

# A CRITIQUE ON LEGAL ANALYSIS OF LOCAL GOVERNMENT AND THE CENTRAL-LOCAL RELATIONSHIP

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## INTRODUCTION

This paper will argue that analysis on local government and the central-local relationship is generally confined to context and that a consequence of this approach is that theory, within this area of scholarship, is viewed as being mutually incompatible. Specific examples of this incompatibility can be found in respect of the works of Loughlin, Vincent-Jones and Cooper. It will be argued that by juxtaposing the work of these three writers, it is possible to connect their analyses, beyond the context within which they write, but that such a connection cannot be achieved through the mechanism of theory. The connection can however be achieved through the use of concepts and the resulting analysis is a form of meta-explanation of a particular period of decision making in local government and the central-local relationship.

### **Local Government, The Central-Local Relationship And Public Law Analysis**

Local government and its relationship with central government are topics which do not attract much attention within public law scholarship. This is possibly because these are areas which are perceived as not raising questions of a wider constitutional or theoretical nature since their focus is the internal institutional structure of the state. When contrasted with other areas of public law scholarship, such as regulation and its analysis of rules and rule making, particularly in the light of the changes to the formal structure of the state, or human rights and its focus upon the relationship between the citizen and the state, local government and the central-local relationship can appear irrelevant and even insular.

These perceptions are further enhanced by the manner in which the institution of local government is presented. Local government, for example, is generally represented as either as a distinct institution<sup>1</sup> or in terms of specific area of decision making, such as housing, education or welfare. Examination of these topics may consider matters such as privatisation, de-regulation and human rights, but these issues are not the basis of the study. Generally, analysis is subject specific and is often concerned with particular contextual aspects and even technical detail. Theoretical concerns are generally excluded although when included, the theory is 'borrowed' and its use is also confined to the specific context or subject area concerned.<sup>2</sup>

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<sup>1</sup> For example, see J. Sharland, *A Practical Approach to Local Government Law* (London: Blackstone, 1997) or S. Bailey, *Cross on Principles of Local Government Law* (London: Sweet & Maxwell, 2<sup>nd</sup> ed, 1997)

<sup>2</sup> For example, see D. Cowan *Housing Law and Policy* (London: Macmillan, 1999) where the theory of autopoiesis is discussed in the context of housing services.

## Local Government, The Central-Local Relationship And Theory

Notwithstanding the technical and contextual emphasis within legal analysis on local government and the central-local relationship it is possible to identify a theoretical element. The works of Loughlin<sup>3</sup>, Vincent-Jones<sup>4</sup> and Cooper<sup>5</sup> are unusual in that, whilst varying attention is paid to detail and context, their analyses also address the question of the wider role of local government along with its relationship with central government. In other words, and importantly for the purposes of this paper, at the core of each analysis is theory.

Loughlin, for example, argues that in the 1980's the relationship between central government and local government underwent a process of 'juridification'. This juridification occurred by means of two distinct processes: legalization and restructuring. Vincent-Jones creates a model of central-local relationship entitled 'responsibilization'. This model stems from observations made in respect of the 'responsive benefits' which the policy of compulsory competitive tendering has brought to local authorities. Benefits, Vincent-Jones argues, which have resulted in the emergence of a form of 'contractual governance'. Cooper argues that there is real pressure on local authorities to disguise their decision making as being non-ideological. Accordingly many decisions are presented in terms of neutral factors, such as economics or managerialism. However, many decisions are challenged by citizens who seek to test the 'boundaries of authority' with the consequence that local authorities govern 'out of order'.

In terms of theory the works of Loughlin, Vincent-Jones and Cooper are diverse, in that each presents an analysis of a particular area of decision making, yet none of the works are irrelevant, unacceptable or even incorrect in terms of wider context of legal analysis on local government and the central-local relationship. In other words, the analyses are

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<sup>3</sup> 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* (Oxford: Clarendon Press, 1996); 'The Restructuring of Central-Local Relations' in J. Jowell and D. Oliver (eds), *The Changing Constitution* (Oxford: Oxford University Press, 4<sup>th</sup> ed, 2000), 137

<sup>4</sup> P. Vincent-Jones 'The Limits of Near-contractual Governance: Local Authority Internal Trading Under CCT' [1994] *Journal of Law and Society* Vol. 21, page 214; 'Responsive Law and Governance in Public Service Provision: A Future for the Local Contracting State' [1998] *Modern Law Review* 362; 'The Regulation of Contractualisation of Quasi-Markets for Public Services' [1999] *Public Law*. 304; 'Competition and Contracting in the transition from CCT to Best Value: Towards a More Reflexive Regulation?' *Public Administration* Vol. 77, No 2 1999 (273 - 291); 'Contractual Governance: Institutional and Organizational Analysis' [2000] *Oxford Journal of Legal Studies* 317; 'Central-Local Relations under the Local Government Act 1999: A New Consensus' [2000] *Modern Law Review* 84; 'Values and Purpose in Government: Central-Local Relations in a Regulatory Perspective' [2002] *Journal of Law and Society* 27; 'Regulating Government by Contract: Towards a Public Law Framework' [2002] *MLR* 611

<sup>5</sup> D. Cooper *Sexing the City* (London: Rivers Oram Press, 1994); 'Local Government and Legal Consciousness in the Shadow of Juridification' [1995] *Journal of Law and Society* 506; 'Defiance and Non-Compliance: Religious Education and the Implementation Problem' [1995] *Current Legal Problems* 253; 'Institutional Illegality and Disobedience: Local Government Narratives' [1996] *Oxford Journal of Legal Studies* 256; 'Talmudic Territory? Space, Law and Modernist Discourse' [1996] *Journal of Law and Society* 529; *Governing Out of Order* (London: Rivers Oram Press, 1998)

just very different, possibly even incompatible to the extent that it could be argued that that apart from writing upon the same topic, the only other feature which they share is that of theory.

### **Theory and Explanation Within The Context of Local Government And The Central-Local Relationship**

The assertion that a shared feature of all the theorists is that of theory would appear to be somewhat simplistic. However, it is argued that theory, as a shared feature, relates to the use of theory as a mechanism for the explanation of knowledge. In this context theory can be seen to perform a dual role; firstly as a form of explanation and secondly, as a structure for explanation. The difference between theory as a form or structure is ontological, that is, in the nature of the explanation which is being sought. It is proposed to explore this difference in terms of legal analysis on local government and the central-local relationship in order to identify how theory is used and how the works of the various theorists may be connected through theory.

#### *a. Theory As A Form of Explanation*

Theory, as a form of explanation focuses upon the phenomenon to be understood. The goal of the analysis is to propose an explanation concerning a particular phenomenon without offering a specific view about the nature of the structure used to present the explanation. In the context of legal analysis on local government and the central-local relationship, this use of theory can be found to operate on a number of levels.

