+Three Decades of Tension: From the Codification of Migration Decision Making to An Overarching Framework for Judicial Review

A Pre-Publication Version: Forthcoming in the Federal Law Review

Grant Hooper[*]

Abstract

Over the last three decades, Australian administrative law decisions about who will be allowed to stay in Australia have led to more interaction and tension between the elected government (Parliament and Ministry) and the judiciary than any other subject matter. This interaction has been intensified by Parliament's attempts to amend the Migration Act 1958 (Cth) to codify judicial review and the procedures to be followed when making decisions under the Act. These amendments were made with the specific aim of minimising, if not practically eliminating, the judiciary's influence over executive decision making. However, this outcome has not been achieved. Rather, through a thousand cuts, or more literally cases, the codification efforts of Parliament have been weakened. Instead, the judiciary has put in place an overarching judicial review framework centred on the inherently flexible concept of jurisdictional error. This framework places equal emphasis on both express and implied statutory obligations and procedures. Express procedures often being interpreted to include judicially created natural justice like obligations and implied procedures often including other natural justice like obligations or at least a base level of fairness premised on the constitutionally entrenched premise that the executive cannot decide arbitrarily.

I Introduction

Over the last three decades Australian administrative law decisions about who will be allowed to stay in Australia have led to more interaction and tension between the elected government (Parliament and Ministry) and the judiciary than any other subject matter.[1] As has been well documented, this interaction has been intensified by Parliament's attempts to amend the *Migration Act 1958* (Cth)[2] ('*Migration Act*') to codify judicial review and decision-making procedures. These amendments were intended to minimise, if not almost eliminate, the judiciary's supervisory role over executive decision making. However, this has not occurred. In fact, it has been said that the judicial response has seen the constitutionalisation of Australian administrative law and the imposition on the executive of a more onerous obligation to justify the decisions it makes when exercising statutory powers.[3]

What has not attracted sustained academic attention is the form by which Parliament sought to exclude the judiciary, a code rather than ordinary legislation. This lack of interest contrasts starkly with academic literature on Australian criminal law where it is generally assumed that enacting a law as a code rather than an ordinary statute will have very different

[*] My thanks go to the anonymous reviewers, Emeritus Professors Mark Aronson and Ron McCallum, Professors Mary Crock and Helen Irving and Associate Professor Andrew Edgar for their insightful comments on drafts of this article. All errors are mine.

[1] Mary Crock and Laurie Berg, *Immigration Refugees and Force Migration Law, Policy and Practice in Australia* (Federation Press, 2011); Mary Crock, 'Judging Refugees: The Clash of Power and Institutions in the Development of Australian Refugee Law' (2004) 26(1) *Sydney Law Review* 51.

[2] *Migration Act* 1958 (Cth) ('*Migration Act*').

[3] Jeremy Kirk, 'The Entrenched Minimum Provision of Judicial Review' (2004) 12(1) *Australian Journal of Administrative Law* 64; Leighton McDonald, 'The Entrenched Minimum Provision of Judicial Review and the Rule of Law' (2010) 21(1) *Public Law Review* 14; Will Bateman, 'The Constitution and the Substantive Principles of Judicial Review: The Full Scope of The Entrenched Minimum Provision of Judicial Review' (2011) 39(3) *Federal Law Review* 463; and Grant Hooper, 'The Rise of Judicial Power in Australia: Is There Now A Culture of Justification' (2015) 41(1) *Monash University Law Review* 102 ('The Rise of Judicial Power').

consequences. Indeed, so prevalent is this assumption that it has been suggested that a distinct divide exists between 'code thinkers' and 'common law thinkers'.[4] While the codification of criminal law and executive decision making under the *Migration Act* are vastly different subject matters and as such a detailed comparison of them is beyond the scope of this article, recognizing that there is intended to be a difference between a code and an ordinary statute adds context to Parliament's attempt to codify decision-making and judicial review in the *Migration Act*.

