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## **CROWNING GLORY: PUBLIC LAW, POWER AND THE MONARCHY**

*'New public law' has a keen interest in the deployment of power and the shifting nature of the public and private. In this article, we argue that the historical legacy of the Crown has hindered the ability of public lawyers to respond to changes in modes of governance in the UK. The constitutional law textbook tradition has played a key role in limiting critiques of the Crown because of the obfuscation that surrounds the legal and political status of the Monarch. However, instead of discounting the significance of the monarchy, we use it as a resource for exploring governing power, the blurring of boundaries and constitutional renewal. Our starting point is the life, death and, most importantly, the funeral of Diana, Princess of Wales. The latter event exposed the political relevance of the 'personal' in a most dramatic way, generating claims about the 'feminisation of the government' and 'emotions augmenting democracy'. We follow through on these claims in order to focus on the effects of adopting private, intimate-sphere norms in the public sphere, in particular public-sphere decision making. While aware of the risks associated with this 'transformation' of democracy, we conclude that the increasing centrality of the intimate merits consideration in new public law's search for progressive tools of modern governance.*

### **INTRODUCTION**

PUBLIC LAW is now in vogue in the UK and there is an excitement about a subject that has failed traditionally to capture the public imagination (Barnett, 1997; Freedland, 1998). Credit for this change of outlook tends to go to New Labour and its constitutional reform programme, described by the Lord Chancellor as 'arguably the most radical . . . since the Great Reform Bill of 1832' (Irvine, 1998: 1). To date, the highpoints in this ongoing project of modernising British political institutions are devolved government for Scotland, Wales and Northern Ireland, the Human Rights Act 1998, House of Lords reform and an elected London mayor (Blackburn and Plant, 1999a; Partridge, 1999).<sup>1</sup>

Modernisation is also the theme of what can be described as ‘new public law’ scholarship (Millns and Whitty, 1999). The historical parameters of public law writing are collapsing amid the sense of constitutional upheaval and renewal, and as Loughlin argues, ‘[f]ew people seem able any longer to call to mind a world in which the British constitution made sense. . .’ (1997: 1). New public law’s key challenge is to the doctrinal tradition familiar to generations of law students – best exemplified in *Constitutional and Administrative Law*, the textbook by Bradley and Ewing (1997). This tradition is founded on a ‘series of comfortable ideas handed down from Blackstone to Bagehot to Dicey’ that confine contemporary public law textbooks to ‘parameters set within a different age’ (Morison and Livingstone, 1995: 1, 6). The influence of Dicey, ‘the high priest of orthodox constitutional theory’, is particularly pernicious (Loughlin, 1992: 140). In the Diceyan tradition, Parliament is the absolute locus of political authority with the result that ‘the main textbooks . . . [still] reveal a world where the exercise of power is more or less neatly within the collection of institutions that the accidents of a long history have thrown up’ (Morison and Livingstone, 1995: 6).

New public law scholarship exposes the deficiencies of this doctrinal tradition by emphasising the redrawing of public and private. It argues that privatisation of utilities, deregulation, contracting-out of services and the creation of new executive agencies and quangos represent radical changes in public administration, changes that undermine orthodox constitutionalism (Harlow, 1994; Taggart, 1999). A particular criticism is the inadequacy of a court-centered, remedy-based system of administrative law (see, for example, Wade and Forsyth, 1994) in responding to the privatisation and contractualisation process (Galligan, 1996; Harlow and Rawlings, 1997; Prosser, 1997; Taggart, 1997). New public law’s key recognition is that ‘[w]ith the systematic dispersal of the sites of power beyond the confines of what we had learned to recognize as the state, the old certainties of public law are no longer there’ (Sedley, 1997: vii).

The new certainty of public law is ‘constitutional reform’. Throughout the 1980s, and certainly since the election of the New Labour government in 1997, a conviction has solidified among mainstream public lawyers (Beatson et al., 1998; Brazier, 1999) that a modernisation programme is the remedy for ailing British constitutionalism. In short, replacing Diceyan orthodoxy is now the new orthodoxy in public law (Hunt, 1998; Loughlin, 1997; Morison and Livingstone, 1995). Once again, though, new public law is sceptical. It is

not opposed to the modernisation of political institutions or the development of a rights culture in UK law; rather, it argues that the nature of the late capitalist state necessitates fresh approaches to public power and democracy:

The problem with the Labour government [reform] proposals is that they are wrongly focused on the traditional agenda of restraining ‘big government’ and shoring up traditional ideas of representative government. Proposals, however well intentioned, about restoring representativeness to the regions, revitalizing Parliament, and ensuring accountability and openness in Westminster and Whitehall are missing the point. . . . As we approach the twenty-first century these reforms seem located in the past. (Morison, 1998: 512)

Morison nominates constitutional *renewal* as the largely unrecognised but vital supplement to the constitutional reform project. In order to renew itself, public law must be able to do two things: first, it must tame the ‘fugitive power’ that operates at levels above, below and through the state as a consequence of privatisation, Europeanisation and globalisation. Secondly, it needs to follow through on the insights of radical, communicative and participatory democracy, guiding us towards ‘new ways to institutionalise democracy beyond parliaments, committees and codes for conduct . . .’ (Morison, 1998: 512).

