A THEORY OF LEGISLATION FROM A SYSTEMS PERSPECTIVE

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ABSTRACT

In this thesis I outline a view of primary legislation from a systems perspective. I suggest that systems theory and, in particular, autopoietic theory, as modified by field theory, is a mechanism for understanding how society operates.

The description of primary legislation that I outline differs markedly from any conventional definition in that I argue that primary legislation is not, and indeed cannot be, either a law or any of the euphemisms that are usually accorded to an enactment by a parliament. I cite two reasons for such a conclusion.

The primary reason for my conclusion is that I see primary legislation as being an output of a particular subsystem of society, while the law is the output of another subsystem of society. I argue that these outputs are the discrete products of separate subsystems of society. I argue that primary legislation should be viewed as a trinity. The first state of this trinity is that, upon enactment, primary legislation is a brute fact in that it is but a thing and the only property of this thing is that of being a text. The second state of this trinity is that following the act of enactment, the thing enacted will be reproduced and this reproduction is a separate thing that will sit in some repository until used. The third state of this trinity is that, upon use, this thing that is primary legislation will be transformed into an object and the user will attribute such functions and attributes to that object as are appropriate to the context within which the object is used. The thing has therefore become an object and an institutional fact. The second reason for my conclusion that primary legislation is not a law relates to the fact that the thing that is primary legislation is a text and the only function of a text is that it is available to be read. That is to say, of itself, a text is incapable of doing anything: it is the reader who defines the status of the text and attributes functions and attributes. Upon use, primary legislation thus becomes a censored input for future action and one of these actions may be some statement by a court of law.
I assert that the view of primary legislation that has been accepted within the body politic is the product of the discourse of a particular subsystem of society that I have designated ‘the legal practice’, and I outline why and how this has occurred. Outlining a view about primary legislation also necessitates outlining a view as to the nature of the law. I assert that the law is a myth and I see this myth as a product of the discourse of the legal practice. I have asserted that although it is the judges that state the law, such statements flow from the discourse of those who practise the law.
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I was fortunate to have had Dr Mark Burton assigned as supervisor and to him I owe a special debt for his encouragement, tolerance, courtesy, and insight. Indeed, without his guidance I might never have completed this thesis.

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I would also like to express my thanks to my companion for her tolerance and patience while this thesis was being finalised.
The general form of a proposition is: This how things are. That is the kind of proposition one repeats to oneself countless times. One thinks that one is tracing the outline of the thing’s nature over and over again, and one is merely tracing round the frame through which we look at it.

Hughes John

Essays on Ludwig Wittgenstein

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1 See the essay about Ludwig Wittgenstein in Hughes John, Someone Else: Fictional Essays, at p 145.
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And such notions that have wandered into this [thesis] have got there by the usual methods, which resemble the ways of the jackdaw: [I] steal the shiny bits, and build them into the structures of [my] own disorderly nests.

Margaret Atwood

*Negotiating with the Dead*

“…for surely the most delightful of all are the public who go on legislating as we described and setting things to rights, always imagining that they will find some way of stopping fraud in contracts and those other difficulties which I mentioned a moment ago, not knowing that they are but beheading the Hydra.”

Plato

*Book IV*

*The Republic*
CHAPTER I – INTRODUCTION

How can we know the dancer from the dance?

W.B. Yeats

Among School Children

I.1. Introduction

This thesis is about a theory of legislation. Any deliberation about a theory raises, either explicitly or impliedly, the question of what is the purpose of the particular theory. I could, for example, be seeking to develop a theory of legislation in order to consider some statutory interpretive approach, or to consider the concept of parliamentary sovereignty, or to reflect on judicial activism. But what I am concerned about is something that is fundamental to any theory of legislation. What really is primary legislation?

2 I have taken this quote from Atwood Margaret, Negotiating with the Dead, where at p xix the author articulates what she called a standard disclaimer in that she, when writing her book about the act of writing, acted like a jackdaw.

3 See also Chapter 6 ‘Dance as a Metaphor for Thought’ in Badiou Alain, Handbook of Inaesthetics, where the author considered the notion of Nietzsche of dance being a metaphor for thought. Dance is conceptualised as a body in that a dance is “first and foremost, the image of a thought subtracted from every spirit of heaviness”. See Badiou Alain, Handbook of Inaesthetics, at p 57. Badiou also suggested, at p 61, that using the term ‘dance’ as the metaphor illustrated that a thought depends upon an event and the “event adds itself onto what there is, but as soon as this supplement is pointed out, the ‘there is’ reclaims its rights, laying hold of everything”.

4 One must, of course, be conscious of the dictum of Horkheimer that one should only publish those ideas that can be defended without reservation. See the Preface to Horkheimer Max, Critical Theory, at p v.

5 I have used the term ‘primary legislation’ throughout this thesis to identify this thing rather than the term ‘statute’ and I outline my reasons for the choice of such a label later in this chapter. The application of a label flows from the task of making sense of a thing irrespective of whether that thing is a material phenomenon or an intellectual production. See Glock Hans-Johann ‘Was Wittgenstein an Analytic Philosopher?’, at p 420. I see the task I have set myself as that of telling about a particular thing of the social world and I have adapted the notion of telling about a thing from Bourdieu Pierre Pascalian Meditations at p 5. Bourdieu claimed that “[t]he sociologist has the peculiarity, in no way a privilege, of being the person whose task is to tell about the things of the social world, and, as far as possible, to tell them the way they are.” The act of telling has, as Cècardi pointed out, “its occasions like any other human
The impetus for this thesis was a concern that the traditional explanations about the nature of what is routinely described as statute law - and by implication the law itself - not only have limited application but are, in my opinion, inaccurate. The traditional view of primary legislation within liberal democracies is something of a linear progression of elected representatives who, within the parliament, make the law through the enactment of legislation. The courts then interpret this law. Traditionally, consideration of legislation involved some contemplation of the law and it is inevitable that an individual in considering the law also exposes some personal theory of the law. As a consequence, this thesis is also about the law.

In outlining my hypothesis I seek to develop the term ‘primary legislation’ from that of a linguistic label, something that represents a concept, into an explanation that is practice” in that it is about accomplishing some action. Cascardi Anthony J., ‘The Grammar of Telling: The Example of Don Quixote’, at p 135. However, as Wittgenstein has pointed out, the act of telling is of itself a particular language game:

“But when I imagine something, something certainly happens! Well, something happens-and then I make a noise, what for? Presumably in order to tell what happens.- But how is telling done? When are we said to tell anything?- What is the language-game of telling?”

Wittgenstein Ludwig, Philosophical Investigation, Remark 363, at p 97.

My hypothesis has developed from my experiences as a public servant in both the Commonwealth and Australian Capital Territory public services. A professional ideology develops from: professional work; particular careers; and daily activities. (Posner R. The Problems of Jurisprudence, at p 202.) I had some little involvement with the suite of legislative changes that were necessary to provide for the advent of self-government for the Australian Capital Territory. On self-government I transferred to the Australian Capital Territory Public Service, initially as a legal officer in what was then the Attorney General’s Department. I then became a legal adviser to a public service department where I was responsible for that department’s legislative programme. I was primarily involved with legal policy work and the development of legislation, both primary and secondary. I had many years experience in the development of all aspects of primary and secondary legislation. So, the theory I am outlining in this thesis is grounded in my experiences and does reflect a view that experience should always be the ultimate test of any theory. I am the product of a phenomenon and I accept the bias that flows from this.

See chapter two for an explanation of this so-called traditional view.

Examples of such a relationship are numerous but the two-part article by Barnes Jeffrey W., ‘Statutory Interpretation, Law Reform and Sampford’s Theory of the Disorder of Law’ serves to illustrate the point I have made.

See, for example, Van Hoecke Mark Law as Communication, at p 5. Van Hoecke adopts a systems perspective and argues that law provides a framework for human action.

I assert that primary legislation has been accepted as a given, something that is a product of a particular social practice, and that this social practice is the context within which this so-called given is defined. So then the term ‘primary legislation’ has become a social construction and I am concerned about overcoming what amounts to a myth of the given. See McDowell John, ‘Real Colour’, at pp 4 and 5. The article by McDowell is a book review within which this notion of the myth of the given, the issue of the framework for establishing whatever is the given, and the impact of a social practice forming a context, are discussed.
relevant within an immediate social context. I make, in outlining my hypothesis, a
distinction between a thing and an object. A thing is merely a material entity that has no
properties other than a physical presence in some particular form, while an object has,
through usage, acquired attributes and become part of the cultural apparatus of some
section of society. That is to say, the relationship between the producer, a parliament, and
the product, primary legislation, becomes at the very least problematic because of the
independence of the object. In arguing that the thing that is primary legislation is
transformed by use within some context, I have adopted a post-modern stance because
the concept of legislation is of itself a contextualisation. The issue of what is primary

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11 See Pipe Gregory, ‘The Problem of Indefinability’ at p 231 where he asserts that a label is a word or a
short phrase that represents some concept.
12 The concept of ‘immediate social context’ has been adapted from Stone Jerry H., ‘Christian Praxis as
Reflective Action’ at p 111 where the author asserts that such theorists as Barth and Gadamer seek to
integrate interpretation and application to recover the past as reflective action in the present. I am in this
thesis developing the notion of Ricoeur that an essential characteristic of a text it that it transcends
the conditions of production and is therefore open “to an unlimited series of reading, themselves situated in
different socio-cultural conditions”. Ricoeur Paul, Hermeneutics and the Human Sciences at p 139.
13 I am here adapting the notion of Heidegger that a thing becomes withdrawn from awareness so that a
distinction exists between, in Heidegger’s terminology, the thing being ‘present-at-hand’ or ‘ready-to-
hand’. See Heidegger Martin, Being and Time, particularly at pp 68 and 69. Heidegger asserts at p 69 that
the correct way of presenting a thing is not self-evident and “to determine what form it shall take is itself
an essential part of the ontological analytic of this entity”. See also Harman Graham, ‘Heidegger on
Objects and Things’, at p 268. This distinction between the ‘present-at-hand’ and the ‘ready-to-hand’ is a
matter of the representation of the thing. However, as Latour has pointed out, there is, that at least in
theory, two different meanings of the word ‘representation’ although in practice the different meaning is
not as clear-cut. According to Latour, the first meaning of the term ‘representation’ is indicative of the law
and political science disciplines and “designates the ways to gather the legitimate people around some
issue. In this case, a representation is said to be faithful if the right procedures have been followed.” The
second meaning attributed to the term ‘representation’ by Latour related to the way those within the
science and technology disciplines would represent the thing and in this case “representation is said to be
good if the matters at hand have been accurately portrayed”. See Latour Bruno, ‘From Realpolitik to
Dingpolitik or How to Make Things Public’, at p 16.
14 I have taken this description from Lefort Claude, ‘Outline of the Genesis of Ideology in Modern Society’
at p 235 where the author outlines the consequences of consumption within some systems of objects so that
“what is consumed is constantly new”. The quoted passage is at p 235.
15 Murphy Tim ‘From Subject to System: Some Unsystematic Systems-Theoretical Thoughts on Race
Equality and Human Rights’, asserts at p 67 that meaning is not inherent to a thing as the thing is and that:
“the idea that things inherently possess meaning is nonsensical in systems-theoretic terms.
Increasingly, perhaps, meaning in this context depends on or refers to meanings circulating more
generally in society.”
16 I am suggesting here that primary legislation when used should not be considered external to the
particular world within which it is utilised. I have adopted this notion from Bruns Gerald L., ‘The
Accomplishment of Inhabitation: Danto, Cavell, and the Argument of American Poetry’, at p 289 footnote
2. Bruns was commenting on the idea of Gadamer that it is not possible to tell whether a thing is art merely
by looking at the thing because “the work is not external to the world that it represents”. See Gadamer
Hans-Georg, Truth and Method, at pp 116 and 117 that:
legislation is something that should go to the question of knowledge, as opposed to a question of mere belief.¹⁷

I.2. What Really is Primary Legislation

My intention in this thesis is to outline what I see as the nature of primary legislation from a particular perspective: that of a broadly based systems standpoint. The term ‘primary legislation’ can refer to both a particular subject that is the matter of discourse¹⁸

“... ()

¹⁷ Generally see Zagzebski Linda, ‘The Search for the Source of Epistemic Good’, for a discussion on the issue of knowledge, as opposed to belief, being regarded as a valuable state. Zagzebski suggests, at pp 12 and 13, that knowledge is regarded as being better that true belief. Indeed the “good of the product makes the reliability of the source that produces it good”. The quoted passage is at p 13.

¹⁸ I have, in this thesis, also utilized a conception of the term ‘discourse’ to identify a social link that is founded on language. (Schroeder Jeanne L., ‘The Four Discourses of Law: A Lacanian Analysis of Legal Practice and Scholarship’, at p 18) While the term ‘discourse’ has, through excessive usage become part of the lexicon, the term serves to classify meanings that cannot be reduced to language intent but rather arise from an inter-relationship that develops between an author, the text, any reader, and, most significantly, the discursive environment that frames that relationship. (Generally see Davies Margaret, ‘Authority, Meaning, Legitimacy, at pp 115–117). The term ‘discourse’ relates to the differing ways in which areas of knowledge and social practices are structured. (Fairclough Norman., Discourse and Social Change, particularly at pp 3-5 and 62-73.) Certainly attempts have been made to classify the particular nature of some discourse through an identification of the group that is engaged in the discourse, for example, whether the discourse can correctly be considered as sociolect: - that is, a discourse determined by social groupings that are based on age, gender or economic position; or as a register, a discourse from a group that is identified by some professional standing such as lawyers or doctors. (Vice Sue, Introducing Bakhtin, at pp 18 and 19.) Whether there is merit in such analysis is not within the scope of this thesis, but what is relevant is that there is recognition that all discourses are dialogical. That is to say, double-voiced, with “the mixing of intentions of speaker and listener and the creation of meaning out of past utterance and the constant need for utterances to position themselves in relation to one another”. (See Vice Sue, Introducing Bakhtin, at pp 45 and 46, and the quoted passage is at p 45.) Rorty has defined ‘normal discourse’ as: “that which is conducted within an agreed-upon set of conventions about what counts as a relevant contribution, what counts as answering a question, what counts for having a good argument for that answer or a good criticism of it.” (see Rorty Richard, Philosophy and the Mirror of Nature, at p 320. See also Murchadha Felix O., ‘Truth as a Problem for Hermeneutics’ at p 123.) So, I have used the term “discourse” to identify those areas of general or specific communication (Generally see Davies Margaret, Asking the Law Question, at p 304, footnotes 21 and 22) that serve as a process that reflects an exercise of power. (Foucault M., ‘Orders of Discourse’, at p 27.) A discourse then is socially constituted and conditioned and can be “an opaque power object in modern societies”. (Blommaert Jan and Chris Bulcaen, ‘Critical Discourse Analysis’, at p 448.) For my purposes, a discourse is the product of a particular practice. (See Schatzki Theodore R., ‘Practice Mind-ed Orders’, at pp 44 and 45. Schatzki asserted at p 42 that “social order is established within the sway of social practices”. Schatzki defines ‘social order’, at p 43, as the “arrangements of people and the organisms, artifacts, and things” that relate spatially, causally and intentionally to enable, and also constrain, activities thereby establishing identities and meanings through coexistence.)
and also to the name of an object that is constituted discursively. A dictionary definition of the term ‘legislation’ includes the act of making or enacting laws and, a law or a body of laws enacted. While both elements of the definition are relevant to this thesis, I have tended to give attention to the latter element.

I have developed my hypothesis about primary legislation as a result of a concern as to how primary legislation, or indeed the law, could be considered to be some objective reality in the first place. I will assert that, contrary to traditional explanations, primary legislation is not: a law; a plan of management; or any other such euphemism, in that it is but a thing, a brute fact. Such an assertion raises a conceptual question. How does one relate this concept of the brute fact, or to use a term of Rorty, transfer this linguistic brutality, to the various contexts within which primary legislation is used? In outlining my hypothesis I have quoted, or utilised, authors who in my opinion have something interesting to say and who are considered by their peers to be prominent within their field. My selection of authors has been somewhat random, as there are many authors who could have been chosen. However, bearing in mind the thesis format, I feel that the authors I have included best represent the arguments I want to present.

To my mind, primary legislation is a thing that exists within a “certain space at a given time”, and upon enactment this thing is a brute fact. That is to say, primary legislation is a thing that is physically separated. This thing does have a particular form in that it is a

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19 This comment has been adapted from Sakai Naoki, ‘Modernity and Its Critique: The Problem of Universalism and Particularism’, at p 477.
20 The Macquarie Dictionary
21 See the Introduction, written by Cavell Marcia, to Davidson Donald, Problems of Rationality, at p xv. Cavell was the wife of Davidson and collected the essays that are in Problems of Rationality. Cavell asserts that a continuing theme for Davidson was an examination of the Cartesian ideal of all knowledge being based on data that individuals have acquired. Davidson questioned the notion of some world independent of the mind by asking how can there be an objective reality in the first place.
22 A theme for Olsen Bjornars ‘Material Culture after Text: Re-Membering Things’ is the interaction of people and things and Olsen asserts, at p 88, that things: “possess ‘real’ qualities that affect and shape both our perception of them and our cohabitation with them”.
23 I have adapted this description of the perceived objective from the chapter entitled ‘Texts and Lumps’ in Rorty Richard, Objectivity, Relativism, and Truth, at pp 80 and 81.
25 I discuss the concept of brute fact in the succeeding section of the thesis.
text, and this thing might exist as hardcopy or a computer record. The only property of a text is that of being a text and a text when used must be interpreted. Interpretation is a product of the field of endeavour (that is to say a subsystem) in which the interpreter is engaged. What is fundamental to interpretation therefore is the impact of the context within which meaning is being attributed. Certainly a court will define the law; certainly a court may consider primary legislation; certainly primary legislation is accorded a particular status by a court when the court does consider the primary legislation; and certainly claims are made about the function of primary legislation. But a court, when attributing meaning to some primary legislation, will do so within the context of the matter before the court and in accordance with interpretative criteria that are endorsed by the court and not in accordance with any interpretative practice that the parliament might have utilised.

A particular subsystem of society has endorsed a process to produce this thing that is primary legislation in order to satisfy some particular demand and so this thing is a means to an end. The end is simply the satisfying of the demand that stimulated the decision to have the primary legislation drafted and enacted. This thing, upon enactment, may be viewed and utilised within numerous contexts and the particular context will construct some manifestation of this thing. The utilisation of this thing will transform the thing into an object and this object can be considered an institutional fact.

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26 I have adapted this description of a thing from Balkin J.M., Cultural Software: A Theory of Ideology, at pp 24 and 25.
27 I discuss endeavour as being the foundation of a subsystem at section III.18 of the thesis.
28 As Pearce and Geddes have pointed out, it is impossible to make assumptions about how a reader of primary legislation will approach the act of interpretation in that a “reader will often try to place a possible meaning on legislation that suits the reader, regardless of what the drafter intended”. See Pearce D.C. and R.S. Geddes, Statutory Interpretation in Australia, at p 2. The complexity of the process of producing primary legislation is also illustrated by Pearce and Geddes who assert, at p 2, that depending on circumstances:
   “responsibility for the content of legislation may rest with or be shared by parliament, the government, the cabinet, the minister responsible for the introduction of the legislation, the legislative drafter, the instructing officers of the relevant department, the political party which is in government, or even pressure groups which have lobbied for the legislation.”
29 See chapter 2 of this thesis for a selection of such claims.
30 As Knapp and Pence point out, the concept of a thing in itself has a metaphysical dimension in that while a thing has an a priori autonomy in that it is a “material entity free from subjective contamination” the thing may be subjected to interpretation. See Knapp James A. and Jeffrey Pence ‘Between Thing and Theory’, at p 654. Knapp and Pence stressed, at p 655, that while there are things that through a material
I suggest that it is useful to think of this thing in terms of a trinity.\textsuperscript{32} This trinity consists of the thing as produced by the parliament; the thing as replicated through a separate production process; and the thing becoming an object when utilised by some agent.

Primary legislation then is a thing that may be transformed into an object through some utilization process. As such this thing becomes a social construction\textsuperscript{33} that forms the basis for further social reconstruction.\textsuperscript{34} So then, I am dealing with this thing from a particular perspective: that of the thing being-in-the-truth as a physical phenomenon that is present-at-hand.\textsuperscript{35} The use that may be made of this thing is entirely another matter: -

existence are a fact, there is a concomitant tendency for things to become objects of study or desire and that:

\begin{quote}
the instant that the thing is reduced to a set of characteristics on which we might agree, it is taken up and transformed into something much less settled: evidence, symbol, artifact.
\end{quote}

\textsuperscript{31} The distinction I wish to make is that a thing is “itself-there” in that it exists “there is the flesh”, however, any judgment or thought about the thing invokes a transformation, an act of objectification, in which the thing becomes an object that is “already be present in mind, either in an empty way or as intuitively self-given”. See Husserl Edmund, \textit{Experience and Judgment}, at p 19. Husserl does not make a distinction between thing and object. Husserl discusses objectification, at pp 62 and 63, and asserts that objectification is a necessary step in the production of knowledge.

\textsuperscript{32} In the \textit{Preface} to the 1994 edition of his book \textit{Laws of Form}, Spencer-Brown comments that it is “remarkable how all the ‘building blocks’ of existence appear as triunions” and indeed the so-called divine trinity of Christianity merely summarizes what is some perceived construction of the “formation of any thing whatever”. Spencer-Brown endorses what he called a triple identity that is “the definitional identity of reality, appearance, and awareness”. See Spencer-Brown, \textit{Laws of Form}, 1994 Limited Edition, at p vii. Such a statement by Spencer-Brown is a reflection of Plato’s comments on the notion of a trinity:

\begin{quote}
For each thing that there is three things are necessary if we are to come by knowledge: first, the name, secondly, the definition, and thirdly, the image. Knowledge itself is a fourth thing, and there is a fifth thing that we have to postulate, which is that which is knowable and truly real”.
\end{quote}

This extract from Plato’s \textit{Theory of Ideas} is quoted in Kenny Anthony, \textit{Ancient Philosophy}, at p 49. An interesting further example of this so-called triunion is apparent in the doctrine articulated by General Powell, the Chairman of the US Joint Chiefs of Staff, following the Vietnam War. The Powell doctrine specified that a necessary condition for any successful extended engagement of American military depended upon the involvement of the three elements, the military, the government, and the people. See Strachan Hew, \textit{Clausewitz’s On War}, at pp 1-3.

\textsuperscript{33} In this thesis, I have used the term ‘social construction’ to mean the way in which a particular social practice gives meaning to the interactions and events that may be associated with an object or event. The social construction would take into account such components as the structural, discourse, systematic and semiotic.

\textsuperscript{34} In suggesting that a thing can be transformed into an object I am arguing that a change occurs in the nature of the thing in that when the thing is used in the furtherance of some course of action the thing is converted from property into capital. I have adapted this distinction of a thing, or an object, being property or capital from Somers Margaret R., ‘\textit{Let Them Eat Social Capital-Socializing the Market Versus Marketing the Social}’, at p 9.

\textsuperscript{35} I have taken this description from Paley John, ‘\textit{Misinterpreтив Phenomenology: Heidegger, Ontology and Nursing Research}’, at pp 818 and 819, where the author discusses the notion of Heidegger of evaluating the ontological priority of everydayness and the impact of the practice of scientific activity.
in that this text may be, or may not be, hermeneutically reconstructed in an endeavour to attribute meaning or to justify some action.\(^{36}\)

I argue that primary legislation has been characterised through the discourse of a particular subsystem\(^{37}\) of society and I call this subsystem the legal practice.\(^{38}\) I further argue that this portrayal of primary legislation is not necessarily correct because characterisation is contingent upon context. While much of the ascribed characterisation of primary legislation by the legal practice is, at the very least, questionable, such categorisation promotes the ends of this legal practice. Primary legislation is defined by this legal practice in terms of a narrative that is a statement of self-perception. This narrative\(^{39}\) is the hidden language of the law,\(^{40}\) and constitutes a metaphysical dimension to identify and give effect to what is perceived by those within the legal practice as amounting to the good. The themes of the narrative stimulate choices about the validity and reality of the law. For example, the narrative provides justification for the perceived causal relationship between so-called legal principles and adjudication. Such a justification is a methodology that is connected to a precedent and this precedent will be a consequence of the narrative.\(^{41}\) The exercise of such a dimension stimulates a perception that primary legislation is something of a self-perpetuating order,\(^{42}\) with each separate enactment becoming part of a collective.

\(^{36}\) This description was adapted from Vandenberghe Frederic, ‘Working out Marx: Marxism and the End of the Work Society’, at p 21, where he analysed the Communist Manifesto. I am not comparing primary legislation to the Manifesto but the description provided by Vandenberghe does provide a framework that I found useful: - the practice of hermeneutically reconstructing a text from the past to be applied in the present.

\(^{37}\) I deal with the notion of subsystems in chapter IV of the thesis.

\(^{38}\) I outline what I see as the attributes of the legal practice in chapter V of the thesis.

\(^{39}\) Action within some narrative context has, as Luhmann has pointed out, the dual function of characterizing actors while propelling the particular story. Luhmann Niklas Social Systems, at p xliii.

\(^{40}\) I have taken the term ‘hidden language’ from Leiboff Maret and Mark Thomas, Legal Theories in Principle, at p 3, where the term is used as an explanation of why some theories about the law are more acceptable to an individual than other theories because the acceptable theory accords with some internalized concept.

\(^{41}\) Generally see Yablon C. M. ‘Law and Metaphysics’, at pp 616 and 617, where the author discusses the development of the arguments of Pound and Bingham.

\(^{42}\) The phrase ‘self-perpetuating order’ was taken from Edmundson Mark, Literature against Philosophy, Plato to Derrida, at p 55, where the author was commenting on the popularity of de Man’s mode of interpretation that was difficult to acquire and it also provided arcane knowledge.
I see it as being necessary to focus on the distinction between describing and justifying a particular course of action. This process is, of course, circular but then circularity is the foundation of the paradox, some impossible unity or conjunction of opposites, which is the law. Circularity is not a logical flaw but is rather a characteristic of a rigorous network. In such networks “all items of discourse circulate back upon each other without being questioned, whereas the very issue of tautology is raised only where networks are separated and in conflict”.44

The rigorous network that I have called the legal practice, by failing to acknowledge the reality of primary legislation, perpetuates myths that endorse a reconstruction of primary legislation. There is within this legal practice an unwillingness to accept the reality of uncertainty and this unwillingness generates an ideal of certainty through the manifestation of statements such as primary legislation is a law; or primary legislation is a plan of management. The legal practice is seeking to construct order by attaching to a particular thing a value or a validity that can be measured against the internal validation of the legal practice. Such a validation is an expression of the self-perception of the legal practice. Order for the legal practice is an ideal that can be achieved by the explicit and continuous application of internal functional components. The search for such an ideal is indicative of a closed entity that seeks to reject the uncertainty that occurs with environmental pressure. What I am suggesting is that these characterisations of primary legislation are instances of a social interaction that has taken a certain linguistic form. These characterisations are the articulation of a narrative that embodies themes of the sovereignty of the law and of certainty.

43  This distinction between a description and the justification of an action is discussed in Yablon Charles M., ‘Law and Metaphysics’, at p 627.
45  See chapter II for a list of so-called traditional statements about the nature of primary legislation.
46  See Axel T. Paul, ‘Organizing Husserl: On the Phenomenological Foundations of Luhmann’s Systems Theory’, at 373, where the author asserts that the basic assumption of Luhmann is that there are subsystems that “must find their place within a hypercomplex environment, and find it specifically through building internal or ordered complexity”.
47  See, for example, the discussion in Clam Jean, ‘System’s Sole Constituent, the Operation: Clarifying a Central Concept of Luhmanian Theory’, at p 66, about order within a subsystem in that the maintenance of order within a subsystem is “an explicit and continuous performance”.
48  I have taken the description of social interaction taking a linguistic form from Blommaert Ian and Chris Bulcaen, ‘Critical Discourse Analysis’, at p 448, where the description is used in a different context.
I see the legal practice as being a socially embedded autonomous subsystem of society that has a complex form of social regulation and an internal evaluation standard. This legal practice amounts to a collective congress that has developed through self-representation and self-affirmation. I have described the legal practice as a subsystem of society in that there is autonomy that is achieved through the self-production that is a characteristic of the legal practice. To my mind, this institutionalisation can be explained through the application of autopoietic theory. The legal practice is a subsystem and this subsystem can also be seen as a form of social capital in that there is a network of all-embracing connectivity. This connectivity endorses and sustains, through various control mechanisms, such things as rules of conduct and also highlights mutual obligations, a norm of mutuality, assumptions, values, social relations, and, most significantly, the development of an ideal language.

While I do not subscribe to the view that reality is dependent upon language, in that there may well be some things that may be apprehended in that they are knowable without interpretation, language and meaning are derivatives of a historical and theoretical context. Language usage will define a practice in that understanding language is a

49 These statements about a collective assemble and self-representation and self-affirmation were taken from Roberts David, ‘Towards a Genealogy and Typology of Spectacle’, at p 55, where the author discusses Durkheim’s views of the essentials of religious life. I wanted to capture something of this characterization in my description of the so-called legal practice.

50 In discussing the application of autopoietic theory to the law, Luhmann has argued that the autonomy of the law is not some desired goal but is rather a fateful necessity. See Luhmann Niklas ‘The Self-Reproduction of Law and its Limits’, at p 112.

51 I am, by this statement, asserting nothing more than propositions are characterised by some truth-value. For example, if I were standing on some rise the fact that the ground is undulated would be universally accepted, however, the term used to describe the undulation may well be contested such as whether it is a rise, a hill, or a mountain. See Davidson Donald, Problems of Rationality, at pp 3 and 4, for a discussion about forming judgements about truth-values.

52 Bloor has asserted that the relationship of theory to practice is usually defined in either one of two ways. The first is to give priority to theory over practice while the second is to reverse the process and give priority to practice. Bloor asserts that the process of according priority to theory is often designated ‘rationalism’ while the label ‘conservatism’ is applied to that of according priority to practice. Bloor asserted “[t]hese are not the only possible approaches but they are, arguably, the most stable and difficult to avoid of the options. They have also given rise to identifiable and, to some degree, self-conscious traditions of ideological and philosophical analysis”.

See Bloor David, ‘Wittgenstein and the Priority of Practice’, at p 95.
social activity with the identity of an utterer being a key indicator for the evaluation of the utterance. In relation to the law, language is a signifying system that has been adopted by the legal practice as an ideal language for identifying, and either solving, or discarding as irrelevant, what are considered by the legal practice to be legal problems. This connectivity inspires a belief of all belonging to the law through the endorsement of co-operative activities and exchanges. These co-operative activities and exchanges develop a social process that operates at macro social, cultural, and institutional levels to shape the ideas that those within the legal practice formulate and express.

The legal practice is the nexus of those forms of both saying and doing that are related to the law by a socially standardised pattern of understanding and knowing. The legal practice then is, in reality a form of tribalism in that it is an expressed self-conception. The identification of what is and what is not the law is a function of the discourse of this legal practice. I see this expression as being twofold because while a judge will pronounce what the law is, such a pronouncement will be a product of the discourse of the legal practice since the judge will be constrained by the current paradigm that is accepted by the legal practice. That is to say, the judge will use the language, and apply the narrative, that is indigenous to whatever is the paradigm within the legal practice at

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53 Generally see Chapter 3 ‘The Language Game: From Ambiguity to Indeterminacy’ in Hutchinson Allan C., *It’s All in the Game.*

54 See Dueck A.L. and Thomas D. Parsons, *Integration Discourse: Modern and Postmodern*, at pp 233 and 234. Dueck and Parsons adopt the notion of Wittgenstein of the linguistic self where the “meaning of a proposition is found in the set of rules governing the use of the expression in practice”. The quoted passage is at p 234.

55 Malik Rachel, *Fixing Meaning-Intertextuality, Inference and the Horizon of the Publishable*, at pp 16 and 17, where the author discussed the concepts of pragmatics, inference and relevance, and the semiotic treatment of language as a model for other signifying systems.

56 I have taken these comments about an ideal language from Gross Neil, *Richard Rorty’s Pragmatism: A Case Study in the Sociology of Ideas* where, at p 95, the author discussed the acceptance by Rorty in his early writings of Wittgenstein’s application of ordinary language.

57 I have taken most of this description of the attributes and functions of ‘social capital’ from Szreter Simon, *The State of Social Capital: Bringing back in Power, Politics, and History*, at p 574.

58 I have taken most the description of this social practice from Gross Neil, *Richard Rorty’s Pragmatism: A Case Study in the Sociology of Ideas*, at p 102, where the author discussed the impact of “the new sociology of ideas”.

59 I have taken the phrase “socially standardized way of understanding and knowing” from p 211 of Reckwitz Andreas *The Status of the “Material” in Theories of Culture: from “Social Structure” to “Artefacts”*, where the author discussed the ideas of Schatzki about social practices and described a social practice as being a regular bodily activity held together by a socially standardized way of understanding and knowing.
the particular time. So while I do acknowledge that there is something called the law, I do question whether there is any point in seeking to discover some valid and accurate knowledge of this entity by an analysis of the law as an independent field of study. In other words, I see little point in attempting to analyse so-called legal principles because within the law, or indeed within any discipline, such principles are a reflection of consensus or belief.60

I see the discourse of this legal practice as being an exercise of power in that the discourse seeks to articulate what is true; what is not true, and what counts as knowledge.61 The boundary of this discourse serves as a form of dissertation control by clearly indicating the frame of reference of what is, or is not, within the perspective of the discourse. This boundary will not, of course, serve to develop or specify the assessment criteria of the discipline. In this case, the discipline is the law and this includes the application of the law. It is through this discourse that the legal practice not only specifies assessment criteria, but also seeks to establish a societal pre-eminence through the maintenance of a unique ideology, association, and function.

The concept of what I have called the legal practice is fundamental to my hypothesis. I reject the representations about primary legislation that have been inherited from what I have called the legal practice, and I acknowledge what has been called the modern social and philosophical condition of recognising the split between subject and object.62 Such a

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60 Generally see Chapter 8 ‘Law and Literature’ in Minda Gary, *Postmodern Legal Movements*, particularly at pp 160 and 161, where the author discussed the law and literature movement and the views of Fish and Rorty. Minda argued, at p 161, that Fish “views professional expertise as merely a matter of literary style or taste; it cannot provide anything more in the way of a legitimating ground”.

61 I have adapted this description from Manderson Desmond, ‘Apocryphal Jurisprudence’, at p 31, where he discussed the concept of the apocryphal. Manderson related the apocryphal to “the bestowing of legitimacy on one story rather than another that comes after the event, as an exercise of power and not of knowledge – or rather in Foucauldian terms, as an exercise of power which thereby constitutes what is to be counted as knowledge and what, henceforth, is not”. The quoted passage is at p 31.

proposal may well be radical as I have sought to deny what seems, at least to me, to be orthodox thought.\textsuperscript{63}

I stated that, upon enactment, the thing that is primary legislation is merely a material entity but will, upon usage, be transformed into an object. A thing is created through practical activity\textsuperscript{64} and usage ensures the emergence of a social construction because the object has some utility attributed to it. As a result, the object is accorded the status of some cultural apparatus for sections of society. That is to say, the thing takes a form and in a western liberal democracy the dominant social form is that of the commodity.\textsuperscript{65} In section III.15 of the thesis I discuss the commodity form and commodification. The material entity thus has become the objective of a belief\textsuperscript{66} and the relationship between the material entity, the thing, and the representations or impressions of that material entity, the object, generates two separate language games. Such a relationship, according to Wittgenstein, is complicated and if “you try to reduce their relations to a simple formula you go wrong”.\textsuperscript{67} There must be something that distinguishes an object from a thing\textsuperscript{68} and it is action that transforms the thing into an object.\textsuperscript{69} A material entity is not frozen in some fixed role nor is it frozen in any one place in the flow of human activity\textsuperscript{70}

\textsuperscript{63} See generally Hunt Alan, \textit{The Radical Critique of Law: An Assessment}, at pp 34 and 35. Hunt asserted that the term ‘radical’ denotes some “self-conscious challenge to orthodoxy which takes the form of a denial of orthodox thought”. The quoted passage is at p 35.

\textsuperscript{64} See Lee Wendy Lynne, \textit{On Marx}, at pp 4 and 5, who commented on the process of objectification and on an object being the product of some practical activity. Marx did not make a distinction between thing and object. In \textit{The Economic and Philosopher Manuscripts of 1844}, at pp 107 and 108, Marx used the term ‘object’ and claimed that for man:

> “all objects become for him the objectification of himself, become objects which confirm and realize his individuality, become his objects: that is, man himself become the object. The manner in which they become his depends on the nature of the objects and on the nature of the essential power corresponding to it; for it is precisely the determinateness of this relationship which shapes the particular, real mode of affirmation.”

The quoted passage is at p 107.

\textsuperscript{65} See Engestrom Yrjo, \textit{Interobjectivity, Ideality, and Dialectics}, at pp 263 and 264.

\textsuperscript{66} See Williams Bernard, \textit{Introduction to Plato’s Theaetetus}, at p 88. Williams discussed notions of knowledge and suggested that it was possible to think of enduring things such as material objects and people as the objects merely of belief.

\textsuperscript{67} Wittgenstein Ludwig, \textit{Philosophical Investigations}, at p 154.

\textsuperscript{68} See Luhmann Niklas, \textit{Law as a Social System}, at p 67. Luhmann argued that any conceptualisation of an object is dependent upon making some observation about the existence of a distinction so that it is the act of making a distinction that is at the basis of what I have designated as the transformation process.

\textsuperscript{69} Engestrom Yrjo, \textit{Interobjectivity, Ideality, and Dialectics}, at p 261.

\textsuperscript{70} Engestrom Yrjo, \textit{Interobjectivity, Ideality, and Dialectics}, at pp 259 and 260.
as there is potential for the “movement of objects between and across their multiple potential roles and meanings”. The thing, using my terminology, coupled with some objective of a user, ensures some potential role and meaning for the thing and the thing has become an object for that user. Indeed, such movements are at base of the functioning of society. In section III.12 of the thesis I discuss the transformation of primary legislation and in section III.14 I outline a view of primary legislation as a transformed object. While the issue of the symbolic value of an object within a society has generated significant literature, such considerations are largely outside the scope of this thesis.

I.3. ‘Brute Fact’ and ‘Institutional Fact’

I have described the thing produced by a parliament as a brute fact and I now outline the distinction between brute and institutional facts.

Searle argued that there are paradigms of knowledge that can vary greatly and these paradigms become components of the model of all knowledge. These paradigms consist of statements about various kinds of facts. Some facts will be a brute fact, that is to say, a fact that can be reduced to a physical or psychological property. There are also institutional facts and the existence of an institutional fact is dependent upon the existence of certain human institutions. A characteristic of an institutional fact is that it has some future consequence in that such a fact cannot exist in isolation but can only

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73 The term ‘paradigm’ is widely used within the natural sciences in that the term seems “to provide a blueprint for how a community of inquirers can constitute themselves as a science, regardless of their subject matter”. This quote was taken from Fuller Steve ‘Being There With Thomas Kuhn: A Parable for Postmodern Times’, at p 269. The term has become something of a term of art and in that it is constituted by some generally accepted criteria. First, there are for any discipline recognised achievements that will serve as coherent traditions from which to define problems and solutions. Secondly, these achievements will be defined as a set of recurring intertwined theoretical and methodological beliefs that serve to selected theories as endorsed standards. Finally, these beliefs form patterns of philosophical and methodological commitments that are revealed through the venues that are utilised by a discipline to outline an endorsed discourse. (I have adapted the description of a paradigm from Shapere Dudley, ‘The Structure of Scientific Revolutions’, where the author discussed the ramifications of the paradigm defined by Kuhn Thomas S., The Structure of Scientific Revolutions, at pp 384-386)
exist within some systematic relationships with other institutional facts.\textsuperscript{74} The example of money has been used to illustrate this relationship because for a monetary system to exist there must be a system of exchange, and for a system of exchange to exist there must be a system of property and property ownership.\textsuperscript{75}

Examples of institutional facts are: the marriage of a Mr Smith and a Miss Jones which is dependent upon the institution of marriage; the results of a baseball game which is dependent upon there being a baseball game; and, for Searle, parliament enacting primary legislation. It has been claimed that each of these examples involves a number of physical movements, states, and raw feelings. But each of these things only amounts to what is a step or stage in the establishment of the institutional fact. The inclusion of some form of institutional activity is necessary to give expression to the particular example. Such institutional activity provides a system of constitutive rules so that each “institutional fact is underlain by a system of rule(s) of the form ‘X counts as Y in context C’”.\textsuperscript{76} The claim that a five-dollar note is an institutional fact illustrates the application of these constitutive rules in that the institution of a monetary system changes the object from a piece of paper with various coloured printing on it to a specific unit of currency and therefore an institutional fact.\textsuperscript{77}

I have related primary legislation to the concept of a brute fact and my use of the term brute fact is an expansion of the definition provided by Searle. I can best illustrate the difference that I want to emphasise by using the example of the five-dollar note. Searle argued that the five-dollar note was an institutional fact because the paper object only became a unit of currency because of the intervention of the institution of the monetary system. My analysis is somewhat different in that the five-dollar note has physical characteristics that are inherent in the production process and these characteristics define the piece of paper as a particular thing: a five-dollar note.

\textsuperscript{74} Searle John R., \textit{Speech Acts}, at pp 50 and 51.
Searle, to my mind, fails to acknowledge the ramifications of production\textsuperscript{78} of the thing; the producer of the thing; and also the contexts within which that object will be used or referenced. That is to say, a five-dollar note may be used in contexts that are divorced from the monetary system. A five-dollar note is a five-dollar note because of the paper used, the design and the ink used, and it is an output by a particular endorsed producer. The five-dollar note, of itself, has no further consequences. The appreciation of the note depends upon the context within which the note becomes the reference. The ramifications of the monetary system will have little meaning to my three-year-old grandson if he is given such a note to play with or to a coin collector. That is to say, the meaning given to the five-dollar note changes with the context within which the note is the reference. The same logical extension applies to primary legislation.

A relevant consideration to this notion of institutional fact is how widely one defines the term ‘rules’. For example, behaviour within a society is governed by a common set of prescribed standards or guides and these standards or guides serve as a common reference point.\textsuperscript{79} The key to any institutional arrangement is that the relevant institutional rules are defined and catalogued.\textsuperscript{80} These so-called institutional rules then go to a distinction I have attempted to make. Primary legislation, on enactment, is a thing and a brute fact. However, through the application of some institutional process, primary legislation will become an institutional fact and, in my terminology, an object.

MacCormick has sought to connect institutional concepts with propositions of legal theory and has argued that fundamental to the notion of institutional fact is the institution itself.\textsuperscript{81} The notion that institutions are systems of constitutive rules has been expanded to acknowledge that institutions and institutional facts, while connected by rules, are not identical. For example, the law will include legal principles and concepts and these legal

\textsuperscript{78} Production process are “cultural phenomena in that they are assemblages of meaningful practices that construct certain ways for people to conceive of and conduct themselves in an organizations context”. See the Introduction to du Gay Paul (Ed) Production of Culture/Cultures of Production, at p 7.

\textsuperscript{79} Bell John., ‘Policy Arguments and Legal Reasoning’, at p 74.

\textsuperscript{80} See the Introduction to Bankowski Zenon, White Ian and Ulrike Hahn (Eds), Informatics and the Foundations of Legal Reasoning, at p 59.

\textsuperscript{81} Generally see MacCormick D.N., Law as Institutional Fact, at p 9.
principles or concepts, such as ownership or contracts, are those things that relate to issues of legal claims and duties. These things are “essential to the enterprise of analysing legal systems into coherent sets of interrelated rules”, and are established, or instituted, by performance or occurrence. A distinction is made between the institution itself and instances of the institution with, for example, the law of contract being an institution and a contract being an instance of this institution. So, in order for some institution to exist within the law, the law must contain some rule that outlines the necessary form for the existence of that institution and instances of that institution.

Now the hypothesis I have outlined does suggest that there is a limitation to the analysis of, for example, MacCormick. To my mind such analysis fails to acknowledge a basic element: the existence of the thing itself. For example, if there is a deed of ownership or if there is a written contract, is it sufficient to accept that the deed, or contract, only exists as a trapping of the legal concept of ownership? To my mind it is not. The deed and the contract have a separate existence and I would make the distinction between the thing and the subsequent activity. Certainly the utilisation of a particular thing is of significance, but we are talking about two separate and diverse aspects: the thing and the use.

The distinction between brute fact and institutional fact illustrates the essence of my argument about the nature of primary legislation. Primary legislation, upon enactment, is merely a thing that has certain physical attributes that the thing was given during the production process. Upon enactment, the thing merely sits in some repository and no consequences can be ascribed to the thing. The thing is not a law, or any other such euphemism, as the thing has no attributes or properties other than the physical properties acquired during production. It is the act of use that transforms primary legislation from a brute fact into an institutional fact in that the attribution of meaning, and therefore ascription of a function, is a product of the act of using. That is to say, this thing may be taken from a repository and used by a social actor within some context and upon use it

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82 MacCormick D.N., Law as Institutional Fact, at p 5.
acquires some institutional value. So the existence of whatever the attributes that have been given to the primary legislation is dependent upon the existence of that particular institution. The primary legislation has become an object and an institutional fact. There is a distinction between the thing and the use of that thing.

I.4. Distinction Between Terms ‘Primary Legislation’ and ‘Statute’

Throughout this thesis I have made a distinction between the terms ‘primary legislation’ and ‘statute’. For me, primary legislation, as enacted by a parliament, has a limited purpose and is, in essence, functionless. The user of the primary legislation will either explicitly or impliedly attribute a function. For example, primary legislation when considered by a court acquires a function: that function is whatever the court said it is. A court frequently considers primary legislation, and the court, in performing its adjudication function, will adopt or adapt those conceptual techniques that are not at odds with the ethos of that particular court and will attribute meaning to a particular enactment. Adjudication is instrumental as it is part of a language game and serves to give effect to an endorsed narrative about the ideal society. For me, the term ‘statute’ is merely the identifier of a statement by a court of the meaning attributed to some primary legislation that has been considered by the court.

In making a distinction by using the term primary legislation I am suggesting that it is appropriate to acknowledge the post-structural concept that a term gains a meaning from its difference from any other term. To call a thing primary legislation is, within Wittgenstein’s conceptualisation, “not to ascribe any extraordinary property to it, but only to its peculiar role in the language-game”; in this case, the language game of naming a particular thing within a specific discourse. While many, of course, see the terms primary legislation and statute as being synonymous, I consider that there is merit in making the distinction because primary legislation is the term to identify the thing that

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84 Generally see Black Julia, ‘Critical Reflections on Regulation’, at p 2.
85 This quote from Wittgenstein Ludwig, Philosophical Investigations was taken from Murphy Tim, The Oldest Social Science?, p 3.
is enacted by the parliament while the term ‘statute’ refers to the court endorsed attribution of meaning that engenders some subsequent unique symbolic value.

While I do not agree with the assertion that an enactment of a parliament is not a law until interpreted by a court, such an assertion does indicate that there is a distinction to be made between the thing enacted and the use of that thing.\(^{86}\) What I am asserting here is that what a court says about primary legislation is not what primary legislation is, because a court in assigning meaning to an enactment is creating an institutional fact from the brute fact and the court, as with any other user, is the creator of that institutional fact.

\textbf{1.5. What I Am Not Arguing}

In answering this question of what really is primary legislation, I reject those traditional arguments that seek to inflict some all-embracing concept, some label, through the imposition of selected universal values or through so-called universally recognised criteria. I give examples of such all-embracing concepts in chapter two of the thesis.

I also want to reject those arguments that would seek to rationalise consideration of primary legislation through the tenets of some theory about choice and policy that sees primary legislation as being the articulation of a compromise of conflicting values and norms.\(^{87}\) Certainly primary legislation could well incorporate some compromise or other, but what is the relevant referent is not a theory that attempts to rationalise any such compromise but rather the thing that is the result of the compromise. Similarly, I would

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\(^{86}\) Gray John Chipman, \textit{The Nature and Sources of Law}, at p 170. Gray made a distinction between primary legislation being part of the law and being a source of the law and based this distinction upon the fact that primary legislation does not interpret itself but rather its “meaning is declared by the courts, and it is with the meaning declared by the courts, and with no other meaning, that they are imposed upon the community as Law”.

\(^{87}\) This description was taken from Douzinas Costas, Warrington Ronnie, and McVeigh Shaun, \textit{Postmodern Jurisprudence}, where they discussed the concept of a theory of legislation being a theory of choice and policy. Aleinikoff in outlining a public choice doctrine asserted that as primary legislation is the product of compromises among groups it would therefore be pointless to attempt to attribute some intention or purpose to the primary legislation. Aleinikoff T. Alexander, ‘\textit{Updating Statutory Interpretation}’, at pp 28 and 29.
also renounce those normative theory assertions that seek to impose some particular
status on primary legislation because the enacted primary legislation does, or does not,
meet some perceived standard.88

Although I would discard the notion of universalism, such a rejection does not imply the
acceptance of the postmodernist attributes of doubt, fragmentation, or any negation of
meaning89, or indeed of any acceptance of some “gnostic vision of the fallen world
trapped in total illusion”.90 A feature of postmodernism, or at least of postmodernist
culture, is the dominance of image so that a thing is defined not in terms of the thing
itself but rather through a conceptual framework91, and indeed, such a culture has been
referred to as a domain of the image.92 For example, within any culture understanding is
the product of the social form of whatever information is being considered rather than the
content of the particular information.93 That is to say, it is the application of what
amounts to a politics of form that will serve to endorse what does amount to a brand
name, and it is this brand name that becomes the necessary connector to convey
understanding.

CHAPTER II THEORETICAL LIMITATIONS AND MAINSTREAM VIEW
OF PRIMARY LEGISLATION

Investigations of knowledge or morality or language or society may be
simply apologetic attempts to externalise a certain contemporary
language-game, social practice, or self-image.

Richard Rorty

88 I give examples of such assertions in chapter two of this thesis.
89 This comment about postmodernism was taken from Zima Peter V., The Philosophy of Modern Literary
Theory, particularly pp 185-188.
90 I have taken this description from Roberts David, ‘Illusion only is Sacred’, at p 85, where he made
comparisons of various versions of the completion of modernity.
91 See King Anthony, ‘Baudrillard’s Nihilism and the End of Theory’, at pp 89 and 90 and 101 and 102.
92 Phrase taken from Kearney Richard, Poetics of Imagining: Modern to Postmodern, at p 170, where he
discussed the views of Roland Barthes.
II.1. Introduction

In considering the characterisation of primary legislation it becomes a question of whether it is sufficient within the analytical process to merely outline a vocabulary, or whether it is necessary to develop a perspective to aid understanding of the symbolic structures that may impact on the social order. Schatzki has suggested that certain phenomena, such as knowledge, meaning, human activity, language, and social institutions, are derived from what he called “the field of practices”. Acceptance of such an idea suggests that merely outlining a vocabulary may be sufficient to resolve a question of integration and whether a thing satisfies a definition. However, further analysis would necessitate the development of a perspective.

In developing my theory about the nature of primary legislation I have concentrated on the Australian Capital Territory. I acknowledge that my hypothesis would have more application in a small polity: a jurisdiction that is similar to that of the Australian Capital Territory. However, I would assert that my hypothesis would also apply to a larger common law jurisdiction. It would not be different in kind but merely different in degree because there is a dominant view of primary legislation that, irrespective of jurisdiction,

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93 Sourayan Mookerjea, ‘Native Informant as Impossible Perspective: Subalternist Deconstruction and Ethnographies of Globalization’, at p 127.
95 See Reckwitz Andreas, ‘The Status of the “Material” in Theories of Culture: from “Social Structure” to “Artefacts”’, and I have adapted this distinction between vocabulary and perspective from the introduction to this article. Reckwitz claimed, at p 195, that cultural theories have difficulty evaluating the material in relation to the symbolic. Reckwitz asserted that within classical sociology theories of knowledge, the material is viewed as a social structure that provides a foundation for orders of knowledge. However, there has been a reaction within modern cultural theories against seeking social foundations outside culture. Reckwitz claimed at p 196:

“High-modern culturalism redefines the material as ‘objects of knowledge’ or ‘symbolic objects’, as objects which become visible in the context of systems of meaning (categories, discourse, communicative action). In the field of cultural theories of the last decades, this conceptualisation of the material has been the dominant one.”
96 Schatzki Theodore R., Introduction: Practice Theory’, at p 2. I have not provided a complete list of the phenomena identified as flowing from this field of practices.
dictates how primary legislation is perceived within the body politic. I argue that this dominant view fails to appreciate the nature of primary legislation because there is a reification of law in legislative form, with an emphasis upon objectification of law. This mainstream view sees primary legislation as a given with an interpretative focus upon a definable object. One possible reason for such an acceptance may be that there has been limited theoretical consideration about the nature of primary legislation. It is indeed surprising, irrespective of the jurisdiction involved, how little theoretical consideration has been given to primary legislation in contrast to consideration of the common law and the judicial process.

In this chapter of the thesis I comment on the limitations of this theoretical consideration and describe the mainstream view of primary legislation. It is, I think, unarguable that primary legislation is considered to be a form of law within this mainstream view.

II.2. Lack of Consideration of Primary Legislation

Dworkin has argued that a theory of law should be both normative and conceptual and should include three elements: a theory of legislation; a theory of adjudication; and a theory of compliance.97 There does seem, however, to have been a dearth of theoretical considerations about what really is primary legislation.

Waldron, for example, claims that there is no normative theory of legislation to evaluate claims about the credentials of both legislation and parliament as respectable sources of law.98 Indeed, Waldron goes somewhat further and claims that the concentration on judicial decision-making within modern legal theory has meant that:

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97 Dworkin R., Taking Rights Seriously, at pp vii and viii.
98 See the Introduction to Waldron Jeremy, The Dignity of Legislation, particularly at pp 1, 2, and 3.
“we are not in possession of a jurisprudential model that is capable of making normative sense of legislation as a genuine form of law, of the authority that it claims, and of the demands that it makes on the other actors in a legal system”.  

Now while I disagree with Waldron’s conception of legislation being a form of law, his claim about the lack of theoretical consideration does seem justified. For example, Wintgens has commented that before the latter part of the 20th century, the focus of legal theory studies was centred on adjudication, to the detriment of any study of legislation. Wintgens argued that there was no real need to consider any theory of legislation because if one followed a natural law perspective then legislation must, by definition, have included natural law principles. If, on the other hand, one adopted a positivist perspective then theory was irrelevant as the law-making institution was sovereign. Wintgens stressed that it is important to develop a theoretical perspective of primary legislation so that criteria may be articulated in order to evaluate whether primary legislation is good or bad. Such a theoretical perspective would also be relevant to the issue of legal scholarship as such a perspective might help to overcome the recurring theme within legal studies about the distinction between the law as it is and the law as it should be.

Primary legislation has certainly been seen as being relative to legal scholarship, but legal scholarship is usually concerned with explaining some perceived hole in legal theory “within some larger theoretical framework in order to achieve some desired societal goal”. Jackson argued that there are two reasons for this focus. First, the dominant positivist paradigm accords primary legislation a certain authority and, secondly, primary legislation is seen as a primary text because the wording is seen as canonical.

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Tomasic has suggested that although the study of the social and legal context of legislation has long been recognised, such studies suffer from “an unfortunate preoccupation” with the effectiveness of legislation. Tomasic also commented that although primary legislation has been perceived as an appropriate response to social problems, “a wide spectrum of writers have pointed to the rather poorly developed theoretical dimension of the interest in the legislative process, in all its parts”. This so-called poorly developed theoretical dimension recurs; with primary legislation being accepted as some form of given.

Posner is another who has commented about the perceived theoretical limitations with the claim that, although there are countless studies that refer to primary legislation, these studies are not guided by any theory of legislation. Posner also claimed that academics and those within the legal fraternity would be critical of any attempt to develop such a theory. Such wariness would seem to have a long history in that there is a tradition of condescension of legislation. For example, Pound, writing at the beginning of the 20th century, commented that a characteristic of American law was the “indifference, if not contempt” that American courts and lawyers exhibit towards primary legislation. Interestingly, there are comments about the attitude of courts that suggest that little has changed since the article by Pound.

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106 See Tomasic Roman, ‘The Sociology of Legislation’ at pp 19, and 33. In the Introduction to the Chapter Tomasic gives a list of various sociological studies of legislation. See also Campbell C.M., ‘Legal Thought and Juristic Values’ at pp 29-30.
108 I am here suggesting that there is an acceptance that primary legislation exists within some benign state.
109 See, for example, Davies Margaret, Asking the Law Question, Pearce D.C., and R.S. Geddes, Statutory Interpretation in Australia, and Marmor Andrei, Interpretation and Legal Theory.
111 See, for example, Nonet Philippe, ‘What is Positive Law’ who claimed, at p 669, that jurisprudence reflects a legal and institutional experience that subordinates positive law, and that jurisprudence “is heir to a long tradition of lawyerly contempt for legislation”.
113 See, for example, Finn Paul, ‘Statutes and the Common Law’, particularly at pp 18-20. Finn concluded, at p 20, that “it may come as a surprise to be reminded that, the limitations of our Commonwealth Constitution apart, we have not as yet committed our common law to the acceptance of an unqualified doctrine of parliamentary sovereignty.” Finn also, at p 20, quoted from Union Steamship Co of Australia Pty Ltd v King ((1988) 166 CLR 1 at p 10) that it remained an open question “[w]ether the exercise of… legislative power is subject to some restraints by reference to rights deeply rooted in our democratic system of government and the common law”.
I would argue that if primary legislation were recognised for what it is, a thing, then that act of recognition would ensure that there is awareness of the negativeness of that thing. That is to say, there is not only an awareness of what the thing is but also awareness that the only function of a thing is that of being a thing. A consequence of such reasoning is that the debate about the law would require a significantly different focus and this focus would be concentrated on the discourse of a particular subsystem of society. While the prevalence of primary legislation is now acknowledged, the conceptual framework does seem to be little different from that described by Wintgens.