To provide context for why in the migration arena Parliament chose to act through a code, this article will begin by addressing the general nature of our common law system and what is meant by codification. This will then be followed by a restrained historical examination to explain why it may have been believed that a code would exclude the common law and limit judicial 'interference'. This historical analysis includes a consideration of the views of Jeremy Bentham. Bentham's ideas conform to a significant degree with the modern political perception that a democratically legitimate Parliament rather than an unelected judiciary needs to be 'at the centre of the network of rules that govern society'.[5] He also provides an illuminating critique of the role played by the judiciary in our common law system.

Having set the scene generally, this article will shift back to the *Migration Act*, starting with a slightly more detailed historical analysis which includes its initial codification in 1989. The balance and substantive component of this article will then address the judicial response to attempts since 1992 to codify judicial review and decision-making procedures (to the exclusion of the common law natural justice hearing rule) under the *Migration Act*. While designed to work together, for the purpose of simplicity the codification of judicial review will be considered first before addressing the codification of procedures.

Having explored the different reasoning used to dismantle both forms of codification (judicial review and procedures), it will be argued that this reasoning has been reconciled in the recent High Court decisions of *Hossain v Minister for Immigration and Border Protection ('Hossain')*[6] and *Minister for Immigration and Border Protection v SZMTA ('SZMTA')*.[7] This reconciliation was made possible through the use of an overarching framework centred around the concept of jurisdictional error. Finally, this reconciled reasoning, together with the reasoning in *Plaintiff M174/2016 v Minister for Immigration and Border Control ('Plaintiff M174'),*[8] will be applied to the Migration Fast Track Review process (Fast Track Review)[9] which was introduced in 2014. The Fast Track Review provides a limited form of review which may be aptly described as a form of super codification or codification on steroids. Yet, early indications are that even this extreme form of codification leaves scope for the judiciary to ensure a base level of fairness.

Before beginning, it is pertinent to make an observation about the goal of this article. This article is in one sense overly ambitious in that it seeks to bring together doctrinal developments that have occurred over the last three decades. However, without doing so it is not possible to fully appreciate how our common law system both limits and enriches Parliament's attempt to govern in the interests of the public. In this regard, it is suggested that while the judiciary has continued to acknowledge that it must respect and implement the decisions of Parliament, the common law process of interpretation has inevitably undermined the initial reasons why Parliament chose to act through a code. In doing so a change in

---

[4] Stella Tarrant, 'Building Bridges in Australian Criminal Law: Codification and the Common Law' (2014) 39(3) *Monash Law Review* 838, 838.

[5] Lindsay Farmer, 'Reconstructing the English Codification Debate: The Criminal Law Commissioners 1833–45' (2000) 18(2) *Law and History Review* 397, 423 as cited in Barry Wright, 'Criminal law Codification and Imperial Projects: The Self-governing Jurisdiction Codes of the 1890's' (2008) 12(1) *Legal History* 19, 22.

[6] (2018) 264 CLR 123 ('*Hossain*').

[7] (2019) 264 CLR 421 ('*SZMTA*').

[8] (2018) 264 CLR 217 ('*Plaintiff M174*').

[9] *Migration Act* (n 2), Part 7AA.

judicial methodology is observable. The traditional methodology was one focused on a simpler view of parliamentary supremacy and the judicial obligation to implement its intentions. The newer methodology is one that acknowledges the democratic legitimacy of Parliament but places greater emphasis on the importance of common law principles such as the principle of legality and the rule of law. [10] This is a methodology championed by former Chief Justice of the High Court, Robert French AC, and is now in ascendancy. Its rise to prominence illustrates how, in an arena where the common law played a significant role, judicial values continue to operate so that over time the introduction of a code neither dramatically reduces the judiciary's influence nor the operation of the principles developed within the common law to protect individuals from arbitrary state action. Even where Parliament takes extreme measures and creates a new and limited system of decision making, as it did with the Fast Track Review, the complete exclusion of the judiciary will not be possible.

II The Common Law System and Codes

A *Definitions*

Codes are more closely associated with civil systems of law than common law systems where the traditional emphasis is on judge-made law. It is therefore useful to start by defining what is meant by the terms common law and code.

B *A Common Law Tradition*

Australia has a common law legal system. While knowledge of the common law's history is largely assumed, it is pertinent to observe that the common law can be viewed in either a broad or specific sense.