In this article, we promote the idea of constitutional renewal by addressing several concerns of the new public law scholarship: the textbook tradition; the concept of the state; and the blurring of conventional public/private divides. We use what may seem to be an unusual vehicle: the monarchy (and the concept of the Crown), and in particular, the death of Diana, Princess of Wales.<sup>2</sup> At first sight, furthering constitutional renewal by focusing on any aspect of the monarchy may seem ironic, even irrelevant. The New Labour modernisation programme has carefully excluded the paramount hereditary institution from its remit (Blackburn and Plant, 1999b: 140; Hames and Leonard, 1998). The Diceyan constitutional law textbook tradition has never wavered from anything other than a deferential royalist tone. Even new public law scholarship remains to be convinced; it either ignores Diana’s life and death, or treats it as politically insignificant.

We seek to challenge these assumptions by using the feminist insight that ‘the personal is political’. There are two aspects to our argument. First, we critique the way that public law obfuscates the myriad distinctions between the Crown as a concept of state/government and the Crown as monarch (i.e. the Queen). While the era of personal rule by monarchs is long gone, central government is still legally personified as the Crown and continues to benefit from immunities and privileges established in an earlier monarchical age; the state hides ‘behind the screen of the personalized image of the monarch like an extension of the royal household’ (Harlow and Rawlings, 1997: 6).

In the first section of the article, we illustrate how the public law textbook tradition shores up this construction of the monarchy. In the second section, we look at the consequences that this has had for developing a concept of the state in public law. We argue that historically the concept of the Crown has stymied interest in the idea of the state and that, more recently, it has thwarted new public law critiques of modern state administration. The final section of the article introduces the second aspect of our argument about the personal and political. It begins with an account of the life, death and, more particularly, the funeral of Diana, Princess of Wales and develops into an examination of the increasing centrality of the intimate to ‘conventionally more impersonal fields of social action’ (McNay, 1999: 113). Our particular interest in this section is in the effects of adopting private (or, more accurately, intimate) sphere norms in the public sphere, in particular in public-sphere decision making.

The argument in the final section develops from Giddens’ ideas about the ‘transformation of intimacy’ (1992). As we see it, two particular claims have emerged under this broad heading. First, the idea of democratising the intimate sphere, by releasing expressive possibilities – in particular for refashioning identity and renegotiating gender relations – through the processes of detraditionalisation associated with late modernity. Secondly, the idea of feminising the public sphere, particularly the public political sphere, by using intimate-sphere norms to augment government and democracy. The latter claim is the one that interests us in the final section of this article. We realise that the idea of the feminisation of government may seem miles away from the legitimate concerns of public law; even new public law, which discusses privatisation, contractualisation and the question of public/private law values, ignores this second angle on the contemporary blurring of public and private, personal and political. We also accept that Giddens’ arguments about the effects of the centrality of the intimate are

contested: as McNay says, '[o]n the one hand, it is associated with a regression of the public sphere and a fetishization of the self. On the other hand, it could be seen as potentially emancipatory in that it is no longer exclusively women who are burdened with the responsibility for the emotional' (Douglas, 1988; McNay, 1999: 113). It is against this backdrop that we set out to identify possible starting points for an exploration of the feminisation of democracy within new public law.

## THE MONARCHY AND PUBLIC LAW TEXTBOOKS

Royalty has always had a good press in law texts. The tone is respectful, if not downright deferential. Moreover, while law students are no longer expected to know the full royal lineage, it is quickly made clear to the reader that constitutional law can only be understood through a monarchical lens. Key themes are copied from text to text: the British monarchy's alleged continuity, stability and the glamour of its pageantry; its lack of real political power; and, most emphatically, its guarantee of the national identity (Hitchens, 1990; Whitty, 1999). Overall, the treatment is uncritical and one-dimensional, reminiscent of an earlier era of general academic commentary on the monarchy (Martin, 1962; Wilson, 1989: 1–2). While other disciplines such as politics (Nairn, 1988), history (Cannadine, 1983, 1997: 1–67) or gender studies (Fraser, 1997; Lewis, 1998) now offer alternative, multilayered accounts of monarchy, contemporary public law remains trapped within a conservative political mythology about the Crown.

The deferential style of public law scholarship is largely related to the origins and evolution of the constitutional law textbook tradition (Sugarman, 1986). The early authorities, such as Bagehot's *The English Constitution* (1872), established a dogmatic monarchical tone which still dominates legal writing today.<sup>3</sup> For example, a prominent, contemporary text, Bogdanor's *The Monarchy and the Constitution* (1995), constructs an unbroken narrative across the decades:

It is known, indeed, that George V, George VI, Elizabeth II, and the Prince of Wales have all studied *The English Constitution*. Since Victoria the changes in the role of the monarchy have been changes in degree and not in kind. There have been no

fundamental alterations to the monarchical model as it had evolved by the end of Victoria's reign. (1995: 40–41)

The canonical status of Bagehot is largely unquestioned. In a 1992 study of the British constitution, Mount found that '[a]ll royal biographers, all newspaper leader-writers and virtually all constitutional writers who have bothered to devote a page or two to the monarchy have followed Bagehot's formula, either tamely repeating it as gospel or rewriting it in their own words' (1992: 94). A cursory look at the contents of the public law textbook confirms this. The Bagehot orthodoxy is so well established that successive editions of undergraduate law texts maintain the same paragraphs on the monarchy (Bradley and Ewing, 1997: 253–62; De Smith and Brazier, 1989: 111–27; Hood Phillips and Jackson, 1987: 255–61). Even more critical public law texts pay scant attention to the significance of monarchy. McEldowney, while providing a wide-ranging account of public law issues, devotes just three pages to the monarchy and references Bagehot as 'useful' reading (1998: 86–8). Turpin includes a range of materials on constitutionalism and constitutional reform but never critiques the monarchy itself. Turpin recognises, however, that 'the Queen has still a pivotally symbolic role . . .' (1995: 144).

