PUBLIC FINANCE AND PARLIAMENTARY CONSTITUTIONALISM BY WILL BATEMAN (CAMBRIDGE UNIVERSITY PRESS, 2020) PAGES 1–234. PRICE $150.95 (HARDCOVER). ISBN 978-1-108-47811-3.

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Parliamentary control of government finances, Sir Anthony Mason has observed, 'lacks the glitter and the glamour of some public law topics' but has a 'long and important history' which 'not only established Parliamentary control over taxation and government expenditure, but also set the pattern of the relationship between Parliament and the executive government as we know it today'.[1] Sir Anthony has gone so far as to embrace Sir Isaac Isaacs's description of 'parliamentary guardianship of taxation and expenditure' as 'the pivot of the *Constitution* and the keystone of the arch of personal liberty'.[2]

Filling a significant gap in our public law scholarship is this new book devoted to examining in meticulous detail the history of the idea and practice of parliamentary control of government finances, and to discerning from that history a common pattern in the contemporary relationship between public finance and parliamentary constitutionalism in the United Kingdom and Australia. Conceived during the fallout of the global financial crisis and brought to publication during the economic turmoil wrought by the COVID-19 pandemic, Dr Bateman's *Public Finance and Parliamentary Constitutionalism* is at once a work of legal history and of constitutional theory.

The legal history is in three principal tranches. Earliest and broadest in its sweep is the history of the emergence in Britain, during the period from

* Justice of the High Court of Australia.

1 Sir Anthony Mason, 'Parliamentary Control of Government Finances' (Speech, University of Tasmania, 22 March 1996) 1.

2 Ibid 1–2, quoting *Commonwealth v The Colonial Combing, Spinning & Weaving Co Ltd* (1922) 31 CLR 421, 434 (Isaacs J) ('*The Wooltops Case*').

roughly the middle of the 17th century to roughly the middle of the 19th century, of a distinct constitutional model of parliamentary public finance which came then to be exported to the British colonies as part of the practice of 'responsible government', a practice which was reflected in the system of national government in Australia for which provision was made in the *Australian Constitution* at the turn of the 20th century. Central to that model, as reflected in s 64 of the *Constitution*, was the practice of formation of executive governments through appointment, as ministers of state to administer departments of state, members drawn from and politically accountable to elected houses of parliament, the overall effect of which was described by Sir Samuel Griffith as being that 'the actual government of the State is conducted by officers who enjoy the confidence of the people'.[3] Other features of the model pertaining specifically to public finance, as reflected in ss 52–6, 81 and 83 of the *Constitution*, were the necessity for executive governments to seek and obtain the legislative sanction of parliaments both to raise revenue through the imposition of taxation and to draw money from the treasury, not only to ensure the administration of departments of state but also to ensure the servicing of debt incurred by executive governments on behalf of the state. Finally, as reflected in s 97 of the *Constitution*, the model provided for systematic auditing of the receipt of revenue and expenditure of money, and periodic reporting to parliaments by independent auditors-general.

The story of the development of those features of that model of parliamentary public finance begins with momentous occurrences in the 17th century, including *R v Hampden* ('*Ship Money Case*'),[4] the *Bill of Rights 1688*,[5] the *Bank of England Act 1694*,[6] and the *Case of the Bankers in the Court of Exchequer* ('*Bankers Case*'),[7] which saw Britain emerge around the beginning of the 18th century as what has been described as a 'fiscal-military state'.[8] The story concludes with the *Exchequer and Audit Departments Act 1866*,[9]

[3] Sir Samuel Walker Griffith, 'Notes on Australian Federation: Its Nature and Probable Effects' (Paper, 1896) 17, quoted in John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901) 704.

[4] (1637) 3 St Tr 826. See generally DL Keir, 'The Case of Ship-Money' (1936) 52(4) *Law Quarterly Review* 546.

[5] *Bill of Rights 1688*, 1 Wm & M sess 2, c 2.

[6] *Bank of England Act 1694*, 5 & 6 Wm & M, c 20.

[7] (1700) 14 St Tr 1. See generally J Keith Horsefield, 'The "Stop of the Exchequer" Revisited' (1982) 35(4) *Economic History Review* 511.

[8] Will Bateman, *Public Finance and Parliamentary Constitutionalism* (Cambridge University Press, 2020) 29, quoting John Brewer, *The Sinews of Power: War, Money and the English State, 1688–1783* (Unwin Hyman, 1989) 130.

[9] *Exchequer and Audit Departments Act 1866*, 29 & 30 Vict, c 39.

sponsored by the reforming William Gladstone.[10] The broad outline of the story is not unfamiliar to students of early modern English history.

