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Public law and the value of conceptual analysis

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Abstract

The goal of this paper is to demonstrate the viability and potential of conceptual analysis as a methodological tool. It is argued that conceptual analysis represents a flexible and open method for connecting public law with analyses that are different, and even incommensurable with its own epistemology. The particular area that this paper seeks to connect public law with is that of feminist critiques. It is a journey that does not occur without some difficulty. Conceptual analysis is unknown within public law and therefore the notion requires defining and explaining. Public law has also been particularly resistant to the inclusion of feminist critiques and therefore the task of identifying suitable concepts is not straightforward. The outcome is, however, not only the identification of a new methodological tool for public lawyers but the capacity to broaden the range of material that can be incorporated within their analyses.

I Introduction

The aim of this paper is to consider the benefit of widening the explanatory structures employed by public lawyers, beyond that of theory, to include conceptual analysis. Whilst theory is a very familiar and dominant explanatory structure within public law,[1] conceptual analysis[2] is, by contrast, virtually unknown. In spite of its absence, conceptual analysis has the potential to offer real benefits to public lawyers. Generally, it could widen the range of methodological tools available, but more specifically and importantly for the purposes of this paper, it would enable public lawyers to connect with material that is currently excluded from their analysis.

In order to demonstrate the potential and viability of conceptual analysis it is proposed to focus upon a specific body of knowledge currently absent from public law, that of, feminist critiques.[3] This choice of feminist perspectives is deliberate. There has been some attempt to incorporate such material (Millns and Whitty, 1999; Baines and Rubio-Marin, 2005; Irving, 2008), but as a subject area public law has proved to be particularly resistant to its inclusion.[4] If it can be demonstrated that conceptual analysis can facilitate the inclusion of feminist critiques then its usage as a viable methodological tool within the wider realm of public law should be less problematic.

1 It is acknowledged that there are differing schools of thought and approaches within public law. It is not the aim of this paper to favour one particular approach/school over another or to even consider the question of 'what' public law is or should be. Accordingly, for the purposes of this paper the term 'public law' is used in a very wide and 'open textured' manner.

2 It is acknowledged that conceptual analysis is a complex and much debated subject within the domain of philosophical analysis. It is not the aim of this paper to contribute, in any manner or form, to that debate.

3 It is acknowledged that there are many forms and schools of feminist analysis/critiques. It is not the aim of this paper to draw upon one particular school or form of thought but to demonstrate how this material could be included within public law analysis. Accordingly, if preference is perceived to be given to one approach/analysis this does not represent an inherent validation of this form of analysis above another.

4 It is not the goal of this paper to consider why such materials are excluded.

Given the ambition and distinctiveness of this paper, some patience will be required on the part of the reader. The early part of the paper focuses upon the nature and mechanics of conceptual analysis. Once the features of conceptual analysis have been explained, the paper proceeds to demonstrate its viability. It is, however, a demonstration that does not proceed without difficulty. In any instance, where something novel and different is explored, it is generally necessary to explain what is not possible before considering the possible.

II The nature of concepts and the mechanics of conceptual analysis

This section will offer an explanation of concepts and conceptual analysis. Given the unfamiliarity of conceptual analysis to public lawyers, it is appropriate to equip the reader with some understanding of the terms and terminology which underpin the key argument of this paper.

2.1 The nature of concepts

There are many varied explanations as to 'what' is a concept (Weitz, 1988). However, a basic definition is that a concept is an abstract representation which attempts to use words to portray reality (Gallie, 1962; Thagard, 1992). The terms 'concepts' and 'theory' are occasionally used interchangeably, but as methods for the presentation of information they are quite distinct. An example used to distinguish between concepts and theory was that of Rufus the Siamese cat (Mauthe, 2005a, 2007). If 'Siamese cat' is a concept then there will exist certain known information which will be associated with the concept of a Siamese cat, such as the fact that Rufus should have blue eyes. If he does not have blue eyes, then he will be something other than a Siamese cat. However, it is also possible for Siamese cat to exist as a hypothesis. If Siamese cat is a hypothesis, then the theory which proves that Rufus is a Siamese cat will attempt to identify what the features of a Siamese cat are. It may be thought that Siamese cats will have blue eyes, but it must first be established that blue eyes are a feature of Siamese cats. Only then can it be concluded that Rufus is indeed a Siamese cat. The feature of blue eyes cannot be assumed, it must be found. In other words, the distinction between a concept and a theory lies with where knowledge is positioned. For theory, knowledge is to be discovered – it is *a posterior* in nature– even if that knowledge is thought to exist, whilst for a concept, knowledge already exists, it is predefined – it is *a priori* in nature.

2.2 The mechanics of conceptual analysis

Conceptual analysis is an approach that can be found within philosophy (Bealer, 1987, 1998; Brown, 2007; Chalmers, 1996; Jackson, 1998; Lawrence and Margolis, 2003; Lewis, 1999) although there are also examples to be found within law (Leiter, 1998; Stravropoulos, 2001; Rodriguez-Blanco, 2006; Bix, 2007). Within philosophical analysis, conceptual analysis is viewed as the prologue to metaphysics (Jackson, 1998). Metaphysics is a broad and complex area but essentially it concerns the investigation into the nature of things, whether visible or invisible, and what distinguishes them from each other (Loux, 1998). It seeks to establish a description which is so basic, so essentially simple, and so all-encompassing that it can apply to everything. However, discussion about the nature of things and their relations to others presupposes an understanding as to what counts as a thing. Conceptual analysis represents the inquiry into that understanding. It is where a claim about a particular phenomenon is explored in terms of the description offered by the concept. More simplistically it can be described as the 'business of addressing when and whether a story told in one vocabulary is made true by one told in some allegedly more fundamental vocabulary' (Jackson, 1998, p. 28). It is not about determining the nature of the world but relates to the 'sharpening' of the words used to give an account of the world (Rodriquez-Blanco, 2006, p. 37).