Not surprisingly, first year law students can be taken aback when confronted with the stance of public law texts. In their eyes, the concepts of monarchy and Crown evoke memories of two decades of saturation coverage of 'the Royals' – generally commencing with Prince Charles' search for a princess, through the televised Royal Wedding, to the marital breakdown, separation, divorce and, finally, funeral (Morton, 1993; Dimpleby, 1994). In public law discourse, however, popular understandings of monarchical life are discounted by the insistence on separating 'constitutional' issues from what Bogdanor describes as the 'personal difficulties' of the monarchy (1995: 305). Brazier emphasises the need for this public/private divide in an article on the Prince of Wales in the leading journal, *Public Law*:

The many media discussions about him have centred on his 'fitness' to be King. An analysis is needed of the position of the Prince of Wales in the constitution, *centred firmly on the constitutional and legal issues* which may lie behind the more *popular topic* of whether he is fit to succeed to the throne. (1995: 401; emphasis added)

Hence, in relation to the monarchy, law students are firmly directed to ignore the private lives of the Royal Family and to focus only on the constitutional aspects of the Monarch (succession, the Royal Assent, opening Parliament). Likewise, students are expected to understand the very particular relationship between the Monarch and the concept of ‘the Crown’ (Sedley, 1994: 289; Smith, 1995). In public law, ‘the expression “the Crown” has two meanings, namely the monarch and the executive’ (*M v Home Office*) and is used in many contexts. But, again, the only aspect of monarchy that is considered relevant in reference to the Crown is the public duties and powers of the Monarch; the private aspects of monarchy are omitted from the scope of public law.

In this article we take issue with this legal orthodoxy, in particular the separation of the public and private dimensions of monarchy. Our view is that Bagehot is correct when he claims that ‘[a] *family* on the throne is an interesting idea . . .’ (1872: 38), and we aim to revive this neglected aspect of the Bagehot legacy. In the next section, we show that, despite the official insistence on separating the ‘constitutional’ from the ‘personal’, the language of public law is saturated with terminology that elides the distinction between the concepts of Crown as state, Crown as monarch and the personality of the monarch (Goodrich, 1990: 218–22). This is not a semantic quibble: the end result of this elision is the masking of the sites and exercise of political power. More specifically, this masking has hindered the development of a concept of the state in public law and, more recently, created difficulties for new public lawyers in mapping modern state administration.

### **THE CROWN AS STATE**

In *M v Home Office*, it was stated that ‘the Crown’ had two meanings, namely the Monarch and the executive. This simple statement hides a rash of confusion. It makes no mention of the fact that myriad synonyms for the Crown exist in modern public law discourse: ‘Sovereign’, ‘Her Majesty’s Government’, ‘Ministers of the Crown’, ‘Queen in Parliament’, ‘Royal Prerogative’, ‘Crown Office’ and so on (Le Sueur and Sunkin, 1997: 46). The common feature is that each synonym links the state with monarchical imagery and the concept of the Crown. As Harlow and Rawlings (1997), Jacob (1996) and Allison (1997) highlight, it is this slippage that has hindered the coherent development of the concept of a state within the English common law tradition.

Historically, common lawyers, unlike their civil law counterparts, avoided the idea of the state in favour of the ‘abstract concept of the crown and the familiar concept of the person or individual official’ (Allison, 1997: 77). In recent years, new public law scholarship has wrestled with the consequences of this history in its attempts to make sense of the blurring of public/private power. Motivated by concern about the diffusion of forms of governance in the UK, and the absence of adequate systems of accountability and control, ‘the Crown’ has come under renewed scrutiny as an accurate map of late modern state administration. Two strands of criticism can be identified: first, the equation of the Crown with traditional central government institutions; and, secondly, the benefits that continue to flow to government from the legacy of monarchical immunities and powers.

Jacob details how the special status of the Crown has gradually declined as ‘something like a *State* has emerged in Britain’ (1996: 8) in the 20th century. However, the retention of the concept of the Crown, with its association with central government, has had the effect of screening out ‘the indistinctness of state administration’ (Allison, 1997: 89). This indistinctness has three obvious sources: first, the series of contractions and expansions in notions of accepted state functions, ranging from the early night-watchman state with minimal law-and-order responsibilities, to the welfare state and, more recently, the neo-liberal distaste for the ‘nanny state’; second, the proliferation of hybrid institutional forms which do not fit a state/non-state classification; and thirdly, the increasingly close relationship between government and private sector, nurtured through governmental bargaining powers (Harlow and Rawlings, 1997). New public lawyers’ attempts to get to grips with the state have been further compounded by the privatising practices of post-1979 governments, including the transfer of public entities to the private sector, and the contractualisation of public administration through techniques of ‘deregulation’, ‘contracting out’ and ‘internal markets’ (Morison and Livingstone, 1995; Taggart, 1997), and also, more recently, via New Labour’s ‘ideas of “contestability”, “best value”, and partnership . . .’ (Morison, 1998: 517; Morris, 1999: 66).

In light of this polycentric nature of state administration, it is hardly surprising that the abstract concept of the Crown is inadequate as a legal tool to map diffuse governing power. Thus, we disagree with Sedley’s claim that ‘[i]t does not matter what you call the state’ (1994:



270) when it comes to revitalising UK public law to cope with the above challenges. We argue that the Crown can never adequately fulfill this role so long as the legacy of monarchy continues to distort perspectives on the sites of public power.

