

The Political Fitness of a Legal System: English Law, Australian Courts and the Republic

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1. *Law in Context: How Lawyers Can Be Observed to Observe Themselves, Legal Practice, and Change*

Law, as lawyers see it, does not need an explanation: they apply it because it is there. There is no gain in understanding in great detail where law comes from, or for that matter, in knowing precisely what law achieves or what it does not achieve, or how the legal system at home is different from other legal systems, as long as one knows "the law". Positive law — a conglomeration of low level abstractions of concepts of legal practice — is all there is to know. Law, then, is produced and reproduced in the way lawyers observe it and observe themselves practicing it.

Not surprisingly then, also comparative law, as perhaps the closest a "legal science" can come to scientific methodology, takes the line of low level abstractions in classifying difference as differences in concepts and institutions practiced in different legal systems. Promising high level abstractions like "legal style", "legal family" or "functionalist" approaches turn out to be typological classifications which explain little.¹ The legal systems of England, the United States and of Australia can be lumped together in the "family" of Anglo-American law, and the particular historical, cultural, economic and political differences between them can be portrayed as minor differences in quite similar legal concepts and highly kindred institutions.² What comparative law could not achieve is an approach to observe how legal systems are produced and reproduced by observing themselves.

In this way, comparative law cannot answer questions like what there is "American" about the law of the United States, "English" about the English law and "Australian" about the Australian law. Does it really matter to know?

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1 Ziegert, K A, "Juristische und soziologische Empirie des Rechts — Genese und Zukunft der Rechtsvergleichung als wissenschaftliches Problem des europäischen Rechts [Juridical and sociological empirical research on law — the origin and future of comparative law as a scientific problem for European law]" (1981) 45 *Rebels Zeitschrift* 51.

2 Zweigert, K and Kötz, H, *An Introduction to Comparative Law, Vol 1, The Framework* (1977), and more recently De Cruz, P, *A Modern Approach to Comparative Law* (1993).

Juridical knowledge, that is, legal practice has not worked out any advanced methodologies for assessing law as a socio-cultural, political and economic process because juridical knowledge does not need, and use, advanced, that is, scientific methods to observe itself.

Of course, arguments have been put, more or less convincingly, for why lawyers should be interested in social, political and cultural contexts. By and large, however, legal education and legal practice have resisted such invitations to a legal science and have, instead, insisted on cultivating self-observation.

Law, as a product of operations of self-observation by lawyers is, indeed, what legal education instils and what lawyers are good at: to work out practical solutions for the impasses of everyday life whatever their social, political and cultural framework may be. And this explains why political regimes as different as those of Henry II of England, George Washington and of the Governors of New South Wales in the 19th century (to name only the milder versions) "work" as soon as they have lawyers on side and on site and it is, in the context of the following observations, important to note that they were all lawyers trained in and practicing English law. The specific contribution of legal practice also explains why political regimes do not "work" — and we can think here of the more atrocious and comparatively short-lived versions in the recent modern history of Germany, Russia and Central and Eastern European countries — if they have no roles to play for lawyers, and no place for the self-observation of law through legal practice: "the land must be toiled with law!"³

Lawyers, and — as we want to show here — especially English lawyers, do not care much about abstract concepts of the framework of their work because they can make the framework work for them. Without such abstract concepts, lawyers can be insensitive to change because the constitution of their professional practices incorporates the experience that change matters little as far as legal practice as work practice is concerned, and that any other change can be easily accommodated by legal practice. Nevertheless, there is change and the conditions of change produce cultural differences in the ways in which legal systems control the work practices of lawyers, but also in the ways as to how legal systems are controlled by the work practices of lawyers. Such an observation of change in a wider perspective leads us to the remarkable finding, for instance, that world wide, there is only one group of lawyers who have been powerful enough to maintain their conceptual framework of legal practice as the law of the land over centuries: the English legal profession and their concept of English law, euphemistically called "common law".

The following observations deal with how legal systems observe themselves, and how the unity or identity of these legal systems is produced and reproduced by their operations of self-observation.⁴ From this angle, these observations will insist that there is subtle and not so subtle, social and legal change and that change is a process which matters. However, in order to understand the dynamics of the processes of legal change we cannot use legal concepts.

3 This is the central motive of Danish and Swedish kings beginning with the 12th century, as an early and arguably successful concept for the rule of law, or, more precisely, as will be argued here, a concept of the "law state".

4 Luhmann, N, *Das Recht der Gesellschaft* [The Law of Society] (1993) at 34.

Moreover, there are points in the development of societies when the management of legal change would have been called for but could not be invoked because legal practice had and has no concepts for change nor its management.

Our case in hand is Australia. Its peculiar geo-political and geo-physical position as a military outpost of English imperialist colonisation far away from its cultural base with self-evident disregard for autochthonous structures did not leave much choice but to begin its legal history with the practice of English common law. Even though, this type of law was eminently suited for the colonisation process, and had — as a practical, improvising lawyers' law — a proven track-record for lending support to a developing "frontier" society: undoubtedly England was a "frontier" society itself when the legal regime of common law had its formative period in early medieval times. The same applies to the United States where the political choice at the time of secession from British rule may well have been to opt for a somewhat more modern "anti-British" legal regime but where the subtle legal sub-text of federalist republicanism was the practice of English common law, and with the grammar of common law lawyers, well in place and sprawling along the wide, amorphous frontier to the West sustained by practical interests, in an independent trade, based on slave-labour economy.

The common law practice dominated the slow development of Australia, its torpid demographic transition to a modern society never quite making it to an industrial society. In this process, neither unification nor independent identity — usually and elsewhere strong political concepts for growing constitutional awareness, and for a fundamental review of the legal system, often resulting in the "foundation" act of a modern, codified state law — were issues for the Australian legal system. Law was already constituted, like the pre-constitutional English legal system 800 years earlier, long before questions as to its political fitness arose. Australian society passed all stages of its unspectacular but steady transition from a British colony to something else with its legal system remarkably intact. In a paradoxical, English way, the legal system provided the constitutional framework for the transition of Australian society to a highly unique society among modern societies without having ever been subjected to the test of political fitness.

It could be argued that such a test of the political fitness of the Australian legal system is now overdue and may be close. The remarkable but inevitable opening of Australian society to a multicultural society, with a growing awareness for the differentiation of internal, regional and international references, the revived political discussion on Australian constitutional law, and the political constitution of the Australian national state may finally turn to the question of how fit the law of the lawyers of the English queens and kings is to constitute the modern law of a federal republic of Australia.

Here sociological jurisprudence and sociolegal research can contribute to an informed discussion on the political fitness of the Australian legal system because they can provide concepts which legal practice cannot provide. Such concepts can help to track the development of law as a socio-cultural process and as part of the complex socio-cultural development of any given society. This development is a process of social differentiation. Therefore, a key for understanding the operation of a legal system over time is to spell out, in sufficient detail, the characteristics of the differentiation of social systems and legal systems (section 2). This will provide us with criteria on a higher level of

abstraction, that is, applicable to all legal systems in the world, which can be used to spell out, on the one hand, the relevant formative properties of English law (section 3.A) and, on the other hand, the differentiation of a specific Australian legal system (section 3.B). It will follow from this theoretical construct that the most important feature of the political fitness of a legal system is the institutionalisation of the administration of justice in courts and by judges (section 4). Therefore, the key issue of the debate on constitutional and legal changes which will reflect the specific social differentiation of Australian state and society over the past 200 years, and more importantly over the last 50 years, can be expected to be a law reform which is based on an adequate understanding of the fundamental, special role of courts and judges in correlation with the transition of Australia to a modern, multicultural and pluralist society and to a democratic, republican, federal state.

2. *Social Differentiation: Social Systems, Legal Systems, Court Systems, and Courtroom Communication Systems*

We gain a sufficiently high level of abstraction for our observations by starting not with law, but with the question as to what constitutes everyday life, or in other words, how people organise their living day by day. From here, we can name the factors or conditions which are relevant for the operation of law in the form of a conditional matrix.⁵ In summarising earlier research on social differentiation and in particular on legal differentiation,⁶ basic propositions of that array of relevant theoretical concepts for understanding social dynamics are the following:

- i In relation to social process: the "units of observation" of social structure are neither individuals nor groups of individuals, nor individual behaviour or actions, but interrelated events which happen "between people" and which link individuals to events rather than individuals to each other; social process is the concatenation of interrelated events;
- ii In relation to social organisation: the social quality of these events is given through an emerging system of human practice which attributes

5 In the exercise of theory-building, a conditional matrix is an analytical aid, a diagram (or here: a series of diagrams) which is useful in considering a wide range of conditions and consequences related to the phenomenon under study (here: legal practice and change of legal practice). The matrix enables the analyst to both distinguish and link levels along a conditional path in order to track events through the various conditional and consequential levels, and vice versa, and to link them directly to a phenomenon, see Strauss, A and Corbin, J, *Basics of Qualitative Research. Grounded Theory in Procedures and Techniques* (1990) at 158 and 161.