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The example generally used within philosophy to demonstrate the nature of conceptual analysis is the statement WATER = H_2O (Kripke, 1972; Searle, 1992; Jackson, 1998). 'WATER' and 'H_2O' are independent concepts, and although they give expression to the same phenomenon they use language or terms which may not be understood within either domain. In this context water can be seen to represent a 'folk' description of knowledge whereas H_2O represents a technical description which only came about after 1750 when the chemical composition of water was discovered. A person may understand what water is but have no awareness of the technical description. It is also possible for a person who lives on another planet, a 'twin Earth' where water does not exist, to understand the technical description without knowing what water is (Putnam, 1979). The goal of conceptual analysis in this context is to identify the intuitions of the various persons involved along with the things that are familiar to them or the things that they are acquainted with, and how all this information is organised in order to form the concept of either WATER or H_2O (Jackson, 1998).

There are of course problems and criticisms to be found in respect of conceptual analysis. It has been argued that it is not viable as a philosophical method (Stich, 1992; Ramsey, 1998), that there may be confusion about intuitions, particularly in relation to other cultures (Weinberg, Nichols and Stich, 2001), or that it is possible for a person to possess a concept and be massively ignorant or utterly mistaken about the concept (Putnam, 1962; Kripke, 1972; Quine, 1960).

Whilst conceptual analysis may not be perfect, this does not justify its dismissal as an alternative and valid method for the presentation of information. Theory too contains flaws (Mauthe, 2005a, 2005b), yet it would be unrealistic to demand the complete abandonment of theory within public law. Nor has the existence of flaws within particular theories prevented or inhibited their continued use within public law[5] (Mauthe, 2000). Conceptual analysis may be novel within public law, and therefore, as a viable explanatory mechanism, untested, but these facets should not hinder its usage and potential development, particularly as there are occasions when theory may not be the best method for the presentation of information. In these circumstances conceptual analysis could prove to be a more viable and satisfactory alternative.

III The application of conceptual analysis to public law

Public law, it could be argued, represents one distinct area of legal analysis, whilst feminist critiques of law represent a further area, separate and distinct from public law. Each is unfamiliar with the other and may use language or terms that will not be understood within the other domain. Each can also co-exist without knowledge or understanding of the other. In other words, public law and feminist critiques represent the legal equivalent of WATER = H_2O, that of PUBLIC LAW = FEMINIST CRITIQUES. The goal is to then explain what constitutes feminist critiques to the 'twin Earth' counterpart of public law. It is suggested that this meeting of domains can occur by introducing a further concept. By juxtaposing these two disparate forms of analysis by way of a further concept the outcome should be the facilitation of feminist critiques into public law. This can be demonstrated by drawing upon the statement 'Rufus the Siamese cat is an animal'. The concepts 'Siamese cat' and 'animal' can represent the equivalent of WATER = H_2O and can be expressed as SIAMESE CAT = ANIMAL. There can exist various theories of Siamese cats and various theories of animals, and it is possible for someone dwelling on 'twin Earth' to know what a Siamese cat is without knowing what constitutes an animal. If, however, a further concept of mammal is introduced, (*SIAMESE CAT = ANIMAL*) = *MAMMAL*, it may be possible to link the disparate forms of information in respect of Siamese cat to the disparate forms of information that

5 Such as the theory of juridification in relation to the central-local government relationship.

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represent animal. In other words, the differing sets of information represented by the concepts Siamese cat and animals can be linked, without the use of theory, but by means of a further concept, that of *MAMMAL*, whilst each of the original concepts will contain theory, a theory of Siamese cats and a theory of animals. The concept *MAMMAL* may too contain a theory of mammals, but there will be features within the concept that will enable it to connect with the disparate concepts of Siamese cats and animals. It will draw upon facets of information, intuitions, experiences, etc. contained within the concepts Siamese cat and animal.

Applying this example to public law and feminist critiques produces the statement (*PUBLIC LAW = FEMINIST CRITIQUES*) = χ. The concept represented by χ will enable public law to accommodate feminist critiques without having to include the conditions or premises from which the material originated. Furthermore, public lawyers will know that the material is valid, without having to either translate or transpose it, because in the context of feminist critiques the material represents sound analysis. In other words, all the methodological and ontological tensions that exist between public law and feminist critiques will not matter. They will not disappear, but their relevancy will be diminished. Of course, it could be argued that this does not represent 'pure' conceptual analysis but a variation or corruption. But advocates of conceptual analysis within philosophy have argued that it is an approach that should not be confined to abstract notions such as 'truth' or 'justice' but that it is relevant to any concept, including the likes of 'proton' and 'molybdenum' (Jackson, 1998; Lewis, 1999). In other words, conceptual analysis represents a flexible and open method for connecting differences however wide or even incommensurable these may appear to be. Accordingly, it should be possible to identify concepts that are facilitative in terms of the purposes of this study. The question then is which concepts are these?

