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Public law, knowledge and explanation: a critique on the facilitative nature of public law analysis

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Abstract

The aim of this paper is to examine why public law is able to incorporate political theory but excludes feminist critiques. In order to achieve this goal a form of discourse analysis will be undertaken using epistemological and scientific perceptions of knowledge and explanation. This approach is both unusual and unique but will illustrate some of the exclusionary suppositions which underpin analysis within public law. The paper will conclude that only by adopting an alternative starting point for analysis, such as the use of concepts, will public law be able to incorporate alternative and critical approaches.

I. Introduction

The aim of this paper is to explore why public law is able to include material, such as political theory,[1] yet exclude new and alternative materials, such as feminist critiques.[2] Given the breadth and ambition of this question, it is proposed to use as the backdrop for the analysis the recent debate within public law concerning the nature of the subject, in particular, whether scholarship should be premised on theory or values and the relationship of the subject to political theory.[3] This debate involves three distinguished public law scholars, namely Cane (2003), Craig (2003) and Loughlin (2005), and encapsulates a diverse range of views regarding the nature of public law analysis. By confining the exploration to this clearly defined but high profile area of public law scholarship, the findings of this paper should give a tentative indication as to the facilitative nature of public law.

In order to address the question of inclusiveness and exclusiveness, I will attempt a form of discourse analysis[4] using epistemological and scientific perceptions on knowledge and explanation

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1 This paper will not engage in any discussion regarding which political theories have been included within public law analysis. Instead, political theory, as a body of information, is used as an example of material that public law has been able to incorporate.

2 It is acknowledged that within feminist analysis there exists a wide range of views and approaches. However, it is not the aim of this paper to engage with such analysis *per se* but to use feminist critiques as an illustration of how public law is able to exclude material.

3 This paper will not, in any way, attempt to extend the debate.

4 No particular 'school' of discourse analysis will be adopted, as this paper does not aim to place public law within the wider domain of knowledge, legal or otherwise.

to identify the suppositions which underpin public law analysis.[5] The use of such material is both unusual and unique. Accordingly, the structure of the paper requires some patience on the part of the reader. Much of the background material must first be laid before the reader, in particular the details of the 'theory and/or values debate', its evaluation in terms of knowledge and explanation along with consideration of the nature and relationship of knowledge and explanation. Once this material has been examined, the issues of inclusiveness and exclusiveness can be addressed. I will conclude by suggesting that if public lawyers were to widen the range of mechanisms for the presentation of information, beyond that of theory to include conceptual analysis, then new and critical materials could become part of public law scholarship.

II. Background to the critique: the theory and/or values debate

The 'theory and/or values debate' emerged as part of a collection of essays in honour of the scholarship of Carol Harlow (Craig and Rawlings, 2003). Within the collection Cane (2003, p. 4) argues that debate about the relationship between public law and political theory has diverted attention away from 'legal values and on to styles of legal and theoretical scholarship'. It is argued that political values and theories are too abstract and there is also some disagreement concerning their understanding (Cane, 2003, p. 19). Furthermore by focusing upon political and moral values, along with their relevance to legal analysis, public lawyers overlook the fact that law is itself 'an authoritative (i.e. an authority-claiming) normative institution' (Cane, 2003, p. 18). In other words, law also possesses values which are 'immanent' in that they are implicit rather than explicitly stated (Cane, 2003, p. 14). It is the discovery of these 'more or less implicit background values' which forms the basis of academic study of judicial decisions (Cane, 2003, p. 6). 'Foreground', or values which are external to law, such as the political theories of pluralism, liberalism and republicanism can help lawyers critically to assess law's own values but law also institutionalises or 'absorbs' certain political values with the consequence that the 'politically valuable becomes legal' (Cane, 2003, p. 19).

Craig's (2003) response to Cane is to criticise the positivist method by which Cane identifies values within public law. It is argued that the values identified are not immanent as Cane suggests, but represent 'the values that public lawyers think are or should be important in a regime of public law' (Craig, 2003, p. 24). Craig continues that it is impossible not to consider the 'nature and object of public law', 'central concepts of public law'[6] and 'doctrinal issues'[7] without recourse to political theory. Craig also disagrees with Cane's (2003, p. 18) assertion that public law cannot make a 'distinctive contribution to our understanding of political values'. Law, argues Craig (2003, p. 40), as 'an authoritative system, can mould values and make a contribution to the resolution of disagreement'. Furthermore, the 'abstractness of values and theory', which Cane (2003, p. 20) argues will ultimately result in a 'point at which values and normative theory run out and need to be supplemented by law', is addressed by Craig. The use of theory in any context, even the non-legal, requires the implications of the theory to be considered (Craig, 2003, p. 43). This does not detract from the contribution theory can make – it may not provide answers, but it can enhance understanding (Craig, 2003, p. 46).

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5 The paper will not undertake a jurisprudential analysis in the sense of examining either the nature of public law or legal theory. Nor will the paper endeavour to employ such materials, or even non-legal approaches such as autopoeisis, currently used by lawyers.

6 In particular parliamentary sovereignty, the rule of law and the separation of powers.

7 Doctrinal issues are represented as possessing two dimensions: a vertical dimension which is referenced to the Diceyan model of 'unitary democracy'; and a horizontal dimension where issues, such as the public-private divide, are reflective of deeper tensions within public law.