Dr Bateman's original contribution to the retelling of the story lies in insights gained from his painstaking review of the contents of centuries of legislation and of his cross-referencing to economic data. His graphic account of legislative trends over centuries is enhanced by his use of actual graphs designed to illustrate the economic impact of the measures he describes.

Interesting to an Australian reader is to learn that annual appropriations by the United Kingdom Parliament over the centuries were typically broadly and loosely expressed and were flexibly administered by the United Kingdom Treasury through a practice known as 'virement' involving the ready transfer of funds appropriated for one purpose to another purpose.[11] Moreover, annual appropriations typically operated in a predominantly retrospective manner in the sense that they operated to ratify expenditure which had in large part already occurred.[12] These revelations of Dr Bateman's research call into question the correctness of the assertion, quoted from time to time in the High Court,[13] that '[t]he chain of historical evidence undeniably proves that a previous and stringent appropriation, often minute and specific, has formed an essential part of the British constitution'.[14] The assertion was made in an 1857 report produced by the House of Commons's Select Committee on Public Monies, and was subsequently picked up by Colonel Durell, Chief Paymaster of the War Office during World War I, in a book entitled *The Principles & Practice of the System of Control over Parliamentary Grants*.[15] Durell's book tellingly contained a foreword written by his superior within the War Office, Sir Charles Harris. Commencing his foreword with a defence of '[r]ed tape' as 'a rhetorical name given to fixed routine by critics who fail to see its utility', Harris welcomed the appearance of Durell's book as 'admirably adapted to the needs of the financial official, of whatever grade, who aspires to be more than a lifeless cog in the vast machine of our administration'.[16] Interesting also to an Australian reader cognisant of the series of cases in

[10] Bateman (n 8) 57–62.

[11] Ibid 34–5.

[12] Ibid 36–7.

[13] See, eg, *The Wooltops Case* (n 2) 449 (Isaacs J); *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 44 [80] (French CJ) ('*Pape*'). See also *Commonwealth v The Colonial Ammunition Co Ltd* (1924) 34 CLR 198, 224 (Isaacs and Rich JJ).

[14] Comptroller-General of the Exchequer, Select Committee on Public Monies, *Reports from Committees* (House of Commons Paper No 279, Session 1857) 74 [17].

[15] AJV Durell, *The Principles & Practice of the System of Control over Parliamentary Grants* (Gieves Publishing, 1917).

[16] Ibid vii–viii.

the High Court which arose out of challenges to national government spending programs in the first decade of this century[17] is to be reminded by Dr Bateman of the nearly complete historical absence in the United Kingdom of meaningful judicial oversight, not only of appropriation legislation, but also of legislation regulating the incurring and servicing of national debt.[18]

The second tranche of the legal history traverses 20th century modifications to the model of parliamentary public finance, the essential structural features of which had been bedded down by the middle of the 19th century. Dr Bateman describes and illustrates how the advent of the welfare state and the pressure of two World Wars precipitated a higher incidence of taxation and a greater reliance on standing appropriation legislation in comparison to annual appropriation legislation.[19] Touching on a potentially more profound development, he refers to the legislative creation around the middle of the century, relevantly by the *Bank of England Act 1946*, 9 & 10 Geo 6, c 27 and the *Reserve Bank Act 1959* (Cth), of quasi-autonomous central banks having legislatively-conferred responsibility for monetary policy combined with the capacity to provide finance to executive governments.[20] Picking up on a theme earlier explored by Professor Peter Cane,[21] Dr Bateman recounts how the final decades of the century then saw the proliferation of essentially private sector management approaches to public-sector administration, a development sometimes labelled new public management. Amongst the private sector management approaches then to gain favour was the adoption of accrual accounting as the basis for parliamentary appropriation, and the conferral on auditors-general of expanded powers to assess public sector management performance and to report on value for money in the expenditure of appropriated moneys.[22]

The final tranche of the legal history recounted takes the form of an in-depth case study of parliamentary public finance in operation in the United Kingdom, and to a lesser extent in Australia, during the period between 2005 and 2016. That chosen period spanned what Dr Bateman describes as the 'bust phase' of the global financial crisis as well as the preceding 'boom phase' and subsequent

[17] See, eg, *Combet v Commonwealth* (2005) 224 CLR 494; *Pape* (n 13); *Williams v Commonwealth* (2012) 248 CLR 156; *Williams v Commonwealth [No 2]* (2014) 252 CLR 416.

[18] See generally Bateman (n 8) ch 3.