For example, a study which focuses upon the provision of a particular service within the context of local government may employ a specific theory as a means of explanation but ultimately the outcome of the study is a micro level analysis on the provision of the service. Explanation may be given in respect of the choice of theory but this done with a view to enhancing the validity of the study of the particular service rather than offering a critique of the chosen theory. At the meso level a study which, for example, seeks to focus upon the use of law within the central-local relationship<sup>6</sup> may result in the construction of a particular theory. However, as a form of explanation the focus is the constructed theory and not the nature of theory. Some consideration may be given to the nature of the constructed theory but only as a means of justifying its validity.<sup>7</sup> Of course, the constructed theory may, in turn, become the subject of further testing in order to ascertain how accurate the theory actually is.<sup>8</sup> The features of the theory may be examined but again the outcome is a study on the nature of the particular theory concerned rather than the nature of theory per se. Ultimately, a limitation of micro and meso level analysis is their contextual nature and this may make consideration of the nature of theory difficult and, it could even be argued, irrelevant.

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<sup>6</sup> Such as Loughlin. See n. 3 above

<sup>7</sup> Such as Loughlin's desire to create a normative theory. See below.

<sup>8</sup> See B. Mauthe, *Walls of Illusion: Decision Making and Compulsory Competitive Tendering in Local Government* unpublished PhD thesis; Above n. 17 (1999)

Within legal analysis on local government and the central-local relationship micro and meso level analysis predominates. Certainly the works of Loughlin, Vincent-Jones and Cooper fall within the meso level category. However, the absence of a macro or meta-level analysis should not preclude its consideration, particularly as meta-explanation may provide an able mechanism for connecting the works of the theorists. Accordingly, a number of options can be considered. The theory of legal pluralism, for example, seeks to provide an explanation as to the nature and the authority of law. These are crucial issues within law in general, and jurisprudence in particular and it would appear that such an 'open textured' theory should be able to accommodate and explain a diverse range of analyses which the works of the three theorists represents. However, as a form of meta-explanation legal pluralism possesses limitations. For example, whilst legal pluralism may accommodate the work of Cooper, who seeks to include a diverse source of norms, Loughlin explicitly seeks to exclude non-official sources of norms and therefore cannot be easily incorporated. In other words, meta-theory as a form of explanation is only effective if the parameters contained within the theory to be accommodated allows for inclusion. Alternatively, the theory of constitutional pluralism could, for example be used to create a common connection. All three theorists share a specific parameter, that of local government, which does possess a constitutional dimension. Except that in this instance the approach represents a form of unification, as opposed to a form of connection. The meeting of theory occurs by way of lifting the features of the lesser theories (those of Loughlin, Vincent-Jones and Cooper) in order to converge with the reductive elements contained within the dominant theory (that of constitutional pluralism). In other words, any link between the three theorists will occur within the context of the theory of constitutional pluralism. Furthermore, since the link will be hierarchical in nature the possibility of a direct linear link between the works of Loughlin, Vincent-Jones and Cooper may be remote, difficult or even become overwhelmed by the theory of constitutional pluralism. Ultimately, the ensuing analysis may not even offer a form of connection for these theories, but result in the creation an enhanced theory of constitutional pluralism. Such an approach may possess merit if the aim is to produce a meta-analysis on local government in terms of the theory of constitutional pluralism. However, since the aim of this paper is to identify a means of connecting theory within the context of local government and existing legal analysis on this topic, the use of the theory of constitutional pluralism would appear to be unwarranted and possibly even divergent.

Ultimately, theory as a form of explanation possesses merit but since its function is to provide reasons or to demonstrate why and how a phenomenon has occurred, its role a method for connecting theories appears to be limited even when the context for analysis is shared. It could even be argued that theory as form emphasizes, rather than diminishes, the incompatibility of the work of the various theorists.

#### *b. Theory As Explanatory Structure*

Theory as an explanatory structure concerns the nature of theory as a mechanism for the explanation of knowledge. It is the nature of theory per se which is the primary focus of

analysis rather than the nature a particular theory (or theories) or context. It is about the effect that theory as a structure can have on an explanation rather than how theory can be used as a mechanism for explanation.

Legal analysis on local government and the central-local relationship generally focuses upon theory as a form of explanation and it is from this perspective the works of Loughlin, Vincent-Jones and Cooper are generally presented and evaluated. Given the paucity of analysis within public law regarding the use of theory as an explanatory structure, it is proposed to consider further the works of Loughlin, Vincent-Jones and Cooper in terms of this approach.

### **Theory As Explanatory Structure And Legal Analysis On Local Government And the Central-Local Relationship**

Theory as an explanatory structure presumes that there are certain features which theory, as a mechanism for the explanation of knowledge, will possess. It can, for example, be argued that key questions which are addressed in respect of every theory are those of how and why the theories have been produced. In other words, perhaps by focusing on features such as methodology, perspective and justification, it may be possible to identify a connection between the works of Loughlin, Vincent-Jones and Cooper.

#### *a. Methodology*

Methodology can be broken down into two categories, those of sources and choice.

##### (i) Sources

The sources used by the theorists are varied. Loughlin uses a non-empirical basis in that the substance of the analysis is legal rules, such as case law and statute. Loughlin also seeks to specifically exclude non-legal rules, such as administrative rules. The justification for this exclusion is that legal rules are the outcome of constitutional processes where procedures for the creation of rules and the control of rule based decision making are identifiable and represent a direct response to the values which operate within the political arena. By contrast, the norms and values which underpin the development of administrative rules originate within the administrative decision making system and are the product of informal, unaccountable professional networks. Accordingly, not only do legal rules represent 'reality,'<sup>9</sup> they possess legitimacy,<sup>10</sup> unlike the administrative rules.

Vincent-Jones employs an empirical methodology in that a detailed examination was conducted in respect of the CCT transactions developed in a large metropolitan city

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<sup>9</sup> Above n. 3 (1989)

<sup>10</sup> The legitimacy is a consequence of the fulfilment of certain criteria and values to be found in the process by which the rule emerges. In the context of the theory of juridification of the central-local government relationship, Loughlin defines both the criteria and the values, which inevitably results in only legal rules possessing legitimacy.

council in the north of England.<sup>11</sup> The focus was upon the practical impact of CCT and the quasi-contractual mechanisms which emerged. In some respects approach is similar to Loughlin's in that there is a practical basis from which the analysis stems. However, it is possible to argue that the objectivity of Vincent-Jones base is more tangible in that it is based on actual observed practices whereas Loughlin focuses upon a series of identifiable events<sup>12</sup> which lead to outcomes within defined processes, such as, legislative and judicial decision making. These outcomes are then represented as observed facts.