II.3. Mainstream View

I now want to outline what I have identified as the mainstream view of primary legislation.

As I have pointed out, the traditional argument is that it is a function of a parliament to enact a law and for a court to interpret the law. For example, with the advent of self-government for the Australian Capital Territory, the Commonwealth parliament authorised the parliament of the Australian Capital Territory to make laws for the Territory. The Self-Government Act 1988 (Cth) specifies that the Legislative Assembly of the Australian Capital Territory may enact laws for the peace, order and good government of the Australian Capital Territory.

Traditional legal doctrine suggests a certain structured concept of society in which the law is specific and independent and also that social positions can be identified spatially depending on the distance from the centre of power. One application of this so-called

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113 Generally see Ost Francois and Michel Van De Kerchove, ‘Constructing the Complexity of the Law: Towards a Dialectic Theory’, where, at p 155, the authors discussed the ontology of the law and sought to reach a dialectic understanding of the negativeness of every object and the developmental nature of being.
114 See, for example, Finn Paul, ‘Statutes and the Common Law’, particularly at pp 20-23, for similar comments.
115 See the Self-Government Act 1988 (Cth) section 5.
116 Generally see Murphy W.T., The Oldest Social Science?, at p 35.
traditional view is that primary legislation is a law.\textsuperscript{117} However, a consequence of this so-called traditional view is that the interests of the legal practice have become more prominent.\textsuperscript{118} This dominance has led to the articulation of a narrative that seeks to order society.\textsuperscript{119}

The rhetoric of this mainstream view identifies Australia as a parliamentary democracy that has a constitutional system within which primary legislation has an exalted status in that it has been identified as the cornerstone of this constitutional system.\textsuperscript{120} A further example of this exalted status is the claim that a fundamental constitutional principle of the system of government within Australia is that primary legislation is the responsibility of a parliament.\textsuperscript{121} That is to say, parliament expresses the will of the people by enacting primary legislation so an enactment is the voice of the people and the people are governed by such legislation. In the Australian context, primary legislation is enacted within a well-established political system that acknowledges a constitutional framework. This political system is that of a western liberal democracy: an advanced late capitalistic society that is characterised by an interdependence of state and society with structures that are oligarchic.\textsuperscript{122} The enactment of primary legislation is a social function that may be seen as a consequence of the development of late capitalism.\textsuperscript{123}

Reilly has provided a succinct statement of this so-called mainstream view of primary legislation and the law with the claim that:

\textsuperscript{117} See for example Paragraph 1.2 ‘Legislation Defined’ in Pearce D.C. and R.S. Geddes, *Statutory Interpretation in Australia*, at pp 1 and 2.

\textsuperscript{118} Unger Roberto, *The Critical Legal Studies Movement*. See also Morrison Wayne, *Jurisprudence: from the Greeks to post-modernism*, at pp 468 and 469.

\textsuperscript{119} I outline my views on the importance of this narrative in chapter four.

\textsuperscript{120} This description was taken from McHugh M.H., ‘The Growth of Legislation and Litigation’ at p 37. Before the Australian Capital Territory became a self-governing territory, government regulation existed by virtue of ordinances made under *The Seat of Government (Administration) Act 1904 (Cth)*. Following self-government the regulatory instruments became acts and regulations.

\textsuperscript{121} Point made by Professor Dennis Pearce on the 25\textsuperscript{th} June 2004 during one of the Australian Senate Occasional Lecture Series. See ‘Rules, Regulations and Red Tape Parliamentary Scrutiny of Delegated Legislation’, at p 81. The claim was also made in the flyer for the lecture.

\textsuperscript{122} See Held D. ‘Crisis Tendencies, Legitimation and the State: Critical Debates’, at pp 183-187, for a general discussion.
“The interpretation of legal texts is constrained by several presumptions and expectations within the legal framework. In contrast to prose and poetry, legal texts are created purposively. Parliament expects the text of legislation to have a particular meaning, not only at the time of its creation, but also at some future time when it is interpreted and applied. Judges are constrained in their interpretations by their position in the political structure of government. Legislators make the law, the executive administers the law, and judges interpret the law in the light of a particular factual dispute. Judges must be careful not to usurp the law-making role of Parliament in this exercise of interpretation. Their interpretation must not be productive (providing new meaning for the text), but reproductive (expounding the will of Parliament).”\textsuperscript{124}

A number of identifiers have been used to identify a particular utterance of a parliament, for example, statutes, laws, acts, ordinances, or proclamations.\textsuperscript{125} The term “primary legislation” identifies a genus; a realised object; and a concept. Primary legislation, therefore, is both an analytical concept and a descriptive term. A traditional view of primary legislation would acknowledge that primary legislation is a law, but that this law has come into existence through a specific political process.\textsuperscript{126} Such a view would emphasise that the political process\textsuperscript{127} is not rational, and that primary legislation could well be a political compromise that is framed into a legislative structure.\textsuperscript{128}

\textsuperscript{123} See Jameson F., ‘Postmodernism, or The Cultural Logic of Late Capitalism’, at pp 2 and 3, where the author described a society of the designated consumer where all things are integrated into a commodity production process.
\textsuperscript{124} Reilly Alexander, ‘Reading the Race Power: A Hermeneutic Analysis’, at pp 476 and 477.
\textsuperscript{125} Gray John Chipman, The Nature & Sources of the Law asserts, at p 154, that there is no recognized noun to identify the particular genus that is, in my terms, primary legislation.
\textsuperscript{126} See, for example chapter 1.2, at pp 1 and 2, of Pearce D.C., and R.S. Geddes, Statutory Interpretation in Australia.
\textsuperscript{127} I have used the term ‘political’ throughout the thesis. The term ‘political’ can be given the restricted meaning of merely relating to “governing constitutional or liberal democracies”. This description was taken from Ricoeur Paul, The Just, at p 69, where the author discussed use of the term by Rawls. See also Mouffe Chantal, On the Political, particularly at pp 8 and 9. The term can be given a wider meaning in that the term could identify some aspect of the human condition; an activity; a particular problem; or a relationship. This description was taken from Crowley John ‘Pierre Bourdieu’s Anti-politics of Transparency’, at pp 149 and 150. I have used the term ‘political’ in this wider context to identify those continuous contests that occur within institutions, either public or private, over access to resources. This
It is an accepted practice to classify legislation as being either primary or secondary. Primary legislation is the legislation that is enacted by a parliament in accordance with some constitutional provision. The parliament will have outlined in the parliamentary standing orders some enactment ritual that is necessary to establish the status of the object as an endorsed output of the parliament. The term, ‘secondary legislation’, is a generic classification that refers to those things that are not enacted by a parliament but are made by a government under the authority of the parliament, for example, regulations, by-laws, ordinances and similar statutory instruments. Again the parliament will have specified some necessary endorsement ritual for this secondary legislation.

II.4. Descriptions of Primary Legislation

The propositions that have been used to describe or identify the perceived nature of primary legislation may be divided into two classes. The first class I have called ‘reification’.

By reification, I mean the use of some abstraction as an identification or explanation. Such reification becomes a construction and then a reality that is endowed with some social efficacy. This abstraction then becomes something of a model that will serve as the frame for analysis. While the abstraction may well not be inaccurate, the abstraction does not provide sufficient emphasis as to the nature of the entity. There is then a tendency to mistake the abstraction for the real. Indeed, there is a tendency to move from some model of a reality to the acceptance of the model as being the reality.
I would suggest that it is questionable whether it is possible to deduce a particular form from an abstraction.\(^{132}\) While labels are useful for inquiry and critique it should be recognised that these labels are not neutral and reflect conceptions and assumptions.\(^{133}\) These labels, or abstractions, do acquire a power that while persuasive does mask the real.\(^{134}\) I have used the term ‘reification’ to identify those statements that seek to classify primary legislation as having a particular form with properties that supposedly go to the nature of the primary legislation.\(^{135}\)

The second class of propositions about the perceived nature of primary legislation relates to the notion of primary legislation being measured against some normative standard. I have identified this class as ‘normative’. That is to say, satisfaction of some normative standard is necessary for primary legislation to be valid.

II.5. Reification

The accepted view of what constitutes primary legislation is something that goes to the ontology, the being, of the law. Such assertions reflect a concept of a social universe of law\(^{136}\) with primary legislation being offered as the primary methodology of modern

\(^{132}\) See, for example, Frug Gerald E., ‘The Ideology of Bureaucracy in American Law’, at p 1293, where he asserted “one of the triumphs of legal realism was to demonstrate that there is no method to deduce from an abstraction (“expertise”) any particular form of social life”.

\(^{133}\) These comments were adapted from Black Julia, ‘Critical Reflections on Regulation’, particularly at pp 2, 12-14, and 20-22.


\(^{135}\) Strathern M., Property, Substance and Effect, at pp 13-18. Strathern asserted that reification occurs when an assumption is made that about the particular form of an entity and this entity becomes an object. This form then indicates the properties by which the entity is known and, “in being rendered knowable or graspable through such properties, entities appear (in Euro-American idiom) as ‘things’”. The quoted passage is at p 13. Strathern suggested, at p 15, that entity becomes an object of attention by being considered a particular thing and therefore an object.

\(^{136}\) Phrase taken from Morrison Wayne, Jurisprudence: from the Greeks to post-modernism, at p 352, where he discussed Hart’s concept of law.
This notion of the primary methodology is summed up by the statement of Scalia that we “live in an age of legislation, and most new law is statutory law”.\footnote{Scalia A., \textit{A Matter of Interpretation: Federal Courts and the Law}, at p 13.}

A number of statements that have been used to identify the nature of primary legislation fall within what I have classified as reification. These symbolic constructions “are not to be seen as a representation of a reality ‘out there’, but as tools for capturing and dealing with what is perceived to be ‘out there’”.\footnote{See Morgan Gareth, \textit{‘Paradigms, Metaphors, and Puzzle Solving in Organization Theory’}, at p 610.} While the validity of the distinction may be problematic, what is relevant about such a statement is the recognition of the application of a symbolic construction to serve as an identifying reference. But, however such statements are classified, they do identify institutional meaning and communitarian norms.\footnote{I have taken the phrases of “institutional meaning” and “communitarian norms” from Cornell Drucilla., \textit{The Philosophy of the Limit}, where they are used in a somewhat different context. Both phrases do however convey an idea of the theme I wish to develop.} I assert that these statements are in fact ontological conditions rather than epistemological conditions. An ontological condition is a condition that does not epistemologically justify some proposition. The proposition that primary legislation is a law would be, for me, an ontological condition. That is to say, the proposition that primary legislation is a law could only be an epistemological condition if, and only if, primary legislation really is a law.\footnote{I have taken this description of ontological and epistemological conditions from Barden Garrett., \textit{‘Formalization, Invention, Justification’}, at pp 245-248.}

\footnote{See pp 4-6 of Morrison Wayne, \textit{Jurisprudence: from the Greeks to post-modernism} where the author outlined a view of legal positivism.}
Perhaps one should start such an examination with an acknowledgement of Austinian analysis, as so much of modern thinking about the law seems to start with Austin. For Austin, primary legislation is a law that has the form or shape of a rule to regulate conduct. However, the statements that fall within this classification of reification are numerous and, while the following listing might well be prolix, the statements do indicate the variety of universals that have been applied to primary legislation:

Primary legislation is a schema; primary legislation is an exercise in controlled social change; primary legislation is a textual recipe, and the enactment represents a particular view; primary legislation is a distinct form of law and is an enactment of a supreme parliament; primary legislation is an exception to, a graft upon, or a correction of, customary law and parliament legislates against the background of an all embracing customary law; primary legislation is the formal expression of a legislative policy and becomes a law; primary legislation specifies a general rule of conduct without reference to any particular case; primary legislation is a definitive ruling by a parliament and is applied wherever the specific provisions permit; primary legislation is a general rule to achieve social and political objectives and is executed by individuals; primary legislation is a form of action; primary legislation is an instrument for the administrative ordering of society; primary legislation is a communication and is subject to communication principles; primary legislation is a statement of

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142 Austin John, *Lectures on Jurisprudence or the Philosophy of Positive Law*, at p 36.
143 See Watkins Megan, *Textual Recipes, Language Pedagogy and Classroom Discourse*, at p 296, for a discussion about text as a schema.
149 Pearce D.C., and R.S. Geddes, *Statutory Interpretation in Australia*, at pp 1 and 2.
150 Norrie Alan, ‘Closure and Critique: Antinomy in Modern Legal Theory’, at p 15.
154 Dickerson Frederick Reed, ‘The Diseases of Legislative Language’, at p 5.
legal rules and the structures necessary to achieve them;\textsuperscript{155} primary legislation is both a management document and a legal document;\textsuperscript{156} primary legislation is a legal document through which a particular policy is sought to be achieved;\textsuperscript{157} primary legislation is an institutional fact, that is, a proposition whose truth value depends not merely upon an act but also upon the application of some social datum to any such act;\textsuperscript{158} primary legislation is essentially a policy decision to endorse a program of political and social action;\textsuperscript{159} primary legislation is the establishment and promulgation of directives by agencies made competent to do so by existing rules;\textsuperscript{160} primary legislation is a program expressed in human language to be executed by humans;\textsuperscript{161} primary legislation is a specific form of communication that formulates norms that are addressed to present, and, or future legal persons with the expectation that such persons will respect and apply those norms.\textsuperscript{162}

Bennion argues that the term “primary legislation” can have two meanings. First, the term relates to a body of enacted law that forms a large portion of the corpus juris. Secondly, the term has a wider meaning and refers to the enactment, application and interpretative processes. This view is not dissimilar to the view of Dworkin.\textsuperscript{163} For Bennion, primary legislation is an act of a parliament that displays certain key features. Primary legislation then, is: a law; universally binding; largely promoted and administered by the executive, enacted by a parliament that broadly supports the

\textsuperscript{156} Kelly David St Ledger, ‘Are Drafting Styles Just a Matter of Taste?’, at p 64.
\textsuperscript{157} Leahy J., ‘Commentary 2 –Are Drafting Styles just a Matter of Taste? a paper by Kelly David St Ledger’, at p 92.
\textsuperscript{158} See the Introduction to MacCormick Neil and Ota Weinberger, An Institutional Theory of Law, particularly, at pp 14 and 15.
\textsuperscript{159} Bell John, ‘Policy Arguments and Legal Reasoning’, at p 79. Bell asserted, at p 74, that enacting primary legislation is a social practice by which common standards are given a determinate canonical form.
\textsuperscript{160} Ross Hamish, Law as a Social Institution, at pp 46 and 47.
\textsuperscript{161} See Kowalski Robert A., ‘Legislation as Logic Programs’, at p 325, where the author considered the language used in primary legislation and the language use of computer programs.
\textsuperscript{162} Hoecke M.V., Law as Communication, at pp 130 and 131.
\textsuperscript{163} Dworkin R., Law’s Empire, at pp 16 and 17.
government; and enforced on the orders of an independent judiciary.\textsuperscript{164} Sidgwick perhaps
best summarises the views that I have classified as reification by arguing that primary
legislation lays down general rules relating to the conduct of individuals, or public
servants, with some form of endorsed penalty to enforce these rules.\textsuperscript{165}

I do not see how one can usefully classify such statements. At the very least, such
statements flow not from some systemic examination of the nature of primary legislation
but rather from some entrenched position. What these statements do is illustrate that, to
borrow a phrase from Black, conceptual confusion leads to definitional chaos.\textsuperscript{166} The
statements I have outlined seem to be a search for some metaphysical truth, and a quest
for such a truth has been summed up as “a mobile army of metaphors, metonymies,
anthropomorphisms”.\textsuperscript{167} Zima gives a striking summation of the articulations of this
metaphysical truth in that attempts to outline the conceptual components of this so-called
truth inevitably lead to an increase in “the expression plane of language and to a
concomitant downgrading of the content plane”.\textsuperscript{168}

I have argued that there is a failure to distinguish between the expressions used to
describe primary legislation and the thing itself. In other words, there is a mystification of
some non-existent reality.\textsuperscript{169} Such statements are exercises in prototype analysis that seek
to categorise the subject matter within limits that are imposed by patterns of past
experience by those within the legal practice.\textsuperscript{170} That is to say, detached linguistic

\textsuperscript{164} Bennion F., \textit{Statute Law}, at pp 7 and 8.
\textsuperscript{165} Sidgwick Henry, \textit{The Elements of Politics}, at p 357.
\textsuperscript{166} Black Julia, ‘\textit{Critical Reflections on Regulation}’, at p 11, where the phrase is used in a different
context.
\textsuperscript{167} Nietzsche F., \textit{Werke}, vol 5, as quoted in Zima Peter V., \textit{The Philosophy of Modern Literary
Theory}, at p 14.
\textsuperscript{168} Zima Peter V., \textit{The Philosophy of Modern Literary Theory}, at p 14 and the discussion of Nietzsche’s
views of metaphysical truth.
\textsuperscript{169} I have taken this phrase from Hoecke M.V. \textit{Law as Communication}, at p 81, where it is used in a
different context. The author was arguing that the Scandinavian realist theorists have tended to deconstruct
certain legal concepts as “mystifications of a non-existent reality”.
\textsuperscript{170} In making such a claim I have utilized the arguments outlined in pp 1-9 and 174-176 of Solan L.M.,
\textit{The Language of Judges}. Solan is critical of the use by some judges of linguistic analysis in outlining the
reasoning behind decisions and suggested, at p 174, that judges will sometimes have difficulty in
articulating the actual justification for a decision and will claim that the decision accords with some legal
analysis is being used in order to theorise by definition.\textsuperscript{171} The statements are monological in that they rely upon their own authority,\textsuperscript{172} and are a reflection of what has been called endotrophic theories. Such theories are centred on the object of a study by isolating the object from all else by giving the object autonomy.\textsuperscript{173} Such statements are merely terminological debates as to the correct nomenclature.

II.6. Normative Statements

I now want to deal with what I have classified as normative statements.

There would seem to be a tradition of normative theorising about primary legislation through an acknowledgment of the validity of prescriptive norms. There is a perception that there is, within the practice of the law, a need to validate primary legislation against some socio-political specifications.\textsuperscript{174} The application of some normative order involves the making of judgements about exclusionary or mandatory prescriptions as a valid course of action.\textsuperscript{175} This tradition may now well be encapsulated in the maxim that there are incorporated within the concept of democracy certain procedural constraints upon a parliament. These constraints do require that any primary legislation enacted by a parliament satisfy specific standards that are seen as being a moral imperative that goes to promoting the public interest.\textsuperscript{176} Examples of such a standard are the need to protect individual liberties and the need to restrict discrimination.

\footnotesize{precedent. Solan asserts that judges who adopt ‘theory talk’, including linguistic analysis, frequently do so to:

“convince the parties to the case being decided and the public as well that the theory is the actual reason for the decision. And they do this to keep up the impression that each decision is made on the basis of a discoverable rule of law that governs the situation, or at the very least, the impression that however it was made, the decision is the only one consistent with the theory.”

The quoted passage is at p 176.}

\textsuperscript{171} See Campbell Tom D., ‘Legal Positivism and Deliberative Democracy’, at p 317, where the phrase is used in a different context.

\textsuperscript{172} See Danow David, The Thought of Mikhail Bakhtin: From Word to Culture, at p 24.


\textsuperscript{174} Kowalski Robert A., ‘Legislation as Logic Programs’, at p 325.

\textsuperscript{175} This description was taken from MacCormick Neil, ‘My Philosophy of Law’, at pp 128 and 129.

\textsuperscript{176} Generally see Freeman Samuel, ‘Constitutional Democracy and the Legitimacy of Judicial Review’, particularly at pp 330-332.
This concept of evaluating primary legislation seems to have acquired some standing within legal theory. Winter, for example, although writing about European jurisdictions gives examples of how widespread the attempts to impose standards on primary legislation have become. To use the broader sense of the term legitimation that Lyotard adopts, primary legislation, to be considered legitimate, must fulfill a given set of conditions. Habermas and Fuller give examples of such legitimation requirements. For Habermas, primary legislation, to be legitimate, must meet the minimum standard of being compatible with those moral tenets that are accepted as universal within the wider community. Fuller would evaluate primary legislation according to whether that legislation adheres to the principles of what he called the morality of law. An attribute of the doctrine of the rule of law therefore serves to regulate the form and content of primary legislation.

What I have identified as normative theorising does seem to have generated at least two themes. The first theme reflects a view of law as a complex normative institution that incorporates, or utilises, distinctive, manipulative rules. The second theme recognises something of the natural law tradition by acknowledging that the law is not instrumental but is a way of being, and that there is a requirement for the articulation of a standard that acknowledges a justification of a contingent order of society. The ubiquity and impact of this so-called contingent order is illustrated in a statement of Wintgens that a legal problem has emerged because of the volume and the quality of primary legislation.

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178 Lyotard J-F., *The Postmodern Condition: A Report on Knowledge*, at pp 8 and 42-47. Lyotard asserted, at p 43, that the legitimacy of a statement involves the application of some existing language game “whose rules of functioning cannot themselves be demonstrated but are the object of consensus among experts”.
180 See Fuller L., *The Morality of Law*, at pp 41-44.
182 This description of law was taken from Feldman David, *The Nature of Legal Scholarship*, at p 509, where it was used in a different context.
183 The phrase ‘way of being’ was taken from the Introduction to Murphy W.T., *The Oldest Social Science?*, where it is used in a different context.
that has been enacted by parliaments seeking to identify some idealised society.\textsuperscript{185} These approaches accord with a Parsonian concept that some form of normative orientation is necessary to the operation of any given conceptual scheme.\textsuperscript{186} This normative orientation would include defining so called good and bad laws; limiting what matters should or could be the subject of primary legislation; and what ought to be taken into account in the legislative process.\textsuperscript{187}

The articulations of normative orientations have a long history and picking a starting point is arbitrary. One could, for example, start such an examination with statements from the classical theorists. Plato argued that the objective of primary legislation should be the collective good and not the welfare of some particular class.\textsuperscript{188} This expressed concern for the common good has been transformed in 21\textsuperscript{st} century Australia into a rhetoric that has acquired veneration in that an obligation should be imposed on a polity to “proceed to legislate with a view to perfecting the form and outline of our state”.\textsuperscript{189}

Aristotle wrote of rightly constituted laws that articulate a general rule “for all contingencies”.\textsuperscript{190} Aquinas developed a similar theme with the requirement that primary legislation should be derived from the general precepts of natural law.\textsuperscript{191} A recent articulation of the application of the notion of eternal and natural laws is seen in the reasons given by Martin Luther King Jr as the justification for disobeying laws that enforce racial segregation. For King, it was not an act of civil disobedience to disobey primary legislation that was not based on eternal and natural laws that seek to uplift the

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\item 184 This concept was taken from Morrison Wayne, \textit{Jurisprudence from the Greeks to post-modernism}, at pp 13 and 14, where the author discussed the rationalisation of legal positivism.
\item 185 See generally the \textit{Introduction} to Wintgens Luc J., (Ed) \textit{Legisprudence: A New Theoretical Approach to Legislation}, at p 5.
\item 186 Generally see Chapter 6 of Ross Hamish, \textit{Law as a Social Institution}, particularly at pp 120-121.
\item 189 Plato, \textit{Dialogues}, at p 504. See also the discussion in Summers Robert S., \textit{‘My Philosophy of Law’}, at p 227.
\item 190 Scalia A., \textit{‘The Rule of Law as a Law of Rules’}, at p 348, where he quoted from Barker Ernest (Transl.) \textit{The Politics of Aristotle, Book III}, at p 127.
\item 191 See Morrison Wayne, \textit{Jurisprudence: from the Greeks to post-modernism}, at pp 66-70, where he discussed Aquinas’ four kinds of law. Primary legislation, or human law, is one kind.
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\end{footnotesize}
human condition. Accordingly, primary legislation that degrades humans should be void and obedience is, at the very least, not warranted.\textsuperscript{192}

One could go on. Henry of Ghent articulated a legislative function that has a familiar constitutional nuance that primary legislation was to promote the peace and well being of a community.\textsuperscript{193} For Locke, a fundamental requirement of good government was that legislative powers were not to be used to promote either arbitrariness or special interests. Locke argued for the placing of restrictions on a parliament’s legislative powers through the application of safeguards. First, the concept of equal liberty was fundamental and could not be sacrificed through any arbitrary exercise of a parliament’s legislative powers. Secondly, parliament was under an obligation not to enact primary legislation that covered particular circumstances and could only enact primary legislation of a general or universal application. So then for Locke, parliament was not to enact primary legislation that did not protect the common good and was to “govern by promulgated established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countryman at plow”.\textsuperscript{194}

These sentiments can perhaps be summarised with the notion that the justification for enacting primary legislation relates to the requirement that the primary legislation does not subvert ethical and moral imperatives such as the common good of those within the body politic.\textsuperscript{195} Coke adopted a principle that would no doubt please many today by asserting that primary legislation that was contrary to the common law was void.\textsuperscript{196} If one adopts the tenets of ethical positivism, then a parliament has a duty to “enact laws

\textsuperscript{192} See Berkowitz Peter, ‘On the Laws Governing Free Spirits and Philosophers of the Future: A Response to Nonet’s “What is Positive Law?”’, at p 703, where he quoted from M.L. King Jr., Letter from the Birmingham City Jail.

\textsuperscript{193} McGrade Arthur Stephen. Et al, The Cambridge Translations of Medieval Philosophical Texts, Volume Two: Ethics & Political Philosophy, Ch 9, at pp 307-309, about the review by Henry of Ghent of the general principles which should govern obedience to the statutes of a superior authority.

\textsuperscript{194} These comments about Locke John, Second Treatise of Civil Government, were taken from Dallmayr Fred, ‘Hermeneutics and the Rule of Law’, at p 6.

\textsuperscript{195} The phrase ‘for the common good’ was taken from Sellers Mortimer The Sacred Fire of Liberty: Republicanism, Liberalism and the Law, at p 99, where it was used to describe an attribute of republican government.

\textsuperscript{196} See, for example, Hunt Alan Reeve, ‘Legislation – Statutory Construction – Validity of Canon that Statutes in Derogation of the Common Law Should be Strictly Construed’, at p 757.
which can be applied more or less without recourse to controversial moral and political judgements”.\textsuperscript{197}

Some would consider that deliberation of the body of laws of a particular jurisdiction is of itself a normative requirement. Waldron, for example, argues that the legitimacy of primary legislation does depend on the regard that the parliament had to the effect of the primary legislation “on the overall coherence of the laws”.\textsuperscript{198} Campbell has argued that contemporary legal philosophy is marked by a decline in the analysis of legal concepts in favour of what he identified as a political philosophy of law so that the frame of reference is not about what is law but rather the sort of law required.\textsuperscript{199}

A recent example of the trend identified by Campbell, and also what I have called ‘normative statements’, can be seen in the public debate about proposed national anti-terrorism legislation. In this debate, Williams has questioned whether a parliament is the place to consider national security information, and whether parliament is the forum in which to conduct an independent review of a decision of the Attorney General under the proposed legislation to ban an organisation. It is, at least for me, problematic as to whether a court is the appropriate venue for the consideration and settlement of issues of social concerns. But be that as it may, Williams concludes his analysis by asserting that bad laws can emerge from hasty decisions and that a parliament should not enact laws that the community is likely to regret.\textsuperscript{200}

Luhmann has argued that normative expectations are inherent within law and that such expectations serve as something of a counterfactual stability to resolve conflict.\textsuperscript{201} For

\begin{footnotesize}
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\item Campbell Tom D., ‘Legal Positivism and Deliberative Democracy’, at p 318.
\item Waldron Jeremy, ‘Legislation, Authority, and Voting’, at p 89.
\item Campbell Tom D., ‘Legal Positivism and Deliberative Democracy’, at p 317.
\item The Australian newspaper 17 June 2002
\item Niklas Luhmann developed what has been called a sociological systems theory to examine the social and societal context within which institutions operate. Social systems within this sociological systems theory are communicative systems that relate to the environment. See Jonhill Jan Inge, ‘Communications with Decisions as Medium and Form – Some Notes on Niklas Luhmann’s Theory of Organization’, particularly at pp 23 and 24. Interestingly, Jonhill commented that although Luhmann could reasonably be considered one of the most important social scientists of the 20th century most of his works remain untranslated. I certainly had trouble tracing translated quotes.
\end{enumerate}
\end{footnotesize}
Luhmann, processing these normative expectations requires the application of a binary code of a positive or a negative value. Indeed, such a code is inherent in the legal system and provides the legal system with an internal constituted form of contingency.\textsuperscript{202} So it would be argued that, following this logic, as primary legislation is a result of a political deliberation, some critical standard is seen as being necessary to evaluate such a deliberation. Such standards are specified as statements to be applied to assess whether primary legislation does or does not meet the required standard.\textsuperscript{203} That is to say, to be valid, primary legislation must meet nominated normative criteria. The following statements are examples of the application to such a notion:

- primary legislation is, or at least should be, an articulation of general principles of law;\textsuperscript{204} primary legislation has unduly emphasised executive power at the expense of the law-making power of the Parliament by not meeting criteria that emphasis the rights and liberties of members of the community.\textsuperscript{205}

Such normative statements can be seen as the product of a desire to classify the object being studied in a certain way. There is, however, a problem with seeking legitimacy through the universal application of some particular maxim. For example, Kniazeva has suggested that any theory that attempts to explain everything does not explain anything, and that to talk about the universal is to talk nonsense.\textsuperscript{206} No matter what the maxim is, or how the maxim is phrased, there will always be some question as to the issues of unity and totality. That is to say, the application of a particular maxim may well deny the legitimacy of some other principle in respect to the matter under review irrespective of the relevancy of that principle.\textsuperscript{207} Such a consideration is yet another example of the

\textsuperscript{202} Luhmann Niklas, ‘Law as a Social System,’ at pp 100-105.
\textsuperscript{203} Parker C. ‘Legislation of the Highest Standard?’, at p 124.
\textsuperscript{204} Hackett-Jones G., ‘Policy Development: The Role of Drafters’, at p 12.
\textsuperscript{205} Parker C. ‘Legislation of the Highest Standard?’, at p 123.
\textsuperscript{206} See Kniazeva E.N., ‘Self-Reflective Synergetics’ where, at p 9, the author raised the question of whether synergetics (a theory about self-organization), as an abstract theory, perhaps fails to explain anything in the attempt to explain everything.
\textsuperscript{207} Generally see Haber Honi Fern, ‘Lyotard and the Problems of Pagan Politics’, at pp 142-144 and 152. Haber stressed, at p 145, the acceptance of Lyotard’s claim from the The Differend Phrases in Dispute (at p xiii) that the linking of phrases is problematic because the linking is a political act reflecting a consensus of cognition, ethics, politics, history, or being.
application of a particular language game, that is, some socially embedded mode of speaking.\(^\text{208}\)

Normative legal thought has been seen as a variety of a language game, a performative utterance, which leads to a rhetorical manipulation in order to achieve a desired political or moral end.\(^\text{209}\) A performative utterance is an utterance that signifies an action and is neither true nor false. For example, the utterance “I do” by the bride or groom at a wedding would be a performative utterance.\(^\text{210}\) Indeed, such a normative approach can lead to a nominalist model where only general propositions are classified as significant.\(^\text{211}\) Such propositions may well be relevant to an instrumental science but could well be destructive as the basis for a social study or policy\(^\text{212}\) because the subject is alienated from the created world.\(^\text{213}\) Schlag, for example, argues that the only possible value of this so-called normative legal thought is that institutions and practices, such as the legal practice, would use such thoughts as the basis for defining and representing themselves and their operations.\(^\text{214}\) What is relevant to my hypothesis is that the normative statements that I have referred to are couched in a particular language. Power flows from language and use of a particular language helps conceal an exercise of power.\(^\text{215}\)

II.7. Why Bother to Question the Mainstream View

\(^{208}\) This description of the term ‘language game’ was taken from Van Neikerk Anton A., ‘Postmetaphysical Versus Postmodern Thinking Retaining the Baby Without the Bathwater’, at p 180, where the author criticised the analysis by Lyotard of Wittgenstein’s use of the term ‘language game’. Insole accepted that the term ‘language game’ can be understood as a “stretch of language used for a particular purpose, in a particular context” but suggested that it is possible to distinguish two types of ‘language game’. The first is that of the discourse-limited language game where the language is divided into ‘subject matters’ or ‘practices’ that relate to various contexts such as the religious, scientific, or legal. The second is that of a cross-discourse language game that runs “through many different ‘subject matters’”. Insole Cristopher J., The Realist Hope, at p 20.

\(^{209}\) Schlag Pierre, ‘Normative and Nowhere to G’, at pp 182 and 183.

\(^{210}\) This example of the use of the declaration “I do” at a wedding is used by Schlag Pierre, ‘Normative and Nowhere to Go’, at p 183 and footnote 47.


\(^{212}\) See Hawkes D., ‘Free Will at a Price’, at pp 5 and 6, for a discussion on social theory.

\(^{213}\) Edmundson M., Literature Against Philosophy, Plato to Derrida, at p 33.

\(^{214}\) Schlag Pierre, ‘Normative and Nowhere to Go’, at pp 184-186.
It is a legitimate question as to what is the value of questioning traditional definitions of primary legislation and the law. My answer is that it does matter because the mainstream view is concerned about enshrining rather than informing and, in addition, because the distinctions I have made as to the being of primary legislation and the law, is fundamental to the understanding of the structure of the contemporary body politic. As Hume has argued, the existence of a thing can only be proved by arguments about the cause or effects of that thing and such arguments can only be founded on experience.\textsuperscript{216}

The question I have raised as to what is primary legislation is not just an issue of taxonomy because the answer, or answers, also leads to considerations of related intellectual and social issues. It is necessary, for analysis to be meaningful, to acknowledge that the conceptions of the analyst about the content and form of any ideal arguments utilised do impact on reasoning. An analyst should not assert that something is true if that analyst does not believe that it is true.\textsuperscript{217} Christie illustrates the point I want to make with the assertion that one of the causes of the seemingly endless arguments about basic legal and moral issues is the failure to achieve some common ground about basic assumptions. Indeed, Christie goes further by asserting that resolution of any dispute is impossible without reaching some agreement about basic issues.\textsuperscript{218} What I am suggesting is that it is pointless to either endorse or reject the empirical content of some individual statement, as the truth claim of any statement is merely dependent upon whatever adjustment is made within the system under review.\textsuperscript{219} I am also of the view that it is important to acknowledge this reality of primary legislation being a brute fact in order to be able to make a distinction about what is the real and what is the appearance or the

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\textsuperscript{215} Benson R.W., ‘The End of Legalese: The Game is Over’, at pp 520 and 530.
\textsuperscript{216} Hume David, Enquiries concerning Human Understanding and concerning the Principles of Morals, at pp 25 and 26. See also Morrison Wayne, Jurisprudence: from the Greeks to post-modernism, at pp 106-109.
\textsuperscript{217} See Christie George C., ‘The Importance of Recognising the Underlying Assumptions of Legal and Moral Arguments: of Law and Rawls’, at pp 39 and 40.
\textsuperscript{218} See Christie George C., ‘The Importance of Recognising the Underlying Assumptions of Legal and Moral Arguments: of Law and Rawls’, at p 39.
\textsuperscript{219} I have taken these comments from Patterson Dennis, ‘From Postmodernism to Law and Truth’, at pp 52-54, where the author examined the rejection by Quine W.V.O., of the enlightenment notion that knowledge is built from the simple to the complex to provide some relationship between the word, a concept, and the world.
\end{flushright}
perception. This is, of course, the adoption of an ideal form argument in that for analysis to be meaningful it is fundamental that the nature of the entity being utilised is acknowledged.

The term ‘primary legislation’, or an equivalent term, is used in a variety of language games and such games do place the term in the context of human interaction and social life in general.220 If one is to be able to consider accurately what a parliament or a court has done, then the accuracy of definitions becomes significant, perhaps even crucial, for meaningful analysis.

CHAPTER III  MY VIEW OF PRIMARY LEGISLATION

For each thing that there is, three things are necessary if we are to come by knowledge: first, the name, secondly, the definition, and thirdly, the image. Knowledge itself is a fourth thing, and there is a fifth thing that we have to postulate, which is that which is knowable and truly real.

Plato
The Theory of Ideas221

III.1. Introduction

It is my contention that primary legislation is a thing that is produced by a parliament to satisfy some demand and that the thing may usefully be seen as a commodity. After enactment, this thing that is primary legislation may be used within some context and upon use will be given attributes and values by the user and, as a consequence of use the thing is transformed into an object. That is to say, objectification occurs. In arguing that

220 Sampford P., The Disorder of Law, at p 11. Sampford asserted that the term ‘law’ encompasses activities and aspects of social life and the term is a descriptive word that is used to refer to a perceived feature of the social life within which some language game occurs. Sampford asserted, at p 11, that the term ‘language game’ is “a Wittgensteinian concept which places the use of words in the context of human interaction and social life in general: a ‘language-game’ involves the use of a word and the activities by the speaker and others that accompany it.”

221 This extract from Plato’s Theory of Ideas is quoted in Kenny Anthony, Ancient Philosophy, at p 49.
primary legislation is merely a thing, I am rejecting the idea that this thing is a law or part of the law. My analysis is subjective and is based upon an application of systems theory.

In this chapter I will outline my views about the nature of primary legislation and in so doing I discuss the notion of primary legislation being a thing, an object, a commodity, and an output. I also discuss the notion of context because primary legislation is transformed from a thing into an object when used, and the act of using is a product of some context. The act of using is a transformation process.

III.2. Main Points of Argument

In this thesis I have highlighted the individual enactment of a parliament by arguing that primary legislation is a thing in itself, and that there is a distinction between the thing and the use of the thing. That is to say, there is a property of being that is independent of any form of perception about, or social construction of, this thing. Further, I claim that there is merit in maintaining this distinction as a basis for analysis. Such a conclusion has ramifications not only in respect of perspectives of primary legislation, but also in respect of the nature of the law.

The central element of the hypothesis I have outlined about primary legislation has three aspects. First, primary legislation is a thing: something that is produced, and this thing is independent of any properties, other than the property of being a specific physical thing.222 The thing is an output of a parliament and, after production, this thing sits in some repository until such time as it is used. As the thing may be used and reused, there is merit in considering the thing a commodity. In essence, I am suggesting that one should acknowledge what I see as a realistic view of primary legislation: a view that acknowledges the sovereignty of the thing.223

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222 The definition of a thing as having only physical properties was taken from Klooger Jeffrey ‘Interpretation and Being’, at p 18.
223 Baudrillard suggests that within what he identifies as the dialectic of meaning there is inertia about the idea of a thing. See Baudrillard Jean, Fatal Strategies, at pp 7 and 20. I have adapted the phrase ‘sovereignty of the thing’ from p 111 where Baudrillard argued that emphasis has always been on the
The second element of the hypothesis is that when used this thing that is primary legislation is idealised and objectification occurs so the thing becomes an object. The thing that is primary legislation is used or considered within some context. Although I have made a distinction between the notion of a thing and the concept of an object, I am conscious of the issue raised by Brown as to whether there is not something perverse about complicating things with theory.\textsuperscript{224}

But, be that as it may, it does seem to me to be worthwhile to make the distinction between a thing and an object because the very act of using primary legislation does generate a transformation that recasts the thing. Thus, this thing that was the output of the political subsystem will, when used in various contexts, be transformed and become a censored input. I suggest that the implications of the particular context will generate censorship. This object is given an idealised projection that is a representation of some user suppositions that reflect the discipline or field of the user and the intended use of the object. A characteristic of each discipline is the construction of a form of objective reality that is unique to that discipline and cannot be reduced to that of any other discipline.\textsuperscript{225} Objectivity is a social product of a discipline and the production of output within that discipline will be influenced by whatever are the accepted presuppositions within that discipline.\textsuperscript{226} The notion of the recasting of an object has been captured by Frow with the claim that:

\begin{quote}
subject but if the emphasis is inverted then it will be recognised that “everything comes from the object and everything returns to it”. Brown Bill in ‘\textit{Thing Theory}’ raised this question, at p 1, and suggested there is merit in not complicating things with theory. Brown asked:

“Is there something perverse, if not archly insistent, about complicating things with theory? Do we really need anything like thing theory the way we need narrative theory or cultural theory, queer theory or discourse theory? Why not let things alone? Let them rest somewhere else in the balmy elsewhere beyond theory.”

\textsuperscript{224} Generally see Part II ‘\textit{A World Apart}’ in Bourdieu Pierre, \textit{Science of Science and Reflexivity}, particularly at p 51.

\textsuperscript{225} See Section 5 ‘\textit{History and Truth}’ in Part II ‘\textit{A World Apart}’ of Bourdieu Pierre, \textit{Science of Science and Reflexivity}, particularly at pp 71 and 72.
“Thingness and the kinds of thingness are not inherent in things; they are effects of recognitions and uses performed within frames of understanding (which may be markets or ad hoc negotiations of action or desire or bodily skills as much as they may be intellectual formattings or sedimented codes). And persons, too, count or can count as things. This is the real strangeness: that persons and things are kin; the world is many, not double.”\textsuperscript{227}

The third element of the hypothesis is that the thing that is primary legislation is not, and indeed cannot be, a law or part of the law because it is merely a thing. That is to say, one should recognise the reality that primary legislation and the law are inherently different.\textsuperscript{228}

I argue that the law is a form of rationalised myth and that a specific social grouping that I have designated the legal practice has not only advocated this rationalisation but

\begin{footnotesize}
\textsuperscript{227} See the conclusion, at p 285, of the article by Frow John, ‘A Pebble, a Camera, a Man Who Turns into a Telegraph Pole’.

\textsuperscript{228} I am adapting the notion that practice absorbs theory because practice is in flux. See Margolis Joseph, ‘Genres, Laws, Canon, Principles’, at pp 131 and 132, where he discussed the conception of Aristotle that reality establishes there is no essential difference between theory and practice.

\textsuperscript{229} I have chosen the identifier ‘myth’ as a metaphor to aid in understanding of the nature of the law by encapsulating the sense of mythology that I see as being at the essence of the law. For example, Pottage Alain in ‘The Paternity of Law’ claimed, at p 151, that the law constructs itself and this flows from western culture being a sequence of texts that are ordered and interpreted “according to a juridical logic of textual practice”. According to Pottage, at p 149, the attempts of those who utilise this textual practice to repress unreason or myth merely serve to endorse some particular myth. Pottage asserted, at p 169, that the continuing existence of a myth depends upon the significance of the institutional representation of that myth and as a consequence the existence of the myth can become more important than the detail of the myth. Pottage, at p 168, quoted Legendre P., Lecons IV L’ inestimable object de la transmission, at p 240, to illustrate the basis of this institutional representation in relation to the law: “Every juridical system is guaranteed by a founding supposition, the expressed content of which may vary according to social and political factors, but which derives its power from its function as general presupposition, or, in other words, as the axiom from which all particular axioms are derived. This general axiom operates within institutional systems as a general normative affirmation having the status of a mythical justification for the system as a whole: for example, God or the People, etc.” The quoted passage is at pp 168 and 169 of Pottage Alain ‘The Paternity of Law’.

I was, however, also attracted to the idea of describing the law as a form of cultural software. Balkin utilised the term ‘cultural software’ as the identifying reference for those tools that are necessary to understanding the nature of human cultural. Cultural software then “is written and rewritten through social interaction and communication” and is a tool that assists in an understanding of the nature of society. Such a tool “consists of the abilities, associations, heuristics, metaphors, narrative, and capacitates that we employ in understanding and evaluating the social world”.
\end{footnotesize}
has also developed an institutionalised context that endorses a particular narrative about
the law, about the so-called instruments of the law, and, more significantly for this
specific social group, about legal institutions. That is to say, this specific social grouping
has not only developed this myth but has also attributed certain functions to this myth.

I have asserted that this rationalisation and the narrative lead to statements about the
nature of primary legislation that do not seek to define the nature of primary legislation,
but rather to further this rationalisation. In chapter two I outlined a selection of the
prevailing views of what constitutes primary legislation and, while the particularities of
these views do vary, they all attempt to enshrine primary legislation within the endorsed
narrative of the specific social group. That is to say, if you limit the analysis of primary
legislation to the traditional view, then you are, at the very least, minimising the
relevance of primary legislation as either a social construction or an instrument of social
engineering. The assertion by Tuori that primary legislation since the end of the Second
World War has increasingly been used as an instrument of social engineering particularly
within the economic system, illustrates something of the point I want to make. So,
as Althusser has pointed out, it is insufficient to merely represent a particular thing.
Knowledge of the particular thing and what Althusser called its law are also necessary.

III.3. Implications of Giving a Thing a Name

Cultural software is concerned with the explanation of how, within a society that is differentiated, cultural
understandings can be shared and Balkin provides examples of cultural software: as knowing how to
operate a computer; being able to dance; or, significantly for my hypothesis, “being fluent in a particular
language”. See Balkin J.M., _Cultural Software: A Theory of Ideology_, at pp 1 to 7, and 14, and the quoted
passages are at p 6 and p 14.

I discuss the notion of narrative in chapter four.


Also see Mitchell Alan, ‘The Blame for Red Tape Mess Falls Within’, at p 22. Mitchell questioned
whether the federal government had reduced the impact on business of what he called bad and unnecessary
regulation. Mitchell claimed that dealing with the impact of regulation was a societal issue in that the
“public has come to see government regulation as a panacea for society’s ills and as a means of protection
from the risks of daily life”. The application of primary legislation is, of course, but one means of
regulation.

Althusser Louis, _Machiavelli and Us_, at p 33. Althusser asserted, at p 23, that Machiavelli’s _The Prince_
should be recognized as a political act. It seems to me that this assessment could be applied to primary
legislation.
I have argued that the issue of what is primary legislation is something that goes to assumptions about society and the nature of the law. I now want to consider the impact of giving a thing a particular name.

A ‘what is’ question is, at its foundation, an essentialist issue because the question is based on the assumption that there is an essence that can be identified. Something of this reductionist perspective can be gauged from the statement by Cowen that, from a British viewpoint, the question of what is primary legislation is purely a procedural question that can be resolved by recourse to the parliamentary roll. But, a ‘what is’ question also is an issue of reflexivity. Asking such a seemingly simple question inevitably leads to further questioning. To ask what some object is, is also to ask what that object is “beyond its temporal manifestations”.

A further example of a ‘what is’ question being an issue of reflexivity is the issue of a factual portrayal of the law. That is to say, does one accept a philosophical answer to such a question as perhaps epitomised in Article 6 of the 1789 Universal Declaration of the Rights of Man and Citizen that the law is the expression of the general will or does a more prosaic explanation suffice? Gray provided an example of this so-called prosaic

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234 See Murchadha Felix O., ‘Truth as a Problem for Hermeneutics’, at p 122. Murchadha asserted that to question what a thing is indicates a desire to know what the thing is essentially in itself and this refers to the being of the thing. Therefore:

“to ask what something ‘is’ is to ask what that thing is beyond its temporal manifestations. It is to ask what something is, beyond the historical context of its apprehension. Temporality-and, at least in the case of human beings, historicality-is the opposite of being-it is the mere place of becoming.”

The quoted passage is at p 122.

235 Generally see Cowen Denis V., ‘Legislature and Judiciary’, at pp 274 and 275, where he stated that the identification of what was an Act of the British Parliament could be resolved by consulting the Parliamentary Role where it would be conclusively established that the particular entity had satisfied the procedural requirements of passing both Houses and also receiving royal assent. Cowen, at p 275, quotes from Edinburgh and Dalkeith Railway Co. v. Wauchope ((1842) 8 Cl. & F. 710, at 724-725, that:

“All that a court of justice can do is to look to the Parliamentary roll: if from that it should appear that a Bill has passed both House and received the Royal Assent, no court of justice can inquire into the mode in which it was introduced into Parliament, nor into what was done previous to its introduction, or what passed in Parliament during its progress in its various stages through both Houses”.

Within the Australian Capital Territory the Legislation Act 2001 (ACT) specified a requirement for the establishment of an electronic database, the ACT Legislation Register, as the authoritative source.


explanation over a century ago when he asserted that the law of a community was those
general rules that have been articulated by the courts when a court makes a judgment
establishing legal rights and duties. The subject matter of the law was the legal rights
and duties of individuals.  

An evolution of such reasoning is the notion that a legal norm becomes valid when a court applies the norm.

It is possible to make a statement as to the essence of a thing by observing the surface
characteristics of the thing and giving the thing a name. Such a name could be called a
rigid designator in that the quality of the thing remains true although many conditions
may be altered. However, a name refers not only to temporal qualities of the thing but
also to the historical external aspects. Pottage has argued that a so-called recognition of a
particular image is often what amounts to a misrepresentation through the failure to
recognise or acknowledge the otherness of that image. There is a duality: the being of
a thing and the essence, or necessary aspect, of the thing being tied to the genesis of the
thing.

Certainly, in relation to primary legislation there is a compound of matter and
form in that each output of the enactment process of a parliament is univocal. That is to
say, each output is an enactment of primary legislation.

Why give a particular name to a thing? A name stimulates recognition by the
exploitation of some intrinsic information system. A name does not impose itself but
is applied because of a narrative, and a narrative arranges a discourse into a sequence of

239 See Aarnio Aulis, ‘The Systematisation and Interpretation of Statutes: Some Thoughts on Theoretical
and Practical Legal Science’, at p 13, where the author discussed the development and application of legal
norms.
240 See Catalano J.S. Thinking Matter, at pp 116-118, for a discussion about the term ‘rigid designator’.
of image and suggested that a so-called “desired image is ‘orthopaedic’ in the sense of being a sort of
corrective device which moulds and supports the desired identity; however, the defect of that virtue is that
it ultimately becomes a rigid, restraining and imprisoning structure”. The quoted passage is at p 156.
242 Catalano J.S. Thinking Matter, at p 118.
243 Cornell Drucilla, The Philosophy of the Limit, at p 51, and the discussion of the impact of Derrida
notion of community and a system of representation that make communication possible.
244 Bourdieu Pierre, Outline of a Theory of Practice, at p 18.
events that give credence to that narrative.\textsuperscript{245} So the giving of a name to a thing reflects whatever are the existing power relationships within a particular social environment.\textsuperscript{246} Power is a medium that stimulates, either expressly or impliedly, motivation to accept some proposition.\textsuperscript{247} So a thing is not possible unless the thing can be imagined, and it is impossible to confirm the possibility of a thing unless the thing actually appears.\textsuperscript{248} A name, and the attributes that may be attributed to that name, are the product of a discourse and a defining mechanism that serves to separate that thing from other things.\textsuperscript{249}

Primary legislation is a thing and the name given to this thing evokes images of the values that are articulated within the discourse of the providers of the name. So the question of what is primary legislation can be answered in three ways. The first is that the term primary legislation identifies an individual enactment of a parliament. Secondly, the term ‘primary legislation’ can be seen as a term that refers to the totality of enactments of a parliament. Finally, primary legislation is also a term that has a symbolic connotation as the term may be used to allude to the attainment of a perceived desirable social reality that is encapsulated in statements about the need for, or benefits of, primary legislation. Social reality is a construction of the processes that are provoked by social interaction,\textsuperscript{250} and the symbolic attribute of primary legislation has a resonance that is perhaps captured by the notion of primary legislation being a commodity. Lowe, for example, has argued that a commodity, within the late-capitalist period, has become what amounted to a

\textsuperscript{245} Generally see Lyotard J-F., \textit{The Post Modern Explained}, at p 31. Lyotard would go further and argue that a narrative would arrange a discourse into a sequence of events that are determined by names.

\textsuperscript{246} See King Michael, \textit{The “Truth” About Autopoiesis}, at pp 231 and 232, where the author discussed the aspect of power within autopoietic theory. In asserting that power might motivate either expressly or impliedly, I am asserting that an exercise of power is not restricted to the use of superior physical, political, or economic strength but rather that the imposition may be indirect. In relation to the indirect imposition of power see Lukes Steven, \textit{Power: A Radical View}, at pp 21-25, and the exposition of the so-called third dimension of power.

\textsuperscript{247} The concept of power as a medium is a notion of Luhmann. See Luhmann Niklas, \textit{Political Theory and the Welfare State}. See also King Michael \textit{The “Truth” About Autopoiesis}, at p 231.


\textsuperscript{249} Spencer-Brown G., \textit{Laws of Form}, at p viii.

\textsuperscript{250} Generally see Scott W. Richard, \textit{Institutions and Organizations}, at pp 29 and 30.
“three-level semiotic hybrid of social and cultural values, changing product characteristics, and exchange value”.251

The term “legislation” is open textured and, basically, a trope:252 a figure of speech that invokes a certain sense of authoritative pronouncement. Unquestionably, the term ‘legislation’ has a symbolic utility that is eclectic. Hitchens, for example, has argued that the United States of America is what he classified as a written country because fundamental to the existence of that state are a number of documents that he identified as the great political writings. These great political writings are subject to update and revision and the writings impact on public debate about the nature of society.253 These documents are designated ‘unacknowledged legislation’ by Hitchens as they identify moral imperatives that create the opportunity for true argument.254 Such documents fit within some concept of law in that they are, both literally and figuratively, a politics of texts.255 There is a doctrinal explanation of what has been identified as authoritative texts, and that the meaning given to these texts is theory dependent in that it is a product of that doctrinal explanation.256

251 Lowe Donald M., *The Body in Late-Capitalist USA*, at p 47
252 See Schaffer Jonathan, ‘The Individuation of Tropes’, for a general discussion on the nature of tropes. Schaffer asserted, at p 247, that tropes are fundamental entities that may be individualised by some spatiotemporal relationship. Heller in discussing tropes has used the definition provided by White H. *Metahistory: The Historical Imagination in Nineteenth-Century Europe*, at 31-34:

“tropes are generic stylised presentation of events that ‘permit’ the characterization of objects in different kinds of indirect, or figurative, discourse. They are especially useful for understanding the operations by which the contents of experience which resist description in unambiguous prose representation can be prefiguratively grasped and prepared for conscious apprehension”.


254 Hitchens C., *Unacknowledged Legislation Writers in the Public Sphere*, at p xvii.

255 The phrase ‘politics of texts’ was taken from p 14 of the ‘Introduction: Politics, Ethics and the Legality of the Contingent’ by Goodrich Peter, Douzinas Costas and Yifat Hachamovitch who claimed:

“The concern with the textuality of law is both political and ethical. The law is made, written and rewritten, produced and reproduced, through the writing of judgments, the reporting of cases, the systematizing of doctrine and the publishing of casebooks and treatises. The politics of law is both literally and figuratively a politics of texts, an ethics of writing, a critique of discourse. It is as a text that law is both preserved and transmitted, it is as writing that law is taught, disseminated, revised and reproduced.”

256 This statement about the doctrinal explanation of authoritative texts was taken from Wintgens Luc J., ‘Legislation as an Object of Study of Legal Theory: Legisprudence’, at p 15, where it was used in a different context.
The claims by Hitchens illustrate notions that are relevant to my thesis and also have
general application: the status and application of specific texts; these texts form a genre;
in this case the “great political writing”; 257 and have an influence because the application
of the texts constitutes both evidence and authority. 258 The texts also satisfy a particular
demand. This demand, for Hitchens, is for the creation of a “moral space for a true
argument”. 259 These texts can also be classified as ‘meta-narratives’. That is to say, the
texts can have a function that is independent of any specific verbal formulation, and that
some meanings attributed to those texts will remain constant when translated from one
medium to another. 260 The texts, the great political writings, are essential to that
particular context and to provide an opportunity for deliberation. 261

In the preceding chapter I questioned what I classified as the traditional view by arguing
that the classification of primary legislation by the legal practice is but an exercise of
power. Such a classification does amount to a fiction, and the fiction serves to perpetuate
the legitimacy of this legal practice as a political ideal. 262 It is a function of this legal
practice, according to the legal practice, to make pronouncements about the nature of the
output of the parliament. So, within the legal practice there has been a development of a
rhetoric that seeks, through endorsed abstractions, to perpetuate a specific form. This
form reflects the process of systemising that has the objective of ratifying the description
of the law as outlined by the legal practice. The discourse engendered by the legal
practice about primary legislation flows from a frame of reference that is based on

257 Hitchens C., Unacknowledged Legislation Writer in the Public Sphere, at p xv
258 See Fitzpatrick Peter, Modernism and the Grounds of Law, at p 4, and the discussion about the telling
text as cogent evidence.
259 Hitchens C., Unacknowledged Legislation, at p xvii
260 See the discussion about narrative in the introduction to Lodge D., After Bakhtin: Essays on Fiction and
Criticism, at pp 4 and 5.
261 See Britt Theron., ‘Narrative Pragmatics and the Genius of the Law in Lyotard’s Just Gaming’, at pp
190 and 191, and the notion of Shelley as to poets being unacknowledged legislators. Britt asserted, at
footnote 1, that this notion of poets as unacknowledged legislators “is based in the idea that acts of
imagination, which poets provide, are both necessary to human society and open to rational
contemplation”.
262 I have taken these comments about form from Castelnuovo Shirley, ‘Public Interest Law: Crisis of
Legitimacy or Quest for Legal Order Autonomy’, at pp 233-236, where she discussed the comments by
Balbus Isaac D. about legal form in his The Dialects of Legal Repression: Black Rebels before the
American Criminal Courts.
assumptions that are rarely questioned and are indeed self-sustaining as they are reaffirmed and reinforced by the legal practice.