Broadly, the common law reflects the traditional legal system of England, as opposed to the civil and codified systems of Europe. Its origins predate Parliament, beginning in the twelfth century with the appointment, by the King, of judges to act as 'his surrogates to dispense his justice'.[11] It thereafter became, and still is, a form of law created by judges and 'founded in notions of justice and fairness'.[12] It is just that in more modern times it has had to adapt and evolve to accommodate the rise of parliamentary sovereignty.[13]

More specifically, and in contrast to laws made by Parliament, the common law can be described as an individually-focused process in which judges constantly rationalise and apply earlier judgments (precedents) in light of 'proofs and reasoned arguments' made by individuals bringing and pursuing their own complaints or defences.[14] The potential choices a judge has available to them in doing so can be viewed both positively and negatively. Positively, as providing sufficient flexibility to enable personalised justice for each case considered. Negatively, as creating uncertainty because this inherent flexibility also means

---

[10] Of course, these 'methods' are generalisations. Judges will invariably sit somewhere on a spectrum between two extremes. Further, a focus on the principle of legality is said to be a contemporary approach but there are historical examples of its use and, as will be discussed, even when interpreting a criminal code judges have historically felt the 'pull' of the common law.

[11] James Crawford and Brian Opeskin, *Australian Courts of Law* (Oxford University Press, 4th ed, 2004), 6-7.

[12] Ibid 6.

[13] The rise of Parliament has seen statutes replace judge made law as the most 'significant source of new rules'. Yet Parliament's rise has arguably changed the initial focus of the courts in common law systems rather than diminished their significance. This is so as while judges will now often start with a legislative rule rather than a common law one, they will nevertheless go on to examine other earlier judgments to determine how the legislative rule has and should be interpreted and how it has been applied by previous courts.

[14] Lon L Fuller, 'The Forms and Limits of Adjudication' (1978) 92(2) *Harvard Law Review* 352, 363-7.

that the outcome of a particular case will rarely be known with certainty in advance and may be dependent upon the predisposition of the particular judge hearing it.

Focusing on the positive aspects of the common law, one of its greatest achievements is the development of natural justice. Typifying the flexibility of the common law, it is 'a doctrine of indefinite scope'[15] which is simply defined as a 'duty to act fairly'.[16] Indeed, the natural justice hearing rule has little specificity, generally requiring that an affected individual at least be: made aware of the information on which the decision is to be based and any critical[17] and prejudicial issues;[18] and given a reasonable opportunity[19] to explain (perhaps in writing, perhaps orally) why a decision should be made in their favour.[20]

To paint with a very broad brush, common law natural justice epitomises judicial values. It is designed to ensure individuals seeking the benefit of Australia's migration laws are treated fairly in light of their individual circumstances. On the other hand, codification of migration law seeks, as will be seen, to create more certainty and predictability, perhaps at the expense of some individual justice.

C *Codification*

The practice of placing the law into a written code is far older than the common law, with the earliest known legal records originating in around 2400 BC.[21] The motivations for codification were many. They included the recording of law for consistency,[22] an attempt to cope with the need to organise society better, to adapt customs to changing conditions[23] and to consolidate power.[24] Max Weber aptly described such motives as the 'conscious and universal reorientation of legal life'.[25] Therefore codification can be broadly described as the simplification, clarification and, ideally, improvement of the law through the act of recording it in writing in one accessible location.[26] Yet, this definition is, at least in the context of this article, too broad to be particularly helpful. This is because it does not allow a distinction to be drawn between codes and ordinary statutes or help us understand how codes, as opposed to ordinary statutes, can or are intended to work in a common law system.[27]

A more specific definition of a code, and one which is adopted in this article, was posited by the Honourable Mr Justice Scarman in 1967 when discussing the *Law Commissions Act* 1965. This Act created an English Law Commission to review and reform the laws of England, including 'in particular the codification of such law'.[28] Justice Scarman's definition was that at