6 Luhmann, N, *Soziologische Aufklärung, Aufsätze zur Theorie sozialer Systeme* [Sociological Enlightenment. Essays on a Theory of Social Systems] (1970); Luhmann, N, *Soziale Systeme. Grundriss einer allgemeinen Theorie* [Social Systems. An outline of a general theory] (1984); Ziegert, K A, *Zur Effektivität der Rechtssoziologie. Die Rekonstruktion der Gesellschaft durch Recht* [Towards the Effectiveness of Sociology of Law. The Reconstruction of Society through Law] (1975); Ziegert, K A, "Courts and the Self-Concept of Law. The Mapping of the Environment by Courts of First Instance" (1992) 14 *Syd LR* 196.

social meaning to events and which organises normatively, that is through social practice, what little control people have over social process through the management of events by communicating about them;

- iii In relation to social control: the management of events through communication has the consequence that individuals ultimately control themselves and each other rather than that they control social process.

The concept of human practice can be seen as the key concept for explaining social phenomena on both the micro and the macro-sociological levels. It is a deliberate substitution for the notion of "world-society", and it avoids the ambiguous concept of "society" with its diffuse image of an unspecified number of individuals who interact with each other in a number of unspecified ways in an unspecified territory over an unspecified time. Moreover, the concept of "practice" stresses the normative aspect of the daily arrangements of interrelated operations. A brief discussion as to how human practice constitutes the parameters for coping with everyday life can take us quickly through to what this implies for legal theory and for comparative jurisprudence. This provides the conceptual framework for the conditional matrix of the circumstances under which English and Australian legal systems developed over time.

Inevitably this discussion will be abstract and often awkward but it will provide the crucial tools for the analysis of the political fitness of legal systems. However, readers who are not interested in the sociological details of the approach which is presented here may prefer to bypass this section, and join the discussion at section 3 where the situation of English and Australian law will be sketched summarily, as a preliminary framework for a more thorough study of the transition of Australian law to modern law, and its consequences for law reform.

In beginning our analysis at the level of everyday life, a closer look reveals that the characteristic property of human practice is communication. Only communication among human individuals, and nothing else, defines and instrumentalises references to the world and to other human beings. Such a use of references constituted by human practice is in stark contrast to the world, both at large and in everyday experience, to which communication refers but which — including the body and the physical functions of the body — is experienced by humans as a pervasive setting of environmental and "natural" conditions which do not "speak" to them, or at best, only speak to them through other humans. Only communication attributes "meaning" to events between individuals, but "meaning" can only be achieved at the cost of normative constructs which are and remain doubtful as to which reality or part of the reality they actually refer to. Normation, therefore, is "risky". It is, by default, inward-looking and it necessarily reduces the number of references to the "real" world to only a few which happen to be established as useful in given identified social contexts. This reduction of the complexity and variability of the world to the restricted view from inside is a fundamental conceptual operation which can be called closure. It renders invisible a far more complex world than can be referred to, and it opts for strategic choices in view of the open-ended and unfathomable world (see Graph 1). Human practice, as communication, is the first and most general level of our conditional matrix. It cannot and does not address the "true nature" of the world at large, whatever that nature may be, but is a human practice arrangement for the management

and maintenance of reliable references to the world. It is achieved and reproduced by adherence to established and accepted normative constructs of meaning (concepts). This normative closure of concepts provides the only available basis for human practice operations, and it can only be achieved socially: it takes at least one sender and one receiver of communication to establish human practice — the one cannot refer to anything without the other, and “truth”, that is, the recognition of and the acceptance of the validity of a reference, begins with the two who “establish truth” between them.⁷

Social structure is an exclusive property of communication, and an expression of on-going processes of operative closure. Importantly, this means that social structure can only be maintained when and where communication takes place and where it is on-going. For instance archaeological finds and objects of foreign and past cultures only “talk” to us in terms of the social structure of our own present culture, and also the recall of our own historical past or of an individual biographical past uses the concepts and conditions of the day in order to recall that past. Obviously, the reproduction of social structure through communication is a complex and multilateral process which “happens all the time”. In order to distinguish relevant theoretical concepts for the observation of this process, especially with legal communication in mind, we propose to analytically dissect the ensemble of communicative events into communication on four different levels (see Graph 5).

Level 1 — Human Practice (see Graph 1)

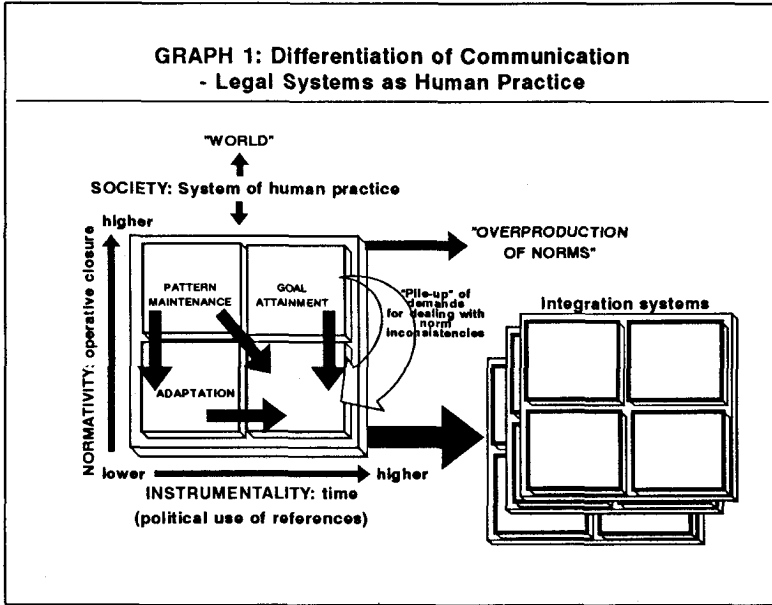
Operative closure as the basic communicative design of human practice is relative and context-sensitive. This means that new experiences find their way into communication by the differentiation of accepted concepts, and the modification of the established use of references, or in other words “communication [is] the ongoing conversion of information into redundancy”.⁸ Converting variety into redundancy in this way opens the use of references from event to event, and thus it differentiates, step by step, the specific forms with which the operative closure of references is maintained. For analytical purposes we can distinguish two dimensions of such a gradual differentiation. One dimension is normativity, that is, the degree of the relative closedness of the references which are used for communication, and which ensure a comfortable degree of redundancy. The other dimension is instrumentality, that is, the relative short or long-term political use or usefulness of references which are used for communication.⁹ As a result of such a differentiation of communications patterns,

7 So already F Nietzsche: “Einer hat immer unrecht: aber mit zweien beginnt die Wahrheit. — Einer kann sich nicht beweisen: aber zweie kann man bereits nicht widerlegen [One individual is always wrong but with two the truth begins; one individual cannot prove anything but already two cannot be contradicted]”. Nietzsche, F, *Die fröhliche Wissenschaft* [The Happy Science] (1886).

8 Luhmann, N, “Legal Argumentation: An Analysis of its form” (1995) 58 *Mod LR* 285 at 291.

9 The dimensions “normativity” (operative closure) and “instrumentality” (political use of references in relation to a controlled time frame) follow the two basic dimensions of operations which constitute systems (including social and personal systems) by reference to the observed results of operations: “desensibilisation” (closure) and “stabilisation of conditions” (instrumentality), see Ziegert, K A, (1975) above n6 at 232–4; Luhmann, N, “Warum AGIL? [Why AGIL?]” (1988) 40 *Kölner Zeitschrift für Soziologie und Sozialpsychologie* 129 at 131–2.

highly complex, differentiated patterns of communication delineate and structure different areas of human practice, that is, areas of communication which constitute various degrees of redundancy and/or variability through specific forms of the use of references.