A consequence of this reaffirmation and reinforcement is the development of an orthodoxy that is not only being taken for granted but is accepted as being a truth. It could well be that such articulations are a characterisation that is the consequence of the traditional conceptualisations of legal thought that see the law in terms of being either natural law or positivism. A natural law perspective and the recognition of some relationship between law, morality, and ethics would engender a desire for some universal standards that do reflect this relationship. On the other hand, a tenet of positivism is that a relationship between law, morality and ethics is merely contingent and, as a consequence, there is a search for a correct metaphor to serve as a definition. Thus, the general propositions about primary legislation that do abound are reflections of this traditional conceptualisation.

I would, however, suggest that such propositions suffer from what Edmundson identified as a Kantian problem of the difficulty of knowing a thing itself, the noumenon, because one can only know its representation, the phenomenon. What I am doing here is applying the term noumenon in a restricted sense to refer to the intentional entity as, for example, the dancer in the line from Yeats indicated in the epigram at the beginning of chapter one. Some, of course, have argued that it is impossible to make a distinction between the noumenal and the phenomenal in that the subject cannot be separated from impacts of language, culture and social relations. I have rejected such a view.

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263 I have adapted most of this argument from Morgan Gareth, ‘More on Metaphor: Why We Cannot Control Tropes in Administrative Science’, particularly at pp 604 and 605. Morgan asserted at p 604 that the boundaries of a discipline are not self-evident and that the “boundaries that one draws around a phenomenon are intimately connected with the image one has of the phenomenon”.

264 See Davies Margaret, Delimiting the Law, at p 1.

265 Edmundson Mark, Literature Against Philosophy, Plato to Derrida, at p 33. Edmundson also pointed out, at p 76, that for Kant noumena were beyond human knowledge.

266 The phrase ‘intentional entity’ has been taken from Follesdal D. ‘Husserl’s Notion of Noema’, at p 681. Follesday asserted that the noema is an intentional entity, a generalisation of meaning.

267 See, for example, McCarthy Thomas, The Philosophy of the Limit and its Other, at p 176, where he asserted that Cornell Drucilla in her book The Philosophy of the Limit adopted concepts from Hegel, Adorno and Derrida that included “a rejection of Kant’s doctrine of the noumenal and phenomenal realisms”.
Primary legislation then is a linguistic form.\textsuperscript{268} Primary legislation, following enactment, may become relational in that there will be some relationship between primary legislation and the user. Acceptance of the notion that primary legislation cannot be reduced to some elementary principle or axiom\textsuperscript{269} then leads to what I have classified as a significant issue. This issue is how to conceptualise the utilisation by one subsection of society, the legal practice, of the product of another subsystem of society, the political subsystem. An interpretation of such a particular course of action, or utilisation, of any primary legislation is a consequence of whatever ideas or goals impelled that utilisation.\textsuperscript{270}

So how then do we know the thing itself?

Jackson would make a distinction between a public and private discourse as to what is primary legislation. A public account would be discursive and justificatory while a private account would be psychological and internalised.\textsuperscript{271} My hypothesis would certainly fall within the psychological and internalised account. I have argued that the traditional propositions are based on some notion that it is necessary to establish a theory that will be determinate by generating answers and therefore stimulating certainty.\textsuperscript{272} As these propositions are expressed as metaphors, much depends on how the nature of language and the significance of language within particular discourses are viewed. For example, does one view a metaphor as merely some figurative device to embellish

\begin{footnotesize}
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\item[268] See Ricoeur Paul, \textit{Hermeneutics and the Human Sciences}, at pp 13-15 and 136-139, for a discussion on the significance of the issue of form. Ricoeur, at p 136, proposed three distinctive features of what he designated ‘a work’. That is to say, a text is work in that it is a structured totality that cannot be reduced to the sentences of which it is composed. The first proposition classified a work as a structured totality that has a sequence longer than a sentence. The second proposition is that a work attracted a form of codification that classified the work as a particular linguistic form: - a story, an essay, or a poem. The final proposition is that “a work is given a unique configuration which likens it to an individual and which may be called its style”. The quoted passage is at p 136.
\item[269] Phrase taken from Strathern M., \textit{Property, Substance and Effect}, at pp 1-3, where it is used in a different context.
\item[270] Generally see Ross Hamish, \textit{Law as a Social Institution}, particularly at pp 20 and 21, for a discussion on this particular point.
\item[272] Singer J.W., ‘The Player and the Cards: Nihilism and Legal Theory’, at pp 63 and 64.
\end{itemize}
\end{footnotesize}
language? Or does one see a metaphor as a meaningful device to identify some relationship or connection between understanding and experience?273

My description of primary legislation is fundamentally essentialist and this does seem, at least to me, to be unproblematic. By this I mean that an acceptance of this notion of essentialism does indicate a belief that, in relation to the description or analysis of some political practice, the pragmatist tenet, that a general theory is not only irrelevant but could well be worthless, has meaning. The enactment of primary legislation is an act that is carried out within the political subsystem, and as such, is a reflection of the prevailing social ethos. That is to say, the implications of an analytic process should not be subverted to cater for some theory, or some encircling totality, because the application of any theory does have what amounts to a normalising effect.274 Primary legislation is the thing that is produced by a parliament and that is that. It is a characteristic of primary legislation that the enactment of that primary legislation does signify, in relation to that primary legislation, the point at which the authority of the parliament is terminated.275

Certainly it was asserted some time ago that the age of primary legislation276 had arrived and that primary legislation is no longer an island within the sea of common law, but has become a continent.277 Such assertions do miss an important point. While it is undeniable that parliaments have continued to produce a proliferation of both primary and secondary legislation one must recognise the reality of form. The thing that is primary legislation is a text and although it is a particular form of text, it is, as with all texts, simply a

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273 These comments about the metaphor were taken from Morgan Gareth, ‘More on Metaphor: Why We Cannot Control Tropes in Administrative Science’, at pp 601-603.
274 I have adapted this description from pp 13-15, of Cornell Drucilla, The Philosophy of the Limit, where the author discussed the criticism of Hegel by Adorno Theodor in Negative Dialectics, at p 45.
275 This proposition has been adapted from Leoni Bruno, Freedom and the Law, at pp 6 and 7.
276 See Calabresi Guido, A Common Law for the Age of Statutes, at pp 1 and 2. Calabresi referred to a legal system choking on primary legislation in that there had been an “orgy of statute making” and that the American legal system had “gone from a legal system dominated by the common law, divined by courts, to one in which statutes, enacted by legislatures, have become the primary source of law”.
277 The quoted passages are at p 1.
278 The concept of primary legislation being continents not islands is taken from Luban David, ‘Legal Traditionalism’, at p 1048, and the discussion of the notion of Ackerman Bruce A., Reconstructing American Law, at pp 6-19, that “statutes and regulations, once making up mere ‘islands’ within the sea of common law, have now become continents”.

document. What is relevant is that the text is merely a printed pamphlet and by itself is functionless and incapable of doing anything. The text to have a value other than that of being some material entity must be utilised, or acted upon, by some actor. A text may, of course, be read; be used as a reference in some debate; be used as a source, or be interpreted according to some theory or other. The Bishop of Bangor was prescient in 1717 with the claim “Whoever hath an absolute authority to interpret any written or spoken laws, it is he [or she] who is truly the Law-giver to all intents and purposes, and not the person who first wrote or spoke them”.278

Thomson has suggested that an object will become discernible when time and space meet and merge.279 So, for example, this so-called simple question of ‘what is primary legislation’ may become a quest to understand the subject matter and this quest seems inevitably to lead to an examination of the context, the circumstances and the stimuli, that are relevant to the issue under examination.280 The reductionist, or so-called simple, question has become a quest to adequately represent the whole, the object, in terms that are relevant to that object. There is the emergence of a quest to discover the phenomenal form and utility of that object within the context that is, at any given time, relevant to that object.

III.4. The Concept of a Thing

Now it could well be argued that the description I have outlined about the nature of primary legislation may well be an example of extreme nominalism.281 For me, primary legislation following enactment is merely an inanimate thing, and it is my assertion that a projection by some user about the thing that is primary legislation amounts to an

278 Hoadly Benjamin, Bishop of Bangor, in a sermon preached before the King, as quoted in Gray John Chipman, The Nature and Sources of the Law, at p 102.
280 This issue of reflexivity was taken from Morrison Wayne, Jurisprudence: From the Greeks to post-modernism, at pp 2-4.
281 The phrase ‘extreme nominalism’ was taken from Albritton Robert T., ‘Language and Political Theory: Weldon’s Vocabulary of Politics Revisited’, at p 19, where the author discussed the notion that a word does not have a core essential meaning that transcends the diversity of the historical uses of that word. So then meaning evolves either as a convention or is defined by experts.
idealised projection that will recast the thing into an object. I now want to deal with the concept of a thing.

The late capitalist period is notable, at least for Bewes, for the acceptance of the concept of the thing and also for the realisation that what he called the encountered world has become a series of things “that are removed from us, and towards which we may feel a sense of reverence, or loss or revulsion”. While a thing has a separate material manifestation in that it exists, a thing both is and is not in that while the thing exists it has no phenomenal form.

A thing would seem to have two features: first, a thing has a material existence, and secondly, this existence can be verified by the senses. The law, for example, is not a thing because while at least some subject matter does exist, the existence of this matter cannot be verified by the senses. The law is a presentation as it is the creation of the imagination and is only bound to the real world through representations. Pound is, for me, undoubtedly correct in his suggestion that the English language is deficient in that there is but one word, law, to cover the numerous aspects of this subject. The French and the German languages on the other hand have, at least according to Pound, multiple terms to differentiate the various aspects of the law.

An entity will come into existence when a distinction occurs because of a separation of space and, as a consequence of this separation, an entity is created and this act of creation

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282 Generally see Bewes Timothy, Reification, particularly at p xi. Bewes, however, does not make a distinction between the terms ‘thing’ and ‘object’.

283 Komter A., ‘Heirlooms, Nikes and Bribes: Towards a Sociology of Things’, at p 59

284 See Brown Bill, ‘Thing Theory’, at pp 3 to 6, and the discussion, and criticism, of the notion of Lacan that a thing can only be represented by emptiness because it cannot be represented by anything else.

285 I have taken this definition from James A., and Jeffrey Pence, ‘Between Thing and Theory’ at p 654.

286 I have adapted the notion of the law being a presentation from Klooger Jeffrey, ‘Interpretation and Being’ at pp 22 and 23 where the author discusses the notion of some mathematical object being a presentation. Klooger argues that representations are also creations and thus imaginary but where such representations relate to something beyond the representation such representations acquires substance.

also creates the other. A thing then is a material entity that has some presence in space and time and, of course, the converse would be true in that any presence within a space and time would be a thing. ‘Otherness’, is an inherent condition that flows from the very notion of form as there must, by definition, always be a counter-factual proposition or image: something other than the referent form. Knapp and Pence suggest that the notion of a thing is an intangible metaphysical conception about some material entity that is “free from subjective contamination”. While the ideal of an uncontaminated material entity is, in the view of Knapp and Pence, “a tautological formulation that one must accept on faith”, a thing is an unassailable fact because of its independent character.

Catalano argued that there is not a single perspective from which to learn the essential structure of a thing. Reliance on a history of practices to make sense of a thing will not reveal the true nature of the particular thing. Certainly a history of practices has outlined perspectives as to what is primary legislation but it is, I suggest, important to accept that there is individuality about primary legislation. That is to say, a necessary element of an individual enactment is the uniqueness of that enactment; it is exactly that: this enactment!

Primary legislation is a thing and this thing takes the form of a text. The production of this thing includes the creation and the publication processes. These processes are necessary attributes of the manufacture and not attributes that may be intrinsic to the use of that thing. The distinction revolves around whether or not it is contextually possible to interpret this thing differently. In the case of primary legislation, the issue is clear-cut: primary legislation is a brute fact and that is that.

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288 Generally see Spencer-Brown George, *Laws of Form*, at pp xxv and xxvi, where the author described the emergence of a universe.
290 See Steiner George, *After Babel: Aspects of Language and Translation*, at p 222, where the author discussed the power of the other and suggests that this concept should be designated ‘alternity’.
293 Catalano J.S. *Thinking Matter* at p 12.
294 See Catalano J.S. *Thinking Matter*, at pp 180-188, for a discussion about individuality.
The definition of thing is but a rhetorical exercise. For example, I, in classifying primary legislation as a thing, do not make a distinction between the artefact, be it a computer file or hardcopy, that serves as the medium upon which the text is printed and the text. I see the text and the medium as one and the same and consider that it is meaningless to make a distinction. Others, however, would see the file, or hardcopy, as the unique thing and the text as a separate material manifestation. While my classification is just another trope, I would suggest that the classification does afford a reference from which to effectively evaluate the rhetoric that has been used to define primary legislation.

III.5. Thing Produced in Response to a Demand

In considering the issue of a demand for the enactment of primary legislation, one needs to be aware that this demand has an institutional perspective and also an individual perspective. In both cases, however, the demand for the primary legislation will have been generated by the desire to satisfy some perceived need. So, irrespective of the status of the originator, the issue of demand does relate to issues of recognition of a political voice within the public sphere.

As MacCormick has pointed out, both primary legislation and judicial decisions are issued to satisfy some political, policy, or curial demand. That is to say, someone at some stage has articulated some particular issue and has come to the conclusion that in relation to that particular issue it would be advantageous to have primary legislation enacted. In addition, and most importantly, the initiator is able to organise sufficient support within the parliament to ensure enactment of the primary legislation.

From my experience, the demand for the enactment of primary legislation may come from any number of sources. The demand may come from the public service; from a

minister; from whatever party is in power; from an interest group; or from an individual. Any parliamentarian may have legislation drafted and tabled. However, a degree of support is required to get the proposed legislation listed for debate within the parliament. I would suggest that the source of the demand is only significant in relation to the degree of support within the parliament that may be engendered for that legislation.

The issue of why primary legislation is produced can be considered in terms of postulated market success or failure. The demand, and whether the demand has been satisfied, are issues that are independent of the thing that is primary legislation. The demand for primary legislation may be based on any number of imperatives. For example, Eng has identified three criteria to be applied when considering the quality of primary legislation, but these criteria could also serve to analyse demand. The first criterion related to moral consideration: the application of certain values by the endorsement or prohibition of identified practices. The second criterion related to political considerations where primary legislation is seen as being the means to satisfy a political end. The final criterion related to legal considerations where it became necessary to give effect to some legal obligation. 297

Primary legislation is not an element within some theoretical narrative articulated by the legal practice: primary legislation is a thing produced, by a specific institution, to satisfy some particular demand. In response to some demand, parliamentarians make a choice about producing a particular output. This output then will be distributed in accordance with such rules as have been defined within the political structure.298 This demand for primary legislation can only be, to my mind, a reflection of the mores of modern society as demand amounts to a form of consumerism. That is to say, the purpose for the enactment of some particular primary legislation is to satisfy some demand from within,

297 See Eng Svein ‘Legislative Inflation and the Quality of Law’, at p 69, where the author discussed the criteria to be applied when considering whether primary legislation is flawed.
298 This notion was taken from Boyle J., ‘A Theory of Law and Information: Copyright, Spleens, Blackmail, and Insider Trading’, at pp 1437-1442 and 1443-1446, where he discussed the idea of information as a commodity.
or from within the institutions of, the body politic. Now as Kant has pointed out, purpose is related to the exclusive notions of either price or dignity because:

“In the realm of purposes everything has either a price or dignity. That which has a price, that can be also replaced by something else as its equivalent; that which in contrast is elevated above all price and allows, hence, of no equivalent, that has dignity.”

III.6. Primary Legislation is an Output

The output of a parliament may take different forms. For example, such an output might be a committee report; Hansard; parliamentary papers; or it might be primary legislation. Primary legislation is the product of a particular production process and this process occurs within the domain of the parliament. This production process is also a political action and there is no ultimate rational foundation to political action as it is not possible to say that an action, or statement, or analysis, or the enactment of primary legislation, could be rationally justified as being correct or incorrect.

Primary legislation has both a symbolic and a substantive domain and these domains are not mutually exclusive. The making, that is, the enactment, of primary legislation has a social significance that is independent of the thing itself; independent of the subject matter of the legislation; and independent of any review or application of that legislation. There is a connection between the symbolic form and social action. Some primary legislation will have some claim as to truth and meaning and some will not. The intention of the parliament in enacting the primary legislation may be, or may not be, independent of any intention that may be expressed in the legislation and may be, or may not be, independent of the construction, application, or interpretation of that legislation. Primary


300 Wintgens Luc J., ‘Rationality in Legislation-Legal Theory as Legisrudence: An Introduction’, particularly at pp 1 and 2, where he discussed the concept of legislation as a matter of politics.
legislation should be seen as being contingent, that is, relative to an historical and social context. So primary legislation then is that commodity that has been produced by a parliament at a particular time to satisfy a particular demand.

The genus ‘primary legislation’ is a class of output of a parliament. The output is made by virtue of a particular legislative provision and in accordance with a specified procedure. Primary legislation then is a text that has been endorsed by the institution that has the constitutional power: a parliament. Primary legislation is a result of political action and is the product of particular events and forces. Although the decision to legislate is a political decision, primary legislation is not just a political occurrence but is something that may attract claims as to authority. That something, the realised article, is a thing, a commodity, which is produced by a parliament to satisfy a particular demand. The realised thing then has an identity and it also may have a particular value. This value will vary depending upon the particular context within which the value becomes a reference. For example, for the political subsystem, the value is relative to the satisfaction of the demand for the output. While the value that may be placed on an object may well vary depending on the particular consumer, primary legislation will acquire some value purely because of its origin as a product of the parliament.

There is, I think, an important further reason for recognising that primary legislation is merely the output of a particular subsystem of society. Recognition that primary legislation is nothing more than a brute fact would do away with the necessity of engaging in the convoluted analysis of trying to fit into the traditional model the use that is made of primary legislation, for example, what judges actually do when adjudicating. Hart’s model of the rule of recognition and also of primary and secondary rules is an

301 See Wintgens Luc J., ‘Legislation as an Object of Study of Legal Theory: Legisprucence’, at pp 28-29, where he discussed the legitimation of political action.
302 See Singer J.W. ‘Should Lawyers Care about Philosophy’, at p 1756.
303 Robinson Vince, ‘Codes, Dooms, Constitutions & Statutes: The Emergence of the Legislative Form of Legal Writing’, at p 108.
305 Waldron J., Law and Disagreement, at pp 84-86.
example of what I have called this convoluted analysis.\textsuperscript{307} One could identify the various permutations of what I have called convoluted analysis, but that does seem pointless in that such permutations are all variations of the theme of relating what actually does happen to some traditional model of what does amount to the law. There may well be some union between primary and secondary rules, but this has little do with what primary legislation really is.\textsuperscript{308}

Primary legislation is, in essence, a thing-in-itself\textsuperscript{309} and is the formalised outcome of an endorsed institutionalised process and as such is a text that has been authorised by a parliament.\textsuperscript{310} That is to say, primary legislation is a particular thing and this thing takes the form of a text.

\section*{III.7. The Impact of Path Dependency}

There are stages within the enactment process that have an impact on each piece of primary legislation. The production of primary legislation is path dependent and it is important to recognise the impact of this path dependency on primary legislation.

Axel has claimed that the majority of social theories that are concerned about the constitution of the social do emphasise two major references: that of the norm and that of the barter. That is to say, one branch of social theory will attempt to explain or describe society through the operation of some barter system while the other branch will attempt

\footnotesize{\textsuperscript{307} Hart H.L.A., \textit{The Concept of Law}, at pp 94 and 95. See also Cox Owen, \textit{‘The Meaning of Law in The Concept of Law’}, at p 147.  
\textsuperscript{308} I have taken this description of the union of primary and secondary rules from Cox Owen, \textit{‘The Meaning of Law in The Concept of Law’}, at pp 146 and 147, where it is used in a discussion about Hart’s so-called definition of the term ‘law’.  
\textsuperscript{309} Phrase taken from Murphy W.T., \textit{The Oldest Social Science?}, where he made a comparison at p 45 between the law and the relationship of law to society and the notion of Kant of a thing-in-itself being inaccessible to reason.  
\textsuperscript{310} I have taken this description from Macdonald Roderick A. \textit{‘The Fridge-Door Statute’} where the author argued that Fuller saw what I have identified as primary legislation not in terms of a formalised outcome but rather as the substantive outcome of some social ordering process. Although I certainly agree with Macdonald’s assessment of the impact of Fuller’s thought that would see primary legislation as a “happenstance tied more to contemporary theories of the political state than to anything inherent in the idea}
to explain the actions of interest groups through the application of norms.\textsuperscript{311} The claim by Axel is interesting in that both of the major references can be related to the hypothesis that I have developed about primary legislation being a product.

Teubner provides an example of the norm reference with his claim that modern society is marked, and perhaps even defined, by the emergence of a legal phenomenon that has taken the form of a highly specialised discourse. This discourse has been the source of social self-reproduction that has become institutionalised as a practice and also a source of norm production.\textsuperscript{312}

Barter is an essential mechanism in the very development of primary legislation, irrespective of whether or not the primary legislation is government sponsored or endorsed. From my experience, the administrative process in force in the Australian Capital Territory that must be undertaken to enable primary legislation to be processed is not markedly different from that of any other Australian jurisdiction. While the number of private member bills that are introduced into the parliament of the Australian Capital Territory may be different from other Australian jurisdictions because of the continuing event of minority governments, the administrative process is similar to that of government bills. The Parliamentary Counsel’s Office will usually draft all bills, including private member bills, and the sponsor of a bill will circulate that bill to interest groups, parliamentarians, and key stakeholders. The trade-offs that will occur over what will be in the draft will be similar, irrespective of whether the proposed legislation is government sponsored or sponsored by a private member. The process of seeking Cabinet approval for primary legislation to be drafted and introduced involves trade-offs between different public service departments, interest groups, and parliamentarians. From my experience, these trade-offs can occur through direct barter, for example, ‘if you change this or that then I will not reject the proposal’; or indirectly. This so-called

indirect bartering can occur at the policy formulation stage or at the drafting stage and takes the form of modifying or omitting something because you think a particular proposal will alienate some significant group or individual whose support is necessary for the proposal to proceed. Such practices are common and this so-called bartering process is, from my experience, a regular occurrence for those who are engaged in the development of primary legislation.

Primary legislation, from conception, will follow a defined path. If the demand for primary legislation originates from within either a minister’s office or a department, a submission will be circulated to all departments outlining the proposal and the legislative impact. All departments have the opportunity to comment, but, from my experience, the formal responses are usually circumspect and the prevailing ethos was about playing the game. A commenting department was aware that at some later stage the support of those it was tempted to criticise might be needed. Trade-offs with other departments will usually have occurred before the initiating department circulates a legislative proposal. A bill, once introduced to the parliament, will follow the path stipulated in the standing orders of the parliament.

There is, for the purposes of this thesis, little point in critiquing all the stages of these paths but I do want to deal with two stages that have a significant impact on the final form of primary legislation. These stages are the drafting processes, and the internal

312 Generally see Part V of Teubner Gunther, ‘The Two Faces of Janus: Rethinking Legal Pluralism’, particularly at p 1457.
313 One incident I was involved in is still firmly fixed in my mind after all these years. A draft proposal was circulated by the department responsible for health issues about a so-called health initiative that would require significant changes to existing legislation and increase the powers of health inspectors. I don’t know whether the initiating department did engage in pre-submission consultation. The proposal gave little detail and consisted of condensed platitudes and I found it impossible to understand what was intended or what might be the possible consequences if the proposal went ahead. I wrote a curt critical comment suggesting that the proposal should be withdrawn and revised. The Secretary of the department I was in informed me that as the proposal would not impact on his department I should withdraw my response. This I duly did. Cabinet approved the proposal in the form I had reviewed. No doubt such a thing could not now happen.
314 See, for example, Hackett-Jones Geoffrey, ‘The scar of Odysseus and the role of parliamentary counsel in the legislative process’ who claimed, at p 56, that the “parliamentary counsel has vitally important functions both as a legal theoretician and as an expert in the form and expression of legislation”. Hackett-Jones was the Chief Parliamentary Counsel for South Australia.
review mechanism that exists in a parliament: certainly within each parliament within Australia. I would suggest that, based on my experience, it is impossible to over-estimate the impact that drafters and the parliamentary internal review mechanisms have on primary legislation.

While a drafter acts as a cognitive filter in that drafters draft primary legislation, drafting is a collegial activity that seeks to impose endorsed standards and models. Drafters see the drafting role as that of being responsible for articulating the law or a change to the law, so drafters are aware of the prevailing judicial pronouncements about the form of legislative provisions. 315 It is an article of faith for drafters that they, individually and collectively, have the burden of ensuring the integrity of the statute book.316 During my time as a public servant, the parliamentary drafters drafted the vast majority of primary legislation tabled. On the rare occasions a proposed enactment was not drafted by that office the proposed enactment was faithfully modelled on some enactment that was so drafted. From my experience, a good drafter would contribute to policy development by enabling a proponent of some proposal to distinguish between trees and the forest. But, whatever the contribution of a drafter to policy development, the final product, the bill, bears the hallmark of the drafter and not the proponent of the legislation. Sometimes, of

315 See Calcutt Gregg, ‘The Voice of Parliament’, who describes the procedure that exists in Western Australia. The author commenced the paper with a quote from Gleeson CJ in Wilson v Anderson ((2002) 213 CLR 401 at 418) that “[p]arliament manifests its intention by the use of language, and it is by determining the meaning of that language, in accordance with principles of construction established by the common law and statute, that courts give effect to the legislative intention.” At p 2 of the paper the author illustrated the significance of drafters to the process by expressing surprise at what he saw as a continuing perception that somehow a parliament will formulate a legislative proposal and then the legislative drafters will draft legislation to give effect to those proposals. The author then described the procedure in Western Australia and the procedure is little different than the procedure I have described. The author then asserted that the complexity of the subject matter and the quality of the instructions that are given to the legislative drafters will determine the number of draft bills that will be necessary in order to get the proposed legislation in a form to be approved by cabinet and introduced in the parliament. The author concludes at p 3 that in terms of the quoted formulation of Gleeson “the legislative will of the Western Australian Parliament will be determined by reference to the language of one of the 15 drafters in the Parliamentary Counsel’s Office.”

316 The collection of essays in Kelly David St. L., Essays on Legislative Drafting gives an excellent insight into how drafters see their role.
course, this does cause friction between the drafting office and the sponsoring agency and this friction can be time and resource consuming.317

The impact of the parliamentary internal review mechanisms, such as the Australian Capital Territory Scrutiny of Bills Committee, is equally significant. All public servants, particularly the lawyers, who are regularly involved in any way with the development of primary and secondary legislation will be well aware of the substantive and procedural requirements of particular review bodies.318 A parliamentary drafter, when drafting a particular provision, would be aware of the endorsed format and would adopt that format. In a discussion of a case study, I give an example of the use of one such endorsed format.

While it is the parliament that enacts primary legislation, it is the drafters and the internal review mechanisms that are primarily responsible for the structure and form of the primary legislation and frequently it is the structure and form that are the substance of primary legislation.

III.8. Primary Legislation as a Text

I have asserted that primary legislation is a thing that has been produced by a parliament and this thing may become an object. Primary legislation is a thing that is a text and it is relevant that a text is merely a pamphlet printed in some format and, by itself, is functionless and incapable of anything. This text is available for perusal in hard copy and also via a computer.

317 One such dispute I was involved in was over the title of a major piece of legislation for the Territory. The dispute between the drafters, including, the head of the drafting office the Parliamentary Counsel, and the sponsoring department became so heated that I felt it necessary to confer with the Attorney-General during a parliamentary debate and get his written directive as to what the title of the proposed enactment would be. While the endorsed title satisfied neither the drafters nor the sponsoring department it became the title of the enacted legislation.

318 For example, when I worked in the Department of the Attorney-General I studied all reports of the ACT Scrutiny of Bills Committee and the corresponding Federal parliament committees and had discussions with colleagues about issues raised in such reports.
A text to have any value, other than whatever value flows from the physical entity, must be utilised, or acted upon, by some actor. The thing that is primary legislation acquires a different perspective when it is utilised as it will become an object and this object is an institutional fact. Weinberger provides a description of a distinction I wish to make between a brute fact and an institutional fact.319 Weinberger has argued that a so-called descriptive language that consists of modal notions of being possible or necessary and contingent is a sufficient medium of communication to describe a thing, a brute fact, and the uses and functions of that thing. However, analysis of institutional facts requires a language sphere of practical sentences because “institutional facts relate to deliberation and selection processes that determine possible actions.”320 This distinction is illustrated by the notion that one can talk of the idea of the being or consequence of an institutional fact through the existence and application of some rule that relates to the occurrence of some brute fact.321 The application of these language spheres is illustrated by Atria in the discussion about the rules of boxing. The institution of boxing exists not to regulate a fight but to create a new institutional form of fighting. A fight then is a brute fact, the rules of boxing are institutional facts and boxing is an institution.322

The immediate consequence of primary legislation being a text is the separation, by time and space, of the text from the source of the text. This separation engenders what Gergen identified as the hermeneutic problem of context, interpretation, and usage, with the mind of the reader as the origin of action.323 What has been identified here is something of an expression of critical materialism in that some social actor receives meaning from some object but will also be constrained by the determinate independence of the object.324

III.9. What is a Text?

321 See Atria Fernando., On Law and Legal Reasoning, at pp 27 and 44-45.
324 See Chapter 1, ‘The Role of German Idealism in the Negative Dialectic‘ in O’Connor Brian, Adorno’s Negative Dialectic: Philosophy and the Possibility of Critical Rationality, particularly at pp 19, 20, and 21, where the author discussed the influence of Kant on the philosophical development of Adorno.
A text is a product of language usage and, while a text may be spoken, the usual medium of expression is writing.\textsuperscript{325} What I am concerned about here is the written medium, and, for my purposes, a text is a literary creation that, at the most basic level, is merely a collection of written words that have been subjected to some formatting considerations.\textsuperscript{326}

I have utilised the term ‘text’ to mean a self-conscious, written verbal formula\textsuperscript{327} that upon publication may become a public object.\textsuperscript{328} There are four functions or attributes that are explicitly tied to the notion of a text. First, a text is a thing that has structural attributes and also has something of an idealised institutional classification of non-contamination and non-contradiction.\textsuperscript{329} What I mean by this is that once a text is printed, the text cannot be contaminated or contradicted because it remains a collection of words and signs assembled on a page or pages. Certainly, alterations or amendments may be made but the altered text would become a different thing. A text may also be classified as belonging to a certain genre and the imposition of a genre classification also has ramifications in respect of interpretation and application.\textsuperscript{330} Secondly, a text is a deliberate creation because it must be composed. Thirdly, a text will have been subjected to some publication process and finally a text is, at the very least, available to be read.\textsuperscript{331}

In his 1996 Boyer lecture, Ryckmans argued that a characteristic of any valid literary creation is that this literary creation cannot be adequately accounted for in any other form.\textsuperscript{332}

\textsuperscript{325} See the Introduction, particularly at pp 3-6, to Steiner Erich H. and Robert Veltman, (Eds), Pragmatics, Discourse and Text: Some Systemically-inspired Approaches.

\textsuperscript{326} This description was adapted from the discussion about text meaning and author intention outlined in the section entitled ‘The Rationale Problem’, at pp 3-5, in Lyons David, ‘Original Intent and Legal Interpretation’.

\textsuperscript{327} See Cover R., Narrative, Violence, and the Law, at p139, footnote 115

\textsuperscript{328} The term ‘public object’ was taken from Knapp Steven and Walter Benn Michaels, ‘Against Theory’, at p 725 where the authors considered the notion that a text is a “piece of language” and a “public object whose character is defined by public norms”.

\textsuperscript{329} Generally see Habermas G. Between Facts and Norms.


\textsuperscript{331} I have adapted this analysis of a text from Ryckmans Pierre, The View from the Bridge, particularly pp 15-20.

\textsuperscript{332} Ryckmans Pierre, The View from the Bridge, at p 38.
Primary legislation is a valid literary creation and it takes an endorsed established form in that the primary legislation will be formatted to accord with conventions. These conventions do have minor variations from jurisdiction to jurisdiction, but the output takes a similar form particularly within common law jurisdictions. The issue of form is something that goes to the acceptance of the validity of primary legislation because the adoption of a particular form indicates a desire to distinguish the particular thing. Spencer Brown argued that one consequence of this desire to use a particular form is that it is impossible to escape from that form. There may be, however, discretion as to how the form is seen.333 While the concern of each enactment of primary legislation is a theme or themes, every enactment of primary legislation is a vehicle for literary expression that highlights style and presentation.334

III.10. Utility of a Text

A text is a factual concrete thing and this thing of itself has no mystical primacy. 335 Upon publication a text has identity, singularity and unity,336 and a text may be read, may be the subject of debate, and may be the fulcrum for some course of action.337 The context within which a text is utilised may well vary from time to time and may well have little relevancy to the reasons for publication. The utility of an object can be judged by the degree to which the object may or may not be appropriated by someone or something other than the production process that created the object. 338

333  Spencer Brown G., Laws of Form, at pp 3-5.
334  Generally see the Introduction by Hannay Alastair to Kierkegaard Soren, Fear and Trembling, particularly at pp 8 and 9, where Hannay discussed the accuracy of the subtitle of Fear and Trembling as a dialectical lyric.
335  The phrase “no mystical primacy” was taken from Mishra Vijay, ‘Text, Textuality and Interpretation: An Interview with Michael Riffaterre’, at p 109. Riffaterre asserted that as a text is a given, a text has no mystical primacy because it is a factual concrete start point.
336  Generally see Habermas J., Between Facts and Norms, and also Ryckmans Pierre, The View for the Bridge.
337  Generally see Ryckmans Pierre, The View from the Bridge, at pp 36-40.
Stout has argued that there will be numerous contexts that could be relevant to any given text, so a text can acquire a social, and possibly a material, entity that is dependent on identifiable institutions of meaning. I have asserted that when this occurs, the thing that is a text is transformed into an object. The examination by a court of some primary legislation is an example of this dependent relationship as a court will view and interpret according to criteria that have been established by the court.

Access to a published text may be restricted but the point I want to make is that, at the moment of publication, a text is there to be read by whoever has access to the text. While a text may be capable of fixed meaning, usually a text is open to interpretation. Bennett has argued that it is difficult to make a significant comment about a text-in-itself without making a decision about the context that will be invoked when the text becomes the object of analysis.

I have made a distinction between primary legislation as a thing and primary legislation as an object. This distinction occurs because interpretation is related to an object but there is no such relationship with a thing. Primary legislation when used becomes an object and this interpretative relationship might be either explicit or implicit. There might well be more than one interpretation but the relationship must exist for the thing to be an object. An object is subjected to some form of interpretation, while a thing is not. Interpretation is always related to an object and, in relation to any text, including primary legislation, the referential linkage between the object and an interpretation is that of context. While the nature of the usage of primary legislation will vary, for example, input into a curial proceeding or a policy directive for bureaucrats, the essential characteristic is constant in that primary legislation is but a text.

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341 See, for example, Pearce D.C., and R.S. Geddes, *Statutory Interpretation in Australia*, at pp 20-24, and also Hutchinson Allan C., *Its All in the Game*, at pp 86-94.
342 See, for example, Morrison Wayne, *Jurisprudence: from the Greeks to post-modernism* and the discussion, at pp 9 and 10, about confronting post-modernity.
344 I have adapted this analysis from Pettersson Torsten, ‘What is an Interpretation?’, particular at pp 33-35.
Dworkin has argued that theories of interpretation exist within a particular context and are, in the main, addressed to some particular culture and that this culture is generally the culture to which the interpreter belongs. This interpretative coupling does have consequences for the law because, unless the interpretative theory is sceptical, the theory “will treat [the] legal system as a flourishing example of law, one that calls for and rewards the interpretive attitude”. This analysis does reflect the notion of Dworkin that it is desirable that the law be used in a “flexible way depending on context or point.”

The act of interpretation does raise the question about where and how the interpretation is grounded, because the interpretation protocols that will be applied will be derived from whatever is the perspective of the interpreter. Interpretation of a text may be grounded, for example, in the originating consciousness; in the interpreter; in the text itself; in the historical context within which the text was produced: or in the context within which the work is being considered. In relation to the hypothesis I have outlined, the interpretation protocol I have espoused is grounded in the notion that, in relation to statutory interpretation, priority is given to some form of contextual application of an endorsed narrative.

But, irrespective of how the interpretation of text is grounded, it does seem that there is little support for the idea of some theory of interpretation. For example, Fish does not accept the notion of some theory, or general evaluative account, of interpretation. Steyn also accepted this idea of the lack of any theory of interpretation because, for him,

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345 Dworkin Ronald, *Law’s Empire*, at p 102. It is interesting that the author stipulated that the theory must be deeply sceptical.
349 There are exceptions to this statement. See Pettersson, Anders *The Multiplicity of Interpretation and the Present Collection of Essays*, particularly at pp 4-7, who discussed several so-called theories of interpretation. This chapter by Pettersson is the Introduction to Carlshamre Staffan and Anders Pettersson, *Types of Interpretation in the Aesthetic Disciplines*.
350 Fish Stanley, ‘Interpretation is Not a Theoretical Issue’, at p 509.
the subject of interpretation is “too elusive to be encapsulated in a theory”.\textsuperscript{351} In relation to statutory interpretation, Pearce and Geddes have specified that the so-called principles of interpretation utilised by courts amount to nothing more than approaches and assumptions about interpretation.\textsuperscript{352} While, according to Steyn, there are so-called rules of interpretation, these rules only have a limited application.\textsuperscript{353} Indeed, the only realistic opinion open to a reviewer is to provide an insight into what interpretation does entail and this is achieved by having regard to the output of legal philosophers, academics, practising lawyers, and judges.\textsuperscript{354}

What I have been asserting is that primary legislation may be seen as something of a sorities paradox in that the world is not as popularly perceived so that a thing that does exist is unlikely to have the properties it is purported to have.\textsuperscript{355} But, be that as it may, what is undeniable is that the thing that is primary legislation is a text.

\textbf{III.11. Primary Legislation a Text-in-itself}

The concept of the text-in-itself revolves around the issue of determinacy and whether the meaning of a text is a recoverable representation deposited, however loosely, within the text itself or whether meaning does not reside within the text but re-emerges from the act of reading.\textsuperscript{356} While the author of a text cannot control how the particular text is to be read or understood,\textsuperscript{357} the authorisation of primary legislation by a parliament means that the text is not divorced from its anchoring source\textsuperscript{358} and this anchoring has consequences for the interpretation and application of the text. There are, of course, issues or questions

\begin{itemize}
\item \textsuperscript{351} Steyn Johan, ‘The Intractable Problem of the Interpretation of Legal Texts’, at p 6.
\item \textsuperscript{352} See Chapter 1.4 ‘Approaches to interpretation of legislation’, in Pearce D.C., and R.S. Geddes Statutory Interpretation in Australia.
\item \textsuperscript{353} Steyn Johan, ‘The Intractable Problem of the Interpretation of Legal Texts’, at p 5.
\item \textsuperscript{354} See Steyn Johan, ‘The Intractable Problem of the Interpretation of Legal Texts’, at pp 5 and 6, and the classification is that of the author.
\item \textsuperscript{355} See Chapter 3 ‘The Sorities Paradox’ of Heller Mark, The Ontology of Physical Objects: Four-dimensional Hunks of Matter, particularly at p 69.
\item \textsuperscript{356} Generally see Hunter Ian, ‘Literary Discipline’, at p 129.
\item \textsuperscript{357} Generally see Chapter 4, ‘Playing with Authority: Interpretation and Identity’ in Hutchinson Allan C., It’s All in the Game.
\item \textsuperscript{358} This notion of a text being divorced from its anchoring source was taken from Fish Stanley E., ‘With the Compliments of the Author: Reflections on Austin and Derrida’, at pp 700-702.
\end{itemize}
about the nature of a text-in-itself that do relate to critical discourses because meaning is not a function of origin. \(^{359}\)

The act of reading does raise the issue of inter-textualism and such an issue can range from the study of sources to the text always being fragmented in that it is a radical transformation of a pre-text. \(^{360}\) However, it is ridiculous to claim that the meaning that can be given to some particular enacted primary legislation is open to idiosyncratic individual choices because there are interpretative conventions that limit possible choices as to meaning by relating the language used to defined referents. \(^{361}\) This is, in part, a consequence of what I have called the anchoring process.

As Dworkin has pointed out, interpretation is an activity and the act of interpretation will of necessity include some mechanism that will enable the identification of the character and the properties of the material that is being subjected to interpretation. \(^{362}\) Therefore, in relation to primary legislation, the constraints on that legislation being a text-in-itself will be partly explained through the social determinants that are a condition of the production of that primary legislation. These social determinants will constitute representations and practices that will limit the meaning that could be accorded to the text that is a particular enactment of primary legislation. \(^{363}\) But it is important to realise that these social determinants will arise within some context and the contexts will vary and this variation could well stimulate variations to the social determinants. I would reject the argument that the structure of a text can ever have sufficient force to overcome the context within which that text becomes the subject of analysis. \(^{364}\) It is not that there is nothing outside of the text but rather that what is outside of the text is a reconstruction.

\(^{359}\) This is a point made by Frow John, in ‘Gongula…’, at p 143.


\(^{361}\) This notion of interpretative conventions and the relationship between language used in primary legislation and a defined referent was taken from Fish Stanley E., ‘With the Compliments of the Author: Reflections on Austin and Derrida’, at pp 695 and 696.

\(^{362}\) Dworkin Ronald, ‘Law as Interpretation’, at pp 531 and 544-546.

\(^{363}\) The phrase “idiosyncratic individual choices” and the comments about the application of social determinants were taken from King Noel, ‘Text/ Reading/ Context’, particularly p 128.
III.12. Transformation of Primary Legislation

Upon use, primary legislation will become a social construction that is shaped by the relationship between the text and whatever is the context, be that context social or political or legal, within which the user is situated whenever the text becomes the subject of examination. Crucial to any consideration of the nature of primary legislation are the issues of time and space. The functions of primary legislation will be a creation of whoever is considering the primary legislation, when and where it is being considered.

I am here adopting something of a post-modernist perspective because a text is written and it has no meaning that can be considered as being given or universal. While, of course, some interpretation or interpretations of a text will be more appropriate than others, a text does not, of itself, reveal any meaning and must, of necessity, relate to something outside of the text and as a consequence meaning is deferred. The reader is outside the text. That is to say, I have rejected the application of some putative order of universalism and will instead be seeking to recognise the disorder of particularism. I see this recognition of disorder as emphasising the primacy of politics. The being of primary legislation and any construction, or reconstruction, of such an enactment through some application or relationship is a separate thing.

When a thing is used, the act of using becomes a transformation process that ensures that the thing will be distorted to some degree, whenever the thing is used. The impact of this

364 The comment about a text having sufficient force to overcome the context was taken from Hume Peter, ‘The Text in Itself’, at p 136.
365 See Vice Sue, Introducing Bakhtin, at pp 200-202, where she discussed the concept of Bakhtin of the ‘chronotope’. Chronotope is for Bakhtin the means of measuring how time, space, and historical persons are articulated in a text. Indeed, for Bakhtin time and space have implications for any cognition. See Bakhtin Mikhail, ‘Forms of Time and Chronotope in the Novel’ in The Dialogic Imagination: Four Essays, at p 85. See also the discussion of this point in Vice Sue, Introducing Bakhtin, at p 201.
366 I have taken this description from Chapter One, Deconstruction and Legal Interpretation, or the Uses of Derrida in the Face of an American Crisis, particularly at pp 14 and 15, of Rosenfeld Michel, Just Interpretations, where the author discussed texts within a deconstruction context.
367 I have taken the notion of the primacy of politics from Ojeili Chamsy, ‘Post-Marxism with Substance: Castoriadis and the Autonomy Project’, particularly at pp 231-233, utilising the notion of Castoriadis that the “question of politics is the overall question of society”. (Castoriadis Cornelius, Political and Social
distortion will mean that the utilisation of this distorted thing can be viewed as an event or a spectacle. The thing has become an object that has a context and this context will be a reflection of both the user and the use. The consideration of primary legislation by a court is an example of this distortion in that the activity of the court converts that primary legislation into a materialised ideal that is a reflection of the institutionally induced belief of the court. The object, as utilised by the court, is not the thing that was enacted by the parliament.

To adopt the distinction of Rorty, a context will come into existence each time the text is used. Any attribute or function attributed to the text therefore will be a function of the context within which the text is used. Reckwitz, for example, has argued that a fundamental concern of most social or cultural theories is relating the material with the symbolic. Around such concerns revolves the question of the status of the material dimension and the definition of this dimension within the vocabulary of the particular theory.

The relationship of the material to the symbolic is an expression of the space where the transformation of the thing into the object occurs. The transformation is part of the third element of what I have called the trinity and I have outlined what I mean by the concept of a trinity. The space of the first aspect of the trinity would be the ritualised enactment process within the institution of parliament and the given time is that of enactment. Following a further, but related production process the object will be replicated, with the result that additional things will be produced. This further production process is the printing of a copy of the enactment within the various media, for example,

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Writings Vol 1 1946-1955, at p 31, as quoted in Ojeili Chamsy, ‘Post-Marxism with Substance: Castoriadis and the Autonomy Project’, at p 231.)

368 See Clam Jean, ‘System’s Sole Constituent, the Operation: Clarifying a Central Concept of Luhmannian Theory’, at pp 67 and 74, where the author refered to Luhmann and the concept of post-ontological structures.

369 See Rorty Richard, Objectivity, Relativism, and Truth, at p 103.

370 If one takes the example of primary legislation being used in some judicial proceedings then the material is the presented text and the symbolic is the proceedings of the court.


372 See the text-surrounding footnote 32.
hard copy or a computer generated referral service. This replicated thing will then exist in a separate space and time. I am here saying that the parliamentary enactment and the copied enactment are separate things. The thing, when considered within the perspective of the first two aspects of this so-called trinity, will be a brute fact.

The third element of the so-called trinity is the object when it becomes the frame of reference of some particular activity. Upon use, this object would be an institutional fact. The space and time considerations relate to the retrieval process and the particular use, for example, when that legislation is used as in a court hearing. This distinction is relevant because each object has a context so that the particular object that has become the referent will have a context that is unique to that object. This emerged context will be a reflection of the particular use and will result in differing attributes or functions being ascribed to this object. That is to say, the subjective activities that are associated with some focus on that object may well exist on varying levels.373 An understanding of the object is impossible outside of that object’s context. Furthermore this context is not merely the external affiliations but would also include the characteristics that are attributed to that object.374

Central to such an argument is the notion that there is a relationship between an object, the form and attributes of that object, and language usage.375 In considering an object one needs to recognise that each object has acquired some degree of temporal and spatial endurance and has also acquired a symbolic framework that identifies a dual order. First, there is the practical material order that relates to the passive and does reflect the notion of the article being a thing, a brute fact. The second order is an expressive order that may endow the object with a status so that the object becomes embedded in some narrative

373 I have taken this idea of subjective activities in relation to an object from Lewis C.S. An Experiment in Criticism, where the author, at pp 1 and 2, made a distinction between readers or types of reading in order to see whether such a distinction could have an impact on the subject of the activity.
374 See Chapter 1 The Ethical Message of Negative Dialects in Cornell Drucilla, The Philosophy of the Limit, particularly at pp 21-23, where the author discussed the views of Adorno about the identity and identification of a thing.
375 See, for example, Mezey Naomi., ‘Out of the Ordinary: Law, Power, Culture, and the Commonplace’, at pp 152 and 153.
construction and is in effect an institutional fact.\textsuperscript{376} Inherent in this expressive order is the concept that the article may be transformed from a thing that exists in-itself into an artefact that is the effect “of a performative stabilization of relational networks”: an object.\textsuperscript{377} The object has become a spectacle. So in formulating this argument, I have adopted a taxonomy that reflects an ontological distinction of a realm of facts and a realm of values. Such a perspective has been called neokantianism.\textsuperscript{378} The law falls within the realm of values, while primary legislation falls within the realm of facts. Primary legislation is a thing-in-itself, and the way primary legislation, or indeed any thing, is perceived or utilised within a society is a function of the subsystems within that society. Primary legislation is independent of the forms given through a perceived reality.

Weinberger illustrates the point I have made with his argument that what he called human reality is not limited to a system of brute facts but also included classes of institutional facts. To illustrate this argument, Weinberger gave the example of a coin that can be described by its physical features but can only be adequately understood if its institutional function is taken into account. That is to say, when the coin is considered within the reference of a monetary system. For Weinberger, reality is not merely the ascertainment of brute, or physical, facts but also includes the regime of institutional facts that define the institutional role of the brute fact.\textsuperscript{379} Primary legislation is the thing that is produced by a parliament, and this thing acquires attributes, or functions, from the various contexts within which this thing becomes the reference point. Within the rhetoric I have adopted, the thing has then become an object.

Steyn illustrated something of such a point in his discussion of what he saw as the intractable problem of interpretation. While Steyn claimed that the dominant source of the law is statute law, he categorised the preponderant work of English judges within the various courts in the United Kingdom as the interpretation of a variety of legal texts such

\textsuperscript{376} See Pels Dick, et al, ‘The Status of the Object’, at p 9, for a discussion of this concept of the dual order of an object. Earlier in the thesis I discussed the difference between a brute fact and an institutional fact.


\textsuperscript{378} See Axel T. Paul., ‘Organizing Husserl: On the Phenomenological Foundations of Luhmann’s Systems Theory’, at pp 375 and 376.
as wills, contracts, or primary legislation. Primary legislation is a legal text to be interpreted during the curial process.\textsuperscript{380} Primary legislation then is referenced as an object-form in that it is a socially constructed artefact. The question then emerges as to the connection between the object-form that is primary legislation and judicial decision-making.\textsuperscript{381} To my mind, the connection is that of giving effect to the endorsed narrative of the legal practice or, as Kennedy has asserted, the connection is the creation of the field of law through some restatement of the law.\textsuperscript{382}

\section*{III.13. Notion of Context}

For primary legislation to be transformed into an object, that primary legislation must be used or considered. However, this utilisation or consideration does not occur in a vacuum but rather within some context. I now want to deal with the notion of context.

One of the definitions of the term ‘context’ outlined in The Shorter Oxford Dictionary is: “the surrounding structure as determining the behaviour of a grammatical item, speech sound etc”.\textsuperscript{383} In relation to primary legislation there will be, as I have asserted, numerous contexts. For example, the context from which the demand for the primary legislation emerged; the enactment process that would include the legislative drafting as well as possible political compromises about the content of the legislation; and finally the contexts within which this primary legislation may be used. The contexts within which primary legislation may be used vary, for example, in a court; in a legal argument or advice by a lawyer to support some proposition; in an academic argument, paper or treatise; in the public service; or in an interest group submission. Although primary legislation is a text, that text will be viewed differently within each of the contexts I have

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\textsuperscript{379} Weinberger Ota, ‘Neo-Institutionalizm: My Views on the Philosophy of Law’, at p 256.
\textsuperscript{381} See Schlag Pierre, ‘The Aesthetics of American Law’, particularly at p 1067, where the author discussed locating what he called the discrete legal artefacts that are object-forms such as cases, holding, statues, principles and values within what he identified as an aesthetic grid reference.
\textsuperscript{382} See Kennedy Duncan, ‘Toward a Critical Phenomenology of Judging’, at p 562.
\textsuperscript{383} Shorter Oxford Dictionary, Volume 1, at p 493.
\end{flushright}
outlined in that the text serves a different purpose within each context and different attributes may be ascribed to that text.

Rorty illustrated the nature of context in an argument about the merits of essentialism and anti-essentialism and this view does have some significance to the points I have attempted to make. Rorty pointed out that the distinction between essentialism and anti-essentialism is not some dichotomy but is rather one of degree and as a consequence should be seen as some form of continuum. Rorty encapsulated the difference between these two concepts by articulating what he identified as his personal fantasy of an ideal culture. This ideal culture is deeply anti-essential in that the referent is not the distinction between what is methodical or what is philosophical. Rather, it is the distinction between what it is that the practitioner does. He gave the example of a sociologist or a physicist. The consequence of all of this is that for Rorty, there is no distinction between explaining and understanding, and no distinction between explanation and interpretation.

This anti-essentialist view is reflected in that argument that an object will come into existence with a context attached and as a result all objects are contextual. The object then cannot be independent of that context, and any inquiry about the object would not be an exercise of discovering the nature of that object but rather some reclassification of beliefs about that object. It is impossible, Rorty has argued, to take an object out of a context and examine that object to see what new context would be appropriate. Objects cannot be divided into those objects that are independent of context and those objects that are context dependent. In essence, “we are not talking about the same [object] if we say very different things about it”. An inquiry about an object then is not aimed at

384 I have taken most of the argument in this paragraph from the chapter ‘Inquiry as Recontextualization: A Anti-dualist Account of Interpretation’ in Rorty Richard, Objectivity, Relativism, and Truth, particularly at pp 97-101.
385 Rorty Richard, Objectivity, Relativism, and Truth, at p 103.
386 Rorty Richard, Objectivity, Relativism, and Truth, at p 103. The statement about the rejection of the distinction between explanation and understanding was taken from p 109.
387 See the chapter entitled ‘Inquiry as Recontextualization: An Anti-dualist Account of Interpretation’, in Rorty Richard, Objectivity, Relativism, and Truth, particularly at p 98.
identifying some representation of that object but rather seeks to make beliefs and desires about that object coherent. An inquiry is the response that follows from the introduction of some novel stimuli that will generate incoherence among beliefs and goes to the unearthing of meaning.  

There are two historic anthropologic concepts relating to structure and performance that are relevant to the attribution of meaning. First, there is the notion that thought is dependent on a given situation so that any given situation will demand a pattern of thought that is appropriate to that situation. The second concept relates to the dependence of one belief on other beliefs so that a belief is not isolated but is part of an anthology of beliefs. One stream relates to habit while the other relates to the process of enquiring.

The growth of a belief follows the development of a habit of action and amounts to some established disposition that legitimises the exercise of this habit. Beliefs and context do change when there is incoherence within the existing context. Collectively, beliefs can form what Rorty identified as a self-rewaving mechanism that will stimulate movement within any organism. A statement by an individual about the representation, or the content of an object, would reflect beliefs that are the consequence of the recontextualising of that object. This structuring of an additional context occurs with the act of representation or description. It is impossible then to divide an object into what it is and what its properties are.

Rorty would divide all contexts into two different categories that can be related to those distinctions of habit and beliefs or enquiring that I referred to earlier. While the distinction between the categories is irrelevant to this thesis, these categories do

390 See Burke Peter ‘Context in Context’, at pp 160-163.
392 See the chapter entitled ‘Inquiry as Recontextualization: An Anti-dualist Account of Interpretation’ in Rorty Richard, *Objectivity, Relativism, and Truth*, particularly at p 98, where the author discussed views of essentialism and anti-essentialism.
393 Here Rorty was outlining a version of the anti-essentialist claims by Davidson Donald ‘Radical Interpretation’ in his *Inquiries into Truth and Interpretation*. See Rorty Richard, *Objectivity, Relativism, and Truth*, at p 107.
emphasise the anti-essentialist perspective that there is no intrinsically privileged context.\textsuperscript{394} A context for Rorty is a logical space. In relation to the theme of this thesis, this logical space would consist of those beliefs about an object that will provide all possible descriptions of or about that object. A context for an object is the set that relates all those things about the object that have an endorsed truth-value. It consists of all possible descriptions about the object in whatever circumstance the object may be placed. So Rorty would argue that an anti-essentialist would reject a distinction between the real and the appearance and endorse a context that would recognise ever-expanding images.\textsuperscript{395}

To me, the problem with the analysis by Rorty is that I cannot see how articulation, in this case of a belief, can be responsible for understanding while at the same time advancing understanding.\textsuperscript{396} There is a duality, and Burke does cater for this duality by arguing that the concept of context has mobility. So a context, depending on what is to be explained, can cater for the application of the entire gambit of being defined precisely, vaguely, narrowly or broadly, or be applied either flexibly or rigidly.\textsuperscript{397}

But what to me is irrefutable is that for object directed thought there must be, at the very least, a relationship between an object and a context.\textsuperscript{398} It is, again as Rorty has suggested, an issue of degree and Deleuze provided an example of the distinction I wish to make about a relationship between object and use. While I find the views of Deleuze


\textsuperscript{395} Generally see Rorty Richard, \textit{Objectivity, Relativism, and Truth}, particularly at p 100.

\textsuperscript{396} See the introduction to Pettit Philip, ‘Practical Belief and Philosophical Theory’, at pp 15 and 16, for comments about the articulation of beliefs. Pettit asserted, at p 15, that a necessary precursor for the articulation by an individual of ideas or beliefs is that the individual has such ideals or beliefs and that the act of articulation is “a matter of analysing what is there, not a matter of adding something new”.

\textsuperscript{397} See Burke Peter, ‘Context in Context’, at pp 171 and 172, 174 and 175. Burke, at p 171, asserted that the term ‘context’ resembles the concept of culture and one could question what is not context because “the concept of context is one that has been defined precisely or vaguely, narrowly or broadly, and employed in both a flexible and a rigid manner”.

At p 172, Burke further asserted that what will count as a context will depend upon the matter to be explained so that a context is “not found but selected or even constructed, sometimes consciously, by a process of abstracting from situations and isolating certain phenomena in order to understand them better”. The article by Burke provides a useful historical analysis of the concept of the term ‘context’.

about the relative impact of context intuitively appealing, it may well be that Deleuze
does go too far with his declaration that:

“[the] text, for me, is only a little cog in an extra-textual practice. It is not a
question of commenting on the text by a method of deconstruction, or by a
method of textual practice, or by any other method; it is a question of seeing what
use a text is in the extra-textual practice that prolongs the text”.

While the claim by Deleuze may be questionable, it seems to me indisputable that the
particular context within which the primary legislation is used will have an effect on the
interpretation of a text. This effect occurs because any context includes those discourses,
systems, and practices, which are relevant to that context and such elements will help to
establish that one interpretation of a text is more plausible than any other
interpretation. This is not to say that the context will enable the discovery of some
correct interpretation in that there may well be conflicting answers. But what the context
will do is suggest some interpretation that will provide some coherent conceptual
representation of the text.