---

[15] Robin Creyke, John McMillan and Mark Smyth, *Control of Government Action Text, Cases & Commentary* (LexisNexis Butterworths, 2015), 633.
[16] *Kioa v West* (1985) 159 CLR 550, 584 ('*Kioa*').
[17] Ibid 587; *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342, 3; *SZBEL v Minister for Immigration & Multicultural & Indigenous Affairs* (2006) 228 CLR 152 ('*SZBEL*'); *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 ('*Ex parte Aala*').
[18] *Kioa* (n 16*); Cole v Cunningham* (1983) 49 ALR 12; *Applicant VEAL of 2002* v *Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88, 100 ('*VEAL*').
[19] *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597, 611 (Gaudron and Gummow JJ).
[20] *O'Rourke v Miller* (1985) 156 CLR 342, 352; *Ex parte Aala* (n 17), 121.
[21] Csaba Varga, *Codification as a Socio-Historical Phenomenon* (Akaḿiai Kiadó, 1991), 28; although the oldest surviving tablet is the Code of Ur-Nammu originating in around 2100-2050 BC.
[22] Ibid 38.
[23] For example the *Reforms of Urukagina;* see ibid 28.
[24] For example: The unification of Mesopotamia in around 1700 BC saw the creation of The *Law of Hammurabi:* see ibid.
[25] Max Rheinstein (ed), *Max Weber on Law in Economy and Society* (Harvard University Press, 1969), 268.
[26] Catherine Skinner, 'Codification and the Common Law' (2009) 11 *European Journal of Law Reform* 225, 227.
[27] Ibid 228.
[28] *Law Commissions Act 1965* (Imp) s 3(1).

the time of its enactment a code 'becomes within its field the authoritative, comprehensive and exclusive source of that law'.[29]

A code is authoritative as it is enacted by a democratically elected Parliament. Therefore, unlike academic treatises or professional restatements of an area of the law, judges must apply and implement it.[30] It is comprehensive in that it is a statement of all law in a particular area and how that law should be applied in the future, not merely a consolidation of or rearrangement of existing statutory and common law.[31] It is exclusive, or exhaustive, in that the legislature is declaring it to be the only law to be followed, or at least declaring it to be the 'fully developed law' to be applied in any given situation.[32]

It is the concepts of comprehensiveness and exclusivity that differentiate a code from more traditional statutory enactments. For example, in Australia the *Administrative Decisions (Judicial Review) Act 1977* (Cth)[33] ('*ADJR Act*') is often said to have codified the grounds of review to challenge Commonwealth administrative decisions.[34] Yet the *ADJR Act* is not a code as defined in this article. Most obviously, it is not comprehensive as while it purports to set out all the grounds of review, it does so by largely restating the grounds of review available at common law without providing any guidance as to how they are to be 'applied to any particular statutory or factual context'.[35] In other words, while it simplifies the procedures to be followed in instituting judicial review proceedings in the Federal Court, to actually decide whether the proceedings will be successful the court must look outside the *ADJR Act* to the pre-existing common law to determine what the grounds of review mean and how they are to be applied. Further, the *ADJR Act* is not exclusive. It was intended to be a simpler alternative to judicial review, not the only option. In this regard, it is still possible to commence judicial review proceedings in the Federal Court using s 39B of the *Judiciary Act 1903* (Cth), proceedings that may actually offer a greater chance of success in some instances.[36]

In stark contrast to the *ADJR Act*, the codification of the *Migration Act* was clearly intended to be both comprehensive and exclusive.

III The Government's Aim in Codifying Procedures and Judicial Review in the Act

In 1989 the *Migration Act 1958* (Cth) was codified by prescribing in great detail who would be allowed to enter and stay in Australia.[37] However, rather than creating greater certainty and predictability, its rushed drafting initially created a confusing and inflexible system that in

---

[29] Justice Scarman, 'Codification and Judge-Made Law: A Problem of Coexistence' (1967) 42 *Indian Law Journal* 355, 358.

[30] Subject of course to it being within the constitutional power of the relevant legislature.

[31] Scarman (n 29) 359.

[32] Ibid 360.

[33] ('*ADJR Act*').