The debate is taken up elsewhere by Loughlin (2005, p. 48), who argues that the positions of Cane and Craig 'are in their own particular ways deficient' and that the debate 'is being conducted within narrow and restrictive parameters'. Loughlin contends that the debate fails to consider a crucial and basic question 'what is public law'? Unless the 'subject of the enquiry is clearly identified, discussion about values or theory "in" public law is likely to be confused and at cross-purposes' (Loughlin, 2005, p. 52). Loughlin then offers a definition of public law[8] and argues that, by representing public law as a distinct form of 'discourse', the issue of theory and/or values does not become the focus of analysis; instead, they become the tools which are to be 'set to work within a defined field' (2005, p. 65).

III. Evaluation of the theory and/or values debate in terms of knowledge and explanation

The method proposed to explore the facilitative nature of public law analysis, in the context of the theory and/or values debate, is through the use of epistemological and scientific perceptions on knowledge and explanation. This approach is both unusual and unique. There is, for example, no history within public law on the use of such materials. Nor does there even exist within public law specific definitions as to what constitutes either 'knowledge' or 'explanation'. These omissions are not unexpected, given that the identification and presentation of either knowledge *per se* or explanation *per se* represent issues of significance to epistemology and/or philosophy. Given such absences within public law scholarship, it could be argued that to deploy such a method is inappropriate, possibly impracticable or ultimately even unproductive. Yet, within scientific analysis, constant testing of a phenomenon is conducted using different methods in order to identify its features. To continuously test using the same methods is not 'good' science, especially if it is known that differences, or flaws, are to be found. Only by adopting new or alternative methods will the reasons for the differences, or flaws, be identified and possibly understood, thereby enhancing overall awareness of the phenomenon. Public law may not be science but the same approach of testing can be applied. Accordingly, it would be 'bad' public law to dismiss an approach just because it does not fall within the established parameters of research either within public law specifically or law in general. If the goal is to identify why certain materials are currently included or excluded from public law analysis, it may be that existing forms of 'testing' are part of the problem. Perhaps by adopting a different approach the reasons which underpin the facilitation of material may be more easily identified especially if the examination is confined to one particular area of public law scholarship. I will therefore consider the theory and/or values debate in the context of knowledge, then in terms of explanation.

(a) Knowledge and public law analysis

Three knowledge-based approaches can be identified within the theory and/or values debate: those of belief, induction and falsification.

(i) Knowledge as beliefs

An established epistemological definition of knowledge is that it can be conceptually analysed as *justified true belief* (JTB). A subject, X, knows that a proposition, Y, is true if, and only if X believes that Y is true and Y is true; therefore X is justified in believing that Y is true (Ayer, 1956; Chisholm, 1957). This definition was challenged by Gettier (1963), whose arguments have been generally accepted by

8 Which Loughlin represents as 'a set of practices concerned with the establishment, maintenance and regulation of the activity of governing the state and that the nature of these practices can be grasped only once that activity has been conceptualised as constituting an autonomous sphere; the political realm' (2005, p. 58).

epistemologists and has resulted in the addition of a fourth element to the equation.[9] The representation of knowledge as beliefs, which are true and justifiable, possesses merit within the theory and/or values debate particularly if allied with an additional parameter, a boundary.

Knowledge as *true belief* can be found in respect of Cane's analysis. For Cane (2003, p. 9), *true belief* is represented by the immanent values which, even if they 'are not part of the law, are necessarily congruent with existing law because they are read out of (or in to) it'. Cane also argues that it is not necessary to offer a particular theory as to how or why the beliefs are justified. Rather, 'law possesses institutional resources (in the form of legislative and adjudicative organs) that enable it to provide determinate answers to moral and political questions that would not be forthcoming' (Cane, 2003, p. 20). What justifies the values as true beliefs is the *boundary*[10] within which the beliefs can be found. Ultimately knowledge, albeit of a wider or external form, and only this knowledge can elucidate upon the existence of the immanent values and, at the same time, justify their existence. There is merit in representing public law analysis as true beliefs and their justification. Knowledge is 'internalised' to law, thereby facilitating the exclusion of subjective beliefs. This does not mean that the model is completely closed. It is always possible to identify new true beliefs, in that the range of immanent values can be widened, the problem lies in the removal of defunct or old values. Once a value is known, the only mechanism for its removal lies with the value being found to be 'false'. However, the identification of even one false value could cast doubt on the validity of the remaining values, particularly as justification for the values is relational rather than absolute. Cane mitigates against this is by presenting the values as being as believable and as true as possible, thus making it difficult, perhaps impossible, for their removal. A consequence of this approach is that the threshold for the inclusion of new values is variable. New values which are similar to the existing values are more likely to be included, because the possibility of them being believable or true is higher. In contrast, new, but different, in particular non-legal, values are less likely to succeed, because the threshold for believability or truth is lower. Ultimately, because the testing for believability occurs against values which are already known, new or different beliefs such as feminist critiques may be deemed too remote from these established beliefs to represent true beliefs and thereby are easily excluded. Conversely, the threshold for the exclusion of political theory is lower, possibly because of the potential link between legal and political activity. The device used to facilitate this exclusion is that of a boundary.