IV Public law, feminist critiques and concepts

It is suggested that the concepts which could prove to be the most productive, in terms of linking public law with feminist critiques, are those which have a common usage across the two domains, such as sovereignty and the state. This approach is direct, simplistic and should allow for consistency and scope.

4.1 Sovereignty

Sovereignty is a notion that attracts much attention within public law analysis. Traditionally it has been presented as a theory. Consider for example the varying interpretations presented by Wade, Allan and MacCormick. Wade (1955, 1980, 1996) adopts a traditional 'black letter' approach, constructing a theory of sovereignty as a constitutional phenomenon. To achieve this Wade draws upon case-law[6] and the works of earlier constitutional writers such as, Coke, Blackstone and Dicey, along with legal jurisprudence, specifically Salmond's notion of the 'ultimate legal principle' (1947). The outcome is the notion of sovereignty as a theoretical phenomenon. Allan (1993, 1997) seeks to construct a theory of sovereignty that is realistic. It must possess an element of political morality, and to achieve this Dworkian interpretivism is employed (Dworkin, 1998). MacCormick (1999) attempts to present a notion of sovereignty through the unification of theories, in particular the unification of positivism with Dworkinian interpretivism. This is achieved by drawing upon the 'institutional theory of law'[7] (MacCormick and Weinberger, 1986; Weinberger, 1991), which seeks to combine a 'normativist conception of institutions with a

6 *Vauxhall Street Estates Ltd v Liverpool Corporation* [1932] 1 KB 733 (KBD); *Ellen Street Estates Ltd v Minister of Health* [1934] 1 KB 590 (CA); *British Coal Corporation v The King* [1935] AC 500 (PC).

7 Also known as 'institutional legal positivism' or 'new institutionalism'.

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particular form of legal positivism' (Weinberger, 1991, p. 111). The justification for the approach is the diverse perceptions that exist in respect of the notion of sovereignty, such as the linear perceptions of legal and political sovereignty, or sovereignty as internal and external, but also hierarchical perceptions of sovereignty as operating at various territorial levels of regions, states, Europe and the international. MacCormick concludes that there has been a movement 'beyond the sovereign state' (1993, 1999, p. 133) to the 'the era of post-sovereignty' (1999, chapter 8).

More recently, sovereignty has emerged as a concept within public law. Walker (2002), constructs a concept of 'late-sovereignty within the framework of the theory of constitutional pluralism. Key features of the concept are those of continuity, distinctiveness, irreversibility and transformation. Walker argues that the task of 'political and constitutional theory in conditions of late sovereignty is not to imagine, or to anticipate, a world in which new political values and virtues flourish in the absence of sovereignty, but to imagine and anticipate ways in which such values and virtues may flourish *through* the operation of sovereignty' (2003, p. 31). Ultimately Walker aims to present 'a plausible mechanism to help make sense of the social world, as well as forming part of the discourse and self-understanding of social actors' (2003, p. 10) and to reconceptualise sovereignty in the context of the European Union. Loughlin (2003a, chapter 3, 2003b, chapter 5) argues that the representation of sovereignty within public law has been fraught with difficulty, and is critical of attempts to construct a notion of sovereignty within a defined theoretical framework, whatever the perspective, as sovereignty is 'quintessentially a political concept' (2003b, p. 56). Ultimately Loughlin constructs what is in effect a model of sovereignty and identifies ten tenets which represent 'the essence of the modern concept of sovereignty' (2003a, p. 56).

Within feminist analysis, sovereignty is a notion that attracts some attention. De Beauvoir (1972) identifies sovereignty as the attribute of men. Sovereignty in this context is about the domination of and violence towards women, and extends beyond the evolution of the state to include the social order and even women themselves. De Beauvoir argues that for a woman 'to realise her femininity she must make herself object and prey, which is to say that she must renounce her claims as a sovereign subject' (1972, p. 691). When a girl becomes a woman 'there is a contradiction between her status as a real human being and her vocation as a female' (p. 359), for, until this point, 'she has been an autonomous individual: now she must remove her sovereignty' (p. 360). De Beauvoir does ask 'Why is it that women do not dispute male sovereignty?' (p. 18), arguing that it is possible for a women to demand the 're-establishment of her own sovereignty' (p. 726) to become an autonomous individual. Such an assertion of sovereignty is akin to slaves liberating themselves. Sovereignty extends beyond that of the capacity to dominate others to include the right to control one's own life. Nor does a woman, in achieving self-sovereignty, have to adopt the behaviour of men (pp. 358–60).