The methodology deployed by Cooper is mixed in that it is part document based and part empirical. However, whereas for Loughlin and Vincent-Jones the purpose of methodology is to provide an explanation of a particular event, both actual and perceived, from which an understanding is constructed, for Cooper methodology is about the search for contingencies. That is, events or occurrences which can influence the present and the future. A suggested consequence of this difference is that whilst the sources used by Loughlin and Vincent-Jones represent certainty, Coopers represents uncertainty and consequently could be perceived to lack rationality.

#### (ii) Choice

Choice relates to the material which will, or will not, be included within the parameters of the particular study. Such decisions are generally represented as being 'theory neutral' but, it is suggested, the choices which the theorists make have implications of a theoretical nature.

As part of the construction of the theory of juridification Loughlin adopts concepts developed in the works of earlier theorists writing on local government, such as Elliot<sup>13</sup> and Grant.<sup>14</sup> Elliot introduced the concept of 'hierarchy' into legal analysis of the central-local government relationship which he represented as the differing constitutional status of local government and central government. Grant devised the concept of a 'central-local axis' which incorporates elements of the political, legal and administrative relationship that exists between the two tiers of government. Both these concepts imply that the central local-relationship is multi-dimensional. Hierarchy, for example, suggests that there are degrees of control whilst the central-local axis indicates that the relationship possesses a linear element in respect of the weight to be accorded to different forms of decision making. Loughlin however chooses to exclude these variances and focus exclusively upon legal decision making which he represents as occupying a superior, weighted and most importantly, a singular position in respect of the dimensions of hierarchy and the linear axis. How Loughlin is able to achieve this partial selection of knowledge is by focusing on those aspects of the concepts which accord with the parameters identified as forming the sources from which the theory of juridification will

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<sup>11</sup> Above n. 4 (1994), 215

<sup>12</sup> Such as the election of the Conservative government in 1979, the 'market' philosophy of the new Conservative government and the increase in legislation and case law relating to local government activities.

<sup>13</sup> M. Elliot, *The Role of Law in Central-Local Relations* (SSRC, 1981)

<sup>14</sup> M. Grant, 'Central-Local Relations: The Balance of Power' in J. Jowell and D. Oliver (eds), *The Changing Constitution* (Oxford: Oxford University Press, 2<sup>nd</sup> ed, 1989), 247

be based. Loughlin is then able to select Elliot's normative analysis on hierarchy, but exclude the descriptive constitutional principles which Elliot identified within the central-local framework. Furthermore, the descriptive features which Loughlin desires to include, that of legal decision making, are relabelled as normative.

The choices made by Vincent-Jones in terms of theory construction are different from that of Loughlin. Whilst Loughlin, from the outset, states that the concern is the wider picture of the central-local relationship Vincent-Jones initial analysis focuses upon a particular area of local government decision making. From this pragmatic level the study is eventually 'lifted' to consider the wider picture. However, the leap from CCT practices to the wider 'picture' of the central-local relationship occurs in two stages. The first stage entails altering the context of the study from CCT to the reconciliation of the operation of a private law mechanism, contract law, in a public law context, local government. The outcome of this stage is the construction of a model of local government which is represented as 'contractual governance'. From this the analysis is then lifted to consider the wider picture of the central-local relationship. What is particularly interesting about this incremental process is the 'lifting' mechanisms employed by Vincent-Jones. In shifting context, for example, concepts are used whilst in shifting level, theory is brought into play. Inherent within the process is the presumption that the knowledge found is universal.

Cooper seeks to identify a network of relations and causality over spatial and temporal dimensions.<sup>15</sup> In terms of Loughlin's and Vincent-Jones this approach can be articulated as Loughlin focusing upon the spatial relationship of central/local government whilst Vincent-Jones focuses upon the temporal development of CCT practices. Cooper seeks to abandon these dimensions because they limit the story that can be told. Ironically Cooper, like Loughlin and Vincent-Jones, also focuses upon the exercise of power and control, but represents this 'governmental excess'<sup>16</sup> as a testing of the boundaries of the state rather than a conflict concerning the possession and control of power. Cooper achieves this by examining how 'excess' is articulated by groups through activities that exist at the margins of society by virtue of features, such as religion, sexuality or animal welfare. The hunting of animals, for example, would not normally be seen as part of the state but the hunt can be seen as part of the state structure when groups use it as a device to link a variety of processes, norms, and practices. This does not mean that Coopers methodological approach is that of 'anything goes'. As Cooper explains there are limitations, but these limitations exist in terms of the sources used, as opposed to the constructivist tools, such as, concepts and theory employed by Loughlin and Vincent-Jones.

The choices exercised by the theorist in terms of construction are quite varied. It could be argued that Loughlin opts for utility, in that the redefined concepts ultimately enhance the weight of the theory of juridification. Vincent-Jones incremental approach represents certainty. The basis for the study is that of accuracy and each subsequent stage of

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<sup>15</sup> M. Dean *Critical and Effective Histories: Foucault's Methods and Historical Sociology* (London: Routledge, 1994), 93-94

<sup>16</sup> Above n. 5. (1998), 4

development can be traced back to this basis. Furthermore, the weight attached to each stage of development is enhanced due to the accuracy which underpins the whole analysis. Coopers choice is quite different in that it is more important to include as wide a range of knowledge as is possible, legal and non-legal, although there are rational limitations. In other words, fruitfulness is the guiding principle.

### *b. Perspective*

Each of the theorists draws upon a non-legal discipline. Loughlin's analysis draws upon political theory, in particular, functionalism which is described as a critical examination of the 'reasoning process of the courts in order to expose the value assumptions on which they rest'.<sup>17</sup> Loughlin argues that 'traditional legal theory' is not "indicative of the reality of relations within the administrative-political system" and its relationship with law.<sup>18</sup>

Whilst Loughlin argues that the functionalist style facilitates the development of legal analysis, it is possible to argue that the style is also capable of the converse, controlling the development of legal analysis. In the context of Loughlin's analysis this 'control'<sup>19</sup> can be identified as assuming three distinct forms, that of limiting, directing and structuring. Limiting occurs by way of restricting the connection of law exclusively to political decision making. The justification for this is the representation of law as the product of specific historical political events and the desire to create a realistic model. Loughlin is dismissive of alternative forms of decision making, most notably administrative decision making. Yet in the context of the central-local relationship administrative decision making has been shown to have impact in terms of the ability of local authorities to make rules, even when the ability to make rules has supposedly been removed through juridifying policies such as CCT.<sup>20</sup> The problem for administrative decision making is that by its nature it is difficult to represent as the master of a process of social evolution since it is generally perceived to be the facilitator of that process.<sup>21</sup>

The functionalist style also enables Loughlin to direct the form of law's connection with politics in that the connection is in respect of political decision making rather than the works of political scientists on concepts such as the state or power or even political theory, its application or development. Functionalism as a theory is not deployed, only the functionalist style, since to apply the theory would require explanation in order to meet the conditions of the theory. In other words, the connection is with the practical rather than the theoretical. The functionalist approach is used as an investigative tool to overcome the evaluative failings of legal analysis.