[34] See for example: Creyke, McMillan and Smith (n 15) 54; Timothy Jones, 'Judicial Review and Codification' (2000) 20(4) *Legal Studies* 517.

[35] Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Lawbook, 6th ed, 2017) 67. This lack of guidance is magnified even further by the fact that the grounds also include what has been termed a 'catch all grounds that the decision was "otherwise contrary to law" or "was an exercise of a power in a way that constitutes abuse of the power"': Mark Aronson, 'Is the ADJR Act Hampering the Development of Australian Administrative Law?' (2005) 12 *Australian Journal of Administrative Law* 79, 79.

[36] Matthew Groves, 'Should We Follow the Gospel of the Administrative Decisions (Judicial Review) Act 1977 (Cth)' (2010) 34(3) *Melbourne University Law Review* 736.

[37] This prescription was achieved by also using formal regulations and policy advice manuals subject to parliamentary disapproval. The only major exception to this high degree of prescription was what is now known as protection or, more colloquially, refugee visas.

turn generated many instances of individual injustice.[38] Limited by its constitutional role, that is declaring and enforcing the law, the judiciary was unable to address such injustices directly.[39] Instead, it focused more intently on the quality of the decision-making procedures followed by the executive when determining whether the legislatively prescribed circumstances were present. It did so by turning to its common law arsenal which included the then recently revitalised doctrine of natural justice, or, as it is now more commonly called, procedural fairness.[40]

Dissatisfied with the manner and increasing frequency with which natural justice was being applied,[41] in 1992 Parliament passed the *Migration Reform Act*.[42] ('*Reform Act*'). The *Reform Act* introduced a number of reforms of great importance including the establishment of the Refugee Review Tribunal (the RRT).[43] However, for the purpose of this article its significance lay in two ambitious changes, the attempt to codify judicial review and a related attempt to remove the judiciary's recourse to natural justice by codifying the procedures that a decision maker must follow in determining whether a non-citizen satisfied the legislatively prescribed criteria to enter and stay in Australia.[44]

The *Reform Act's* major themes were stated to be 'simplicity, clarity, certainty and fairness'.[45] In pursuing these themes, it was made very clear that the process of codification was intended to be both comprehensive and exclusive as it would remove the judiciary's recourse to the common law, particularly natural justice, and in doing so keep migration decisions 'out of the courts' unless there was a breach of an explicit procedure specified by Parliament. In this regard the explanatory memorandum to the *Reform Act* clearly, confidently and repetitively stated that it would 'codify decision-making processes'[46] which would in turn 'replace the uncodified principles of natural justice with clear and fixed procedures …'.[47]

---

[38] See, for example, an article written at the time by Adrian Joel, 'Immigration Madness' (1990) 28(5) *Law Society Journal* 51, and for a later but more detailed description of the confusion created: Sean Cooney, *The Transformation of Migration Law* (Australian Government Publishing Service, 1995) 40–43 and Sean Cooney, 'The Codification of Migration Policy: Excess Rules? Part I' (1994) 1 *Australian Journal of Administrative Law* 125, 130–1; see also Wilcox J in *Eremin v Minister for Immigration Local Government and Ethnic Affairs*—BC9003486 (Unreported, Federal Court of Australia, Wilcox J, 1 August 1990).

[39] See the famous observations of Brennan J in *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 35–6.

[40] The reach of natural justice had been expanded significantly by *Kioa* (n 16); see Grant Hooper, 'From the Magna Carta to Bentham to Modern Australian Judicial Review' (2016) 84 *AIAL Administrative Law Forum* 22, 30 ('From the Magna Carta').

[41] Explanatory Memorandum, Migration Reform Bill 1992, Migration (Delayed Visa Applications) Tax Bill 1992, 5, 6, 9, 81, 82, 84; Commonwealth, Second Reading Speech, Migration Reform Bill, House of Representatives, 4 November 1992, 2620.

[42] *Migration Reform Act 1992* (Cth) ('*Reform Act*') . It only became operative from 1 September 1994.

[43] Which extended Tribunal merits review to refugee claims: *Migration Reform Act 1992* (Cth), ss 23, 31, 32, Explanatory Memorandum, Migration Reform Bill 1992, Migration (Delayed Visa Applications) Tax Bill 1992, 8–9.

