

THE NOTION OF SOVEREIGNTY AND ITS PRESENTATION WITHIN PUBLIC LAW: A CRITIQUE ON THE USE OF THEORY AND CONCEPTS

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INTRODUCTION

Theory is the dominant method for the presentation of knowledge within public law. Theories may be criticised, altered and developed yet little consideration is given as to why theory is employed in the way that it is, how theory may impact on the analysis concerned or even whether alternative approaches may be more effective. Accordingly, this paper seeks to address these questions by focusing on a key area within public law analysis, that of the notion of sovereignty.

The notion of sovereignty has been selected as the focus of investigation because it is an area of recent debate and it is preferable to focus on a single notion in order to identify the diversity of theoretical approaches and issues that a single notion can raise. Accordingly, the paper falls into a number of sections. Initially the notion of sovereignty will be considered in terms of theory and will draw upon the work of three particular public lawyers, Wade¹, Allan² and MacCormick.³ The notion of sovereignty will then be evaluated as a concept. Here the writers Walker⁴ and Loughlin⁵ will be examined. The paper will then attempt to identify an alternative approach to the presentation of the notion of sovereignty. Theory and concepts will be used as evaluative tools but the manner of their deployment will be reassessed in the light of the earlier findings. The paper will conclude by offering a number of observations on the use and application of theory and concepts in relation to the notion of sovereignty in particular and the application of theory and concepts in general within public law.

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¹ See H. W. R. Wade, 'The Legal Basis of Sovereignty' (1995) *Cambridge Law Journal* 172; *Constitutional Fundamentals* (1980); 'Sovereignty – Revolution or Evolution?' (1996) 112 *Law Quarterly Review* 568.

² T. S. R. Allan *Law, Liberty and Justice* (1993); 'Parliamentary Sovereignty: Law, Politics and Revolution' 113 *Law Quarterly Review* (1997) 443.

³ N. MacCormick *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (1999).

⁴ N. Walker 'Late Sovereignty in the European Union' in N. Walker (ed.) *Sovereignty in Transition* (2003), 3.

⁵ M. Loughlin 'Ten Tenets of Sovereignty' in N. Walker (ed.) *Sovereignty in Transition* (2003a), chap. 3; *The Idea of Public Law* (2003b), chap. 5.

Public Law And Theory

Within the realm of public law theory has always been the dominant method for identifying and attributing meaning to phenomena. It is used as a means of representing certain undertakings which are perceived to be particular, or 'internal', to public law.⁶ Theory is also used to interpret events which have been viewed as changing the nature of public law, such as regulatory theory⁷ or the theory of juridification.⁸ In addition to this contextual development and deployment of theory, public law also draws upon theories which, it could be argued, are 'external' to its analysis. Such theories may be viewed as being legal in nature although the origin of these theories may not lie within public law analysis *per se*.⁹ Even theories which can be viewed as being 'external' to legal analysis, in that they originate from a non-legal discipline, have been used.¹⁰ Public law also incorporates theories developed by individuals, both lawyerly¹¹ and non-lawyerly in their origins.¹² Given this strong and diverse tradition it is not surprising that sovereignty is a notion which has been the subject of much theoretical examination. Accordingly, it is proposed to examine how theory has been used to present the notion of sovereignty.

The Notion Of Sovereignty And Theory

In respect of the notion of sovereignty it is possible to identify a number of ways in which theory is used as method of explanation.

a. Sovereignty As A Theoretical Phenomenon

The classic presentation of sovereignty is as a particular theoretical phenomenon. This approach can be found in the work of Wade.¹³ Wade argued that that there could be no substantive limits placed on the legislative powers of Parliament and that ultimately the only real limitation was that Parliament could not detract from its own sovereignty.

In constructing a theory of sovereignty Wade draws on three sources: firstly, the works of earlier constitutional writers, such as, Coke,¹⁴ Blackstone¹⁵ and

⁶ Such as the rule of law or the separation of powers.

⁷ See J. Kay, C. Mayer and D. Thompson (eds.) *Privatisation and Regulation-the UK Experience* (1986).

⁸ See M. Loughlin 'Law, Ideologies and the Political-Administrative System', (1989) *Journal of Law and Society*, Vol. 16, page 21; *Legality and Locality: The Role of Law in Central-Local Government* (1996); 'The Restructuring of Central-Local Relations' in J. Jowell and D. Oliver (eds), *The Changing Constitution* (4th ed, 2000), 137.

⁹ Examples of such theories are those of legal positivism and natural law.

¹⁰ Such as autopoiesis and functionalism.

¹¹ Such as Dworkin.

¹² Such as Foucault and Habermas.

¹³ See n.1 above (1955) 172.

¹⁴ E. Coke, *The First Part of the Institutes of the Laws of England* (1628); *The Second Part of the Institutes of the Law of England* (1641); *The Fourth Part of the Institutes of the Law of England Concerning the Jurisdiction of the Courts* (1644).

¹⁵ W. Blackstone, *Commentaries on the Laws of England, Book the First: The Rights of Persons* (1765).

most notably Dicey.¹⁶ These writers are part of a formalist tradition within public law¹⁷ where law is represented as being ‘strictly neutral’ and that the ‘purity of constitutional law’ depends on a strict separation of law from politics.¹⁸ Secondly, Wade also uses case law as a source.¹⁹ Again, this is a feature which can be found within the formalist tradition. Finally, Wade draws on legal jurisprudence. Here Wade initially drew upon Salmond’s notion of the ‘ultimate legal principle’.²⁰ Wade identified a common law “rule” concerning sovereignty that is distinguishable from all other rules of common law.²¹ The “rule” relating to sovereignty is an exception because it cannot be altered by statute and the source for the rule is historical rather than legal. It is the ultimate rule of the system in that those who operate the legal system accept it as a ‘truism’ and the ‘ultimate political fact’. Although Wade’s analysis was challenged by other constitutional writers,²² it was not until the passing of the European Communities Act 1972 and the decision *R v Secretary of State for Transport, ex parte Factortame Ltd (No. 2)*²³ that Wade shifted his view. Wade commented that whilst the House of Lords may ‘turn a blind eye to constitutional theory’ and that the decision may be ‘unsatisfying to the academic mind, it at least provides a further example of the constitution bending before the winds of change, as in the last resort it will always succeed in doing.’²⁴ For Wade the change represented a ‘technical revolution’ which is inevitable when ‘political necessity’ causes ‘judges, faced with a novel situation, elect to depart from familiar rules’.²⁵ Since one of one of Wade’s three methodological features was excluded by the judiciary, namely that of constitutional theory, Wade had to accommodate any change to the theory by drawing upon the remaining two. Initially, case law²⁶ was deployed, albeit from a non-UK source, but ultimately legal jurisprudence was used. Jurisprudentially, Wade justifies the change by deploying Harts analysis on the ‘rule of recognition’.²⁷ Hart, in a debate on sovereignty, had argued that the ‘ultimate rule of recognition’ cannot be validated by any other legal rule or norm but exists through the ‘complex and normally concordant practice’ of judges. Accordingly, Wade is able to detect that the ‘new’ rule of recognition possesses an authority which was absent in the old rule of recognition – a change which the judges

¹⁶ A. V. Dicey, *An Introduction to the Study of the Law of the Constitution*, (10th ed., 1960), 27.