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<sup>17</sup> M. Loughlin, *Public Law and Political Theory*, (Oxford: Clarendon Press, 1992), 172

<sup>18</sup> Above n. 3 (1989), 25

<sup>19</sup> See D. Feldman, 'Judicial Review: A Way of Controlling Government', *Public Administration*, Vol. 66, Spring 1988, page 21.

<sup>20</sup> See B. Mauthe 'District Auditors and Decision Making in the Central-Local Government Relationship' [1999] *Anglo-American Law Review* 447; B. Mauthe, 'The Notion of Rules and Rule-Making in the Central-Local Government Relationship' [2000] *Anglo-American Law Review* 315

<sup>21</sup> H. Simon *Administrative Behaviour* (New York: The Free Press, 4<sup>th</sup> ed, 1997)

Finally, structuring enables Loughlin to make explicit the goals and values to be deployed in constructing the model. For example, legal analysis is first directed towards political decision making and informed that such decision making occurs prior to legal decision making. This allows legal analysis to ignore the actual details of political decision making, deploying it instead as descriptive explanatory background. It also confines legal analysis to proper constitutional principles, such as the status of local government as a decision making body within the wider institutional structure of the state.

The connection by legal analysis with political theory is complex. In some respects Loughlin has adopted a political theory yet manages to deploy it in a non-theoretical manner in order to construct a legal theory. Ultimately, it could be argued that it does not matter what form of model Loughlin produces, which methodology is used, whether the model is 'realistic'/'correct' or what form or manner of political theory is deployed. What Loughlin does achieve is to facilitate a wider framework for legal analysis of the constitutional lacuna which the central-local relationship was perceived to represent.

Whilst Loughlin is explicit in seeking to link law with a non-legal discipline, such a link is not so expressive within Vincent-Jones analysis. Certainly, the first impression of Vincent-Jones analysis is that it is firmly entrenched in law. Not only is there an examination of a legal mechanisms, CCT practices, the evaluation occurs against a coherent body of law, namely contract law. In the subsequent development of the model of 'contractual governance', this too is evaluated against the legal theory of autopoiesis. However, there is a link with a non-legal discipline, namely economics, although this connection is rooted deep within the subject matter of the analysis, the emerging CCT practices in local authority service provision. However, the dilemma facing Vincent-Jones is that the 'market' for local authority services is not a true market but a quasi-market. Accordingly, legal analysis which draws upon neoclassical economics, such as pure contract law, cannot apply, nor can the 'new' economic approach to law which focuses upon non-market law,<sup>22</sup> such as the family.<sup>23</sup> However, the existence of the quasi-market, does facilitate the deployment of legal analysis which focuses on the regulation of economic systems and the legal forms which maintain them, in other words, systems analysis and in particular, autopoiesis. Systems are self regulating mechanisms which seek to perpetuate their own existence whilst autopoietic systems take the notion of perpetuation further into that of self-reproduction.<sup>24</sup> As an autopoietic system law is self-reproducing in that it ultimately produces new legal acts.

The attraction of autopoiesis for Vincent-Jones is this feature of self-reproduction in that it facilitates explanation of the impact of CCT on local authority decision-making. CCT caused local authorities to alter their internal organisation and decision-making procedures. There occurred a fundamental shift 'from vertically integrated or

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<sup>22</sup> P. Burrows and C. E. Veljanovski (eds), *The Economic Approach to Law* (London: Butterworths, 1981)

<sup>23</sup> G. S. Becker *The Economic Approach to Human Behaviour* (Chicago: University of Chicago Press, 1977)

<sup>24</sup> See N. Luhman, 'The self-reproduction of the Law and its limits' in G. Teubner (ed), *Dilemmas of Law in the Welfare State* (Berlin: Walter de Gruyter, 1985) and G. Teubner, *Law as an Autopoietic System* (London: Blackwell, 1993)

hierarchical organisations' where social order and expectations were maintained through centralised command, bureaucratic administrative procedures to that of markets which require a separate institutional ordering and normative guarantees against risks and uncertainties that naturally arise in competitive contexts where the self-interest of business operators conflict'.<sup>25</sup> The self-reproduction occurs through local authorities 'neutralising' the legislation by adopting strategies of minimal compliance which left their core values intact.

A further attraction of autopoietic systems is their closed and self-referencing nature. An economic system, for example, will only recognise economic norms and not legal norms. Legal norms are 'external noise' which the economic system will filter and reconstruct in accordance with its own rationality of efficiency.<sup>26</sup> In other words, law works indirectly through 'reflexion structures' that encourage within the systems a self-reflection on the norms and values that should be guiding decision-making. In the context of CCT, local authorities self-reflection resulted in the adoption of 'the logic of competition, accounting separateness and a quasi-market organisation'.<sup>27</sup>

There is merit to Vincent-Jones analysis. In terms of autopoiesis, Vincent-Jones is able to affirm much of its notions and, ironically, address some of its main criticisms. Autopoiesis, for example, has been criticised for its non-empirical base and the absence of a 'regulatory crisis'. Vincent-Jones analysis is an empirical study of a 'crisis' period in local government. A further criticism of autopoiesis is its tendency towards 'grand theory' – a criticism that can also be levelled at Loughlin. However, whilst this flaw is not evident in Vincent-Jones analysis the potential is there in terms of the methodology in that Vincent-Jones predilection to lift the analysis in stages could, if taken to the ultimate, result in the creation of a grand theory of local authority governance.

A final criticism is that of the intricacy of the analysis which occurs on two levels. Firstly, in terms of the analysis itself, it could be argued that the outcome of Vincent-Jones analysis is an evaluation of the responsive and reflective nature of law and the development of legal theory rather than an evaluation of the substantive law either in the context of contract or local government. In other words, Vincent-Jones analysis does not remain within the social framework from which it originated but moves into a jurisprudential context and therefore becomes removed from the reality which it sought to explain.