Brace (1997) develops further from de Beauvoir the idea that sovereignty can take many forms. She argues that the classic view of sovereignty, such as that represented by Hobbes, is about masculine individuality. For Hobbes, sovereignty is about security, which entails distrust of enemies, the importance of self-defence, the possibility of invasion and a permanent atmosphere of distrust. This statist dimension also extends to the self, which must exist within a fortress, viewing others as either invaders or potential fighters. Brace argues that there are alternative approaches that can be adopted, such as that of Gerrard Winstanley. Winstanley was a seventeenth-century radical who, although he did not discuss sovereignty, did consider the importance of notions such as community, the self and relatedness (Sabine 1937, 1941). Brace argues that Winstanley's approach allows for the overlap of common domains and the rejection of mastery and domination, which enables feminists to conceptualise sovereignty in a different way and reject its traditional masculine attributes. The notion of a territorial self, fortressed and defensive, can be replaced with that of a self-inhabiting domain where there is a connection to others through a shared narrative. It is an argument that has been developed further by Jones

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(1993, 1996). Jones rejects the Hobbesian paradigm of sovereignty, which equates authority with an absolute sovereign coupled with the biologically determined right of fathers to rule and establishes political authority as naturally hierarchical and paternal in nature (Jones, 1993, p. 42). This paradigm fails to consider how individuals relate to one another as members of a common community, whether based on class, race or gender. It also denies the maternal contribution to 'bio-social reproduction' (Di Stefano, 1991, p. 103). The social contract is in fact a 'sexual contract' that allows men 'to claim the right of sexual access to women's bodies and claim rights of command over the use of women's bodies' (Pateman, 1988, p. 30). Jones, however, rejects authority as sovereignty and argues that there is a 'sovereignty trap' (1993, p. 43). The Hobbesian position is logically patriarchal and despite Hobbes's otherwise equalitarian arguments, it stresses oneness and monolithic unity in the exercise of power. For Hobbes, authority as sovereignty is so because it represents a personalised rule within a perceived natural order. But, argues Jones, authority can assume different forms; it need not be interpreted in terms of sovereignty. Instead, authority can be connected to historically constructed differences such as race, class or sex. Authority need not privilege sexuality and it can be compassionate.

Yet it has also been countered by feminists that any interpretation of sovereignty which draws upon the notion of the self or individuality will be rooted in the Western liberal tradition. One of the key facets of that tradition, in addition to its commitment to individualism, is the recognition of equality. This has been translated as the importance of women as persons in their own terms of equality and equal rights. Offen (1992) argues that such a tradition ignores the subjugated realities of women's lives, where structural constraints often leave them powerless and frustrated. Accordingly, any notion of individualism must first be disentangled not from the notion of sovereignty but from the statist, hierarchal and patriarchal dimensions embodied in the liberal tradition. Only then can the notion of sovereignty break away from its exclusivist and chauvinist form.

This analysis demonstrates that for public lawyers the notion of sovereignty has undergone considerable transformation from its representation as theory to that of a concept. It is suggested that this change is symptomatic of the problems that public lawyers have with the notion of sovereignty, indicating that it is either too difficult or complex to identify, and hence it should be abandoned (van Roermund, 2003, p. 35), or alternatively that the existing epistemology of public law is inadequate and that an alternative approach is required. There are, however, a number of key facets that can be identified. Sovereignty remains fundamentally statist or institutional and is attached to some sort of perception of domain or territory. It is also hierarchical in that it represents some form of ordering, primarily through the instrument of law, and it relates to the exercise of power.

Feminist critiques of sovereignty represent the converse of public law. The focus is on the individual and her attempts to acquire control in a domain that is dominated by men, where domain is not necessarily perceived in terms of territory but in terms of an individual's capacity for decision-making. The closest that public law analysis relates to this is through MacCormick's work, except that for MacCormick the notion of community is a device to justify increased decision-making powers for a territory, namely Scotland. It is not about empowering individuals who live within a specified territory or domain. Therefore, to conclude, sovereignty as a shared concept between public law and feminist critiques highlights the ontological differences between these two approaches, indicating that its use as a means to connect these divergent areas cannot be successful.

4.2 The state

The second concept, the state, is also selected on the basis that there will be some shared or common usage between the domains of public law and feminist critiques. Within public law there is no

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specific definition as to what constitutes the 'state'. It is also a term that is rarely used in either legislation or case-law, and where it does occur its interpretation is problematic for the judiciary.[8] The notion is generally linked with institutions, except that there is some confusion as to which particular institution represents the state. For example, it is sometimes used in relation to the Crown (Dyson, 1980, pp. 37–42; Daintith and Page, 1999, chapters 1, 2), except that even the usage of the term 'Crown' is abstract and uncertain (Pollack and Maitland, 1898), whilst others prefer the term 'public interest' (Tay and Kamenka, 1983, p. 79; Finn, 1983). This absence of an adequate formal definition of the state has been criticised by public lawyers, such as Sedley (1994) and Prosser (1995). There are academics, such as Loughlin (2003b), who originally wrote about the state without seeking to offer a definition, whereas Tomkins (2003, p. 1) does offer a definition. An explanation for this disparity is that Tompkins and Loughlin are pursing different goals. Loughlin seeks to construct a theory of public law within which key concepts, in particular power and sovereignty, are identified and then given meaning. There is an acknowledgement of the central importance of the notion of the state, but what this term represents is not viewed as being essential to the theory of public law since it is the activity of governing through the institution of the state that matters (Loughlin, 2003b, p. 6). More recently, Loughlin (2009, 2010 chapters 7, 8, 9) addresses the concept of the state by examining the historical and political facets of state formation and operation, but again it is to demonstrate its centrality in the emergence of public law as a distinct discipline. Tompkins, on the other hand, offers an analysis of public law with the focus being on power and accountability. A definition of the state is represented as being essential, since the fundamental premise of the analysis is that it is the state which is the principal unit through which political power is exercised (Tomkins, 2003, p. 60). Interestingly, public law is not the only academic discipline to struggle with the concept. Within political theory the concept became the subject of much criticism (Bartelson, 2001, chapter 3), whilst contemporary political theorists have suggested the demise of the concept (Dyson, 1980, pp. 282–87) yet also presented the disagreements as a source of stability (Thompson, 1984; Held, 1989).