The idea of a boundary within a particular knowledge community is not unusual. In science, for example, the notion has been used to demarcate the discipline from other varieties of non-science (Gieryn, 1989). The purpose of the boundary is to define the space that a particular knowledge community occupies in terms of both the physical, that is the materials to be used, and the intellectual, how knowledge is to be disseminated and employed. In other words, boundaries define matters which can be included as part of the rationalisation of knowledge and, at the same time, define matters to be excluded. This definition may appear to be somewhat simplistic, but boundaries do not emerge overnight; they are a consequence of a complex historical development involving successes, failures, ideology and even people. The theory and/or values debate represents a form of 'boundary work' and within Cane's analysis two distinct boundary features can be identified. First, there is the element of utility which should facilitate the inclusion of whatever forms of analysis will enhance public law. In the context of Cane's analysis, utility operates to affirm the flexibility of the immanent values and at the same time exclude approaches such as political theory or even feminist

9 Which is generally represented as K = JTB + G. K represents knowledge whilst the nature and content of G, the fourth element identified by Gettier, has been the subject of much debate amongst epistemologists. Given the breadth of discussion this would suggest that the nature of G is unspecific. See, e.g., Goldman (1967), Lehrer and Paxson (1969), Kaplan (1985).

10 See below.

critiques. The second boundary is the subject matter of public law. Here Cane is not so much identifying what public law is, but is instead considering what it is not. Public law is not about the merits of one theory over another, regardless of whether the theories are legal or political in nature. Indeed, allowing such a debate to develop 'has encouraged a certain pre-occupation with the views of influential writers and with "styles of public law scholarship" ' (Cane, 2003, p. 9). Instead, for Cane (2003, p. 9) the focus should be 'the sustained analysis of legal rules and values'. Both of these boundaries are interlinked and reinforce the exclusionary nature of knowledge as justified true beliefs.

(ii) Knowledge by induction

Induction is a system of reasoning that begins by observing particular instances of a general pattern and concludes that the pattern can be applied to all instances (O'Hear, 1989). Inherent within any inductive argument is that the premise from which the analysis commences should ultimately support the conclusion. Furthermore, the more 'truthful' the premise is itself this will indicate, with some degree of strength, that the conclusion is also true. An example of knowledge by induction can be found in respect of Craig's analysis. The premise from which Craig commences is that political theory possesses merit within public law analysis. This is supported by the nature and object of public law (Craig, 2003, pp. 25–28), the relevance of political theory to legal discourse (Craig, 2003, pp. 28–34) and 'doctrinal issues' (Craig, 2003, pp. 34–39).

There is merit to the inductionist approach. It captures in a formal and coherent way many of the commonly shared views of public lawyers. Conversely, there is also the matter of how the knowledge first appears, from which the inductive analysis commences, along with that of judging its relevance for inclusion. If knowledge is to be arrived at by induction then all arguments must be referenced to prior knowledge which also must have been arrived at by way of induction. This will in turn require an appeal to earlier inductive knowledge, and so on. Loughlin addresses the 'circularity' of the inductive approach, arguing that Craig fails to consider the correct initial question – 'what is public law?'. However, the inductive approach also highlights the facilitative nature of public law analysis. Economic and political theory are included because a connection can be construed through observations where patterns of a public law nature can be identified. Examples of such patterns are the economic justifications for the contracting out of public services or the political background behind a particular piece of legislation. Conversely, inducting a particular observation which can be viewed as feminist is more difficult. It may be possible to identify a feminist perspective in respect of the provision of public sector services or a body of legislation but there is a distinction between a perspective and an observation. An observation represents a 'sighting' of the inductive premise, whereas a perspective represents a view of the sighting. Accordingly, perspectives are, when compared to observations, too insubstantial to be included within public law analysis. It can be countered that Craig's 'central concepts'[11] are not observable sightings but they are such an established and substantial part of public law that their exclusion would undermine the validity of any analysis.

(iii) Knowledge and falsification

At its simplest, falsification is where the aim of analysis is not to confirm a hypothesis but to disconfirm it (Popper, 1969, 1972, 1979). It is an approach that was developed as an alternative to inductivism. For the falsificationist, theories are created as speculative and tentative conjectures in order to give some form of adequate account of a particular phenomenon. The created theories are then rigorously tested and those which fail are replaced by further theories so that,

11 See above.

ultimately, only the 'fittest' theories survive. The surviving theories do not necessarily represent the truth, they are just the best explanation available. As an approach, falsificationism developed within the context of scientific analysis. Its purpose is not to offer an understanding as to what constitutes knowledge *per se* or to even provide for the discovery of knowledge. It is a method devised for the 'moving forward' of knowledge within a particular realm. In this respect, aspects of the falsificationist approach can be found within Loughlin's analysis where moving forward entails abandoning the positivist approaches of Cane and Craig. For Loughlin (2005, p. 65), public law is a 'special form of discourse that sustains the political realm' and 'positivists, of whatever variety' will never be able 'to offer a coherent explanation of what public law is'. There are merits to the falsificationist approach. It is an audacious way of introducing alternative material, in particular political theory, and possibly moving knowledge forward at a rapid pace. Yet, falsificationism as an approach may be too bold within the context of public law where the dominant tradition is one of incrementalism and insights. In other words, boldness is ultimately tempered by tradition and therefore the inclusion of feminist critiques could be viewed as too audacious.