Secondly, there is complexity in the terms of the theoretical lineage of the analysis. Whilst it was possible to identify the route which has led to the construction of Vincent-Jones analysis, unravelling the route of construction of the concepts and theories that he deploys reveals an intensely complex web. Explained simplistically, systems analysis, for example, was initially developed in engineering and physics. It was then adopted by social scientists, ultimately discredited and then abandoned although it has been deployed by law through the theory of autopoiesis. Autopoiesis itself was developed in biology

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<sup>25</sup> Above n. 4 (1998), 374

<sup>26</sup> J. Black, 'Constitutionalising Self-Regulation' [1996] *Modern Law Review* 24

<sup>27</sup> Above n. 2 (1998), 373. See also note 8 above for an alternative interpretation on the impact of CCT.

and adopted by 'sociology of law' thinkers in order to explain phenomena occurring in regulatory analysis<sup>28</sup> although the existence of the phenomenon, i.e. a crisis, is a matter of debate. Regulation is fundamentally a political-economic concept<sup>29</sup> and systems theory is just one approach, albeit one that is increasingly used for the analysis of law.<sup>30</sup> At each stage of development, theories will have been constructed to solve a particular problem. If knowledge of that particular problem is not passed to the next stage of development then all the values, norms, definitions, flaws, etc that went into the construction will pass into the new development unrecognised. New theories 'envelop' the old theories but the concepts which link one theory to another may not always demonstrate continuity but discontinuity.<sup>31</sup>

Accordingly, given the intricacies of the theoretical development, the link between Vincent-Jones analysis and economics could be described as tenuous, but it does exist. Vincent-Jones never sought to explain an economic reality but to identify why law behaves the way it does in a particular economic situation. In other words, the economic situation, just as Loughlin's political situation, is the catalyst for an analysis on the nature of law.

The non-legal discipline which Cooper draws upon is that of sociology. In particular, Cooper draws on Foucault's work of governmentality.<sup>32</sup> The notion of governmentality is counterpoised to statist conceptions of power which Foucault regards as dominating modern analysis of social relations. Foucault argues that to represent power as something which is institutional or prohibitive, does not explain the diverse and infinitesimal power relations that permeates all aspects of society. In other words, to focus exclusively upon law does not represent reality, but to identify reality it is necessary to acknowledge that law, politics, economics, etc are part of a complex web of power. Loughlin and Vincent-Jones would agree with this argument but differ from Cooper in terms of their identification of how the various powers are arranged. For Loughlin, law and politics are juxtaposed but politics presupposes law. A consequence of this presupposition is that laws, which are the product of political activity (which is its self established in the form of law), will possess legal validity and yet be free of extra-legal connections, such as politics.<sup>33</sup> Vincent-Jones takes this argument further in that politics is excluded even when laws are used to pursue specific ideological goals, such as, the use of markets. Cooper challenges the notion that law is a normatively closed tool for government policy. Law, like politics, is a technique of state power and can be subject to 'local interpretation

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<sup>28</sup> See H. Rottleuthner 'Biological Metaphors in Legal Thought' in G. Teubner (ed) *Autopoietic Law: A New Approach to Law and Society* (1988) page 97; M. King 'The 'Truth about Autopoiesis' [1993] *Journal of Law and Society*, Vol. 20, page 218

<sup>29</sup> A. Ogus, *Regulation* (Oxford: Clarendon Press, 1994), 1

<sup>30</sup> See B. Lange, 'Understanding Regulatory Law: Empirical Versus Systems-theoretical Approaches', [1998] *Oxford Journal of Legal Studies* 449

<sup>31</sup> See M. Tiles, *Bachelard, Science and Objectivity* (Cambridge: Cambridge University Press, 1984)

<sup>32</sup> See G. Burchell, C. Gordon and P. Miller (eds.), *The Foucault Effect: Studies in Governmentality* (Chicago: Chicago University Press, 1991); A. Hunt and G. Wickham, *Foucault and Law* (London: Pluto Press, 1994) and A. Barry, T Osborne and N. Rose (eds.), *Foucault and Political Reason* (Chicago: University of Chicago Press, 1996)

<sup>33</sup> The same argument could be applied to Vincent-Jones but with the notion of politics replaced with that of the market place.

and responses' which in turn are driven by ideological goals. In other words, law can never exist separate from politics even once laws come into existence. Even the interpretation of law and the response of institutions to law represents a form of political activity.

This desire for the inclusion of a diversity of power relations is manifested within Cooper's analysis in two ways. Firstly, Cooper goes beyond the traditional bi-institutional perspective of central government and local government to include civil bodies that speak about religion, sexuality and animal rights. These bodies do not possess formal legal powers but they do influence decision making. However, because of the breadth of agencies that are used, this means that Cooper's analysis must always remain at the meso level. It can never be used to evaluate decision making at the macro level, such as Loughlin, or even to form the basis of construction of a macro level model, such as Vincent-Jones. Whilst these wider/higher forms of analysis are not part of Cooper's goal, as a limitation it could be argued that such a limitation does not represent a flaw, since Cooper's aim is exposure rather than explanation or evaluation. Alternatively, as a limitation it may be perceived as a form of underdetermination in that once reality is exposed Cooper leaves nothing to provide for further development. Of course, this argument assumes that development, or the need to create further theory or to facilitate the further creation of theory, is the desire of theory and theorists. The approach also asserts, albeit covertly, that any alternative theoretical explanations are 'unreal'.

Secondly, Cooper's approach allows for the inclusion of 'narrative'. Narrative is the use of biographical information, for example, where someone tells of their involvement or perspective concerning a particular incident or conflict.<sup>34</sup> This verbal response of individuals is used by Cooper to demonstrate the interaction of law with people, politics, history, geography, identity, norms etc. It is an approach that neither Loughlin nor Vincent-Jones could deploy although Vincent-Jones will have acquired 'biographical information' as part of the empirical base. The information is not used because within the context of methodology deployed such subject matter comes to represent objective observations. However, for Cooper, biographical information represents part of the text of the conflict. Again, a potential criticism of the use of narrative is that it limits analysis to the micro level.

### *c. Justification*

Justification relates to the reasons that the various theorists present in terms of sources and choices. Loughlin, for example, specifically wishes to construct a model of the central-local relationship that is 'realistic'.<sup>35</sup> Furthermore, this realism is to be achieved by adopting as the 'principal focus the examination of the manner in which the normative structures of law can contribute to the tasks of guidance, control and evaluation in government'.<sup>36</sup> However, in creating this realistic and normative model, Loughlin begins

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<sup>34</sup> Generally see A. Cavarero *Relating Narratives* (London: Routledge, 2000)

<sup>35</sup> Above n. 3. (1989), 25

<sup>36</sup> Above n. 17 (1992), 264

from a descriptive premise, the evaluative failings of law, and then translates this into a normative premise, of how central government has employed its superior legal status in a relationship where law did not matter. Loughlin's translations are possible because the concepts developed by Elliot and Grant have become intuitive in that they are accepted as a priori truths within legal analysis. The irony of this path of construction is that the reality and the objectivity of the model is not dependant upon Loughlin's discovery of the political use of law but the passivity and the subjectivity<sup>37</sup> of the concepts.