Graph 1: The observed “units” depicted in this graph are used references, that is, communication events in coping with an environmental setting “world”. Coping is defined as the process of formulating references to the observed results of a previous use of references. Coping processes constitute the social system, or — at the most general level here — the system of human practice. Its dimensions are instrumentality (or, stabilisation of conditions in a controlled time frame through a political use of references) — presented here horizontally — and normativity (or, desensibilisation through the operative closure of the use of references) — presented here vertically. The most reliable use of references (relatively high normativity, relatively low instrumentality) is in an area of pattern maintenance (or, cultural communication) which is the platform for and sustains all subsequent differentiations of the use of references. Along the dimensions of normativity and instrumentality, we can distinguish an area of relatively high normativity and high instrumentality defined as goal attainment (or, political communication) and/or in an area of relatively low normativity and low instrumentality defined as adaptation (or, economic communication). The complex patterns of a differentiation of the, always normative, use of references creates an “overproduction of norms”, that is, for each operation a new set of norms which are not necessarily consistent with previous ones or each other, and a “pile-up” of demands to deal with norm inconsistencies through a use of references in an area of relatively low normativity and high instrumentality, defined as integration (or community communication). With further differentiation of human practice, this area of the use of references is further differentiated as reflected by the emergence of a variety of different, specialised integration systems, among them moral communication, customs communication and legal communication, but also State communication. Guided by the concept of differentiation, the directions of social process, indicated here by the arrows inside the quarters, are “from the bottom up”

rather than from the "top down", and from a use of references to social vicinity (or "familiarity") to a use of references to social distance. This observation leads to the assumption then, that for example, communication in the area of pattern maintenance is the most formative, resilient and fundamental but also the most redundant use of references, and in this sense: the most vital form of communication in human practice while communication in the area of integration is the most fragile, superstructural, but also most variable and in this sense: artificial use of references in human practice arrangements.

For a more detailed look at processes of differentiation, as profiled by the dimensions of the degree of closure (normativity) and the degree of instrumentality (political use of references), we have to move to the second level of our conditional matrix. This level is defined by the specialisation of communication in the different areas of human practice. In order to identify and label such areas we use, for convenience, the established terms¹⁰ of pattern maintenance, goal attainment, adaptation and integration (see Graph 1).

For the purposes of the discussion here we follow, in particular, the differentiation path of integrative communication (see Graph 1). However, if we were not interested in law but, say, cultural communication or politics, we could similarly follow the differentiation path of, for instance, cultural communication in the area of pattern maintenance or political communication in the area of goal attainment. The area of human practice with which we are most concerned here, however, is an area in which patterns of communication respond to the "fallout" of necessarily not other than normatively constituted references in all their differentiated varieties: norms in abundance, and norms at variance with each other, each norm equally socially valid (that is, providing operative closure and instrumentality) but not necessarily consistent with other norms. In other words, communication — as an everyday-life coping device — results simultaneously in a heterogeneous over-production of norms and a "pile-up" of demands for dealing with the inconsistencies of normatively constituted references. Integrative communication deals with those demands — normatively.

The horizon, then, which is addressed by integration is not the world at large — something lawyers like to call "the facts" as in contrast to "the law" — but the abundance of inconsistent norms which is a result of human practice operations in all areas of everyday-life communication. The use of references which constitutes integrative communication is relatively highly instrumental and relatively open (with relatively low normativity). Research shows that those communication patterns refer, above all, to concepts of procedures and programs which can absorb in their arrangements the norm inconsistencies created by differentiated human practice. The patterns of integrative communication are in this way quite different from those which constitute the concepts of social control in an area of relatively high normativity and low instrumentality of the use of references.¹¹ These latter forms of communication

10 Sociological experts will recognise the classic "AGIP" formula of Talcott Parsons, see Parsons, T, *The Social System* (1951). However, it must be stressed that here we use only the labels and not the underlying concepts of Parsons' theory, in particular not his wide use of the concept of "social action".

11 With these features, social control is of only limited use in the larger context of highly differentiated communication processes like those constituted by integration systems and towards individualist, pluralist and multicultural societies. This limited usefulness of social

are more aligned with patterns of socialisation, enculturation and individual self-concept formation (human development).¹² Of course, also integrative communication systems cannot but use references normatively in order to produce and reproduce concepts, for instance, of a communal moot or a Germanic "thing" or of authoritative elders or the authority of a patriarch, king or the State. Legal systems branch out from such integrative communication systems, but all integration systems together compound the "normating of norms" in response to pressures for dealing with the inconsistencies of normative human practice arrangements.

Level 2 — Legal Practice (see Graphs 2 to 4)

A specialised form of human practice, legal practice can, then, be seen as a distinct area of communication which forms the second level of our conditional matrix. A move to this level would correspond to a similar move to specialised levels of cultural, political or economic communication in order to arrive at specific cultural systems (for instance, families or peer-groups), political systems (for instance, religious systems) or economic systems (for instance, market economy) respectively which must remain outside the scope of a detailed discussion here.

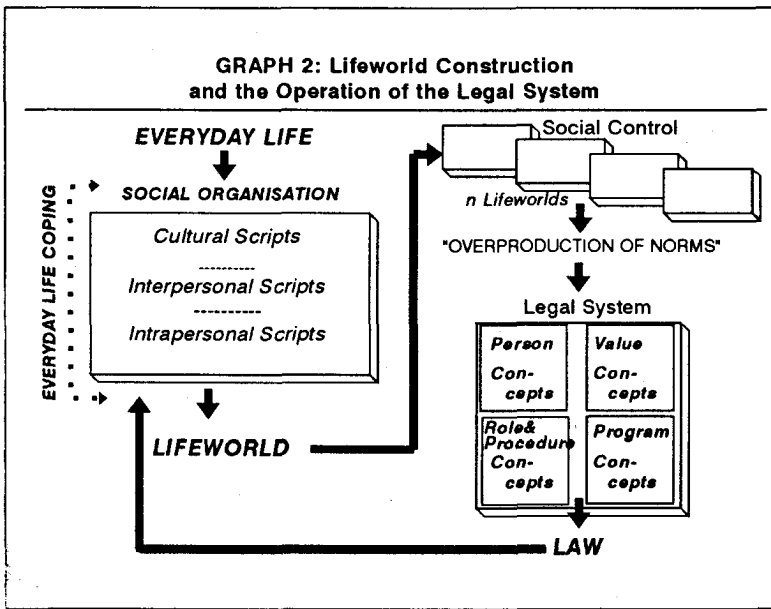
Legal communication, accordingly, is a further differentiation of integrative communication which constitutes and reproduces special forms of the "normation of norms". Legal communication may vary in its forms throughout history and across cultures, but the pile-up of demand for a normation of norms, that is, for legal decision-making, is never in doubt. It is the very constitutive requirement for the differentiation of legal practice as a speciality of human practice. All historical, social anthropological and sociological research confirms this pressure of demand as the primary source for legal practice. The body of constructs which results from legal practice ("law") is the formal outcome of, rather than a principle for, legal practice.

The gyrations of operatively closed forms of human practice towards a pile-up of demands for normative decision making are also evident when we change our perspective and look at how individuals cope with everyday life (see Graph 2). Individuals organise their daily coping as a result of and in tune with the normative constructs which, for them, represent their lifeworlds. These constructs are constituted by intricate sets of cultural (normative) scripts,¹³ interpersonal (normative) scripts and intrapersonal (normative)

control in a larger context is often overlooked when law is simplistically equated with social control, mainly for purposes of, politically communicated, legal policies, see Ziegert, K A, "A Sociologist's View" in Kamenka, E and Tay, A E S (eds), *Law and Social Control* (1980) at 60, and Cohen, S, *Visions of Social Control: Crime, Punishment, and Classifications* (1985).

- 12 This observation of human, individual development as a "constructive" concept-forming process which, ultimately, constitutes the unity of self through a concept of self, see Rosenberg, M, *Conceiving the Self* (1979). This observation has important consequences for the understanding of how communication, including legal communication is constituted as a self-referential "inside-out" operation (see below).
- 13 We use here the social-psychological concept of "script" to denote an operative design which gives (accessible) form to a string of normative concepts for a habitualised use of references on the basis of past experience. For a more detailed account of script theory see

scripts. They are a product of the life history of every given individual. As an operative design for each individual to cope with everyday life, a script is never identical with the script of another individual. Consequently, resulting individual operations are more often than not in conflict with the operations of other individuals — as each pub brawl and each domestic argument confirms. The vital necessity of normative closure for the constitution of everyday life operations feeds a plurality of equally valid, and socially functional but heterogeneous, and often aversive usages of references. We have called this constitutive plurality of normative designs the “overproduction of norms”.¹⁴ The legal system can be seen as a differentiated response by human practice to the plurality of operatively closed lifeworlds, and their normative fallout. Legal systems confront this plurality of normative designs with the constitution of their own normative, namely legal, scripts through a selective operation of references to the lifeworld-data which are presented by the parties to a conflict from event to event, and which are submitted to legal communication from case to case. As a result, legal systems construct a lifeworld of their own. This construct of a legal lifeworld is “law”. The on-going selective scripting of strings of legal concepts forms the (historical and systemic) self-concept of the legal system, that is a normative matrix of what constitutes “law” and what does not. In this way, the historically scripted self-concept of a legal system (“law”) provides the secure, normative base for its own operative closure.