The second strand of new public law criticism of the Crown confirms our impression. Public law has been unable to discard all the immunities and privileges that existed in the era when monarchical power was unbridled. The present-day ability of the Crown to avoid the effects of statutes, and to limit its liability in contract and tort stems from a time of personal sovereign power (Vincenzi, 1998: 317). As Harlow and Rawlings point out, government is able to continue benefiting from the status of the Crown because of the ‘modern perception of the titular head of state as without political power and confined to dignitary functions’:

The monarchical imagery is absurd, and the legal fiction that power is *not* vested in the Prime Minister, Cabinet and other organisms of the modern state but in a royal dignitary incapable, in Blackstone’s famous aphorism, not only of *doing* but even of *thinking* wrong, is dangerous. (Harlow and Rawlings, 1997: 6–7)

The pretense clearly has attractions for government; as Jennings recognised, ‘[t]he State functions more easily if it can be personified’ (1966: 120–21). The key to the constitution becomes ‘one icon, one family, one Crown’:

Not a day passes without news of the monarchy in all the media: it may be deemed trivial but in quantitative terms there is an irrefragable significance to the circulation of one symbol, of one icon, of one family, of what we are as represented in the comings and goings, the doings and sayings, the court news and the state functions of the royalty, the royal family. (Goodrich, 1990: 219)

Public lawyers, however, have begun to respond to the danger of allowing the state to hide ‘behind the screen of the personalised image of the monarch’ (Harlow and Rawlings, 1997: 6). There now exist constitutional reform proposals that substitute the Crown for a concept of the state via a written constitution (IPPR, 1993), either with or without a monarch remaining as head of state (Barnett, 1994; Brazier, 1991: 110). More specifically, the drawn-out attempts of the courts to subject Crown powers to judicial review have been criticised (Sedley,

1994), as has the extent to which '[t]he royal prerogative remains a crucial . . . power in the hands of government' (Vincenzi, 1998: 317) or, more accurately, in the hands of the Prime Minister (Blackburn and Plant, 1999b: 150).

We agree with these reform proposals in relation to the Crown, but they are not what interests us here. Instead, we want to use the monarchy as a springboard to the wider issue of conceptualising state power in public law. Our broader aim is to illustrate that, as well as looking towards political science, public administration and other fields, new public law can also find resources within the traditional concerns of its own discipline when pushing ahead with the project of constitutional renewal. Thus, in the next section, we suggest that the life and death of Diana, Princess of Wales, is relevant to a critical theorisation of the late modern state.

## **PRINCESS DIANA AND THE FEMINISATION OF POWER**

*1997: ANNUS . . . ?*

Diana, Princess of Wales, was the most photographed, most discussed member of the Royal Family in the last 20 years. In a 1992 essay, Paglia described her as possibly 'the most powerful image in the world popular culture today, a case study in the modern cult of celebrity and the way it stimulates atavistic religious emotions' (1994: 164). Six years later, after the Princess' death, Wilson highlighted just how powerful the image had been, arguing that Diana became a 'living simulacrum . . . a copy without an original, a multiple personality with no "real" Diana' (1998: 140). Diana herself asked to be a 'Queen of Hearts'; later, after her death, the Prime Minister styled her as the 'People's Princess'. She was 'anything and everything' (Wilson, 1998): an ingenue, a story-book bride and a fairy-tale princess; she was also a mother, a betrayed wife and lover, a divorcee, a victim and a survivor; after her death, she became a saint, a republican, a feminist and a great humanitarian. Through it all, she was an international 'covergirl': '[e]ven leftwing magazines have used her image on their front pages: the New Statesman presented a Warhol pastiche; Red Pepper gave us Diana as Che Guevara; Living Marxism – I kid you not – thought her face worthy of a cover' (Greenslade, 1998: 2).

In life, and more so in death, media pundits and opinion-makers swarmed around the Princess, feeding ‘the “myth” “Diana” ’ (Wilson, 1998: 137). One version of the Diana story claims that the Princess ‘did something that no woman in the royal family has done in the twentieth century: she called a monarch to account’ (Campbell, 1998: 251), and that she did it – in part at least – by making the private public.<sup>4</sup> This ‘publicisation’ worked its way through several, by now well-known, stages. First, there was Morton’s book, *Diana: Her True Story* (1993); although, its revelations were tempered by the measures taken to safeguard the Princess’ ‘deniability’. Morton’s book was followed by a spate of Taj Mahal-type photo opportunities and by the Princess’ increasingly public sponsorship of a series of un-Royal charities, including homelessness and AIDS. Finally, on Monday evening, 20 November 1995, Diana herself ‘gave testimony’ on BBC television’s *Panorama* programme, and ‘Britain stayed at home’ to watch and listen (Campbell, 1998: 213). During the interview, she spoke about bulimia, primogeniture, postnatal depression, the paparazzi, love and betrayal, and the Establishment. We listened as she used ‘the language of such disparate discourses as traditional romance, psychotherapy and even feminism’ (Smith, 1997: 11). Throughout, we watched her publicise the affective and foreground the private, the personal, even the confessional.