The approach of public lawyers and political theorists can be sharply contrasted with the work of feminists, where the notion of the state is subject to both definition and critique. MacKinnon (1989) offers a specific definition of the state, arguing that the notion is based on the pretence of liberal equality and that essentially the state is a mechanism for the domination and control of women. The objectivity of law, its norms and categories, are to be regarded as male standards which effectively enshrine the oppression of women, rendering them invisible whilst at the same time legitimising the male point of view and male authority. Men are sovereign in society just as for Austin (1954) law is sovereign. They are the group whose commands are habitually obeyed but are themselves not in the habit of obeying others (MacKinnon, 1989, p. 169). Men are also the group who possess the authority to make law, thereby embodying Hart's (1961) 'rule of recognition' (MacKinnon, 1989, p. 170). It is also men and male values that make up the authoritative interpretive community that, according to Dworkin (1998), make law distinctively law-like (MacKinnon, 1989, p. 170). MacKinnon argues that according 'difference' between men and women acts as 'the velvet glove on the iron fist of domination' and that this difference is used as a form of power to deny women, and punish them, but also to applaud and protect them (p. 170). MacKinnon draws on Marxist critiques of the liberal state, which argue that social inequality was not eradicated by the liberal state but serves as the ideology which justifies the perpetuation of social inequality. She applies this argument in the context of gender, concluding that ultimately the only solution is the reversal of power, that is to turn around the hierarchy.

8 *Chandler v Director of Public Prosecutions* [1964] AC 763 (HL.); *R v Ponting* [1985] Crim. LR 318 (CCC).

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There are, of course, criticisms of MacKinnon. For instance, Allan (1990) questions the need for a feminist theory of the state. Evaluating the state by means of adjectives such as 'patriarchy' or 'male' does not address the fundamental issues for feminists, which is not a critique of the state per se, but facets of the state, such as 'policing', 'law', 'culture', 'violence', etc. which impact on the lives of women (p. 22). Cornell (1999, p. 130), a lawyer, also offers a critique of MacKinnon's methodology, arguing that the analysis is premised on the absence of a feminine 'reality' or 'imagination'. Whilst Cornell agrees with MacKinnon that masculine standards are represented as the only standards by which to assess the condition of women, she disagrees with MacKinnon's method of sexualising feminine reality, arguing that this sexualisation is itself a product of male domination. For Cornell the solution is not to reverse the current way of looking at the world but to construct an alternative vision where fundamental notions, such as power, are redefined (p. 131). She therefore argues for the affirmation of 'equivalent rights' which would not assimilate women to men's standards but accommodate and enfranchise female realities (p. 131). Cornell is also critical of the conventional structures of gender identity which represent gender as being either biologically necessary or culturally desirable. This approach not only erases the 'reality'[9] of women's suffering but also demands 'the affirmation of feminine sexual difference as irreducible to the dominant definition of the feminine within the gender hierarchy as man's other or as his mirror image' (1992, p. 281). Gender hierarchy limits the choices that an individual can make, which then forces women to operate within an unsatisfactory, either/or, identity in which the female sex is devalued (p. 291). Cornell wants respect for feminine sexual difference as imagined by actual women to become the basis for equivalent rights. These equivalent rights would deconstruct rigid gender structures and are not just symbolic, but reflect the realities of women's lives and are to be ascertained by way of a feminist narrative using notions of the self, being and the other to distinguish between what is real and what is perceived as being real to women's lives. It is ultimately a very complex framework which has also attracted some criticism (Sandland, 1998).

This analysis indicates that, in contrast to the notion of sovereignty, public lawyers do not seem to experience any problems with the notion of the state, but only as a consequence of the lack of any directed search for a definition. Conversely, within feminist critiques, the notion of the state is subject to much analysis. It could even be argued that the above analysis represents a mere snapshot and is not indicative of the breadth and depth of the debate (Kantola, 2006, chapter 6). Once again, a recurrent theme within feminist critiques is the empowerment of the individual. Accordingly, the use of the state as a shared concept between public law and feminist critiques also highlights the ontological differences between these two approaches, indicating that its merit as a means of connecting these divergent areas is doubtful.

V The viability of conceptual analysis as a method for connecting public law with feminist critiques

On the face of it the task of linking one set of a priori information to another set of a priori information appears to be relatively simple and straightforward. The reality of achieving such a connection has been shown to be quite complex. Concepts, such as sovereignty and the state, may possess a fundamental, strong and common usage within each domain, yet the a priori beliefs and understandings in one realm do not connect with the a priori beliefs and understandings in the other realm. A number of conclusions can be drawn from this. The above analysis reaffirms the ontological and methodological differences between public law and feminist critiques. Second, the apparent impossibility of achieving a connection by way of concepts, such as sovereignty and

9 Authors usage.

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the state, further strengthens the position of theory-based analysis. It may just be a matter of time before a connective theory emerges. Finally, it could be concluded that conceptual analysis does not possess any value as an explanatory mechanism. These conclusions represent the antithesis of this paper, and for this reason they will be set aside. This then raises the question: Why should the author continue to represent conceptual analysis as a viable explanatory mechanism for public law with a particular view to connect it with feminist critiques?