Interpretation then invokes the functional rather than the formal in that interpretation is
about meaning assignment. As a result, context becomes a relevant consideration. I
would stress that in relation to a text, the context within which the text will be utilised is
not some element that exists merely outside of the text but is, in Bennett’s terms, a thing
that “bears in on the text, opening it up from the outside in”. As a consequence the use
of the primary legislation within some context, for example: by a public servant
responding to some demand; a lawyer arguing some case; or a judge deciding a case; will

400 Eagleton Terry, ‘The Text in Itself’, at p 117.
401 Generally see Pettersson Torsten, ‘What Is an Interpretation?’, particularly at pp 33 to 39
402 I have taken the phrase ‘meaning assignment’ from Pettersson Anders, ‘Five Kinds of Literary and
Artistic Interpretation’, at pp 52 and 53, where the author argued that interpretation is an approximate
synonym for meaning assignment whether to a text or an art work.
impact, to a greater or lesser degree, upon the meaning attributed to the enactment by the user.

In view of the divergence of the opinions I have outlined, perhaps the identification by Fish of two simplistic concepts of context may well be sufficient. The first is narrowly based and relates to a collection of features and is therefore something that can be identified by an observer. The second notion has a broader application and sees a context as being a structure of assumptions. I favour the broader description.

III.14. Primary Legislation as an Object

Notwithstanding that primary legislation is the thing that has the properties of being a text, how one approaches or uses this thing does involve cognitive considerations. DuGay has argued that a characteristic of contemporary society is for changes to occur to the interrelationship of different systems of production and consumption, or regimes of value, and “the multiplication of relatively independent sites for the use of things”. Brown has captured something of the distinction I want to make between things and objects, with use of the aphorism that “[t]hings are what we encounter, ideas are what we project”. Primary legislation, for example, becomes an object through use. This use might be as diverse as a court where the primary legislation is utilised as a privileged text that will have a meaning attributed to it by the court using the sanitised interpretative techniques appropriate to that court; or by a bureaucrat using primary legislation as a policy or a plan of management upon which to base some course of action; or be an academic pursuing some theme; or by a lawyer to aid in the achievement of some objective; or by an interest group seeking a political goal.

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403 Fish Stanley E., ‘With the Compliments of the Author: Reflections on Austin and Derrida’, at pp 707 and 708.
406 DuGay Paul, (Ed), Production of Culture/Cultures of Production, at p 4. See also ‘The Introduction’ to Gottdiener Mark (Ed), New Forms of Consumption: Consumers, Culture & Commodification, at p ix.
Primary legislation could well be considered a cultural phenomenon. That is to say, the way that primary legislation is subjected to debate, or is viewed, or is used, will depend on the motives of the debater or user, the modes of representation, and language usage, applied during the debate or utilisation. The modes of representation and the language usage will serve to reconstruct the thing that is primary legislation through the filter of some social structure and this structure will have particular attributes and a particular meaning. Language usage is a critical analytic tool in that language does relate to claims by a discipline about knowledge and certainty.

Certainly, a meaning or value can be attributed to a thing and some would argue that any such meaning or value could be considered an aspect or a function of the thing. However, the endorsement of some meaning or some value is a function of how the user of the thing perceives and uses that thing. I would suggest that any meaning or value attributed to a thing is a subjective expression by a user of that thing and the act of attribution recasts the thing as an object.

An object does not produce itself and the term ‘object’ is somewhat problematic in that there can be both internal and external objects. An internal object is a representation such as an image, idea, feeling, or memory that is relevant to some person. An external object

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408 I have taken these comments about cultural phenomenon from the Introduction to Du Gay Paul, (Ed), Production of Culture/Cultures of Production, particularly at pp 4-6.
409 In relation to the issue of language usage as an analytical tool see Debris Francois, ‘Language as Criticism: Assessing the Merits of Speech Acts and Discursive Formations in International Relations’, particularly at pp 209-211.
410 See, for example, Ayers David, ‘Materialism and the Book’, at p 761; Knapp James A., and Jeffrey Pence, ‘Between Thing and Theory’, at pp 651-654; and Frow John, ‘A Pebble, a Camera, a Man Who Turns into a Telegraph Pole’, at pp 273-275. Frow asserted at p 285 that “[t]hingness and kinds of thingness are not inherent in things; they are effects of recognitions and uses performed within frames of understanding”.
411 See Part 1, particularly at pp 220 and 221, of Petit Jean-Luc, ‘Constitution by Movement: Husserl in Light of Recent Neurobiological Findings’, where the author discussed the relevance of an aphorism attributed to Husserl that the world could not make itself without the active participation of the organism for which the world exists.
can be a person, place, or some thing.\textsuperscript{412} The act of knowing what an object is enables the application of “a special kind of term to the object”.\textsuperscript{413}

An object will have been accorded properties and these properties may be sparse or abundant.\textsuperscript{414} Jubien has suggested that there is a division between what he called a brute physical object, that is a thing that is independent of any properties other than the property of being a specific physical thing, and what he called objects of familiar kinds that will have properties that are perceived as being independent of the property of being a brute physical object, a perceived object.\textsuperscript{415} I have classified brute physical objects as things and objects of a familiar kind, the perceived objects, simply as objects. There can be a relationship between the brute physical object and the object of a familiar kind. Jubien gave the example of a statue that is modelled from clay.

A consequence of this distinction between a brute object and a perceived object is that the arrangements of the parts of the object acquire some importance where the object is a perceived object but the arrangement of parts is unimportant where the object is a brute physical object.\textsuperscript{416} Jubien has suggested that a false consciousness may develop in that a perceived property may well be taken to be the real object by some reviewer.\textsuperscript{417} A further consequence of this arrangement divide is the development of object fixation. This fixation will occur when a proposition about a perceived object is seen as having some truth-value and, as a consequence, the proposition will tend to be transferred to the brute physical object.\textsuperscript{418}

The significance of classifying primary legislation in any particular way has consequences as to how the primary legislation is viewed, or used, within a society. What

\textsuperscript{412} I have taken this description of an object from Chapter 1 ‘The Object’, particularly at p 6, of Hamilton N. Gregory, \textit{Self and Others: Object Relations Theory in Practice}.
\textsuperscript{413} See, for example, Hirsch Eli ‘Physical Identity’, at p 359, where the author discussed ramifications of the sortal theory.
\textsuperscript{414} See Jubien Michael, ‘Thinking about Things’ at p 2. Jubien, however, asserted, at p 2, that for him the “realm of properties might really be quite ‘sparse’”.
\textsuperscript{415} See Jubien Michael, ‘Thinking about Things’, particularly at pp 3 and 4.
\textsuperscript{417} See Part II ‘Three Tendencies’, particularly pp 4 and 5, of Jubien Michael, ‘Thinking about Things’.
I am suggesting here is that there is a failure to acknowledge that primary legislation is a thing and that this failure has consequences because it causes a focus on interpretation technique rather than a focus on the object of interpretation.419

III.15. The Commodity Form and Commodification

I now want to discuss the notion of primary legislation being considered a commodity because I have asserted that primary legislation is a thing that is produced. This thing may become an object that can be considered to be a commodity in that the object may be used and reused because it has a use value and an exchange value.

The term ‘commodity form’ can have two meanings. The first is a narrow meaning that relates to literal markets where things are exchanged between buyers and sellers for money. The second meaning is broader with the term becoming a social construction.420 The market would then become metaphorical and, while market rhetoric is recognised, commodification is concerned with social interactions that do not necessarily involve a direct transfer of money.421 Radin defines the term ‘commodification’ as a social construction that relates to the process by which an object comes to be considered as a commodity and that central to the notion of commodification is the concept of commensurability.422 I would suggest that the term ‘commodification’ should be recognised as being multi-dimensional.

419 I am here picking up and adapting an issue raised by Sasaki Ken-ichi, ‘Limits of Interpretation’. Sasaki accepted, at p 70, that the notion of interpretation implies the existence of differing interpretations with conflict being an essential feature of interpretation. As all cognitions are interpretations for Sasaki (p 70) it becomes (at p 74) a question as to whether it is possible to individualise the object of interpretation and as a consequence the emphasis is on interpretive content rather than the object of interpretation.
420 Lee gave examples of the term ‘commodity’ having a wider meaning in that a “commodity can be anything, for example, telephones, services performed by telephone operators, events like Lillith Fair, resources like the Colorado River, or labor such as coal mining”.
421 See Lee Wendy Lynne, On Marx, at p 18.
422 See Radin Margaret Jane, Contested Commodities, at p xi. See also Lane Robert E., The Dialectics of Freedom in a Market Society, at p 3. Lane asserted that an individual within a market society constructs a picture of the way things are and then comes to believe that the way things are “represent the way they ought to be”.
Value, in the case of primary legislation, is a socially imputed property\(^{423}\) and is a representation of the benefits that the proponent of the primary legislation would see as accruing. The thing that is primary legislation, and the use that primary legislation may be put to, are the products of a form of social exchange and these forms will be a manifestation of a specific power and of a structural relationship.\(^{424}\) The description of primary legislation I have outlined does recognise the heterogeneity of the concept of commodities. That is to say, a commodity is an occurrence of a term that is inherent within political rhetoric; that of value.\(^{425}\)

While the term ‘commodity’ is commonly used to refer to an article of trade or commerce or a thing that is of use,\(^{426}\) the term does, however, have an historical and social particularity.\(^{427}\) A commodity can be viewed from either a production perspective or from a consumption perspective. A commodity, in addition to the relevant perspective, can also be analysed through what does amount to a set of contexts. The commodity form identifies a social relationship and a commodity then would be anything that is governed by that social relationship.\(^{428}\)

An examination of the development of the commodity form as being fundamental to capitalism begins with Marxism.\(^{429}\) Within Marxist theory, a commodity is a distinct object that was produced by a distinct form of labour. Traditionally, a commodity then

\(^{422}\) Radin Margaret Jane, *Contested Commodities*, at pp 118 and 119.
\(^{423}\) I have taken this description from Arthur Christopher J., *The New Dialectic and Marx’s Capital*, at pp 8 and 11-15, where the author discussed Marx’s view of value.
\(^{424}\) Molm Linda D. ‘Theoretical Comparisons of Forms of Exchange’, at p 1. Molm argued, “that the form of exchange affects the causal mechanisms underlying power use and the relation between network structure and power”. The quoted passage is at p 1. Molm also pointed out, at p 2, that social exchange can include tangible goods and services and also the capacity “to provide socially valued outcomes such as approval or status.”
\(^{425}\) I have taken this description from Arthur Christopher J. *The New Dialectic and Marx’s Capital*, at pp 27-30.
\(^{426}\) *The Macquarie Dictionary* 2\(^{nd}\) Revised Edition
\(^{427}\) Frow J., *Time and Commodity Culture*, at pp 138-142.
\(^{428}\) Frow J., *Time and Commodity Culture*, at p 132.
has a use value, and an exchange value.\textsuperscript{430} The term ‘use value’ refers to those specific properties that are capable of satisfying a human need. Exchange value is independent of use value and refers to the value that makes a commodity exchangeable with another commodity.\textsuperscript{431} The concepts of ‘use’ and ‘exchange value’ have come under attack with emphasis on sign value.\textsuperscript{432}

According to Marxist analysis, an object would, under certain conditions, assume the form of a commodity when the material reality of the object remains constant but the use value is transformed into an exchange value.\textsuperscript{433} All cultural products, irrespective of whether that product is from a large-scale production process or from a restricted production process, are both a commodity with a commercial value and a symbolic good with some specific cultural value.\textsuperscript{434}

Different commodities have differing use values and this difference is reflected in the exchange value, and money is the medium that identifies the value of every commodity. Money then has become the formal identity of every product.\textsuperscript{435} The commodity form can become an abstraction that hides the different aspects of commodities. It is possible for this abstraction to develop into what can be a common form of the commodity. The commodity form then is an economic measure that has an independent existence.\textsuperscript{436} Marxist theorists would certainly consider commodification as being inimical to the development of society.\textsuperscript{437}

\textsuperscript{430} This description of a Marxist perception of a commodity was taken from Balbus Isaac D., ‘Commodity Form and Legal Form: An Essay on the “Relative Autonomy” of the Law’, particularly at pp 573 and 574.

\textsuperscript{431} See Lowe Donald M., The Body in Late-Capitalist USA, at pp 47-53 and 79-80.

\textsuperscript{432} See the Introduction: Jean Baudrillard in the Fin-de-Millennium to Kellner Douglas (Ed), Baudrillard A Critical Reader, at p 2. Kellner asserted that for Baudrillard, late capitalism is based on sign value rather than the concepts of use value and exchange value.

\textsuperscript{433} See Gottdiener Mark, ‘Approaches to Consumption: Classical and Contemporary Perspectives’, at p 3 where he discussed, and quoted from, Lefebvre’s analysis of Marx’s concept of commodity. Lefebvre Henri, The Sociology of Marx, at p 47.


\textsuperscript{435} This description was taken from Balbus Isaac D., ‘Commodity Form and Legal Form: An Essay on the “Relative Autonomy” of the Law’, at p 573.

\textsuperscript{436} See Balbus Isaac D., ‘Commodity Form and Legal Form: An Essay on the “Relative Autonomy” of the Law’, particularly at p 574.
Gottdiener argued that a commodity can have three attributes and these attributes are important in relation to utilisation. First, a commodity possesses use value in that a commodity is a tool to satisfy functional or symbolic desires and the commodity may be used to remedy some perceived physical or psychological lack. Secondly, a commodity will possess exchange value as it is purchased in a market usually with money. Thirdly, a commodity will possess a symbolic sign value. A sign is a mode of self-expression that can have a use in social interaction.\textsuperscript{438}

For Balbus, there is a duality in the notion of commodity form because there is: “a double movement from the concrete to the abstract, a double abstraction of form from content, a twofold transmutation of quality into quantity”.\textsuperscript{439} This notion of the double movement within the commodity form does, to my mind, illustrate what I have called the symbolic form of primary legislation. That is to say, the commodity form of primary legislation functions independently by creating a relationship that is fetish-like and serves to make an abstraction of primary legislation by emphasising the act of enactment, rather than whatever substantive matter may be specified by the text of some enacted primary legislation. The value to the user flows from the act of enactment.

In addition to a commodity being subject to sale or alienation,\textsuperscript{440} it can also be perceived as satisfying some particular demand.\textsuperscript{441} The domination of the concept of the market has seen the institutionalisation not only of the market ideal but also of commodification and the concept of production for exchange value. The notion of a commodity is not restricted to issues of sale, or alienation, but includes exchange value. A market will create both

\textsuperscript{437} See Radin Margaret Jane, Contested Commodities, at pp 79-83.
\textsuperscript{439} Balbus Isaac D., ‘Commodity Form and Legal Form: An Essay of the “Relative Autonomy” of the Law’, at p 574.
\textsuperscript{440} Radin Margaret Jane., Contested Commodities, at pp 80, 118 and 119.
\textsuperscript{441} Best Steven, ‘The Commodification of Reality and the Reality of Commodification: Baudrillard, Debord, and Postmodern Theory’, at p 43.
commodities and value systems as reproductive mechanisms. The term ‘primary legislation’ therefore can also be seen as a social construction.

The views outlined above could well be called extreme objectification as the commodity is seen as being socially constructed, that is, as an object that is separate from any individual or any social relationship. Objectification is a social construction that seeks to acknowledge a distinction between persons and things. Radin has defined such a construction as the “ascription of status as a thing in the Kantian sense of something that is manipulable at the will of a person”. The use of the term then identifies a specific ontological commitment in which a person is the subject and an autonomous self-governing moral agent.

The issues of consumption and the commodity form are inherent in a market economy that is an integral part of a late capitalist society. The issue of what is primary legislation is not, within Australia or indeed any western liberal democracy, independent of capitalist economic developments. The concept of commodity is a social construction that is, to a greater or lesser degree, a useful metaphor to explain behaviour. Langer argues that, in the second half of the 20th century, the expansion of commodification into a material culture has not been merely geo-political but now encompasses what she called the social and the psychological. So commodification now has a social dimension that ensures that the concept of the market is no longer defined as a response

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442 McGovern Patrick, ‘A Closed Community: Fredric Jameson and the Commodification of Political Science’, at p 273. McGovern suggested, at p 273, that a thing becomes a commodity because “someone somewhere has been convinced that it is a need and therefore given value”.

443 Concept was taken from Radin Margaret Jane, Contested Commodities, at p 6.

444 Radin Margaret Jane, Contested Commodities, at p 118.

445 Radin Margaret Jane, Contested Commodities, at p 118.

446 See Miklitsch R., From Hegel to Madonna: Towards a General Economy of Commodity Fetishism, at p 6, for a discussion on these issues in relation to the media market. Miklitsch suggested, at p 80, that what is revealed in a consideration of such theorists as Adorno, Horkheimer, and Baudrillard, is that late capitalism is not so much a continuation of classical or monopoly capitalism but rather a different order of commodification and as a result the goods and services associated with the advent of specialized and positional consumption are commodities.

447 See Frow John, Time and Commodity Culture, at pp 61-62, 125-126, and 141.

448 See Langer Beryl, ‘Commodified Enchantment: Children and Consumer Capitalism’, at p 69, where she discussed children and the constantly expanding market.
to need but is now a determiner of need. A commodity then is a product of the prevailing culture and a defining characteristic of any such product is a short shelf life.

What I am suggesting is that the concept of commodity can be applied to any particular thing that has a certain utility. That is to say, the thing has material and communicative properties and does satisfy the function of being an exchange medium or a standard or a store of value. I am not advocating, as some have done, that an object is somehow irrelevant to any consideration of the subject. However, in market economies both the person and the relationship between persons and things are understood through the metaphor of the commodity. It would seem that the practice of production and consumption in late capitalism has changed the nature of commodification and the concept of commodity. They are no longer seen as being stable and unproblematic. An object now becomes a commodity not because of any inherent value in the object but rather because there is a perceived need and as a result someone has given that object some value. In what Wallerstein called ‘historical capitalism’, capitalism has involved the commodification of those processes that had been conducted by means other than a market. Such processes included those of exchange, production, distribution, and investment.

In the late capitalism epoch, commodities are not now characterised as possessing “relatively stable, slow-changing, qualitatively distinct use value”. Instead, at least for

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449 Langer Beryl, ‘Commodified Enchantment: Children and Consumer Capitalism’, at p 78. Langer asserted that the notion of the market could now be considered sacred with the ‘market’ “itself culturally constituted and constituting”.

450 I have taken this characterization from McGillion Chris, ‘Passion of Gibson’s Film on Christ is in the Conflict it Generates’, at p 15.

451 Concept adapted from the discussion of the notion of money in Deutschmann Christoph, ‘The Promise of Absolute Wealth: Capitalism as a Religion?’, particularly at pp 40-42.

452 See The Introduction to Kellner Douglas, (Ed), Baudrillard A Critical Reader, at p 2. Kellner suggested that Baudrillard “proclaimed the disappearance of the subject, political economy, meaning, truth, the social, and the real in contemporary social formations”.

453 Frow John, Time and Commodity Culture, at p 126.

454 Lowe Donald M., The Body in Late-Capitalist USA, at pp 8 and 9.


456 Wallerstein Immanuel, Historical Capitalism with Capitalist Civilization, at pp 13 and 14.

457 Lowe Donald M., The Body in Late-Capitalist USA, at p 47.
Lowe, they are now defined in terms of certain elements: social and cultural values, changing product characteristics, and changing exchange values. This has occurred because consumption is no longer a function of production. Production and consumption have developed conjointly and this has led to a universalisation of the concept of commodity and the dominance of exchange practices.\footnote{See Chapter 3 “The Hegemony of Exchangist Practices” in Lowe Donald M., \textit{The Body in Late-Capitalist USA}, particularly at pp 78-80.} Certainly the concept of universalism as a general statement as to what constitutes knowledge does seem fundamental to capitalism.\footnote{See the discussion about the impact of universalism, at pp 129-132, of Wallerstein Immanuel, \textit{Historical Capitalism with Capitalist Civilization}.}

Exchange practices in late capitalism will “consist of the combination and recombination of structure, discourse, systems, and semiotics”.\footnote{Lowe Donald M., \textit{The Body in Late-Capitalist USA}, at p176.} A commodity then is no longer a one-dimensional correlation of use and exchange value.\footnote{Lowe Donald M., \textit{The Body in Late-Capitalist USA}, at p 47.} One of the characteristics of late capitalism has been the development of commodification with a change of emphasis from the relatively stable Marxist concept of use value.\footnote{See Miklitsch R., \textit{From Hegel to Madonna: Towards a General Economy of Commodity Fetishism}, at pp 78-80 and also Lowe Donald M., \textit{The Body in Late-Capitalist USA}, at pp 69-73.} The terms ‘commodity’ and ‘commodity form’ are somewhat problematic. Marx asserted that if commodities could speak they would say: “Our use-value may be a thing that interests men. It is not art of us as objects.”\footnote{Marx Karl, \textit{Capital: A Critique of Political Economy}, at p 83. See also in Miklitsch R., \textit{From Hegel to Madonna: Towards a General Economy of Commodity Fetishism}, at p 66.} A commodity may consist of physical characteristics and imputed characteristics and could be a psychological thing.\footnote{Lowe Donald M., \textit{The Body in Late-Capitalist USA}, at p 53.} Indeed, it may well be that almost everything could become the subject of commodification.\footnote{See “The Commodification of Everything” in Wallerstein Immanuel, \textit{Historical Capitalism with Capitalist Civilization}, particularly at pp 16 and 17.} For example, it would seem that image is now a commodity.\footnote{Debord has argued that the last state of commodity reification is image. Debord Guy, \textit{Society of the Spectacle}, at p 11. See also Frow John, \textit{Time and Commodity Culture}, at pp 6-8, for a discussion on the argument of Debord.} So there has been an expansion into things that were previously not considered to be commodities.\footnote{Mandel Ernest, \textit{An Introduction to Marxist Economic Theory}, at pp 8 and 9.} It is now a tenet of capitalism that the
commodification of everything is legitimate, and the utility of a particular commodity depends on some particular social practice. Indeed, it may well be that the concepts of commodification, exchange, and capital accumulation activities have become hegemonic. Gottdiener, for example, has argued that commodification has extended the concept of the material object “to the farthest reaches of the human condition.” Commodification, including the use of the term ‘commodity’, has pervaded all aspects of society to become a societal given. For Langer, this increased commodification has not been limited to any geopolitical considerations but is also relevant to the social and psychological.

An example of the increasing use of notions of commodification is the application of the market rhetoric to considerations of an upgrade of facilities within public libraries. Apparently, some consideration is being given to the modernisation of public libraries, both in Australia and overseas, by the application of the consumer techniques of organizations such as McDonald’s, the Body Shop, or even a petrol service station. Of course, such an approach has not been met with universal approval, and I am certainly not competent to question the merits of any such proposal. However, what is relevant is a comment from the debate that once “you start using product language, you start treating your service as a commodity. And then the funding bodies will start saying people should pay for the ‘commodity’.”

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468 Wallerstein I., *Historical Capitalism with Capitalist Civilization*, at pp 15 and 16. Wallerstein argued, at p 17, that capitalism has been governed by an intention of maximizing accumulation and as a consequence the process of commodification continues.

469 See Lowe Donald M., *The Body in Late-Capitalist USA*, at pp 47-53.


No doubt objects do abound in subtleties and niceties. However, as Du Gay has pointed out, the use or appropriation of an object is usually an instance of both consumption and of production. In my definition of primary legislation, the term ‘commodity’ has a semiotic property that incorporates the referential potential of image. The essence of primary legislation is that it is primary legislation. But if primary legislation is a commodity, as I have asserted, then the user of the commodity will recast that essence. Primary legislation then can be both a material manifestation and a social signifier, and can become an instrument for the realisation of some other order, such as power, influence, or status.

To paraphrase Miklitsch, if primary legislation is a commodity then the history of primary legislation cannot be dissociated from the concepts of commodity fetishism and capitalism. Jameson, for example, questioned manifestations of what he considered the historical development of capitalism and saw the evolution of late capitalism dialectically as being both catastrophic and progress. Indeed, from a certain perspective, a natural consequence of the development of late capitalism has been the general application of the commodity form, and this has led to the rationalisation of social relations as an adaptive mechanism. Indeed, it may well be correct to consider late capitalism as commodity capitalism. It is within this discourse that primary legislation should be considered.

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475 See the quote from Marx that a commodity is “a very queer thing, abounding in metaphysical subtleties and theological niceties” in Best Steven, *The Commodification of Reality and the Reality of Commodification: Baudrillard, Debord, and Postmodern Theory*, at pp 42 and 43.

476 See the *Introduction* to Du Gay Paul, (Ed) *Production of Culture/Cultures of Production*, at pp 4 and 5.

477 See Van Fraassen, *Essence and Existence*, particularly at pp 8-13, for a discussion on the concept of essence.

478 Generally see Poster Mark, ‘Critical Theory and Technoculture: Habermas and Baudrillard’, at pp 77-78, where the author stressed the assertion of Baudrillard that a commodity is not just a material object but also a social signifier.

479 See Frow John, *Time and Commodity Culture*, at pp 114-116, where he discussed the argument of Levi-Strauss Claude, *The Elementary Structure of Kinship*, that goods are not merely commodities but can be vehicles or instruments for the realisation of some other social order.

480 See Miklitsch R., *From Hegel to Madonna: Towards a General Economy of Commodity Fetishism*, at p 4. Miklitsch is concerned about recognising the materiality of the body in late capitalism and suggested that if the body is a commodity then the history of bodies cannot be disassociated from the history of fetishism and capitalism.

481 See Jameson Frederic, *Postmodernism, or the Cultural Logic of Late Capitalism*, at pp 196-217.


483 The term ‘commodity capitalism’ was taken from Roberts David, *Illusion only is Sacred*, at p 85.
The nature of politics and of societal institutions has changed with the result that politics really has become “a symbolic spectacle for the people rather than a substantive engagement by the people”. 484 Society is now different and the political institutions within the polity, such as a parliament, have a function that reflects the current social ethos.

III.16. The Production Processes of the Legal Practice and the Political Subsystem

I have suggested that the application of systems theory, and a modified form autopoietic theory, coupled with the recognition of the impact of capitalism and market rhetoric, aid in understanding the nature of primary legislation, the nature of the law, and the operation of the law. A commodity, be that commodity primary legislation or the law, is something that is produced. I now want to outline what I see as the production processes of the two subsystems of society that produce the law and primary legislation.

I have outlined my views of the nature of both primary legislation and the law, and in this part of the thesis I want to consider the processes by which both primary legislation and the law come into existence. I have identified the production processes that produce primary legislation and the law as the process of enactment and the process of adjudication. I want to suggest that these so-called production processes have similar characteristics, although they are viewed differently within the body politic. Enactment is seen as a purely political process while adjudication is accorded an enhanced status as it is seen as being an impartial deliberation of a court and not political. That is to say, adjudication has been accorded the classification of being sacred.

The modern state is constructed through a complex of interconnections and transformations that reflect the dominant social ethos. 485 Within a western liberal democracy, the dominant social ethos is capitalism. Whether one equates capitalism with

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485 See Arnason Johann F., ‘Capitalism in Context: Sources, Trajectories and Alternatives’, particularly at pp 110-114 and 123.
modern society or sees capitalism as the dominant formative component of modern society is irrelevant because the tenets of capitalism stimulate and regulate social action. One of the products of capitalism has been the construction and diffusion of self-interpretations that “are at best selective projections of capitalist practices [and] their institutional and ideological impact is evident in a variety of ways”. There is a context that is reflective of the dominance of economic values and the search for sustained economic growth through an emphasis on accumulation, ownership, and the allocation of resources through a market. It is against such a framework that the nature of, and indeed the demand for, not only primary legislation but also the law should be considered.

One consequence of the development of capitalism is that every social transaction may be considered a possible commodity. Frow has argued that it has become difficult, in an advanced capitalist society, to separate the commodification of immaterial goods such as services from that of material goods. The processes by which primary legislation and the law come into existence are both social transactions. I have argued that primary legislation and the law are the products of different subsystems of society. Further, both derive from the acceptance by the appropriate subsystem of a need to satisfy some stimulation from the environment that is transformed by the particular subsystem from a noise to a want, thereby stimulating an outcome by that subsystem. One outcome would be the enactment of primary legislation while another would be a declaration about what constitutes the law.

To my mind, both enactment and adjudication are merely the terms given to identify the production process of different subsystems of society. The outputs, primary legislation and judgments of a court, are merely things that may be utilised within differing contexts for varying purposes and when used will become an object. Both things are outputs and

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487 I have taken this description from Arnason Johann P., ‘Capitalism in Context: Sources, Trajectories and Alternatives’, at pp 103 and 104, and the examination of the views of Baechler J.
488 Wallerstein Immanuel, Historical Capitalism with Capitalist Civilization, at p16.
489 Frow John, Time and Commodity Culture, at pp 61 and 62.
these outputs are texts that may become the censored input for future action. That is to say, when used, the thing that is primary legislation is a text that will be subjected to the current interpretative criteria in force within the particular subsystem, together with such other input imperatives that may impact on the user, irrespective of whether or not the user is the political subsystem. Likewise with the judgment of a court. Such a judgment is a text that will when used, irrespective of whether the user is within the legal subsystem, be subjected to the current interpretative criteria in force within the particular subsystem to which the user belongs, together with whatever input imperatives are applicable to that subsystem.

I see the enactment of primary legislation by a parliament and adjudication by a court as being similar in that both are processes that are structures within a subsystem. Such structures will accord with some subsystem internal validation in order to produce an output to satisfy some demand that was perceived by the particular subsystem as emerging from the environment. Both enactment and adjudication are production processes that have responded to an irritant from the environment that has been accepted by the subsystem to produce an output that can usefully be considered as being a commodity. Both outputs are necessary to the survival of the subsystem. Enactment and adjudication are fundamental activities of each of the subsystems that, in my opinion, amount to games of rhetorical justification. ⁴⁹⁰

Within the hypothesis I have outlined, the court is the central referent of the legal practice and in reaching a decision in relation to some particular case a court is exercising discretion by reconstructing the past within the context of the matter at hand. ⁴⁹¹ Kennedy, for example, has suggested that the rationale of what a court does is not about rule application but instead is about the creation of a field of law through a restatement of the law. ⁴⁹² The descriptions that have been given of the act of adjudication are almost as

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⁴⁹⁰ The phrase ‘game of rhetorical justification’ was taken from the Preface, at p ix, of Hutchinson Allan, It’s All in the Game where the author described adjudication as an engaged game of rhetorical justification.
varied as the descriptions of primary legislation that I quoted in chapter two of this thesis. Adjudication has been described as an exercise in rule application; a stylised elucidation of principles; a blunt tool for social engineering; a rationalisation of power; an institutional practice of story telling; a flawed distillation of justice; an elite hegemony; and a dialogic meditation.\textsuperscript{493} Haack has suggested that adjudication is a particular class of inquiry that is adversarial and is constrained by policy considerations; formal rules of evidence; a requirement to speedily reach a decision; a requirement for the decision to satisfy a validity standard; and also a requirement to satisfy what she called epistemological desiderata.\textsuperscript{494} Hutchinson argued that adjudication is an activity that is political because the decision making by a court involves “a choice between competing values or a commitment to a particular normative assumption”.\textsuperscript{495} But, irrespective of the definition one might apply, adjudication is the production process by which the law is stated. However, while adjudication provides the formal process for articulating the law, the source of such an articulation of what is the law is the discourse of the legal practice. That is to say, the law is whatever the judge said it is when adjudicating. However, any such statements will have emerged from the paradigm that is established by the discourse of the legal practice.

Adjudication is an exercise in need-satisfaction because it is a response to a demand and results in an output. Enactment performs a similar function. A parliament, according to my hypothesis, is the central referent of the political subsystem and, in enacting primary legislation, the parliament is exercising discretion in order to satisfy a demand through the production of a particular output. In exercising discretion both judges and parliamentarians are responding to the internal logic of the respective subsystems to utilise production processes that although innate to the two separate subsystems produce products that are fundamental to the continuing existence of these subsystems.

\textsuperscript{493} I have taken these descriptions from Chapter 1, ‘Playing the Game: An Introduction’ of Hutchinson Allan, \textit{It’s All in the Game}, particularly at pp 2, 9 and 10.
\textsuperscript{495} See Chapter 9 ‘Playing Politics: Putting Poetry in Motion’ in Hutchinson Allan C., \textit{It’s All in the Game}, and the quote is at p 252.
I now want to question, through the application of a proceduralist model, whether there is any inherent difference in the processes. Primary legislation comes before a body that is constituted within the terms of some obligatory framework and the body is accorded the status of pre-eminence. Primary legislation, when enacted, is an output that is unique to the parliament. Primary legislation comes into existence through a process that follows an endorsed procedure and the process could be considered arbitrary. That is to say, a parliament, in respect to a matter before the institution, exercises discretion by a vote. The voting will follow some stipulated procedure and is arbitrary in that the vote will serve the interests of the parliamentarian who voted. The decision to vote for or against primary legislation is an exercise of discretion. But this exercise is not unfettered because there will be imperatives that must be considered by a parliamentarian when deciding whether to vote yes or no. While the details of such imperatives are not relevant to this thesis, a parliamentarian would ignore these factors at her or his peril. What is relevant is that the decision as to which way to vote is a necessary stage in the production process that produces primary legislation.

The process of adjudication is not dissimilar to that of enactment and, I would argue, the qualification as to arbitrariness is also relevant. Adjudication is a term that identifies the process of a court in which a matter comes before that body; the body is constituted within the terms of some framework and is accorded the status of pre-eminence; the matter before the body is subjected to an endorsed procedure, for example, court procedures, and the rules of evidence; the matter is considered and finalised by the application of whatever imperatives are considered applicable by members of that body; again judges ignore such imperatives at their peril; and the output is unique to the body that produced it. So, for both the court and the parliament, an output is produced to satisfy some particular demand and the output is unique to that body. Members of both bodies have imperatives to satisfy before producing the output. Both processes depend on the initiation of some demand that has been accepted by the body as being appropriate to the body. In considering whether to satisfy the demand, particular imperatives that are relative to the particular matter and appropriate, or at least not inappropriate, to the members of the body are applied. In addition, the output is given an endorsed format that
has an identifiable social utility and the ability and willingness to produce the output are necessary for the continued existence of both subsystems. No doubt, the institutions see themselves, and their particular roles differently, and, no doubt, each institution is given a different persona by the public. But each body is still an institution, and to me, a political institution that is within the body politic. In addition, each institution is part, and probably the central reference, of a different subsystem. While, no doubt, it is possible to over emphasise the similarity of enactment and adjudication, they are merely production processes that exist to produce an output that is unique to the particular institution. One should, however, acknowledge that the legitimacy and the authority of the institutions will be viewed differently by the members of each institution and may well be viewed differently within the body politic.

A questioning of the output of a particular discipline does tax the intellectual honesty of the questioner. For example, no matter how one may define what it is that a court does in purporting to consider and apply the law, adjudication remains, for me, “an engaged game of rhetorical justification”.

An important consideration of adjudication, for me, is that of self-gratification by the court and this self-gratification by a court is, I would suggest, illustrated by the issue of interpretation by a court. The interpretation of primary legislation within the curial process is an exclusive judicial function.

Steel has suggested that although courts do acknowledge the supremacy of parliament, the courts do have the power of interpretation and in carrying out interpretation the courts will be guided by self-imposed rules of construction. These so-called rules of construction do include the endorsement of precedent. That is to say, there is a consequence in accepting the epistemological fallacy of believing that the world is nothing but one’s description of it.

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496 Hutchinson Allan C., It’s All in the Game, at p ix.
497 See, for example, Levi Edward H., An Introduction to Legal Reasoning, at pp 41-43.
498 Steel Alex, ‘Intertextuality and Legal Judgments’, at p 89.
499 I have taken this notion from Scollon Ron, The Dialogist in a Positivist World: Theory in the Social Sciences and the Humanities at the End of the Twentieth Century’, at p 77, where the author discussed the concept of a critical realism that sought a resolution between an ontological fallacy of believing the world is the same as one’s description of it, and an epistemological fallacy of believing that there is nothing to the world but one’s description of it. This concept of critical realism endorsed the view that a world does exist that is independent of one’s description of it.
Certainly, I can accept that this so-called self-gratification is rationalised by a court as an exercise in applying some idealised concept of society that will accord with an endorsed narrative. At its most basic, adjudication is a special game that is grounded in a ritual and result because it is “an intelligent, self-conscious, and serious human endeavour that is part of[,] and in the service of[,] of a larger political context”. It is but an imposition of a tyranny in that the court will seek to impose as absolute some version of the rule of law. Many would, of course, challenge this proposition by arguing that the rule of law constitutes a valid descriptive principle. But be that as it may, the curial process is self-gratification in that adjudication is the affirmation by the judiciary that it is the court that is the institution for defining both an idealised society and also the ramifications of this ideal. The impact of this assertion was illustrated by the retiring speech of a judge of the Supreme Court of Victoria with his claim that:

“This court is not some part of the public service and it must never be seen as such. Established as a court of plenary jurisdiction and with supervisory jurisdiction over all other courts and tribunals, this court is the third arm of government, co-equal in concept with Parliament and the executive. Its role, inter alia, is to control and to limit those other arms according to law and to that end to stand between those other arms and the citizen. Hence the emphasis on the court’s independence, especially from the executive.”

III.17. Problem of the Sacred

So how then do the processes of enactment and adjudication have such differing social values given that enactment and adjudication are production processes with similar attributes that exist to produce a text? The answer to that question is that adjudication is

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500 See Chapter 2 ‘It’s all in the Game: Adjudication in a Nonfoundationalist Way’, in Hutchinson Allan C., It’s all in the Game, and the quote is at p 20.
501 See the retiring speech of Judge John D. Phillips from the Supreme Court of Victoria as reported in the Age newspaper of the 24th of March 2005, at p 19, in an article entitled ‘The Corporatising of our Courts’.
seen within the body politic as relating to the law and has acquired something of the sacred.

However, any such conceptualisation raises a further issue that seems to me to be fundamental. How is it possible within a society that a particular social construction, in this example the law, acquires legitimacy, when that society is not only complex and differentiated but is also continuously assailed by contingencies? Habermas asserts that this legitimacy is acquired through what he identified as a self-legitimatisation process. That is to say, the rule of law is a necessary attribute for any liberal democracy to exist, and as a consequence, a dependency develops between the state as epitomised by the contemporary society and the law. I find such an argument simplistic and unconvincing. Further, this simplicity offers little to an understanding of the nature of society and of the nature of the law.

In considering the issue of what the law is I have been troubled by what I see as “the ‘problem’ of the sacred”. That is to say, how do you account for the continuing attempts to apply a perceived universal, the sacred, within a society that not only lacks any shared understanding of the good but also lacks a perception as to how societal unity and cohesion are to be the achieved? While those civic republicans who focus upon the rational consensus may disagree with my analysis of a perceived universal, the concept of ‘the sacred’ has a significance that is not restricted to some sociology of religion but has a wider application that can be applied to social theory generally. What I am talking

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502 See James Adrian L., ‘An Open or Shut Case? Law as an Autopoietic System’, who asserted, at p 275, that the law by its very nature is a social construction to represent, sustain and prosecute defined values and objectives.

503 Such a question is fundamental to the thesis outlined by Habermas Jurgen, Between Facts and Norms, at pp 8-17, 25-27, and is also raised by Andersen Heine, ‘Jurgen Habermas: Fakizität und Geltung’, at p 93.

504 Habermas Jurgen, Between Facts and Norms, at pp 135 and 136, 447-450, 454 and 496.

505 This quote was taken from White Richard, ‘Georges Bataille and the Philosophy of the Sacred’, at p 53, where the author considered how postmodernism and post-structuralism deal with the notion of the sacred as denoting a privileged or special region of being.

about is “a realm accessible only through revelation”. I have used the term ‘the good’ to refer to an ethic that will include some broad incorporated perspective. I leave open the question of the merit of achieving unity and cohesion.

I have asserted that those within the legal practice have, through the application of an endorsed narrative that is based on an appeal to a privilege of origin, sought to give the law a particular ethos, and standing. Weisberg provided an example of such an ethos some twenty years ago. Weisberg argued that while judges are now more likely to heed an edict of a parliament than previously, such judges “do not seriously believe themselves bound or even guided by general principles of interpretation beyond the vaguest adages about respect for [parliamentary] intent”. Weisberg concluded that a court would usually not feel bound by accepted principles of statutory interpretation independently of the substance of primary legislation and that when a principle is utilised that principle will merely be summarised and previous usages cited.

A current example of this ethos is illustrated in a newspaper article by Judge Sackville of the Federal Court of Australia, defending the appointment of a personal friend to the Victorian Court of Appeal. Apparently a journalist had criticised the appointment to the Victorian Court of Appeal because the appointee was considered by the journalist to lack appreciation of the supremacy of parliament. Sackville argued that it was nonsense to suggest that a lawyer who has sought to be a law reformer would on appointment to the Victorian Supreme Court “set about subverting the will of Parliament as expressed in legislation”. Interestingly, Sackville defended the appointee, not by concentrating on an adherence to the will of a parliament, but, rather highlighting how seriously judges

507 See Said Edward W., ‘Opponents, Audiences, Constituencies, and Community’, at p 17, where the author outlined a view about interpretative communities and the process of interpretation.
508 See Rosenfeld Michel, Just Interpretations, particularly Chapter Seven, ‘Partiality and Comprehensive Pluralism’, at pp 200 and 201.
509 The phrase “privilege of origin” was taken from White Richard, ‘Georges Bataille and the Philosophy of the Sacred’, at p 61, where it is used in a related context.
take, and I am sure that they do, the judicial oath that requires a judge “to do right by all manner of people according to law”.\textsuperscript{513} Judges, for Sackville, must have what he called “the requisite intellectual qualities, a thorough understanding of legal principle, diligence and personal integrity”.\textsuperscript{514} Sackville concluded that all judges share an adherence to a core set of values that include “the importance of judicial independence, impartiality, integrity and a commitment to reasoned decision making”.\textsuperscript{515} No mention of the supremacy of parliament. What appears to be important for Sackville is that judges have a set of ideal characteristics and this seems to be translated into the adherence to a particular vision of the rule of law. What the emphasis on ideal characteristics does is reinforce the tenet that defining the law and the application of that law are solely within the purview of the legal practice.

Although there are various configurations of the rule of law, the rule of law has for some become a sacred text because members of the legal practice not only see it as being a sacred text but also have convinced others outside the legal practice that it is a sacred text. Thus a dilemma has emerged as to how, in a complex modern society, one relates the concept of being separate, of being set aside as some transcendental reality that has a special meaning, with the post-modern concept of differentiation and a subsequent rejection of the universal. It seems to me that the concept of differentiation is of critical importance to such a scenario. That is to say, there is a paradox because it is the process of differentiation that provides and sustains autonomy but this autonomy is not a universal hegemony. Further, it exists through a relationship with the separate subsystems that make up a society. While there is no universal sacred, the status and prominence of any given subsystem depend upon the ability of that subsystem to convince other subsystems of the significance of some endorsed holy writ. It would be, in the terms of Luhmann, an issue of the effectiveness of an exercise of structural

\textsuperscript{513} See Sackville Ronald, ‘I Disagree with Bolt’, on the Editorial Page of the Herald Sun 7\textsuperscript{th} March 2006, at p 22.
\textsuperscript{514} See Sackville Ronald, ‘I Disagree with Bolt’, on the Editorial Page of the Herald Sun 7\textsuperscript{th} March 2006, at p 22.
coupling. What I am saying here is that the prominence of the legal practice, and the courts in particular, depends upon convincing others of the sanctity of the law. Within the hypothesis I have outlined, the legal practice is an autonomous subsystem of society and the law is an output of that subsystem.

I have no doubt, based on my professional experience and I do tend to support the view myself, that some members of the legal practice would endorse an apotheosis of the law and would relate the law to the definition of the sacred outlined by Greeley “[b] y the sacred I mean not only the other-worldly, but also the ecstatic, the transcendental, that which takes man out of himself and puts him in contact with the basic life forces of the universe.”

While I have suggested that some would see the law as being something to be worshipped, it may well be debatable as to whether the law is sacred or merely cultic. But, be that as it may, what does remain is the interesting issue as to how one does account for the paradox where every “sacred being is removed from profane touch by this very character with which it is endowed”. That is to say, there is an “absolute separation and difference between the forms of the sacred and the profane.” Inherent in being sacred, or indeed cultic, is the necessity of contact with the worshipper and it may well be that the final stage of commodity reification is the image. I would suggest that it is an issue of representation and as Laclau has pointed out “it is of the essence of

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516 See Chapter 10 ‘Structural Couplings’ in Luhmann Niklas, Law as a Social System, particularly at pp 385-390. Luhmann asserted at p 381 that “the more systems theory stresses the operative closure of autopoietic systems, the greater the need to establish how the relations between the system and its environment are shaped”. So then the relations between a subsystem and the environment are subject to structural coupling.

517 Of course some form of the law is necessary for society to survive but this is a product of the survival of the legal practice.


520 See White Richard ‘Georges Bataille and the Philosophy of the Sacred’, at p 54, where the author discussed the views of Durkheim on forms of religious life.

521 See Jameson Fredric in the Foreword of Lyotard Jean-Francois., The Postmodern Condition: A Report on Knowledge, at p xv.
the process of representation that the representative has to contribute to the identity of what is represented”. 522

A society is structured and operates in a particular way and, for a society to be stable, social actions must conform, to a greater or lesser degree, to norms that are not in conflict with the social structures and ethos of the society. I have been suggesting that in seeking an explanation of the sources of power within a society, or of the relationship between the major societal institutions, one reaches a logical impasse. Within the law, Kelsen overcame this impasse by the concept of the grundnorm, while for Hart it was the ultimate rule of recognition. 523 In order to get beyond what I have seen as an impasse about classifying the relationship between the parliament and the court and understanding how society operates, I have asserted a view of society as being differentiated with an interaction of societal subsystems. That is to say, I have sought to overcome this impasse through the application of systems theory and an acceptance of the theory of autopoiesis. What is of significance is that the description of a system as being autopoietic, that is to say operationally closed, refers “to the network of its operations and not to the totality of all empirical conditions, that is, the world”. 524 As I have outlined, the basic tenet of autopoietic theory is that a subsystem is determined by its own rules with the result that a subsystem is dominated by functionality and there is a legitimation by procedure. Comprehension within a subsystem is reliant upon the functionality of the subsystem. 525

III.18. The Political Subsystem

I have asserted that primary legislation is a thing that can usefully be seen as a commodity. This thing, however, is not produced in a vacuum independent of society. I

523  I have taken this notion of an impasse from Puvogel Lars, ‘A V Dicey and the New Zealand Court of Appeal – Must Theory Finally give in to Legal Realities?’ and the references to the grundnorm of Kelsen and the ultimate rule of recognition of Hart are at p 116 of the article.
have suggested that society consists of a number of subsystems and a parliament is an institution within the political subsystem. The political subsystem has a structure similar to that of the legal practice in that it is a subsystem of the differentiated system of society and this subsystem is itself internally differentiated, both hierarchically and segmentally, into sub-subsystems. This internal differentiation would cater for some “organizational-professional inner core” and would also enable a subsystem to classify communications and afford a communication a status and a priority. I have asserted that the defining characteristic of a subsystem is not communication but rather endeavour. A subsystem therefore is formed around a particular field of endeavour. In relation to the political system that endeavour, encompassed the political act of being involved with the seeking, within the public arena, of access to resources. The political subsystem contained institutions such as the parliament, councils, and the public service. Indeed, within an Australian context, the political subsystem would consist of the sub-subsystems of the federal parliament and the state parliaments.

I have throughout the thesis referred to the structure and function of the legal practice and I will make further comments about the legal practice in chapter four. However, while the issues of structure and the functions of what I have designated the political subsystem are similar to that of the legal practice I do want to consider separately how one should view parliament itself because parliament is the producer of primary legislation. While the function of enacting primary legislation is an essential characteristic of a parliament in a western liberal democracy, the thing, primary legislation, does not construct itself as it is produced as a result of the deliberate action of the institution responsible for producing the thing.


528 I have given a limited definition of what I mean by the term ‘political’ at footnote 127.

While it may be problematic as to whether or not parliament is the centre of the political process, parliament is certainly a vehicle of and for political action. A consequence of this political action for any parliament is the business of enacting, amending or repealing primary legislation. The ability to enact primary legislation is a basic function of a parliament, and primary legislation is a particular desired transaction.

An indication of the attraction for such transactions can be gained from the volume of primary legislation that is enacted in all jurisdictions. Eng has questioned whether the use of the phrase ‘legislative inflation’ to indicate the over production of primary legislation does illustrate some value premise. For Eng, the enactment of primary legislation has reached “critical quantitative limits” because the quality of primary legislation is substantially flawed, and this has a significant impact on the quantity of primary legislation enacted.


So how then do we view a parliament?

A cultural concept within some classification of identity is dependent upon access to whatever index is used. I see this question of the nature of parliament as involving two separate issues. The first issue is the identification of the constitutional framework that establishes the parliament in that within a western liberal democracy some form of constitutional reference is necessary for existence. The second issue is the provision of an adequate description of the nature and role of parliament in contemporary society.

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530 Pietila Kauko, in ‘Rationality of Legislation in a Sociological View’, at p 51, saw a parliament as being the centre of the political process in which the principal society political forces assemble to legislate.
531 Generally see Luban David, ‘Legal Traditionalism’, at p 1048.
533 The phrase ‘desired transaction’ was taken from Radin Margaret Jane Contested Commodities, where the phrase is used, at pp 27-29, in an unrelated context.
534 Eng Svein., ‘Legislative Inflation and the Quality of Law’, at p 65.
535 Generally see Eng Svein., ‘Legislative Inflation and the Quality of Law’, at pp 68 and 69.
Outlining the constitutional framework of the parliament in the Australian Capital Territory is simple. However, the concept of the nature and role of parliament in contemporary society is far more complex. There seems to me to be at least three perspectives that are relevant to the concept of parliament as the producer of primary legislation. First, parliament may be seen merely as a constitutional entity. Secondly, parliament may be seen as an institution. Thirdly, given consumption is an issue that goes to cultural identity, a parliament can be seen to function as a mode of production. The notion of sites and a regime of value do raise the issue of whether parliament could usefully be considered a political market because the term ‘market’ is a frame of understanding. The application of such a label is not inappropriate. A parliament seems to meet the criteria of the recognisable social form that is a market with the production, circulation, and consumption of a particular constructed primary legislation.

III.20. Constitutional Framework

The case study I have utilised in this thesis relates to a provision of a particular enactment of the Australian Capital Territory and I will confine these constitutional comments to those that are relevant to the Australian Capital Territory. The constitutional issues relating to any Australian jurisdiction would not be different in kind, merely different in degree.

The establishment of the Australian Capital Territory as a separate geographical location can be traced to two turn of the 20th century acts of the Commonwealth parliament; the

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536 I have taken these comments about the form of identity being dependent upon some index from Silverstein Michael, ‘”Cultural” Concepts and the Language-Culture Nexus’, at pp 631 and 632.
537 See the Introduction to Gottdiener Mark (Ed), New Forms of Consumption: Consumers, Culture & Commodification, particularly at pp ix and x.
539 The notion of a market being a frame of understanding was taken from Frow John, ‘A Pebble, a Camera, a Man Who Turns into a Telegraph Pole’, at p 285.
540 I have taken the comment about the market being a recognisable social form from Silverstein Michael, ‘”Cultural” Concepts and the Language-Culture Nexus’, at p 643. Silverstein asserted, at p 632, that each time a person uses a word or expression a specific value is indexed within some knowledge schemata.
Seat of Government Act 1908(Cth) and the Seat of Government Acceptance Act 1909
(Cth). By virtue of these acts of the Federal Parliament, an area to be known as the
Australian Capital Territory (hereafter the Territory) was set aside.\(^{541}\) Administration of
the Territory was then a function of the Federal Parliament.

The Territory became a separate political entity with the commencement of the
Australian Capital Territory (Self-Government) Act 1988(Cth) (hereafter the Self-
Government Act). Section 7 of the Self-Government Act established the Territory as a
body politic under the Crown and continued the formal title of the Territory. Section 8 of
the Self-Government Act established the parliamentary body, to be known as the
Legislative Assembly for the Australian Capital Territory, and section 22 provided the
Legislative Assembly with powers to make laws for the peace, order and good
government of the Territory. A power to make laws for the peace, order and good
government is a plenary power.\(^{542}\) However, section 23 of the Self-Government Act
restricts this general law making power of the Legislative Assembly.

Parliament then could be considered to be the ultimate power within a particular political
entity.\(^{543}\) By restricting the concept of a parliament to that of a constitutional entity, a
parliament could be accepted merely as a given: something that is just there,\(^{544}\) and the
only relevance of a parliament is that it is the vehicle that enacts primary legislation.
Such a view could, for example, be taken to satisfy the provision of Section 1 of The
Australian Constitution in that the legislative power of the Commonwealth is vested in
the Federal Parliament that shall consist of the Queen, a Senate and a House of
Representatives.\(^{545}\)

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\(^{541}\) See section 5 of the Seat of Government Acceptance Act 1909(Cth).

\(^{542}\) See *Union Steamship Co. of Australia Pty. Ltd. v King*, at p 9, in relation to the issue of plenary power.

\(^{543}\) This concept was taken from Detmold M. J., *Legislation and Adjudication*. Detmold suggested, at p
89, that by virtue of section 128 of the Australian Constitution the ultimate legislative power within
Australia rests in the people.

\(^{544}\) See Smith T., *Paradigms of Parliament: Speculations about Development in the Study of Australian
Legislative Institutions*.

\(^{545}\) Section 1 of *The Constitution of the Commonwealth of Australia, The Commonwealth of Australia
Constitution Act 1900 (UK)*
But such an approach does not do justice to the concept of parliament. Certainly, such a description does not adequately describe the concept of parliament that one develops from regularly sitting on a parliamentary adviser’s bench. In my experience, a parliament is a multi-functional institution and a full understanding of the nature of a parliament would require an extended intellectual enquiry. Such an enquiry would require something similar to the methodology of Weber with the observation of parliamentary activity and then the identification of the reasons for the behaviour of the actors involved in the action.\footnote{Generally see Morrison Wayne, \textit{Jurisprudence: from the Greeks to post-modernism}, at pp 283 and 284, where he outlined Weber’s methodology for understanding law sociologically. That is to say, “we need to observe a pattern of action and appreciate the subjective meaning of the actors involved in the action. We need both an external and an internal perspective.” The quoted passage is at p 283.} Parliament is not merely the vehicle for the enactment of primary legislation.

\section*{III.21. Parliament as an Institution}

Now to the question of whether parliament is an institution.

Historically, at least in European thinking, the parliament was seen as the vehicle, or the intermediary, to articulate the views of citizens.\footnote{Van Hoecke Mark, \textit{Law As Communication}, at p 83, where the author discussed the theories of the German historical school of the nineteenth century.} Of course, reviewing a political institution depends, at least in part, on the particular model one adopts. For example, Drew, in describing the current American experience, utilises a public choice model to review the parliamentary structure and is critical of Congress and the approach of President Bush. It is a depressing picture as Drew argued that members of Congress are frightened of alienating voters or interest groups and have become increasingly dependent on political consultants who will do whatever is necessary to get the member re-elected.\footnote{Drew E., \textit{‘War Games in the Senate’}, at p 66.}

Parliamentarians are the actors and parliament is the venue that is logically distinct but not separated from parliamentarians. An institution is a particular kind of named entity
“around which relations, rules and local models form”. For Weinberger, an institution is a frame for action for interpersonal co-operation and is a complex entity “of ideal and real character”. An institution can be considered an entity that is logically distinct from relevant actors but not separated from those actors. While an institution does represent continuity and persistence, the existence of the institution is dependent upon the continuing activities of the individuals within that institution. Strathern argued that there are functional interrelations within any social organisation and any organisation that “generates behaviour that is unpredictable, non-linear and capable of producing multiple outcomes” can be considered complex and evolving. Parliament as a forum for debate and also the producer of primary legislation would be a complex and evolving social organisation.

Selznick has sought to make a distinction between an organisation and an institution. An organisation becomes an institution when that organisation takes on a special character and achieves a characteristic competence through the emergence of distinctive forms, processes, and strategies that create social commitments. Organisations will, through the development of a structure and a character, acquire an identity and, with this identity, self-maintenance becomes a fundamental concern. The concern for self-maintenance was all too readily illustrated by the response of churches within Australia and overseas to allegations of sexual abuse. Invariably the major concern of church primates was the protection of the particular religious institution and pastoral care was secondary.

All parliaments would certainly satisfy these definitions of institution and organisation. That is, a parliament is a construct that incorporates regularity and uniformity of

551 See Barden Garrett, ‘Formalization, Invention, Justification’, at pp 250 and 251.
555 Generally see Scott W. Richard, *Institutions and Organizations*, at pp 115 to 124, particularly the segment entitled *Structural Effects of Institutional Context*. 
behaviour and depends on the existence of institutionalised human groups. A parliament is a structure that has rules and resources that become the medium for the undertaking of endorsed practices. All parliaments, whether large or small, have a decision-making process that is characteristic of an individual parliament. Parliament has been identified as a system of roles and that role distribution and orientation are not random. That is, a parliament is a network of relations between parliamentarians and others with all parties being involved in decision-making in different ways.

III.22. Parliament as a Political Market

In this part of the thesis I want to suggest that a parliament has a shifting status, and that this status will be a reflection of cultural practices. Given the importance of the market as a, and perhaps even the, social determinant it would seem to me that parliament can usefully be seen as a political market.