(b) Explanation and public law analysis

As with knowledge, three explanation-based approaches can be identified within the theory and/or values debate, those of realism, unification and finality.

(i) Explanation and realism

An accepted view of realism is that there are objective facts which exist independent of the framework by which these facts are experienced or discovered (Chalmers, 1999). In the context of the theory and/or values debate, it can be argued that Cane's analysis represents a form of realism. The realism stems from the existence of the immanent values which represent certain core facts which are both discoverable and expressible within public law, regardless of the adopted perspective and irrespective of the level of expression of the analysis. Consider, for example, the key features of the values (Cane, 2003, pp. 16–17), such as the fact that 'the immanent values of public law are a product of a complex interaction between legislative and judicial activity', the values 'reflect the particular features of the British constitution'. These represent invariable factors within public law analysis. Furthermore, public law has progressed to this condition by way of theories that are approximately true which, in turn, have also discovered some of the immanent values. In other words, Cane's analysis is merely the latest in a historical line in the development of public law.[12] There are merits to the approach in that it is forthright and provides for continuity, yet there are also flaws. There is a problem with the historical dimension, in that the future development of public law will be dependent upon past successes. This incremental approach makes it difficult, but not impossible, to include political theory but is especially restrictive in terms of non-traditional materials, such as feminist critiques. Since inclusion will be based on the relationship of the new material to existing material the relationship of feminist critiques may be viewed as being too tenuous, ultimately even unrealistic, in terms of current public law analysis to merit inclusion.

(ii) Explanation and unification

Unification is where fundamental features of explanation, such as theories, are accounted for in terms of an alternative analysis (Kitcher, 1990). Craig's analysis represents a form of explanation as unification, in that the Dworkinian view of law is used to connect public law with political theory.

12 The backdrop to Cane's analysis is the work of Carol Harlow. See Craig and Rawlings (2003, notes 1–7).

There is merit to unification. The approach provides the foundation for a more general theory of public law. However, crucial to unification is the method by which it is achieved along with the impact on the further development of analysis. In respect of Craig, unification occurs by way of interconnectedness. Here features of one area of analysis meet with similar features in another. For Craig, this meeting occurs by way of moral and political values. The approach should provide for flexibility in terms of the development of future public law analysis, except that there are structural implications attached to unification. The theory which enables unification to occur must be general enough to allow for unification, yet specific enough so that combining can occur. In other words, unification entails a cost in that only certain parameters of the combining theory will be drawn upon whilst others will be discarded. This means that any criticism of the combining theory can become lost, although its flaws could remain and become transferred to form part of the new 'higher' analysis. In terms of alternative analysis, such as feminist critiques, the possibility of their emergence into the domain of public law becomes even more remote. There are feminist critiques of Dworkin's defence of liberal political theories (Schwartzman, 1999), but such criticism is unlikely to appear within the theory and/or values debate since the aim of unification is to enhance Craig's analysis of public law rather than Dworkian analysis.

(iii) Explanation and finality

Finality, or 'final theory', represents an explanation that underlies all other theories (Oppenheim and Putnam, 1958). The idea of final theory represents a form of unification except that unity is achieved by way of reduction, as opposed to convergence found in respect of Craig's analysis. The approach argues that the differences between all phenomena represent a matter of degree, rather than a matter of kind. Accordingly, there are no instances which can remain outside of a final theory nor can any other alternative explanations exist for the phenomena which are being explained. The notion of a final theory can be found within scientific analysis[13] and Loughlin's analysis, particularly in respect of *The Idea of Public Law* (2003), represents a form of final theory. There is merit to explanation as finality. In the context of Loughlin's analysis, unification occurs by means of phenomena, as opposed to theory, which means that the problems identified in respect of Craig's interconnectedness are avoided. There are, however, flaws to be found particularly in respect of perspectives that are currently excluded from public law analysis. If a final theory of public law has been achieved, how can feminist critiques ever achieve inclusion? The approach also assumes there is a level of compatibility between all phenomena within public law. There is the possibility that finality could be achieved in respect a phenomenon at one level and at different level for another phenomenon. The outcome would thus not be unity, but disunity. This argument finds support within Cane's analysis. One of the key features identified by Cane (2003, p. 16) was that 'public law values may be in competition with one another' such as 'transparency, with secrecy, executive authority with representation' and that ultimately 'public law reflects a plurality of commitments characteristic of moral and political life'.

(c) Conclusion

A number of points thus emerge from the above analysis. There is confirmation that within public law specific definitions of either knowledge or explanation do not exist. Accordingly, there are no particular restrictions regarding their use as a methodological tool. Furthermore, as a methodological tool, epistemological and scientific perceptions on knowledge and explanation have proved to be both practical and productive. It has been illustrative of a number of arguments essential for this paper. The method has, for example, confirmed the wide spectrum of approaches to public law

13 Such as the theory of evolution. Finality occurs in that every sub-discipline within the biological sciences premises its analysis upon the theory of evolution.

analysis that can be found within the theory and/or values debate. This would indicate that the debate represents an appropriate basis for this study. The use of knowledge and explanation has also demonstrated and affirmed the facilitative nature of public law. It was established, in the context of the theory and/or values debate, that public law is generally able to incorporate political theory, yet the threshold for the inclusion of feminist critiques is either non-existent or so high that the parameters are almost unobtainable. However, the analysis, whilst functional and illustrative, does not reveal why public law distinguishes between materials which can, or cannot, be included. The answer to this question requires consideration of the nature of the methodological devices used, that is, knowledge and explanation.