The difficulty of demonstrating the viability of conceptual analysis was recognised at the start of this paper, hence the request for patience on the part of the reader. It was also necessary, given the novelty of applying conceptual analysis to public law, to first explore the viability of common or regular concepts. There are strong reasons for continuing to explore the viability of conceptual analysis. If it can be shown that conceptual analysis can achieve a connection between public law and feminist critiques then this will represent a widening of the methodological tools available to public lawyers. No longer will theory represent the only method by which public lawyers can represent their analysis. Second, it will enable public lawyers to incorporate a wider range of material, such as feminist critiques. Inclusion of such material should enable public lawyers to ask different types of question. The difficulty now is how is this to be achieved? It is argued above that the reason why a connection could not be achieved through concepts such as sovereignty and the state is that there was too much a priori information. There was insufficient reduction. For conceptual analysis to succeed as an explanatory mechanism concepts must be selected that represent the minimalist level of commonality; only then can fruitfulness, scope and accuracy be achieved. This may appear to be an obvious norm when considering divergent materials, except that conceptual analysis is not about offering a comparative analysis of difference; it is about the merging of difference. It is therefore proposed to demonstrate the viability of conceptual analysis by using concepts that are more 'open-textured', perhaps even 'theory-minimal' or 'theory-neutral', in terms of their definitional nature within both public law and feminist critiques, concepts such as personhood and space.

VI Personhood

The concept of personhood is not unknown within legal analysis. Medical law considers the concept in relation to abortion, where the issue of whether or when prenatal human beings can be viewed as entities possessing moral rights which should in turn be recognised by law (Callahan and Knight, 1992; Harris, 1985). The loss of personhood is also a subject for consideration. One view is that personhood is permanently lost through being in a persistent vegetative state (Kennedy, 1981), whilst it is also argued that a body may be technically alive but this does not necessarily represent a permanent loss of personhood as there could be a possibility of personhood returning (Harris, 1985). Within company law the debate is whether rights accorded to natural persons should also be accorded to legally constructed entities, such as companies (Wolff, 1938). Within public law the concept is unknown, which means that it is first necessary to examine what the concept represents.

The essence of personhood is that it relates to a person, yet the idea as to what constitutes a person is open-textured, and the term can be used to refer to any entity, such as a human being or a corporation. It is frequently associated with notions such as soul, mind, spirit or physical body and is generally considered to possess a variety of capacities along with a moral or normative status that is dependent on those capacities (Taylor, 1985). Personhood incorporates all these facets but also includes the dimensions of recognition and belief. That is, the manner in which someone is treated is constitutive of their being a person (Dennett, 1981; Laitinen and Ikäheimo, 2007). This recognition can be both external or internal and can come about by a variety of techniques, such as discourse, performance, context or relationships with other persons or even

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objects, places, animals, etc. whether tangible or intangible (Fowler, 2004). Personhood is also not constant but reflexive, in that a person may pass from one state of personhood to another. Essentially, personhood is about how I am to myself, how I am to you/them/it and how you/them/it are to me (Harrè, 1998, p. 69).

Aspects of the concept personhood can be found within the works of many of the feminist writers cited above. For de Beauvoir, personhood relates to how women achieve self-validation by renouncing male sovereignty. Brace and Jones reject the Hobbesian notion of personhood, where the notion of self represents a recognition of nature that includes the determination of a similarity with others which then provides a pattern for behaviour. For Brace and Jones this initial step of self-recognition is essentially male and therefore the subsequent development of the perception of personhood follows from this gendered base. Jones and Brace argue for a different perception of personhood. For Jones, facets such as race, class and sex are also relevant to the concept of personhood and can produce a relationship with others that is not based on authority but compassion. For Offen, personhood can only be achieved by removing externalities which are essentially statist, hierarchical and patriarchal. MacKinnon's notion of personhood focuses on the complete rejection of the state since it will not liberate women. Women must focus and develop their own consciousness. Cornell rejects as flawed legal concepts which relate to women and seeks to construct a set of equivalent rights based on the actual experiences of women's lives, including a woman's own sense of self-recognition and her actual experiences in relation to others. What the concept of personhood facilitates in the context of the feminist critiques is the recognition of the self and the belief in the self. In other words, all those subjective elements that public law analysis currently excludes.

In respect of public law and notions of the state and sovereignty it is more difficult, but not impossible, to identity personhood. There is, for example, some debate amongst theorists of international relations as to whether the state can possess personhood by virtue of its capacity for intention and possession of consciousness (Wendt, 2004; Schiff, 2008). Whilst public law may not include a definitive notion of the state it could be argued that there are facets of the analysis considered above which posses attributes of personhood. It could, for example, be argued that Wade's analysis represents a form of personhood in respect of the institution of parliament. Parliament is legally sovereign because it asserts sovereignty. This indicates that the institution of parliament possesses a perception of selfhood and capacity. Parliament is also recognised as possessing, or is believed to possess, this selfhood and capacity by other institutions within the constitutional arrangements of the UK and by citizens who express their relationship with parliament through elections which are in turn an expression of personhood. Whilst the basis for this personhood may lie in case-law, jurisprudence and constitutional theory, this does not negate the idea of equating personhood with an institution.[10] MacCormick also presents a form of personhood, but the relationship is not that of the individual but a geographical domain, Scotland. For Walker, sovereignty is about making sense of the social world as well as forming part of the discourse and self-understanding of social actors. Whilst Walker presents such features in the context of the geographical and institutional domain of Europe, are not such questions also relevant to the notion of a person and hence its relevance in terms of the concept of personhood?

