PUBLIC FINANCE AND PARLIAMENTARY CONSTITUTIONALISM

Public Finance and Parliamentary Constitutionalism analyses constitutionalism and public finance (tax, expenditure, audit, sovereign borrowing and monetary finance) in anglophone parliamentary systems of government.

The book surveys the history of public finance law in the UK, its export throughout the British Empire and its entrenchment in Commonwealth constitutions. It explains how modern constitutionalism was shaped by the financial impact of warfare, welfare state programmes and the growth of central banking. It then provides a case-study analysis of the impact of economic conditions on governments' financial behaviour, focusing on the UK's and Australia's responses to financial crises, and the judiciary's position vis-à-vis the state's financial powers.

Throughout, it questions orthodox accounts of financial constitutionalism (particularly the views of A. V. Dicey) and the democratic legitimacy of public finance. Currently ignored aspects of government behaviour are analysed in depth, particularly the constitutional position of central banks and sovereign debt markets.

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Dedicated to the Batemans.

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PREFACE

All constitutional systems grapple with a fundamental question: does ultimate power rest with the representative or governing institutions of state? This book addresses a subordinate enquiry: do parliaments or executive governments control public finance in the parliamentary tradition? Many jurists may find the answer given contentious: executives, not parliaments, hold the vast preponderance of constitutional authority over public finance.

This book was conceived in a period of financial panic and muted constitutional turbulence. In 2007, the North Atlantic financial system crashed as a result of widespread fraud in financial markets and a failure of bank regulation. As the financial tsunami raced from New York to London, Britain's executive government made a choice to rescue banks that had precipitated the crisis and followed an American project to pump liquidity into financial markets.

Constitutionally, the UK's response to the financial crisis was stunningly irregular.

Without any parliamentary or legislative consent, the UK Treasury spent almost £24 billion bailing out an insolvent commercial bank. That unlawful expenditure exceeded the Treasury's lawful budget by 119 per cent and amounted to 6 per cent of the entire UK central government's main estimates for fiscal year 2009. Parliament was never asked to authorise that expenditure because the Treasury made a strategic decision not to inform parliamentarians of its plans. Nor was Parliament asked, in 2009, before the Treasury agreed to indemnify the Bank of England's plans to give vast amounts of newly created money to financial institutions under the, euphoniously branded, 'quantitative easing' programme. When the Treasury and Bank of England agreed to subsidise Britain's sovereign debt issues, via the remittance of profits from quantitative easing, Parliament was never consulted, and no legislative framework authorised that debt monetisation programme. Perhaps Parliament would have done anything the Treasury asked, but perhaps not.

Conventional wisdom is that parliaments control public money. If that were true, those staples of the UK's response to the financial crisis were, in a non-marginal sense, unconstitutional. The research underpinning this book sought to understand why no constitutional eyebrows were raised. After several years of wading through a morass of financial legislation, public accounts and Hansard over several continents, it became clear that the financial structure of parliamentary government gives neither representative assemblies nor judiciaries any meaningful role in the state's financial fortunes. Executives hold the financial charge, parliaments ratify their plans and judiciaries intervene only sporadically in financial affairs, and not always in support of parliaments.

This book is devoted to explaining that distribution of constitutional power through an historical and contemporary analysis of the legal and financial behaviour of governments in the parliamentary tradition. In doing so, it confronts a conundrum: most jurists are repulsed by numbers, but public finance cannot be understood entirely non-quantitatively. Wherever possible, I have cast my treatment of finance, law and constitutionalism in terms which should be digestible for qualitative and quantitative scholars.

ACKNOWLEDGEMENTS

Many people helped bring this book to life, both by teaching its author how to think clearly and by providing the necessary support (financial, emotional and logistical) underpinning any major research project.

None of the research for this book could have been undertaken without the generous financial support of several research funding bodies: the Cambridge Trust, Cambridge Australia Scholarships and the Cambridge Australia Poynton Scholarship. I am extremely grateful for the extensive support provided by their donors, trustees and administrators.

Professor David Feldman supervised the doctoral research on which this book is based. Our meetings in his study between 2014 and 2017 were enriching and congenial discussions about constitutionalism, parliamentary government and the scholarly method. Together, we tried to overcome Hofstadter's law: 'it always takes longer than you expect, even when you take into account Hofstadter's law'.

During a doctoral intermission, the Hon. Justice Stephen Gageler impressed the importance of applying Occam's razor to legal and constitutional thought, while focusing on 'what matters'. His wisdom, patience and concision were inspirational. I hope he forgives me for the long-windedness of the following acknowledgements.

Back in Cambridge, I was lucky enough to spend time talking about constitutionalism with Professor Peter Cane, whose views had a major impact on my own thinking. I could not have understood constitutions as mechanisms for 'distributing' authority, save for Peter's introduction of that idea in a seminar in Lent term 2017.