¹⁷ See M. Loughlin, *Public Law and Political Theory* (1992).

¹⁸ See n.1 above (1980) at pp.1–2.

¹⁹ *Vauxhall Street Estates Ltd v Liverpool Corporation* [1932] 1 KB 733; *Ellen Street Estates Ltd v Minister of Health* [1934] 1 KB 590; *British Coal Corporation v The King* [1935] AC 500.

²⁰ Sir J. Salmond, *Jurisprudence* (1947) 155.

²¹ See n.1 above (1955) at 187-189.

²² Such as Sir I. Jennings *The Law of the Constitution* (1967), R. F. V. Heuston *Essays in Constitutional Law* (1964) and G. Marshall *Constitutional Theory* (1971). Generally see P. Craig ‘Parliamentary Sovereignty of the United Kingdom After *Factortame*’ (1991) 11 *Year Book of European Law* 221.

²³ [1991] AC 603.

²⁴ See n.1 above (1996) 568 at 575.

²⁵ *ibid* at 574.

²⁶ *Harris v Minister of the Interior* 1952(2) S.A. 428; [1952] 1 T.L.R. 1245, discussed in (1955) *Cambridge Law Journal* 172.

²⁷ H.L.A. Hart, *The Concept of Law* (2nd ed. 1994).

were able to recognise.²⁸ It is interesting that Wade uses legal jurisprudence as the most forceful support for the shift in position given that the other features within the original theory, those of constitutional theory and case law, had been the strongest. This may be partly explained by the fact that the work of the constitutional theorists and the use of case law drew on the formalist tradition, whilst Wade's use of legal jurisprudence was innovative and possibly gave increased weight to the theory at the time.

Ultimately, it can be argued that Wade's analysis represents sovereignty not just as a theoretical explanation of a particular phenomenon but also as an observational term, that is, something which is. Furthermore, the theory and the observation are unified, in that when Wade writes of sovereignty it is synonymous with Parliament, Parliament's capacity to create law and the fact that Parliament does create law. However, this convergence of theory and observation works as long as there is no change. When one of the features of the theory is challenged through the passing of entrenching legislation, such as the European Communities Act 1972, then a problem occurs. Since it is the observation which causes the divergence, it is the construction of the theory which becomes the focus of concern. Wade reconciles the difference between the theory and the observation by asserting that there has been a failure on the part of the judiciary to recognise a particular observation within the original 'rule of recognition'. This unobserved observational information helps to preserve the integrity of the theory. If however, the unobserved information had been represented as 'bad history', that is a flaw within the observation: this would have cast doubt on the validity of the analysis. Ironically, underpinning the entire analysis is yet another theory, the separation of powers. The separation of powers provides an explanation as to the structure, institutions and functions within which Wade's analysis occurs and makes the analysis both plausible and confirmable.

It could be argued that, to present the notion of sovereignty as a theory is a useful method for the explanation of observations as they function within a structure. However, there are a number of inadequacies that need to be acknowledged, such as the requirement of another theory in order to achieve a full explanation along with the difficulty in accommodating new information, in that change can only occur within the parameters or observations of the theory. Change which takes place outside or beyond those parameters can never be included because it will ultimately be beyond observation and, if it is included, then the representation which the theory explains will cease to exist. At the same time sovereignty, as theory, can also be used to exclude certain types of information, such as the political. Ultimately, presenting sovereignty as a theory is not a very powerful method for proving the existence of the phenomenon.

b. Sovereignty, Theory And Realism

An example of where theory is used to construct a view of sovereignty which is 'realistic' can be found in the work of Allan.²⁹ In contrast to Wade, Allan argues that legal sovereignty possesses a component of political morality and

²⁸ See n.1 above (1996) 568 at 574.

²⁹ See n.2 above (1993) 282-286.

in order to include such an element, Allan uses theory, in particular the work of Dworkin.

Dworkin is doubtful about the idea of a legal theory that views what matters as a valid proposition of law can only be determined by reference to its 'pedigree'.³⁰ Instead, Dworkin argues that in 'hard cases' where relevant legal rules are ambiguous, vague, inconsistent or just absent and consequently do not provide a clear answer to a legal dispute, then judges will look 'behind the rules' to the principles that underlie and justify them. For Dworkin, the law includes not just rules, but also underlying principles and beyond these, more abstract principles, all of which fit together into a coherent whole.³¹ If, it is then found that a particular rule or principle is incompatible with these deeper principles then it must be rejected as a mistake. Dworkin argues that judges do this when they overrule common law doctrines which have been laid down in earlier cases. In these situations judges are not radically changing the law but merely correcting an error in the application of the deeper principle.³²

Allan argues that Dworkin's theory can be applied to fundamental constitutional rules, including Hart's 'rule of recognition'.³³ For Allan, 'the fundamental rule that accords legal validity to Acts of Parliament is not itself the foundation of legal order beyond which the lawyer is forbidden to look.'³⁴ Instead, Parliamentary authority ultimately derives from deeper principles that are indistinguishable from the deepest principles within the common law. Furthermore, argues Allan, 'the sovereignty doctrine must be understood in the light of a moral or political theory of the polity',³⁵ such as democracy, the rule of law and equal citizenship.³⁶ Accordingly, constitutional rules, including parliamentary sovereignty, must be repudiated if they are inconsistent with those deeper principles.³⁷

It is suggested that Allan's use of theory to construct a theory of sovereignty which is realistic raises a number of questions. Firstly, whilst there are merits to Dworkin's analysis as an explanation of the common law, it has been questioned as to whether Dworkin's theory of the common law is applicable in a constitutional context.³⁸ Dworkin presents his theory as an 'interpretation' of how judges decide cases in a common law system and claims that his theory can be confirmed from the way judges act and speak as is they are guided by principles.³⁹ But, argues Goldsworthy, whilst the facts do not have to be altered to fit Dworkin's theory, its application to cases of a

³⁰ R. Dworkin *Taking Rights Seriously* (1977) chap. 2.