Simon, W and Gagnon, J H, "Sexual Scripts: Performance and Change" (1986) 15 *Archives of Sexual Behaviour* 97.

- 14 This admittedly awkward term is intended to contradict notions that there could be an a priori norm-set, that is, a unilateral and homogeneous set of norms for all human beings (for instance, natural law), and all that remains for jurisprudence to do is to find it. The concept of an "over-production of norms" confirms that consistency and lack of ambiguity are not requirements for the functioning of norms but that operative closure is this requirement.

Graph 2: The incessant stream of everyday life events is converted by the historically specific conditions of social organisation into meaningful concepts which can be accessed selectively through communication. Scripts give form to selectively constituted strings of concepts as communicated culturally (that is, between members of a group), interpersonally (that is, between an individual and significant others), and intrapersonally (that is, through individual experience constituting the personal self-concept). Scripting provides the normative matrix for the use of references to a relevant lifeworld. This construct provides, in turn, the (normative) operative base for individual human practice. The necessarily pluralist constitution of lifeworlds overall suggests an overproduction of norms, in which all norms are equally constitutive for operative closure but not necessarily consistent with each other. The legal system emerges as a special form of communication (legal communication) which responds to a pile-up of demands for a normation of norms. This communication is constituted and reproduced by a specific scripting of legal concepts (highly normative/little instrumental: person concepts; highly normative/highly instrumental: value concepts; little normative/little instrumental: role concepts and procedure concepts; little normative/highly instrumental: program concepts) which forms, through legal practice, the self-concept of the legal system ("law") as its conceptual operative base. As such, legal concepts and law can be, but do not need to be, selectively adapted by the community at large for the scripting by individuals in coping with everyday life.

Legal self-concept operations, as human practice operations, are not and cannot be structurally different from other human self-concept operations. Communication can only operate if selection of references is guided by the scripting of the self-concept, has consequences only for the self-concept, and is above all, operated with a design to protect and to maintain the self-concept. References to legal concepts can be used in other than legal communication only if such references are actively selected by such communication. These selection processes are out of reach and out of control of the legal system, and they are exclusively controlled by everyday life coping operations (see Graph 2). Seen in this way, the effectiveness of legal systems, that is, their power to find acceptance for and commitment to legal references, cannot be achieved by legal practice. This effectiveness rests exclusively on the acceptance (selection) of legal concepts through the use of relevant references in other than legal communication. That means in order to be successful legal communication must be actually communicated and understandable, amenable and not aversive.¹⁵ Threat ("deterrent") and coercion lead invariably to an avoidance of communication, that is, ultimately to a rejection of acceptance and commitment. This is the strong message of all research on the low degree of efficiency of criminal law and criminal law policies.¹⁶ But also findings of recent research on procedural justice support these observations as to how scripting through reference to legal concepts works. These findings suggest that only when individuals can link their personal self-concept of standing and respect to the process of decision-making, and when courts and judicial decision-makers address the demands for forms of communication which express a personal recognition of the parties, those decisions, and irrespective of their legal merits, are acceptable and accepted by the parties through scripting them as "just".¹⁷

15 Ziegert, above n6.

16 Cohen, above n11.

17 Lind, E A, "Procedural Justice and Culture: Evidence for Ubiquitous Process Concerns"

This observation leads to one of the central research issues of sociolegal research, namely the question as to "how law works", that is, how "legal impact" can be assumed, observed or even measured. The doctrinal answer here is that legal control is achieved through an alleged "law enforcement" via "norm implementation" with subsequent "norm conformity" under the threat of sanctions. There is little empirical evidence that law enforcement has, in fact, any of these legally scripted and therefore supposed effects.¹⁸ Rather, this coercive concept of law enforcement is the result of a dilemma in which each perceived act of deviance and "each narrative of lawless violence reminds us that law's violence constitutes us as anxious, fearful subjects caught between a fearful aversion to the former and a fearful embrace of the latter".¹⁹

In view of what has been said about the self-concept operations of legal communication, we can say that normative assumptions of lasting coercive effects of law enforcement are certainly constitutive for legal scripting but too mechanical and too simplistic as an empirical account as to what makes legal decisions and legal-administrative acts "binding". Legal control reaches only as far as legal communication can reach. Also here, as with all communication, the success and the meaning of a message are determined by the scripting audience and not by the scripts of the sender. In other words, most of legal communication is operated purely for the purpose of internal differentiation, converting variety into redundancy, and so for a reproduction of the legal self-concept. Most of it is lost on a wider audience. This observation suggests a further modification of our conditional matrix of legal practice operations which can reflect that formative, and central, concern with the legal self-concept (see Graph 3).

Our observations lead to the assumption that the large majority of all legal practice operations protect, maintain and reproduce the legal self-concept. In order to do so, many of these operations serve the further differentiation of legal concepts, mainly through case-law and legislative programs, that is, through doctrinal, textual adaptations of legal references as supported by "live" courtroom communication (see below). However, many operations are also drained into a diffuse sediment of highly redundant, ritualistic forms and references with uncertain meaning. We must assume that these forms are operated in order to render invisible, by demonstrative symbolic actions, the high redundancy of these operations which have, in fact, a low degree of control over the outcomes. These actions are constitutive and stabilising for the reproduction of the legal self-concept, precisely because of their high redundancy, but their conceptual design does not deal very well with the high variety of the contexts of legal outcomes. They are in this sense, without control over outcomes, that is, acratia actions.²⁰

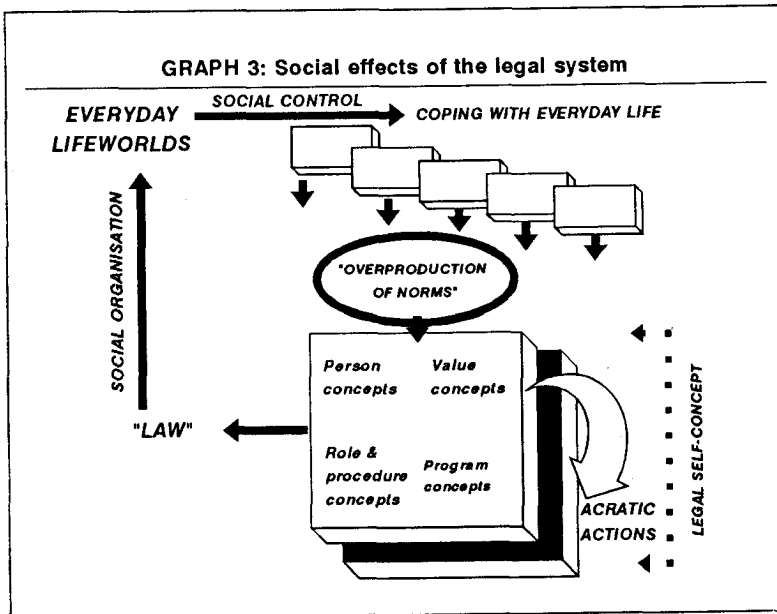
(1994) 15 *Zeitschrift für Rechtssoziologie* 24 at 36.

18 Above n16.

19 Sarat, A, "Speaking of Death: Narratives of Violence in Capital Trials" (1993) 27 *L Soc R* 19 at 55.

20 Acratic derives from Greek "akrasia = out of control", see Luhmann, N, "Strukturelle Defizite [Structural Deficits]" in Oelkers, J and Tenorth, H E (eds), *Paedagogik, Erziehungswissenschaft und Systemtheorie* (1987) 57 at 61. Examples would be actions like "doing justice", "keeping peace" or actions which appear to satisfy a requirement that "justice must be seen to be done". Further examples are also many traditional courtroom practices

On the other hand, legal practice supports human practice in everyday coping by adding normative concepts to the operative repertoire of human practice. However, this support is only indirectly controlled by the legal system and relies mainly on the conditions under which legal concepts, "law", can be selected by social organisation to affect the scripting of everyday lifeworlds. In this view, legal practice is only selected into scripts for everyday life coping if it is coupled with further supportive communication which is provided by other than legal communication. Here we can refer again to the findings of research on procedural justice as empirical evidence that the legal "correctness" of a decision is not enough for legal references in order to be scripted as "just".²¹



Graph 3: The graph depicts the differentiation of the modes of operation of legal practice and their outcomes. The dominant feature of legal practice is, in response to the demand for decision-making due to the overproduction of norms, the protection, maintenance and reproduction of the legal self-concept. This can take either the forms of a further differentiation of person concepts, value concepts, role and procedure concepts and program concepts constituted in legal texts. However, the maintenance of the legal self-concept also takes the forms of acritic actions, which through their design cannot affect what are maintained as their effects. In contrast, differentiated legal concepts ("law") can provide a supportive infrastructure when selected by social organisation for the constitution of lifeworlds and their giving form to social control in coping with everyday life.

of lawyers and judges, and all operations of a jury in a modern legal system (see below). All these operations all imply effects of legal operations but cannot spell out precisely what these effects are.