IV. The nature of explanation and knowledge

Knowledge and explanation represent processes for the presentation of information, but they are distinguishable. In simplistic terms, knowledge is about belief, *what* something is, whilst explanation is about understanding, *why* something is (Cornwell (ed.), 2004). The problem is that in respect of knowledge, belief will not necessarily provide for understanding, nor does a belief *per se* constitute knowledge, even if the belief is true, justifiable, inducted or represents the best possible explanation. All that can be said about belief is that it is a necessary, but insufficient, condition for knowledge (Williamson, 2000). In respect of explanation there are similar problems (Hempel, 1965). Understanding can be achieved in a variety of ways; for example, by making a phenomenon real, fitting it together with other phenomena to become a unified whole, or presenting a coherent final explanation. To understand a phenomenon it is also not necessary to possess belief. In other words, understanding is also a necessary, but insufficient, condition for explanation. How, then, does this relationship between explanation and knowledge impact upon the facilitative nature of public law analysis in the context of the theory and/or values debate?

V. The relationship between knowledge and explanation

What is revealed from the above is that, between knowledge and explanation there exists a gap. This would suggest that it is possible to utilise knowledge and explanation for the presentation of information, but that knowledge and explanation together will not represent a coherent analysis. Instead, knowledge and explanation represent two very distinct and separate forms for the presentation of information. There is some justification in the existence of the gap. The gap protects the distinctiveness of knowledge from explanation and vice versa. It is also not undesirable given that public law does not offer, or contain, a definition as to what constitutes either knowledge or explanation. The existence of the gap also suggests that there is an element of flexibility between analysis as explanation or knowledge. At the same time, because there does not exist any valid justification for knowledge and explanation to coexist it is also acceptable to disassociate and distinguish them. Given this range of possibilities, within public law one form can be found to predominate over the other, with the dominant method for the presentation of information being explanation. This statement may appear to be simplistic and somewhat obvious, but there are implications to be found, particularly in respect of the facilitative nature of public law. Before these implications can be explored, it is first necessary to consider *how* explanation predominates with particular reference to the theory and/or values debate.

VI. Public law analysis and the predominance of explanation

The reasons why explanation predominates over knowledge-based analysis are ontological and methodological in nature.

(a) Ontological differences between knowledge and explanation

In order to understand why explanation, as opposed to knowledge, is the dominant mode of analysis within public law, it is necessary to consider how explanation differs ontologically from knowledge. Ontological differences relate to the *nature* of knowledge and explanation. Such differences are not material in terms of the relationship between knowledge and explanation, as considered above, but matter in respect of the purpose of analysis as either knowledge or explanation. If it is accepted that the goal of any form of enquiry, be it as knowledge or explanation, is to identify the truth, whether in terms of cause or reason for being and that this process should be seen to be free, authoritative, effective and possess rigour, if these features are not present, then the outcome represents something other than truth. The imperative for any form of analysis is to be objective as opposed to subjective.

Knowledge is by nature subjective, in that inherent within the very notion of a belief exists the element of subjectivity. Beliefs are also propositional attitudes, in that they can have a causal role in generating an action. The causal role can occur on the part of an individual, but it can also occur as part of an enquiry. Beliefs as a causal role on behalf of an individual could, with some degree of certainty, be regarded as subjective but the issue of subjectivity becomes less clear when beliefs are asserted as part of an enquiry. This would suggest that beliefs can be represented as possessing an element of objectivity. Consider, for example, Cane's immanent values, Craig's premise along with the fitness of Loughlin's analysis. As subjective beliefs it is difficult to separate the resulting analysis from the role of the analyst. It is after all the analyst who identified/created them. These same beliefs can also be found within analysis as explanation but they represent realism, unification and finality. The issue of subjectivity dissipates because realism, unity and finality can be separated from the analyst and are represented as part of the enquiry. The reason for this difference lies in respect of the justification attached to the beliefs.

Justification relates to the reasons, arguments or evidence that supports an analysis. In respect of explanation the justification for analysis relates to the *process* of enquiry. The direction that an enquiry takes is one of inevitability, in that if the goal of truthfulness is to be achieved, be it in terms of reason or cause, it would be unjustifiable, and ultimately untruthful, to adopt any alternative route. There is a perception of no choice whereas, in respect of knowledge, the direction of enquiry represents an exercise of choice. Of course, the notion of no-choice in the context of explanation and choice in the context of knowledge are challengeable. The subjectivity of choice, in respect of knowledge, can be mitigated against in that choice can be presented in terms of the status of the person exercising choice. Cane, Craig and Loughlin are eminent academics within public law scholarship and therefore the exercise of choice on the part of such individuals will possess weight beyond that of those with a 'lesser' standing within the realm of public law scholarship. It could be argued that there is no-choice.