Essentially, a market can be conceptualised in three ways. First, a market is a price-selling mechanism where decision makers regulate behaviour to a price that will satisfy a demand. Secondly, a market serves to facilitate the bringing together of rule based central coordinating hierarchies and cooperative networks in order to stimulate price competition. Thirdly, a market is seen as the forum where the action exchanges are

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558 Eulau Heinz, *Decisional Structures in Small Legislative Bodies*, at pp 343-346. Eulau asserted, at p 345, that “all political activity, be it that of an individual or a group, or even that of an ‘amorphous’ mob on the streets, is limited or constrained by the structure of the relationships that obtain in the group.”
560 For example, Liagouras has argued that the dominant form of wealth within a post-industrial economy is not the accumulation of goods but rather the “proliferation and the amelioration of symbolic and relational systems”. I have suggested that a parliament is one such relational system and that primary legislation is an output of that subsystem. As Liagouras has suggested, an output is subject to radical uncertainty in that it is dependent upon the capacity of the service provider to understand and anticipate the needs of a client. Liagouras George ‘The Political Economy of Post-Industrial Capitalism’, at pp 21and 30, and the quoted passage is at p 21.
embedded in social networks that influence and sustain, usually economic, transactions and relations. 561

The metaphoric conceptualisation of political market is perhaps open ended but it does recognise the hegemony of exchange practices. Galloway, for example, sought to explain society through an exchange theory where individuals sought to gain advantage by participating in exchanges. Social life is “seen as a market place in which competition thrives as attempts are made to attain the greatest rewards”. 562 Thus, a parliament is a political market that serves as a venue to realise expectations by catering for a particular exercise of market power. A parliament is an entity that will accord an actor the opportunity of fulfilling a maxim of the so-called first generation of the law and economics movement by choosing, through an exercise of market power, a course of action that will maximise utility. 563

Market power refers to “the capacity to behave in a certain way (which might include setting prices, granting or refusing supply, and arranging systems of distribution) persistently free from the constraints of competition”. 564 A market is a social construction that reflects the cultural ethos of the society. 565 A function of a market is the generation and dissemination of information, 566 and the acknowledgment that a parliament also serves as a market is a reflection of the dominant ideology of market theory. That is to say, in order to control instability and reflect social relations a social actor will seek to

563 See Chapter 5 ‘Law and Economics’ of Minda Gary, Postmodern Legal Movements, particularly at pp 88 and 89, where the author discussed the development of the law and economics movement. See also Somers Margaret R., ‘Let Them Eat Social Capital- Socializing the Market Versus Marketing the Social’ where, at pp 14 to 17, the author discussed the ability of state institutions to regulate the economy and also generate what she called mercantilist political mechanisms to create publicly mediated markets that included a form of the political.
566 Will George, ‘Democrats are Playing to Win’, at p 47.
create those institutional structures that will placate organised interests.\textsuperscript{567} Although this definition refers to an exercise of economic power it is, in my opinion, realistic to relate the definition to the exercise of political power. This is because the omnipresence of the market paradigm has become, to use the phrase of Lyotard “the tenor of the times”,\textsuperscript{568} and within this market paradigm a parliament is an institution that will, within a non-commercial context, facilitate the enactment of legislation by enabling a bartering of those transaction costs that are inherent in having legislation enacted.\textsuperscript{569} Indeed, for Lyotard, capitalism has the capacity to transform “familiar objects, social roles, and institutions that so-called realist representations can no longer evoke reality except through nostalgia or derision”.\textsuperscript{570}

De Montoya argued that it is inappropriate to consider a market merely as an entity or an institution. Rather, a market is a network of social relationships and is both a reflection of social values and a medium that serves to form such values. The market as a medium is not passive, and as a result marketing relationships have the potential to change the social order.\textsuperscript{571} A parliament would certainly be a market because it produces specific output that reflects societal demands. Primary legislation is one such product that has, as I have argued, the characteristics of a commodity because it is displayed, objectified and has a recycle value. But, a parliament is also a provider of services whose spatial, social, and economic characteristics have been determined by the social practices that determine social relations.\textsuperscript{572}

\textsuperscript{568} Lyotard J-F., The Postmodern Explained, at p 1.
\textsuperscript{569} The scenario I have outlined about the application of the market paradigm does accord with the discussion on the wider application of the transaction cost theory of Coase in Fiss O.W., ‘The Death of the Law?’, at pp 6 and 7.
\textsuperscript{570} Lyotard Jean-Francois, The Postmodern Explained, at p 5.
\textsuperscript{571} See de Montoya Monica Lindh, ‘Market as Mirror or Model: How Traders Reconfigure Economic and Social Transactions in a Rural Economy’, particularly at pp 58 and 59. Although the author was talking about the trading of goods such as crops and commercial agriculture I think her comments about the nature of a market do have wider ramifications in that her comments can be considered within a general theory of value.
\textsuperscript{572} I have adapted the descriptions in the preceding sentences from Goh Robbie B.H., ‘Shop-soiled Worlds: Retailing Narratives, Typologies, and Commodity Culture’, particularly at pp 6-9. Goh examined the shop as the locus of commodity relations in post-industrial society but I am of the opinion that much of his argument applies equally to a parliament.
A parliament may well purport to have some mystical standing that exceeds that of the mere service provider but, in relation to the enactment of primary legislation, the characteristics of a parliament do accord with a Marxist characterisation of “the abstraction of the human agent from the commodity, or his [or her] reification within the processes of production and exchange”. To adapt the argument of Goh, a parliament “is more than the sum of these commodity characteristics: part of its facilitation of commodity exchange is its pose of being something more, of adding something of value to the acts of consumption and exchange”. Parliamentarians then would seek to distinguish parliament from the commodity that is produced by seeking to assume “narrative control over the meaning of its product[s]”.

One of the attributes of a parliament is that it does serve as something of a public space of appearance as a parliament is the venue that accords some priority to those interpersonal communications that seek to achieve some objective while excluding third parties. Such a concept is a continuation of the notion of Rawls of society being seen as an enterprise that provides for the distribution of goods. If this were so then it would seem useful to apply the concept of a market as an institution for the exchange of desires to the recognition of parliament as an institution within the political subsystem. A market derives authority as a result of the decisions about consumption that individuals make, and the efficiency of a market is related to the barriers erected to distort the flow of information.

575 Again I have adapted this quote from the description given by Goh Robbie B.H., ‘Shop-soiled Worlds: Retailing Narrative, Typologies, and Commodity Culture’, at p 8, and his argument about what he identified as the ambition of a shop to become total and complete.
576 I have taken the phrase ‘public space of appearance’ from Ricoeur Paul, The Just, at p 8, where the phrase is attributed to Arendt Hannah.
577 See the Preface to Ricoeur Paul, The Just, at p xviii.
578 This concept was taken from Detmold M.J., The Law of Love.
579 Hutchinson Allan C., It's All in the Game, at pp 282 and 283.
580 Generally see Will George, ‘Democrats are Playing to Win’, at p 47.
Fundamental to the idea of a market is the concept of property.\textsuperscript{581} Within a market, relationships are formed to obtain a benefit by influencing the transfer of goods, that is commodities, and these relations will end after the transfer. Relations within a market are therefore episodic rather than enduring.\textsuperscript{582} Will has, for example, seen the recent United States Presidential caucus at Iowa in terms of a political market where the “barriers to entry were negligible and information was abundant” and that this free flow of information was a cause of the defeat of a fancied candidate for the presidential nomination of the Democrat party.\textsuperscript{583}

Castells has argued that one of the consequences of what he called the information revolution has been the changes that have occurred to the particular meaning or status that has been attributed to any particular place. This change has occurred because of the interactions that flow from the network of instructions, problems and like indicia that are associated with this information revolution.\textsuperscript{584} Now Castells was talking about areas such as Silicon Valley and was arguing that a consequence of this information revolution is that increasingly individuals have become place-oriented and linked to communities while acquiring a desire to exercise control over their lives and objectives. However, the claim by Castells is also relevant to institutions such as a parliament in that the nature of parliament and the demands that are made on parliament are a reflection of current communal and societal values. That is to say, an individual is increasingly prepared to use any institution that is within the perspective of that individual in order to pursue some personal objective. In making this assertion I am, of course, engaging in an ideological construction by allocating the terms ‘parliament’ and ‘primary legislation’ some particular value that do fall within the rhetoric of a particular ideology that emphasises commodification.

\textsuperscript{581} See, for example, Hyde John, ‘What the Economic Rationalists (Dries) Really Believed’, at p 19.
\textsuperscript{582} Generally see Podolny Joel M., and Karen L. Page, ‘Network Forms of Organization’, at p 59.
\textsuperscript{583} Will George, Democrats are Playing to Win’, at p 47.
\textsuperscript{584} See Castells Manuel, The Informational City: A New Framework for Social Change, at pp 71-76.
The process of commodification is not self-limiting so it becomes problematic as to where to set the limits of such a conceptualisation. One needs to keep in mind the warning of Lane that the acceptance of market rhetoric leads to a tendency to try and locate everything within the market. But I find it hard to reject the argument that the increasing sites for, and forms of, consumption have meant that the issues of consumption and consumerism become increasingly complex. As a political market, parliament becomes the site for a polity to seek an established formalised objective, primary legislation, in order to satisfy some subjective desire. Thus, seeing a parliament as a political market would enable a revaluation, using the dominant rhetoric of the market theory, of both the activities of members of parliament and the demands that are made on parliamentarians. Such a market theory would emphasise self-determination, individualism, and factionalism by recognising the concept of choice and preference.

In addition, the use of the linguistic label of ‘political market’ would seem appropriate as it also acknowledges a code of post-modern capitalist culture: the market economy. That is to say, to provide for the transformative potential of primary legislation as a commodity there must be some form of institution that has the necessary creative capacities to assist in realising the potential of that commodity. This transformative potential would be defined by the tension that exists between the nature of the structure of parliament as a particular institution and demands from the body politic.

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585 This concept was taken from Langer Beryl, ‘Commodified Enchantment: Children and Consumer Capitalism’, particularly from pp 77 and 78.
587 See pp ix and x of the Introduction to Gottdiener Mark (Ed), New Forms of Consumption: Consumers, Culture and Commodification. Gottdiener asserted, at p x, that while consumption and production are inexorably linked, an understanding of such a relationship “requires paying more attention to how consumerism has changed ways of living”.
588 These characteristics were taken from the market/pluralist model that Frug Gerald E., outlined in ‘The Ideology of Bureaucracy in American Law’, particularly at pp 1360 and 1361.
589 This concept of market theory was taken from Campbell Tom D., ‘Legal Positivism and Deliberative Democracy’, at pp 325-327.
590 The phrase ‘post-modern capitalist culture; was taken from the Introduction to Miklitsch Robert, From Hegel to Madonna: Towards a General Economy of Commodity Fetishism, where it is used in a different context.
591 I have taken the comments about transformative potential and institutions from Deutschmann Christoph, ‘The Promise of Absolute Wealth: Capitalism as a Religion?’, at p 44. Deutschmann accepts
Fundamental to the notion of commodification is whether the process was “one that could or should be transacted through a market”. Such a view recognizes that fundamental to any political interaction is the issue of an exchange for gain. In considering parliament as a political market one can adopt either a narrow model or a more encompassing model. The narrow view is revealed in an economic or public choice model. In this model a parliament is seen as being similar to a market in which the medium of exchange is votes not money. So the objective of parliamentary activities is self-interest and parliamentarians strike bargains to satisfy some particular interest or preference. A more encompassing model would acknowledge that within a parliament there is recognition and acceptance of many interests including that of public purpose or public interest.

Primary legislation is a result of a particular demand that receives an endorsement from the parliament but, as Rodriguez has pointed out, the enactment process is a series of games that involves repeat players. As someone who over a number of years had a supporting role in the development of primary legislation I find it hard to reject the notion of game playing within a particular arena where the game is highlighted by continuous struggles to secure or retain some political advantage. To seek the enactment of primary legislation supposes the interaction within those particular physical and social contexts that are integral to the enactment of the primary legislation. Primary legislation is certainly the result of political, institutional, or economic demand but all primary legislation is not the product of political competition or an interest group purchase.

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592 Wallerstein Immanuel, *Historical Capitalism with Capitalist Civilization*, at p 15.
593 See, for example, Radin Margaret Jane, *Contested Commodities*, at p 1, and the notion of a metaphorical market with actions as trades.
While parliament is the producer of primary legislation the finished product is not something that can be known before enactment. Primary legislation is a composite, not a simple product, and it is difficult to understand what particular influences have shaped the final text.

It is then an issue of what model one adopts in an attempt to understand the particular influences that have shaped the final text. I have argued that it is systems theory and, in particular, autopoietic theory that provides the most comprehensive model as the basis for analysis. Irrespective of whether a parliament is classified as an institution or as a political market, a parliament is, for me, a sub-subsystem within a particular subsystem of society. Society is the system that consists of numerous subsystems with the political subsystem but one subsystem and a parliament is a sub-system within that subsystem.

CHAPTER IV SYSTEMS PERSPECTIVE

“All explanations or descriptions are made by observers (i.e., people) who are external to the system. One must not confuse that which pertains to the observer with that which pertains to the observed. Observers can perceive both an entity and its environment and see how the two relate to each other. Components within an entity, however cannot do this, but act purely in response to other components”.

Mingers John

Self-Producing Systems

IV.1. Introduction

597 For example one major piece of legislation I was involved in developing was subject to 150 amendments during the parliamentary debate. Some of the amendments were significant and were at odds with stated government positions and departmental desires.

598 See Wilson W, Congressional Government, at pp 113 and 325. Wilson, at p 301, identified legislation as being “but the oil of government”.

The issue of what really happens in a society is relevant to the question of what is primary legislation, and in this thesis I have sought to represent things as they are, rather than as they are imagined. I have argued that primary legislation generally has been defined by a particular dominant practice and that this practice makes claims as to truth, competence, and authority. These claims as to truth, competence, and authority, are made by the legal practice through determinate judgements, and these judgements stifle alternative discourses by tending to concentrate not on the thing that is primary legislation but on a representation.

In addition, these claims as to truth, competence, and authority, tend to be accepted within the body politic. So there is circularity as there is an acceptance within the body politic of the so-called ideal of primary legislation because the ideal is collectively accepted and, paradoxically, because the body politic believes that the ideal is objectively grounded. Boudon gave an example of such circularity with the claim that primary legislation tends to create norms and for these norms to be considered legitimate the norms must be adapted to satisfy public demands. For Boudon, rules considered illegitimate by the public will be a source of social tensions and conflicts so the requirement for legitimacy is essential for the well being of the body politic. Therefore:

599 See Mingers John, *Self-Producing Systems*, at p 10, where the author discussed observations by Maturana H., and F. Varela in *Autopoietic and Cognitions: The Realization of the Living* about what distinguished a living system from non-living systems.
600 I have adapted the notion of what really happens in a society from Weinberger O., *The Language of Practical Philosophy*, at p 285. Weinberger argued that action “is a behaviour motivated and controlled by information processes” and these processes determine how an individual acts. Weinberger argued that the law is not an object to be grasped through sensuous experience but rather through a hermeneutic process because it is an ideal entity that is a product of social and cultural development. See Weinberger O., “Neo-Institutionalism: My Views on the Philosophy of Law”, at p 254.
601 See Machiavelli N., *The Prince*, Ch XV, at p 54. Although Machiavelli in the Prince was discussing the methods and rules that may be useful for a prince, the comments are relevant to my thesis: “I fear that my writing about it may be deemed presumptuous, differing as I do, especially in this matter, from the opinions of others. But my intention being to write something of use to those who understand, it appears to me more proper to go to the real truth of the matter than to its imagination”.
602 See Lyotard J-F., *Peregrinations: Law, Form, Event*, at pp 24 and 25, where the phrase is used in a different context.
603 The assertion about the two-stage acceptance of an idea is credited to Durkheim E., *Elementary Forms of Religious Life*, at p 624 by Boudon Raymond, *The Poverty of Relativism*, at p 24.
“it is impossible to understand the evolution of law if one does not see that a new norm can only be accepted by the public if it arouses a feeling of legitimacy, while on the other hand such feelings of legitimacy or illegitimacy can only appear in the presence of concrete laws.”

Truth is that which is articulated through some particular discourse and is the product of an exercise of power. It seems to me that there is a two-fold requirement to an understanding of what is primary legislation. The first requirement is an analysis of the thing, primary legislation, itself: - “the singular problem to be posed and resolved”, and I have done that in the preceding chapter. The second requirement is an outline of a schema that will place the thing in a societal perspective by dealing with the Bakhtin notion of plurality: the mystery of the one and the many. It is my belief that systems theory, particularly the application of a modified form of autopoietic theory, offers the most cogent means of explaining this mystery.

IV.2. Why Systems Theory

It is my argument that the legal practice has generated a discourse that has enshrined a particular social construction. It is possible, of course, to view this social construction from various perspectives. I have chosen a system-based standpoint because I consider that systems theory provides the analytical foundation not only to accord recognition of practices but also to place such practices within a meaningful societal

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606 Lyotard J-F., *The Postmodern Condition: A Report on Knowledge*, at p 46. See also Davies Margaret, ‘Legal Separatism and the Concept of the Person’, at pp 124-127, for a discussion of the application of discourse and the exercise of power.
607 Phrase taken from Althusser L., *Machiavelli and us*, at p16
609 The basic principles of systems theory are relatively settled and as a consequence I will only briefly discuss the principles of the theory. The study by Walmsley D.J., *Systems Theory: A Framework for Human Geographical Enquiry*, provided a summary of tenets of the theory, and chapter 4 ‘Developments in Systems Theory’, particularly at pp 40 to 49, provided a typology of systems. I found Churchman C.W. *The Systems Approach* useful.
I see systems theory as being relevant because systems theory enables the construction of order by providing a theoretical basis upon which to rationalise differences between entities and the environment within which those entities exist and operate.

Systems theory is not merely an analytical tool for examining aspects of society but is also a prescription. Systems theory is an instrument for the description of what amounts to the constitution of the entity under review because issues such as action, function, practice, and environment become secondary in that the primary emphasis is that of meaning. Such an emphasis transcribes into a “prevailing of a purely operativist conception of the system”. No doubt my selection of a systems perspective is a reflection of my background.

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611 See Chapter 4 ‘Niklas Luhmann’s Systems Theory’ of Andersen Niels Akerstrom, Discursive Analytical Strategies: Understanding Foucault, Koselleck, Laclau, Luhmann, particularly at pp 77 to 81.


614 Clam Jean, ‘System’s Sole Constituent, the Operation: Clarifying a Central Concept of Luhmannian Theory’, at p 63.

615 Before obtaining legal qualifications I was an analyst.
It is, of course, a legitimate question to ask whether there are such things as systems or whether a system is anything more than a social construction.616 Beer has suggested that a system might well be considered to be subjective because a system is not presented to an observer but is recognised by that observer and, as a consequence, the labelling of system connections is merely a process of arbitrary distinction.617 However, be that as it may, Luhmann, for example, is one who had no doubt as to the existence of systems 618 although he did question whether the social system could be considered a living system.619

617 See the Preface by Beer Stafford, to Maturana Humberto and Varela Francisco, Autopoiesis: The Organization of the Living, at p 349.
618 See Luhmann Niklas, Social Systems, particularly at pp 12-14.
619 See Millett Stephan, Autopoiesis and Immanent Teleology: Toward an Aristotelian Environmental Ethic, particularly at pp 51 and 52, and also Luhmann Niklas, Social Systems, particularly at pp 24 to 29.
A system will be viewed as being autopoietic when that system has the ability to continue its own operations rather than existing in equilibrium with the environment. Autopoietic theory is a development of systems theory and provides an over-arching explanation for the continuing existence of societal entities through the linking of societal interaction. Autopoietic theory seeks to explain the “operations of social systems and their relationships with each other and with the general social environment”. An autopoietic unity does seem to have an existence that is independent of any observer so whether or not an entity is a unity does not depend upon some observer recognising the entity as a unity. Indeed, autopoietic theory has been described as a theoretical paradigm rather than a unified theory.

IV.3. Assumptions of Systems Theory

The basic assumption of all systems theory is that there are empirical subsystems that have a space within an environment because those subsystems have established an internal and ordered dynamic that binds all elements of that subsystem. Within this chapter I have adopted the schema of Luhmann in that society is a system and there are within this system a number of subsystems.

The notion of system thinking is not new. Kant, for example, conceived of organisms forming a system that was a complete dynamic unit consisting of parts that only had

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621 Ladeur Karl-Heinz *The Theory of Autopoiesis as an Approach to a Better Understanding of Postmodern Law*, at pp 7 to 13, where the author discussed the nature of systems theory and the application of autopoietic theory.
626 See Luhmann Niklas, *Law as a Social System*, at p 72, although the terminology used by Luhmann is inconsistent.
meaning within this system.\textsuperscript{627} Traditional systems theory would envisage that systems
would be either open or closed. An open system survives in an environment through the
organisation of inputs and outputs with an input triggering the production of an output.\textsuperscript{628}
Within open systems theory there is a conception of a system seeking to fulfil production
requirements by continuously collecting, organising, and operating upon the raw material
of facts that are obtained from the environment.\textsuperscript{629} While the capacity to convert inputs
into outputs is a necessary condition for an open system to survive, the volatility of a
continuously changing environment will determine the efficiency of that conversion.\textsuperscript{630}
Open systems theory emphasises that the system boundary is permeable and this
permeable boundary stimulates the interchange of inputs and outputs between the system
and the environment within which the system operates. Inherent within an open system is
a feedback loop that provides information to the system about the impact of output upon
the environment.\textsuperscript{631}

A tenet of modern systems theory is that it is communication that enables a society to
exist and operate. Systems theory emphasises how communications operate and how
different subsystems of communication can exist and function. Communication then is an
empirical reality that can be studied and analysed.\textsuperscript{632} I have accepted that action theory,
practice theory, and systems theory are not alternative approaches but are
complementary. Systems theory would tend to relate behaviour to the characteristics of
the system under review while action theory would see a relationship between action and
the meaning accorded to that action.\textsuperscript{633} Practice theory tends to focus on relationships

\textsuperscript{627} Kant I., \textit{Critique of Judgement}, section 65, at pp 275-280. Kant suggested that understanding the being
and form of the parts of a thing was “only possible through their reference to the whole”. The quoted
passage is at p 276. See also the discussion in Ruiz-Mirazo Kepa and Alvaro Moreno, \textit{Basic Autonomy as
a Fundamental Step in the Synthesis of Life}, at p 236.

\textsuperscript{628} Luhmann Niklas, \textit{Operational Closure and Structural Coupling: the Differentiation of the Legal
System}, at p 1419.

\textsuperscript{629} King Michael, \textit{The “Truth” About Autopoiesis}, at p 219.

\textsuperscript{630} Van Twist M.J.W., and L. Schaap, \textit{Introduction to Autopoiesis Theory and Autopoietic Steering}, at
p 32.

\textsuperscript{631} I have taken this description of an open system from Baxter Hugh, \textit{Autopoiesis and the “Relative

\textsuperscript{632} I have taken the comments in the preceding sentences from the \textit{Introduction} by Nobles Richard and
David Schiff to Luhmann Niklas, \textit{Law as a Social System}, particularly at pp 1 and 2.

\textsuperscript{633} Scott W. Richard, \textit{Institutions and Organizations}, at pp 29-32.
that develop from the actions and interactions of actors and the systems that develop from such actions. 634

Clam argues that systems theory developed from the classical representation of an ordered entity that faced an environment and that this environment acted upon the entity as a form of systemic rationality. 635 Within such a representation the system was evaluated as an entity that had a relational structure. 636 That is to say, traditional systems thinking focused on a linear dynamic of part or whole determinism but the focus has now changed to that of a system operating within an environment. 637 King has argued that in the latter part of the 20th century, systems theory thinking began emphasising an ever-increasing openness. As a result, systems came to be seen as increasingly more adaptive to their environment with subsequent actions and decisions being influenced and even determined by the environment. 638 This theory development meant that output produced by some systems can no longer be thought of as merely artefacts that may have some extrinsic relationship to the environment. Rather such artefacts have an asymmetrical anchoring within the system, and this asymmetrical anchoring reflected the duality between the system and the environment. Thus, there are systems within society that are guided by an internal principle that is the product of “the recursive processes that constitute themselves”. 639

IV.4. Identification and Operation of a Subsystem

As I have pointed out, society is the system and there are a number of subsystems. So what then is a subsystem? A subsystem evolves when the capability of some independent
entity to transform chaos, unorganised complexity, into organised complexity is
developed through the operations of an internal operational structure to the extent that
the essential characteristic of individual autonomy is formed.

So what then is the constitution of a subsystem? Febbrajo suggested a subsystem is:

“a set of elements that, being linked by structural inter-relationships, can be
regarded as a unit which entails a certain distribution of resources and of
information, and which is fundamentally directed to the actual conservation
and/or reproduction of the system itself”.

The activities of the subsystem are the continuous re-generation of the processes and
components of the subsystem itself. Luhmann asserts that the basic characteristic of a
subsystem is that of the distinction between the subsystem and the environment. A
subsystem then is not some typology of norms or values but is for Luhmann “a context of
factually enacted operations, which have to be communicated because they are social
operations”. Laclau has provided a relational definition of a subsystem that I consider
useful. First, a subsystem consists of elements that are defined by rules that outline how
each element combines with other elements within the subsystem. Secondly, it is
impossible to define the elements of the subsystem independently.

There is a relationship between the components of the entity such that the components constitute a

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640 Hernes Tor and Tore Bakken, ‘Introduction: Niklas Luhmann’s Autopoietic Theory and Organization Studies – A Space of Connections’, at p 12. I have altered the identifier ‘system’ used by the authors to ‘subsystem’ to accord with the framework I have adopted in this thesis.
641 See Chapter 2 ‘The Organization of Living Systems’ in Mingers John, Self-Producing Systems, particularly at pp 10 and 11, and the discussion about the characteristics of living systems.
644 Luhmann Niklas, Law as a Social System, at p 78.
645 See Laclau Ernesto, ‘Discourse’, at p 432. Laclau was describing Saussure’s theory and whether language could be seen as a system. I consider his description has wider application. See the text associated with footnotes 624 and 680. See also Febbrajo Alberton, ‘The Rules of the Game in the Welfare State’, at p 129. A system for Febbrajo is “a set of elements that, being linked by structural interrelationships, can be
whole. There is then a gestalt and this notion of wholeness is fundamental to the notion of a system.

The concept of a boundary is a necessary attribute of any subsystem in that the boundary will serve to both separate the subsystem from its environment and link the elements of that subsystem. The boundary of a system will be that area of space where a level of order is achieved that will satisfy the internal and ordered dynamics of the subsystem. A further necessary attribute of any subsystem is some form of memory function that will enable the endorsement of communications and will also enable the subsystem to be functionally proficient. The subsystem will incorporate a form of relationship that is administrated by a rule that is unique to that subsystem. This rule will provide for both inclusion and exclusion within the subsystem and will also generate behaviour that is, in Luhmann’s words, “grounded in the indeterminate fluctuations of distinctions over time”.

IV.5. Introduction to Autopoietic Theory

I have asserted that, although it is the judges that state the law, this law emanates from a particular subsystem of society and not from any other social sphere. To my mind it is the legal practice that, through the regulation of the activities of those whose field of endeavour is the law, outlines the paradigm from which the judges take their rhetoric.

So what then is the theoretical basis for making such a claim? What is needed to answer this question in relation to the law is, in Baxter’s terms, a methodological directive that will enable the law to be traced to those structures, concepts, standards, and dynamics regarded as a unit which entails a certain distribution of resources and of information, and which is fundamentally directed to the actual conservation and/or reproduction of the system itself.”

Mingers John, Self-Producing Systems, at pp 11 and 14.

See Part I of Von Foerster Heinz, Observing Systems.

See Luhmann Niklas, Social Systems, at p 167.

I have taken this description of what the legal practice is and does from Chapter 1 ‘The Emergence of Practice’, particularly pp 15-19, in Schatzki Theodore R., Social Practices: A Wittgensteinian Approach to Human Activity and the Social, where the author identified the social theorists who have promoted the concept of practice as the fundamental social phenomenon.
that are internal to the legal system and only that system. Such a directive will enable
the presentation of a specific view to the exclusion of all other views and it is my
contention that a modified form of autopoietic theory provides the appropriate platform
from which to trace both the emanation of the law and the mainstream view of primary
legislation. I see autopoietic theory as providing a theoretical basis upon which to
centralise the institutions that make up modern society and to rationalise the
operations of such institutions. An additional attraction for me is that it seems that
autopoietic theory reflects the historical trend of the decline in the importance of
ideology as a key indicator for analysis.

Luhmann has suggested that a recursive universe of disorder, unpredictability and non-
linear complexity has replaced what he called the Newtonian logic of a timeless
mechanical universe that was marked by order and predictability. This replacement
has occurred because there has been a significant increase in complexity associated with
change within society. As a result, society has had to become functionally
differentiated and this differentiation has lead to the development of autonomous
subsystems within a society that is itself autopoietic. However, Badiou asserted that
the world is not as complex as claimed and in broad terms the world is simple. Indeed
Badiou claimed that the world consists of two intertwined processes. The first process is

651 See the Introduction: The Problem of ‘Relative Autonomy’ in Baxter Hugh, ‘Autopoiesis and the
652 Murphy W.T., The Oldest Social Science?, at pp 165-166.
653 See, for example, Van Hoecke Mark, Law as Communication, at pp 3-6, where the author discussed the
notion of theories generally not outlasting some historical context. For example, the author claimed that in
Germany national-socialist legal theory did not survive the collapse of the Nazi administration. The author
pointed out that the trend of recent positivistic theories was to omit ideology and cites the example of the
autopoietic theory of law.
654 See the discussion by Knodt Eva M., in the Foreword to Luhmann Niklas, Social Systems, particularly
at pp xi and xii.
655 See Glover Dennis ‘Ideas with Currency’, at p 26, where the author, in outlining the nature of
contemporary Australian society, asserted that “[w]e live in an era of constant and profound change. Old
political ideas are rapidly becoming obsolete. In some cases this is due to long-term societal trends beyond
the immediate control of politicians and intellectuals.”
656 I have taken these comments about differentiation from Osterberg Dag, ‘Luhmann’s General
Sociology’ and the author’s discussion about the framework of Luhmann’s theory of society, particularly at
pp 18-20. In relation to the issue of differentiation see also Mair Peter, ‘Ruling the Void’. Mair, at p 26,
provided an example of how one may consider the impact of the political and the issue of governance by
acknowledging that as society now consists of self-organizing networks any attempts by government to
intervene “will be ineffective and perhaps counterproductive”.

an extension of the automatisms of capitalism so that the world has become a global market with the imposition of what the author claimed is the rule of abstract homogenisation. That is to say, everything “that circulates falls under the unity of a count, while inversely, only what lets itself be counted in this way can circulate.” Badiou claimed that the second process “is a process of fragmentation into closed identities” and that a cultural and relativist ideology accompanies this fragmentation.657 But, be that as it may, the claims about the increasing complexity of society are not a modern phenomenon658 and, for Luhmann, modern society is a “phenomenon of evolved complexity”659 that generates differentiation among the elements that constitute the society.660 Subsystems operate as real systems in the real world and without subsystems there would be a disintegration of society.661

A subsystem at the most basic is a collection of elements that are within a structure that is separated from the surrounding environment.662 Such subsystems are not merely configurations of difference663 but are paradigmatic entities that have a steady form. This steady form provides identifiable boundaries that isolate the entity from the environment.664 Within autopoietic theory a subsystem will define its own boundary and will therefore be operationally closed. There is the subsystem and the environment is

657  Badiou Alain, Saint Paul The Foundation of Universalism, at pp 9 and 10. The quoted passages are at p 10.
658  See, for example, Stehr Nico and Reiner Grundmann, ‘The Authority of Complexity’, particularly at pp 314-317, where the authors provided an historical analysis of the claims about the complexity of society.
659  Luhmann Niklas, Ecological Communication, at p 8. The phase is used in a slightly different context but the phase encapsulates the point I want to make. There is a phenomenon and this should be considered when evaluating societal products.
660  This definition of the term ‘complex’ was taken from the Translator’s Introduction to Luhmann Niklas, Ecological Communication, at p viii, where the translator, Bednarz John Jr., referred to Talcott Parsons’ use of the term.
663  The phrase ‘configurations of difference’ was taken from Walther Bo Kampmann, ‘Spencer-Brown – Luhmann – Derrida: Differences and Paradoxes’, at p 1.
664  See, for example, Luhmann Niklas, Social Systems, at p 76, and Walther Bo Kampmann, ‘Spencer-Brown – Luhmann – Derrida: Differences and Paradoxes’, at p 2. The concept of an organization of steady forms flows from the form theories of Spencer-Brown George, Laws of Form, at pp 1-3. The form theory of Spencer-Brown is basic to the subsequent development of autopoietic theory as developed by Luhmann and others.
whatever is outside the boundary of the subsystem. It is autopoiesis theory that enables a distinction to be made between a subsystem that is operationally closed and cognitively open.

An examination of this particular subsystem of society that I have identified as the legal practice is fundamental to my thesis. I see the legal practice as analogous to a living thing in that it is a unified system of organised endeavour and that this thing seeks to preserve its existence by protecting and promoting its own well-being through the promotion of the ideal of the law. What I am doing is expanding on the notions of, for example Luhmann and Teubner, that institutions do create a reality in their own image so that communications by individuals are not “simply the expressions of the individuals concerned but of the institution”. In this case, the institution is the legal practice and, for me, this so-called legal practice fashions in its own image the particular social construction that is the law. It becomes a question as to how one conceptualises the relationship between what I see as collective knowledge, an action-directing stock of knowledge, and a specific social structure.

IV.6. Nature of Autopoietic Theory

Autopoietic theory is a development of open systems theory. The term ‘autopoiesis’ came to prominence in 1972 when two biologists used the term to identify what they
considered to be the central organisational feature of a living entity. But autopoietic theory, as developed by Luhmann and others differs, from what I have labelled open systems theory. There is a change of emphasis from an input and output model to that of a model in which the subsystem is not only simultaneously open and closed but also self-maintaining and self-reproducing. The term ‘autopoiesis’ serves to both identify and describe the process of self-production by which an organism maintains itself as a unity, although the component parts of that organism may change over time.

Autopoietic theory has served as a means of explaining the fragmentation of society and the emergence of different institutions from this fragmentation. Such institutions tend to be isolated and see the world from their own perspective by creating a unique reality through the use of a language that will accord with the ethos of that institution. For example, Zolo has suggested that autopoietic theory has its roots in the desire to answer two ‘what is’ questions. The first question is what is a living system, while the second question relates to cognition.

Autopoietic theory has been seen as a reconstructive practice in that it is based on experiences of real life and therefore can rationalise the paradoxes and antinomies that are the foundation of the self-organising practices that are inherent in a modern society. For example, Cotterrell suggested that autopoietic theory reinterprets the internal dichotomy of how the law is viewed into “a matter of social practice”.

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671 The two biologists were Maturana Humberto and Francisco Varela. See Mingers John, Self-Producing Systems, for an excellent critique of the development of the theory of Maturana and Varela.
673 Millett Stephan, Autopoiesis and Immanent Teleology: Toward an Aristotelian Environmental Ethic, particularly at pp 6 and 7.
676 See Part II of Teubner Gunther, ‘The Two Faces of Janus: Rethinking Legal Pluralism’.
677 Cotterrell Roger, ‘The Representation of Law’s Autonomy in Autopoiesis Theory’, at p 86. Cotterrell criticised autopoiesis theory because the theory tended to reify understandings of lawyers about the law by accepting as a given such things as legal experience and an internal and external dichotomy within the law.
autopoietic theory does illustrate is that there is a basis for arguing that the law is not, and indeed cannot be, independent of political, economic, or other societal processes and neither can the law be completely reduced to such societal processes. Certainly, it is the legal practice that defines the law, but any such definition will be coloured by the censored input to the legal practice and this censored input will include noise from the environment.

In arguing that the legal practice is a subsystem of society, I am rejecting what may be called methodological individualism by accepting some form of determinism in that the law, and the activities of those involved in the law, are determined. That is to say, such things are compiled and constructed by the discourse that emanates from the legal practice. Proponents of autopoietic theory argue that it is critical to distinguish the phenomenon itself from any description of the phenomenon. So, a fundamental distinction is made between the entity that is created by some observer in distinguishing the thing from the background environment of the thing and the phenomenon that is constituted as and by autopoiesis.

Within autopoietic theory literature, the terms ‘system’ and ‘subsystem’ seem to be interchangeable but I have accepted a notion of Luhmann that society is the system and individual units that are separated from their environment are subsystems. The literature makes distinctions between first, second, and third levels of autopoiesis, and although I am undecided about whether there is merit in being concerned about the

678 I have taken the terms ‘methodological individualism’ and ‘determinism’ from Chapter Two ‘Education’ in Reed-Danahay Deborah, Locating Bourdieu, at pp 53 and 54, where the author contrasted the theory of Raymond Boudon who advocated a theory of individual strategy and rational choice in education, with that of Bourdieu. The phrase ‘compiled and constructed, was also taken from Chapter Two, at p 61, where the author discussed Foucault’s theory of power and that power is diffuse and permeates all aspects of social and cultural life.

679 See, for example, Chapter 4 ‘Niklas Luhmann’s Systems Theory, in Andersen Niels Akerstrom, Discursive Analytical Strategies: Understanding Foucault, Koselleck, Laclau, Luhmann, particularly at pp 72 to 80.

680 Maturana Humberto and Varela Francisco are credited with developing the initial impetus of autopoietic theory. The claim about the fundamental distinction between phenomenon and description is attributed to Maturana and Varela, Autopoiesis and Cognition, see Millett Stephan, Autopoiesis and Immanent Teleology: Toward an Aristotelian Environmental Ethic, at p 12, footnote 19.
relevance of levels, it is the second level of autopoiesis that is relevant to my argument.\textsuperscript{682} Within the so-called second level of autopoiesis, an entity has a boundary that is created and maintained by the entity.\textsuperscript{683} The status of individuals within a subsystem is a contentious issue with, for example, Luhmann seeing each individual as being a separate autopoietic system so these individual autopoietic subsystems are part of society itself.\textsuperscript{684} I have taken a different view in that I see endeavour as the defining characteristic of a subsystem so then an individual can, and usually does, belong to more than one subsystem.

Within autopoietic theory, the emphasis has become focused on the internal operations of the subsystem so that the input and output model is replaced by a model that emphasises selective connections between the subsystem and its environment through what are called structural couplings.\textsuperscript{685} There is then a change from concern about some knowing subject to a concern about "a reality that consists solely of self-referential systems and their ‘empirically’ observable operations".\textsuperscript{686} Societal complexity will also impact on the evolutionary selections of a subsystem and limit the randomness of the form of the subsystem that will be created.\textsuperscript{687}

Autopoietic theory does provide a radical analysis of autonomy by recognising that subsystems are normatively closed but cognitively open, and, as a consequence, subsystems seek to maintain their existence and establish independence through the mechanisms of self-regulation, self-production and self-organisation.\textsuperscript{688} A subsystem is constituted through the distinction between the subsystem and the environment of that

\textsuperscript{681} Luhmann Niklas, \textit{Social Systems}, particularly at pp 1-11. According to Luhmann an individual would also be an autopoietic system.
\textsuperscript{682} See Chapter 5 of Millett Stephan, \textit{‘Autopoiesis and Immanent Teleology: Toward an Aristotelian Environmental Ethic’}, for a discussion on this issue. Luhmann Niklas, \textit{Social Systems}, is also relevant.
\textsuperscript{683} This definition was taken from Andersen Niels, \textit{Discursive Analytical Strategies: Understanding Foucault, Koselleck, Laclau, Luhmann}, particularly at pp 70 – 72.
\textsuperscript{684} Luhmann Niklas, \textit{Law as a Social System}, at pp 414-416.
\textsuperscript{685} Luhmann Niklas, \textit{‘Operational Closure and Structural Coupling: the Differentiation of the Legal System’}, at pp 1419-1421.
\textsuperscript{686} Knodt Eva M., in the \textit{Foreword} to Luhmann Niklas, \textit{Social Systems}, at p xvii.
\textsuperscript{687} Generally see Chapter 1 \textit{‘Sociological Abstinence’}, of Luhmann Niklas, \textit{Ecological Communication}.
\textsuperscript{688} This description was taken from Black Julia, \textit{‘Critical Reflections on Regulation’}, at pp 7-10.
Subsystem boundaries are not spatial in that there is an internalisation of the subsystem environment and this internalisation ensures that the self-differentiation of the subsystem becomes a form of self-identification. A subsystem will seek to establish its own identity and unity, and will define this identity by establishing its own boundaries, structures, and processes. There are two entities: the subsystem and others, and these others are part of the environment and also observers of the subsystem.

A subsystem will be self-producing in that it will produce the elements that constitute the subsystem through its own operations. A subsystem may engage in self-reproduction because the subsystem will reproduce itself as a network of communication. This characteristic of self-reproduction enables the subsystem to alter and to even transform itself. A subsystem is self-referential because the subsystem operates recursively upon its own elements. A subsystem is autopoietic as it is self-producing, self-reproducing, and recursively self-referential. The subsystem will be operatively closed but cognitively open; will be self-referential; will have a communicative mechanism that establishes the boundaries of the subsystem and will also be recursive.

A subsystem will develop a system specific code through the utilisation of positive and negative values so that things are either in or out according to that code. The utilisation of the code will establish the subsystem as a unity and will also serve to establish the boundaries of that subsystem. Any communication that invokes the code of the subsystem will belong to that subsystem while any communication that does not invoke that code will belong to the environment. For example, in the legal practice this code

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689 Clam Jean, ‘System’s Sole Constituent, the Operation: Clarifying a Central Concept of Luhmannian Theory,’ at p 67.
690 I have taken this definition from Beck Anthony, ‘Is Law an Autopoietic System?’, at pp 406-409, and such a definition captures what I want to say about the legal system.
691 Gren Martin and Wolfgang Zierofer, ‘The Unity of Difference: A Critical Appraisal of Niklas Luhmann’s Theory of Social Systems in the Context of Corporeality and Spatiality’, at p 618. The authors, at p 616, posed the question of distinguishing a subsystem from the environment and suggested that such a question shifts the focus from objects and structures “to their constitution as objects by an observer”.
692 This description was taken from Baxter Hugh, ‘Autopoiesis and the “Relative Autonomy” of Law’, at pp 2003-2008.
693 This description of a subsystem was taken from Baxter Hugh, ‘Autopoiesis and the “Relative Autonomy” of Law’, at pp 2007-2009.
will facilitate legal closure through the application of a binary code of legal or illegal. Rosenfeld suggests that this legal closure is an empty tautology that does not enhance meaning or produce information but merely distinguishes the legal subsystem from the other.694 The binary code then is seen as a necessary, but not sufficient, mechanism to account for the normative characteristics of the subsystem.695

It is a tenet of autopoietic theory that the validity of output from any subsystem, be that subsystem politics; the church; the economy; or the law; rests within the subsystem itself and not on any criteria that may be generated from the environment.696 This will be achieved by the development of a binary scheme to evaluate whether normative expectations within the subsystem are fulfilled.697 While each subsystem is operationally closed but cognitively open, this operational closure does not mean that the subsystem is a closed system and therefore independent of its environment but, rather, that there is an internal adaptive mechanism within the subsystem. The concept of ‘operational closure’ is inherent to all autopoietic systems. The concept relates to the issue of identity and how subsystems reproduce and not to relationships. What differentiates subsystems is the form of operational closure adopted, and for the legal practice the particular form would be that of normative closure so that the operations of the legal practice would be structured around a distinction between norm and fact.698 This adaptive mechanism enables each subsystem, through its own operational systems, to receive and process noise from the environment, but only in terms that are relevant to the continuing existence of that subsystem. This noise will be transformed into information by the

694 See Chapter Four, ‘Justice Confined’, at p 93, of Rosenfeld Michel, Just Interpretations, where the author compared the application of the binary codes of the legal subsystem and the economy subsystem.
695 See Rosenfeld Michel, Just Interpretations, at p 109, where the author discussed the interpretation of law but I suggest that his comments have wider application.
696 See Luhmann Niklas, Law as a Social System. Luhmann argued, at p 71, that the issue of validity did not relate to any normative or teleological connotation but rather the application of a symbolic endorsement by the subsystem. Luhmann also argued, at p 210, that the past and the future are symmetrically related to each other within such margins that might have been set by the programs of the subsystem.
697 Chapter 4 ‘Coding and Programming’ in Luhmann Niklas, Law as a Social System, particularly at pp 174-176.
698 See the Introduction by Nobles Richard and David Schiff to Luhmann Niklas Law as a Social System, at pp 7-9.
internal operations of the subsystem concerned. Each subsystem reproduces itself recursively on the basis of its own specific operations.\textsuperscript{699}

Operational closure means that each subsystem will develop and rely on unique all-purpose operations to confirm and change structures within the subsystem, and each operation will determine the next operation.\textsuperscript{700} Any variation within an autopoietic subsystem must, of necessity, maintain the autopoiesis of that subsystem.\textsuperscript{701} Complex autopoietic subsystems are inferential systems that have established a patterned connection between the subsystem and possible external interventions. This inferential system will recognise that interactions between the subsystem and the environment will not necessarily recur under similar circumstances. An inferential system will provide for the production of expectations that are future oriented and will also recognise the likelihood of controlled changes to the structure of the subsystem.\textsuperscript{702}

The use of autopoietic theory, as well as being the most interesting of the many versions of systems theory, is also perhaps the most problematic. Autopoietic theory has been seen as being everything from a biological theory to something of a grand theory or a total vision of the social world.\textsuperscript{703} But, be that as it may, autopoiesis does provide a conceptual framework in which to describe and account for the legal practice and also to evaluate both the process of enactment and the process of adjudication, through the creation and reformulation of meaning.\textsuperscript{704}

IV.7. What Makes an Entity Autopoietic

Millett has suggested that a minimal configuration for an institution to be considered autopoietic is some operational whole that is comprised of aggregated individuals and

\textsuperscript{699} See Knodt Eva M., in the Foreword to Luhmann Niklas, Social Systems, at p xii.
\textsuperscript{700} Luhmann Niklas, ‘Operational Closure and Structural Coupling: the Differentiation of the Legal System’, at p 1440.
\textsuperscript{701} Willke Helmut, ‘Societal Guidance Through Law?’.
\textsuperscript{702} Generally see Willke Helmut, ‘Societal Guidance Through Law?’.
\textsuperscript{703} King M., ‘The Construction and Demolition of the Luhmann Heresy’, at p 126.
this whole takes the form of a social institution.\textsuperscript{705} Autopoietic systems are “sovereign with respect to the constitution of identities and differences”.\textsuperscript{706} An autopoietic system will not create some material world of its own by presupposing a different reality, but whatever autopoietic systems “use as identity and differences is of their own making”.\textsuperscript{707}

Millett has proposed a series of questions to identify whether an entity is autopoietic: \textsuperscript{708}

1. Is the entity self-created and self-maintained and does it have an identifiable boundary?

2. Are there constitutive elements or components within this boundary?

3. Do the components of the entity themselves determine the interactions and transformations that the components undertake by the establishment of a form of structural determinism?

4. Do the components engage in what Millett called preferential neighbourhood relations to reinforce the boundary?

For Teubner, the key requirement for a subsystem to be autopoietic is that of self-referentiality enabling the subsystem to recursively reproduce its own elements from the network that is formed by those elements.\textsuperscript{709} This reproduction is created by the subsystem through the structures and elements that not only define the structure of the subsystem but also define the operations of the subsystem. Thus, the subsystem is able to organise, within a given environment, the self-continuation of that subsystem within

\textsuperscript{704} Nelken D., ‘Beyond the Metaphor of Legal Transplants: Consequences of Autopoietic Theory or the Study of Cross-Cultural Legal Adaptation’, at p 269.


\textsuperscript{706} Luhmann Niklas, Essays of Self-reference, at p 3.

\textsuperscript{707} Luhmann Niklas, Essays on Self-reference, at p 3.


\textsuperscript{709} Teubner Gunther, ‘How the Law Thinks: Toward a Constructivist Epistemology of Law’, at p 88.
parameters that are acceptable to that subsystem. The elements of that subsystem are those acts and those communications that are a product of that subsystem.\textsuperscript{710}

Jacobson has suggested that the core image of autopoiesis “is the individual organism, ceaselessly generating elements out of elements, forming each element into an indissoluble unity from a more complex base of energy and matter”.\textsuperscript{711} For the law, this means that the legal practice will continuously generate and transform legal materials exclusively from legal materials to incessantly determine the conditions of, and for, the validity of the law.\textsuperscript{712}

I have commented briefly about the significance of the boundary definition. It is a tenet of autopoietic theory that ingredients lose their individuality when they are part of an entity that is autopoietic.\textsuperscript{713} While a necessary property of an autopoietic entity is that of a self-created and self-maintained boundary, it is difficult to specify what this boundary is. Nevertheless, it is a boundary that distinguishes the subsystem from its environment.\textsuperscript{714}

IV.8. Subsystem Communications with the Environment

While the concept of the environment is an inherent consideration for any form of systems theory, considerations of the environment have particular significance in relation to the autopoiesis theoretical notion of a subsystem being operationally closed but cognitively open. What then is the impact of the environment upon such a subsystem and how does the subsystem deal with the environment? Teubner attempted to answer such a question with the concept of an actual and a constructed environment where the

\textsuperscript{710} Willke Helmut, ‘Societal Guidance Through Law? ’.
\textsuperscript{713} See Chapter 5 of Millett Stephan, ‘Autopoiesis and Immanent Teleology: Toward an Aristotelian Environmental Ethic’.
\textsuperscript{714} See Chapter 5 of Millett Stephan, ‘Autopoiesis and Immanent Teleology: Toward an Aristotelian Environmental Ethic’.
subsystem can only deal with the reconstruction. But, as Priban has pointed out, the environment cannot be reduced to that of a mere political space because there will always be at least some tension between the environment and the subsystem. The evaluation of the status of the environment by a subsystem will depend on the internal communication mechanism of the subsystem and a subsystem may construct an environment. There is then a question as to whether the legal practice has the capacity to make a distinction between the reality of the environment that exists because of the subsystem, and therefore only noise to the subsystem, and that of the constructed environment which will become a factor in the operations of the subsystem.

Luhmann suggested that what he called the autopoiesis of a subsystem can only be reproduced through the subsystem’s own operation and as a result a subsystem “cannot operate in its environment and hence cannot communicate with the environment by using [its own] operations”. A subsystem must have a specific mechanism to communicate with its environment and this mechanism takes the form of coupling. Luhmann made a distinction between structural and operative coupling. Operative coupling refers to the coupling of operations with operations. Indeed, autopoiesis, with the production of operations of the subsystem by the operations of the subsystem, is one variant of operative coupling. The other variant of operative coupling is based on a synchronicity of the subsystem and its environment. There is a presumption that a subsystem will be synchronised with its environment and it is through this operative coupling that a subsystem responds operationally with operations that the subsystem has attributed to its environment. Luhmann gave as examples of such activities: fulfilling a legal obligation by making a payment; or symbolising political dissent; or consensus by enacting legislation. Luhmann also referred to the passing of legislation as an example of

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718 Luhmann Niklas, *Law as A Social System*, at p 381.
operative coupling.\textsuperscript{720} Included in the legal subsystem are, according to Luhmann, the sub-subsystems of the parliament when it legislates and the courts.\textsuperscript{721} I have indicated that I think that such a distinction is not possible because the output of a subsystem can never be anything other than a reflection of the unique function of a subsystem; be that output primary legislation or the law. Output does not determine structure or where some structure may sit within the subsystem. Rather, output is a function of structure.\textsuperscript{722}

Now this operative closure that is associated with synchronisation is time dependent as it is restricted to the duration of some event. By contrast, structural coupling occurs if a subsystem presupposes as ongoing certain features of the subsystem’s environment and there is a structural reliance on such features. Luhmann gave the examples of the fact that money will be an acceptable exchange medium or that time can be ascertained.\textsuperscript{723} I tend to see such coupling rather in the terms of the primacy of politics because a subsystem will communicate with the environment when forced to do so by some internal element; or when forced to do so by some element in the environment; or when the subsystem perceives some advantage in so doing. Certainly, the mode and medium of communication will be a reflection of the ethos of the subsystem but the demand might well be external.

IV.9. Relations with Other Subsystems

Subsystems do not exchange input or output with other subsystems, and as a consequence it is impossible for information to freely cross subsystem boundaries. The operations of one subsystem do not provide information to another subsystem. Rather such operations may generate noise that recurs within the environment. Exchanges between subsystems

\textsuperscript{720} Luhmann Niklas, \textit{Law as a Social System}, at p 381.
\textsuperscript{721} Luhmann Niklas, \textit{Law as a Social System}, at p 381.
\textsuperscript{722} The notion of output being a function of structure is a tenet of ‘general systems theory’ and Churchman E. West, \textit{The Systems Approach}, is a general reference. Rottleuthner Hubert, ‘A Purified Sociology of Law: Niklas Luhmann on the Autonomy of the Legal System’, at p 789, recognised the logic of Luhmann’s view that as it is possible to easily equate the legislative system with the political system then the political system would become an element of the legal system but suggests that this would be too simple a critique. Needless to say, I agree with the conclusion of Rottleuthner.
are regulated through a system of coupling because a subsystem will be coupled to its environment.\textsuperscript{724} So, whether or not noise will be converted into information by a subsystem will depend on the internal structures and operations of the receiving subsystem.\textsuperscript{725}

While the environment is an inherent feature of any systems theory as a subsystem must be located within some spectrum, a subsystem can only deal with the environment by a reconstruction of that environment in accordance with the internal evaluation mechanism of the subsystem.\textsuperscript{726} Anything outside the subsystem remains a noise until the subsystem transforms that noise into an acceptable input to the subsystem.\textsuperscript{727} Such adoption occurs through structural coupling,\textsuperscript{728} with the coupling performing the function of censor. Noise therefore may become a censored input for the subsystem.

The borders between subsystems have been described as horizontal and serve merely as a means of differentiating, and not as a distinguishing medium to resolve issues of superiority or inferiority.\textsuperscript{729} Where a subsystem considers another subsystem to be of importance to its existence, that subsystem may within its own borders construct an image of the second subsystem as a mechanism to filter noise. This constructed image

\begin{itemize}
\item \textsuperscript{723} See Chapter 10 ‘Structural Couplings’ in Luhmann Niklas, \textit{Law as a Social System}, particularly at pp 381-385.
\item \textsuperscript{724} See Baxter Hugh, ‘Autopoiesis and the “Relative Autonomy” of Law’, at pp 2036-2039, for a discussion on structural coupling. See also Luhmann Niklas, \textit{Law as a Social System}, at pp 263 and 264, and also Chapter 10 ‘Structural Coupling’. Luhmann Niklas, ‘Operational Closure and Structural Coupling: the Differentiation of the Legal System’, at pp 1429-1431, is also relevant.
\item \textsuperscript{725} Baxter Hugh, ‘Autopoiesis and the “Relative Autonomy” of Law’, at pp 2005 and 2006.
\item \textsuperscript{727} Priban Jiri, ‘Legitimation Between the Noise of Politics and the Order of Law: A Critique of Autopoietic Rationality’ particularly at pp 114-117.
\item \textsuperscript{728} Luhmann Niklas, ‘Operational Closure and Structural Coupling: the Differentiation of the Legal System’, particularly at pp 1430-1434.
\end{itemize}
will accord with the criteria established by some perception apparatus within the originating subsystem.\textsuperscript{730}

The description I outlined in the preceding paragraphs does not mean that a subsystem will not relate to turbulence from the environment of that subsystem. Such a subsystem is only operationally closed and this is a major difference between open systems theory and autopoietic theory. For example, both the legal practice and the political subsystem will react to public pressure in various ways, with the protection of turf issues the most strident example of this. But such reactions will be in accordance with the internal processes of the respective subsystem because a subsystem will be operationally closed and, at the same time, cognitively open.

A subsystem deals with noise that is perceived as a problem from its environment by the use of programs within that subsystem. Such programs select noise and subject this so-called noise to review and evaluation by the application of specific programs that the subsystem has endorsed. The result of this review and evaluation will lead to the inclusion or exclusion of the so-called problem.\textsuperscript{731}

\section*{IV.10. Subsystems and Communication}

Within a subsystem, communication may be either central or peripheral. A self-referential subsystem is not an isolated entity that does not relate to its environment but is a subsystem that, of necessity, is differentiated or distinguished from its environment through its operations.\textsuperscript{732}

For Luhmann, a subsystem will be autonomous because it will have operationally closed networks of specialised communication systems that will process subsystem specific

\begin{flushleft}
\textsuperscript{730} Chapter 5 ‘Social Regulation through Reflexive Law’ of Teubner Gunther, \textit{Law as an Autopoietic System}, particularly at p 74, and Chapter 10 ‘Structural Couplings’, particularly at pp 412-415, in Luhmann Niklas, \textit{Law as a Social System}.

\end{flushleft}
information in accordance with the specific codes of the subsystem. Because of the communication code, subsystems are autonomous operationally closed networks that process subsystem specific information in accordance with the subsystem specific communication codes. Autonomy in this context is a consequence of the operative closure of the subsystem and accordingly the structures of the subsystem are derived from the operations of the subsystem.

Information is derived from noise as information is subsystem specific in that information is given meaning by the operations of the subsystem. A subsystem will have an internal system that makes a distinction between coding and programming. A code is invariant and amounts to the binary distinction between positive and negative values such as, for example, legal or illegal. A program will, on the other hand, provide for the allocation of such a code in particular situations. Luhmann made the distinction between a code and a program because a code enables distinctions to be made as to whether a matter belongs, or does not belong, to the subsystem. A program may be likened to a rule because a program provides for the attribution of values. A program must identify the conditions to be applied in order to differentiate between the values.