21 Above n17.

It follows from the observation of these conditions of legal practice that the less differentiated legal systems are, the less they provide detailed concepts which can be effectively linked with other forms of communication. This means that legal practice is less able to offer chances for the support of human practice in everyday coping. Instead, legal practice resorts to highly symbolic, acritic actions in order to render invisible its actual lack of control over outcomes.

Based on this distinction between differentiated and acritic legal operations we can assume that the "attractiveness" of legal communication for a wider public in everyday life is positively related to the degree of its internal differentiation. It is this degree of internal differentiation of the legal system which hinders or facilitates that legal references can be entered less or more speedily and effectively into on-going lifeworld construction, and can be referred to in daily human practice operations.

A higher degree of internal differentiation also allows legal practice to "map its environment" more effectively and to provide conceptual links with other forms of communication. This more effective use of legal references to differentiated concepts which are provided by other areas of human practice on an institutionalised basis can be defined as structural coupling.²² Schematically, four especially distinct instances of such a conceptual alignment of the use of legal references with the use of references to other forms of communication stand out (see Graph 4).

The prohibitive function of law, in an area of a relatively high normativity and low instrumentality of the use of legal references exercised by, for instance, criminal law, can be reinforced by a structural coupling with social control concepts like customs, folk-ways and popular culture. These linkages increase the effectiveness of criminal law in spite of its limited instrumental potential.

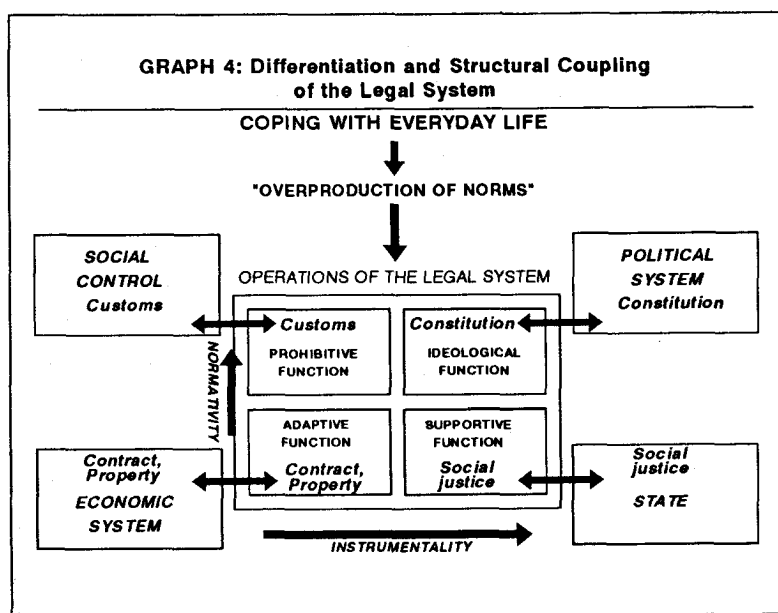
The ideological function of law, in an area of relatively high normativity and high instrumentality of the use of legal references exercised by, for instance, the legal reference to basic, civil and human rights, can be reinforced by a structural coupling with political system concepts like constitutional concepts. This coupling of political with legal concepts increases the effectiveness of constitutional law as a guarantee for and an effective review of the implementation of political promises.

The adaptive function of law, in an area of relatively low normativity and low instrumentality of the use of legal references as exercised by, for instance, private law, and especially economic and commercial law, can be reinforced by a structural coupling with economic system concepts like contract or property. This enhances the effectiveness of private law as a guarantee for and an effective review of the opportunities for free enterprise and free trade.

The supportive function of law, in an area of relatively low normativity and high instrumentality of the use of legal references as exercised by, for instance, social security, welfare and equal opportunity law, can be reinforced by a structural coupling with welfare state and "Rechtsstaat" concepts. This enhances the effectiveness of public and administrative law as a guarantee for

22 Luhmann, N, "Verfassung als evolutionäre Errungenschaft [Constitution as evolutionary Achievement]" (1990) 9 *Rechtshistorisches Journal* 176.

and an effective review of the implementation of state and welfare programs (see Graph 4).



Graph 4: The graph depicts the instances of the structural coupling of a differentiated legal system in four distinct areas of the use of legal references: the prohibitive function of a differentiated legal system is enhanced by structural coupling with social control concepts; the ideological function is enhanced by structural coupling with political system concepts; the adaptive function is enhanced by structural coupling with economic system concepts, and the supportive function is enhanced by structural coupling with state concepts.

Level 3 — The Courts System (see Graph 5)

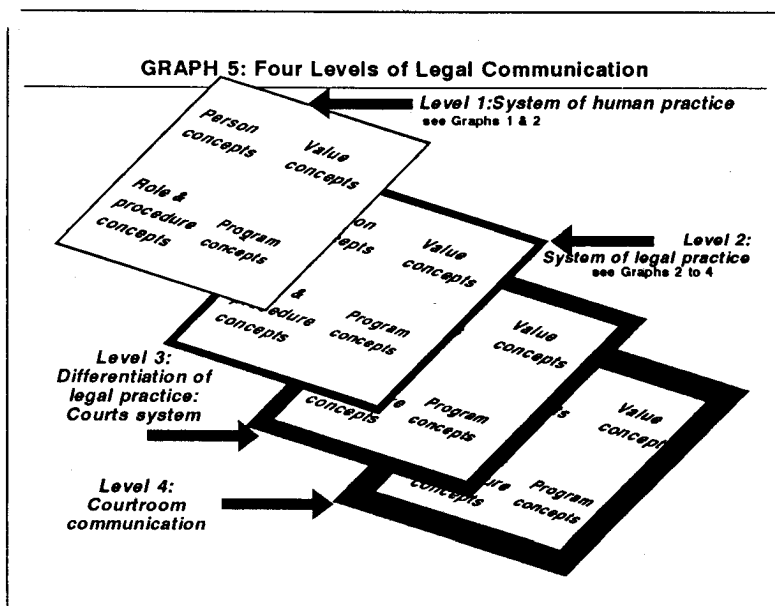
Putting our conditional matrix of legal operations into dynamic "action", we can distinguish a further level of a distinct specialisation of the use of legal references. On this level of, on the one hand, administrative acts, and, on the other hand, acratik actions, courts are in a central and commanding position in each respective legal system²³ to reproduce legal communication by both "clawing their way back to the facts"²⁴ and by protecting and maintaining a consistent legal self-concept.²⁵ The hierarchical differentiation of the instances of that communication allows us to specialise practices for self-concept maintenance (in the higher courts and through "hard cases") and separate them

23 Luhmann, N, "Di Stellung der Gerichte im Rechtssystem [The Position of Courts in the Legal System]" (1990) 21 *Rechtstheorie* 459

24 Shapiro, M, *Courts: A Comparative and Political Analysis* (1981) at 37.

25 Above n15.

from routine administrative practices which are primarily designed to relieve the court system from work-load pressures (in the lower and "local" courts). However, significantly, courts on all levels do practically the same,²⁶ and the interculturally varied patterns²⁷ of the hierarchisation and differentiation of the instances of the administration of justice, that is courts and all "court-like" agencies with the functions of courts, are a matter of historical differentiation. Court organisation is not a principled matter, and no ideal type for court organisation exists.



Graph 5: The graph completes the depiction of the matrix of conditions (conditional matrix) under which legal practice is differentiated and stabilised on specific levels of operations. The basic, formative level (level 1) is that of human practice conditions in general. Differentiation of a specific integrative form of communication establishes legal practice as a special communication system (legal system — level 2) which uses its self-concept operations for further differentiation of a specific system of the administration of justice (courts system — level 3) which is constituted and reproduced in its day by day operations by courtroom-communication (level 4).

²⁶ Above n6.

²⁷ Here notably the "oppositional pair" of adversary and inquisitorial court organisation patterns in the development of European law, in which the adversary pattern appears historically as the traditional Germanic pattern and the inquisitorial pattern as the "modern" concept, introduced by ecclesiastical courts in England and on the European continent.