[44] Explanatory Memorandum, Migration Reform Bill 1992, Migration (Delayed Visa Applications) Tax Bill 1992, 5,6,9; Commonwealth, Second Reading Speech, Migration Reform Bill, House of Representatives, 4 November 1992, 2620; Commonwealth, Parliamentary Debates, House of Representatives, 11 November 1992, 3147 (Dr Catley) [Labor].

[45] Explanatory Memorandum, Migration Reform Bill 1992, Migration (Delayed Visa Applications) Tax Bill 1992, 2.

[46] Ibid 5.

[47] Ibid 23; see also Commonwealth, Parliamentary Debates, House of Representatives, 11 November 1992, 3147 (Dr Catley) [Labor].

Despite these reforms, migration litigation continued to increase[48] leading to further amendments to strengthen the codes in the *Migration Act*.[49] It was made clear that these further amendments were motivated by a perception that activist judges were ignoring the 'intentions' of Parliament and compromising the ability of the executive to make migration decisions in an efficient manner.[50] In this regard, the then Immigration Minister Mr Ruddock was the most vocal, making statements to the effect that the government would 'restrict access to the courts in … all but exceptional circumstances',[51] that despite the government's efforts 'some judges make decisions, where their own view of the work is the premier factor, rather than the law [legislation]',[52] and that some Federal Court judges were inappropriately 'finding a variety of ways and means of dealing themselves back into the review game'.[53]

When the later comments came to the attention of Chief Justice Black of the Federal Court he indicated that it could be seen as improperly pressuring the court (which by implication could lead to proceedings against the Minister for contempt) and in effect demanded an apology. The Minister responded, through legal counsel, expressing his regret that his comments had been misinterpreted and acknowledging that it was for the Court to interpret the *Migration Act*. Yet this was far from an apology. With more than a hint of defiance it was also stated that 'it may be necessary to legislate again if the privative clause [Parliament's latest amendment] is held not to operate as the Parliament intended'.[54]

It was therefore abundantly clear that the government believed that judicial involvement in migration decision making needed to be minimized. It was equally clear that a 'code' was perceived to have a special ability to exclude the common law. Of course, this perception did not derive from the manner in which a code is given legal effect as it is enacted in the same way and has the same legal status as any other legislation.[55] Rather, it could only be derived from a belief that when a code is enacted by Parliament the judiciary will accept that Parliament intends it to systematically and comprehensively state the law in the field it covers to the complete exclusion of the common law. To explore why it may have been believed that a code would operate in this way, or even why it needed to operate in this way to be effective,

---

[48] In the financial year in which the provisions of the *Reform Act* came into force, 1994/1995, there were 409 migration applications to the courts: Department of Immigration and Multicultural Affairs, 'Annual Report 1994–1995' in *The Parliament of the Commonwealth of Australia, Parliamentary Paper No 231* (1995). Three years later in the 1997/1998 financial year this number had almost doubled to 804: Department of Immigration and Multicultural Affairs, 'Annual Report 1997–1998' in *The Parliament of the Commonwealth of Australia, Parliamentary Paper No 370* (1998).

[49] For example: *Migration Legislation Amendment Act (No 1)* 1998; *Migration Legislation Amendment (Judicial Review) Act 2001* (Cth); *Migration Legislation Amendment (Procedural Fairness) Act 2002* (Cth); *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth).

[50] See for example: Commonwealth, Second Reading Speech, Migration Legislation Amendment Bill (No 1) 1998, House of Representatives, 2 December 1998; Commonwealth, *Parliamentary Debates*, The Senate, 27 June 2002, 2790–1 (Ian Campbell).

[51] Philip Ruddock, 'Administrative Law Under the Coalition Government' (1998) 87 *Canberra Bulletin of Public Administration*, 37–38.

[52] Commonwealth, Second Reading Speech, Migration Legislation Amendment Bill (No 1) 1998, House of Representatives, 2 December 1998, 1125 (Mr Sciacca quoting Mr Ruddock as reported in *The Australian* newspaper 30 November 1988).