Some would go as far as arguing that communications within a subsystem have a degree of independence. Such a view would provide that communications then are not dependent upon the individuals within that subsystem, but are dependent upon the internal structure of the subsystem itself. As a consequence, the communication system is an aspect of this structure and individuals have become some form of “semantic

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732 Luhmann Niklas, *Law as a Social System*, at pp 81 to 86.
734 For a discussion of Luhmann’s views on autonomy see footnote 94, at p 2008, of Baxter Hugh, ‘*Autopoiesis and the “Relative Autonomy” of Law*’.
737 See p 19, and Chapter 4, ‘*Coding and Programming*’ in Luhmann Niklas, *Law as a Social System*.
738 See, for example, Chapter 4, ‘*Niklas Luhmann’s Systems Theory*’ in Andersen Niels Akerstrom, *Discursive Analytical Strategies: Understanding Foucault, Koselleck, Laclau, Luhmann*, particularly at pp 74 and 75.
However, be that as it may, a system of communication is a generated system that will create and validate the elements and function that constitute individual subsystems. Within autopoietic theory, communication, according to Teubner, forms a closed auto-reproductive network because there is a “synthesis of utterance, information, and understanding - that recursively reproduces communication”.

Luhmann stressed the significance of communication by arguing that society is constituted by communication and that communication can only emerge from communication. Action achieves a unity only through an interaction with others, and indeed, the definition of what is an act is a function of communication. Within the theory developed by Luhmann, communications are intra-organisational so that, for example, all communications relating to the law are part of the legal subsystem. The structure and functions of the legal practice, and therefore the law, are defined in the communications that are the product of the legal practice. For Luhmann, a communication initiated by, or about, a court will be a central communication and any other legal communication will be regarded as peripheral.

While, as I have pointed out, a subsystem is “a self-conditioning communication network oriented about a thematic difference” I do see a thematic difference that is based upon some field of endeavour. Such a concept is based on the notion of differentiated social subsystems and presents the explanation for what may seem to be a logical problem for my hypothesis about primary legislation. That is to say, primary legislation is produced by one particular subsystem, the political subsystem, but can only become, by my

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742 See, for example, Luhmann Niklas, Social Systems, at pp 38 and 39 for general comments about communication being basic to the concept of society. Also see Gren Martin and Wolfgang Zierhofer, ‘The Unity of Difference: A Critical Appraisal of Niklas Luhmann’s Theory of Social Systems in the Context of Corporeality and Spatiality’, at pp 617 and 618.
definition, a censored input for any other subsystem. So how then do the subsystems, that of the legal practice and that of the political subsystem, communicate with each other over primary legislation? My conclusion is that they do not, because each subsystem goes about its own business operating under the ambit of its own codes.

To repeat a point I have made, a court in relation to primary legislation will interpret primary legislation in terms that are relevant to the court and so primary legislation is nothing more than a censored input. It is, at best, a happy accident if the interpretation of the court in applying such primary legislation to the case at hand accords with any desire the parliament may have had in enacting that primary legislation.

IV.11. Disagreement with Luhmann

Luhmann argued that the defining characteristic of a subsystem is that of communication, and, within the model of Luhmann, the legal subsystem would be based on all those communications that relate to the operations of the law. The width of the legal subsystem as defined by Luhmann is frighteningly wide, because for Luhmann “every communication that makes a legal assertion or raises a defence against such an assertion is an internal operation of the legal [sub]system, even if it is occasioned by a dispute among neighbors, a traffic accident, a police action, or any other event.”

According to Luhmann, a directive by a property owner to someone to vacate that person’s land would constitute a communication that is within the legal subsystem. Luhmann argued that primary legislation is a communication of the legal subsystem.

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747 See, for example, Beck Anthony, ‘Is Law an Autopoietic System?’, at p 407, where the author pointed to the use by Teubner of such a concept.
748 Luhmann Niklas, ‘Law as a Social System’, at pp 141. See also Baxter Hugh, ‘Autopoiesis and the “Relative Autonomy” of Law’, at p 2007. Baxter asserts, at p 2007, that for Luhmann the statement ordering someone to “get off my property” is a communication within the legal subsystem because it invokes a legal right to exclude.
However, there is a contradiction as Luhmann also acknowledged that primary legislation is subject to political control but that only the law is able to define or change the law.\footnote{See Michailakis Dimitris, ‘Law as an Autopoietic System’ and the discussion, at p 329, of Luhmann’s views See also Luhmann Niklas ‘The Self-reproduction of Law and its Limits’, at pp 112 and 113.}

As I have pointed out, I see the defining characteristic of a subsystem as being that of endeavour rather than communication.\footnote{See Hagen Roar, ‘Rational Solidarity and Functional Differentiation’, particularly at pp 28 and 29, where the author proposed replacing the concept of communication as the defining characteristic of a subsystem with that of action. Ost has also raised the issue of whether the paradigm expounded by Luhmann is the only paradigm. Ost Francois, ‘Between Order and Disorder: The Game of Law’, at pp 71 to 74.}

Endeavour is a shared practice, because it is the sustained pattern of behaviour within some particular collective activity, so the field of endeavour that an individual is engaged in defines individual membership of a subsystem. To my mind, communication cannot be anything other than the product of endeavour. As a consequence, membership is not an either or issue because a person can well be, and usually is, part of at least two subsystems. For example, a lawyer employed in the public service is a member of at least the legal practice and the political subsystem. Certainly, from personal experience, there is conflict but conflict is inherent in any undertaking involving the utilisation of resources.\footnote{Any lawyer who has occupied a senior bureaucratic position can recount instances of such conflict. One personal example was insisting at a meeting that, following a major restructuring of the department, instruments of delegation must be immediately revised because many decision makers were acting without authorisation and one consequence was that the department could well be liable. After the meeting, a very senior official asked me what I was getting excited about because it was merely an issue of risk management in that the situation had existed for some time and the department had not incurred any public liability. My assertion that it was unacceptable to ignore the principle of those who purported to exercise power must have that power was dismissed as an irrelevancy.}

It would seem that there is a developing sociological theme that has placed an emphasis on understanding the relevance and importance of shared practices.\footnote{See, for example, Schatzki Theodore R., et al, The Practice Turn in Contemporary Theory, for a collection of articles on this theme.}

Within such studies, social systems are seen as being ordered and continuous, self-reproducing, shared practices. Such practices are forms of action that are “central to the understanding of social and cultural phenomena of every kind”.\footnote{Barnes Barry, ‘Practice as Collective Action’, at p 17. Barnes asserted, at p 17, that social systems “have been characterized as ongoing, self-reproducing arrays of shared practices”.

The law is a social phenomenon and...
central to any consideration of the nature of the law is an understanding of those practices that, at the very least, contribute to the development of the law.

Barnes suggested that an obscure technical activity may usefully serve as a referent and such a referent becomes an algorithm to decide membership of the legal practice.754 So what those who form the legal practice do when engaging in activities that relate to the law is not limited to enacting the practices of the law. These activities can, in addition, be seen as being goal oriented as such an activity demonstrates that the practices of the law are being observed while also impliedly acknowledging the rhetoric of the law. The rhetoric being articulated is an endorsed narrative that will outline the patterns that constitute the law.755 To engage in a practice is to exercise power756 so the question of how such a practice should be defined and understood becomes significant. Bourdieu has argued that the meaning or function of a practice is primarily related to the continuing existence of that practice.757

Those who engage in an endeavour develop a perspective, a cultural imperative, which stimulates both an intellectual perception about the endeavour and a feeling of uniqueness. There is then, for example: the ‘we of the law’; the ‘we of the armed services’; the ‘we of the political activity’; the ‘we of the church’; or indeed, the ‘we of the unemployed’. While affinity with a party, an interest group, or a movement involves the acknowledgement of a classification of them and us, such identification does not of itself instil a capacity to act.758 What the so-called cultural imperative also does is advance the development of language because there is a relationship between culture and language. As a consequence the values inherent in this cultural imperative will be

754 Barnes Barry, ‘Practice as Collective Action’ asserted, at p 17, that a central task of social science theory is to specify what distinguishes members of a collective from outsiders and on what basis members of that collective sustain among themselves orderly activities and relationships. Barnes, at pp 18 and 19, outlined examples of practices.
755 I have adapted this description from Barnes Barry, ‘Practice as Collective Action’, at pp 21-25.
757 See Bourdieu Pierre, Outline of a Theory of Practice, at pp 96 and 97.
reflected in a particular discourse. So, for me, the defining characteristic of a societal entity that I have identified as a subsystem is endeavour and this endeavour develops kinship and a cultural imperative. I see communication as being an outcome of the merging of these characteristics and not of itself the defining characteristic of the subsystem. However, as Koselleck has pointed out:

“a ‘we’ group can become a politically effective and active unity only through concepts which are more than just names or typifications. A political or social agency is first constituted through concepts by means of which it circumscribes itself and hence excludes others; and therefore, by means of which it defines itself. A group may empirically develop on the basis of command or consent, of contract or propaganda, of necessity of kinship, and so forth; but however constituted, concepts are needed within which the group can recognize itself as a function agency. In the sense used here a concept does not merely denote such an agency, it marks and creates the unity. The concept is merely a sign for, but also a factor in, political or social groupings.”

As I have indicated, I question the highlighting of the notion of communication to the detriment of all else. Luhmann argued that communication is the fundamental base for the differentiation of society so that, for example, parliament when enacting legislation is performing a legal act and in this instance is part of the legal subsystem. Such a distinction makes irrelevant the issue of the significance of individuals within a

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759 I have taken the comments about the relationship between language, culture and discourse from Dueck A.L., and Thomas D. Parsons, ‘Integration Discourse: Modern and Postmodern’, at pp 233 and 234.

760 Koselleck R., Futures past: On the semantics of historical time, at p 160. See also Andersen Niels Akerstrom, Discursive Analytical Strategies: Understanding Foucault, Koselleck, Laclau, Luhmann, at pp 38 and 39, and the statement that the construction of identities will involve asymmetric classification. The term ‘concept’ for Koselleck referred to a range of social and political meaning:

“Concepts comprise an undecided abundance of meaning, a concentration of meaning, which makes them ambiguous. Precisely through its ambiguity, the concept creates a space of signification, which is open to interpretation and can become a semantic battlefield.”

For me, the terms ‘endeavour’ and ‘cultural imperative, which I have used as the defining characteristic of a subsystem, are concepts. See also Andersen Niels Akerstrom, Discursive Analytical Strategies: Understanding Foucault, Koselleck, Laclau, Luhmann, at p vi.

761 See Luhmann Niklas, Law as a Social System, particularly at pp 31, 222, 228, and 258 and 259.
subsystem.\textsuperscript{762} For example, a legislative drafter when drafting is, for Luhmann, performing a legal act. I take a different view in that a legislative drafter is a member of at least two subsystems, the legal practice and the political subsystem, but when drafting is operating as a member of the political subsystem I would argue that communication is a deliberate act that is performed by individuals within a particular social context with the objective of satisfying some need dictated by that context. Therefore, for me, the fundamental frame of reference is not communication but rather endeavour within some societal context.

Considering the example of the legislative drafter, such a drafter when drafting a bill would certainly attempt to give reference and perhaps prominence to the particular demand for the legislation, but the draft bill will reflect the legal imperatives that the drafter has considered appropriate, such as what a court may have pronounced about a significant issue. The same conditions will apply when a legal officer within a department gives advice. The advice will be tailored to answer whatever issue has been raised, be the issue political, policy, or legal, but the advice would give reference to the court or academic pronouncements that impact on the issue. That is to say, such officers will be giving effect to the professional obligations that are part of any professional existence. In the examples I have quoted, the drafter and the legal officer would be members of both the legal practice and the political subsystem but would be operating as part of the political subsystem.

IV.12. The Legal Practice and the Articulation of the Law

An inherent function of the legal practice is to outline those norms that define and regulate the relationship of individuals within the legal practice, and also those principles

\textsuperscript{762} See Muller Anne Friederike, \textit{Some Observations on Social Anthropology and Niklas Luhmann’s Concept of Society}, particularly at pp 171-173, for a critique of the view of Luhmann on the significance of individuals and also those who are critical of Luhmann’s approach.
that outline the field of endeavour that is the law.\textsuperscript{763} The legal practice will therefore dictate patterns of behaviour that are fundamental to any analysis of the law.\textsuperscript{764}

A subsystem will consist of those individuals who satisfy some criterion of membership that is based on endeavour, and this configuration will generate a discourse that will have meaning to members of the subsystem; serve to reinforce subsystem membership; and serve as a mechanism of governance by regulating conduct and endorsing some version of the truth. The discourse generated within a subsystem is fundamental as both a binding agent and a directional agent.\textsuperscript{765} So for me, while it is the judges who declare the law, this declaration will be a reflection of the discourse of the legal practice. However, the discourses of whatever other subsystem a judge may belong to will, to a greater or lesser degree, also have an impact.

The discourse of the subsystem satisfies four fundamental requirements for a subsystem. First, the discourse specifies and endorses the criteria for membership of the subsystem. Secondly, the discourse provides the criteria to satisfy the code criterion of relevant or irrelevant, and thirdly, the discourse establishes and endorses the communication network for the subsystem. Finally, the discourse regulates the activities of members of the subsystem by reducing reality to an interpretation of the discourse. I would also assert that the impact of technology, particularly in communication, has strengthened the relevance of the discourse as a criterion to be considered when analysing the behaviour of a subsystem.

The generation of a discourse about, or perhaps of, the law is a reflection of an ability to create fictions and these fictions not only establish the current paradigm but also become

\begin{itemize}
\item\textsuperscript{763} See Scott W. Richard, \textit{Institutions and Organizations}, at pp 20-26, where he outlined the view of institutions held by a social analyst such as Parsons.
\item\textsuperscript{764} See, for example, Van Hoecke Mark., \textit{Law as Communication}, at pp 37-45, where the author discussed the autonomy of the law and the impact of what is identified as the legal system. Such arguments also apply to what I have called the legal practice.
\item\textsuperscript{765} Foucault M., \textit{‘Orders of Discourse’}, at pp 15-17.
\end{itemize}
an ideological delusion. Priban argues that “[these] fictions are the general artificial constructs supporting the claim of modern law to be a rational, logically coherent and hierarchical system which operates independently of (and on) other normative orders and social systems”.767

The legal practice seeks to reduce uncertainty through the imposition of order by the insulation of so-called legal activities and the identification of criteria for decision-making within these legal activities.768 I am then, in relation to the law, making a distinction between the legal practice and the subject matter. The discursive nature of the law, the unfinished nature of the law, and the activities of the legal practice, conflate what has been called the force of law and the sense or meaning of the law769 to effect a “phenomenological reconstitution of lived experience”.770

This conflation of the law and the legal order explains, at least in part, the paradoxes that abound in law. Such paradoxes no doubt flow from the very nature of law for, as Fuller has pointed out, the law both serves to facilitate interactions and is derived from these interactions.771 The law is not something that exists as a brute fact but is rather something that is “made and adapted in a day-to-day practice by officials and by the addressees of the law”.772

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768 I have taken these descriptions from Axel T. Paul, 'Organizing Husserl: On the Phenomenological Foundations of Luhmann’s Systems Theory', at pp 379 and 380, where the author discussed the development of organisational theory from Weber to system theorist such as Luhmann.
769 Goodrich Peter, Reading the Law: A Critical Introduction to Legal Method and Techniques, at p 20. See also Bruns Gerald L., 'Law and Language: A Hermeneutics of the Legal Text', at pp 24-25. Bruns described the language of the law as a unitary language that, in order to control the law, translates social reality into terms that accord with the language of the law. The language of the law then is a rhetoric that is disguised as logic. Bruns Gerald L., 'Law and Language: A Hermeneutics of the Legal Text', at p 25.
772 Van Hoecke Mark, Law as Communication, at p 65.
Gordon has defined what he called the ordinary discourses of law as being “debates over legislation, legal arguments, administrative and court decisions, lawyers’ discussions with clients, legal commentary and scholarship”. The legal practice has an internal dynamic that establishes a conceptual connection between shared concepts and shared problems with differences of emphasis. The adoption of this terminology does not indicate that I think the law is a closed system, but rather that there are “social conditions that may make law so appear, or which seem to impel the ‘legal’ to seek to achieve ‘closure’ in a variety of ways”. It may well be that, in order to delineate the legal realm from any other realm, the constitution of a general theory of law needs to articulate those elements, structures, and concepts that constitute this so called “distinctive world of the legal”. Ross has argued that this legal dominion is institutionalised, relatively autonomous, analytically separable but not empirically severable from the non-legal world. This legal practice then amounts to more than the texts, discourse and language that are about or relate to the law.

So the answer to the question as to what is the law should be seen not in terms of a search for a correct answer, but rather as an answer that is not inconsistent with the criteria of the current paradigm. For example, Luhmann has asserted that the law is not related to some concept of truth because the requirement of a modern society is not so-called true law but law that will serve to enable social action and decisions.

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774 I have taken the notion of an inner dynamic from Fararo Thomas J., ‘The Spirit of Unification in Sociological Theory’, at p 178. I have asserted that the legal practice is a subsystem of society with shared concepts that are reinforced through the practice of the law. As Fararo asserted, at p 187, a social network that has strong ties will produce closed sub-networks.
775 Cotterrell Roger, ‘Sociological Perspectives on Legal Closure’, at p 175, where the adoption of a broad sociological perspective for the examination of the law is advocated.
776 Ross Hamish, Law as a Social Institution, at p 11.
777 Ross Hamish, Law as a Social Institution, at pp 11 and 12.
778 I have adapted this concept of ‘practice’ from pp 2 and 3 of Lowe Donald M., The Body in Late-Capitalist USA.
IV.13. Autopoietic Theory and Paradoxes

One of the things that attracts me to autopoietic theory is that the theory seeks to productively apply, rather than ignore, paradoxes.\(^{780}\) Luhmann illustrates this productive use of a paradox with his comment that what is legal is also illegal. That is to say, within a society “both legal and illegal exist in an unavoidable conjunction: the legal status for one party is the illegal status for the other party, while both are members of the same community”.\(^{781}\)

Willke has suggested that there is still a debate about whether a society creates the law, or whether the law serves to encapsulate a blueprint for that society. Such a debate has limitations and to overcome these limitations Willke has suggested that, because societal development has in fact been based on the primacy of functional differentiation, analysis should begin from what he identified as “a genetic-functionalist vantage point”\(^{782}\). Such a starting point is appropriate because this functional differentiation has fashioned subsystems that have considerable autonomy from each other and from any central integrating institutions.

This functional differentiation outlines a paradox. On the one hand, there is a specialisation and interdependence in that a subsystem is viable and evolutionary only in relation to other subsystems so that there is a co-existence. On the other hand, the structures and functions of a subsystem increase the subsystem’s inner-directedness, not only in respect of the subsystem’s structure but also in respect of elements and operational procedures of that subsystem. That is to say, the environment of a subsystem can only have a limited impression on that subsystem and then only according to the selection criteria of that subsystem.\(^{783}\) The subsystem is self-referential becoming an


\(^{781}\) Luhmann Niklas, Law as a Social System, at p 175.

\(^{782}\) Willke Helmut, ‘Societal Guidance Through Law?’, at p 353.

\(^{783}\) Generally see Willke Helmut, ‘Societal Guidance Through Law?’. 
isolated self-contained sphere by distinguishing itself from its environment.\textsuperscript{784} So there is a paradox in that a necessary element for a subsystem to exist is an environment. However, that subsystem will seek to distinguish itself from that environment.

Autopoietic theory then attempts to resolve this paradox of self-reference and external reference by relating environmental events to the circularity of the operational system of a subsystem.\textsuperscript{785} It seems to me that Luhmann has illustrated the essence of this circularity with the suggestion that if, in my language, the legal practice endorses some incident as being illegal then the subsystem cannot ignore that issue but must find a way of dealing legally with the illegality.\textsuperscript{786}

IV.14. Significance of Individuals Within a Subsystem

Central to the hypothesis I have outlined is the notion that society consists of subsystems that govern actions and organise practices in relation to particular fields of endeavour and I have tendered a version of autopoietic theory to support this concept. While I accept the basic tenet of autopoietic theory, I do want, in respect to the hypothesis I have presented, to advance some distinctions to the concept of autopoiesis. What I am suggesting is that while autopoietic theory provides a useful analytical reference because the theory enables insight into the operations of a modern society, some enhancement of the theory is necessary in order to fully understand how subsystems operate.\textsuperscript{787}

Autopoietic theory as endorsed by theorists such as Luhmann\textsuperscript{788} and Teubner\textsuperscript{789} defined subsystems in terms of a subject matter through the reference of communication. That is to say, according to Luhmann’s version of autopoietic theory, the legal subsystem is defined by those communications that relate to the law and is characterised by two principles: that of self-reference and that of self-regulation. These principles enable those

\textsuperscript{785} Willke Helmut, ‘Societal Guidance Through Law?’. 
\textsuperscript{786} See generally Part II of Chapter 4, ‘Coding and Programming’, in Luhmann Niklas, Law as a Social System.
\textsuperscript{787} I have taken the comment that there is a need to supplement autopoietic theory from Millett Stephan, ‘Autopoiesis and Immanent Teleology: Toward an Aristotelian Environmental Ethic’, at p 210.
\textsuperscript{788} See, for example, Luhmann Niklas, Law as a Social System.
who engage in the practice of the law to reject extra-legal sources of authority by
claiming that the validity of the law can only come from within the law itself. In addition,
those who engage in the practice of the law also seek to regulate activities that are
external to the law while claiming some form of autonomy for the law.790

Priban has pointed out that the theory of autopoiesis advanced by Luhmann reduced, and
perhaps even omitted altogether, the significance of the role of individuals.791 Luhmann
was quite clear about this arguing that society was a system of communications, and only
communication, and that there “are no other elements, no further substance but
communications”.792 Thus, for Luhmann, it is a mistake to think of a subsystem as
“consisting of concrete people, individuals with bodies and minds”,793 because each
individual is a separate subsystem and can never be part of any other subsystem. While
Luhmann recognised that communication presupposes awareness of states of conscious
systems, and he argued that it is impossible for conscious states to be part of the
communicative operations. Conscious states remain part of the environment of the
subsystem.794 Teubner suggested that Luhmann had gone further and has separated
psychic and social processes, causing a “disenchantment of the human individual”
because an individual is merely a communicative artefact.795 To my mind, such analysis
is limited because individuality is a product of social practices in that individuality is an

789  See, for example, Teubner G., Law as Autopoietic Systems.
790  See the Introduction to Luhmann Niklas, Law as a Social System particularly, at pp 44-46, and Lavi
Shai ‘Autopoiesis, Nihilism and Technique: on Death and Origins of Legal Paradoxes’, at pp 1 and 2
where the so-called paradoxes of the law are discussed. See also the Introduction: The Problem of
‘Relative Autonomy’ in Baxter Hugh, Autopoiesis and the ‘Relative Autonomy’ of Law’, particularly at
pp 1989-1992, where the author outlined the views of Robert Post and concluded that the law should be
viewed as being relatively autonomous.
791  Priban Jiri, Legitimation Between the Noise of Politics and the Order of Law: A Critique of
Autopoietic Rationality’, at p 108.
793  Luhmann Niklas, ‘Operational Closure and Structural Coupling: the Differentiation of the Legal
System’, at p 1422.
794  Luhmann Niklas, ‘Operational Closure and Structural Coupling: the Differentiation of the Legal
System’ at p 1432.
795  Teubner Gunther, How the Law Thinks: Toward a Constructivist Epistemology of Law’ at p 91 where
the author referred to the approach of both Foucault and Luhmann.
achieved status that is socially constructed and as a consequence conscious states must be within the subsystem and not outside.796

What I am doing here is suggesting that Luhmann was incorrect to assert that because a functional system operates on the level of communication, the materiality of an object is excluded from the system reference.797 For Luhmann, society was a system that exists beyond the individual and can only be understood in terms of communicative events and not individuals or actions.798 Thus, an individual is merely part of the environment of a subsystem not an element within the subsystem.799 A subsystem is not a network of interdependencies and relationships that are created by an individual but is rather a system of communication that exists apart from an individual. Luhmann has argued that:

“Human beings, concrete individual persons, take part in all social systems. But they do not enter into any of these as determinate parts themselves nor into society itself. Society is not composed of human beings, it is composed of the communication among human beings.”800

Certainly, communication impacts on endeavour, but communications are a medium for expression. To my mind there is circularity in that those who make up the subsystem will, in performing functions, help to establish, and also give effect to, the prevailing ethos within the subsystem. This ethos will reflect some normative narrative that is unique to the subsystem. However, the prevailing narrative of whatever subsystems the individual belongs to will impact upon the performance of the individual.801 Certainly, I would

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797 I have taken this comment about the exclusion of the materiality of an object from Roberts David, ‘Paradox Preserved: from Ontology to Autology. Reflections on Niklas Luhmann’s The Art of Society’ at p 54. See also Luhmann Niklas, Law as a Social System, at p 340, and the discussion about a text not being a legal concept but rather an object.
799 Generally see Rottleuthner Hubert ‘A Purified Sociology of Law: Niklas Luhmann on the Autonomy of the Legal System’. At footnote 2, on p 781, Rottleuthner commented that legal scholars are outraged at the dismissal of the human element from what I have called the legal practice.
801 I will discuss the notion of the narrative in chapter five.
agree that the binary code will have an impact in defining the boundaries of the subsystem, but the programs that stimulate normative criteria are of equal importance in defining the particular subsystem. I do not have a problem with the orthodoxy of Collins who argued that a social individual is shaped by communication in that:

“What they think and say comes to them from the outside in, reshaped by the exigencies of communicating it to someone else; thinking is a loop in the ongoing process of communicating, in the dialogue among imaginary audiences and parts of the self that make up one individual’s mind”.

Communication is but a medium and a medium has an impact on the message being conveyed, but I want to suggest that, when considering the structure of a subsystem, it is the human component that should be emphasised. That is to say, subsystems are not founded purely on communications but rather communication is subordinate to the activities of individuals who are clustered around some identifiable focus of endeavour, for example, the law, the police, organised religion, politics, the armed services and so on. There is then, of necessity, a blending of communication and consciousness.

Subsystems are made up of individuals who during the course of those activities that are related to a particular field of endeavour will operate with, and be influenced by, some communication system. The formation and operation of a subsystem are dependent upon the particular endeavour because the particular endeavour will generate some form of professional ideology and will define work practices and become the very nature of the operations of the subsystem. It is, I think, significant that Luhmann, in spite of his statements rejecting the significance of individuals within a subsystem, recognises the

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803 I have taken the phrase about the blending of communication and consciousness from Teubner Gunther, ‘How the Law Thinks: Toward a Constructivist Epistemology of Law’, at p 92, where the author asserted that Habermas in defining inter-subjectivity does blend communication and consciousness unlike either Foucault or Luhmann.
804 See footnote 634 and 739 and the surrounding text.
human component with his refusal to classify individuals according to social status and also with his claim that no individual could operate in only one subsystem.\footnote{Luhmann Niklas, 'The Individuality of the Individual: Historical Meanings and Contemporary Problems', at p 318.}

Certainly, it would seem an attractive proposition to assert that it is impossible for a functional system to operate other than on the level of communication. But, while communication serves as a functional distinction, communication is a derivative because it must be initiated at some stage by human intervention. I agree that the nature of the communication will reflect the ethos of a subsystem, but this ethos will be a product of those individuals that belong to the subsystem because subsystems do not think.\footnote{Teubner, for example, has argued that organisations do think and can be regarded as epistemic subjects. Organisations, for Teubner, do not consist of individuals but rather of communications and that it is “through internal communication that they construct social realities of their own, quite apart from the reality constructions of their individual members”. See Teubner Gunther, 'How the Law Thinks: Toward a Constructivist Epistemology of Law', at p 88.}

I would suggest that it is impossible to substitute processes for being.\footnote{Goodrich Peter, suggested in 'Anti-Teubner: Autopoiesis, Paradox, and the Theory of Law', at p 200, that autopoietic theory counter-intuitively “substitutes process for beings, systems for subjects, and disappointed expectations for the discourse of rights”.}

Within a subsystem the materiality of any object, be it physical or abstract, has a significance that is relative to the value of the object within the subsystem. To my mind Teubner, for example, is incorrect with the claim that the law as a cultural artefact is not produced by the intentional actions of individuals but rather it is the “law as a communicative process that by its legal operations produces human actors as semantic artefacts”.\footnote{See Teubner Gunther, 'How the Law Thinks: Toward a Constructivist Epistemology of Law', at p 89. See also Luhmann Niklas, Law as a Social System, at pp 5 and 6.}

I see the process as being reversed because it is the activities of individuals operating within a particular field of endeavour that produce the object. The law is the identifying reference for the output that is produced by those operating within the practice of the law. As I have outlined previously, I accept that the circularity of such argument is an accurate statement of the practice of the law.

What I think Luhmann and his peers also fail to adequately recognise is the impact of individuals belonging to more than one subsystem. The distinction made by Luhmann of
individuals operating in subsystems is, to my mind, artificial because the defining characteristic of a subsystem is endeavour and not communication. As I have outlined, I have used the term ‘endeavour’ to denote some commonality of purpose; some common enterprise that engenders a division of them and us and this division is reinforced by the impact of whatever social and physical dimensions are appropriate to the particular enterprise. These dimensions establish a reality of some framed world and this framed world restricts representations of experiences by emphasising the internal and the external. The ‘we’ is the collective of some particular field of activity and the undertaking of that activity separates those engaging in the endeavour from all others.

Membership is a necessary criterion to be satisfied to enable the performance of some endeavour within an identifiable field. In my own case, I was a member of the legal practice in that I was a lawyer, a member of the political subsystem as I was a senior public servant, and I was also a member of a particular church. For each of these subsystems there was a membership requirement to be satisfied before I could engage in the particular endeavour. That is to say, I was a member of three subsystems and the membership impacted on decisions I made about the relevance and application of the law. I was not particularly significant within the food chains, but I would suggest that the relevance of such factors increases substantially at the pinnacle of any subsystem or as one moves from the periphery to the centre of the subsystem. Luhmann, for example, saw the courts as occupying the centre of the legal subsystem while the other structures such as lawyers, and for Luhmann the parliament, form the periphery. It is, to use the

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810 See section III.18 of this thesis and also footnote 748 and the surrounding text.
811 I have taken the idea of reality being defined through a social and physical dimension from Baggott Jim A Beginner’s Guide to Reality, at p ix.
812 I have taken the notion of the limitation of experiences from Angus Ian, (Dis)figurations: Discourse/ Critique/ Ethics, at p 3, where the author argued that knowledge has been seen as some necessary limitation in the representation of experience.
813 See pp 30 and 31 of the Introduction, by Nobles Richard and David Schiff, to Luhmann Niklas, Law as a Social System.
terminology of Dworkin, an issue of capitals and princes.\textsuperscript{814} While process may well be significant, processes will always be affected, to a greater or lesser degree, by the ethos of those who are within the particular subsystem. Within the code that operates in a subsystem there will always be an external element that accords with the ethos of individuals and, as some individuals may well be members of some other subsystem, there will be some reflection of the biases of these other subsystems. To adapt a description of Teubner, the discourse of the legal practice will be affected by the internal rationality of the legal practice; the exigencies of the market; the peculiarities of personal interaction; and the intrinsic logics of other subsystems to which members of the legal practice belong.\textsuperscript{815} What would be of relevance would be the dominant ethos within a subsystem. For example, within the legal practice, the culture of the law is of such dominance that the possibility of any drastic impact from the value systems of other subsystems that individuals may belong to would be problematic. The problem I have is the failure to recognise that an individual can be part of more that one subsystem and each subsystem will impact on the decision making of that individual.

The distinctions I would emphasise are the foundation of a subsystem; the importance of discourse as a subsystem conditioning mechanism; and, most significantly for me, the rejection of the notion that the key indicator is communication. For me, the key indicator is endeavour so that the human component and the impact of a discourse take on considerably more relevance. Communication, rather than the indicator, is but a consequence.

\textbf{IV.15. Concept of Field}

I have asserted that an expansion of autopoietic theory, as developed by Luhmann and others, is necessary in order to understand how a subsystem operates and I see field theory as fulfilling that requirement. That is to say, while autopoietic theory provides a

\textsuperscript{814} I am here adapting the concept of Dworkin R., from \textit{Law’s Empire}, at p 407, of the court being the capital of the empire of the law and the judges are the princes.

\textsuperscript{815} Generally see Part IV of Teubner Gunther, \textit{‘The Two Faces of Janus: Rethinking Legal Pluralism’}, particularly at p 1456.
functional statement as to the existence and operations of society, the theory does not, to my mind, satisfactorily explain the role of individuals within a subsystem

In outlining the concept of the legal practice, I have sought to outline the fundamental relationship between an actor and a particular structure that I identified as the legal practice. I now want to argue that internally a subsystem should be considered as being constituted somewhat akin to a cultural field that is structured by a social practice to become a multi-dimensional space that is autonomous. Within this field, the interactions of individuals are regulated through the pursuit of some particular interest. What I am suggesting is that a subsystem is akin to a field that is organised around some particular endeavour, such as the law or politics or being unemployed, and within this field skirmishes recur over the definition and application of those core values and discourses that have been articulated as forming the fundamental principles of the particular field.816

Schatzki has argued that there has been a development of what he called ‘site ontology’ that seeks to either locate, or identify, some social entity with some site such as a cultural field.817 For Gartman, this development has been significant in changing the concept of the “cultural realm of society, its organization and changes”.818 There is then a debate about a symbolic interaction over the role that an individual plays in the production, or reproduction, of social life. Social life is seen as being centred on collective action and this requires the cooperation of individuals.819 So, how then do we explain this collective action and cooperation?

Bourdieu, for example, has seen power as being a phenomenon that manifests itself through a set of fields that are linked by what he called “a true organic solidarity”.820 While recognising that the process of analysis is limited by the perceptions of the analyst,

816 I have taken this description of a field from the Introduction to Reed-Danahay Deborah, Locating Bourdieu, at pp 11-13. Chapter 1, ‘Contexts and Approaches’; in Webb Jen, Schirato Tony and Geoff Danaher, Understanding Bourdieu is also of interest.
817 See Schatzki Theodore R., The Site of the Social, particularly at pp 138-140.
Bourdieu asserted that it is fundamental that sociology provides a mechanism to analyse those visions of the world that could be regarded as contributing to the construction of society. Bourdieu has outlined a general theory about the properties of fields by arguing that there is social differentiation that is based on the emergence of autonomous fields. A field exists to both fabricate and protect the power and privileges of dominant actors and to also stipulate the position of challengers. Social actors are a necessary attribute of the concept of the field and the emergence of a field would depend on the skilled performance of dominant actors.

Bourdieu stated that if forced to provide a label for his work, the label he would provide would define his work as constructivist structuralism or structuralist constructivism. By structuralism, Bourdieu meant that there are objective structures that are independent of the consciousness and will of individuals and that these structures serve to guide and constrain the practices of individuals. I see these objective structures as being autopoietic subsystems. Bourdieu asserted that constructivism refers to a social schema consisting of: perceptions; thoughts; and actions; which together constitute, for Bourdieu, the habitus. Bourdieu referred to these structures as fields, and a thing will be within a field to the extent that the thing produces an effect within the field. For Bourdieu, the activities of an individual will be constrained by the impact of the objective conditions of some social field and also by some internalised and personified outlook about the world that is expressed in emotions and feelings.

A field then is some unique social universe that, through its own dictates, functions independently of other cultural fields. For Bourdieu, knowledge is viewed as being a

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825 Crowley John, ‘Pierre Bourdieu’s Anti-politics of Transparency’, at p 152.
826 Chapter One ‘Bourdieu’s Point of View’ in Reed-Danahay Deborah, *Locating Bourdieu*, particularly pp 22-24.
relational concept, and the form that any demand for knowledge will take will largely be governed by whatever is the dominant philosophy. Therefore the legal practice, through its internal validity process, would be separate from, and function independently of, other cultural fields, such as the political; the economy; the armed forces; or the church. This legal practice then is a spatiotemporal nexus of linked behaviour consisting of holistically related doings and sayings that motivate shared understandings and rules for the attribution of meaning to people, objects and events. This linked behaviour will also generate programs and coordinate responses to stimuli. This nexus, characteristically, has “its rigid factions, its bitter feuds, its vested interests – …– but [is] rock-solid against outsiders”.

Fligstein has argued that emergence of a field requires three necessary stimuli. First, societal practices must be coupled with the ability of actors to utilise the technologies that have created those formal organisations that are relevant to the field. Secondly, the rules of every field must function as a form of local knowledge as the rules will be unique and will be expressed in the power relationships that govern actors within the field. Thirdly, actors must be subject to endorsed cognitive structures that will not only stimulate analysis of the actions of others but will also aid actors in making decisions about what constitutes a valid course of action. A field then is able to establish authority and exercise power because that field has the capacity to simultaneously express itself both objectively and subjectively. Bourdieu has argued that the social

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827 Bourdieu Pierre, *Outline of a Theory of Practice*, at p 3. See also Vandenberghe Frederic, *Comparing Neo-Kantians: Ernst Cassirer and Georg Simmel*, at p 20, footnote 28, where Vandenberghe asserted that Bourdieu was influenced by the notion of Cassirer that the real is relational and that Bourdieu used a relationist conception of knowledge to develop the theory of the properties of the field.
828 Bourdieu Pierre, *Practical Reason*, at p 39, where the author discussed the state and the bureaucratic field.
831 This description was taken from the novel of Browne Marshall, *The Wooden Leg of Inspector Anders*, at p 11, where the author described the arrival at a café of two members of an Italian regional police force. The description by Browne evoked an image of how I see the legal subsystem.
sciences are fundamentally divided between the concepts of subjectivism and objectivism and the reflected modes of knowledge of these concepts are either social phenomenology or social physics. Within a field, this objectivity will take the form of specific organisational structures and procedures while subjectivity will be expressed through the forming of mental structures, perceptions, and thoughts.

Bourdieu argued that axes, or moments as he calls them, exist in a dialectical relationship and he acknowledged that the objectivism and subjectivism distinction he makes is rarely expressed or indeed realised in the radical terms he has outlined. The distinction of objectivism and subjectivism seems a useful frame of reference. Social analysis oscillates between institutional facts being treated as things and this would “leave out everything that they owe to the fact that they are objects of knowledge, of cognition – or misrecognition – within [a] social existence”. The other extreme relates to the social world being reduced “to the representations that agents have of it, the task of social science consisting then in producing an ‘account of the accounts’ produced by social subjects”. Bourdieu is one of the few analysts who acknowledge that field theory is about power.

So, for Bourdieu, a field, at the very least, is some activity or practice that is socially structured. This field can be seen as a social space and this space will consist of a system of relationships between agents, groups, or institutions. A field consists of structured social positions that will, to a greater or lesser degree, lack transparency. The term ‘field’ identifies those “situations where organised groups of actors gather and frame their actions vis-à-vis one another”. While the concept of the field is a key idea

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834 Generally see Bourdieu Pierre, *Practical Reason*, at p 40. Although the author was describing the state and bureaucratic fields the reasoning has, in my opinion, wider application.
838 Generally see Fligstein Neil, ‘Social Skill and the Theory of Fields’, at p 111.
for Bourdieu, he has, unfortunately, provided several descriptions. However, the most complete explanation he gave is:

“A field is a structured social space, a field of forces, a force field. It contains people who dominate and others who are dominated. Constant, permanent relationships of inequality operate inside this space, which at the same time becomes a space in which the various actors struggle for the transformation or preservation of the field. All the individuals in this universe bring to the competition all the (relative) power at their disposal. It is this power that defines their position in the field and, as a result, their strategies.”

For Bourdieu, a field has essential properties. First, a field is a competitive arena within which an individual seeks to accumulate capital at the expense of others. In addition, positions within a field are hierarchical. Each field will have unique criteria for defining the hierarchy within that field and such criteria will not automatically apply to other fields. Secondly, the field is insulated from a broader social context. A consequence of this insulation is that participants within a field have a vested interest in seeking to apply some normative distinctiveness to regulate the closure of this field. Bourdieu identified the application of the normative distinction as ‘autonomy’. This autonomy is limited because a field is part of a society, although capital accumulated in one field may be converted into capital that is relevant in some other field. Consequently, there is intra and inter field competition and such competition is structured around “the existence of generic capital, of which money and culture are the two most important forms”.

This description of a field accords with the notion of the legal practice that I have developed. The action of an individual actor within a field is influenced by the organisation of the field; the position and status of the actor within that field; and the

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842 Eagleton Mary claimed in ‘Carol Shields and Pierre Bourdieu: Reading Swann’, at p 314, that Bourdieu had provided many explanations of the term ‘field’.

activities of other actors within that field. The foremost entity within the legal practice is the superior court and the pronouncements of that court will become the referent that will influence the subsequent activities of the dominated actors within the legal practice. This referent will serve as what amounts to a present past and this present past will generate, and enforce, a political vocabulary. This political vocabulary will flow from the linguistic evolution that is a product of both the perception and appreciation by the superior court of its prominence as the superior court. This dominance is created by an implicit referral of power by those within the field. The dominance of the courts within the legal practice and the body politic is, however, not a matter of necessity but, rather, is contingent. The subsystem that is the legal practice has emerged from the social interaction of the actors in the relevant field and this field both empowers and constrains such actors. Fligstein provided an analysis that sums up the constitution of the legal practice in that “pre-existing rules of interaction and resource distributions operate as sources of power and, when combined with a model of actors, serve as the basis by which institutions are constructed and reproduced”. An institution, for Flibstein, would consist of those rules and shared meanings that not only define and categorise social relationships, but also provide actors with cognitive frames within which to interpret the behaviour of others.

Symbolic capital is an important aspect of this field theory. Symbolic capital is any form of physical, economic, cultural, or social property or capital that is perceived by some social actor within the field to have a value. Bourdieu gave the example of the concept of honour being symbolic capital where social actors would conceive of conduct as being honourable or dishonourable. The law would, for the legal practice, be an “objectified and codified form of symbolic capital” that is distinct from other forms of capital.

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844 I have taken this description of the logic of the field theory from Crowley John, *Pierre Bourdieu’s Anti-politics of Transparency*, and the quote is at p 151.
845 This schema was adapted from a description provided by Fligstein Neil, *Social Skill and the Theory of Fields* at pp 115 and 116.
including financial capital. Symbolic capital is a product of a coherent and systematic structure that imposes an order that is in agreement, or at least not at odds, with the particular field. This order will form a paradigm, a particular view that will acquire a dominance and will tend to become a universal point of view. The monopoly of this universal viewpoint is premised on a rejection of other points of view and also on the recognition that this dominance has acquired the canons of legitimacy and disinterest.

Bourdieu made a distinction between social and geographic space. The closeness of occupants in a geographic space, be they agents, groups, or institutions, would be a significant factor in determining the properties the occupants have in common. This is not necessarily so in social space. The capital an occupier possesses and the structure of that capital will determine properties in social space. Thus, a social space consists of those agents who, although endowed with different properties, are still systematically linked to each other. Within the schema I have presented the systematic linkage flows from involvement with and in the law, and those within this legal practice are influenced by any other view about the law. There is a double structuring: objectively, through the properties of agents and institutions, and, subjectively, through the construction of a social reality that endorses a political vocabulary that emerges from the linguistic evolution associated with perception and appreciation.

The act of creation is the product of an objective relationship between a habitus that flows from existing social conditions and the position that an individual occupies in a field. The term ‘habitus’ is important within the analysis that Bourdieu provided. Again, unfortunately, Bourdieu provided differing definitions of the term. The habitus is those mental structures through which some agent apprehends the social world by the production of practices and representations. It “is both a system of schemes of production of practices and a system of perception and appreciation of practices”. The habitus is a

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referent for the impact that the totality of social conditions will have upon an individual by developing some particular life style, and the habitual understandings and actions that occur from an individual’s positions as a member of one or several fields.\textsuperscript{854} There is then a link between the actions and interests of actors within a field because such an actor will be predisposed to act in accordance with the logic of that particular field.\textsuperscript{855} The habitus will thus tend to dictate the meaning of individual behaviour\textsuperscript{856} in that it is a principle of continuity and regularity that is “a present past that tends to perpetuate itself into the future by reactivation in similarly structured practices, an internal law through which the law of external necessities, irreducible to immediate constraints, is constantly exerted”\textsuperscript{857}

The application of field theory is relevant to what I have called the legal practice. As Habermas has argued, certain cult-like practices survive in highly sublimated forms.\textsuperscript{858} The term ‘the law’, like the term ‘the public service,’ identifies a distinct field of endeavour that has both an internal and an external dynamic. In addition, this activity has seen the emergence of a professional grouping that has a collective vested interest. This professional grouping operates within a field of forces “within which agents confront each other, with differentiated means and ends according to their position in the structure of the field of forces, thus contributing to conserving or transforming its structure”\textsuperscript{859}.

This collective interest has been seen as a subsystem consisting of “communications which construct reality as a field of meaning as that reality is relevant to definitional structures of the [sub]system”\textsuperscript{860}.

\begin{footnotesize}
\begin{enumerate}
\item[855] Ledeneva Alena V., Language as an Instrument of Power in the Works of Pierre Bourdieu, at p 22.
\item[856] Generally see Yadgar Yaacov, ‘SHAS as a Struggle to create a New Field: A Bourdieuan Perspective of an Israeli Phenomenon’, at pp 228 and 229.
\item[857] Bourdieu Pierre, The Logic of Practice, at p 54.
\item[859] Bourdieu Pierre, Practical Reason at p 32 and also Reed-Danahay Deborah, Locating Bourdieu, at p 134.
\item[860] I have taken this description of what is a subsystem from Cornell Drucilla, ‘The Philosophy of the Limit: Systems Theory and Feminist Legal Reform’, at pp 75-78, and the quoted passage is at p 76.
\end{enumerate}
\end{footnotesize}
IV.16. Legal Practice as a Practice and a Field

If one adopted the reductionist perspective that I referred to, one would simply say that the legal practice consists of those people who are involved in or with the practice of the law. However, as I have also pointed out, a reductionist definition raises more questions than it answers. I, for example, have used the term legal practice in two contexts. First, I have used the term to identify a particular grouping and, secondly, I have used the term as an explanation of specific human action that is conditioned on a relational process.

Therefore, the legal practice is both a practice and a field. There is a field of human action that is a derivative of a certain culture, that is to say, a “configuration of values, concepts, practices and institutions through which individuals interpret and apply [legal] norms”. Culture then is that “fabric of ideas, conventions and attitudes that gives everyday life its texture”. Indeed, the legal practice has acquired an identity through deliberate, and self-generated, statements that have the intention of screening out or at least dismissing any other discourse. Such statements by the legal practice amount to a normative declaration about the law: what is valid or invalid; what is legal or illegal; what is lawful or unlawful; and in a political context, what is right or wrong. This human action is expressed through a discourse, and for the legal practice, this discourse amounts to a professional discourse.

My use of the term ‘legal practice’ to identify a particular grouping raises the related issues of differentiation and organisation. I suggest that the legal practice was guild based but, with the increasing complexity of society, this guild has become a subsystem of society. There is recognition of the notion of the practice of the law being guild based,

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861 See section III.3 of this thesis.
863 Bell John, ‘English Law and French Law – Not so Different?’, at p 64.
865 I have adapted this statement about the identity of what I have called the legal practice from Krawietz Werner, ‘Legal Communication in Modern Law and Legal Systems: A Multi-level Approach to the Theory
with lawyers being subjected to some form of the craft apprentice training,\textsuperscript{866} and such a notion recurs. For example, in a recent article in The Australian newspaper, the Editor of that paper criticised an award of damages to the Victorian Deputy Chief Magistrate in a defamation action. The action flowed from an article by a Melbourne journalist claiming that that magistrate “was the target of criticism from Victorian police prosecutors”. The editor claimed that the appeals court highlighted the costs of allowing the lawyer guild to control the court system. The editor argued:

“Consider if only the journalists union were allowed to run newspapers or if the train drivers union were given control over running the railways. Centuries of lawyer-guild control of the courts has over-promoted cherished crafts such as the barristers’ art of advocacy and common law jurisprudence. And it has allowed the guild to protect lawyers and judges when threatened by outsiders, such as by forbidding clients from suing negligent barristers.”\textsuperscript{867}

**CASE STUDY**

IV.17. Introduction to Case Study

I have outlined a hypothesis about the nature of primary legislation and also about the nature of the law. In this section of the thesis I discuss a particular case study involving the introduction and application of a particular legislative provision. My objective is to see whether this case study supports the hypothesis I have outlined. Thus, the purpose of the case study is limited to the issue of support for my hypothesis.

I have argued that to understand the nature of primary legislation one needs to make the distinction between what is an order of practice and what is an order of representation to

\textsuperscript{866} See, for example, McCormick John P., ‘Max Weber and the Legal-Historical Ramifications of Social Democracy’, at pp 168 and 169.

\textsuperscript{867} See, for example, McCormick John P., ‘Max Weber and the Legal-Historical Ramifications of Social Democracy’, at p 99, where he described the legal system as gaining “its social identity as result of its self-generated, (deliberate) legal-normative acts”.

and Philosophy of Law’, at p 99, where he described the legal system as gaining “its social identity as result of its self-generated, (deliberate) legal-normative acts”.

\textsuperscript{866} See, for example, McCormick John P., ‘Max Weber and the Legal-Historical Ramifications of Social Democracy’, at pp 168 and 169.
overcome what is not merely failure of recognition but, rather, blindness. It is impossible to prove or disprove the hypothesis I have outlined and, given the limitations of the thesis format, it is not possible to examine more than one particular case study. Indeed, as the issue of the implementation of legislative provisions has been examined repeatedly, there seems little point in seeking to review additional case studies. Tomasic, Paulus and Cotterrell, for example, have provided examples of such studies and these examinations amply illustrate the limitations of a legislative provision, of itself, implementing social change. For example, Cotterrell asserted that the law and supposed statements of the law in primary legislation are continually reified so that legal institutions and legal doctrines are themselves identified as social forces. The conclusion of Cotterrell has significance to the hypothesis I have outlined:

“The understanding of law’s social effects and of the social factors that shape it requires legal theory - theory which attempts to explain systematically the nature of law. However, because law is an aspect of society, a part of a larger social field, this theory must, itself, be informed by – and a part of – social theory. Social theory seeks to explain systematically the structure of societies and the conditions of social order and stability, and of social change.”

868 I have taken this assertion from Lefort Claude, ‘Outline of the Genesis of Ideology in Modern Societies’, at p 183. Lefort argued that the concept of ideology has lost the initial meaning from which it derived its critical force so that the term “is reduced to the ideas that one ‘defends’ in order to assure the victory of a class, to a good or a bad ‘cause’, whose nature one knows or could know, and whose agent one knows or could know oneself to be”. The quoted passage is at p 183.
870 Paulus Ingeborg, The Search for Pure Food: A Sociology of Legislation in Britain, at pp 31-39 and pp102-104. Paulus claimed, at p 7, that not “often are the contents and forms of law treated as if they were features of a relatively autonomous process. Instead, they are defined as little more than the rationally extensible properties of social structure.”
Teubner illustrated something of the distinction I have sought to make between primary legislation and the law. Teubner claimed that all that primary legislation does “is produce noise in the outside world. In response to this external disturbance, society changes its own internal order”\(^{874}\). While I can readily relate to the notion of primary legislation as noise, I would reject the idea of the inevitability of a change to the internal order of society. Primary legislation is the product of one subsystem and the enactment may, or may not, generate noise within the environment. I now want to relate a case study to illustrate the ramifications of the systems framework that I have outlined. The case study suggests that, upon the enactment of some legislative provision, society does not change its internal order and the study supports my hypothesis about the nature of primary legislation.

While the case study refers to a simple legislative proposal that specifies a personal obligation, it does highlight two significant factors: first, it was questionable as to whether the stated reason for the introduction of the particular obligation was accurate, and secondly, the edict is routinely ignored by the public and by the instrumentalities of government. In essence, a legislative prohibition was introduced, but this prohibition is largely ignored. I now want to outline the detail of the particular case study.

In 1992, primary legislation was enacted in the Australian Capital Territory to prohibit a person from riding a bicycle unless that person was wearing an approved helmet. I will outline the regulatory scheme as it was enacted. However, it should be noted that the statutory framework has now been changed but the changed reference does not have an impact on the prohibition that was imposed. The case study I have chosen concerns an amendment that was made to the Traffic Act 1937(ACT) (hereafter the Traffic Act) in 1992. The Traffic (Amendment) Act 1992(ACT) (hereafter the amending Act) made several amendments to the Traffic Act. The particular amendment I want to concentrate on was the inclusion of section 6C into the Traffic Act, to place certain restrictions on a person riding a bicycle on a public street or in a public place.\(^{875}\) While the amendments

\(^{875}\) Section 6C *Traffic Act 1937(ACT)*.
to the Traffic Act do not involve any complex legal issues, the amendments did raise two issues that are of interest in relation to the reasons for the introduction of the legislation and the continued application of the legislation.

It is apparent, from even a superficial contemplation of cyclists and cycling within the Territory, that not only are many of the general public routinely ignoring this prohibition but so also are those public officials who would be expected to be charged with enforcement. How widespread the failure to wear a helmet has become was illustrated by a recent call to a Canberra talk back radio station about the practice of not wearing a helmet when cycling. The caller expressed concern that, when he dropped his children at school, he regularly saw secondary school children not wearing a helmet when riding a bicycle to the school. What the call did was reinforce the impression one gains from travelling around Canberra of the number of people who do not wear a helmet when riding a bicycle. The parliament quite clearly enacted legislation that imposed an obligation that would apply when engaging in a certain activity. What then is the status, and what is the impact, of this obligation?

IV.18. My Role

At the time of the drafting of the amending Act, I was a legal officer in what was then the Attorney General’s Department of the Australian Capital Territory, and I should stress that some of the comments about the legislative proposal flow from personal experiences and from discussions with officials within that Department. I attempted to obtain access under the Freedom of Information Act 1982 (ACT) to verify my impressions, but access was denied.

Somewhat unusually, the Attorney General’s Department at that particular period was tasked to prepare drafting instructions for all ACT government departments to have

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876 The call was to Canberra radio station 104.7 on the 19th of August 2004. When I contacted the manager of the station the manager remembered the call, and the nature of the comment I have outlined, but advised me that a transcript or a tape of the call is not available.
legislation drafted. A particular division within the Attorney General’s Department handled most of this work and prepared the drafting instructions for the amending Act. The drafting of primary and secondary legislation was the responsibility of the Office of the Parliamentary Counsel and this Office was a division of the Attorney General’s Department. Although I did not personally work on the amending Act, I was aware of the attitude of the involved officials and privy to discussions within the Department about the nature of the legislative proposal and any possible application of the particular provision.

The legislative proposal was initiated by the then Attorney General in his capacity as Minister for Urban Services. There was considerable concern among some officers within the Attorney General’s Department about the legislative proposals. Such concerns centred on the appropriateness of regulating a recreational activity and whether such a provision would be nugatory in that it was unlikely that the police had either the resources or the desire to enforce the provisions. Indeed, the officer responsible for developing the legislative proposal wrote to the Minister expressing concern about seeking to regulate such a social activity and whether the police force was in a position to enforce the regulation. The response of the Minister was a curt handwritten annotation to the communication. The Minister stressed that the legislative proposal satisfied an important social imperative and that, if one had any doubt about the merits of the proposal, one could visit a hospital neurological ward.877

I now want to give an example of an incident that I was involved in that, at least to my mind, sums up the attitude of the civil authorities to the particular legislative proposal. In 1995 I attended a meeting between the then Minister for Urban Services878 and representatives of interest groups over the control of dogs within the Territory. A senior RSPCA official chaired the meeting and the Minister and a senior Australian Federal Police representative sat with the chairperson. My role was that of legal adviser to the Minister. The purpose of the meeting was to discuss primary legislation that had been

877 Personal knowledge reinforced by discussions with the author of the communication to the Minister. I attempted under the freedom of information legislation to obtain a copy of the communication but access was refused.
878 The then Minister was not the initiator of the legislative change.
enacted to require the use of a leash when walking a dog in a public area. The detail of this primary legislation and most of the discussion are irrelevant to my thesis. However, during the meeting the senior police officer was asked why police were not taking action to enforce the leash requirement. The senior police officer replied that the police did not have the resources to enforce such prohibitions and then added that the police also lacked the resources to regulate the requirement to wear bicycle helmets when cycling. The Minister made no comment about the statement by the senior police officer at the meeting, nor, to my knowledge, after the meeting. He certainly made no comment to me. So, here we have primary legislation enacted by the Legislative Assembly, given a strident endorsement by the then first law officer of the Territory and then dismissed, somewhat casually, by a senior police officer during a public meeting. In addition, a government minister present at that meeting apparently did not consider the incident worthy of comment.


Section 6C of the Traffic Act as amended stated:

(1) A person shall not, without reasonable excuse, ride a bicycle on a public street or in a public place unless he or she is wearing an approved helmet appropriately adjusted on the head.

(2) A person riding a bicycle on a public street or in a public place shall not, without reasonable excuse, carry as a passenger a person who has not attained the age of 14 years unless that other person is wearing an approved helmet appropriately adjusted on the head.

(3) A person who has attained the age of 14 years shall not, without reasonable excuse, travel as a passenger on a bicycle on a public street or in a public place unless he or she is wearing an approved helmet appropriately adjusted on the head.
(4) Subsection (1) does not apply to a person who does not normally reside in Australia and who is in Australia to compete in a bicycle race, rally, test, trial or similar event.