Level 4 — Courtroom Communication (level 4)

Courtroom communication, in turn, appears to be at the very core of court systems and of legal practice as a whole. It is the place where the law "talks" in a translegal, transcultural, transnational, and in fact universal fashion. Courtroom communication systems represent, in the work of judges, the "hub of the wheel"²⁸ of legal communication, and through that of legal system operations. The major transcultural feature of courtroom communication is the triadic,²⁹ three-party flow of communication through which normative references adduced by two parties are confronted argumentatively with each other in a procedural context which is controlled by a third party.³⁰ While courtroom communication exhibits, again universally, the appearance of limitless non-discrimination against who is heard and what can be heard and what is said in courts, and an atmosphere of limitless patience to listen, it is at pains to render invisible the highly effective selectiveness of references which are accepted for the use in this communication process.³¹ Through this high selectiveness which is brought about by the sum of the multi-layered conditions of scripting of human and legal practice which we have observed here, courtroom communication is able to give firm legal form to the high variety of events. It is this selective form of legal argument in court, and its shadow of what may be argued in court, which allow us to distinguish relevant concepts of events, and to establish them as legal references to events. Also legal argument in courtroom communication, like communication in general, achieves this through cautiously converting information into redundancy:

Argument overwhelmingly reactivates known grounds, but in the practice of distinguishing and overruling occasionally also invents new ones, to achieve a position where the [courtroom communication] system can, on the basis of a little new information, fairly quickly work out what state it is in and what state it is moving to. Using argument, the system reduces its own surprise to a tolerable amount and allows information only as "differences added in small numbers to the stream of reassurances".³²

However, constructs like "grounds" and "errors"³³ but also like "motives"³⁴ which protect the legal self-concept, that is, pass the pervasive test of how stories "stand up" in court against the authority of the legal self-concept, promise more certainty than legal communication can keep in order to make judicial decisions binding. In this way, all courts labour under great pressure to have to construct the "authorised" story out of many possible ones,³⁵ and to

28 Ulmer, J T, "Trial Judges in Rural Communities: Contexts, Organizational Relations, and Interaction Strategies" (1994) 23 *J Contemp Ethnography* 79 at 81.

29 Above n24.

30 For an original early operationalisation of the concept of three party configurations for empirical research on courts see Geiger, T, *Vorstudien zu einer Soziologie des Rechts* [Preliminary studies towards a Sociology of Law] (1947).

31 Mathiesen, T, *Skjellig grunn til mistanke? En studie av forhrsretten* [Grounds for reasonable doubt? A study of trial courts] (1989).

32 Above n8 at 292.

33 Id at 285.

34 Luhmann, N, *Legitimation durch Verfahren* [Legitimacy through Procedure] (1969) at 79; Hopper, J, "The Rhetoric of Motives in Divorce" 55 *J Marriage and the Family* 801.

35 It is important to insist that courtroom communication does not detect and establish "the facts" about the events of a given case but must construct its own "authorised version" of events through the co-operation of the participants in courtroom communication to agree

have to demonstrate the authority of this construct, which, after all, is only built on plausibility induced by redundancy, through decisive action. While judges clearly control legal communication in the court room, their control over how law is implemented and enforced in everyday life is far from clear. Therefore, we must suspect that courts are, universally, the place where most of the acrotic actions of legal systems occur. Or, one must appreciate every instance where legal systems have differentiated their institutional settings to such a degree that they can support an emancipation of courtroom communication from the "tyranny" of its acrotic actions.

3. *Historical Contexts: English Law and Australian Courts*

We have sketched social and legal differentiation in detail in order to be able to distinguish between legal systems. The emerging richly detailed theoretical framework can only be obtained at the cost of high level abstractions which can address the considerable degree of variety which is encountered when observing the differentiation of legal systems on their way to modern law. This theoretical framework can be applied now to distinguish between the structural profiles of English law and Australian law.

As we are not concerned with historical detail, a summary outline must suffice for the purposes of a re-interpretation of the key events and key features of English law and for contrasting them with the key features of Australian law. In this way, well-known processes and events which can be seen as relevant for the requirements of political fitness of modern law, can be identified in a summary fashion.

A. *Key Events and Key Features of English Law in the Light of Legal System Differentiation*

The outstanding features of English law are

- i the remarkable continuity of legal practice on an almost uninterrupted trajectory since its early medieval formative period,
- ii the timing of the formative period of English legal practice before the formative period of a modern English state,
- iii as a result of this asynchronicity of the development of English state and law, the para-constitutionality of the position of the English legal profession, including the English judiciary in the English legal system.

The formative period of the English legal system can be dated as the period of centralisation of the courts system under the reign of Henry II [1154-1189].³⁶ Its long, uninterrupted run on the course of differentiation, sketched

on an authorised version. The participation of expert witnesses in courtroom communication, deriving their authority for expertise from outside the authority of courtroom communication but who cannot rely on their scientific authority in court, is particularly revealing in this respect, see Knauth, B and Wolff, S, "Realität für alle praktischen Zwecke. Die Sicherstellung von Tatsächlichkeit in psychiatrischen Gerichtsgutachten [Reality for all Intents and Purposes. The Attainment of Factuality by Psychiatrist Expert Witnesses]" (1990) 11 *Zeitschrift für Rechtssoziologie* 211.

36 De Cruz, above n2 at 89-90; Baker, J H, *An Introduction to English History*, (2nd edn,

generally above, is unique in European history. Here, the differentiation of a legal self-concept is based on the formation of a status-group of legal practitioners with a highly restricted access, and through peculiar, status-related recruitment rituals. With it, England had, from an early date, at the latest by the fourteenth century, a bench and bar which were united by their membership to a common interest group, that is, the legal profession. In its inner circle, this elite body of advocates and judges who belonged to the order of sergeants-at-law comprised less than a thousand men over a period of 700 years.³⁷ The early professionalisation and monopolisation of legal practice is the key for understanding the legal self-concept of common law as a body of rational concepts which were developed by an elite status-group and which differentiated further on this exclusive basis:

The growth of this peculiarly English professional structure, wholly independent of the university law faculties ... helped preserve the distinctive character of English law and secure its isolation from the influence of Continental jurisprudence ... The strength and unity of the profession explains how the reasoning of a small group of men in Westminster Hall grew into one of the world's two greatest systems of law.³⁸

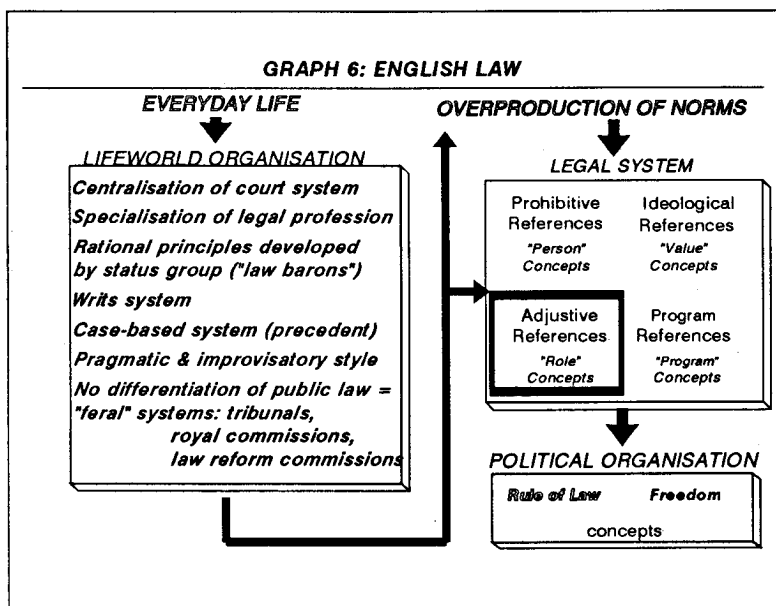
Unaffected by concurrent state development, a legal system of this type predictably centred its differentiation processes on the development of the courts system — with the important add-on of the Court of Chancery, and later integrative reform legislation (Fusion Supreme Court of Judicature Acts 1873-1875). The protection and maintenance of the resulting legal self-concept rests squarely on the operations of courts and courtroom communication, that is, judicial decision-making, and a professionally exclusive writs system. The distinctive legal style of this case-based system is improvisatory and pragmatic, and the typical concepts which structure the further differentiation are contract, trust, tort, estoppel and agency.³⁹

1979) at 133.

37 Baker, above n36 at 133.

38 Ibid.

39 De Cruz, above n32 at 89-90.



Graph 6: The graph depicts the formative references in the differentiation of the self-concept of the English legal system. These references are mainly operated through the adaptive function of the legal system, concentrating on the operation of courts and court-like agencies under the control of the legal profession with relatively little differentiation in other areas of legal communication. This corresponds to a promotion of political references to the rule of law and individual freedom, in alignment with the adaptive function of law and, in particular, its structural coupling with the economic system (see graph 4).