Two years later, during a week in September 1997, the nation appeared to follow Diana’s example as the private became public in an unforeseen, but rapidly hyped, way. This, of course, was the week of Diana’s death and funeral, a time when ‘an ectoplasm of emotion enveloped the land’ (Wilson, 1998: 141) and ‘[a]nother country stirred . . . an undreamt-of *pays reel* beneath the starched tapestry of the Windsor-Westminster *pays legal*’ (Nairn, 1998: 40–41). The week brought flowers, poems and ‘impromptu shrines’ (Paxman, 1998: 241); a remodelled pop song; and, as punditry exploded in the search for an explanation for it all, an (almost) media-wide eulogy.

Initially, three particular claims were made for the ‘weird convulsion’ (Nairn, 1998: 40) of that week: first, it united the country; second, it feminised it; and finally, and most daringly, it signposted a future republican nation. Hutton saw the death of Diana as a defining constitutional moment, a date from which historians would source change. He was clear that ‘within a generation the monarchy’s role [would] change, and that Britain [would] look and behave much more like a republic’ (Hutton, 1998). Other commentators explained the week’s

events as ‘a generalized regret for eighteen years of Thatcherism . . . years of missed opportunity and a decline in public values’ (Wilson, 1998: 141). Orbach chose to twin the week of Diana’s death and funeral with 2 May – the day after New Labour’s landslide electoral victory, arguing that ‘May and September . . . offered moments of mass participation in the life of the nation’:

. . . with Diana’s death, what the individual felt and how he [sic] acted again metamorphosed into something larger and more profound than could be expected from the singular acts and feelings of individuals. Diana’s death became another moment of participation in which there was a claiming and reshaping of public space, an insistence that public discourse respect the feelings of the people and a moment of potential constitutional change. (Orbach, 1998: 61)

Orbach’s claim is the one that interests us. In particular, we are interested in her description of the May/September events as a ‘nascent realignment of politics and emotions’ such that ‘emotions were no longer only private matters best kept hidden – even from ourselves . . . [rather] [*e*]motions augmented democratisation’ (Orbach, 1998, emphasis added). This claim raises the anchor of public and private; more importantly, in an era characterised by widespread rewriting or blurring of this boundary, it does it in an unexpected way. By arguing that emotions can augment democracy, it places the private-sphere ‘stigmata of affectivity’ (Thornton, 1995: 13) on a public sphere which has historically been associated with rationality and reason, and then trumpets the outcome as improved democracy. Amid prevailing trends which push private market virtues and characterise privatisation as the way to improve public rule, this blurring of public and private brings an entirely different set of private norms into the public domain. In this way, it represents a rather different take on the question of how to invigorate the public sphere. As we see it, Orbach’s claim fits with the recent popular interest in ‘feminisation’, in particular with what has been described as the feminisation of the public sphere.

The latter is hard to pin down (not least because it has been spin-doctored), but its popularity is undeniable: as Moore points out ‘the word you are most likely to read about these days is not feminism but feminisation’ (1998: 20). The affective has been embraced by late modern governments and workplaces: the Blair government promotes a more emotive, ‘“just call me

Tony” ’ style (Moore, 1998: 20) and corporate giants claim that the future is feminine and that people skills, flexibility and intuition will be the prized attributes of the millennial public sphere (Clarke and Newman, 1997: 73).

Specific claims about the feminisation of the public sphere seem to cluster around two particular developments. First, the ‘genderquake’ of the 1997 UK general election – when New Labour captured women’s votes, particularly young women’s votes – resulted in a dramatic increase in women’s presence in the machinery of government (Thomson, 1999). More women MPs were returned in 1997 than ever before, generating column inches, photocalls and television programmes as well as the sobriquet ‘Blair’s Babes’. And as Wilkinson explains:

When the photo image of Blair standing on the steps of Church House flanked by 100 female MPs was relayed around the world within days of New Labour’s election victory, we were all left in no doubt that the force of the ‘genderquake’ had finally hit parliamentary politics itself. (1998: 58)

The second development feeding recent speculation about a feminisation of the public sphere concerns the shift in the style of government under New Labour (Leonard, 1998). Blair’s government does not respect the polarity between public and private; in fact, it keenly appropriates the language of affection, emotion and intimacy. Consider, for example, the language of New Labour government policies about ‘bringing rights *home*’ and practising ‘tough *love*’ to ‘help individuals to help themselves’. Moreover, as Weldon points out, New Labour certainly presents itself as female: it uses ‘the language of compassion, forgiveness, apology, understanding and nurturing . . . It wants to be loved. The old traditionally male values of constancy, gravitas, restraint, heroism, dignity and honour are seen as belonging to a past world’ (1999).

#### *AS TIME GOES BY*

Later commentaries on the week of Diana’s death and the New Labour ‘genderquake’ have been far more mixed than the early ones; they also contain few grand claims about republicanism, nationhood or feminisation. Talk of republicanism petered out early on and, as

Nairn explains, what had initially been perceived as a fracture was ultimately reread as traditional instinct:

British popular monarchism established a very powerful fusion of nationality and personality, a channeled identity which worked by separation of the charismatic and the political state . . . The heart which burst into the streets in September was as yet far from that of a republic. It remains that of a national romanticism. (Nairn, 1997: 6)

Orbach's enthusiasm for what she had first seen as a positive realignment of politics and emotion also dried up. She argued that '[t]he moment [of May and September] had been turned on its head'; that feminisation had become emotionalism; and that the latter had corrupted public space. Thus, rather than emotions augmenting democracy, 'deeper issues were [now] subsumed under a screeching of ersatz emotionalism'. Citing the cases of Louise Woodward and Mary Bell, she noted how:

. . . our interest is now drawn to stories of wrongdoing. Our newspapers campaign on the side of the alleged victims or the alleged perpetrators, plucking at our heart strings to engender support where the underlying structural issues are set aside or remain unaddressed . . . We are left with a sense of participation through superficially shared emotional expression rather than a linking of the political, economic, social and emotional issues that these cases pose. (Orbach, 1998: 62)

Wilson never had any truck with official explanations of the week of Diana's death. Claims about mass participation, augmented democracy and feminisation of the public sphere had always struck her as somewhat facile: 'if it was "compassion", it had no "hard edge" . . . Mourning for Diana . . . was softcentred in the extreme [and] emotion, divorced from and devoid of content, is not simply vacuous but dangerous' (1998: 142). Wilson also sensed that modern British culture craved goodness and caring without hard choices, and that '[g]rief for Diana expressed that perfectly'. Why? Because, '[y]ou could emote all you wanted without having to give anything up' (1998: 141).

The feminisation of government is also considered a let-down. Consider the evidence: the Minister for Women, currently Baroness Jay, confirms feminists' suspicions about 'women's

work': she does a double shift, combining her work in the House of Lords with the Women's ministry; more importantly, she does the second shift without pay. The Social Exclusion Unit towers over the Women's Unit: indeed, the latter has been relocated three times in less than two years. Labour women MPs, erstwhile 'babes', have been recast by the media as 'the fixers and the nannies of the Government' (Wilkinson, 1998: 59). The quota politics of 1970s and 1980s Labour feminism have been decommissioned: the Prime Minister is said to prefer 'androgynous' politics – basically, a gender-neutral politics that 'mainstreams', rather than foregrounds, women's issues. Wilkinson senses that there is spin at work here:

what is dressed up as New Labour's androgynous political culture actually turns out not to be so androgynous after all – behind the veneer of feminization, it actually turns out to be pretty male. Boyish New Laddism is its offshoot, and is all the more insidious precisely because it is rooted in the language of modernity, the language of androgyny. (1998: 59)

This claim resonates with Brown's analysis of the late modern American state. In her book, *States of Injury* (1995), Brown highlights parallels between the late modern state and late modern masculinity, in particular the so-called 'new man', and points out that the state is not above playing perceived 'impotence' to its own advantage:

[L]ike the so-called new man, the late modern state also represents itself as pervasively hamstrung, quasi-impotent, unable to come through on many of its commitments, because it is decentralizing itself, because 'it is no longer the solution to social problems,' because it is 'but one player on a global chessboard,' or because it has foregone much of its power in order to become 'kinder, gentler.' The central paradox of the late modern state thus resembles a central paradox of late modern masculinity: its power and privilege operate increasingly through disavowal of potency, repudiation of responsibility, and the diffusion of sites and operations of control. (1995: 193–4)

Thus, Brown portrays the late 20th-century American state as a modern Janus – protector and foe, pervasive and intangible, potent and subordinated by privatisation and globalisation, incoherent and dominating – with many different and overlapping powers. Moreover, like its

British counterpart, the American state is inconsistently gendered: it is feminised; androgynous; emasculated; New Mannish; and New Laddish. The question Brown raises is: why are the complexities and contradictions of this type of late modern state power largely unacknowledged in critical theory and progressive political activism?

### *TOWARDS FEMINISATION*

Brown may be overly pessimistic about the lack of acknowledgement of modern governing forms. In the UK, new public law *is* examining aspects of late capitalist state power. There is a healthy interest in privatisation and contractualisation, and also in public law values and their overlap, if any, with private law virtues (Oliver, 1997). To date, however, this interest has been somewhat narrowly tailored, neglecting aspects of the contemporary blurring of public and private. One area of neglect has been what was described above as the ‘feminisation of government’. In this final section, we aim to remedy this by moving beyond popular disappointment with this phenomenon in order to assess its radical political potential. We do this by considering the effects of adopting intimate-sphere norms in public-sphere decision making, in particular the claim that emotion can augment democracy.

Clearly there are dangers in this approach. It is arguable that the idea of the ‘feminisation of government’ is little more than a spin doctor’s tool. Ascribing radical political significance to the phenomenon may be the product of sociological *naïveté*. There has already been criticism of the tendency towards ‘spontaneist populism’ in certain branches of cultural studies. McNay cautions against ‘short-circuited movement from the ontological to the political’; the elision of ‘a process of symbolic destabilization with processes of social and political transformation’ such that ‘some theories of reflexive transformation overestimate the significance of the expressive possibilities available to men and women in late capitalist society’ (1999: 106). Hennessy (1995) makes a similar point in arguing that making the previously private public is not inherently emancipatory or subversive, especially if it involves processes of commodification or what has been described as the ‘Oprahfication’ of everyday life (Moore, 1998: 20). Hence, visibility alone is no guarantee of progressive outcomes; furthermore, it has to be remembered that how visibility is conceptualised matters. It is also worth emphasising the risks of essentialism that attach to describing the new centrality of intimacy to public-sphere governing as a process of ‘*feminisation*’ (although the



inconsistent gendering of the late modern state in descriptions of this phenomenon – feminised, androgynous, emasculated, New Mannish and New Laddish – does highlight the ‘uneasy suturing’ and ‘potential conflict’ that lie behind the ‘idealized fictions’ of dominant understandings of both masculinity and femininity (McNay, 1999: 108)).