It could also be argued that what Loughlin represents as 'reality' could in fact be represented as 'correctness'. Reality represents 'what is', or fact, whilst 'correctness' is the product of procedures which result in a determinable end model –something which 'ought to be' rather than 'what is'. Accordingly, it is possible to produce a model that is 'correct' but not necessarily 'real' since such an end model is a product of the chosen process of discovery rather than the actual discovered knowledge. It is also a method that validates the model since, like the method, it is reasoned and coherent. The outcome of such an approach is that any challenge to the model also represents a challenge to the method. This, in turn makes any challenge to the model problematical. After all, it is easier to 'trash' a 'real' model since all that is required is new evidence whereas to challenge a 'correct' model requires not just evidence but the identification as to why and what is flawed in the model. Loughlin's model has been shown to contain flaws<sup>38</sup> but it's 'correctness' is so entrenched within Public Law that there have been few direct challenges.

Vincent-Jones also wishes to provide an explanation of reality but, it is suggested, the reality which Vincent-Jones identifies is ultimately a representation of practice and theory. This assertion can be found through examination of the methodology employed. The analysis begins with two forms of knowledge, CCT practices and contract law. The CCT practices are empirical evidence which is represented as newly acquired factual knowledge. Contract law, however, represents a pre-formed body of knowledge which possesses specific features, such as, abstract elements<sup>39</sup> and conditions<sup>40</sup> which ultimately provide the framework for its existence as a body of knowledge. It is against this body of knowledge that the emerging CCT practises are tested and the outcome is the construction of a model which is represented as 'near-contractual governance'. This model then becomes the object of further testing against another body of knowledge, the theory of autopoiesis, which is more abstract, less conditioned and possesses a more limited framework than contract law. The outcome is yet a further model, 'contractual governance' which in turn possesses the potential for further testing. Testing occurs against yet another theory, that of governmentality, which is again a theory that is more abstract, less conditioned and possesses a more of a limited framework than the original

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<sup>37</sup> The subjectivity arises because unlike Loughlin, neither Elliot nor Grant sought to construct a model based on a particular perspective. Elliot and Grant also include both normative and descriptive elements within their analysis.

<sup>38</sup> Above n. 8 and 20 (2000)

<sup>39</sup> For example, the notion of consideration.

<sup>40</sup> Such as the rules or circumstances which must be met in order for a contract to exist.

premise for construction, that of contract law. The analysis proceeds through a series of stages which ultimately represents a hierarchy of constructs.

A potential problem with this incremental approach is that the relationship between the original approximation and the ultimate approximation could become remote, possibly misplaced or even lost.<sup>41</sup> Furthermore, with each stage of development the potential for abstraction and generalisation increases (a consequence of the emerging gap between each approximation) and the cycle for development becomes endless. Ironically, the whole process is represented as rational and objective, yet there is irrationality, it lies in the first step, that is, the choice of foundation from which to begin the analysis.

In some respects Vincent-Jones methodology is more open-ended than Loughlin's. The potential for the construction of models is infinite in that there is no limit other than the availability of suitable theories. Loughlin's model is, by contrast, finite in that it does not invite, or leave open, an avenue for development or revision. Instead, the only revision available is to test the validity of the theory itself which can ultimately lead either to its affirmation or destruction.

Like Loughlin and Vincent-Jones, Cooper also seeks to provide an explanation of reality but through an interpretation, or a 'reading', of specific events on the basis that political conflict is 'fluid' and 'constantly evolving'. The focus is on method as 'history' rather than method as deployment of a particular perspective (Loughlin) or method as development of theory (Vincent-Jones). The approach is directly attributable to the theorist that Cooper draws upon, namely 'Foucauldian political analysis, discourse theory, socio-legal studies and cultural geography'.<sup>42</sup> However, it is possible to argue that the contingencies which Cooper includes are so diverse that they are incapable of producing coherent analysis of a phenomenon. Except that coherence only matters if the desired outcome is to identify error or accuracy. Since Coopers aim is to identify an alternative perception of reality, diversity, because of its breath should only produce exposure. The key to this exposure lies in how the contingencies are structured, in other words, there must be some commonality. Furthermore, this commonality goes beyond the mere assertion that there is commonality or that the only limitation is that of 'sources'. In other words, in there is a rationality to Coopers methodology. For example, Cooper argues that reality can be drawn from projections of relationships but, for the relationships to be valid there must be filters. In other words, Cooper states what 'real history' is to be included, rather than what is to be excluded. Ultimately each 'real history' becomes a 'representation' of a relationship which then forms the basis for a formal structure which then becomes the encapsulation of the particular phenomena. Ironically, the outcome is much the same as that of Loughlin and Vincent-Jones, the creation of a model/theory except that the aim is exposure rather than explanation or description.

#### *d. Summary*

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<sup>41</sup> Vincent-Jones does attempt to address this problem through the extensive use of footnotes.

<sup>42</sup> Above n. 5 (1998) Preface

The above examination on how and why the theories of Loughlin, Vincent-Jones and Cooper have been constructed reveals few shared features from which to identify a basis for interconnection. It could also be argued that the examination highlights, even further, how mutually incompatible the works are. Given the difficulties in connecting the works, in terms of theory, either as form or structure, it may be that theory is not the most effective method for achieving a connection. In other words, it might be more effective to abandon theory and consider an alternative mechanism for the explanation of knowledge, such as concepts.

### **Concepts As A Mechanism For The Explanation of Knowledge**

There are many definitions as to ‘what’ is a concept<sup>43</sup> although basically they can be described as an abstract representation which attempts to use words to portray reality.<sup>44</sup> The terms concepts and theory are occasionally used interchangeably but as structures for the explanation of knowledge they are quite distinct. Theory is, for example, informal in nature in that there are no particular rules regarding its construction. The above examination of the works of the theorists revealed great diversity and incompatibility which would certainly indicate that, within the context of legal analysis on local government and the central local relationship, particular rules regarding theory construction do not appear to exist. Furthermore, even the role of theory was found to be dissimilar. Cooper, for example, seeks to use theory as a form of exposure rather than as a method for explanation. Concepts, on the other hand, appear to be the converse of theories. As a mechanism for the explanation of knowledge, concepts can seem to be both formal and fixed. Consider, for example, the notion of juridification. If a study on local government and the central-local relationship uses the notion of juridification as a concept, then for the concept to be understood there need only be a reference to a definition, such as that proffered by Loughlin.<sup>45</sup> It would be unnecessary to offer any further explanation since the concept would always be understood by virtue of the referenced definition. However, if the study wishes to use the notion of juridification as a hypothesis, then as a hypothesis it would be necessary to identify what are the features of juridification deployed by Loughlin. These features would be explained and it would be argued that, whilst it may be thought that these processes have occurred, it must be established that they have indeed occurred. In other words, juridification cannot be assumed it must be explained, identified and then proved. Accordingly, the distinction between a theory and a concept lies with where knowledge can be found. In respect of concepts, knowledge is pre-defined, whilst for theory, knowledge must be discovered however certain it may be thought that the knowledge exists.