This particular form of a legal system deals with the momentous changes and transitions in English society, from a medieval feudal society to a modern state and industrial society only in the terms of the legal self-concept operated by the legal profession. In this way, legal responses to fundamentally changed and changing social structures are either side-stepped or subsumed under provided concepts, with statute law as only a subsidiary source for references in a patch-work fashion. Above all the crucial differentiation between private law and public law is poorly reflected in the concepts and scripts of English common law. Privatised legal practice provides only limited references to concepts which allow an easy further differentiation of public law⁴⁰ into the important specialised branches of constitutional law, modern (state) criminal

⁴⁰ Such a concept is, for instance, the concept of the "administrative act" which, comparatively, provides the European continental legal systems with a strong base for the differentiation of public law including the specialisation of the administration of justice in administrative courts, constitutional courts, and through the institution of the office of ombudsman (in Sweden), all this, however, on the basis of a different sequence of the timing of differentiation processes compared with England, that is, the differentiation of the legal system after the differentiation of state operations.

law, procedural law, tax law and administrative law, differentiating, in turn, into further specialised branches like labour law and social security law. This does not mean that the English legal system does not develop concepts of modern human practice, or that it does not deal with the variety of modern everyday life. However, the lack of sufficient differentiation of modern criminal law and public law concepts means only that the common law has a poorly developed redundancy structure to cope with the pile-up of demands for decision-making in an area of explosive growth of norm inconsistencies and conflicts. This leads, on the one hand, to an incongruent segregation of a two-classes administration of justice in magistrates' courts and ordinary courts, and on the other hand, to a desperate proliferation and ad-hoc improvisation of "feral" legal institutions like tribunal systems, commissions and inquiries which all emulate, under the umbrella of the concept of adversary-style judicial review, the traditional legal style of the common law without adequate political fit to modern, far more complex requirements for legal responses and modern legal practice. Here, the power of the English High Court to scrutinise the constitutionality of judicial, and much more importantly, administrative decisions, is severely limited to a formal scrutiny of the legality of a decision and/or an administrative action. On the other hand, feral decision-making through bodies outside the unity of the ordinary court hierarchy equips these bodies with extraordinary, often unprecedented resources and powers, lacks or limits the rights of appeal, limits the efficacy of claimants' remedies and/or limits or precludes legal representation, even though these bodies represent the major venues for normative decision-making, often in the most crucial areas of human practice in a post-industrialist society (see Graph 6).

In conclusion, we can say that the peculiar differentiation of the English legal system shows the dilemma of a distinctive "high level equilibrium trap" in using pervasively references to the political concept of the "rule of law" rather than using more differentiated concepts of references to modern state and public law. Through the early formation of a highly specialised legal profession, the legal self-concept of English law is exclusively formed in the concepts of a (privately) practising profession with all the benefits and restrictions of professional knowledge production. This knowledge production reaches a high level of proficiency and sophistication before fundamentally new and differentiated political and legal concepts are developed in a modern democratic state, and in modern industrial and post-industrial human practice. Having reached the structural limit of differentiation of a court-based and professionally developed self-concept of law, the English legal system is in a poor position to provide concepts for the law of a democratic republic. Under these circumstances, the concept of the "rule of law" renders invisible a structural deficit: while this concept, with its claim for the "supremacy of law", clearly subjects political process to the scrutiny of courts, that is, as we have seen, to the politics of the legal practice concepts, it has difficulties in providing fully modern legal concepts for the support of political process. As is evident, the further development of European integration has left England floundering in its wake: as far as continental European systems are concerned, the concept of the "rule of law" — with the absence of a dominant position of an organised legal profession, is accepted as a functional and not as a hierarchical concept: it connotes the connectivity of the legal system with a highly differentiated autonomous system of state functions and state operations, and, at

the same time, the scrutiny of the state systems by an autonomous, highly differentiated legal system. Differentiated, that is, highly varied, communication in the one system cannot operate successfully without the use of references to concepts provided by the other system. Neither this degree of differentiation nor this autonomy is evident in the English legal system. At the point of its highest possible differentiation, it failed to differentiate further.

B. Key Features of Australian Law in the Light of Legal System Differentiation

In the comparativist view, Australian law shares key elements of English law. In this view, differences between Australian law and English law can be dismissed easily with the observation that Australian law "doesn't differ more from English law than it does".⁴¹ However, with the help of the concept of legal differentiation, we can qualify that view.

Even if, initially, the Australian legal self-concept is operated as English law in Australia, the special context of its operation soon puts considerable pressure on the legal system to consider other concepts which eventually lead to further differentiation. However, Australian legal differentiation does not pick up pace with its independence from England, at a time when the differentiation of the English legal system has come to a halt. Instead, the reproduction of the Australian legal self-concept is wedded to the reproduction of the English legal self-concept for another 80 years. Evidently, in a historical moment when English law is, politically, at its widest expansion, such structural deficiencies of the legal system, rendered invisible by the imperial power of the United Kingdom, are difficult to identify and English law is a self-evident legal practice to be applied in the British colonies.

So, formally a possible opportunity to recalibrate the political fit of Australian legal self-concept reproduction was unwittingly passed over. Nevertheless, the parameters for a crucial differentiation in the further process were set by "foundation", that is, through constitutional process and federation.

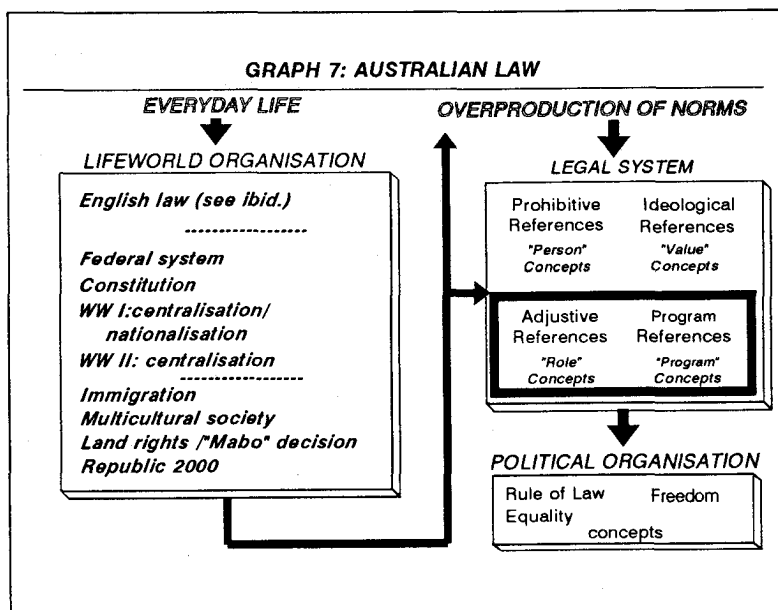
First, the concept of federation vitalised the constitutional debate and provided Australia, like the United States, but unlike England, with the concept of a written, that is, codified, constitution and through that with a modern political, republican concept of the rule of law which allowed legal references to the political concepts of a constituted, autonomous political system by way of structural coupling (see Graph 4).

Second, federation set the differentiation of an Australian legal self-concept formation on the tracks of the differentiation of public law in providing concepts for the differentiation of political powers in their external and internal operation, and in their accountability for the administration of law. This provided the Australian legal self-concept with political concepts and concepts of public law which are absent in the English law, and which are better institutionalised than in American law.

Third, the particular geo-political and geo-physical situation of the emerging Australian nation-state as that of a developing but resourceful country provided

41 *Id* at 90.

legal concepts of state and public sphere operations with considerably more weight than in English law. While not translated into a fully fledged differentiation of modern public law, public sphere concepts in Australia nevertheless led to new legal concepts in the areas of industrial relations and social security in the framework of the tradition of English common law self-concept. Together, all these developments have moved the Australian legal system to a further differentiation of its base in English law (see graph 7).



Graph 7: The graph depicts the formative references for the operation of the Australian legal self-concept. In the light of cultural, political and economic circumstances, the Australian legal system extends differentiation processes perceptibly into the area of the supportive function of law, indicating an extension of Australian law to a modern administration of justice. This use of legal references is aligned with the use of political references to the concepts of the rule of law and individual freedom but also of equality.