In respect of analysis as explanation, the notion of inevitability can also be challenged in that at some point within any analysis academics will have made a choice from a number of competing hypotheses. This 'theory choice' is structural in nature, in that it will determine the direction in which the study is taken. In scientific analysis, theory choice is presented as occurring within a rational paradigm where considerations such as accuracy, consistency, scope, simplicity and fruitfulness will form part of the judgement (Kuhn, 1977, ch. 13). Within analysis as explanation theory choice does occur. Consider, for example, Craig's use of Dworkin and Loughlin's use of functionalism. There is even the choice by Craig and Loughlin to incorporate political theory within their analyses. Such choices are, however, generally represented as being premised in terms of the strength or weight a particular theory possesses which is then justified in term of rationality. Accordingly, theory choice can also operate to exclude theories which are perceived to be weak or lacking in weight, such as feminist critiques.[14]

14 See below.

There are consequences attached to developing analysis on the basis of choice or inevitability. For example, should the resulting analysis be found to be flawed then choice can be perceived as 'bad' scholarship with the consequence of immediate abandonment of the analysis. There is always the risk, however much the notion of choice is objectified, that an element of subjectivity remains. This risk becomes especially heightened if the chosen theory is perceived in terms of beliefs, such as feminist critiques.[15] In contrast, analysis developed as a consequence of inevitability, thus if the outcome is unsound, then the resulting analysis is not represented as bad scholarship but as 'flawed' analysis. The outcome for flawed analysis can at worst be abandonment and, at very least, the analysis can be altered to accommodate the identified flaws. Within public law scholarship the abandonment of analysis is improbable,[16] whereas accommodation is the norm.

(b) Methodological issues and the predominance of explanation

Methodological issues relate to the *forms* by which analysis is expressed, such as theories and concepts. Public law analysis accords primacy to one method in particular, theory. Specific features are drawn upon, such as the authority and facilitative capacity of theory, which enhance the attractiveness of explanation, when contrasted with knowledge, and thereby affirm the primacy of explanation. The authority of theory stems from its ability to resist dislodgement. In respect of knowledge-based analysis, this ability can be found to be especially weak. It is possible, for example, to dislodge Cane's analysis by establishing the falsity of any one of the immanent values although, as discussed above, this can be mitigated against. Realism, by comparison, can be adjusted to accommodate omitted factors. It is not a matter of inaccuracy, something which could overwhelm the theory, flaws only appear when factors unobserved at the time of construction become observed at a later date. The perception of what is real is adjusted to accommodate the newly discovered information. Beyond the theory and/or values debate, the dislodgement of theory is very difficult, almost impossible, even when it has been demonstrated that a particular theory is flawed (Mauthe, 1999, 2000), or that the phenomenon under investigation is possibly too complex to be expressed in terms of theory (Mauthe, 2005a). It is suggested that this 'resistance' is partly attributable to the perception that theory is the only valid mechanism for the presentation of information within public law.[17]

The neutrality of theory relates to the perception that theory is itself value free and produces value free analysis. In the context of analysis as knowledge, theories can never be represented as being value free since they are subjective creations. Within analysis as explanation, neutrality can be affirmed by the perception that the origins of theory are irrelevant, what matters is the applicability of theory. The functionalist approach, for example, originated in the natural sciences, was adopted by the social sciences, initially by sociologists and then political theorists. The particular definition that Loughlin draws upon stems from political theory and it is irrelevant that functionalism has since been discredited within the natural sciences and sociology. This 'flaw' does not impact on the overall validity of explanation as finality whereas, in respect of explanation as falsification, this could result in Loughlin's analysis being dismissed as not representing the best explanation. This would suggest that neutrality in the context of explanation offers a flexibility which cannot be found in respect of knowledge.

Theory can also accommodate change. This apparent flexibility can be found to operate in a number of ways. Consider, for example, the inclusion of economic analysis which entered public law as a consequence of de-regulation. De-regulation resulted in a fundamental alteration in the role of the state. It shifted the basis of decision-making in some areas from the political administrative

15 See below.

16 Consider, for example, the debate on sovereignty. See Walker (2003), pp. 3–32.

17 See below.

framework to the economic. For public law this meant a re-examination of the nature of rules and theories of discretion (Ogus, 1994; Black, 1997). Furthermore, the resulting theoretical analysis on regulation was expressed in terms of explanation and not as knowledge. The reason for this was that change, in terms of knowledge, represented an alteration in belief, something which could be viewed as absolute. In contrast change, in terms of explanation, represented an alteration to an understanding, something which is not absolute and is, therefore, flexible.

VII. The implications of explanation led analysis within public law

The above affirms that explanation, as opposed to knowledge, is the preferred method of analysis with public law. There are, however, implications to be found in respect of explanation led analysis, particularly in relation to the facilitative nature of public law. These implications are also ontological and methodical in nature.

(a) Ontological implications

Ontological consequences relate to the *nature* of the material that public law analysis can accommodate. Political theory appears to be accommodated because such analysis is viewed as being objective in nature and it represents a form of explanation-based analysis, as opposed to a form of knowledge-based analysis. Furthermore, as explanation political theory can, or cannot, enhance public law analysis according to the justifications for inclusion or exclusion. Consider, for example, the differing approaches to the inclusion of political theory presented by Cane and Craig. The issue was not the ability of public law to incorporate such material but the benefits of incorporation. This approach can be contrasted with regard to the inclusion of feminist critiques. There have been attempts to include such analysis within public law (Milns and Whitty (eds.), 1999), but the subject appears to be particularly resistant. The difficulty stems from the perception that such perspectives represent a form of knowledge as opposed to a form of explanation. Feminist perspectives represent subjective beliefs and therefore cannot contribute to the development of public law analysis. Public law allows for the inclusion of new or alternative analysis, but such incorporation only functions in relation to other forms of explanation-based analyses. This then raises the question, how have these differing perceptions, as regards political theory and feminist critiques, arisen? The reasons lie with the perceived characteristics of each analysis.