[19] Ibid 96–111.

[20] Ibid 112–16.

[21] See generally Peter Cane, *Controlling Administrative Power: An Historical Comparison* (Cambridge University Press, 2016) ch 12.

[22] Bateman (n 8) 116–18.

'recovery phase'.[23] Drawing principally on the United Kingdom's experience during that period, the author navigates his way through a fog of obscure primary sources and cuts through a mass of detail to make two broad claims. In respect of what he refers to as 'fiscal authority', being legal authority to tax and to spend, he claims that executive governments not only exercised broad fiscal authority delegated through standing taxation and appropriation legislation, but systemically failed to comply with appropriation legislation as a result of both administrative error and, in the United Kingdom, deliberate overspending.[24] In respect of what he refers to as 'debt and monetary authority',[25] his claim is even more stark. It is that parliaments 'have no meaningful role in the authorisation and acquisition of debt finance from private financial markets, and monetary finance from central banks'.[26] He puts it that '[n]o discernible legislative framework governs the issue of monetary finance', leaving central banks and treasuries 'largely unshackled by positive law in deciding the terms on which public expenditure will be monetised'.[27]

All of that history forms the backdrop to Dr Bateman engaging in a critical evaluation of the theoretical basis of parliamentary control over public finance. So far as I am aware, the intellectual exercise in which he engages is of a nature no other legal scholar has had the temerity to engage in since the second half of the 19th century — and the exercise is all the more impressive given the enormous changes wrought in the 20th century.

In the 19th century, two prominent explanations of the operation of the system of parliamentary public finance vied for acceptance. One was that of Walter Bagehot, a barrister-turned-political journalist, banker, and long-time editor of *The Economist*, whose book *The English Constitution* was first published as a serial, and then in book form in 1867,[28] with a second edition following five years later. The other was that of Albert Venn Dicey, a barrister-turned-legal academic who in 1885 published his *Introduction to the Study of the Law of the Constitution* which went through numerous editions before and after his death in 1922.[29]

Bagehot famously distinguished between 'dignified' parts of the unwritten British constitution, being 'those which excite and preserve the reverence of the

[23] Ibid 125 (emphasis omitted).

[24] Ibid 141–5.

[25] Ibid 151.

[26] Ibid.

[27] Ibid.

[28] Walter Bagehot, *The English Constitution* (Kegan Paul, Trench, Trübner & Co, 1909).

[29] AV Dicey, *Introduction to the Study of the Law of the Constitution*, ed JWF Allison (Oxford University Press, 2013).

population', and 'efficient parts' of the same unwritten constitution, being 'those by which it, in fact, works and rules'.[30] The 'efficient secret' of the constitution, Bagehot revealed, lay in 'the close union, the nearly complete fusion, of the executive and legislative powers' in the Cabinet, or Ministry, which he described as 'a committee of the legislative body selected to be the executive body'.[31] The House of Lords being largely a 'dignified' institution, the principal function of the House of Commons, as Bagehot portrayed it, was not to enact legislation but rather to act as 'a permanent electoral college, to which the [executive] government of the day is permanently accountable, and which may at any time dismiss the government from office'.[32] Bagehot's approach to the functioning of the Parliament has been summed up as being 'neither to underestimate nor to undermine the significance of [Parliament's] lawmaking [function]' but rather 'to recognize that law is less made *by* Parliament, and more made *through* Parliament' in the sense that '[i]t is, on the whole, the [executive] government's law that is made' and that the Parliament is merely 'the vehicle' through which that law is made.[33] Applying this approach to public finance, Bagehot saw the Parliament as having no special function in controlling public finance; rather, the executive was the 'breadwinner of the political family' and had 'sole financial charge'.[34] As a matter of practical reality, this control of the purse strings allowed the executive to fulfil its function, 'for all action costs money, all policy depends on money, and it is in adjusting the relative goodness of action and policies that the executive is employed'.[35]

Dicey, by contrast, famously distinguished between the 'law' of the constitution, which he defined narrowly to consist of rules enforced or recognised by the courts, and the 'conventions' of the constitution, which he defined to consist of customs, practices, maxims or precepts not enforced or recognised by the courts which were therefore not 'law' according to his conception but were rather consigned to the realm of 'constitutional or political ethics'.[36] The 'law' of the constitution he reduced to two basic principles: the 'supremacy' of the Parliament and the 'rule of law' according to which all persons, including ministers within the executive government, were subjected

[30] Bagehot (n 28) 4 (emphasis omitted).

[31] Ibid 10–11.