We accept that there are real risks in over-celebrating the idea of feminising the public sphere. Mixed feelings abound about the development of a concept like the ‘caring’ war, as when ‘humanitarian’ reasons are used to justify NATO’s sustained bombing of Serbia and politicians opt for photo opportunities at refugee camps rather than traditional military environments. It also seems that the feminisation of ‘law and order’ discourse more generally has potentially troubling spin-offs. This manifests itself most clearly in the new ‘criminologies of intolerance’. As Jock Young (1999) points out, there are parallels between feminism’s discourse of ‘zero-tolerance’ against crimes against women and other, conservative (and vastly more publicised) discourses of ‘zero-tolerance’ (such as Kelling and Coles’ famous *Fixing Broken Windows* philosophy (1997) which is conventionally (but controversially) linked to New York City’s policing ‘miracle’):

Both wish to reduce tolerance – to, in the phrase, ‘define deviancy up’. And both are concerned with a range of infractions: that is they are worried by both what are regarded by all as serious offences and by the more minor ‘quality of life’ crimes (Young, 1999: 138).

Unfortunately, the lack of emphasis on the *differences* between these two ‘zero-tolerance’ discourses has led to the neglect of valuable feminist (and realist) insights about the continuum of violence, and the rise of allegedly ‘feminised’ criminal justice programmes which separate crime from the causes of crime, and replace genuine debate about ‘community safety’, ‘inclusiveness’ and ‘accountability’ with child curfews and anti-social behaviour orders (see Crime and Disorder Act 1998; Piper, 1999).

So, there are risks associated with feminisation. However, we still want to argue that there may be a potential upside and that, as such, feminisation merits deeper consideration. At present, feminisation may be ‘spin’, non-politics or regressive politics, but outcomes are not predictable and it may be possible to capture the concept for more progressive political ends.

In the following paragraphs, we suggest that recent work by Young (1997), Harvison Young (1997) and Cooper (1998, 1999) provides some starting points for this project.

As noted above, Morison proposes constitutional renewal as a necessary supplement to New Labour's current constitutional reform project. His project is based, in part, on following through on the insights of deliberative democracy (Habermas, 1996). Thus, the focus is 'not more or even better refined aggregative democracy but more and better democratic deliberation' (Morison, 1998: 531). It is about turning attention to 'process and participation' rather than institutions per se, and designing devices such as 'consultation requirements, vetoes, and conditions of minimum consensus' in order to 'maximize participation in all the agencies, quangos, networks . . . that make up the public space within the new and more complex conditions of governance today' (1998: 533–4).

Young (1997), however, highlights the need to temper this new enthusiasm for deliberative democracy with a socio-cultural awareness of the myriad ways in which inequality infects even formally inclusive public spheres or deliberative bodies. Her proposals fit neatly with our interest in 'feminising' the public sphere. Young argues that many advocates of discussion-based theories of democracy restrict deliberation to a particular range of communicative forms and styles of speaking, privileging argument, reason and dispassionate, disembodied speech:

Norms of deliberation . . . tend to presuppose an opposition between mind and body, reason and emotion. They tend . . . to identify objectivity with calm and absence of emotional expression. Thus expressions of anger, hurt and passionate concern discount the claims and reasons they accompany. Similarly, the entrance of the body into speech – in wide gestures, movements of nervousness, or body expression of emotion – are signs of weakness that cancel out one's assertions or reveal one's lack of objectivity and control. (1997: 65)

These norms of deliberation result in cultural bias; they privilege 'the dispassionate, the educated and those who feel they have a right to assert' (1997: 73). Young believes that the norms contain a particular bias towards the speech culture of white middle-class men, wherein communication 'tends to be more controlled, without significant gesture and

expression of emotion' (1997: 73). She addresses this bias through what she calls an 'expanded conception of democratic communication' and, as noted above, we believe that this proposal fits with our interest in using intimate-sphere norms to democratise public-sphere debate and decision making. Under Young's broadened conception of deliberative democracy, conventionally prized political speech is made to cede ground to norms of deliberation more closely associated with the intimate sphere. The result is that political deliberation opens out into communication as opposed to mere speech. In addition, the traditional allegiance to norms of assertiveness, combativeness, orderliness and 'literal' language (as opposed to figurative language, like metaphor or hyperbole, or body language, like gesticulation or tears) receives a substantial and timely jolt.

Cooper's work suggests another possible starting point for 'feminising' the public sphere. She explores the idea of 'governing out of order'— where institutions exceed the boundaries of their role and authority – and considers the progressive possibilities that may flow from excessive governance (1998, 1999). One of her case studies concerns a cluster of local government cases – *Wheeler* (1985), *Shell* (1988), *Times Newspapers* (1986) and *Fewings* (1995) – involving controversial public authority decision making. Each case involved judicial review of a local government decision to rescind funds, land or contracts from bodies whose actions were opposed by the council; for example, *Fewings* concerned Somerset council's decision to withdraw permission to hunt deer across council-owned land from the Quantock Stagounds. In each case, judicial hostility was directed at local government for moving outside perceived statutory discretion, and for flouting the boundaries of 'proper' public authority.