³¹ *ibid.*, at chaps. 2 -4.

³² See J. Goldsworthy *The Sovereignty of Parliament: History and Philosophy* (1999) at p.247.

³³ See n.2 above (1997) 443 at 444.

³⁴ See n.2 above (1993) at 265-6.

³⁵ See n.2 above (1993) at p.280 drawing on n.30 above (1977) Chap. 4 and R. Dworkin *Laws Empire* (1986).

³⁶ See n.2 above (1997) 443 at 445.

³⁷ See n.2 above (1993) at page 146 and (1997)443 at 445.

³⁸ See R. Dworkin *Freedom's Law: The Moral Reading of the American Constitution* (1996) chap. 10

³⁹ See n.30 above (1977) Chap. 4, esp. 86-7, 112, 115-116. See also n.35 above (1986) Chaps. 1, 3 and 7.

constitutional nature is not so apparent.⁴⁰ In such instances judges seldom talk of applying ‘political’ or ‘moral’ principles and where such issues do arise, judges may specifically defer to Parliament.

Secondly, Allan’s realism is based on objective facts, which can be identified as the outcomes of judicial decision making in the context of constitutional law. If these objective facts match the outcome of judicial decision making, in the context of the common law, then there must be realism. How this convergence comes about does not matter, it is only the fact that there is a convergence which is relevant. Furthermore, given the diversity of contexts within which these areas of law operate, then there must exist some deep principles which facilitates the convergence. Accordingly, to argue that Allan’s analysis is inaccurate would be preposterous since it would suggest that the convergence of common law and constitutional law was either impossible, which it is not since it occurs, or that the convergence is random. Observations indicate otherwise, and these observations are facts. Accordingly, it cannot be co-incidence, but must represent reality and ultimately accuracy since the convergence did occur.

The problem with the realist approach is that it does contain an element of reflexivity.⁴¹ For example, if judges make decisions based on deep principles, then the deep principles will then be communicated to others who represent these principles as reality, yet the system within which the principles operate and the existence of the principles per se, may not converge. So in the short term there is idealism instead of reality, but with the potential for reality in the future as the process of communication continues and expands. In some respects theory as realism is static in that it is passive and may possess weight but is ultimately unmoving in terms of the development of any analysis. There is also a requirement to go beyond the empirical content of the theory to a belief in the theory itself. It is acceptability of the theory itself which then provides the belief in the phenomenon that the theory attempts to explain. Accordingly, if the theory is not believed, then the phenomenon does not exist. Furthermore, knowledge of the theory, reveals more about the nature of things beyond that with which the theory is concerned. Certainly, Allan’s presentation on the notion of sovereignty reveals as much about the nature of liberal democracy within the UK.

c. Sovereignty And The Unification Of Theory

The unification of theory in order to present a theory of sovereignty can be found in the work of MacCormick.⁴² MacCormick argues that law is an institutional system of rules and norms and in every system there will exist some way for determining what are the authoritative norms. In that way each system will possess a self-referential quality. Traditionally, these institutional systems have been perceived as being territorially concentrated in the form of a state and there has a tendency to equate the state with law. MacCormick describes this interrelation of coercive power with the

⁴⁰ See n.32 above.

⁴¹ Generally see G. Teubner *Law as an Autopoietic System* (1993); N. Luhman ‘Law as a Social System’ *Northwestern University Law Review* (1989) 136.

⁴² See n.3 above.

normative order as 'state-law' but argues that such a perception has the effect of distorting legal theory, particularly in reference to sources of authority. Where a state has law which regulates citizens and political activities, then there is a system of 'Law-State', or *Rechtstaat*. A 'well ordered Law-State or *Rechtstaat* is not subordinate to any political sovereign outside or above the law' and this shows 'that sovereignty is neither necessary to the existence of law and state nor even desirable'.⁴³ Hence, MacCormick's conclusion, that there has been a movement 'beyond sovereign state'⁴⁴ to the 'the era of post-sovereignty'.⁴⁵

Unification, as a method for the presentation of the notion of sovereignty within MacCormick's analysis occurs at two levels: firstly, in respect of theory and secondly, on respect of the notion of sovereignty. In respect of theory, the basis of MacCormick's analysis is the 'institutional theory of law'⁴⁶ which seeks to combine a 'normativist conception of institutions with a particular form of legal positivism'.⁴⁷ It is argued that institutions possess a normative core which provides the aims and values to be deployed in respect of their competency and behaviour. These norms operate both internally and externally, but they are also organising and justificatory in nature. They also represent a form of deliberation and control which occurs through social action and interaction with other institutions. MacCormick represents the institutional theory of law as a means of 'unifying' positivism with Dworkin. As MacCormick states, the institutional theory of law recognises the 'explicit and the implicit legal ideal connections between the norms of the legal system, i.e. with legal principles, the teleological background of the law and with policies in the sense of *Dworkin*'.⁴⁸ In respect of the notion of sovereignty there is a unification of the diverse perceptions of sovereignty. There are the linear perceptions of sovereignty as legal and political, or sovereignty as internal and external, but also hierarchical perceptions as sovereignty operating at various territorial levels of regions, states, Europe and the international. The unification of this diversity occurs through the operation of norms, that is, sovereignty as a form of 'political morality'⁴⁹ which provides a form of limitation on the operation of power. MacCormick's analysis does offer explanation and increased understanding of the notion of sovereignty in that it demonstrates a multitude of varieties of sovereignty, except that all these variations operate on the basis of a single, shared feature, that of institutional norms. In other words, the approach provides an explanation by way of subsumation. That is, if it is considered why sovereignty operates in a particular way, then it is because of the underlying norms.

⁴³ *ibid.*, (1999) at p.129.

⁴⁴ *ibid.*, (1999) at p.133 and N. MacCormick 'Beyond the Sovereign State' (1993) *Modern Law Review* 1.

⁴⁵ *ibid.*, (1999) Chap. 8.

⁴⁶ Also known as 'institutional legal positivism' or 'new institutionalism'. See D.N. MacCormick and O. Weinberger *An Institutional Theory of Law: New Approaches to Legal Positivism* (1986); O. Weinberger *Law, Institutions and Legal Politics: Fundamental Problems of Legal Theory and Social Philosophy* (1991).