[32] See Adam Tomkins, 'The Republican Monarchy Revisited' (2002) 19(3) *Constitutional Commentary* 737, 754.

[33] Ibid (emphasis in original).

[34] Bagehot (n 28) 138.

[35] Ibid. See also Bateman (n 8) 218–19.

[36] Dicey (n 29) 185.

to legal norms enacted by the Parliament and enforced by the courts.[37] Relating the supremacy of the Parliament and the rule of law to public finance, Dicey referred to there being a 'system of Parliamentary control' of public finance.[38] Dicey in that respect explained as critical that '[n]ot a penny of revenue can be legally expended except under the authority of some Act of Parliament'.[39] Going on to address the question of '[w]hat is the sanction by which obedience to the conventions of the constitution is at bottom enforced',[40] Dicey explained the conventions of the constitution concerning responsible government as being ultimately supported in part by the need for the executive government to obtain the enactment by the Parliament of appropriation legislation in order to spend without contravention of the law.[41]

In the penultimate chapter of *Public Finance and Parliamentary Constitutionalism*, emphatically entitled 'Failure of Parliamentary Control', Dr Bateman firmly rejects the Diceyan notion that there exists, or ever truly existed, a system of public finance in the United Kingdom or Australia meaningfully capable of being described as one of 'control' by the Parliament. The manner in which financial authority is and has long been distributed between parliaments, executive governments and courts, he argues, is not accurately captured by the description of 'parliamentary control' favoured by Dicey: parliaments exercise neither 'legal control' nor 'effective control' over public finance. Jurists seeking to understand the true dynamics of public finance in systems of parliamentary constitutionalism must look for an alternative descriptive story.

Dr Bateman contends that the best description of the distribution of financial authority between parliaments and executive governments in the United Kingdom and Australia is that of 'parliamentary ratification of public finance'.[42] The ratification role that he ascribes to parliaments has three elements. The first is giving 'approval' to the financial proposals formulated by executive governments.[43] The second is providing a forum to 'ventilate' uses of public money, assisted by auditors-general.[44] The third is 'structuring' the financial activities of the executive government through the enactment of 'legislative norms which provide a set of discernible standards within which

[37] Ibid 95, 100.

[38] Ibid 174–5.

[39] Ibid 173.

[40] Ibid 196.

[41] Ibid 196–202.

[42] Bateman (n 8) 222.

[43] Ibid.

[44] Ibid 223.

the … executive must comply if its financial activities are to be legally authorised'.[45] This structuring both 'establishes a set of conditions which limit the lawfully permissible actions of the executive [government] itself … thereby setting a baseline of legal legitimacy for the [executive government's] own actions' and 'provides a set of conditions which can be used by treasury departments to evaluate the financial activities of the broader executive'.[46]

Sensitive to the diversity of fiscal and monetary activity undertaken by the executive, Dr Bateman acknowledges that parliament's exercise of each of these three aspects of its ratification role varies depending on the executive activity in question. With respect to some activities, like taxation, parliament plays a more formal role in formulating the content of the law. With respect to activities like sovereign borrowing, parliament's role is far more informal, with legislation imposing few legally enforceable limits on executive activity.[47]

Rejecting, along with Dicey's account of parliamentary control, Bagehot's account of executive control of public finance, Dr Bateman understands his theoretical contribution of 'parliamentary ratification' as providing the most accurate description of 'the constitutional aspect of public finance'[48] — though that is not to say that Dr Bateman is content with the situation that he describes. He perceives 'a relatively low level of democratic control of public finance' in the United Kingdom's and Australia's constitutional arrangements.[49] Though the burden of the book is not to propose constitutional or institutional reforms to remedy that democratic deficit, in his short concluding chapter, titled 'Theory and Practice of Financial Self-Rule', it is clear that Dr Bateman has his eye on these, and other, normative inquiries.

It seems to me that Dr Bateman's descriptive account of public finance in a parliamentary system has some resonances with a normative account proposed by another 19th century Englishman: the polymath John Stuart Mill.[50] Speaking in the House of Commons in 1868, in a passage picked up in part by Colonel Durell in *The Principles & Practice of the System of Control over Parliamentary Grants* and in turn relied on by Evatt J in *New South Wales v Bardolph*,[51] Mill said:

[45] Ibid.

[46] Ibid.

[47] Ibid 223–4.

[48] Ibid 197.

[49] Ibid.

[50] See generally William Selinger, *Parliamentarism: From Burke to Weber* (Cambridge University Press, 2019) ch 6.

[51] (1934) 52 CLR 455, 472 (Evatt J), quoting Durell (n 15) 20.