Cooper analyses the ideologies underlying the courts' depiction of these particular council decisions as arbitrary and in absolute contradiction to the imperative of rational decision making. She argues that the judicial condemnation was connected with a fear that the councils had 'feminised' public sphere decision making. First, local government had 'placed inappropriate demands upon others: what could be said; with whom they could associate [. . . and] were unable to maintain ordered, consistent boundaries in the allocation of power, responsibilities, and autonomy'. Secondly, it had flouted 'principles of proper punishment' by punishing according to feminised, domestic-sphere norms:

Within the judicial imagination, councils over-react; they act out of emotion and partisan feelings rather than reason. As Swinton Thomas LJ, declared in *Fewings*, ‘the [council] debate was in fact fuelled to a substantial extent by antipathy to the hunters as opposed to a perceived cruelty to the deer’. (Cooper, 1999: 266–7)

Interestingly, the judicial condemnation is marked, not by a rejection of all private-sphere norms, but by a strict demarcation between them. Certain private-sphere norms are deemed to merit expression in municipal decision making; for example, in the courts’ account, the ideal council would resemble a market-driven organisation, grounded in the rational, efficient norms of the private, commercial domain. But private, *intimate*-sphere norms are treated very differently by the courts; in these cases, local government is heavily censured for bringing them into the public sphere.

Judges themselves face strict rules about what they can bring to their particular public-sphere decision making. When challenged on the ground of bias, assessment of a judge’s impartiality turns upon an examination of possible financial, proprietary or personal interests in the outcome of litigation (*In re Pinochet*, 1999). While the first two grounds present little problem, the third raises more intriguing questions. When does the ‘personal’ corrupt judicial decision making? What contexts trigger such allegations? Must we choose between the fiction of ‘tabula rasa impartiality’ or the ‘arbitrariness of whatever “baggage” the particular decision-maker carries’? Harvison Young argues that we can sidestep this dichotomy:

The focus should shift from the ‘baggage’ that we all have to the enterprise of making judgements . . . [O]ne might begin by being less concerned about the possibility that [a judge] was ‘biased’ at the outset, and more concerned with her reasons in themselves. (1997: 347–8)

Like Young and Cooper, Harvison Young is committed to questioning prevailing views about governing behaviour. All three seem to us to provide new ways of thinking about democratising the public sphere by using the new centrality of the intimate as a progressive tool for governance. Admittedly, the argument that ‘emotions can augment democracy’ does have limits. ‘Feminising’ the public sphere cannot be an excuse for a free-for-all or chat-show sentimentalisation or emotionalism. Nor is it our intention that this blurring of the

personal and the political should validate the political quietism of much contemporary lifestyle culture. Or that it should bolster ‘law and order’ discourse, justify ‘tough love’ coercive practices, or mask difficult questions about military interventions. Limits will have to be set. In thinking about such limits, we suggest that a decent baseline involves recognising that ‘the validity of transgressing the boundaries of institutional role, rights and responsibilities depends on the motivating norms and values – in particular . . . whether [it] occurs in the pursuit of social and economic justice’ (Cooper, 1998: 7).

## CONCLUSION

New public law has a keen interest in the deployment of power and the shifting nature of the public and private. In this article, we have argued that the historical legacy of the Crown has hindered public lawyers’ ability to develop an adequate concept of the state and to respond to changes in modes of governance in the UK. The constitutional law textbook tradition has played a key role in limiting critiques of the Crown because of the obfuscation that surrounds the legal and political status of the Monarch. However, instead of discounting the significance of the monarchy, we have used it as a resource to explore governing power, the blurring of boundaries, and constitutional renewal. Thus, we have shown how the funeral of Diana, Princess of Wales, exposed the political relevance of the ‘personal’ in a most dramatic way, generating claims about the ‘feminisation of the government’ and ‘emotions augmenting democracy’. We followed through on these claims in order to focus on what we think is an intriguing question for new public law: the effects of adopting private, intimate-sphere norms in the public sphere, in particular in public-sphere decision making. Our brief study of this question suggested that, while there are risks associated with such a ‘transformation’ of democracy, there is no doubt that the increasing centrality of the intimate does merit consideration in new public law’s search for progressive tools of modern governance.

## NOTES

Our thanks to the two anonymous reviewers for their helpful suggestions.

1. For some of the reasons why Northern Ireland constitutionalism does not excite the same interest, see Morison and Livingstone (1995) and O’Leary (1997).

2. The abdication of Edward VIII in 1936 because of his relationship with Wallis Simpson provides another rich resource for an exploration of the public/private aspects of monarchy. While ‘the ostensible cause of the King’s departure was his refusal to accept the advice of his ministers that he could not marry a divorced woman’ (Pimlott, 1997: 38), it remains unclear the extent to which this aspect of his ‘personal’ life was seized upon by both Establishment and media to deflect attention away from the rather more serious fact that ‘his political sympathies were certainly pro-German and perhaps pro-Nazi’ (Cannadine, 1997: 47).

3. ‘The use of the Queen, in a dignified capacity, is incalculable. . . . The English Monarchy strengthens our government with the strength of religion. . . . It would be a very serious matter to us to change every four or five years the visible head of our world. . . . Above all things our royalty is to be revered, and if you begin to poke about it you cannot reverence it’ (Bagehot, 1872: 33, 46, 59).

4. For another twist on Diana and public/private, see Story’s (1998) account of treating Diana as intellectual property: ‘Given that Diana was a public figure *par excellence* and given the particular relationships and intimacy, real or imagined, that existed between Diana and her legions while she was alive, should private parties be given the power, now that she is dead, to exclude others – or exclude them unless they pay a licensing fee charged, in turn, to consumers? Should Diana’s value, which during her lifetime lacked “private propertiness” because of its endless supply and its royal connection, now become commodified as private property, a scarce intellectual property resource?’.

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