dewar and Funell (2016), *A History of British National Audit*; Elliott and Thomas (2017), *Public Law*, 644–652.

financial authority refers to the authority to engage in financial activities provided by law and legal processes.

Parliamentary Constitutionalism

Public finance law varies widely between constitutional systems. The concern here is its operation in *parliamentary constitutional systems*. Abstractly, that term is a metonym for anglophone constitutional systems where the parliament: exercises supreme legislative authority, does not exercise direct governing authority and is the principal democratic institution to which governing authorities are accountable. Empirically, it describes the constitutional systems which devolved from the British Empire.

Congressional constitutional systems are the prime comparators.[79] In the English-speaking world, the only examples are found in the United States of America. As Chapter 3 explains, America's divergence from Britain left a very different set of public financial institutions and a different balance of constitutional authority over public finance.[80] The practical extent of that difference is illustrated by US legal publications concerning public expenditure. For almost forty years, the US Government Accountability Office has published the *Principles of Federal Appropriations Law* (informally, 'The Red Book'), currently spanning three volumes and containing over 3,000 pages of detailed legal analysis regarding the operation of federal appropriations law.[81] A database of legal advice relating to public money is also published which links to US federal court decisions involving public finance.[82]

No body of comparable legal materials exists in the parliamentary constitutional systems. The meek contenders are chapters in books on parliamentary procedure devoted to 'financial procedure', like *Erskine May's Parliamentary Practice*, Part 5 of which deals with financial procedure in around 90 pages.[83] One of this work's ancillary benefits is to

[79] Bradshaw and Pring (1973), *Parliament and Congress*; McKay and Johnson (2010), *Parliament and Congress*.

[80] Bradshaw and Pring, (1973), 305; McKay and Johnson (2010), chapter 6.

[81] The Government Accountability Office is a loose analogy to the UK National Audit Office.

[82] www.gao.gov/legal/appropriations-law-decisions/search.

[83] Jack (2011), 711–797. Excellent treatments of public finance law can, however, be found outside the Anglophone world, see De Bellescize (2019), *Le Système Budgétaire du Royaume-Uni*.

provide the foundation upon which a comparable literature could be built in the parliamentary tradition.

Collecting a wide diversity of constitutional systems under the banner of the 'parliamentary tradition' attempts no 'meta-Commonwealth' analysis. Parliamentary government as practised in Australia, Britain, India, Singapore and Papua New Guinea is neither uniform, nor static: it is inflected by the politics, culture and geography of its location. Striking uniformity does, however, exist in relation to the legal structure of the financial activities of central governments throughout the parliamentary world, as the analysis in Chapter 4 demonstrates. A desire to engage with the diversity and similarity of those jurisdictions has motivated this book's cosmopolitan attitude.

Argument, Method and Structure

Stated shortly, this book's argument is that a sober analysis of the design and operation of public finance law does not support a claim that parliaments control public money in parliamentary constitutional systems. A predominance of financial authority is distributed to executive governments, rather than parliaments.

Constitutions and the Distribution of Authority

By focusing on constitutionalism as a way of *distributing* authority, this work's method is slightly unusual in the anglophone constitutional tradition, which tends to focus on how constitutions *limit* or *confer* power on particular institutions. The temptation is always to declare a winner: parliament triumphing over executive and judiciary: judiciary triumphing over executive. That approach to constitutionalism mimics the win:lose calculus of common law litigation, but is an unsatisfying way to explain the institutional complexity of constitutional government.

Viewing the principal function of a constitution as distributing authority between institutions incorporates that complexity, albeit in a way which is less rhetorically effective than announcing a winner in a battle between parliament and executive. That approach is adopted here:[84]

> *State power is not simply a function of state structure, it is also a function of state infrastructure. This complicates the picture, especially from a legal*

[84] Loughlin (2010), *Foundations of Public Law*, 416.

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perspective: in place of a clear, symmetrical, rule-based constitutional structure, we are obliged to examine a complex arrangement of government.

Applying that approach to an historical and contemporary examination of public finance in the parliamentary tradition produces three major claims.

Major Claims

This work's first major claim is that a distinct constitutional model of public finance exists in parliamentary systems of government, which locates executives, rather than parliaments, at the apex of public finance.