These perceptions of personhood, in the context of public law, differ sharply from its usage in medical and company law, but outside law there can be found a much wider definition of the concept. Anthropologists, for example, have found that in other cultures personhood can be applied to inanimate objects such as land, or a building such as a house (Fowler, 2004). Such objects become part of the expression of personhood if value/merit is attached to them and there

10 See below.

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is recognition of this. Nor need this recognition remain static, but can evolve and alter with the passing of time. It is argued that this approach could also be applied to buildings of significance within public law, such as parliament, a government department or even the new Supreme Court. Anthropologists have also identified that in other cultures people are 'multi-authored'. That is, a person is the composite of the actions and substances of others in addition to possessing a dividual self. Sometimes one feature of that self will dominate, sometimes another (p. 26). Again, this could be applied to public law and the absence of the notion of the state. The above analysis in respect of the state revealed that, in the absence of a formal defined structure, there are plural and composite relationships of politicians, lawyers and administrators. They are spatio-temporally located and causally related. Each group possesses motivation in the form of agency and there is interaction within each group and between each group. Each group possesses its own beliefs, which will also entail a recognition of the beliefs of the other groups. Why else would the lawyers determine that it is not for them but others, such as politicians and administrators, to construct a notion of the state? In other words, there is a form of personhood. These arguments may appear to be quite fanciful but the concept of personhood could produce tangible outcomes in terms of widening public law analysis.

The concept avoids the ontological problems identified in an earlier paper where it was argued that one of the reasons public law excludes feminist critiques is that such analysis is viewed as being belief based (Mauthe, 2007). Belief is essential to the concept of personhood (Evnine, 2008), but in the context of personhood belief possesses a relational dimension. It does not focus exclusively on the self but entails a recognition of others and their beliefs. In terms of the relationship between public law and feminist critiques this would mean that public law possess beliefs about itself but also beliefs in respect of feminist critiques. These beliefs may be distinctive from those of public law but there is a recognition that there are beliefs. The differences become a shared point which can be explained or justified rather than excluded. It is a starting point from which to connect the two disparate analyses, and whilst this may not represent inclusion it certainly does not represent exclusion. Second, the concept of personhood draws upon values represented as being inherent within public law, such as dignity and autonomy (Oliver, 1999). These are values which can also be found within the feminist critiques cited above. This commonality of values could also be used to include feminist critiques within public law. Third, the concept of personhood could avoid some of the problems to be found in respect of human rights. Human rights are rooted in the Western liberal tradition and are represented as being attached to individuals. In actuality, human rights represent the interests of society as a whole, that is group-based beliefs, rather than those of the individual (Mitnick, 2006). Consequently a victim can only claim a right if they belong to an identifiable group that merits protection, which can result in inconsistencies between the goals of human rights and the actual protection offered. This inclusion or exclusion is generally represented as having consequences in terms of affected social groups, but it also has consequences in terms of an individual's self-perception, that is, their personhood (Mitnick, 2006, p. 59).

A brief contextual example of this can be found in the area of immigration law and immigrant women who are victims of domestic violence. The legislative framework deals with immigration law and domestic violence as two distinct and separate areas of law and policy. The goal of legislation, in these contexts, is to limit immigration and prevent domestic violence, both established accepted social goals. Each legislative framework will construct characteristics of the persons that they will seek to protect or exclude. There is, however, a problem when a victim of domestic violence is also an immigrant, in that there is a meeting of characteristics, those of race and violence, which neither set of legislation and policy is able to adequately recognise (Gill and Sharma, 2007). The consequence of this conflict between the two regimes is that the legislative framework for immigration prevails, primarily because it relates to the wider good of the public realm as opposed to the more limited good of the private realm. This also indicates that, within

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society as a whole, the beliefs attached to the characteristics which relate to immigration policy possess greater weight than those which relate to domestic violence. The outcome is an inconsistency in the level of protection accorded to immigrant women victims of domestic violence, whose experiences in this context are marginalised or not even recognised (Crenshaw, 1991), whilst other characteristics of their identity, such as race, ethnicity or nationality, are viewed as being of greater significance. Whilst race, ethnicity and nationality may posses meaning to the woman's perception of herself, at this particular point in her life it may not be the factor by which she wishes to define her selfhood in relation to the rest of the world. This failure also entails a loss of autonomy, in that she is not able to proclaim the identity that matters to her along with the accompanying loss of dignity. Human rights, in this instance, would not be able to assist the woman victim as they too will also focus on constructed social characteristics rather than the experiences which are particular to the victim. The concept of personhood should be able to address these problems. It can include all those beliefs and senses of self which current public law analysis cannot accommodate.