⁴⁷ O. Weinberger *Law, Institutions and Legal Politics: Fundamental Problems of Legal Theory and Social Philosophy* (1991) at p.111.

⁴⁸ See n.46 above (1986) at p.113 (authors italics).

⁴⁹ See n.3 above (1999) at p.130.

There are, however, some problems with using theory to unify diverse explanations of particular phenomena in that whilst it may provide some understanding of a notion, such as sovereignty, in terms of why it operates in a particular manner, it does not explain how. But then, given the wide range of parameters which are being unified does this matter? There is also the presumption that the same values or norms will operate throughout the various features which are being unified. However, should one dimension choose to adopt different norms or values, due to the occurrence of a crisis, then the notion of sovereignty descends into schisms, in other words, a dimension which exists beyond mere division.

Ultimately, the problem with using theory as unification is the method used to create unity. This can be achieved either, by determining or displaying a degree of interconnectedness, or by way of reduction. Whilst reduction can produce a rigid theory, interconnectedness allows for flexibility but the structure of the theory must be very broad in order to allow for the inclusion of an assortment of phenomenon. In respect of MacCormick's analysis interconnectedness is used. However, it could be argued that, the various notions of sovereignty which are being connected within MacCormick's analysis are too diverse that the outcome is not unification but the creation of something entirely different, an alternative model of sovereignty, that of post-sovereignty.

d. Summary

The above examination on sovereignty and the use of theory reveals that whilst Wade, Allan and MacCormick are examining the same phenomenon, using different methods and approaches, the outcome of their analysis is quite diverse, almost unconnectable. The statement may seem obvious, but it raises the question, is this diversity a consequence of differing approaches to the phenomenon under investigation or the nature of the phenomenon being evaluated? In scientific analysis constant testing of a phenomenon is conducted in order to prove the existence and features of the phenomenon. Furthermore, testing will be undertaken using different methods and conditions in order to verify its existence and features. In other words, the focus of study is actually quite fixed, it is the methods for testing which will vary. If diverse results are produced, then the reasons for the differences will be explored, methods revised and altered to accommodate the new findings but, if ultimately, the particular phenomenon cannot be found to exist, then the theory may be abandoned.⁵⁰

In the context of public law analysis in relation to the notion of sovereignty, it has been shown that there is a history of differences being explored, revisionism and methods altered. Whilst this may indicate the use of diverse approaches for the testing of the notion, the actual mechanism for testing is actually quite fixed - that of theory. Ironically, given the diversity of analysis surrounding the notion of sovereignty there has begun to emerge some discussion on abandoning the phenomenon.⁵¹ It is an argument which

⁵⁰ Consider for example, theories such as, the world is flat, the earth revolves around the sun and creationism.

⁵¹ For a critical assessment of this argument see B. Van Roermund in N. Walker (ed.) *Sovereignty in Transition* (2003) at p.33.

originated within modern political science⁵² and it is interesting to note that, within this discipline, the notion of sovereignty has also received mixed treatment. Within political science there also occurred a proliferation of the senses in which the notion is used, for example, state sovereignty and national sovereignty⁵³ although some of the senses have become 'blurred', for example, popular sovereignty, popular state sovereignty, shared sovereignty and divided sovereignty.⁵⁴ The 'abandonment thesis' came about because of the perception that the notion of sovereignty had become too ambiguous, too nuanced and even 'a barrier to analysis'.⁵⁵ There are also arguments against abandonment and it has even been suggested that the notion of sovereignty does not receive sufficient attention because the focus of analysis has been conditioned by other phenomena, such as the state⁵⁶ or democracy.⁵⁷

The possibility of public lawyers abandoning the notion of sovereignty is an option but, it is also worth considering the various alternatives that are available. One option is to search further and wider for theories that can be used to evaluate sovereignty. This approach possesses merit as it represents a continuation of the form adopted by Allan and MacCormick. The problem is, how far and how wide should the search be conducted for ultimately, if the theories employed are too remote then the outcome could lack strength as an explanation of the phenomenon of sovereignty. There is also the danger that the focus of analysis will become the critique rather than the phenomenon under investigation. A further alternative is to construct a higher, or meta-theory of sovereignty. This approach also possesses merit given the tradition within public law for hierarchally constructed theories.⁵⁸ But, there are problems in respect of the element of distance between the meta-theory and the original theory.

All these approaches presume that theory is the only, or best, mechanism for the presentation of knowledge. Yet, when a phenomenon, such as sovereignty, produces such a wide range of theory it may be more appropriate to consider using a different mechanism for the presentation of knowledge. In other words, rather than abandon the notion of sovereignty, why not abandon the current method used to present the notion and employ an alternative, such as concepts.

⁵² See S. I. Benn 'The Uses of Sovereignty' *Political Studies*, 3:2 1955, p.122.

⁵³ See E. H. Carr *The Twenty Years Crisis 1919-1939* (1978); see also n.52 above

⁵⁴ See M. Newman *Democracy, Sovereignty and the European Union* (1996).

⁵⁵ See C. Lord 'Sovereign or Confused? The "Great Debate" about British Entry to the European Community Twenty years On' (1992) *Journal of Common Market Studies* 30:4, (1992) p.420; P. Lynch 'Sovereignty and the European Union: Eroded, Enhanced, fragmented' in L. Brace and J. Hoffman (eds.) *Reclaiming Sovereignty* (1997) pp.43-44.

⁵⁶ See J. Bartelson *A Genealogy of Sovereignty* (1995).

⁵⁷ See D. Held *Political Theory and the Modern State* (1989).

⁵⁸ For example, the theory of constitutional pluralism. See N. Walker 'The Idea of Constitutional Pluralism' (2002) 65 *Modern Law Review* 371.

The Nature Of Concepts

There are many explanations as to ‘what’ is a concept.⁵⁹ A basic definition is that a concept is an abstract representation which attempts to use words to portray reality.⁶⁰ The terms concepts and theory are occasionally used interchangeably but, as methods for the presentation of knowledge, they are quite distinct particularly in relation to the positioning of knowledge. Consider the example of Rufus the Siamese cat. 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. In other words, the distinction between a concept and a theory lies with where knowledge is positioned. For theory, knowledge is to be discovered, even if that knowledge is thought to exist, whilst for a concept knowledge already exists, it is pre-defined.

This may give the impression the concepts are quite rigid and fixed but pre-defined knowledge can also be ‘open-textured’. Consider again the blue eyes of Rufus the Siamese cat. There are many shades of blue, eyes can be numerous shapes, some eyes cannot see colour whilst others may need the assistance of glasses. Accordingly, it is proposed to consider how sovereignty can be presented as a concept.