At it most simplistic, the essence of political theory is the study of fundamental notions such as the state or government along with the enforcement of authority. These are identifiable themes within public law. Where public law may differ is in respect of emphasis. In Cane's analysis, for example, the emphasis is on the authority of law which is why alternative systems of authority, such as political decision-making, can be excluded. For Loughlin, the authority of political decision-making provides the background to public law analysis, and hence its inclusion. Apart from this similarity of shared notions, there is also the issue of a shared ontological tradition. Within analysis of political theory, there is a strong tradition of elucidating 'neutral' concepts, and of constructing meanings to key notions such as the state and sovereignty without attributing a particular general philosophical or ethical view of the world. It is an approach that is mirrored within Cane and Craig's analysis. Cane overtly draws upon the positivist tradition whilst Craig, although drawing upon Dworkinian interpretivism, ultimately shares Cane's positivist outlook (Loughlin, 2005, p. 52). Loughlin may argue for the abandonment of the positivist tradition, but the outcome of his analysis is an affirmation of the exclusionary tradition.

By comparison, what characterises feminist analysis in its broadest sense is the perception that gender is a category which is relevant in the study of *any* discipline. Analysis is premised upon a specific belief and the goal is not that of neutrality, but the identification and critique of value. The articulation by the speaker on their position in relation to gender and the exercise of power is

deemed relevant (O'Donovan, 1985; MacKinnon 1987, 1989; Smart 1989; Edwards, 1996). There is thus an ontological dichotomy between public law analysis and feminist critiques which, on the face of it, appears to be irresolvable.

There are, of course, a number of possible solutions to this issue. One approach would be to challenge the neutrality of public law analysis. The converse would be to 'objectify' feminist perspectives so that they can be viewed as a viable and legitimate form of explanation, comparable to that of political theory. Yet such 'de-politicalisation' would mean that the perspective ceased to be feminist. Both approaches also contain one essential problem – it is necessary to consider what is meant by the term objectivity. Yet, in order to identify what is objective, in the context of public law, it will also be necessary to consider what is subjective. This would raise epistemological issues which are relational but not necessarily of direct relevance to the development of public law analysis. Furthermore, given that it is explanation, as opposed to knowledge, which predominates public analysis such an exploration would certainly be a weighty and complex task, possibly one that is even unattainable.

(b) Methodological implications

Methodological implications relate to the use of theory to inhibit the facilitation of alternative critiques. This restrictive methodological approach can be found to operate in a number of ways. There is, for example, the construction of theory upon theory, such as Craig's use of Dworkin, or the creation of super theories, such as Loughlin's final theory. These approaches are not unique to the theory and/or values debate. Indeed, similar practices can be found in respect of analysis on the central-local government relationship (Vincent-Jones, 1998, 1999, 2002; Mauthe, 2005) and other super theories include legal pluralism and constitutional pluralism (Walker, 2002). What makes a theory 'super' is the perception that somehow these 'bigger and better' theories will resolve the analytical tensions that exist within public law analysis. By compounding explanation-based analysis upon explanation-based analysis, the ability of any form of knowledge-based analysis, such as feminist critiques, to enter into public law become more remote and maybe even impossible.

A further effect of according primacy to theory is its proliferation. There are advantages attached to such proliferation, for example, it illustrates the breadth and complexity of the subject of public law. It also offers choice to academics. Yet breadth of choice can also be harmful because complexity can come to be viewed as the norm with the consequence that any study which promotes simplicity risks being dismissed as unacademic and possibly even detrimental to the long-term development of analysis. Contrast this view to the approach within science where simplicity can be found to convey great complexity. This can be seen in, for example, the simplicity, yet the depth of complexity, conveyed within the equation $E=mc^2$.

An additional outcome resulting from the proliferation of theory is the risk of incommensurability. Incommensurability occurs when there is an abundance of theories, all relating to the same observation or phenomenon and there is no agreement regarding the use or understanding of key terms or notions within the body of analysis concerned. The meaning of any term or notion can only be determined by referencing the particular theory adopted to explain a particular phenomenon (Kuhn, 1996). The theory and/or values debate can be viewed as a form of proliferation, and proliferation can also be found in diverse areas of public law analysis, such as the notion of sovereignty (Mauthe, 2005a), the central-local government relationship (Mauthe, 2005) and the rule of law. Within such areas of analysis there is little agreement as to what is meant by the nature of public law, the notion of sovereignty, the nature of the central-local government relationship or the idea of the rule of law.

This proliferation and predominance of theory reinforces the established boundaries of public law analysis in that new material has to enter as theory or through theory in accordance with the existing parameters of analysis as explanation. Whilst this approach may be effective in terms of

including material such as political theory, there are particular consequences for feminist critiques where theory may not be regarded as the goal of analysis (Bottomley, 2000; Conaghan, 2000; Lacey, 1998; Naffine, 1990; Smart, 1992). Instead, theory may be viewed as a *process*, something which feminists can use rather than become subservient to (Nicholson (ed.), 1990). The emphasis of analysis is upon the discovery of context and the legitimacy of expression of personal experiences. Theory, in its current use within the theory and/or values debate and public law (along with the wider remit of law in general) marginalises such material. The consequence for some feminist analysis is to search for alternative methodologies (Cooper, 1998). Accordingly, there is a methodological dichotomy between public law analysis and feminist critiques, which on the face of it, appears to be irresolvable.