### **Concepts And Legal Analysis On Local Government And The Central-Local Relationship**

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<sup>43</sup> Generally see M. Weitz *Theories of Concepts* (London: Routledge, 1988)

<sup>44</sup> Generally see W. B. Gallie ‘Essentially Contested Concepts’ in M. Black (ed.) *The Importance of Language* (Englewood Cliffs, New Jersey: Prentice-Hall, 1962); P. Thagard *Conceptual Revolutions* (Princeton: Princeton University Press, 1992)

<sup>45</sup> Above n. 3 (1989)

The use of concepts within legal analysis on local government and the central-local relationship is not unusual but, it is suggested, that the matter of how concepts are used, as a method for explanation, remains unexplored. Accordingly, it is proposed to consider how the various theorists use concepts in order to identify a number of perceptions regarding them.

Firstly, it can be found that concepts are generally presented as being fixed and inflexible in terms of the knowledge that they represent. The use of the concept of juridification, as indicated above, would appear to affirm this representation. Yet consider the concept of law as employed by Loughlin and Cooper. For Loughlin, law specifically relates to the formal structures from which statute and case law are produced whilst Cooper seeks to include a wide range of norms; social, political and even religious – hence the ‘governing out of order’. This diversity in the understanding of the presentation of law as a concept would suggest that concepts are not in fact rigid or fixed structures but possess an element of flexibility or ‘openness’. In other words, the pre-defined knowledge which makes up the understanding of the concept can be altered according to the context in which the concept is used. This flexibility allows for the presentation of alternative understandings by theorists who appear to share little beyond that of the context within which they write.

Secondly, within legal analysis on local government and the central-local relationship theory is used as the primary mechanism for the presentation of knowledge. Concepts are deployed as an explanatory tool but they are generally represented as a secondary or subsidiary mechanism to that of theory. Consider for example, the concepts of legalization and restructuring which form part of Loughlin’s theory of juridification. Yet, the manner in which Vincent-Jones deploys concepts, as a means for altering the level of analysis, would indicate that concepts do not have to exist within the domain of theory. Concepts possess a flexibility, in that they can be part of the structure of theory, yet exist apart from theory and at the same time facilitate theory. In other words, just like theory, concepts can exist as a stand alone mechanism for the presentation of knowledge, ultimately even facilitating the explanation of complex structures where diverse and disparate theories may exist.<sup>46</sup>

Accordingly, given the difficulties in connecting the works of the theorists in terms of theory, it is proposed to explore whether concepts may be able to facilitate such a connection.

### **Concepts As A Mechanism For The Presentation Of Knowledge In Respect Of Legal Analysis On Local-Government And The Central-Local Relationship**

If concepts are to form the basis for the connection of the work of the three theorists, then the questions arises, which concepts should be deployed? The most obvious choice would be to select those concepts already used by the theorists, such as law, politics or government. Except that in using these concepts there are the risk of transferring the

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<sup>46</sup> See B. Mauthe ‘The Notion of Sovereignty and its Presentation within Public Law: a Critique on the use of Theory and Concepts’[2005] *Northern Ireland Law Quarterly* 63

predefined knowledge attached to these concepts. Consider, for example the diverse interpretation employed by Loughlin and Cooper in respect of the concept of law. Accordingly, it is proposed to draw upon a number of concepts which should provide scope, simplicity, consistency and accuracy.

Within the work of each of the three theorists it is possible to identify a concept which provides a distinctive representation of their analysis. It can be argued, for example, that Loughlin focuses on 'structure', Vincent-Jones on 'rules', and Cooper focuses upon 'ideology'. In other words, the connection between all three theorists lies, not through theory, but through the examination of these concepts. Whilst these concepts may possess specific representation within the context of a particular theorist but, as concepts, they also have common elements which can be found within the works of all the theorists. It is proposed to examine this commonality.

#### *a. 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 organised within the framework. Each of the theorists contains aspects of 'structure' within their work. Furthermore, 'structure' can be identified in assuming numerous forms.

Loughlin focuses upon the institutional structure of central government and local government. Central to Loughlin's perception of institutional structure is that local government is constrained and cannot choose or even define its relationship with central government. Any defining of the institutional relationship must be done either by central government or the judiciary through the mechanism of law. The solution offered by Loughlin to this constraint is also structural in nature. Initially, Loughlin argued in favour of a written constitution.<sup>47</sup> This solution, whilst being the most ideal, was also recognised as being the most unlikely and ultimately Loughlin settled for the creation of a constitutional norm of 'locality'.<sup>48</sup> Although the normative status of the level of protection has altered, the focus of protection remains the same, the institutional relationship of central government and local government.

The second facet of structure that can be identified within Loughlin's analysis lies in respect of the relationship of law to politics. Loughlin argues that political decision making exists prior to legal decision making in that a political decision to implement a particular policy may result in legislation. However, once the political decision has been made, and law is produced, then the relationship between law and politics ceases. How this represents a form of structure is that politics and law represent separate disciplines yet Loughlin's approach allows for the articulation of a relationship. However, there are hidden facets within Loughlin's approach since it is only the activities within the realm of law that enables the structural relationship with politics to be identified and maintained. Furthermore, the sequential position occupied by law within this structure ultimately

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<sup>47</sup> M. Loughlin *The Constitutional Status of Local Government* (Commission for Local Democracy, 1994)

<sup>48</sup> Above n. 3 (1996)

enables law to 'ignore' politics from a specified, but self determined position. It also allows law to be selective as to which political activities to focus upon. Whilst the approach facilitates the inclusion of issues which previously were not possible within legal analysis of the central-local relationship,<sup>49</sup> it also acts a restraint in that law is seen as both a facilitator and enabler, but the limitations of law, whether conceptual or practical, are never explored.<sup>50</sup>

Vincent-Jones within his analysis focuses on a different structure from that of the central-local relationship. Central government, through the use of law, requires local authorities to enter into an alternative, non-public law framework, that of the marketplace. Whereas Loughlin would focus on how this framework emerged, Vincent-Jones is more interested in exploring how local authorities operate within the new framework, particularly in respect of their relationship with private contractors. Whilst Loughlin represented structure as hierarchical in nature, for Vincent-Jones, structure is linear. The focus is also that of decision making but decision making based on relationships of equality within the market place. As a consequence, the concept of 'structure' is not a dominant feature in terms of the content of Vincent-Jones' work and it only becomes a recognizable facet when there is a change in the structure. For example, when the market place is created and when it is altered as a consequence of the switch from CCT to Best Value. Such a change in the structure affects all the parties, hence its linear perception, unlike the operation of hierarchy within Loughlin's model. It could be argued that where structure does dominate Vincent-Jones' analysis is in relation to methodology. The incremental approach represents a discrete structure in that there is interplay between theory and practice within a strictly defined framework.