VII Space

There is no specific definition as to what space as a concept represents, which means that there can exist a multitude of attributes. Space can relate to specific areas, such as territory, or a geographical feature, such as an island, or a man-made feature such as an electoral constituency or a park, but also objects such as a car or a shopping precinct or even an individual's body (Blomley, 1994; Cooper, 1998; Holder and Harrison, 2003). Features of space are those of boundary, control and place.

Aspects of the concept space can be found in the legal writers used above. Sovereignty of parliament as presented by Wade represents a form of place that merits protection against 'others', such as Europe. Allan's analysis also represents a form of place, albeit one constructed from a differing basis from than that of Wade, that of facts, which also represents a form of boundary. Similarly, MacCormick's analysis relates space to Scotland and the desire to create a boundary of self-preservation within the geographical domain of Europe and its institutions. Space for MacCormick is about control and the protection of place. Walker also offers a form of sovereignty as place which can be found in the values, such as community, in the theory of constitutional pluralism. For Loughlin there is an ideological boundary, as sovereignty is an apolitical expression of power. Sovereignty is more about control than place.

Within the feminists critiques considered above, features of space can also be identified. In the work of Cooper and de Beauvoir space represents a form of control, not just the legal and political boundaries, but social boundaries which Cooper further extends to include the administrative. In other words, the boundaries of the state are unlimited, which would in some ways accommodate the absence of the development of the concept within public law. In this context, public law is about the controls used to define the boundaries of a space that the state represents. Boundary for Cornell is about challenging the parameters used by theorists such as MacKinnon, but also about constructing an alterative way of looking at women's lives based on equivalent rights. For Cornell, then, boundary is also about identity, which emerges through her methodology, that of drawing upon social theory and psychology. De Beauvoir and Brace also incorporate a dimension of boundary in that identity is the basis for analysis, as opposed to community, which then facilitates and justifies the inclusion of the experiences and realities of the lives of individual women.

It is evident that the concept of space has a number of advantages. Like personhood it avoids the ontological problems referenced above. Second, it offers an alternative way for lawyers to consider techniques for control. Public law generally focuses upon rules, be they legal, administrative or political in nature, whilst feminist critiques include alternative methods for control, such as social and cultural considerations; the concept of space can include these differences. Each form of

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control has a different set of boundaries which the concept of space can transcend. Finally, the concept allows for an alternative explanation of places. Public law focuses upon places as institutions, regions or territories. The concept of space can extend this to include cultural, gender and ethnic considerations. In other words, the concept of space, like that of personhood, has the potential to widen the parameters of public law analysis, which could be useful when examining phenomena that cannot be adequately explained by way of theory.

A brief contextual example of this use of the concept of space can be found in relation to parliament. Instead of considering parliament as an institution, or a form of power, consider it instead as space. As space, parliament possesses a sense of place, control and boundary. Drawing on Wade's analysis, parliament is so powerful it possesses unlimited boundaries and therefore can control whatever it wishes. It is also a place of such admiration that it has been recreated elsewhere in other, arguably subsiduary, constitutional regimes. Yet there are boundaries, in terms of function. How far does the power of parliament extend? There are also internal, structural boundaries such as the division into the House of Lords and House of Commons, which also represent differing forms of control. Yet as space it could also be argued that it is gendered and culturally specific. As place, parliament represents a form of masculinity by virtue of its architecture and the adversarial mechanisms by which it operates. Architecturally, parliament represents power, the unlimited power of the empire, but also masculine power (Rendell, 1999). The current building was constructed after the fire in 1834 and initially had no provision for women, who were confined to the roles of visitor or spectator (Rogers, 1981). Whilst women may now sit as MPs, their roles are, it could be argued, still bounded by masculine parameters. The political business of parliament, for example, is generally excluded by public lawyers, although theorists such as Loughlin argue that such considerations are relevant, albeit in a limited form (2003b). By representing parliament as space it is possible to include not just the political but also cultural, social and even gendered dimensions. Parliament may possess a legal function, the legitimacy of which is based on the political, but ultimately the space within which these functions operate possess social, cultural and other values. This approach is also one that could be extended to other institutions, such as the executive or the judiciary. Again, these arguments may appear to be quite fanciful, but they do give an indication of the breadth of material that the concept of space could be used to include within public law analysis.

VIII Conclusion

The aim of this paper was to demonstrate the viability of concepts as a way of widening the methodological tools available to public lawyers. It is acknowledged that theory is, and will quite fittingly remain, the dominant method by which public law analysis is presented. Theory is a complex mechanism, one that contains both negative and positive dimensions. It is also the explanatory mechanism that public lawyers are most familiar with. Conceptual analysis is also a complex mechanism, and offers public lawyers a new way of viewing their world, but it also possesses the potential for entry into other academic domains currently excluded, such as feminist critiques. It is also an approach that public lawyers could become familiar with in time, given its exceptional analytical benefits. The academic benefit of conceptual analysis is that it provides an additional methodological tool for public lawyers. The practical benefit is that conceptual analysis represents a feasible and direct way to link public law with a much wider range of material than is currently possible by way of theory. This paper, by virtue of its word limit, could only tentatively demonstrate its viability by focusing on two concepts, those of personhood and space, but it asserted conceptual analysis can be done; it is just a matter of willingness on the part of public lawyers.

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