The Presentation Of Sovereignty As A Concept

The presentation of sovereignty as a concept within public law is quite recent and can be found in the work of Walker⁶¹ and Loughlin⁶². Just as the analysis of sovereignty in terms of theory was found to contain certain features, features can also be found to exist in respect of sovereignty and its presentation as a concept. For example, both Walker and Loughlin commence their analysis with a definition. Walker defines sovereignty as:

“the discursive form in which a claim concerning the existence and character of a supreme ordering power for a particular polity is expressed, which supreme ordering power purports to establish and sustain the identity and status of the particular polity *qua* polity and to provide a continuing source and vehicle of ultimate authority for the juridical order of that polity.”⁶³

⁵⁹ Generally see M. Weitz *Theories of Concepts* (1988).

⁶⁰ Generally see W. B. Gallie ‘Essentially Contested Concepts’ in M. Black (ed.) *The Importance of Language* (1962); P. Thagard *Conceptual Revolutions* (1992).

⁶¹ See n.4 above.

⁶² See n.5 above.

⁶³ See n.4 above at p.6 (authors italics).

It is then claimed that implicit in this definition is ‘that sovereignty involves a ‘speech act’⁶⁴ – a ‘claim to ordering power’.⁶⁵ For Loughlin, sovereignty ‘is to be understood as a representation of the autonomy of the political, and as providing the foundational concept of the discipline of public law’.⁶⁶

Both writers also provide a context, or justification, for their definition. Walker, for example, is dismissive of the arguments against the abandonment of sovereignty but concedes that sovereignty has been aggravated by numerous developments within public law, most notably membership of the European Union. These developments have resulted in sovereignty moving from a Westphalian phase to a post-Westphalian phase. Part of these changes has entailed a change in the use of sovereignty as a form of *meta-language*, traversing and linking the *object-language* of the domains of political science, law, international relations, etc. Sovereignty’s use as a form of *meta-language* remains, ‘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’⁶⁷ but, the challenge is to reconceptualise sovereignty in the context of the European Union. Walker argues that the ‘basic conceptual apparatus of sovereignty can be adapted to understand the new order’.⁶⁸ A number of approaches have been attempted but the most viable is that of ‘constitutional pluralism’.⁶⁹ Within this theoretical framework Walker then constructs a notion of ‘late-sovereignty’ where the key features are those of continuity, distinctiveness, irreversibility and transformation. Walker concludes 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’.⁷⁰ Further ‘sovereignty-dependent’ features are then identified as being a reflexive and publicly approbated constitutional discourse, a broad jurisdictional scope, interpretive autonomy, institutional depth and breadth, citizenship and representative mechanisms.

Loughlin argues that the representation of sovereignty within public law has been fraught with difficulty. The reasons for the difficulties range from the inability of commentators to recognise public law as a practice with its own distinctive methods and objectives, the attempts by political scientists and lawyers to ‘fix the concept of sovereignty within a formal, analytical and positivist frame’,⁷¹ or their attempt to ‘devise some transcendental principles of right conduct which legal and political behaviour must be subject’.⁷² In other words, Loughlin is critical of attempts to construct a notion of sovereignty within a defined theoretical framework, whatever the

⁶⁴ *ibid.*

⁶⁵ *ibid.*

⁶⁶ See n.5 above (2003a) at p.56.

⁶⁷ See n.4 above at p.10.

⁶⁸ See n.4 above at p.19.

⁶⁹ See n.58 above.

⁷⁰ See n.4 above at p.31.

⁷¹ See n.5 above (2003a) at p.56.

⁷² *ibid.*

perspective, as sovereignty is ‘quintessentially a political concept’.⁷³ Loughlin then proceeds to identify ten tenets which present are ‘ideas that have been translated into concrete practices’ and represent ‘the essence of the modern concept of sovereignty’.⁷⁴ The tenets can be summarised as follows: sovereignty is a fact of the modern state and political relationships do not derive from property relationships. Public powers differ from private power, is official in nature and is the product of political relationships. Sovereignty is an expression of public powers and it is relational in nature. Rights are not antagonistic to sovereignty but a product of the expression of sovereignty. The system of public law is an expression of sovereignty and finally, public law is not solely a matter of positive law.

Finally, it is suggested, that a key feature which underlies both Walker’s and Loughlin’s analysis on sovereignty as a concept is the relationship of the concept to theory. Accordingly, in order to understand further how the notion of sovereignty can be represented as a concept, it is necessary to explore further this connection.

The Relationship Between Concepts And Theory

Both Walker and Loughlin contain within their definitions of sovereignty a premise that concepts are integral to theory. Where they differ is in the nature of the relationship. For Walker the relationship between the concept of sovereignty and theory is quite explicit. A concept of sovereignty is devised which, is not itself strictly theoretical but, is firmly placed within the context of theory, that of constitutional pluralism. Constitutional pluralism is itself positioned within a further theory, that of legal pluralism. The perception of sovereignty is that it ranks within a hierarchy of constructs. Sovereignty, as a concept within this hierarchy of constructs, occupies a position which is subsidiary to that of theory but is ultimately part of theory. In other words, it is theory which forms the basis for the presentation of knowledge and concepts are merely an explanatory tool within this mechanism. This linking of the notion of sovereignty with the theories of constitutional pluralism, and ultimately legal pluralism, may be viewed as desirable in respect of the overall presentation of knowledge in the realm of public law. However, by firmly entrenching the concept of sovereignty within theory, or theories, there are implications in terms of the representation of the notion of sovereignty.

Firstly if, as identified above, for a concept to exist there must be some form of pre-defined knowledge, then entrenching a concept within theory is not unacceptable. There are, however, consequences attached to deploying concepts in such a manner. In terms of Walker’s analysis it means, that ultimately, the true meaning of sovereignty can only be found within the wider context of the theory of constitutional pluralism and ultimately the theory of legal pluralism and not within the definition that Walker offers. In other words, any analysis which includes Walker’s definition of sovereignty would be incomplete unless the wider parameters of the concept were both acknowledged and included. This is not an immediate flaw but a potential flaw in respect of long term deployment of the concept of sovereignty.