Cooper offers a very different perception regarding structure from that of Loughlin and Vincent-Jones. Although no formal definition of the concept can be found, nor is it a dominant feature of the analysis, structure can be found within the content of the analysis through the use of attributes such as community and geography. Cooper offers a spatial perception of the concept in that structure is a 'stretched out' notion which consists of a configuration of relations that operate at different levels and different ways. In other words, structure is about space, in particular local space, and how things are organised and done within that space. Where the boundary of local space ends does not matter, nor is it even an issue, since it is the activities within the local space that represents structure rather than space per se. Whilst different, there is some similarity to Loughlin and Vincent-Jones in that they too focus on activities albeit in respect of institutions (Parliament, the Executive and the Judiciary) or a context (the market place). Such wide variations on the concept would suggest that structure can be represented as multi-dimensional in nature, almost three dimensional, but, it is only by combining the works of the three theorists that this perception of structure in the context of local government can be found.

### *b. Rules*

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<sup>49</sup> Such as the central-local relationship as a mechanism for distributive justice.

<sup>50</sup> Such as highlighting the limitations of law in the absence of a formal written constitutional framework.

None of the theorists none offer a specific definition as to what constitutes a rule. However it is possible to identify a number of features concerning rules.

For Vincent-Jones, rules lie at the core of the analysis. Vincent-Jones observations on rule making by local authorities within the CCT regime provide the basis for the construction of the contractual governance model. This, in turn, leads to the construction of the theory of responsabilization. In other words, rules serve a dual purpose, those of subject and method. The rule making practices of local authorities represent observed knowledge, in other words they are Vincent-Jones's subject matter. But the explanation of these observations follows a reasoned progression, or method. Initially the knowledge is used in the construction of models and latterly in the deployment of theory. Whilst the progression is not represented as following a specific 'rule bound', formula, its continuous application by Vincent-Jones suggests, at least, the existence of a convention for the construction of models and theories.

For Loughlin, rules also lie at the core of the analysis in that legal rules, such as statute and case law, form the basis for the theory of juridification. Furthermore, Loughlin's perception of legal rules is that they represent the only real form of 'control' within the hierarchical structure of central government and local government.

Cooper does not focus on rules per se but on conflicts which can be based not only on law but also upon symbolic and cultural norms, factors which are often dismissed by lawyers as being irrelevant. These conflicts are about the stretching of the boundaries of authority rather than producing a definitive perception of what constitutes a rule or law.

Again it is possible to identify from the three theorists different facets of the same concept. Vincent-Jones perception of rules is about one area of law, contract law, accommodating another area of law, CCT. There is no formal requirement for these two areas of law to accommodate one another, just that the consequence would be the failure of the local authority market with the possibility of direct interference by central government. It is therefore in the self interest of local authorities to find mechanisms for accommodation. Such economic and political factors are not apparent within Vincent-Jones analysis as the rules which emerge are represented to be a consequence of the responsive and reflexive nature of law. Loughlin focuses upon the authority that law possesses as a consequence of the operation of politics. There is a presumption that the power and authority of law are synonymous and that rules are the outcome of command and legitimacy. Cooper focuses on conflicts where law is only one of many factors. No explanation is offered regarding the nature of law, nor are there presumptions about what law can do. Yet, authority, power and command, features of law, exists within Coopers analysis, they are just not the overtly formal mechanisms identified by Vincent-Jones and Loughlin. This would suggest that in the central-local relationship the concept of rules is not static but depends upon numerous factors, such as context and the relationships being evaluated.

### *c. Ideology*

Cooper defines ideology as ‘the various frameworks of meaning which justifies, legitimise, promote and emerge out particular networks of social relations’.<sup>51</sup> Furthermore, ideology is not singular and its role is to create discourse. In the context of governance, ideology goes beyond beliefs and norms to include methods and paradigms. Accordingly, even conflicts which appear to be non-ideological, such as the banning of hunting<sup>52</sup> or the increasing of Christianity’s profile within schools<sup>53</sup>, possess an ideological component, since these issues ultimately concern differences in values and objectives.

Within Loughlin’s analysis the process of juridification is a direct consequence of the election of a Conservative government in 1979 with a specific ideological remit concerning the role and function of the state. The legal conflicts which emerge between central government and local government in the 1980’s are a direct consequence of this change in ideology. To some extent, Loughlin is chronicling the change in ideology. For Vincent-Jones, ideology underpins how rules emerge within the context of local authority transacting in the market place. Here, it is the impact of the new ideology on rules and rules making that are being chronicled. The conflicts which Cooper discusses are about how far dominant ideologies extend and lesser or alternative ideologies can challenge, through law and other mechanisms, dominant ideologies. In other words, how far does ideology operate as a form of control, beyond law.

It is suggested that ideology is a significant concept within the central-local relationship. Furthermore it links in with structure, since structural issues can often be a consequence of ideology (the basis of Loughlin’s analysis) and rules are often the consequence of ideology (Vincent-Jones).

## CONCLUSION

The aim of this paper was to demonstrate that although legal analysis of local government and the central-local relationship is incompatible in terms of theory, it is possible to connect the disparate analysis through the use of concepts. In order to achieve this aim, the notion of theory was explored in terms of its usage as either a form of explanation or as a structure for the explanation of knowledge. Far from revealing a means to connect the works of Loughlin, Vincent-Jones and Cooper, beyond the context within which they write, this approach appeared to enhance the diversity of their analysis. Accordingly, it was concluded that theory was not an appropriate device, by which to connect the works, and that it may be more effective to consider the use of an alternative mechanism for the presentation of knowledge, such as that of concepts. The nature of concepts was then considered along the perceptions concerning their usage within legal analysis on local government and the central-local relationship. It was found that, as an explanatory mechanism, concepts possess an openness and flexibility and could even be used to explain complex structures. Three concepts were then identified by which to evaluate the works of the theorist, those of structure, rules and ideology. The resulting analysis was a

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<sup>51</sup> Above n. 5 (1994), 7–8 and 151–5. For Loughlin see above n. 1 (1989).

<sup>52</sup> Above n. 5 (1998), Chapter 7

<sup>53</sup> Above n. 5 (1995) and (1998), Chapter 3

form of meta-explanation of a particular period in decision making within local government and the central-local relationship.

It is suggested that the approach contained within this paper could be transferred to other areas of public law analysis where a number of disparate and diverse theories exist in respect of a particular phenomenon. The approach has certainly been applied, with some success, in the respect of that most difficult of phenomenon with public law, sovereignty.<sup>54</sup> Given the vast differences between the notion of sovereignty and the topic of local government and the central-local relationship, this would indicate that the approach possesses merit.

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<sup>54</sup> Above n. 46