Professors David Howarth and Tony Prosser provided very helpful comments on a dissertation-shaped version of this book. I consider myself extremely fortunate to have had the benefit of their accumulated professional and academic experience with all things financial, governmental and parliamentary.

In Cambridge, and latterly in Berlin, I was blessed to be part of a salon composed of Dr Jason Allen, Dr Ben Folit-Weinberg, Dr Jens van't

Klooster and Dr Justus Schollemeyer. Dr van't Klooster gifted me his deep knowledge of North Atlantic financial markets, the European philosophical canon and, most importantly, his friendship. Most of the good ideas in this book were gestated on or near Templehofer Feld in conversation with Jens. Without his steadfast support, this project would never have been completed.

Dr Jason Allen opened my mind to jural and monetary metaphysics. He also welcomed me, on more occasions than I deserved, into the domestic bliss he has built with Steffi and Poppy. Over unbelievably long conversations, Dr Ben Folit-Weinberg introduced me to the idea of the Parmenidean road, threw the best dinner parties and suffered through multiple retellings of my thoughts on finance, democracy and anglophone government. Dr Justus Schollemeyer kept me company in the low lights of the Staatsbibliotek zu Berlin and encouraged me to produce intellectual work of interest to people other than academics.

In Cambridge, Dr Anna Bachmann was a fount of wisdom, brunch and yogic inspiration; Dr Edward Cavanagh gifted me his historical perspective, raw intellectual firepower and camaraderie; Dr John Liddicoat provided quali-quant perspective; Dr Claire O'Callaghan kept me caffeinated; Dr Julia Powels ensured technology was on my radar; Dr Barry Solaiman's passion and integrity inspired me; and Dr Stefan Theil was a sympathetic and insightful friend whose predictive skills far surpassed my own. Major Mark Hammond DFC ensured that all intellectual heavy-lifting had a physical counterweight.

In London, Dr Cameron Miles has been a stalwart friend and intellectual supporter for the last decade, while Dr Jonathan Ketcheson gently encouraged perseverance when my patience with doctoral study was flagging. Dr Mike Grainger provided Singaporean succour. In Oslo, Lofoten and Brussels, Dr Johannes Meyer forced me to focus on data, not models, while Dr Felicitas Parapatis ensured that I remained, constructively, enraged.

In Canberra, Professors James Stellios and Leighton McDonald patiently taught me how to think and endured my garrulous learning style, while sharing their wisdom with me. Since I joined the Law School at the Australian National University, they have become cherished colleagues. Dr Lachlan McCalman and Ms Jacqualine Myint have been sources of mentally enlivening and spiritually nourishing friendship.

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patience. I am equally grateful to the anonymous reviewers of the draft manuscript whose suggestions and constructive criticisms enriched the final product. While this book was being prepared for production, I was lucky to have the editorial assistance of two talented law students, Ms Karen Chow and Mr Harry Fenton. Their capacity to think clearly under pressure bodes well for their professional futures.

In Sydney (and Tokyo) Mr George Blades provided unconditional friendship and shelter, while Mr Timothy Boyle and his long-suffering family, Lauren, Alfie and Piper, accommodated, belayed and supported me. Mr Mike Forster provided loyal friendship, surfing instruction and financial inspiration. Ms Georgia Huxley and Mr Nicholas Kelly both gifted me their valuable counsel and (more) shelter. Mr Mark Higgins provided many late-night Chinese dinners.

Ms Marion Poerio provided boundless love, logistical and typographical support, for which I am extremely grateful. Over two continents, she has kept me upright, sane, pried me away from dusty books and gifted me her energy, love and kindness. I am a very lucky man.

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NOTES ON THE TEXT

This book uses the following citation system.

Cases

First citation: Full case citation.
Subsequent citations: *Abbreviated case name* (Year), pinpoint.

Legislation

All citations: *Title and year* (Jurisdiction), section number.
UK legislation: Regnal years and chapter numbers appear until 1958.

Secondary Sources

First citation: Author (Year), *Title of book* or 'Title of article', pinpoint.
Subsequent citations: as above, omitting the title.

Government Documents

All citations: Institution, *Title* (Year), pinpoint.

ABBREVIATIONS

AGBP	Australian Government Budget Papers
ABS GFS	Australian Bureau of Statistics, *Government Finance Statistics*
ABS NA	Australian Bureau of Statistics, *Australian System of National Accounts*
BHS	Mitchel (1998), *British Historical Statistics*
ONS NA	Office of National Statistics, *National Accounts*
ONS PSF	Office of National Statistics, *Public Sector Finance Statistics*
PESA	HM Treasury, *Public Expenditure Statistical Analysis*