⁷³ *ibid.*

⁷⁴ *ibid.*

Secondly, the theory of constitutional pluralism is a ‘new’ theory developed to address perceived inadequacies within current constitutional analysis.⁷⁵ However, by addressing the inadequacies within one area of analysis, it does not necessarily follow that the inadequacies identified within another will also be resolved. Furthermore, any differences between the various areas of analysis could be made more acute if the areas are then ranked, not in terms of merit of investigation, but in terms of a hierarchy of mechanisms used to present the investigation. In other words, not only should any analysis which includes Walkers concept of sovereignty include an acknowledgement and explanation in terms of the theory in which the notion of sovereignty is entrenched, there should also be some acknowledgement and explanation concerning the choice of mechanism used to present the notion. Whilst public lawyers do acknowledge the former, the latter is generally unrecognized.

Yet, by entrenching sovereignty within a new theory, such as constitutional pluralism, this does offer the opportunity for the re-evaluation of established knowledge and/or the inclusion of new knowledge regarding the notion. Consider, for example, the ‘political’ element excluded by Wade, but included by Allan, approved by MacCormick and now argued by Walker (and Loughlin) to be intrinsic to any analysis in respect of the notion of sovereignty. However, it is suggested, that this assimilation of knowledge is not automatic even if a theory is specifically represented as possessing attributes which will allow for the inclusion of new material.⁷⁶ The process for inclusion is incremental and dependent upon some sort of consensus concerning the weight to be accredited to the new material. This explains the ‘history’ of the political element in relation to the legal presentation of the notion of sovereignty. It also explains why some views are excluded, for example feminist analysis. It is ironic that within the public law material used for this paper there is no discussion regarding feminist critiques on sovereignty, yet within political analysis, such discussions are well established. Arguably, feminist critiques could be incorporated through existing new theory, such as the theory of constitutional pluralism, or even the development of further new theory but, the fact remains, for such an approach to be included it must first be invited in as it cannot enter freely. Even once invited in, its future remains uncertain.

Regarding Loughlin’s presentation on sovereignty as a concept, it can be argued that Loughlin widens the knowledge that sovereignty as a concept can represent, but a consequence of this widening, is that rather than particularizing the instances where the concept can be used, such as in the context of theory or even a particular theory, the concept becomes separated or set apart from theory. The outcome is that Loughlin’s concept, albeit one that is interesting, is in reality a model – a framework used to present in isolation and in a systematic form in respect of a specific phenomenon in a specific situation.

Accordingly, it is suggested that public law analysis on sovereignty as a concept possesses the same potential for conflict, confusion and inadequacy as the analysis on sovereignty and theory. However, whilst such grounds

⁷⁵ See n.58 above.

⁷⁶ *ibid.*

were used to justify the abandonment of theory in respect of the notion of sovereignty, it is suggested that the use of concepts in respect of the notion of sovereignty merits further exploration. The justification for this further investigation relates to the fact that, when contrasted with the use of theory within public law, the use of concepts as a primary mechanism for the presentation of knowledge is unexplored. Accordingly, it is proposed to explore how the notion of sovereignty could be presented in terms of concepts.

The Notion Of Sovereignty And Concepts

The use of concepts to present theory in respect of a notion, such as sovereignty, may appear to be improbable for a number of reasons. Firstly, it could be argued that concepts must either be premised in theory or attached to theory. Certainly, concepts cannot exist in isolation from theory because their nature (the requirement for predefined knowledge) entails a theoretical element. However, does this feature necessitate that a concept must be tied to a single theory? Could not a concept facilitate a connection between several theories, even when those which appear to be too diverse and possibly even incompatible or unconnectable?

Secondly, whilst public lawyers are familiar with theory as a method of for the presentation of knowledge, they are unfamiliar with using concepts in this manner. This argument is certainly true in relation to issues of a public law nature, but outside of public law, public lawyers do think in terms of concepts. Consider the notion of the universe, or even that of a bird or a tree. Just stating these terms will bring forth all sorts of information and understandings concerning the form and nature of these objects. In other words, public lawyers are used to thinking about concepts, but not in the context of public law because they have been 'trained' to think otherwise, in terms of theory. This 'training', it is suggested can be and, should be challenged.

Thirdly, it could be argued that only theory can be used to portray complex structures. This assertion stems from the limited role that concepts have been given within current public law analysis. If concepts are used and portrayed as descriptive mechanisms, subsidiary to theory then they will always be perceived as being limited as methods for the presentation of theory. However, consider again the notions of the universe, bird or tree. Each of these notions gives rise to a complex structure of meaning. The universe, for example consists of stars and planets. Stars can be further subdivided into types attached to which planets can, or cannot, be found. Planets form part of solar systems which are then classified as to types. Within this system there will be a number of theories concerning the origin of the universe and its behaviour. In other words, concepts can be used to create complex structures. It can even be argued that a single concept can facilitate the inclusion of a much wider range of material than any single theory. Concepts, for example, can incorporate the depth of analysis as found within theory, but in contrast to theories, concepts can traverse across many theories at the same time without creating a hierarchy of knowledge. Concepts can connect theories that on the face of it appear to be unconnectable, such as the analyses of Wade and Walker in the context of sovereignty. This can be done by closing the field of application for the

concept, *i.e.* the notion of sovereignty, but at the same time opening up the concept to divergent interpretations.

Finally, it could be argued that to depart from the established mechanism for the presentation of knowledge within public law could destroy the validity of any material which currently exists. There is a risk that the material, norms and values contained within current theoretical analysis will become lost, undermined even overwhelmed. Given that the focus of this analysis has been the methods used for presentation and not what sovereignty is, then any changes to the question of what is sovereignty will only become apparent when that particular question is addressed. In such a study, material which is accurate should survive in spite of the conditions under which it is tested.

The question then is which concepts could be used to evaluate the notion of sovereignty? The most obvious choice would be those concepts already found to exist within public law analysis, such as law, politics, state, democracy, citizenship, etc. However, it is suggested that, in selecting these concepts there is a risk of transferring the existing predefined knowledge already attached to these concepts along with the incumbent problems found to relate to the theories within which these concepts were used. Furthermore, it could even be argued that some concepts actually represent a fallacy in the context of public law. Consider for example, the concept of the state. There has not evolved, in the context of the UK, an effective theory of the state, a facet which has been attributed to the existence of the Crown.⁷⁷ Even the usage of the term 'Crown' is uncertain. It has been used by the judiciary to refer to the Monarch personally, or to the executive itself⁷⁸ and even to the government.⁷⁹ In other words, the concept of the state may be applied to the executive, which performs many of the function of the state, yet in the context of sovereignty, it is parliament which is considered. It is suggested that the dilemma has arisen because the executive has never been the focus of conflict, either political or historical. Accordingly, public law has not been able to create a body of case law, or even draw upon a body of coherent statute law, in order to develop any understanding surrounding either the existence of the executive or its attributes. Where case law and statute do exist in respect of the Executive the focus of lawyers has been that of limitation,⁸⁰ whilst in respect of Parliament the focus has been the absence of limitation,⁸¹ a facet that lends itself to the notion of sovereignty.