> When a popular body knows what it is fit for and what it is unfit for, it will more and more understand that it is not its business to administer, but that it is its business to see that the administration is done by proper persons, and to keep them to their duties … Even in legislative business it is the chief duty — it is most consistent with the capacity of a popular assembly to see that the business is transacted by the most competent persons; confining its own direct intervention to the enforcement of real discussion and publicity of the reasons offered *pro* and *con*; the offering of suggestions to those who do the work, and the imposition of a check upon them if they are disposed to do anything wrong.[52]

Of course, to note that Dr Bateman's observations as to contemporary conditions may have historical precursors is in no way to gainsay the originality of his contribution. One matter which is brought into particular relief by his detailed work on the contemporary institutions and practices of public finance is that theoretical resources which predate the welfare state and the rise of central banking can only take us so far. The task for constitutional theorists of public finance going forward will be to couple historical learning with an awareness of the dramatically changed economic conditions, both domestic and international, to which their scholarship must speak.

One matter which Dr Bateman leaves unexplored in the book is the mechanism or mechanisms by which he says that the norms legislated by parliaments establish conditions which limit the 'lawfully permissible actions' of executive governments and set a 'baseline of legal legitimacy' for the actions of executive governments[53] — in Mill's language, 'keep[ing] them to their duties'.[54] In his elaboration of the 'approval' aspect of parliament's ratification role, Dr Bateman highlights the fact that parliament has 'choices' as to whether to approve executive activity.[55] In light of the vast scope of the spending needs of modern governments — and the urgency with which some spending decisions must be made — parliament's 'choices' in this domain can, practically speaking, be quite confined. He acknowledges that sometimes they are limited to a binary choice: either 'approving (and maintaining confidence in a government)' or 'refusing (and leading to the downfall of a government)'.[56]

Here enters the elephant into Dr Bateman's carefully constructed room. A consequence of the quest to find commonality in the contemporary

[52] United Kingdom, *Parliamentary Debates*, House of Commons, 17 June 1868, vol 192, cols 1731–2 (J Stuart Mill) (emphasis in original).

[53] Bateman (n 8) 223.

[54] *Parliamentary Debates* (n 52) vol 192, col 1731 (J Stuart Mill).

[55] Bateman (n 8) 222.

[56] Ibid.

relationships between public finance and parliamentary constitutionalism in the United Kingdom and Australia is that the complexities which have arisen in practice, both within and outside the walls of the Commonwealth Parliament, from the federal nature of the *Australian Constitution* are left almost entirely out of the analysis. Nothing is said, for example, about the role of the Senate and the Compact of 1965 in which the Senate and the House of Representatives (and the executive government of the day) reached a largely settled understanding of what constitutes 'ordinary annual services of the Government' for the purposes of appropriation legislation,[57] nor about the Financial Agreement of 1927,[58] which for much of the 20th century governed Commonwealth and state borrowing pursuant to legislation enacted by the Commonwealth Parliament under s 105A of the *Constitution*. And strikingly, nothing is said about the constitutional crisis of 1975 which, as Professor Geoffrey Sawer demonstrated in his chapters dealing with the petrodollar loan and the Senate's deferral of supply in *Federation under Strain: Australia 1972–1975*,[59] lends itself to an analysis as a crisis of public finance. The private prosecution of the Ministers involved in the approval of the petrodollar loan, to which the decision of the High Court in *Sankey v Whitlam* related,[60] and the role of government legal advisers touched on in Carmel Meiklejohn's *Without Fear or Favour: The Life of Dennis John Rose AM QC*,[61] suggest further and alternative potential pathways for rule of law analysis and consideration of the existing conventions within which public officials operate. Dicey may yet speak to questions of public finance.

But this is to draw attention to a limitation imposed by the scope of *Public Finance and Parliamentary Constitutionalism* rather than to criticise its contents. Dr Bateman has trodden a long and lonely path to open up a frontier of public law scholarship that is of immense practical importance and that has for too long been neglected. That there is more territory to be explored does not detract from the congratulations due to him.

[57] See Commonwealth, *Parliamentary Debates*, Senate, 17 February 1977, 185–7.

[58] See *Financial Agreement Act 1928* (Cth) sch 1.

[59] Geoffrey Sawer, *Federation under Strain: Australia 1972–1975* (Melbourne University Press, 1977) chs 5, 7.

[60] (1978) 142 CLR 1.

[61] See, eg, Carmel Meiklejohn, *Without Fear or Favour: The Life of Dennis John Rose AM QC* (Attorney-General's Department, 2016) 52–7.