In sum, it can be said that while Australian state and society started from an intimate symbiosis with English legal practice, the Australian political context forced the Australian legal system to forge links to political concepts and the use of political references which were unavailable in English law.⁴² This has pushed differentiation of the Australian legal system further when compared with the English legal system (see Graph 8). However, in developing those new concepts, the Australian legal system could only operate in the narrow

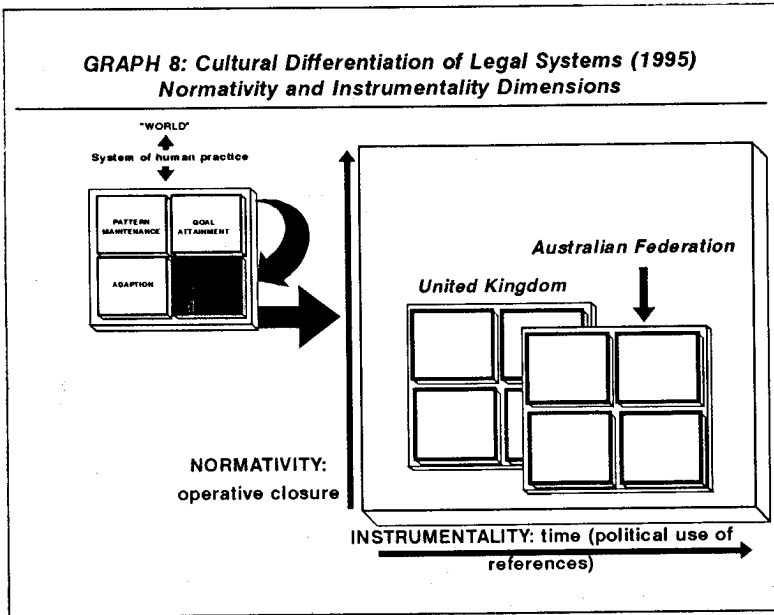
42 Arguably, European integration may now force such a differentiation on the British legal system which may, ultimately, overtake the differentiation of the Australian legal system due to the "economics of scale" in favour of European integration.

band-width of common law differentiation. More importantly, the Australian legal system could only operate on the basis of the English concept of privately practised law, that is, through legal practice in imitation of and symbiosis with the English legal profession. As long as the demographic transition from colony to independent state was slow and unfinished, the colonial dependence of the Australian legal self-concept on English legal practice were politically largely irrelevant. However, it has become clear — beginning with the end of the second world war and a further decisive move to concepts of nationhood (see Graph 7) — that the independence of the Australian nation-state is premised on an autonomous, vibrant Australian political system. It is less obvious, but follows from our general and historical observations here, that an autonomous, vibrant political system must be sustained by an autonomous, and equally vibrant, legal system. This is the historical issue of the republic.

4. Republican Law: the Key Role of the Judiciary

Australia has side-stepped the dilemma of the “high level equilibrium trap” of English law by forcing its legal differentiation on the path of modern state law by particular parameters, among them federation, constitutional debate, and high levels of public sphere operations. This has provided legal practice in Australia with more venues for differentiation towards modern law than English law (see Graph 8), but it has not solved the dilemma of the high level equilibrium trap of common law of being both highly developed and not sufficiently differentiated. The particular “English problem” in the operation of a modern Australian legal practice is the reproduction of the legal self-concept through and in the terms of the practice concepts of the legal profession, and its silence in the core area of legal communication, the administration of justice through a congruently organised, unified court system. In other words, the use of pre-colonial concepts of English law as they are still used in order to reproduce Australian legal practice prevents a functional, politically fitting, that is, republican concept of the rule of law, in which the administration of justice is clearly a function of the republic and not a domain of the legal profession, and through that a domain of improvised, short-term and ad-hoc decision-making and law reform.⁴³

43 Research shows that judges and judicial policy-makers typically “fail to anticipate accurately the consequences of their ... reform decisions”. Smith, C E, “Judicial Policy Making and Habeas Corpus Reform” (1995) 7 *CJPR* 91 at 91. Such structural difficulties of law reform through courts are also visible in the recent attempts at the improvement of case-management in New South Wales courts.



Graph 8: The graph summarises schematically the degrees of differentiation of English law and Australian law as historical versions of integrative legal communication under different political conditions. As a result, the Australian legal system is comparatively better poised as to the characteristics of modern law (higher instrumentality, lower normativity) though differentiation remains confined by the restrictions imposed by the heritage of English law.

How such a differentiation of a congruent and unified modern courts organisation can be achieved must be left to speculations which are outside the scope of our observations here. However, summarising the observations on the differentiation of legal systems in their peripheral and core areas above, it is not mere speculation to identify the role of judges as the single most important factor affecting the quality of the administration of justice.

Significantly, a major move of the American legal system to reject English law concepts was to focus on judicial appointments through public election of judges, possibly in an overestimation of what people's will might achieve, and clearly underestimating the requirements of modern state law, state administration and administration of justice. While, in this way, the election of judges in the United States did not amount to any structural change of legal practice because it left the reproduction of the legal self-concept through the legal profession intact, and, if anything, enhanced the dominant position of the profession, it clearly touched on the most sensitive point of legal self-concept formation.

Judges do their work in the centre of legal self-concept formation and, so, legal differentiation because they have a crucial position within the concentric rings of legal communication and courtroom communication. Here the English common law concept of the trial as an adversarial, contentious process

carried out by professionals with the judge as an umpire, renders invisible the historical role of the judge as a peer, "primus inter pares", and agent of the legal profession. While, formally, the independence of common law judges is never in doubt because they are removed from state operations clearly enough through their fraternal professional corporation, it is difficult to see how common law judges can represent a congruent and unified modern courts organisation, precisely because of their professional corporation.

A republican Australian legal system must go further. It must reflect that the basic tenets of acceptance of legal communication are related to a high internal differentiation of the legal system, procedural justice and the support of individual self-concepts:

We make a mistake, when we think that by designing legal procedures that lead to accuracy and efficiency, we will assure public acceptance of the procedures. The mistake is in thinking that what the public wants is efficiency and accuracy ... All of the efficiency in the world will not make a procedure work if people do not trust it, or if they find it demeaning.⁴⁴

In order to make legal communication acceptable, and that is, to make it work, judges must be put in a position in which they can scrutinise legal concepts and the constitutionality of political concepts in a plural, multicultural society independently and separated from concepts derived from the self-concept of the legal profession. In other words, judges can only be legitimate as administrators of (procedural) justice if they guide the reproduction of the legal self-concept in legal communication and courtroom communication independently from the organisation and self-observation of a legal profession. The legal profession is only one interest group, even if crucial one, among many interest groups in the political arena and among a wider public who refer to law. The concepts and operations of practitioners are, even though essential for the reproduction of law, not the ones which make law work in everyday life. This is achieved through the public administration of law and its acceptance by the public.

As far as can be gleaned from a comparative observation of legal systems, the autonomy of the judiciary, which is necessary for a public acceptance of the administration of justice, can only be achieved if legal education and training focuses on the special occupational role of a judge in a modern state, and if the careers of judges are separated and structured separately from the occupational role of lawyers (practitioners). It cannot longer make sense in a modern state-society, with its highly complex forms of organisation and communication, that the most vital activity centres of the legal system on all levels of its operations are staffed with office-holders who have no particular training nor any special expertise for operating in this position, nor any experience in or specialised understanding for the organisation to which they are called, and the consequences of the operations of that organisation as a whole. While the English medieval model had in practising lawyers the best legal experts who, at the time, could be provided for the position of a judge, the high differentiation of modern legal systems can recognise legal practice only as one of many, and then rather undifferentiated, inputs in legal self-concept

44 Above n17 at 35.

formation. Judicial knowledge and expertise, therefore, can only be gained outside of private professional legal practice, namely in specialised judicial practice and training. Furthermore, it must be able to reflect on more legal concepts and a broader range of extra-legal, foremost political, economic and social-cultural concepts than those concepts which are operated by the legal profession. Most importantly, a differentiated body of career judges on all levels and in all branches of jurisdiction would be in a better position to organise and maintain the functioning of a congruent unified courts organisation, and the administration of justice, and so direct and systematise the differentiation of public law, the single most crucial area of law in a highly differentiated legal system of a modern pluralist society.

Practically, all necessary legal and other knowledge which is necessary for the establishment of judicial legal practice as a career, and for the training of career judges, is available in Australia through a highly developed legal education in universities which no longer provides only legal professional concepts. From here, students who have demonstrated their ability could step through to a specific judicial training and a judicial career straight after completing their law degree. This direct link of court organisation with legal education on a broad and highly differentiated level would provide the Australian legal system not only with a more balanced judiciary in relation to gender and the multicultural reality of a highly differentiated and open Australian society. The direct access to a judicial career in the framework of a unified courts organisation could also provide the Australian legal system on all levels with the lively and legitimate operations of procedural justice which a legal system needs in order to be able to sustain a vibrant political system on all levels of the democratic process. This support of the democratic process through law which, in turn, is sustained by democratic process, is the prospect of the republic.