Accordingly, it is proposed to draw upon a number of concepts which will provide scope, simplicity, consistency and accuracy. These concepts are ideology, structure and space. It is not proposed to present an in-depth presentation of sovereignty using these concepts, since it was not the aim of this study to consider the issue of what sovereignty is. Instead, it is proposed to demonstrate how such an analysis might be undertaken through the use of

⁷⁷ See K. Dyson *The State Tradition in Western Europe* (1980) at pp.37-42. Also see T. Daintith and A. Page *The Executive in the Constitution: Structure, Autonomy and Internal Control* (1999) Chaps. 1 and 2.

⁷⁸ *M v Home Office* [1994] 1 AC 377 at 395 *per* Lord Templeman.

⁷⁹ *Town Investments Ltd v Department of the Environment* [1978] AC 359 at 381 *per* Lord Diplock.

⁸⁰ The basis of judicial review.

⁸¹ The basis of discussion on parliamentary sovereignty.

a few key concepts. Here the works of the various theorists will be considered along with how alternative approaches to the notion of sovereignty may also be included

a. Ideology

No specific definition is offered in respect of the concept of ideology but, it is suggested that ideology can symbolize numerous things, such as legitimization, integration and socialization.⁸² In terms of the notion of sovereignty, the concept can be found to exist in a number of forms. In respect of Wade's analysis, it could be argued, that the 'ideological' does not exist because of the desire to separate the legal from the political, yet underpinning this separation lie certain values regarding the role of law and politics which could be regarded as being ideological in nature. In contrast to Wade, the ideological component within Allan's analysis is more apparent and is a direct consequence of drawing upon the work of Dworkin, whereas with MacCormick the link with the political is achieved through the institutional theory of law. It is suggested that a common feature shared by the theorists as regards the concept of ideology is that of neutrality. There is a distinction, however, in where this neutrality can be found. Wade for example, neutrality lies in respect of the notion of law. For Allan, neutrality stems from Dworkin's arguments that political decisions occur independent from any conception of the good life or what gives value to life.⁸³ With MacCormick, neutrality is represented through norms. Each perception of neutrality represents a particular view of liberalism. For Wade, the notion of sovereignty represents a form of liberalism where the state cannot impose any restrictions, not even upon its institutions; whereas Allan accepts that restrictions can be imposed as the meaning of the values used possess legitimacy whilst MacCormick espouses an form of nationalist liberalism where the potential excesses of nationalism are moderated through institutional frameworks, especially as these frameworks operate not just at a national level, but also a pan-national level through institutions such as the EU. Central to all three perceptions of liberalism is the notion of the state, although this is manifested in terms of institutions because of the absence of a refined representation of the state within public law.⁸⁴ For Wade, parliament is central and is seen to possess an authority and legitimacy above all other institutions within the state, whereas for Allan, it is the judiciary and for MacCormick, the executive. Each draws upon a specific vision of a liberal democracy whereby communal need is expressed through a specific institution. Both Loughlin and Walker attempt to move legal analysis beyond the statist perception of sovereignty which dominates Wade, Allan and MacCormick. As a consequence, it could be argued that the ideological element is more apparent. For Walker, the ideological occurs through 'sovereignty dependent features' such as citizenship and representation whereas Loughlin refers to features such as rights and power. However, would it not be more appropriate to unify these features through the concept of ideology rather than sovereignty, especially as it is sovereignty which is

⁸² Generally see M. Freedman *Ideologies and Political Theory: A Conceptual Approach* (1998).

⁸³ R. Dworkin 'Liberalism' in *A Matter of Principle* (1986) at p.191.

⁸⁴ See above.

being explained? The concept of ideology can then facilitate the explanation.

Ideology could also be used to distinguish between different forms of power, not just the private and public power included by Loughlin but also feminist critiques along with Foucault's⁸⁵ argument that sovereignty is a medieval institution in which absolute control is exercised over subjects through an open and explicit display of violence. In other words, going beyond positive law to include other theoretical approaches is much simpler to achieve through a concept, such as ideology, than by constructing a new theory.

b. Structure

A notional definition of structure is that it relates to framework, the various components within the framework, how these components relate to one another and how things, in general, are organized within the framework. Structure, as a concept, can be found to exist within all the various theorists examined and can be found to assume three forms, although the level of consideration along with the context may vary.

Firstly, structure can be seen to relate to the institutional arrangements of the UK constitution and ultimately the relationship with the EU. It is suggested that such approach dominates the analysis of Wade, Allan and MacCormick, albeit in different levels and dimensions. Secondly, the concept of structure also concerns the relationship which the differing forms of sovereignty seek to achieve, such as MacCormick's 'divided sovereignty' or the relationship between law and politics focused upon by Allan and the use of Dworkin to achieve such a connection. This approach can be contrasted with that of Loughlin, who whilst acknowledging the relationship between the legal and political also asserts that sovereignty must be distanced from a particular theory, that of positivism. Finally, structure can also relate to how explanatory mechanisms, such as theory, concepts and models are used. Consider, for example, the relationship between theory and concepts employed by Walker.

Whilst this diversity may seem apparent and therefore unrevealing in terms of the concept of structure, it is suggested that by using the concept of structure it is possible to offer a number of critiques concerning sovereignty which would otherwise be difficult to achieve in terms of the particular analyses offered. For example, the concept of structure enables the identification of a historical dimension in terms of how public lawyers have sought to address the notion of sovereignty. This 'historicism' also provides the basis for a comparative critique between the theorists. Finally and possibly, most significantly, by focusing on the concept of structure it is possible to include alternative theories which are not part of current public law analysis, such as feminist critiques. Here sovereignty, evaluated through the concept of structure, can be seen to represent a command-obedience framework which can be construed as patriarchal, hierarchal and exclusionary in nature in terms of women's lives.⁸⁶ A further approach,

⁸⁵ See A. McHoul and W. Grace *A Foucault Primer* (1993) at pp.62-63.