Chapters 2 and 3 narrate the growth of English, British and then the UK's legal institutions concerning public finance and the way they distributed authority between parliament, executive and judiciary. The narrative starts around the conclusion of the Civil War and stops at the turn of the twentieth century; including close examination of hitherto overlooked details of legislative, administrative and judicial history. Necessarily, that is a detail-intensive exercise. Sufficiently motivated readers will appreciate that the constitutional significance of the 'fiscal maze'[85] cannot be properly understood until the Baroque complexities of Britain's public finance law are explicated.

Chapter 4 surveys the export of the UK's model of parliamentary public finance: beginning in North America, moving to Australasia and then proliferating throughout the decolonised states which adopted written constitutions in the twentieth century. Throughout that export, the details of public finance law were adapted to local circumstances, but the basic model of parliamentary finance was not meaningfully altered. Chapter 5 explains how the parliamentary model of public finance continued to develop under the pressures of twentieth-century government. Parliaments lost even more authority to executive governments under the impact of the fiscal expansions of the World Wars, the adoption of the welfare state, the growth of central banking and paradigm shifts in public administration.

Those historical chapters are directed towards identifying continuity and change in the development of government institutions, rather than attempting to track an idea of 'parliamentary control' through different epochs. Methodologically, that use of history is designed to 'help liberate our legal thinking from the tyranny of the old' by explaining what is

[85] Brazier and Ram (2006), *The Fiscal Maze: Parliament, Government and Public Money*.

'contingent', rather than 'necessary' about the distribution of financial authority in parliamentary constitutional systems.[86] Expressed less grandly, the historical analysis reveals the pathway upon which the modern design of financial constitutionalism depends.

Economic Conditions and Constitutional Authority

This book's second claim, argued for in Chapters 6–8, is that the balance of financial authority between parliaments and executive governments can vary according to economic conditions, in a way largely unimpeded by judicial power. That claim is made by way of a case study of financial behaviour in Australia and the UK between 2005 and 2016.[87]

Chapter 6 focuses on the way that the design and operation of legislation governing fiscal activity (taxing and spending) influences the distribution of financial authority in radically different economic conditions. Chapter 7 undertakes the same inquiry for sovereign borrowing and monetary finance. Both chapters observe how the extent of financial authority delegated to executive governments can increase as economic output contracts and how economic emergencies can denude parliaments of all meaningful financial authority.

The claims made in those chapters are necessarily tentative. They are limited to the two parliamentary constitutions selected for analysis: Australia and the UK. They are also limited because the data set upon which the analyses proceed are based is limited in reach. Methodological caveats aside, clear evidence exists that financial authority moves away from parliaments during economic crises, and their aftermaths. Chapter 8 explains why the presence of judicial power does little to correct against that trend.

Impact on Constitutional Doctrines and Practice

The book's final claim, made in Chapter 9, is that the concept of parliamentary control of public finance fails to describe the distribution of authority in parliamentary constitutions. That claim is the culmination of the foregoing historical and contemporary analyses. It is dignified with an entire chapter on the basis that core constitutional ideas should not be lightly dismissed.

[86] Allison (2013), 'History to Understand, and History to Reform, English Public Law', 556.
[87] The rationale for using those two jurisdictions as case studies is given in the introduction to Part II.

Alert to both the strict legal form of public finance law, and the manner in which it operates, a wide 'deficit' of parliamentary control over finance is identified. Alternative conceptions are considered, 'interdependence' and 'executive control', and rejected as unsatisfying descriptions of the distribution of financial authority between parliaments, executives and judiciaries. A notion of 'parliamentary ratification' is proffered as an alternative conception, and its limitations are explained.

Rather than mooting different verbal formulations, the import of that claim is to illustrate the substantive loss of democratic legitimacy which flows from the model of parliamentary public finance.

The Future of Constitutionalism and Finance

The book's final chapter closes, not with additional claims, but with a recognition of the impact of its descriptive claims on future inquiries into constitutionalism and finance: How much financial power should be concentrated in representative assemblies? Does law govern the state if not enforced by the judiciary? Should an analytical wall be constructed between 'public' and 'private' finance in constitutional thinking? The difficult issues which may arise in future thinking about those questions are broached, but final answers must await another day.