Relevant terms in section 6C are defined in the Traffic Act, the Motor Traffic Act 1936 (ACT) or the Interpretation Act 1927 (ACT). The phrase “without reasonable excuse” is a term of art within the Australian Capital Territory jurisdiction and dates from the pre-self government era. At that time, legislation appertaining to the Australian Capital Territory was subordinate legislation made under the Seat of Government (Administration) Act 1912 (Cth) and the Senate Standing Committee that reviewed subordinate legislation insisted on the inclusion of that phrase to make it clear that offences were not strict liability offences. The ACT Supreme Court has considered the phrase on at least one occasion but, as the phrase is not relevant to this thesis, I will not deal with that phrase. As I indicated, the legislative scheme has now been changed by the incorporation of integrated road legislation, but the obligation is still in existence and the changed legislative structure in no way impacts on the issues I have discussed.

IV.20. Membership of Legislative Assembly

The Legislative Assembly for the Australian Capital Territory has 17 members and the government in power when the amending Act was enacted was the Australian Labor Party. To remain in power, the government was dependent on the support of at least one independent. The composition of the Legislative Assembly was eight Labor Party, six Liberal Party, one Abolish Self Government Coalition and two Independents. From my experience, the Independents, Mr Michael Moore and Ms Helen Szuty, had a commonality of interests and at times seemed to form a loose alliance. The minister responsible for the introduction of the Bill that became the amending Act was the Honourable Mr Terry Connolly. Mr Connolly had responsibility for several portfolios: Attorney General; Minister for Housing and Community Services; and Minister for
Urban Services. The Bill was introduced into the Legislative Assembly under the authority of the Minister for Urban Services.

A feature of the political scene of the Australian Capital Territory was that, from the commencement of self-government for the Territory in 1989 until the general election in 2004, there had never been a majority government. In the general election in 2004, the Stanhope Labor government was elected with an absolute majority. At various times up until the 2004 general election, both major parties, the Australian Labor Party and the Liberal Party, had been in government and each government has had to accommodate a minor party or independents. While in theory it might be possible to argue that the succession of minority governments would have an impact on the enactment of primary legislation, it was my experience that, in practice, this sequence of minority governments was of little significance to the enactment of legislation. But such speculation can only remain speculation in that it would be extremely difficult, if not impossible, to quantify that impact.

From my experience, briefing a party room was little different from briefing non-government members. Any necessity for some wider perspective was irrelevant because one was always dealing with the various sectional interests that are inherent in any party caucus. It was merely a question of placating interests in order to achieve some objective. Certainly this accommodation, from my experience, necessitated being aware of the perspectives of those non-government members of the Legislative Assembly whose support was necessary to ensure passage of the primary legislation. A sponsoring minister would, in order to ensure that proposed legislation would not be rejected, just as readily barter to cater for party and factional concerns, as take into account the concern of non-government members. The demands reflecting the vested interests remain the same and the question for the sponsoring minister is the same: does the particular benefit that would flow to the minister from getting the primary legislation enacted exceed the cost of placating opposition to the proposal. From my experience, the so-called party discipline was marked by an absence rather than an imposition. To continue the analogy I have continually adopted in the thesis – it was all part of the game. During policy development
one was aware of the perspectives of both the government and those whose support was necessary and when legislation was proposed, or a Bill was drafted, one briefed both government and non-government members.

IV.21. Initiation of Legislative Process

The legislative process was commenced in 1990 with a submission to Cabinet entitled Legislative Amendments to Implement Commonwealth Road Safety Initiatives. This submission listed the changes that would have to be made to ACT legislation in order to obtain Commonwealth funds. The imposition of an obligation to wear an approved helmet when cycling was one of the initiatives required by the Commonwealth in order for the Territory to gain an enlarged Commonwealth grant. Following endorsement of the submission by the Cabinet, action was taken to amend the relative ACT legislation.879

IV.22. Explanatory Memorandum

The Explanatory Memorandum for the Traffic (Amendment) Bill 1992 highlighted that introduction of legislation to require the wearing of bicycle helmets was a necessary element in obtaining a Federal grant. Apparently, the then Federal government had specified a so-called 10-point road safety initiative that included a requirement for the compulsory wearing of bicycle helmets for all cyclists and their passengers on public roads and in public places. The Explanatory Memorandum states that the Australian Capital Territory was to receive an amount of $3.4 million over three years for the implementation of the 10 point road safety package.880

879 Confirmation of the submission to Cabinet and subsequent action to amend legislation was obtained under the Executive Documents Release Act 2001. See also the Explanatory Memorandum to the Traffic (Amendment) Bill 1992 (ACT), that confirmed that the obligation to wear a helmet was imposed pursuant to the acceptance of the Government of the Commonwealth’s road safety initiatives. Interestingly, the presentation speech of the Minister emphasised the public safety imperatives but made no mention of the financial gain to the Territory although opposition members of the Legislative Assembly certainly did. See Hansard of the 9th April 1992, and of the 19th May 1992, particularly the speeches by Ms Szuty and Mr Moore.

880 The Explanatory Memorandum was incorporated in Hansard on the 19th May 1992, at page 581.
Interestingly, an appendix attached to the Explanatory Memorandum included a chart that detailed the numbers of deaths in New South Wales and Victoria from cycle accidents for the years 1988 to 1991. Apparently, compulsory cycle helmet legislation was introduced in those States in 1991. The chart shows that the number of deaths did decrease dramatically following the introduction of compulsory cycle helmet legislation: from 20 deaths in New South Wales and 24 deaths in Victoria during 1990 to 10 deaths in New South Wales and 12 deaths in Victoria in 1991. That is to say, the number of deaths was halved in both states during the first year of operation of the relevant State compulsory cycle helmet legislation. It was also claimed, in the appendix to the Explanatory Memorandum that in 1991 in the Australian Capital Territory 18 cyclists were admitted to hospital with injuries. Of these 18, seven suffered head injuries, none of whom was wearing a helmet. Eleven cyclists were admitted with other injuries, five of whom were wearing a helmet. Thus, none of the five helmeted cyclists admitted to hospital suffered head injuries. Whereas seven of the 13 non-helmeted cyclists did sustain head injuries. The figures quoted in the Explanatory Memorandum seem to reinforce the notion that it is in the interests of cyclists to wear a helmet and also seem to add support to the argument that it is in the public interest to make wearing of a helmet compulsory.

IV.23. Report of the Scrutiny of Bills and Subordinate Legislation Committee

I have referred to the role and significance of the Standing Committee of the Legislative Assembly on the Scrutiny of Bills and Subordinate Legislation in relation to bills. The Standing Committee reported on the amending Act in Report No 2 of 1992. While the Report of the Standing Committee made no comment about the provisions to provide for the compulsory wearing of bicycle helmets, the Report did contain a comment that illustrates something of the implications of what I earlier called the path dependence factor, stating:
“As with a number of other Bills in the report this one, too, is careful to avoid using existing language in the amendments that it contains. However, there appear[s] to be a number of sexist provisions still in the principal Act.”

IV.24. Tabling Speech

The Minister presented the Traffic (Amendment) Bill 1992 (hereafter the amendment Bill) to the Legislative Assembly on the 9th of April 1992. In introducing the amendment Bill the Minister made two major points: that the legislative amendments were necessary in order to limit public expenditure on health care and that legislative amendments were in the public interest. The Minister stressed that the proposal to make the wearing of bicycle helmets compulsory was an essential element of a road safety initiative of the Commonwealth. The Minister also claimed that agreement over the road safety initiatives had been reached between the then Commonwealth Government and the then Government of the Australian Capital Territory, and that the current Labor Government of the Territory had endorsed the initiatives as an effective road safety measure.

In endorsing the legislative amendments as a public interest issue, the Minister stated:

“Cycle injuries add a significant strain to public expenditure on health care. The Bureau of Transport and Communications Economics estimated that the hospital, medical and rehabilitation costs alone, in 1988 dollars, of each road accident victim in Australia averaged over $6,000. The cost to the ACT health system in 1991 of cycle accidents alone was well over $100,000. The introduction of this legislation will reduce the number of serious head injury cycle accidents, which in turn will reduce the pressure on the already strained hospital system, as well as significantly reducing the pain and suffering of the community.”

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882 Hansard of the 9th of April 1992, at p 144.
The debate was adjourned.

IV.25. Debate on the Traffic (Amendment) Bill 1992

Debate on the amendment Bill was resumed on the 19th of May 1992 and during the debate the Liberal Party supported the government. However, the two independents spoke against the proposal to make the wearing of helmets compulsory although both personally supported the wearing of bicycle helmets.

One Liberal Party member, Mr Westende, while acknowledging that the proposal did infringe on what he called the rights of freedom of choice, strongly supported the introduction of the legislation. Mr Westende quoted remarks made by the Chairperson of the ACT Trauma Committee of the Royal Australian College of Surgeons, who was also the Secretary of the Neuro Surgical Society of Australasia; the ACT Branch of the Australian Medical Association; the Child Accident Prevention Foundation of Australia; the Australian Council of State School Organisations; and the Canberra High School Parents and Citizens Association, pointing out the risks that flow from not wearing a helmet and strongly supporting the legislative proposal. Mr Westende also acknowledged a detailed submission from the Cyclists Rights Action Group who objected to the proposal to require the wearing of cycle helmets. It was apparent from the comments of Mr Westende that he did not doubt that the medical associations and teacher and parent groups overwhelmingly supported the legislative proposal and that there was also appreciation that the legislative proposal had a high social utility.

The two independent members of the Legislative Assembly spoke against the proposed legislation during the debate. Ms Helen Szuty argued that compulsion would not achieve the objective of ensuring that cyclists wore helmets but that the government should engage in an education program. Interestingly, Ms Szuty acknowledged that she was aware that the Government was seeking “to honour a commitment made to the Federal Government in return for money given to upgrade a number of black spot intersections
around Canberra”. Ms Szuty went on to say that if the objective in compelling bicyclists to wear helmets related to a public health imperative then such an imperative would also apply to roller bladers, roller-skaters, skate-boarders and even pedestrians.

Mr Moore, the second independent, also opposed the imposition of the obligation to wear a helmet. Mr Moore claimed that in opposing the proposed obligation to wear a helmet he was:

“probably one of the very few people in the Legislative Assembly who ride a bicycle regularly and wear a bicycle helmet. It would be of interest to me to know just how many other [members] own helmets and ride their bicycles”.

The question was not answered during the debate. For Mr Moore, it was something of an exercise in cost benefit analysis with the benefits not justifying the imposition of the obligation. Mr Moore was concerned about the establishment of a precedent to govern a recreational activity and that it was not the function of the Legislative Assembly to interfere with the rights and freedoms of citizens engaging in recreational activities. He argued “that we should allow education to fulfil the role”.

In closing the debate, the Minister, Mr Connolly, assessed the debate as supporting a measure to protect lives and protect against serious injury. Nevertheless, he did acknowledge the point made by Ms Szuty about the users of skateboards and roller blades wearing helmets and that some legislative proposals might be forthcoming. There does not seem to have been any such initiative to date. However, Mr Connolly did attempt to differentiate bicycles from skateboards, roller blades and skates. Mr Connolly asserted that the board and skate activities were essentially “recreational activities and in the ACT we encourage them to be done in recreation parks that we provide and in skateboard rinks that we provide”. No comment was made as to why cycling was not

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884 *Hansard* of 19th of May 1992, at p 571.
885 The comments by Mr Moore are in *Hansard* of 19th of May 1992, at pp 576-578, and the quoted passages are at p 576.
considered essentially a recreational activity, especially given the extensive cycle paths within the Territory. The Minister concluded that the safety arguments in respect of the obligation to wear a helmet were overwhelming.\textsuperscript{886}

What the debate did establish was that, while members recognised that there was a benefit for individuals in wearing a helmet when riding a bicycle, the imposition of the obligation did impact on personal freedom. However, the majority felt that this imposition was justified in the public interest. There were some interesting asides about what conclusions should be drawn from the public safety issues. Mr Moore quoted from statistics supplied by the Cyclists Rights Action Group, but drawn from the Federal Office of Road Safety, that the number of cyclists killed due to head injuries amounted to 80\% of fatalities, while the percentage for pedestrians falling within the same category amounted to 78\% of fatalities. So it became, for Mr Moore, a question of where to draw the line. Pedestrians and cyclists seemed to be similarly affected so should pedestrians be obliged to wear a helmet and, if so, what about vehicle passengers and children being carried.\textsuperscript{887} Ms Szuty was the only member to draw what seems to me to be the obvious conclusion that if the public health imperative is of such significance and importance that statutory intervention is necessary then why would not the obligation to wear safety equipment be imposed on those who use roller skates and skate boards. The answer to that question is, at least in part, that there were no Federal Government funds at risk.

There was one exchange during the debate that, although no doubt light-hearted, illustrated something of a view about what it is that a parliament does. Mr Stevenson, the sole representative of the Abolish Self Government Coalition, quoted John Stuart Mill to the effect that the only justified exercise of power against the will of any member of a civilised community was to prevent harm to others. A person should not be compelled to do something for her or his own good. Mr Stevenson concluded by claiming “I have always been a firm believer in education, not legislation. We do not necessarily all

\textsuperscript{886} The debate in reply of Mr Connolly is in Hansard of the 19\textsuperscript{th} of May 1992, at pp 582-586, and the quoted passage is at p 584.

\textsuperscript{887} In relation to the comments by Mr Moore see Hansard of the 19\textsuperscript{th} of May 1992 at pp 576 and 577.
benefit in our lives from the three million rules and regulations and Acts and amendments that we have had since Federation.”

Mr Humphries, who was at the time Deputy Leader of the Opposition and later became Chief Minister, replied: “We do here. We make them. It gives us something to do”.

During the debate on the detail of the Bill, the Legislative Assembly rejected one provision of the Bill unrelated to the obligation to wear an approved helmet by nine votes to eight while the remaining provisions were agreed to be by leave. Neither of the two independents, nor Mr Stevenson, voted against the imposition of the obligation.


Although the Traffic Act 1937 was repealed in 1999, the obligation to wear an approved helmet while riding a bicycle was continued in the suite of legislation that was introduced into the Australian Capital Territory to give effect to national road legislation. The changes to the legislative structure do not in any way impact on the hypothesis I have outlined.

IV.27. Traffic Infringement Notices

While there have been some prosecutions, and I will later discuss one prosecution, the principle mechanism used to regulate the practice of riding a bicycle without a helmet is that of the traffic infringements notice. Section 180A of the Motor Traffic Act 1936 (ACT) authorises a police officer to serve a motor traffic notice on a person who has committed a prescribed offence and the failure to wear an approved helmet when riding a bicycle is a prescribed offence.

It has been impossible to establish accurate figures of the number of traffic infringement notices that have been issued. The information I was given by the Australian Federal

888 Hansard of the 19th of May 1992, at p 575.
889 Hansard of the 19th of May 1992, at p 575.
Police is that no records are now available for the period 1993 to 1998 when the revised legislative scheme came into effect. I was advised that no records of notices issued in relation to the obligation created under the old legislative scheme were kept. Similar advice was obtained from the ACT Department of Urban Services. However, I have a recollection of attending a Departmental meeting shortly before I retired from the public service in 1998 and being advised that a total of 140 notices had been issued since the introduction of the obligation specified in the Traffic Act. Since 1999, the following number of notices has been issued: for the period 1999-2000, 35 notices; for the period 2000-2001, 17 notices; for the period 2001-2002, 85 notices; for the period 2002-2003, 40 notices; and for the period 2003-2004, 40 notices.890 There was no information available as to the reasons for the increase during the period 2001-2002. If my recollection as to the pre-1998 figures is correct, then the number of notices issued annually since the imposition of the obligation to wear a helmet when cycling does seem to be roughly compatible.

IV.28. Enforcement of Restrictions

It is not my intention to enter into the debate about the wisdom, or otherwise, of wearing a bicycle helmet when riding a bicycle and even a cursory Internet search reveals the intensity of the debate. What is, I think, interesting is the balancing exercise that seems to occur with the utilisation of primary legislation that seeks to impose some obligation on what is a social activity.

I have referred to the disquiet within the Attorneys-General’s Department about the nature of the legislative proposal. This disquiet about regulating a social activity was apparent in some non-government members of the Legislative Assembly during the debate. However, it was only the Independents, Mr Moore and Ms Szuty, who argued that if the social imperative of protecting this particular aspect of public health was of

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890 The Australian Federal Police provided this information following a freedom of information request. Officers of the AFP with whom I spoke were most helpful, unlike some public service departments, and the inability to provide figures before 1999 seems related to an inadequate computer retrieval system and not based on some distaste for providing information.
such significance, then why was the obligation to wear a helmet not extended to others at risk when engaging in social activities such as, for example, walking or skate board riding.

The prosecution I want to refer to concerns a Mr Peter van Schaik. Mr van Schaik was convicted of not wearing a helmet while riding a bicycle in a public place in February 1995 and was fined $41. Mr van Schaik appealed against the decision and the matter, Peter van Schaik v Stephen Peter George Neuhaus, was heard in the Supreme Court of the Australian Capital Territory in April 1996. This particular matter is of interest for two reasons. First, the judgment of Chief Justice Miles includes an examination of the phrase ‘without reasonable excuse’ and this examination was, at least in my time in the public service, one of the few instances of a judicial review of the phrase. The particular phrase has a history in that the phrase is peculiar to the Australian Capital Territory and is used at the insistence of parliamentary legislative review bodies, such as the Senate Standing Committee on Regulations and Ordinances and the ACT Scrutiny of Bills Committee, to indicate in offence provisions that it is not intended that the offence be one of strict liability. The second reason for the interest is the identity of the defendant. Mr van Schaik was a member of the Executive of the Cyclists Rights Action Group and this Group was prominent in the public debate before the introduction to the Legislative Assembly of the amending Act. The Cyclists Rights Action Group made submissions to most parliamentarians, contacted senior public servants, made freedom of information requests about the material used by the introducing Minister, and I have discussed the use Mr Moore made of one of the Group’s submissions. The dramatic introductory paragraph of Chief Justice Miles’s judgment perhaps indicates awareness by the Chief Justice of the irony of the incident:

“Beside the lake on a late summer afternoon, Constables Newhaus and Cameron of the Tuggeranong Bicycle Patrol stopped an unhelmeted cyclist. Little did they realise that the cyclist they had stopped was Mr. Peter van Schaik, a man with a

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891 See Peter Van Schaik v Stephen Peter George Neuhaus, Supreme Court of the Australian Capital Territory, SCA 83 of 1996, ACTSC 37 (May 1996), before Chief Justice Miles.
long-standing and deeply felt conviction that the requirement of the law that a
cyclist wear a helmet is an infringement of his civil liberties and an actual risk to
the safety of cyclists. Mr van Schaik, in no uncertain terms, told the constables of
his belief. He expanded upon that belief and the reasons for it when he was
subsequently prosecuted…”

One can, I think, only be bemused about the circumstances of this particular case and
also speculate about what the priorities were that caused two police constables of a
regional bicycle patrol to take action on a late summer afternoon against a middle-aged
man riding a bicycle around a lake foreshore.

IV.29. Demand for Primary Legislation

So what then was the demand of the primary legislation and what has been the impact of
the legislation? To my mind there is no doubt, despite the rhetoric to the contrary, that the
reason for the enactment of the primary legislation was to obtain the Commonwealth
grant. The question of the impact is somewhat harder to evaluate. Certainly, it would
seem to be unarguable that wearing a helmet when riding a bicycle is a safety-measure
that has merit. But, the readily apparent failure of so many within the Territory to wear a
helmet when riding would seem to suggest that the legislation has not had effect as a
medium of compulsion or education. Perhaps all that can be said is that, as a result of the
imposition of the obligation to wear a helmet, for the period 1999/2000 to 2003/2004
some 217 people are out of pocket.

However, there remains the question of how one does account for the fact that some 217
traffic infringement notices were issued over the period. The answer to that question will,
however, depend upon the analytical perspective one adopts. For example, in adopting a
mainstream view, one would argue that officials have exercised a power under the law
and issued the notices. That is to say, the law is always there and the state has made a
decision as to the exercise of a power. It is but an example of the omnipotence of the state
and there is rarely, if ever, a perfect enforcement of a law. To my mind, such a view
emphasises a representation and the acceptance of the representation as the explanation, and justification, of some particular course of action. I, on the other hand, take a different view and would concentrate on the practice of some officials utilising the enactment involved. That is to say, some official has exercised discretion by selecting from some repository a text as the basis upon which to implement the activity of issuing a traffic infringement notice. The primary legislation then has become an input to a process that generated a traffic infringement notice. It is impossible to say what other inputs contributed to the decision of an official on a particular day to issue a traffic infringement notice for a failure to wear a helmet when riding a bicycle. To my mind, however, it is merely of inputs related to a particular output.

CHAPTER V SURVIVAL OF THE ACCEPTED RHETORIC

“It is the mark of a practice that being taught how to engage in it involves being instructed in the rules which define it, and that appeal is made to those rules to correct the behaviour of those engaged in it”

John Rawls

Two Concepts of Rules

V.1. Introduction

I have argued that there is a mainstream view about the nature of primary legislation and the law and I have asserted that this view consists of representations that are used to construct the myth that is the law. In chapter four I asserted that these representations are a product of the particular subsystem of society I designated the legal practice. There is then a question as to how such a manifestation is effected, and then why this manifestation has been accepted, to a greater or lesser degree, within the body politic. What I seek to do is question how it is that this myth, and that is what the law is in that it
is a story told and retold, is generated and sustained within a society that has a dynamic eclecticism. My conclusion is that meaning, certainty, and determinacy, are not inherent properties of the law but are rather the ends of the discourse generated by what I have called the legal practice and this legal practice has acquired the power to sustain this myth. In this chapter I want to do two things. First, outline what I see as the internal ordering of the legal practice that induced such a manifestation and, secondly, suggest how and why such representations are accepted within the body politic.

The objective of this thesis was to outline a theory of legislation. In chapter two I outlined a selection of the traditional views of primary legislation and asserted that such views do not accurately describe the nature of primary legislation. Such views define primary legislation in terms of a representation that accords with a conceptualisation of the law as an objective world of order and reason. I then outlined a personal view about the nature of primary legislation suggesting that the perception of an object is relative to the social context within which the perceiving is done. I have asserted that, upon enactment, primary legislation is but a thing that will sit in some repository until used but when used this thing will be transformed into an object. That is to say, upon use the thing will be transformed because it will be accorded a function and attributes by the user and will become a censored input for future action. This transformation into a censored input is possible because, as Millett has suggested, there can be for subsystems what amounts to a meta-domain of representations through the sharing of some sign system. This domain is meaning making as it enables the imposition of what amounts to a consensual order that will impact on the subsystems that share the sign system. This does not mean that a shared sign is given the same value.

892 Chapter 3 ‘The Language Game: From Ambiguity to Indeterminacy’ in Hutchinson Allan C., It’s All in the Game, particularly at p 81.
893 Davies Margaret, Asking the Law Question, at p 120, considered the ramification of the so-called scientific revolutions and the author discussed the notion of Kuhn that a change of a paradigm will impact on the way that scientists see the world. Davies quoted the statement of Kuhn that what “were ducks in the scientist’s world before the revolution are rabbits afterwards”. Kuhn T. The Structure of Scientific Revolutions, at p 111, as quoted in Asking the Law Question, at p 120. I consider that the declaration by Davies has wider application.
In outlining my theory, I have asserted that in order to explain how and why particular views about the nature of primary legislation and the law have become the accepted rhetoric within the body politic one must analyse the subsystem of society I have designated the legal practice. What I am suggesting is that in order to understand the phenomenon that is the law, and this includes the process by which primary legislation is conceptualised, one must appreciate and place in perspective two issues. The first issue is that of the representations that define the law and the second issue involves the source of those representations. That is to say, the relationship of those representations to whoever is responsible for the representations cannot be ignored when considering the nature of the phenomenon. One must, to adapt a statement of Derrida, differentiate between “what is and what is said or thought, between what is said and what is understood, indeed between what is thought and said or heard and understood”.

A significant question, to my mind, is how particular characterisations of the nature of primary legislation, and indeed the law, have been confined within a paradigm, while other views are subdued when the rhetoric that outlines this paradigm is contingent. It is a question of the ability of a particular segment of society to not only determine a form of ideals that will be held by those within the segment but also ensure that such determinations have societal acceptance and application. The presentation of the

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894 See Millett Stephan, *Autopoiesis and Immanent Teleology: Toward an Aristotelian Environmental Ethic*, particularly at pp 30 to 33.
895 I have taken concepts of the formation and performance of the law being the legal culture and of the unit of measurement from Part 1 'The Meaning of Legal Culture', at pp 1-11, of Nelken David, 'Using the Concept of Legal Culture'.
896 I am here adapting what I think is an interesting point from Roy Jean-Michel ‘Saving Intentional Phenomena: Intentionality, Representation, and Symbol’, at p 111, whether it is “scientifically relevant and philosophically legitimate to introduce a representational level in the explanation of cognitive phenomena?”
897 Roy suggests that if the answer to that question is yes then a further problem is raised. That is to say “[h]ow should it be analysed in the first place? In other words, how are a representation and a representational process to be defined at the mental level itself?” While I have reduced the scope of the examination raised by Roy in that I am not interested in any scientific considerations, the adaptation does succulently identify the themes I have sought to develop: that of the representor and the representations about something that is regularly produced.
898 In chapter two I provided a summary of various views about the nature of primary legislation.
899 I have adapted this claim from Collins Randall, ‘A Network-Location Theory of Culture’, at p 70.
utterance serves to legitimise the utterer in that the legal practice, as well as being an identifiable body, is also “an institutionalised process by which what is considered appropriate to it is kept appropriate”. 900

V.2. The Internal Ordering

The mainstream view of the law and primary legislation is the product of the internal ordering of the legal practice. I see this so-called internal ordering as a product of a collective intellectual consciousness that is developed by those whose field of endeavour is the law through a particular language that generates a discourse to specify a narrative that has particular themes. This linguistic practice can be characterised as a particular language game performed by those within the legal practice to construct the myth that is the law by articulating representations, and this includes representations as to the nature of primary legislation. 901

V.3. Practice and Collective Intellectual Conditioning

To my mind, an analysis of the law must begin with the recognition of practice as the key indicator to establish meaning. That is to say, those that make up the legal practice become accomplices to the processes902 of the legal practice and thus there is an objectification of the output of such processes. As a consequence, a normative universe is created,903 based on interpretive commitments, which will “determine what [the] law means and what [the] law shall be”. 904

900 Said Edward W., The World, The Text, and The Critic, at p. 12, where he discussed the notion of Foucault of culture being such an institutionalised process.
901 I have taken the description of a linguistic practice being characterised as a language game from Forster Michael N., Wittgenstein on the Arbitrariness of Grammar, at p 8, where the author outlined how Wittgenstein defined the term ‘grammar’.
902 I am here using the notion of Bourdieu Pierre, outlined in the Logic of Practice, at p 65, that agents “become the accomplices of the processes that tend to make the probable a reality”. See also Reed-Danahay Deborah, Locating Bourdieu, at p 109.
903 See Cover R., Narrative, Violence, and the Law, at p 95, for a description of the normative universe.
Krawietz has suggested that an understanding of the law does not begin with some theory about the nature of the law but, rather, begins with an examination of the practice of the law. For Krawietz, the basis upon which to develop an understanding of what is the law is the recognition of the actual social phenomena of the practice of the law, or in the language of Krawietz “the rationality potential of practical life experience”. Each practice has “its own discourse and its own concepts, its own limited resonance; each field can only communicate with itself without regard for the other fields.” The discourse of the law is a product of the practice of the law, so to understand the law one must look to the activities of those who practice the law.

The law is a field of endeavour because it is a social practice that establishes factual and normative orders that facilitate coexistence through an institutionalisation of a form of social order. The legal system is a subsystem of the differentiated system of society and this subsystem is itself internally differentiated, both hierarchically and segmentally, into sub-subsystems. This internal differentiation would cater for some “organizational-professional inner core”, and would also enable a subsystem to classify communications and afford a communication a status and a priority. Within the model I have outlined, a judgment of a superior court, which serves as a professional inner core, would be given a greater status than, for example, the advice of a legal officer for it is the judgment of courts that state the law. The legal practice as a subsystem is some internally differentiated discrete entity that has become separated from the environment through the

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907 See the Introduction to Anderson Niels Akerstrom, Discursive Analytical Strategies: Understanding Foucault, Koselleck, Laclau, Luhmann, particularly at pp x and xi.
908 This description was adapted from Schatzki Theodore R., ‘Practice mind-ed orders’, at p 42 and p 43 and the discussion of the views of Charles Taylor about the notion of practice. Schatzki defined a social order as being “the disposition and hanging together of entities”. A social order is the “arrangements of people and the organisms, artefacts, and things through which they coexist”. While the term ‘practice’ referred to a set of activities. A practice, for Schatzki, is not restricted to an activity but includes the site, the instruments, and the context within which the activity reoccurs.
maintenance of a continuous distinction between the subsystem and the other. Other subsystems would follow a similar pattern. Cornell classifies this distinction as inside and outside but perhaps a more realistic distinction is that of ‘the we’ and ‘the others’.911

Scheppele asserts that contemporary legal scholarship arguments about the meaning and significance of the law are often framed in terms of ‘the we’ and ‘the others’.912 Thus, ‘the we’ of the law makes up the legal practice. There is then an ontological tradition because being one of ‘the we’ will subject that individual to a form of conditioning in that the nuances of whatever is the historically generated tradition that binds ‘the we’ will influence understanding and therefore knowledge.913 Conditioning generates prejudices that become preconditions to understanding. Influence will be an aspect of the being of the group, and the degree of influence the conditioning will have on understanding will depend upon the vitality and dynamism of the tradition and the group.914 The legal practice is local, theoretically indeterminate, and is constituted relationally and constructively through reasoning and institutions.915 There is an interpersonal structuring of knowledge and understanding that amounts to what Schatzki called commonality, a common understanding of the things that orchestrate the activities of individuals through a non-independent determination of tasks.916 One can relate this to some Durkheimian notion of a subsystem of society with a degree of the division of labour that will produce, and reify, concrete and particularised symbols, so that the feeling of belonging for

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912 Scheppel Kim Lane, ‘Foreword; Telling Stories’, at p 2073.
913 See Balkin J.M., Cultural Software: A Theory of Ideology, at p 7, who quoted Gadamer Hans-Georg, ‘The Problem of Historical Consciousness’ (in Rabinow Paul and William M. Sullivan, Eds, Interpretive Social Science, at pp 103 – 159) that understanding “always implies a pre-understanding which is in turn pre-figured by the determinate tradition in which the interpreter lives and which shapes [her or] his prejudices”. The impact of this pre-understanding does not mean that individuals within the tradition will never question the detail of the tradition because an inherent feature of a cultural tradition is that those individual who live within the cultural tradition will continuously contest the content and scope of the tradition. See Balkin J.M., Cultural Software: A Theory of Ideology, at p 9.
914 I am here paraphrasing a consideration of Gadamer’s argument by Balkin J.M., Cultural Software, at p 8.
915 I have adopted these criteria for the legal practice from Ruiz-Mirazo Kepa and Alvaro Moreno, ‘Basic Autonomy as a Fundamental Step in the Synthesis of Life’, at pp 235-237.
members of that subsystem is enhanced and “collective representations are dogmatically treated as essences”.917

V.4. The Field of Endeavour that is the Law

In chapter four I outlined what I meant by the term ‘endeavour’. Those whose field of endeavour is the law can be characterised as seeing the law as not only a given but also a necessary element for society to exist. The form of the law is seen as being a description of the real world, so that the law is formed through the reasoning, methodology, techniques, and theoretical statements of those who are engaged in the practice of the law and who therefore constitute the legal practice.918 One consequence of this characterisation of the law as being such a product is that there is an intellectual impenetrability that revolves around the rhetorical issues as to what is intrinsically valid as the law.919 The result of this is that the symbols of the law have become paradoxical in that such symbols have substance only through the definitions that are included in the discourse of practitioners.920

A theory is both a reflection of, and is reflected in, social relationships. Any theory about the law is, of necessity, based on the primacy of those social relationships that produce or are the product of the practice of the law.921 Activity is contextually dependent and this context will be a dimension that is mobilised by some collective identification.922 A

917 Collins Randall, ‘A Network-Location Theory of Culture’, at p 69. See also Chapter 5 ‘Modes of Social Association I: Encounters, Groups, and Organizations’, particularly at pp 191-193, in Fuchs Stephan, Against Essentialism, for a discussion of the Durkheimian notion of ritual and solidarity.
918 See Campbell C.M., ‘Legal Thought and Juristic Values’, at pp 23 and 24. Campbell also argued at p 13 that those engaged in the practice of the law accept the law as a given and “habitually operate within the framework of the legal system and adopt for their own standpoint the interpretations of reality contained in the law”.
919 See Campbell C.M., ‘Legal Thought and Juristic Values’, particularly at pp 26 and 27.
920 This argument has been adapted from the comments about religious phenomena and symbolism by Deutschmann Christoph, ‘The Promise of Absolute Wealth: Capitalism as a Religion?’, particularly at pp 50 and 51. Deutschmann pointed out, at p 51, that what he defined as a new religion “cannot do without myths, prophets and priests explaining and interpreting it” so that the “faithful are dependent on an authentic representation of absolute by charismatic prophets, holy scripts and priests”.
922 I have taken the notion of a dimension mobilised through the activities of some collective identification from Mouffe Chantal, On the Political, at p 6. Mouffe argued that democratic politics cannot be limited to
consequence of such reasoning is that it is necessary to recognise that the practice of the law within a modern state “already assumes the existence of a theory of law of whatever kind, be it implicit or explicit”. Legal theory is concerned about an object, the law, which has been “theorised in everyday life”. The practice of the law then does not flow from some theory about the law but, rather, such a theory has emerged from that practice. It is inevitable that, as Krawietz has suggested, theories about the law will emerge from the practice of the law.

Thus, what I have called the legal practice has two aspects. First, there is the issue of structure. While structure is neither irrelevant nor determinative, there exist structures that are independent of the perceptions of involved actors. The structure of the legal practice is problematic but there are, within the legal practice, fixtures that tend to be hieratical because they specify the dimensions of those authorities that guide or constrain activities within the practice. Structure, however, not only defines boundaries but may also define function by controlling the selection of information for the particular entity through what has been called a double selectivity. That is to say:

“In a meaningfully constituted world it is advantageous, or even essential, to relate steps of selection to each other. In the daily communication process this happens by someone choosing a piece of information from a multitude of possibilities and the recipient treating the information not as selection, but as a fact or as premise of his selection, that is to say, by basing other kinds of choices on the outcome of the pre-selection. This largely relieves the individual of

establishing compromises among interests or values or to deliberation about the common good but must acknowledge a partisan character of ‘the we’ and therefore confrontation.


Luhmann Niklas, Law as a Social System, at pp 84-86.
independent testing of alternatives. Structures potentialise this relief effect by making selection depend on selection.”\textsuperscript{928}

The second aspect of the legal practice that I want to deal with is the concept of a collective intellectual consciousness.\textsuperscript{929} This collective awareness is embedded in the analytical tools and operations of the legal practice and serves to ensure that there are relationships of dependency and determination.\textsuperscript{930} An additional objective of this intellectual consciousness is to seek to ensure that, to a greater or lesser degree, individuals will attach accepted meanings to particular actions.\textsuperscript{931} The issue of accepted meaning may take many forms. McDonnell, for example, has argued that since the latter part of the 20\textsuperscript{th} century, there has been an increasing tendency for lawyers to regard themselves as social engineers who have the capacity, and, perhaps, the obligation, to correct the mistakes of democratically elected governments.\textsuperscript{932}

A cognitive mapping of particular spheres of action outlines the reality of this legal practice. Social differentiation creates a variety of individual and collective spheres of action that engender complementary discourses about the law.\textsuperscript{933} The spheres of action may involve questions of relative status that give the output of one entity more weight than another.\textsuperscript{934} These spheres of action can be seen in the common representations, semantic configurations, and the structured interrelationships, between the legal practice and the environment.\textsuperscript{935} There is a body of output that has common or interrelated themes originating from groups and individuals who share a related or common academic,

\textsuperscript{928} Luhmann Niklas, \textit{A Sociological Theory of Law}, at p 31.
\textsuperscript{929} See my use of the term ‘cultural imperative’, at section IV.11.
\textsuperscript{930} See Bourdieu Pierre, \textit{In Other Words: Essays Towards a Reflexive Society}, at pp 145-148.
\textsuperscript{931} Cotterrell R. ‘The Representation of Law’s Autonomy in Autopoiesis Theory’, at pp 98 and 99.
\textsuperscript{932} See McDonnell John, ‘Law for the People and by the People’.
\textsuperscript{933} The terms “social differentiation” and “spheres of action” were taken from Teubner G., \textit{Alienating Justice: On the Surplus Value of the Twelfth Camel}, at p 35, where the statements were used in a different context.
\textsuperscript{934} See Cotterrell R., ‘The Representation of Law’s Autonomy in Autopoiesis Theory’, at pp 99 and 100.
\textsuperscript{935} See Clam J., \textit{The Specific Autopoiesis of Law: Between Derivative Autonomy and Generalised Paradox} at p 46. Clam argued that while many legal theorists acknowledge the autonomy of the legal system, such theorists are unwilling to accept the thesis of the production of the law exclusively from the self-produced elements of the legal system. Clam suggested at p 46 all “too evident are common
professional, or employment experience. As Foucault pointed out, the communication and exchange of information is a necessary facility for a discipline. Further, the discipline will seek to control discourse and the discourse may be restrictive in that all areas of the discourse will not be open to all members of the discipline. In addition, the discipline will establish validity criteria to enable the assessment of the validity of any proposition.936

The law has become its own subject, and while it may be true that communications about the law are described as having acquired an independent agency, such an agency is only apparent. The apparent power of a communication about the law reflects “the distribution of power and the state of received ideas and values in a community”,937 and that community is the legal practice. Teubner summed up this distinction with his claim that legal “facts are not imported into the law from the outside, they do not represent an independent reality, but they are constructed within the law by operations of the legal [sub]system”.938

So for me, the legal practice is a schematised social construction that has developed into a subsystem of society. The legal practice constitutes a distinctive functional practice with a privileged form of discourse, and the output of the practice is accorded a special prominence. As Luhmann pointed out, the legal practice is subjected to stricter consistency requirements than the political subsystem.939 Validity for the legal practice does not relate to expectations or to some norm but rather whether the subject satisfies a test of valid or invalid.940 Validity for the political subsystem is still a question of form, but that form is related to participation in the political.

936  Foucault Michel ‘Orders of Discourse’, at p 17.
937  See Beck Anthony, ‘Is Law an Autopoietic System?’ at p 410. Here the author discussed the apparent power of a so-called legal text but I suggest that this argument has a wider application.
939  Luhmann Niklas, Law as a Social System, at p 121.
940  Luhmann Niklas, Law as a Social System, at p 121.
In outlining what I mean by the legal practice, I have not intended to concentrate on the issue of status characteristics, other than to specify a relationship of working in the law. Such a relationship would include judges, lawyers, court officials and academics. I have not included the police within what I have identified as the legal practice because it seems to me that, within an Australian context, one can mount a persuasive argument that the police constitute a separate subsystem. Those whose field of endeavour is the law have skills and understandings that, while derived from a historically generated tradition, also serve to dictate and perhaps even regulate, views about society.

V.5. Language as a Tool

Involvement in society cannot be divorced from language participation and socially constructed forms of ordering because it is impossible to participate in society while standing outside of both language and the constitutive power of discourses. I have indicated that I would be stressing the primacy of politics and, as Lyotard has suggested, politics revolves around linkages of moves and countermoves that reflect a politics of language where what is heterogeneous: that is to say different, unfamiliar, or incongruent, is rendered homogeneous: the same, identical, congruent, or familiar. I see language as part of the internal ordering of the legal practice.

An individual does not usually live a life that is separate from a community so an individual usually has significant communal bonds. I have asserted that one such communal bond is the legal practice. Hutchinson has argued that, while it is now commonplace to acknowledge that the law is a language, the implications of acknowledging that the law is a linguistic practice have attracted relatively little

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941 Luhmann, for example, argued that the dominant features of what he called the legal system are organisation and professional activity. Luhmann Niklas, ‘The Self-Reproduction of Law and its Limits’, at p 111.

942 Lee Cameron, ‘Agency and Purpose in Narrative Therapy: Questioning the Postmodern Rejection of Metanarrative’, particularly at pp 227 and 228.

943 See footnote 367 and the related text.


945 Rosenfeld Michel, Just Interpretations, at p 202.
Language is a reflection of a culture because it has developed to identify needs and desires and has become, to use a metaphor of Wittgenstein, a form of life. Language is a human achievement and any social phenomenon is dependent, at least in part, on the use of language and those linguistic forms that emerge from self-organising systems. However problematic the use of language may be, language is a tool as it is an instrument of action. Language provides a window through which to view the legal practice’s perception of the field of endeavour that is the law. Language therefore serves as a membership constraint for that field because it is necessary to speak and understand the language of the field. Language considerations and the use of language are significant, perhaps even fundamental, to the study of the law in that the identification and examination of attributes of the law can be seen “as a particular language game that takes place within the larger language games of law and society”. Thus, the language of the law “is a game of social activity that depends on convention and context for meaning”.

Certainly, language is a tool, but what is of interest is how that tool is used. For example, this notion of language being used as a tool is illustrated by the claim by Stone that, for law, the use of a so-called academic language provided a conceptual framework through which the roles of teacher, commentator, and “participant in the law-creation process” are integrated. Language then is the basis for the construction of some form

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946 Generally see Chapter 3 ‘The Language Game: From Ambiguity to Indeterminacy’, particularly at pp 54 and 55, in Hutchinson Allan C., It’s All in the Game.
948 See, for example, MacWhinney Brian, ‘Models of the Emergence of Language’, at p 200.
949 This notion of language as a tool was taken from Morrison Wayne, Jurisprudence: from the Greeks to post-modernism, at p 87, where the author classified Hobbes as a nominalist who saw language as a tool.
950 See, for example, Chapter 2 “Outline of a Hermeneutic Approach in Legal Theory” in Aarnio Aulis, Philosophical Perspective in Jurisprudence, particularly at pp 57-61.
951 Hutchinson Allan C., It’s All in the Game, at p 54.
952 Generally see Chapter 3 ‘The Language Game: From Ambiguity to Indeterminacy’ in Hutchinson Allan C., It’s All in the Game, and the quote is from p 54.
953 See, for example, Rorty Richard ‘Idealizations, Foundations, and Social Practices’, at pp 333 and 334, where the author outlined the concept of antifoundationalism and that language is a tool that should be used to breakdown distrust.
954 Stone Christopher D., ‘From a Language Perspective’, at p 1149.
of social reality\textsuperscript{955} because there is a unity of expression that is linked to some historical phenomenon.\textsuperscript{956} It could well be that, as Bakhtin claimed, language is not a total system but, rather, a plurality of many social languages with the result that there is a continuous contest between centrifugal and centripetal forces. This continuous contest results in language being layered and heterogeneous.\textsuperscript{957} On this view, language is a vehicle for revealing, or identifying, social and cultural structures within a society.\textsuperscript{958} This so-called vehicle, or perhaps ‘practice’ is the more appropriate term, will provide for the endorsement of particular political and ideological representations and these representations will be considered privileged because they are seen as being natural and acceptable within the body politic because of the source of the representation.\textsuperscript{959} What develops is a shared conceptual framework that engenders a unity of style and language that permeates the culture.\textsuperscript{960} Language usage highlights symmetrical and asymmetrical power and knowledge relationships that delineate what may be articulated and done within some context.\textsuperscript{961}

Language achieves a “categorical ordering of social reality” and can be a legitimating artefact to maintain an ideology.\textsuperscript{962} The conceptual analysis of a subject can be aided by an awareness of the particular word usage describing or explaining a concept or idea.\textsuperscript{963} Meaning then becomes a function of the differentiation of words within a linguistic

\textsuperscript{955} See Morrison Wayne, \textit{Jurisprudence: from the Greeks to post-modernism}, where he discussed, at pp 361-366, the application of the latter Wittgenstein’s approach to language that is articulated in \textit{Philosophical Investigation}.  
\textsuperscript{956} Klonk Charlotte ‘\textit{Face the Parts}’, at p 20.  
\textsuperscript{957} Generally see Bruns Gerald L., ‘\textit{Law and Language: A Hermeneutics of the Legal Text}’, at p 30, where the author discussed the ramifications of Bakhtin’s theories.  
\textsuperscript{958} Abdi Reza, ‘\textit{Interpersonal Metadiscourse: An Indicator of Interaction and Identity}’, at pp 139 and 140.  
\textsuperscript{959} Debrix Francois, ‘\textit{Language as Criticism: Assessing the Merits of Speech Acts and Discursive Formations in International Relations}’, at pp 209-212. Debrix asserted, at pp 201 and 202, that constructivism and post-structuralism are paradigms for linguistic studies. Debrix distinguished, at pp 209 and 210, the two streams by asserting that constructivism emphasises the normative and a quest for knowledge while post-structuralism emphasises language performance and the significance of discourse. Discourse is not merely a reflection of power constructions within social practices but is of itself the creator of power.  
\textsuperscript{960} I have taken this description from Klonk Charlotte, ‘\textit{Face the Parts}’, at p 20.  
\textsuperscript{961} See Maclure Jocelyn., ‘\textit{The Politics of Recognition at an Impasse? Identity Politics and Democratic Citizenship}’, at p 9, where the author raised the issue of language usage in relation to identity politics.  
\textsuperscript{962} Lowe Donald M., \textit{The Body in Late-Capitalist USA}, at p 4.  
\textsuperscript{963} See Ross Hamish, \textit{Law as a Social Institution}, at pp 68-70, where the author discussed the claim that Hart was influenced by the theories of Wittgenstein.
The language of the law, or that of the legal practice as I have described it, has been identified as a unitary language that seeks to define social reality within terms that are relevant to a legal discourse in order to control differing usages from various social discourses. What I want to stress is a point that is made by Hutchinson that there “are no facts about the way that law-as-discourse works that are not themselves beholden to some theory about what counts as law, language, and social facts”. What does seem apparent is that the use of language has become increasingly significant to any consideration of social practices and that some concept of a philosophy of language, no matter how limited the concept, is fundamental to a critical study of a social practice. The use of language for the identification of one thing as being like or unlike another is not merely an act of classification because the identification of one thing as being distinct is to also use that language to exclude, distinguish, or discriminate. The drawing of a boundary enables distinctions to be made by an indication of differences. So the establishment of a particular space will create a universe.

V.6. Evaluation of Discourse

In chapter four of this thesis I commented briefly on the function that discourse performs for the legal practice. I now want to make some general comments about the nature of discourse as an internal ordering mechanism within the legal practice.

I have adopted the view that for a group, language is a tool to construct a discourse that will engender the articulation of definitions; the specifications that regulate identity; and

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964 Heller Thomas C., ‘Structuralism and Critique’, at p 142. Heller outlined a structuralist view of language and meaning. Heller asserted, at pp 143 and 144, that a structuralist theory of language had political ramification because such a view questions the capacity of any individual to generate meaning independently.
966 Hutchinson Allan C., It’s All in the Game, at p 67.
969 Spencer Brown G., Law of Form, at pp xxv and xxvi and p 1.
the description of objects. Such a discourse will be controlled by an established order that regulates power within the group through the management of random events. Within such a discourse there will be an objective of maintaining that discourse through the continuous manufacture of material for that discourse. A discourse is seen as having a dual function in that discourse is both the object of some struggle and the method by which the struggle is conducted. Within a discourse, meaning may be contested because a discourse is contingent and subject to ritual or political appropriation. But Singer has argued that in a discourse, a view will be considered objective if that view has been the subject of discussion by those “who agree on the criteria for describing and judging it, and they do in fact agree about it.”

The legal discourse will consist of certain activities and characteristics and will have the capacity to simultaneously tolerate and confine radical themes. The activities will be those of writing, reading and the exchange of information considered relevant to the activities and interests of the legal practice. The discourse will include ritual; an implied constitution that identifies the status of doctrinal groupings; defined roles for speakers; and recognition of a valid medium for the preservation or reproduction of the discourse. The concept of ritual is important as a means of regulating discussion and communication within a discourse by defining the qualifications for a communicator. Most importantly, ritual lays down the supposed, or imposed significance of the words used, their effect upon those to whom they are addressed, and the limitations of their constraining validity. The legal discourse then “should ideally be read in terms of control - of dominance and subordination - and of social power-relations portrayed and

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970 This description of language is attributed to Hobbes by Morrison Wayne, *Jurisprudence: from the Greeks to post-modernism*, at p 87.
971 Foucault Michel, ‘Orders of Discourse’, at p 17.
974 Hutchinson Allan C., *It’s All in the Game*, at p 106.
975 Singer J.P., ‘The Player and the Cards: Nihilism and Legal Theory’, at p 34.
976 See, for example, Tushnet Mark, ‘Critical Legal Studies: A Political History’, at pp 138-140.
977 I have adapted this listing of the criteria from Foucault Michel, ‘Orders of Discourse’, at pp 18 and 19.
addressed to a far more general audience than that of law-breakers and wrong-doers alone”.

Some would see this legal discourse as the repetition of claims that the law has developed rational techniques and institutions that contribute to an idealised civil society through the exercise of consent and free rational choice. But Goodrich has asserted that countries with a common law tradition have adopted what he classified as ‘the antirrhetic’. That is to say, the discourse has the dialectical structure and form of a discourse of denunciation that is aimed at both outsiders and heretics. A consequence is that there is competition and conflict between the discourse of the legal practice and the discourse of other disciplines. This discourse of the legal practice will specify within the law a set of signifying practices that endorse certain activities with a legal significance. These signifying practices will include language and the identification of cultural norms to “describe and to develop the context of what is to be regarded as valid law in light of a social basis of validity”.

V.7. The Law as a Myth

Most theorists who attempt to outline a view as to what is the law struggle to give form to the phenomenon that is the law. What I am talking about is the emergence and

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980 See, for example, Gordon Robert W., ‘Unfreezing Legal Reality: Critical Approaches to Law’, at p 198, and also the arguments outlined in Davies Margaret, Asking The Law Question, at pp 134-138 and 155-158.
983 Davies M., Asking the Law Question, at p 43.
985 The term ‘myth’ is defined in the Macquarie Dictionary as being a traditional story, an invented story, or a “collective belief that is built up in response to the wishes of the group rather than an analysis of the basis of the wishes”. See The Macquarie Dictionary, 2nd Revised Edition, at p 1133.
986 See, for example, Danow D. The Thought of Mikhail Bakhtin, at pp 137-140, for a discussion of Bakhtin’s notion of theoretism. See also Morson, G.S. and C. Emerson, Rethinking Bakhtin: Extensions and Challenges, at p 7, who defined theoretism as “a way of thinking that abstracts from concrete human actions all that is generalizable, takes that abstraction as a whole, transforms the abstraction into a set of
prominence of a particular form of order, however limited and disjointed, from chaos, so there is a question of how and why the form of law that exists within the body politic has emerged. The law cannot speak, or think, or act so whatever has emerged has been imposed and accepted. My conclusion is that the law is an output in that it flows from the discourse of the legal practice and that action is the basis of meaning. Those involved with, and in, the law manage the “internal paradoxes of the law, on the problematic relation of the law to itself”. This internal paradox is encapsulated by the notion of the law being an ideal concept and a social reality. I see the law as being a form of myth for, as Fitzpatrick has asserted, the law “as a unified entity can only be reconciled with its contradictory existences if we see it as myth”.

In designating the law a myth, I am adopting a metaphor to illustrate what amounts to a pattern in the mind that has become a pattern in matter. A myth is a story that is told, and retold, in order to make sense of “the disparate and fragmented state of rules, and then derives norms from those rules”. See also Danow D. The Thought of Mikhail Bakhtin, at pp 8 and 9.

Teubner and Luhmann, however, accepted that the law and organisations do think. See King Michael and Christine Piper, How the Law Thinks About Children, who, at pp 23 and 24, claimed that an essential feature of Teubner’s theory of the law is the notion that social organisations and institutions think and this thinking is different to, and independent of, the thinking of members of the organisation or institution. Luhmann adopted a similar approach; see, Luhmann Niklas, Law as a Social System, at p 70.

Badiou is, I think, correct with his assertion that truth designates a fable and that each truth is a product of cultural historicity. See Badiou A., Saint Paul The Foundation of Universalism, at p 6, and although the author outlined his views on religion such an assertion can, in my opinion, be applied to the law.


Fitzpatrick P., The Mythology of Modern Law, at p 1. Relating the notion of the law to that of a myth is not uncommon and two examples from differing perspectives within the legal practice serve to illustrate the phenomenon. First, the former Chief Parliamentary Counsel for South Australia, Geoffrey Hackett-Jones, identified the law as “kind of secular mythology with its own sacred texts and hordes of pharisaic expositors”. See Hackett-Jones Geoffrey ‘Policy Development: the Role of Drafters’, at p 8. Secondly, Manderson Desmond, the Director of the Julius Stone Institute of Jurisprudence, asserted that to most the law is mythical in that it provides a narrative framework through which questions about the social world are structured. In addition, this framework aids understanding of that social world. So then this myth enables a grasping of reality. See Manderson Desmond, Apocryphal Jurisprudence, at p 40. Manderson also asserted, at p 31, that what he designated ‘apocryphal jurisprudence’ is concerned “with the circulation of stories in a culture: as we will see, many of its practitioners are interested in ideas of myth and reality, of the historical contingency of authority, and of the importance of narrative in the construction of our beliefs”.

I have taken this concept of a pattern in matter being a pattern in mind from Abrams Jerold, ‘Philosophy After the Mirror of Nature: Rorty, Dewey, and Pierce on Pragmatism and Metaphor’, at p 229, where the author discussed the approach of Rorty.
knowledge.” Prickett argued that the term ‘myth’ is a description of function rather than content. The significance of a myth, for Prickett, does not revolve around the degree of truth involved but rather around the significance of the function that the myth performs. The myth of the law has a two-fold application because the myth is the basis of an incessant ideological critique of the law while at the same time providing the basis upon which to challenge any argument about the subject matter of the law. By labelling the law a myth, I do not intend to denigrate the law. Myths do not always reflect the ignoble and immoral. They can exemplify the concepts of sacrifice, integrity and idealism. Indeed, such myths have a dignity that is independent of whoever perpetuates the myth. A myth may have the goal of legitimising some institution or practice, in this case the law, not through a future to be accomplished or an idea to be realised, but, rather, through some founding act.

So what then is the form of the myth that is the law? The myth is not an articulation of some stable ideal with descriptions of those structures such as rules, norms, or texts, which may be classified as the law. Rather, it is a collection of general propositions that have been perceived as being necessary for the ordering of society. Such propositions tend to be problem, and case related, and guide and restrict the process of judicial decision-making. I would argue that the myth that is the law includes the law

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I have taken this concept of the duality of the myth of the law from McCormick John P., ‘A Critical Versus Genealogical “Questioning” of Technology: Notes on How Not to Read Adorno and Horkheimer’, at p 290, where the author discussed how Adorno and Horkheimer in *Dialectic of Enlightenment*, deal with the notion of myth when defining the enlightenment.

I have taken this notion of a myth not always being about falsehoods from King Charles, ‘Laws and Wards of War’, at p 32, where the author discussed the myths that flowed from a nineteenth century war.


See Luhmann Niklas, *Law as a Social System*, at p 78, where the author asserted that legal theories, particularly positive legal theories, refer to the structures of the law such as rules, norms, or texts.

I have adopted this part of the definition of the nature of the myth from Luhmann Niklas, *Law as a Social System*, at p 53, where the author asserted that legal theories that are produced in response to the legal practices are a product of a need to arrive at binding decisions. Such theories classify the subject matter and transform “the opaque material with which legal practice is faced” and “turn it into problem-related and case-related constellations, which from then on can restrict and guide the process of decision-making”.
of the law.\textsuperscript{999} While I would not go as far as accepting that there is some degree of "morality that is internal to [the] law itself",\textsuperscript{1000} I would certainly reject, as being limited, the legal positivist argument that the legal system is but a self-enclosed hierarchy that generates structures and procedures for the self-perpetuation of the legal system.\textsuperscript{1001} I see the law as a reflection of a narrative and this narrative includes an element that reflects some ethos about what society has designated as the good.\textsuperscript{1002} Those who would be considered as being part of the legal practice are also part of a community, and probably members of additional subsystems, so there will be some communal ethical values that have had ramifications for what I have identified as the endorsed narrative. I see these communal ethical values as being the law of the law.

While I have asserted that the law is a form of myth, I do want to emphasise that this myth is not a free product of any imagination. The myth then can be seen as a morphological expression as the form of the law determines the form of the ideas held by people within the law.\textsuperscript{1003} This myth has been developed, or perhaps produced, to accord with what I have argued is a narrative that has received endorsement within the discourse that is articulated by those within the legal practice. The survival of the legal practice depends upon the acceptance of the myth within the body politic. Hutchinson, for example, argues that legal theory:

\begin{quote}
“exists as a kind of grand narrative or meta-discourse that is produced by the discourse of law to validate its own status as a scientific discourse in the sense
\end{quote}

\textsuperscript{999} The phrase ‘the law of the law’ was taken from Cornell Drucilla, \textit{The Philosophy of the Limit}, and the discussion in Chapter 4, ‘The Good, the Right, and the Possibility of Legal Interpretation’, particularly at p 101.


\textsuperscript{1001} Generally see Cornell Drucilla, \textit{The Philosophy of the Limit}, and the discussion in Chapter 4, ‘The Good, the Right, and the Possibility of Legal Interpretation’, particularly at p 101. What I want to do is recognise the significance of the concept of Luhmann, among others, of the importance of the notion of the subsystem being cognitively open.

\textsuperscript{1002} I have taken this assertion of the good from Chapter 4, ‘The Good, the Right, and the Possibility of Legal Interpretation’, of Cornell Drucilla, \textit{The Philosophy of the Limit}. 
that it possesses an objectivity and foundation that lies outside itself and whose evaluative standards are adequacy, accuracy and [t]ruth itself”.  