⁸⁶ Generally see C. A. MacKinnon *Towards a Feminist Theory of the State* (1989); K. B. Jones *Compassionate Authority: Democracy and the Representation of Women* (1993); J. Hoffman *Gender and Sovereignty* (2001).

currently not considered by public lawyers is that of Giddens theory of structuration. Giddens argues that structure is a set of historically contingent and mutable rules whose origin and development are dependent upon agency.⁸⁷ In terms of the notion of sovereignty, there is a connection between the internal dimension of the state and the external dimension of international relations. This dualism is however, not separate but interdependent and is not just a product of history but also other features, such as resources and power. It is suggested that Giddens analysis represents and alternative critique to MacCormick's use of the institutional theory of law with its emphasis upon institutions and norms or Allan, Walker and Loughlin's focus upon the relationship of the political to the legal. Giddens is a sociologist and the inclusion of sociological perspectives within public law is currently limited.⁸⁸ However, by using the concept of structure such material could be incorporated.

c. Space

A feature which dominates much of the analysis on sovereignty has been the struggle to accommodate the changes in the legal and political order of UK at a regional, national, and international level which is represented as being consequential to membership of the EU. Furthermore, this breadth of change is condensed into a single notion of sovereignty, be it MacCormick's 'post sovereign state' or Walkers 'late sovereignty'. Public lawyers are in effect separating or creating 'boundaries' between legal and political factors from the geographical.⁸⁹ The essence of sovereignty is territory and regions yet law and politics are viewed as forces which act upon these factors rather than viewing geography as another form of power which can act upon law and politics. It is suggested that the concept of space can accommodate the shifts in knowledge that the membership of the EU has brought about but also widen legal analysis on a number of levels and at the same time facilitate the introduction of other critiques.

Firstly, the concept of space can offer explanation in terms of particular places, locations, or as Walker states 'polity', be this at international level, state level or at the level of a community, or individual citizens, facets already acknowledged as part of legal analysis on sovereignty. However, the concept of space is more 'open textured' in that it can go beyond regional or territorial confines, avoid the property relationships that Loughlin wishes to exclude from issues of sovereignty to include facets such as culture, ethnicity, gender, sexuality and even objects such as workplaces, buildings,

⁸⁷ Generally see A. Giddens *The Constitution of Society: Outline of the Theory of Structuration* (1984).

⁸⁸ There are attempts to link law with sociology but the direction for such a connection is generally driven by sociologists rather than lawyers and occurs within the realm of jurisprudence rather than public law. For example see R. Banakar *Merging Law and Sociology: Beyond the Dichotomies in Socio-Legal Research* (2003). See further R. Cotterell 'Why Must Legal Ideas be Interpreted Sociologically' (1998) 25 *Journal of Law and Society* 171 and the response by D. Nelken 'Blinding Insights? The Limits of a Reflexive Sociology of Law' (1998) 25 *Journal of Law and Society* 407.

⁸⁹ Generally see N. K. Blomley *Law, Space, and the Geographies of Power* (1994); D. Cooper *Governing Out of Order: Space, Law and the Politics of Belonging* (1998); J. Holder and C. Harrison (eds.) *Law and Geography* (2003).

shops, cars etc. Accordingly, space can accommodate a group who may relate to territory in one way, institutions and/or processes in another way and objects in yet a different way. In other words, space can accommodate a range, depth and complexity of situations beyond that of law or politics or even theories such as constitutional pluralism.

Secondly, space can offer an alternative explanation of techniques for control. For example, political and legal techniques for control can be expressed through rules, the ideological and even the symbolic. Such controls may be perceived as operating in respect of space, yet space can also in turn impact upon the political and the legal through the resources available in a particular tract of land, how a particular tract of land is used or viewed, its terrain and even the climate. So whilst a nation or people may have a particular view of 'sovereignty' which will be expressed in legal and political terms, the spatial dimension may actually be directing how and why legal and political controls assume the manner and form that they do. It could even be argued, that whilst public law analysis has focused upon the tension between the legal and political in terms of the notion of sovereignty (and hence the shift from Westphalian sovereignty and the creation of a number of forms of sovereignty) the real debate on sovereignty is that of the geographical, as expressed through resources, terrain, climate, etc factors which are influencing the development of the EU and the notion of sovereignty.

d. Summary

Given that sovereignty is essentially a political notion, and that much of the debate within legal analysis has been the tension between the legal and the political dimensions and how to reconcile such diverse disciplines, it is suggested the method presented above, represents a possible solution, particularly when contrasted with the attempts to reconcile this tension through the use of theory. Furthermore, by using concepts as the basis for examination, it has also been shown that there exists the potential to include alternative approaches, such as feminist critiques, sociology and critical geography.

CONCLUSION

The aim of this paper was to examine how public lawyers use theory and concepts. In respect of theory, it was argued that this represented the dominant method for the presentation of knowledge within public law yet little consideration is given to how such a form can direct, and even be directed by a theorist, in terms of the outcome of an analysis. The notion of sovereignty was selected as the focus of examination having established that it was a phenomenon which merited consideration within public law. The particular theorists examined were those of Wade, Allan and MacCormick. It was found that, despite focusing on a single notion, the work of the theorists were diverse and possibly even unconnectable. It was not argued that this diversity was undesirable, but that possibly theory was not the best mechanism for the presentation of a notion as complex as that of sovereignty. The notion of sovereignty was then considered as a concept. Here two particular writers were considered, Walker and Loughlin. The analysis offered by Walker and Loughlin were also found to be diverse, suggesting

again, that representing sovereignty as a concept could not accommodate the diversity of analysis which the notion of sovereignty represented.

However, as part of the examination on theory and concepts, the nature of theory and concepts were also considered. It was found that although theories and concepts perform a similar function in respect of the presentation of knowledge, they differ in terms of the manner in which this knowledge is presented. Knowledge, in terms of theory, must be discovered although such knowledge may be suspected, whilst for concepts, knowledge is pre-defined. It was also argued there are no 'rules' regarding methods for the presentation of knowledge within public law, only entrenched practices. Accordingly, it was suggested that concepts, rather than theory could form the basis for analysis in respect of the notion of sovereignty. Sovereignty was then evaluated using a few key concepts, those of structure, ideology and space. These concepts facilitated the inclusion of all the theorists considered. They also encapsulated much of the tensions within legal analysis regarding the notion of sovereignty and avoided the problems identified in respect of representing sovereignty as either a theory or a concept. Furthermore, it was found that using concepts as the basis for analysis could widen the ability of public law to include alternative perspectives.

Finally, it is not suggested that public lawyers should abandon theory as a method for the presentation knowledge. Theory possesses great merit as a tool but its function/role needs to be understood and its limitations acknowledged. Furthermore, as the domain of public law expands and becomes more complex it may be necessary to expand the tools by which knowledge is presented.