VIII. Public law and the long-term development of analysis

The above examination raises a number of issues in respect of the long-term development of public law analysis. Given the exclusionary properties of explanation identified within the context of the theory and/or values debate and its likely, albeit untested, manifestation within wider analysis of public law, the question arises, should explanation remain as the preferred method of analysis? To alter the basis of public law analysis fundamentally would entail searching back to the origins of the subject, and possibly even strike at the very nature of legal analysis. Such a task would prove overwhelming, unrealistic and ultimately unfruitful, particularly if the enhancement of public law scholarship is the desired goal as opposed to the enhancement of explanation as analysis. If it is accepted that explanation is, and will remain, the dominant form within public law, this then raises a number of additional questions. How, for example, can public law analysis develop to accommodate alternative knowledge-based approaches? How can public law analysis move beyond domination by theory? There is one answer to both these questions – through the use of concepts.

IX. Concepts and public law analysis – concluding remarks

Within the context of the theory and/or values debate, and the wider remit of public law, there does not exist a specific meaning as to what is a concept although outside of public law many definitions can be found (Weitz, 1988). Basically, a concept can be described as an abstract representation which attempts to use words to portray reality (Gallie, 1956; Thagard, 1992). Concepts and theory are tools for the presentation of information, yet they differ particularly in terms of where information can be found. In respect of theory, information has to be discovered even if it is thought or known that that the information exits. Theories represent, at most, a consensus regarding the information relating to a particular phenomenon and an essential part of that consensus is the process of discovery by which the validity of the agreed information can be confirmed. Concepts, on the other hand, represent an idea about a particular phenomenon; in other words, information is predefined, it does not have to be discovered as it is already known. The particular example used elsewhere to illustrate this difference was that of Rufus the siamese cat (Mauthe, 2005a). If siamese cat is a concept then there will exist certain pre-defined 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.

Within public law analysis there is a perception that the relationship between theories and concepts is hierarchical in nature. Theories are the situated at the apex of this hierarchy whilst

concepts are subsidiary to and entrenched within theories. Furthermore, concepts are isolated representations of information and it is theory which links one concept to another.[18] A consequence of this subsidiary and isolated role is that concepts are viewed as being closed in nature and lack the facilitative capacity of theory. These perceptions have, however, been successfully challenged elsewhere, specifically in relation to the incommensurability of theories, where it was found that concepts possess a flexibility and can incorporate a breadth of analysis beyond that of theory (Mauthe 2005, 2005a). Instead of linking disparate concepts via a single theory, a number of disparate concepts were used to link a variety of theories which, when juxtaposed, appeared to be incompatible. This was achieved by using a few loosely defined, or 'open textured' concepts to link to information found within the various theories. It is an approach that public lawyers do all the time, but not necessarily in the context of public law. Consider, for example, the statement 'Rufus the siamese cat is an animal'. The concepts 'siamese cat' and 'animal' will be known and is it unnecessary to explain them yet it is also accepted that there is a link between the two sets of information (Jackson, 1998). In other words, the disparate sets of information represented by the concepts siamese cat and animals can be linked without the use of theory whilst each of the concepts will contain theory, a theory of siamese cats and a theory of animals. Of course, transferring conceptual analysis from this somewhat simplistic example to the wider remit of public law analysis will require some rigour. Given the success of this use of concepts in complex areas of public law analysis, such as sovereignty (Mauthe, 2005a) and the central-local government relationship (Mauthe, 2005), this would indicate that concepts can be used as explanatory mechanisms in their own right and the task may not prove to be impossible.

There are also a number of positive outcomes to be found in respect of using concepts as the basis for analysis. There would, for example, be a widening the range of analytical tools available to public lawyers beyond that of theory. Concepts could also be used to traverse the gap between explanation and knowledge thereby facilitating the inclusion of knowledge-based analysis, such as feminist critiques. The approach possesses merit, especially as there are areas of public law analysis where concepts have been used to resolve analytical difficulties (Mauthe, 2005). Alternatively, concepts could be said to lack the authority of theory, except that authority, particularly when it is premised upon the capacity to resist dislodgement, is only one facet as to what should constitute 'good' analysis (Kuhn, 1996). Additionally, there is always the risk that strength does not represent reality (Mauthe 1999, 2000). Indeed, if concepts can facilitate the inclusion of alternative and new critiques within public law analysis then surely that represents a form of strength. The question is then, which concepts are to be used. The answer to this question represents another paper.

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18 Evidence of this approach can be found within the context of the theory and/or values debate. Loughlin (2003), for example, develops a number of disparate concepts, such as representation, constituent power and sovereignty which are then unified in the form of a theory of public law. There is also evidence to be found outside of the theory and/or values debate. Consider, for example, the theory of juridification of the central-local government relationship which is premised on the concepts of 'restructuring' and 'legalisation' (Loughlin, 1989). More widely, examples of this approach can also be found within the works of Vincent-Jones (1998, 1999); Walker (2003).

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