A tenet of legal positivism is that the legitimacy of the law is tied to the pedigree of the law and the subsequent endorsement of subjective values of the lawmaker. There is then some recurring ideal of autonomy as the basis of achieving legal certainty. I agree with the identification of subjectivism as the fundamental feature of legal positivism, but I would suggest that an expansion of this legal positivist analysis is necessary in order to realise this so-called ideal of autonomy that runs through much of the debate about the nature of the law.

I would argue that autonomy is not inherent in the subject under review, in this case the law, but is what amounts to an outcome of the activities of the responsible subsystem, the legal practice. Order emerges not because of the nature of the particular subject matter but rather through a rationalisation of expectations about the subject matter, and this rationalisation occurs through endorsements by the subsystem that is responsible for the subject. The ability of the legal practice to construct what it considers an appropriate social practice through the mystification of the law in order to achieve social objectives depends upon the ability of the legal practice to generate a discourse that is seen by the body politic as not being merely self-promotion but being rational and objective.

Those within the legal practice seek to achieve the goal of an endorsed social practice by the generation of what Kessler has identified as a myth of legal reasoning that is treated as a form of knowledge that is considered true and certain. While a myth is a story that is told and retold, there is an adjunct aspect in that a myth “also involves placing its

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1003 I have taken the definition of morphology from Collins Randall, ‘A Network-Location Theory of Culture’, at p 69, where the author discussed the notion of Durkheim that the form of society determines the forms of ideas held by people within it.
1004 Hutchinson Allan C., It’s All in the Game, at p 166.
1005 See, for example, Rosenfeld Michel, Just Interpretations, at p 17.
receivers in touch with another dimension of being other-worldly and divine”.

The point I wish to make is that this so-called myth of legal reasoning reflects the endorsed narrative of the legal practice because it is a practice of human justification rather than a demonstration of logical necessity. There will be, of course, a multitude of voices within this legal practice but these voices will be in a common language that serves to identify and then reinforce the characteristics of this institutionalised meaning. Kuhn’s notion of a paradigm illustrates the point I want to make in that the characteristics of the law will have been developed from a dominant framework of ideas. So within the law, the current paradigm will command such a degree of acceptance that most members of the legal practice will not question the existence of the paradigm.

The myth that has become accepted as being the law has been developed through a particular language usage that outlines certain themes to identify concepts and values. These themes form an endorsed narrative that facilitates the growth of interpretive techniques and methodologies. These things are not, of themselves, necessarily philosophical but they have acquired a philosophical bent that has become fundamental to the discipline. The consequence of this is that there is an institutionalisation of meaning that is reflective of the ideals and aspirations of that particular subsystem of society that is the legal practice. The importance of precedent to the law may well be a

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1007 Kessler Mark, ‘Legal Discourse and Political Intolerance: The Ideology of Clear and Present Danger’, where, at p 565, Kessler accepted the notion that the legal discourse will contain “the myth of legal reasoning”.

1008 See Warner Marina, ‘Sexy Fun-Comments about the Myths of Rome’, at p 8, where the author in reviewing a book by Wiseman T.P., The Myths of Rome, suggested that Wiseman’s working definition of myth being “a story that matters to a community, one that is told and retold because it has a significance for one generation after another” is limited because a myth also has a “dimension of being: other-worldly and divine”.

1009 Hutchinson Allan C., It’s All in the Game, at p 152.

1010 Kuhn Thomas, The Structure of Scientific Revolutions, at pp 48 and 49, where the author discussed the application of the paradigm and the acceptance of the theory of Newton. See also Prickett Stephen, Narrative, Religion and Science, at pp 62-71.

1011 See Page Carl, ‘Philosophical Hermeneutics and its Meaning for Philosophy’, at p 129. Page asserts that techniques for the interpretation of texts and the methodologies for social or natural scientific disciplines are not philosophical and that such “techniques and methodologies remain subordinate to the interests of the specific domains whose instruments they are”. Page also suggests at pp 133-135 that the act of understanding recurs as a series of cognitive acts that can be characterised and identified “in terms of the contents that they make known”. The result is presuppositions that serve to establish the legitimacy of the discipline. The quoted passage is at p 133.
matter of conjecture, but what cannot be dismissed is that the historical, that which has occurred, is significant to the law. The historical must, of necessity, be treated narratively because the very process of forming some thesis by relating data to events is not something that occurs independently but, rather, requires the application of some principles of interpretation. Indeed, as Dworkin pointed out, the law is but an interpretive concept that ideally flows from the interpretation of the interpreted law.

V.8. Narrative as a Frame of Reference

I have asserted that there is an orthodoxy that has emerged from the legal practice to define what is, and what is not, considered knowledge. What I am suggesting is the real, in this case the law, is relational and defined functions and relations have priority over objects because “the real is dissolved into different relational structures which are mutually interlinked by a whole system of laws which mutually condition each other”. This legal practice is a nomos: some normative universe that seeks to “create and maintain a world of right and wrong, of lawful and unlawful, of valid and void”. MacCormick, for example, has argued that in order for an individual to think of some reference beyond the immediate perceptual field, that individual must acquire or acknowledge some narrative account of this frame of reference. This so-called narrative, which could be considered a personification of the collective entity called the law, reflects what Murphy identified as “self-identity, purpose, and scope for

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1012 See, for example, Steel Alex, ‘Interextuality and Legal Judgments’, at pp 87 and 88 who argues that legal judgments are overtly intertextual in that the legal system is based on the concept of precedent.
1017 Cassirer Ernst, Substance and Function, at p 288, as quoted in Vandenberghe Frederic, Comparing Neo-Kantians: Ernst Cassirer and Georg Simmel, at p 20.
1020 This concept was taken from Murphy W.T., The Oldest Social Science?, at p 37, where the author discussed Weber’s hostility to the personification of such collective entities as ‘society’.
autonomous historical action”. There is then circularity imposing a regime on both theory and methodology for those who practice the law.

Dimaggio argued that a narrative enables an individual to reconstruct significant episodes in her or his life and then use that reconstruction as a schema for decoding events. A narrative is a historical concept to merge both space and time and will be, for any individual, an important reference through which to assimilate data and make choices about future behaviour. Individuals situated in different societal structures assess events in distinctive ways and the interpretation of events will depend “on the way in which people have organized their own sense-making and observation, on the patterns that have emerged in the past for them as meaningful in living daily life”.

Thus, individual beliefs and values are not pure abstractions but are reflections of perceptions about the world. The actions and relationships of individuals are guided by a set of narratives because a narrative can stimulate understanding by relating concepts and categories to the experiences of an individual. Such narratives for an individual will contain not only representations of the self but also representations of the world and those others with whom that individual will react.

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1021 Murphy W.T., *The Oldest Social Science?*, at p 37.
1024 See Vice Sue, *Introducing Bakhtin*, at pp 201-203, where she discussed the concept of the chronotope and the relationship of time and space within a narrative.
1025 Schepple Kim Lane, ‘Forward: Telling Stories’, at p 2082.
1026 Schepple Kim Lane, ‘Forward: Telling Stories’, at pp 2082 and 2083.
1027 Schepple Kim Lane, ‘Forward: Telling Stories’, at p 2084. Schepple also asserted, at p 2085, that storytelling is a patterned activity and that legal storytelling “is no less patterned than other sorts of storytelling; indeed, it may be even more structured because it is embedded in a larger institutional framework that routinizes solutions to unusual events and that values regularity and predictability”. The quoted passage is at p 2085.
A narrative is something that goes to the temporal organisation of experiences so it is a mode of organising experience and constructing a reality. A narrative then will, for a defined audience, amount to a clear sequential order that connects events in some meaningful way by allowing insights into the world. So, the themes of a narrative will be a reflection of a fundamental dichotomy of a shared experience because a referent will either accord with the theme of the narrative, or it will not. A narrative will function as a transaction by linking discursive sequences and social constructions to reveal contingencies, while at the same time balancing expectations and satisfaction. A narrative will also enable interpretive projections to incorporate information that may be missing because of some inadequacy within the discursive sequence.

A narrative is directional as it establishes a thematic unity to define the relationship that is perceived as existing between social actions, events or experiences. These social actions, events or experiences, become ordered through this perceived unity and are given a value. In addition, this narrative can also regulate potential changes to the existing social order in two ways. First, a narrative can serve to channel these potential social changes by defining some sequence of events that has been successful in the past in achieving a desired social status. Secondly, a narrative can be used to subvert challenges to an existing social order, by the adoption of language that will placate those elements that would threaten the existing order.

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1029 This description taken from Gare Arran, ‘Narratives and Culture: The Role of Stories in Self-creation’, at p 81.
1030 Hinchman Lewis P., and Sandra K. Hinchman, Memory, Identity, Community, at p xvi.
1031 The reference to a narrative theme reflecting a fundamental dichotomy of experience was taken from Klein Kitty, ‘Narrative Construction, Cognitive Processing, and Health’, at pp 56 and 57.
1032 Generally see Part 3 ‘Fleshing Out (or Moving Beyond) the Narrativity Condition’ in Christman John, ‘Narrative Unity as a Condition of Personhood’, particularly at pp 707 and 708.
1033 This description was adapted from Part 1 ‘The Narrativity Condition’ in Christman John, ‘Narrative Unity as a Condition of Personhood’, particularly at pp 697 and 698, where the author discussed the nature of a narrative.
1034 Generally see Fuller Steve, ‘Being there with Thomas Kuhn: A Parable for Postmodern Times’, at p 269.
The narrative provides the framework from which causal priorities may be assigned between competing hypothetical variables.\textsuperscript{1035} There is a conceptual, and ideologically grounded, ideal of the truth and knowledge that finds expression through an articulation of the perceived foundation of the law and by the maintenance of a dichotomy between the subject and the object.\textsuperscript{1036} This narrative articulates several themes that serve, to a greater or lesser degree, as necessary conditions for the evaluation of truth and knowledge about the law.\textsuperscript{1037} The fundamental thrust of this narrative for the legal practice is that it is reproduced at the level of cognition. This narrative may well be regarded as being theological because the narrative consists of propositional edicts that are seen as having something of the sacred in that they are expressions of the rule of law. The narrative then becomes an issue of the edicts of a community of believers being enacted to guide the experiences of the community and, indeed, the existence of the state.\textsuperscript{1038}

It is through the application of the narrative that a conceptualisation of an ideal becomes, either explicitly or impliedly, the focus for the legal practice and the basis for a dissertation about what is the law.\textsuperscript{1039} From within the legal practice an incremental

\textsuperscript{1035} I have taken the idea of the assignment of causal priorities between competing hypothetical variables from Nelken David, ‘Using the Concept of Legal Culture’, at pp 9-11 where the notion was used to outline what Nelken saw as the mainstream social science explanatory approach to identifying how priorities are assigned within the legal culture.

\textsuperscript{1036} I have adapted this assertion from the arguments at pp 150-152 of Chapter Six ‘Using Pragmatism to Downsize the Interpretive Subject’ of Rosenfeld Michel, Just Interpretations, where the author outlines the diverse range of pragmatism.

\textsuperscript{1037} What I am suggesting is that although the law operates prospectively, the law can only be understood retrospectively: - by looking backwards. See Jacobs Alan, ‘What Narrative Theology Forgot’, at p 29 where the author provided an extract from the journal of Kierkegaard:

“It is quite true what philosophy says: that life must be understood backwards. But then one forgets the other principle: that it must be lived forwards. Which principle, the more one thinks it through, ends exactly with the thought that temporal life can never properly be understood because I can at no instant find complete rest in which to adopt the position: backwards”.

\textsuperscript{1038} I have taken the description of a theological narrative from Jacobs Alan, ‘What Narrative Theology Forgot’, at pp 25 and 26.

\textsuperscript{1039} See Balkin J.M., and Sanford Levinson, ‘Legal Canons: An Introduction’, at pp 14-21, for a discussion on the importance of narrative to legal thinking. The authors outlined various categories of narrative that are seen as being central to legal reasoning particularly constitutional interpretation and claimed, at pp 16 and 17, that:

“Every society has a set of stock stories about itself, which are constantly retold and eventually take on a mythic status. These stories explain to the members of that society who they are and what values they hold most dear. These stock stories are both descriptive and prescriptive: they
discourse is generated that is a denotation text-in-context that serves to connect participants within a social relationship.\textsuperscript{1040} It is through the application of the narrative that the legal practice overcomes “the utter inadequacy of expressing law”,\textsuperscript{1041} and thereby achieves the objective of the dominance of the legal practice. The consequence of this is that the construction of other possible meanings about the law, and the interpretation of instruments that may be considered as being relative to the law, are deduced by reference to this paradigm of faith.\textsuperscript{1042}

A narrative about the law will stimulate a reinforcement of those practices that the legal practice has endorsed as being significant by establishing and then reinforcing legitimacy. This so-called legitimacy will enable the use of the rhetoric of the law to affect the reception of the law.\textsuperscript{1043} Hutchinson illustrated this claim by arguing that a decision, a performance or a move, can never be explained or reduced to the application of a rule in that a “performance or move cannot be detached from the general game itself – each [the game and the performance or move] can only be fully appreciated in the context of the other”.\textsuperscript{1044}

Both the form of the narrative and the generation of the narrative are of significance when considering not only the nature of the law but also the generation or application of the law. The legal practice in applying this narrative seeks to establish the law as an identified reality that exists in time and space. It is also obligatory that these concepts of

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not only frame our sense of what has happened and how events will unfold in the future, but also explain how those events should unfold”.
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\textsuperscript{1040} I have adapted these comments about an incremental discourse that is a denotational text-in-context from Silverstein Michael, ‘Cultural’ Concepts and the Language-Culture Nexus’, at p 622.
\textsuperscript{1041} See the Acknowledgements in Fitzpatrick P., Modernism and the Grounds of Law, at p ix.
\textsuperscript{1042} The phrase ‘paradigm of faith’ was taken from Winter Steven L., The Cognitive Dimension of the Agon Between Legal Power and Narrative Meaning’, at p 2253, where it was used in a related context.
\textsuperscript{1043} Cohen Ira J., and Mary F. Rogers, ‘Autonomy and Credibility: Voice as Method’, at pp 304 and 305. Cohen and Rogers accept edthat objectivity is constructed narratively and that professional knowledge producers “seal narratively their ownership of that knowledge”. The quoted passage is at p 304.
\textsuperscript{1044} Hutchinson Allan C., It’s All in the Game, at p 173. The author considered a comment of Derrida’s about judicial decision making but I would argue that the definition has wider application in that it can be related to the decision making process of what I have called the legal practice. That is to say, a decision by the legal practice about the nature or application of the law or the status of the legal practice is fundamentally a comment about the continued existence of the legal practice and as a consequence a decision is valid because it is a decision.
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reality and existence be studied and, of course, defended where necessary.\textsuperscript{1045} I now want to deal with the themes of this so-called narrative. I see these themes as being the basis for the conceptualisation of the principles of the law.

The first of these narrative themes is related to the separation of powers doctrine and a view about the relative importance of each element.\textsuperscript{1046} Not surprisingly, the independence of the courts is emphasised. Whether or not there is an actual separation of powers is irrelevant. What is relevant is that implicit in this concept of the separation of powers is the notion that the law and the activities of the courts are somehow different, both in reality and in aspiration, from the other elements of the separation of powers doctrine.\textsuperscript{1047} A consequence of this view about the separation of powers is the acceptance that it is for the law itself, as articulated by those who practise the law, to make authoritative determinations as to what is the law and who may make or change the law.\textsuperscript{1048}

The second of these themes relates to the use by the legal practice of a particular language as a tool through which to present a legitimate world view. Within the legal practice, there is a doctrinal view of the law in which the law is regarded as a normative communication structure.\textsuperscript{1049} This linguistic approach leads to a view that primary legislation is based “on the principle of textual parsimony”,\textsuperscript{1050} so that the meaning of the primary legislation can only be discovered through the application of expertise and method.\textsuperscript{1051} It is a necessary attribute, for those whose field of endeavour is the law, to speak and understand a particular language. This linguistic practice indicates a desire for

\textsuperscript{1045} Murphy W.T., \textit{The Oldest Social Science?}, at pp 184 and 185.
\textsuperscript{1046} These comments about the separation of powers doctrine have been taken from Chapter 3 of Ross Hamish, \textit{Law as a Social Institution}, at pp 43, 44 and 49, where the author outlined a view of Hart’s analysis.
\textsuperscript{1047} Murphy W.T., \textit{The Oldest Social Science?}, at pp 176 and 177.
\textsuperscript{1048} Generally see Van Hoecke Mark, \textit{Law as Communication}, at p 193, and the comments about legitimation of the law in Luhmann’s systems theory.
\textsuperscript{1049} Generally see Krawietz Werner, ‘Legal Communication in Modern Law and Legal Systems. A Multi-level Approach to the Theory and Philosophy of Law’, where at p 95, the author argued that as the law has been considered to be a normative communication structure then the law will act to determine legal actions but not rob individuals “of their spontaneity and freedom”.
certainty in the law,\(^{1052}\) and becomes a language game to sanctify legal texts and reify both those who ascertain meaning and the practice of ascertaining meaning.

The third of these themes is, in my opinion, the most significant in that the law is seen as being central to the very existence of the society.\(^{1053}\) There is also an endorsement by the legal practice of the notion that the law is a separate discipline with a unique idiom and professional ethos.\(^{1054}\) For example, both Hart and Kelsen illustrated this theme with their arguments that law has a unique special property.\(^{1055}\) So, for the legal practice, the law is a perceived unity that is a necessary, and perhaps, even a sufficient condition for the existence of a civil society, because the law regulates social conflict and establishes the order that is essential for a civil society.\(^{1056}\)

The fourth of these themes is the notion that the law is an impersonal order that is bereft of any expression of political power. Inherent in such a view is the idea that the law is not an instrument of power.\(^{1057}\) There is what has been described as a cult of the impersonality of the law that emphasises the rule of law as being impersonal and not subject to arbitrary application and therefore fundamental to the existence of a modern society.\(^{1058}\) Although some, Kelsen for example, would argue for a non-personification and non-anthropomorphist view of law,\(^{1059}\) I would argue that this is not the norm within the discourse of the legal practice. Generally, the norm is to see the law in anthropomorphic terms. There are numerous instances of this trend. For example, MacCormick when discussing the law of contract stated “that the law ascribes certain

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\(^{1052}\) Manderson Desmond, ‘Apocryphal Jurisprudence’, at pp 32 and 33.
\(^{1053}\) I have taken this assertion from the Introduction of Fitzpatrick P., Modernism and the Grounds of Law, particularly at pp 71-73.
\(^{1054}\) Bruns Gerald L., among others, made this point in ‘Law and Language: A Hermeneutics of the Legal Text’, particularly at pp 28-29.
\(^{1055}\) Generally see Ross Hamish, Law as a Social Institution, at pp 80-82, for a discussion on this issue.
\(^{1057}\) Phrase taken from Ross Hamish, Law as a Social Institution, at p 81, where it was used to describe ideas of Hart and Kelsen.
\(^{1059}\) See the Preface to Kelsen H., A General Theory of Law and State. See also Morrison Wayne, Jurisprudence: from the Greeks to post-modernism, at pp 323 and 324.
rights and duties to individuals conditionally upon the existence of contracts”.\textsuperscript{1060} One of the clearest statements of such a concept is the statement by Frankfurter that the law “becomes civilized to the extent that it is self-conscious of what it is doing”.\textsuperscript{1061} I have certainly fallen into such an anthropomorphic trap if indeed it is a trap.

The fifth theme relates to the application of traditionalism. While the disciplines of sociology, economics and philosophy now influence legal reasoning; traditionalism is still an important theme in what I have called the narrative of the legal practice. By traditionalism I mean an instinctive propensity to see the law as being orderly, evolutionary and something that, through the acceptance of precedent, only changes gradually.\textsuperscript{1062} Fuller captured something of this concept with his claim that the law exists as some form of inert matter so that the central issue is whether or not there is law.\textsuperscript{1063} The law then is an objective world of order and reason while at the same time being complete and formal. Complete, in the sense that it can provide correct solutions for each matter adjudicated, and formal, through the application of principles derived from cases. The law then is seen as holistic with principles and concepts derived from some conceptually ordered system.\textsuperscript{1064} Little seems to have changed since the turn of the 19th century certainty of Langdell and the idea of the law being a science that has all of its material contained in books.\textsuperscript{1065}

The final, and I think very important, theme within the narrative is a distrust of political power, and I would suggest also of politicians. So, within the legal practice there is an acceptance of the view that an obligation exists upon the court to protect individuals and minorities from what is perceived by the legal practice as being excesses of majority power. In satisfying this obligation the court may issue edicts as to the ordering of society.

\textsuperscript{1060} MacCormick D.N., \textit{Law as Institutional Fact}, at p 3.
\textsuperscript{1061} See Frankfurter Felix, \textit{‘Some Reflections on the Reading of Statutes’}, at p 530 where the epigram is attributed to Oliver Wendel Holmes.
\textsuperscript{1062} Generally see the discussion in Luban David, \textit{‘Legal Traditionalism’}, particularly at pp 1042-1047.
\textsuperscript{1063} Fuller L.L., \textit{The Morality of Law}, at p 123.
\textsuperscript{1064} I have adapted this description of the law from Chapter I \textit{‘Origins of Modern Jurisprudence’}, of Minda Gary, \textit{Postmodern Legal Movements}, particularly at pp 13-15.
and how society should be governed. Michelman writing from an American perspective has identified this theme as being the balancing of the majoritarian doctrine of popular parliamentary supremacy with what he defined as the incompatible concept of “the modern constitutionalist aim of securing, by judicially enforced high law, individual rights against political oppression”.1067

It is through a particular narrative that the law “becomes not merely a system of rules to be observed, but a world in which we live”.1068 I see this so-called narrative as being an artificially simplified model that endorsed a particular code by relating a normative system to the social construction of a reality. Thus, the narrative becomes the corpus “through which we study and experience transformations that result when a given simplified state of affairs is made to pass through the force field of a similarly simplified set of norms”.1069

So, those engaging in the practice of the law must observe and meet standards. Something other than reflective self-interpretation is therefore necessary in order to engage in the practice of the law, or, to adopt my rhetoric, operate as a member of the legal practice.1070 To my mind, this something other than reflective self-interpretation is a narrative. This narrative is given form through the use of language, and this language will be a reflection of the ethos of the subsystem of society that is the legal practice. The application of this narrative serves to outline a philosophy that portrays the law as a discrete entity that is, to a large degree, autonomous.1071 What I am suggesting is that there is merit in accepting a constructionist presumption that acknowledges that discourses, narratives, and relationships amount to instances of the real.1072

1066 See Chapters 9 and 10 ‘Judicial Activism’ in Kirby Michael, Through the World’s Eye, for an interesting discussion on judicial activism and judicial technique.
1068 Generally see the Introduction to Cover Robert M., ‘Foreword: Nomos and Narrative’, and the quoted passage is at p 5.
1069 The quotes are taken from Cover Robert M., ‘Foreword: Nomos and Narrative’, at p 10.
1070 I have adopted these comments from Christman John, ‘Narrative Unity as a Condition of Personhood’, at p 697, where the author examined claims about narrative unity.
1071 I have taken this description from Beck Anthony, ‘Is Law an Autopoietic System?’, at pp 406 and 407.
Winter makes a distinction between the construction of meaning and the institutionalisation of that meaning and suggested that the very act of being interactive will necessitate a reconstruction of the narrative. This narrative has become an ideal narrative for the legal practice because it “provides an explanation for the outcome”. However, such a description may be expanded in that all too often this narrative becomes what has been called a ‘rescue narrative’ as the narrative serves as the basis to both diagnose a problem or issue and then offer a solution. The narrative then is the basal vehicle for outlining the legitimacy of the law and also for resolving questions of indeterminacy and interpretation will be dependent upon the shared social meaning that flows from what I have called the endorsed narrative. That is to say, those issues of legitimacy and indeterminacy within the law are measured against the prevailing narrative.

V.9. Acceptance of Representations

I see the definitions of primary legislation and the law that I have outlined as being a consequence of the differentiation of society that is coupled with the emergence of a mass culture. Within this mass culture, the marketplace has become a unifying site where images and signs are contorted to both stimulate, and respond to, demand and where commodities are continuously circulated. Differentiation, coupled with the impact of this mass culture, has impacted on all social activity by ensuring the emergence of the

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1074 This definition of ‘ideal narrative’ was taken from Gergen Kenneth J., Realities and Relationships Soundings in Social Construction, at p 192.
1077 I have taken the concept of differentiation from Luhmann Niklas, Social Systems, Chapter 5 ‘System and Environment’, particularly pp 190 to 193. See also Deggau Hans-Georg ‘The Communicative Autonomy of the Legal System’. Deggau argued, at p 130, that differentiation referred to the process of continual reformation of differences and thereby implies identity. Identity and difference are relational concepts in that identity cannot exist without difference. I have taken the description of the impact of mass culture and commodification from Schwartz Frederic J., Blind Spots, at p 1. Schwartz argued that the modern analysis of art has been influenced by this commodification.
subsystems that collectively constitute the society and also by encouraging object utilisation. Each subsystem can be related to a particular field of endeavour and each field will be defined through language usage and discursive constructions. Such usage and construction develops what amounts to a particular language game and the rules or the grammar of one particular language game may well be, and usually are, different from those of any other language game. Communication between games is hindered in that it is difficult to have advanced knowledge of the compatibility of different language games. The increasing emphasis on object utilisation has meant that all things are treated as commodities to be sold, bartered, or used to advantage.

A discourse is a feature of a subsystem and is necessary for the emergence and survival of that subsystem. I have asserted there is a mainstream view of primary legislation and the law that has been generated by the discourse of the subsystem I have designated the legal practice. This view reflects a paradigm that is the product of the internal ordering of the legal practice described in the preceding part of this chapter. I have asserted that this output of the legal practice becomes environmental noise that may be adapted, to a greater or lesser degree, by other subsystems of society. To my mind, there are three reasons why the transformation from noise to input may occur and, while all reasons illustrate the power of the legal practice within the body politic, the first two reasons identify the internal and external application of the rhetoric of the legal practice within other subsystems.

The first reason for this transformation from noise to subsystem input is that output of the legal practice generates a noise within the environment of such intensity that it permeates the boundaries of other subsystems. The rhetoric of the legal practice recurs within

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1078 The term ‘language game’ is attributed to Wittgenstein and enjoys widespread acceptance as part of discourse rhetoric. See Forster Michael N., *Wittgenstein on the Arbitrariness of Grammar*, particularly at pp 21 and 22 and 74 and 75.
1079 See Dueck A.L. and Thomas D. Parsons, ‘Integration Discourse: Modern and Postmodern’, at p 233, for a discussion about the possibility of differing rules of language games.
1080 When irritated by noise from the environment a subsystem will increase the complexity within the subsystem in order to reduce the irritation caused by the environment. That is to say, the subsystem will seek to match the complexity with complexity. See Muller Anne Friederike, *Some Observations on Social Anthropology and Niklas Luhmann’s Concept of Society*, at p 174.
media such as newspapers, radio and television, to the extent that the rhetoric has become a general discursive construction impacting on all within the society. For example, open any paper and there will be some politician, lawyer, or public figure, using the language of the legal practice to comment on the rule of law or the independence of the judiciary or the abuse of a right. These comments have been given prominence within the public domain to become information available to the public. Such information then has the potential to influence public opinion by modifying the values of individuals within different subsystems, thereby impacting on the validation codes of those subsystems. To my mind, there are two explanations for adoption of this rhetoric. First, the media constitutes a separate subsystem whose field of endeavour is the dissemination of information. This involves producing a commodity that can be traded within the marketplace. So statements by public figures become part of the commodification process and are accorded the status of information to be manipulated to achieve some market objective. Secondly, the language of a communal reality such as the legal practice promotes order and predictability because such language usage satisfies some principle of a perceived public good, through the connection of heterogeneous phrases\textsuperscript{1081} that will favour “unity and social solidarity”.\textsuperscript{1082} That is to say, the language of the legal practice has achieved a societal prominence so that the themes of, for example, solidarity and order can be classified as being a form of public utility as they have resonances that attract positive public attention and become public discursive constructions. To survive, sub-subsystems within the media subsystem must sell their product. These sub-subsystems, therefore, continuously provide information that is endorsed by the media subsystem as an attractive commodity. It is impossible to determine why some rhetoric is given prominence and some is not. I see the distinction as an expression of power in that some subsystems have achieved such public prominence that their pronouncements have become information that is accorded the status of knowledge by the media subsystem.

The second reason for the transformation from noise to subsystem input is that the rhetoric used by the legal practice to outline the representations that construct the law has

\textsuperscript{1081} See Lyotard J-F., \textit{The Differend Phrases in Dispute}, at pp 98 and 143.

\textsuperscript{1082} See Dueck A.L. and Thomas D. Parsons, \textit{‘Integration Discourse: Modern and Postmodern’}, at p 243.
become so persuasive that some of these representations have acquired the status of a shared sign system. Such shared sign systems transcend subsystem boundaries by being accorded a function and attributes by an adopting subsystem, thereby becoming a censored input for future action by the adopting subsystem. I see such transformation as being something that goes to the survival tenet of individual subsystems because there will be instances where the purpose of some subsystem is served by the adoption of a representation of the legal practice in order to illuminate and justify the activities of the adopting subsystem. For example, it may serve the interests of the political subsystem to have outputs of the political subsystem sheathed in the endorsed language of the legal subsystem through the utilisation of such shared signs as the rule of law or the separation of powers doctrine. Such an adoption is an intentional determined activity to justify the operations of the adopting subsystem. Thus, representations of the legal practice are used within the particular linguistic practices of other subsystems to become a discursive construction and a shared sign for that subsystem. However, because of the nature of the linguistic practices that constitute the particular language game played by individual subsystems, these shared signs will not necessarily be given a universal value. That is to say, the value given to a representation by the legal practice will not necessarily be, and usually is not, replicated by a subsystem that adopts the representation as a form of shared sign.

The third reason for transformation of noise relates to the recognition of the legitimization of the myth that is the law as the social construction that can transcend tribal constraints to establish order. Such recognition occurs, at least in part, because there exists within society a desire for order and for society to exist, chaos must be transformed into some form of order. This establishment of order occurs, at least to some degree, through the imposition by an institution, which has been endorsed by society, of some code that has societal acceptance. That is to say, the law has been recognised as a device to establish and maintain order and the legal practice has been accepted within the body politic as being the institution to produce the law.
The myth that is the law serves to facilitate both the division of social activities into doctrinal categories and also the definition, and the application, of statements of principles that will evaluate social constructions. The myth that is the law then is the “manifestation of social power congealed in linguistic forms”.  

1083 The significance and utilisation of any social construction occurs because of two things. First, from the application of some idealised cognitive model and, secondly, from the use of both metaphor and metonymy that will endorse particular signs. These signs will have the function of both aiding the understanding and applying the construction. 1084 These signs may be articulated and endorsed through both direct and indirect means. That is to say, the myth may be told and retold through various media. For example, Bourdieu has suggested that the law is an active discourse that produces effects through its own operations, 1085 with the practice of the law producing the world of the law because “acts of naming achieve their power of creative utterance to the extent, and only to the extent, that they propose principles of vision and division objectively adapted to the pre-existing divisions of which they are the products”. 1086

Legitimacy, particularly in regard to the law, is a contested concept, but it does seem to me that at least two criteria must be satisfied for the law to be perceived as legitimate. The first criterion relates to the perception of the law being imitated by an institution that is authorised to make or state the law. The second criterion relates to a perception that the law does not violate those norms that are ingrained within the body politic. 1087 The paradigm of belief inducing mechanisms is perception 1088 as the law and expressions of legal rationality do not, of themselves, ensure a public acceptance of the law. 1089

1083 I have taken this phrase from Schlag Pierre, ‘The Politics of Form and the Domestication of Deconstruction’, at pp 1632-1633.
1087 I have adapted the criteria for the legitimacy of the law from Tucker Robert W., and David C. Hendrickson, ‘The Sources of American Legitimacy’, at pp 18 and 19, where the authors developed a framework to evaluate the legitimacy of American action in Iraq.
1088 See Chapter 3 ‘The Sorites Paradox’ in Heller Mark, The Ontology of Physical Objects: Four-dimensional Hunks of Matter, particularly at pp 96-98.
Irrespective of whether one takes a wide or a narrow view of the concept of legitimacy there must be a belief in, or acceptance of, the law within the body politic regardless of whether one may define this legitimacy as being charismatic, traditional, or legal.\textsuperscript{1090} MacCormick, for example, has argued that all legal systems are based on criteria that are endorsed by societal acceptance so that validity is a matter of satisfying the endorsed criteria.\textsuperscript{1091} Such a definition says little as to how the criteria became endorsed. However, the argument of Kuhn does enable the link to be made because legitimacy relates to the utilisation of procedures that accord with rules defined and imposed by whoever was responsible for the existing paradigm.\textsuperscript{1092} It may be that this legitimacy should be considered to be blind, as the reasons for, and the application of, this legitimacy cannot be explained or justified.\textsuperscript{1093} I would, however, argue for a narrower perspective that is illustrative of the so-called third dimension of power\textsuperscript{1094} that ensures the acceptance and prominence of the law.

I have referred to the significance of chaos mythology and such a mythology contains a deterministic element that colours the many attempts to identify the necessary source for different forms of legitimacy. For example, Rawls argued that the source that will establish legitimacy is what he identified as the criterion of reciprocity. That is to say, an exercise of power can only be legitimate when there has been full disclosure of the reasons for the exercise; when the reasons offered by the exerciser are considered to be sufficient to justify the exercise; and when the exerciser of the power is also of the

\textsuperscript{1090} This view is attributed to Weber in Priban Jiri, ‘Legitimation Between the Noise of Politics and the Order of Law: A Critique of Autopoietic Rationality’, at pp 104 and 105.

\textsuperscript{1091} MacCormick Neil, Legal Theory and Legal Reasoning, at p 62. See also the argument outlined by La Torre Massimo, ‘Theories of Legal Argumentation and Concepts of Law. An Approximation’, at p 386.


\textsuperscript{1093} I have taken this notion of the blind from p 4 of the Introduction to Heyes Cressida J, The Grammar of Politics, and the discussion about Wittgenstein’s analysis of the reasons for rule-following because rule-following is “in the last analysis, blind: it cannot be explained or justified”.

\textsuperscript{1094} See Lukes Steven, Power: A Radical View, at pp 24 and 25. Lukes developed a three-dimensional model of power. Within this third dimension there is the recognition that social forces, institutional practices, or the decisions of individuals, can prevent potential issues from becoming the focus of a political process. The result is that those subjected to the application of the power may well be unaware of the application.
opinion that members of the body politic “might also reasonably accept those reasons”.1095 Rosenfeld provided a further example of this chaos mythology with the argument that a necessary element for the achievement of justice and the legitimisation of the legal system is that the laws of the society are the product of just interpretation.1096

One consequence of this legitimisation process is that the law is accorded a mystical quality through the application of the endorsed narrative that acknowledges the sanctioned source. The uses of metaphors to epitomise this purported mystical quality abound and the metaphor used by Gummow that the law is a bridge and that this bridge facilitates the societal movement from the past to the future is but one example.1097 This mystification seems to have a universal application that finds expression in unusual places. For example, an illustration of this perceived mystical quality is evident in the statement about the essence of the law that was contained in the course notes about the law that were provided to Commanding Officers within the Royal Australian Air Force. It was claimed that:

“Law is not in essence just a collection of technical rules and vague mysteries which only the learned may comprehend. It is a simple and grander thing. It makes it possible for men [and women] to live together in communities, to lead a peaceful and organized life.”1098

There is, I think, an additional element necessary for the rhetoric of the legal practice to be accepted as legitimate within the body politic. While I have argued that the law is the phenomenon that has emanated from the practice of the law, I assert, however, that the rhetoric that emerges from the practice of the law must include what amounts to the law of the law.1099 That is to say, in order for the law to be accepted as legitimate, two things

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1095 Rawls John, *Collected Papers*, at p 578.
1096 Generally see Chapter One of Rosenfeld Michel, *Just Interpretation*.
1098 The passage quoted was taken from page 1 of the ‘Introduction’ to Course Note, Officers’ Training School, *Short Law Course for Commanding Officers, Royal Australian Air Force*.
1099 As Black pointed out, the law is not merely an articulation of power and authority. See Black Virginia, ‘Putting Power in its Place’, at p 77. I have taken the phrase ‘the law of the law’ from Chapter 4 ‘The
must occur. First, the law must be consistent with whatever social imperatives are considered by the body politic to be necessary for the well being of the body politic. Secondly, the law must not include any imperatives considered deviant by the body politic, although such imperatives might be considered necessary by the legal practice.

It is, I suggest, beyond contention to argue that modern society is pluralistic and that there will be a multiplicity of conceptions of the good within that society.\(^{1100}\) What does need to be recognised is that the validity of knowledge about a social practice and the status of any pertinent theory are, at best, problematic, unless such things are related to some account of the relationship between social structures and societal values.\(^{1101}\) There must be some recognition and acknowledgment of the good.

While the law is a product of the internal deliberations of the legal practice, a necessary attribute for that law to be accepted by the body politic is the inclusion of the law of the law. This law of the law reflects fundamental values of the body politic. I would argue that the acceptance of the law within the body politic is conditional on the myth that is the law being perceived as including what I have designated as being the law of the law. Otherwise, there will be a breakdown of order within the body politic that may be limited to civil disquiet or disorder or, if the perception is that the law of the law has been distorted, anarchy or revolution.

**CHAPTER VI CONCLUSION**

*As I thought through the theoretical part, considering its whole scope and the reciprocal relations of all its parts, I noticed that I still lacked something essential, something that in my long metaphysical studies I, as well as others, had failed to pay attention to and that, in fact,*

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\(^{1100}\) Rosenfeld Michel, *Just Interpretations*, particularly at pp 200-203.

\(^{1101}\) Generally see Chapter 8 ‘Calling the Shots: The Development of Legal Doctrine’ in Hutchinson Allan C., *It’s All in the Game*, especially at pp 217 and 218.
VI.1. Conclusion

In this thesis I have attempted to be both critical and constructive in outlining a view of primary legislation and the law that utilises Luhmann’s autopoietic theory, the field theory of Bourdieu, and, to a lesser extent, Wittgenstein’s notion of a language game. My selection of particular theorists to support my hypothesis was random. I utilised those I felt had something interesting to say and who were prominent in their fields. As I outlined in the Introduction to this thesis, my objective has been to present a particular vision of primary legislation and then see if there was theoretical support for my hypothesis. I asserted that this thesis was also, of necessity, about law in that the act of declaring a particular view of primary legislation also involved making a statement about the nature of the law. While several theorists do provide arguments that indirectly support my hypothesis about the nature of primary legislation, no one, as far as I have been able to ascertain, directly agrees with my views.

I have asserted that there is a mainstream view about the nature of primary legislation and also about the nature of the law, and that this view has been accorded a pre-eminence within the body politic. What this mainstream view does is objectify primary legislation and the law so both are conceptualised as givens; representations that have become

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1102 This extract from a letter by Kant as quoted in Gardner Sebastian, *Kant and the Critique of Pure Reason*, at pp 27 to 29. Gardner argued that ‘representation’ is Kant’s generic term for a constituent or element of cognition that is similar in scope to the notion of ‘idea’ in the writings of the rationalist or empiricists so that ‘representation’ refers to anything subjective that plays a role in the composition of judgement or knowledge. The ideal of the object for Kant involved a separation between the supposition that there is such a thing as reality and the conception of objects that we are capable of cognising. The idea of a thing as it is constituted in itself as a fully real thing does stand but it cannot help in recognising representation. So then for Kant the concept of an object in general is not pre-asserted to have reference and he treated the two distinct matters of object-hood and know-ability as one.

1103 I have taken the phrase ‘critical and constructive’ from Nussbaum Marthe, *Frontiers of Justice*, at p 5, where the author used the phrase to describe the approach she adopted in her book.
idealised facts. I see this mainstream view as being the product of an epistemology-centred discourse generated by a particular subsystem of society, the legal practice, and within this discourse the representations that define primary legislation and the law are depicted as knowledge; a justified true belief.\textsuperscript{1104} To my mind, this so-called mainstream view is, at the very least, misleading because it does not accurately define either the law or primary legislation. Within this thesis I have outlined a different perspective by asserting that justification of some belief is the product of a particular practice so a distinction needs to be made between a fact and the representations that may be made about that fact.\textsuperscript{1105} Certainly, knowledge may be a justified true belief, but it is propositional and justification of a proposition depends upon other propositions. As Rorty claimed, “there is no such thing as justification which is not a relation between propositions”.\textsuperscript{1106}

I have outlined a threefold perspective of primary legislation. First, primary legislation is a thing that is produced to satisfy a demand and once that demand is satisfied that is that. Primary legislation, on enactment, is a brute fact because it is a text and the only property of a text is that of being a text. Secondly, this thing will become an object when used because it will be accorded such functions by the user as the user sees appropriate, given the context within which the primary legislation is used. Primary legislation, upon use, can be compared to an image or a sign in that the attributes given to the primary legislation will vary with the user and also with the context within which the primary legislation is used. Finally, primary legislation is not a law, irrespective of whether primary legislation is a thing or has been transformed into an object. The first of these so-called perspectives is unremarkable. It is, at least in my opinion, unarguable that the thing, the text, produced by the parliament has been produced to satisfy some demand, although, of course this demand can be initiated by any number of sources. The second perspective is, I think, also mundane as primary legislation, upon enactment, sits in some repository until used and the use the text is put to will be determined by the context.

\textsuperscript{1104} I have taken the definition of knowledge as a justified true belief from Guignon Charles and David R. Hiley, \textit{Richard Rorty}, at p 10.
\textsuperscript{1105} See Guignon Charles and David R. Hiley, \textit{Richard Rorty}, at p 12.
\textsuperscript{1106} Rorty Richard, \textit{Philosophy and the Mirror of Nature}, at p 183.
within which the text is used. As a result, the attributes assigned to the text will vary from context to context. A text is not self-executing and a text, when used, must be subject to some interpretative approach, with the user assigning meaning to the text. Interpretation is a product of whatever field of endeavour the interpreter is engaged in, so what is fundamental to interpretation is the impact of the context within which meaning is attributed.

It is the proposition that primary legislation is not, and indeed cannot be, a law that is, at the very least, debatable. The acceptance of such an assertion depends upon the view one takes of society and the law. I have outlined a view of society as being differentiated and consisting of subsystems with the primary division of these subsystems based on endeavour. Thus, one subsystem produces primary legislation while another subsystem produces the law. They are two separate and discrete entities. In addition, primary legislation, upon enactment, has no properties other than the physical property of being a text. A text does not, of itself, do anything, nor does it have any inherent qualities; it just sits in some repository available to be read should some requirement arise. Any use that the text is put to is the result of specific intentionally determined human activity. Belief is determined not by some physical event but by a socially constructed institutionalised vocabulary that provides some “space of reasons in which causal stimuli come to have a propositional form and a place in a set of inferential relations.”

Carrington, in considering the nature of the law, suggested that the meaning of the law, if it exists, must be found in the conduct of officials. One can therefore conclude that, at the very least, the “law will reflect the tastes of the class of persons from whom the officials are drawn”. This would indicate that the law is not to be found in the language of some primary legislation, but is, rather, the product of the actions of an endorsed class. Lasswell and Kaplan claimed that primary legislation would cease “to

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1107 Guignon Charles and David R. Hiley, Richard Rorty, at p 32.
embody a law (except in a formal sense) to the degree that it is widely disregarded”.

So, if the body politic ignores primary legislation then that legislation is not a law. According to such reasoning, for an enactment to become a law there must be some deliberate act after enactment. I have asserted that primary legislation can never be more than a censored input into the process by which the law is stated and I have argued that in relation to the law only a court can perform such a deliberate act.

It is also possible to argue that this thesis could be seen as outlining what is a fixity as the thing, primary legislation or indeed the law, cannot be other than it is. However, what I have attempted to do is outline some general model that defines primary legislation in the terms that I see it, that is to say, through the behaviour of complex subsystems. I have classified the law as a myth and I see this myth as not only outlining how the past is to be understood but also serving as the rubric for the representation and analysis of an issue. I have come to the conclusion that the Feyerabendian notion, that there is no method or rule that can capture a science, has application to any study of the law. For, as Alexy pointed out, one of the few points of agreement in contemporary jurisprudence is that it is impossible to maintain “that the application of laws involves no more than a logical subsumption under abstractly formulated major premises”. I have asserted that the law is a myth that has been accorded a degree of legitimacy. The law cannot be considered to be an instrument for direct intervention nor is it a description of the interrelationship of subsystems. The law is the product of those that practise the law,

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1110 Lasswell H., and A. Kaplan, *Power and Society*, at p 95. I take the claim as to a formal sense merely as indicating that the enactment will remain on the statute books.

1111 I have taken this comment about ‘fixity’ from Fitzpatrick P., *Modernism and the Grounds of Law*, where the term is used in a different context.

1112 I have taken the comments about the use of a general model to understand a complex system from Kinaeva E.N., *Self-Reflective Synergetics*, at pp 8 and 9, and Kinaeva asserted, at p 9, that “[a] theory that explains everything explains nothing.”

1113 I have taken this assertion about relating the past to the issue of representation and analysis from Schwartz Frederic J., *Blind Spots*, at p 1 where it was used in a different context.

1114 See the Preface by Munarov Gonzalo, at p vi, in Preston John, Munarov Gonzalo and David Lamb. (Eds) *The Worst Enemy of Science? Essays in Memory of Paul Feyerabend*, where reference was made to the thesis advanced by Feyerabend of the impossibility of capturing science through some method or rule.


1116 These descriptions were taken from Willke Helmut, *Societal Guidance Through Law?* where they were used in a different context.
the legal practice. This legal practice can be considered to be a world of its own in that its operations and its output are hermetically sealed.\textsuperscript{1117} It seems to me that the nature of the law can be considered through a twofold process. First, the law is whatever the superior court judges have said it is, but, and this is the second aspect, the opinions of judges are developed within the discourse that is generated by the legal practice. The law flows from the discourse of those who are engaged in the practice of the law so then the law is the product of what I have called the legal practice. What those who practise the law have done is delineate, and enshrine, a narrative that outlines the mainstream view. It is through the application of this narrative that the stories that form the myth that is the law continue. This myth that is the law has acquired the status of being sacred. That is to say, action in relation to the law must be accepted as the basis of meaning.\textsuperscript{1118}

The case study I outlined related to a simple proposition of creating an obligation to wear a helmet when riding a bicycle. There is an issue about the real demand that was being satisfied. The responsible Minister made great play of the public safety issue. However, from the explanatory memorandum supporting the Bill and the parliamentary debate that ensued following the introduction of the legislation, it would seem that the primary purpose for the government in enacting primary legislation was to obtain Commonwealth funding. So, I would assert that the purpose for the introduction of the legislation was to obtain this funding. Once the necessary condition for the funding to be obtained was fulfilled the Government had little, if any, interest in the subject and as a result there is only minimal attention in ensuring that the statutory obligation is enforced. While using the one example of a particular case study to support a hypothesis does little more than raise an issue of how many examples are necessary to prove or disprove the hypothesis, an examination of the case study does suggest that there is merit in pursuing certain themes in order to place primary legislation within a perspective that reflects contemporary society.

\textsuperscript{1117} Generally see Murphy W.T., \textit{The Oldest Social Science?}, at pp 51 to 57, for a discussion of the concept of operations being hermetically sealed. \\
\textsuperscript{1118} The description of action being accepted as the basis of meaning was adapted from Gare Arran, \textit{‘Narratives and Culture: The Role of Stories in Self-creation’}, where, at p 93, the author referred to a
I would also suggest that there is support for my conclusion that it was impossible for primary legislation to be a law. For example, according to Aleinikoff, the words used by the parliament “may be strong evidence of its intent, but they are merely windows on the legislative intent (or purpose) that is the law”. The discovery or articulation of intention or purpose is a matter for the court. Certainly, the rhetoric that courts engage in continues this so-called mainstream view, with some acknowledgment that primary legislation is a law. However, I would suggest that the reality is different. The courts, while according a status to primary legislation that might well be unique, do interpret the primary legislation. Pearce and Geddes argued that, while the courts have a duty to give a meaning to legislation that is referred to them in the course of an action, the courts over the years have adopted what the authors identified as approaches and assumptions to facilitate the discovery of meaning. Courts, of course, have a duty to attempt to give meaning to whatever is referred to them. Pearce and Geddes concluded that the approaches to, and assumptions about, interpretation are not rules, but are aids to interpretation.

MacCormick has given an example of this distinction with his assertion that if the law does exist, and certainly for MacCormick there is such a thing as the law, then the law is not a brute fact but is an institutional fact. The language of MacCormick is, of course, much more sweeping:

“If law exists at all, it exists not on the level of brute creation along with shoes and ships and sealing-wax or for that matter cabbages, but rather along with kings and other paid officers of state on the plane of institutional fact.”

As I have earlier indicated, MacCormick has classified primary legislation as an institutional fact. While I disagree with that conclusion, his assertion about the nature

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1120 Pearce D.C., and R.S. Geddes, Statutory Interpretation in Australia, at p 4.
1121 Pearce D.C., and R.S. Geddes, Statutory Interpretation in Australia, at p 4.
of the law is useful. That is to say, for the law to exist there must be a supposition and acceptance of “the existence of certain human institutions”, and, of course, action by these human institutions. This aspect of the nature of the law is reinforced by the declaration of Summers that the law is fundamentally “a distinctive and complex mode of social organization”. To my mind, this so-called mode of social organisation can be expressed in the maxim that the law is the product of the legal practice. For Van Hoecke, an understanding of the law requires a multi-dimension model of reality because the law, and society, have become so complex that any linear model, and he defines such a model in terms of citizens-elections-parliamentary legislation-judicial application, cannot account for this complexity and therefore the linear model is obsolete. While the law does not consist of disembodied legal rules it does amount to more than a mere articulation of a judge made during adjudication. Such an articulation should be considered within the frame of the formulations that occur within the discourse of the legal practice as to what is the law. Luhmann acknowledged this reality with his claim that there “may be political control of legislation, but only the law can change the law”.

There is, however, a recurring question as to why and how this mainstream view of primary legislation, and the law, continues to dominate the rhetoric of the body politic and in the preceding chapter I outlined my views as to why and how this recurs. I would suggest that a focus of any further study could be to establish why the traditional view of the law and the attributes of the law continue to be so prominent in that, in my opinion, such a view ignores reality. One can appreciate that certainty is a desirable objective but

1123 MacCormick, writing about the UK experience has asserted that primary legislation comes into being “after it has been duly passed by both House of Parliament and has received the Royal Assent”. See MacCormick D.N., “Law as Institutional Fact”, at p 4. I on the other hand have asserted that primary legislation is a thing and the production process, which includes creation and publication, is a necessary attribute. I have stated my conclusion that primary legislation is a brute fact.

1124 I have taken the phrase about the existence of institutions from Searle John R., Speech Acts, at p 51, where it is used in a different context.


1126 Van Hoecke Mark., Law as Communication, at p 10.

1127 I have taken most of the description in this paragraph from Yablon Charles M., ‘Law and Metaphysics’, particularly at pp 616-618, and the author’s examination of the so-called scientific analysis of the law movement as articulated by Pound and Bingham in their attack on philosophical abstraction.

this does little to explain why platitudes about the law continue. An examination of the existence of this so-called mainstream view could begin with an acknowledgement of the reality of the significance of a judicial legislative function and place such a function at the forefront of legal theory. Australia, as the then Chief Justice has pointed out, has emerged into a form of legal realism. What form then does this legal realism take? I have suggested that whatever the law is, it is not merely a collection of the statements of superior courts because while it is the judges that expand whatever the law is: such statements flow from the discourse that is the product of a particular subsystem of society. Such a study would need to place in perspective those attributes of the body politic that constitute contemporary Australia and may well require an enhancement of systems theory to recognise endeavour as the primary determinant of subsystem structure.

A refinement of systems theory might also expand upon the field theory notion of Bourdieu by recognising the contraction of what Bourdieu classified as geographic space. This contraction has occurred because of the impact of communication developments such as the Internet and networking to, in Friedman’s terms, flatten the world. The impact of such communication development means that individuals in separate geographic locations operate as if they were located within the same office. As a consequence, the discourse that flows from a field of endeavour has an immediate and personal impact that can be likened to a discussion across a partition.

An additional theme may well be to recognise that an understanding of the nature of interpretation is not dependent upon some grand theory of interpretation. Interpretation is merely about attributing of meaning and meaning emanates from the

1129 Mason Anthony, 'The Role of the Courts at the Turn of the Century', at p 156.
1130 See footnote 840 and the accompanying text.
1131 See footnote 852 and the comments about social space in the accompanying text.
1132 Friedman Thomas, The World is Flat, particularly at pp 5-16.
1133 See, for example, the Introduction to Deciu Ritivoi Andreea, (Ed), Interpretation and its Objects. As Deciu stated, at p 4, there are epistemic assumptions and ontological commitments to interpretive practices. So it is a question of whether there is one admissible interpretation of an object or whether we can “tolerate several equally admissible though maybe not also equally preferable interpretations?”. However, as Deciu
membership of some particular subsystem and is just another product of a particular subsystem. Interpretation then flows from the adoption of whatever is the ideal language that has been appropriated by some particular field of endeavour. Perhaps within a social science such as the law, a paradigm shift based on the recognition of new facts is difficult because of the dominance within the body politic of the rhetoric of the legal practice that has enshrined the linear model of parliament enacting laws and the courts interpreting such laws. But attempts should be made to widen debate by acknowledging alternate views. For example, if, as Mason has pointed out, judges really do see themselves as a more reliable guardian of the rights of individuals than a parliament,\textsuperscript{1134} then the members of the body politic should be provided with a realistic appreciation of the precise nature of the instruments and instrumentalities such as the law, the courts, and primary legislation, so that contemporary social and political debate can be informed. An example of the narrative tenet of distrust of politicians and the political process\textsuperscript{1135} that I referred to earlier is illustrated by the claim by Mason that the political process will readily compromise basic individual rights by subverting the elements of the rule of law:

“Politicians have a powerful survival instinct. They are anxious to keep onside with popular sentiment, even more so when popular sentiment has been fanned by media-fuelled anxiety about threats to security. No politician wants to be labelled as ‘soft’ on security. So the political process is willing to compromise on basic rights and on the rule of law to convey the impression that politicians are seen as tough on terrorism. In the result, statue law may override common law protection of fundamental rights and basic elements of the rule of law. This willingness to compromise on basic rights is not confined to threats to security where the justification may seem stronger.”\textsuperscript{1136}

\textsuperscript{1134} Mason Anthony, ‘Rights Bill a Matter for Judgment’, at p 17.
\textsuperscript{1135} See footnote 1066 and the accompanying text.
\textsuperscript{1136} It seems to me paradoxic that Mason has suggested that the enactment of a bill of rights will enable the courts to continue to protect individual rights. I see such expressions as yet another example of the primacy of politics with a desire to expand power through the expression of what I have called the mainstream view. That is to say, the power of a superior court would be enhanced by the creation of a bill of rights because the proposed legislation would provide the basis for any judicial intervention by a superior court.
One of the consequences of the so-called war against terrorism is the disturbance of the rights and privileges an individual should enjoy within the society. If the notion of ‘we the people’ is to have meaning within contemporary society then there should be a free and informed debate about the nature of such a society. Brock, for example, has suggested that individuals within contemporary society are blind to what happens before their eyes and has posed the question “where will we find the foundations of wisdom to identify and expose contemporary intellectual, religious or spiritual ignorance”.\footnote{See the Graduation Address of April 2006 at the University of New England by Paul Brock as quoted by Ramsey Alan, *Amid Apathy, a Voice of Sanity*, at p 23.} It seems to be fundamental that realistic debates about the nature of such things as the law and the perceived instrument of that law are necessary to expose intellectual ignorance. That is to say, alternative views about the nature of the law and primary legislation need to be recognised by those who have responsibility within the society.

The question as to why particular views about society and the attributes of that society enjoy such prominence is rather akin to that of whether the chicken or the egg came first. There is a mainstream view as to the nature of the law. Indeed, it would be impossible for any profession group such as the legal practice to exist without some paradigm to direct thinking. Nor is there any doubt that this mainstream view as to the nature of the law and primary legislation has an exalted status within the rhetoric of the body politic. While I see this societal prominence as an exercise of power, it is problematic as to whether such a power relationship exists because of some steadfast effort by the body politic or merely through the acquiescence of the body politic. But, be that as it may, I suggest that this relationship can be explained through an application of a version of systems theory.

\footnote{Certain prominent jurists have just as readily argued that the superior court has the common law power to overturn legislation that adversely impacts on so-called fundamental rights. See Mason Anthony, *Rights Bill a Matter for Judgment*, at p 17. Interestingly, such a claim is endorsed by another prominent jurist with the claim that striving for what he called the illusory goal of full protection from terrorism will create the risk of bad laws that do greater damage to society. See Williams George, *What Price Security?*, at p 7. While Mason commented that statute law might override common law protection of fundamental rights there are clear statements that indicate the judiciary would be prepared to read down any such statutory attempt.}
The thrust of my thesis is, I suppose, plebeian in that I have described what I see as the prosaic routines of two subsystems of society that produce particular outputs. These outputs are primary legislation and the law. Both outputs are not only discrete but are also necessary for the survival of the subsystems. The view of primary legislation I have outlined reflects my professional experiences and so I argue it mirrors the realism of what happens. That is to say, my hypothesis is contingent in that it encapsulates my retirement perspective of my professional experience in the development and application of primary legislation. While I have suggested the impotence of views that do not accord with the paradigm of the legal practice, there are alternate views and mine would certainly be one such view.

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