[53] Darrin Farrant, 'Judges call Ruddock to account for court attacks', *Sydney Morning Herald* (Sydney, NSW), 4 June 2002, 2; Benjamin Haslem, Barclay Crawford, Sophie Morris, 'Ruddock regrets and party applauds', *The Australian,* (Canberra, ACT) 5 June 2002, 2; Kirsten Lawson, 'Court hits out at Ruddock', *Canberra Times* (Canberra, ACT), 4 June 2002, 6.

[54] Michael Milett, 'Ruddock denies pressuring judges', *Sydney Morning Herald* (Sydney, NSW), 5 June 2002, 7.

[55] D C Pearce and R S Geddes, *Statutory Interpretation in Australia*, (LexisNexis Butterworths, 8th ed, 2014) 27.

a brief historical examination follows of Jeremy Bentham's views and the early interpretation of Australian criminal codes.

A *The Argument for Codes—A Historical Perspective*

As already touched upon, the emphasis given to 'codification' in endeavouring to limit the judiciary's involvement in migration decision making indicated it was seen as something more than the simple recording in writing of a law.[56] Rather, it was seen as a tool that in theory could be used to allow the government to reform and improve the law.[57] In this sense the improvements would, as envisaged with the *Migration Act*, include making the law and the steps to be followed in applying the law easily accessible and clear in one well drafted statute. Jeremy Bentham's views most clearly articulate why this will not be possible if a code does not displace the pre-existing common law.[58] His views also have some striking similarities to the justifications given by the government for the introduction of its codes.

B *Codes as a Critique of the Common Law Method: Bentham, Austin and Griffith*

Bentham was perhaps the first and certainly the most vocal global advocate of codification, being described as 'the Legislator of the World'.[59] Dworkin suggests that he was the last great theorist to have a unifying theory of legislation, adjudication and government.[60]

Central to Bentham's theories was the view that only Parliament could govern for 'the greatest happiness of the greatest number' of people and as such a law was only truly legitimate when enacted by it.[61] In contrast, Bentham saw the common law as a 'tool of despotism'[62] that enabled those in power, including judges, to perpetuate their 'sinister' interests.[63] It did so as its inherent flexibility allowed judges to decide a case as they pleased.[64]

Bentham's vision of a code was comprehensive and exclusive.[65] Only then could an individual determine in advance the consequences of their actions.[66] The judiciary was still

---

[56] The focus of this article is the interpretation of codes in a common law system. While there is an interesting debate as to whether the manner of interpretation in a civil law system is similar or different to that which takes place at common law, it is not a debate addressed in this article.

[57] See for example Aubrey L Diamond, 'Codification of the Law of Contract' (1968) 31(4) *Modern Law Review* 361, 372–5; M R Topping and J P M Vandelinden, 'Ibi Renascit Jus Commune' (1970) 33(2) *Modern Law Review* 170, 171 & 174.

[58] A key benefit of a code is seen to be its orderly, logical and comprehensive enactment of a whole field of law: See also Andrew Hemming, 'When is a Code a Code?' (2010) 15(1) *Deakin Law Review* 65, 66, 69–70; Dan Svantesson, 'Codifying Australia's Contract Law—Time for a Stocktake in the Common Law Factory' (2008) 20(2) *Bond Law Review* 1, 8.

[59] 'Letter from Jose Del Valle, Guatemala, to Jeremy Bentham received 1826' in Philip Schofield and Jonathan Harris (eds), *The Collected Works of Jeremy Bentham: Legislator of the World: Writings on Codification, Law and Education* (Clarendon Press, 1998), 370.

[60] Ronald Dworkin discusses this particular attribute of Bentham: Ronald Dworkin, *Taking Rights Seriously* (Gerald Ducksworth, 1977), ix.

[61] This focus underlies all of his writing. For example, it is specifically stated in Jeremy Bentham, 'Chapter II Means and Ends' in James H Burns and Frederick Rosen (eds), *The Collected Works of Jeremy Bentham: Constitutional Code* (Oxford University Press, 1983) vol 1, 18.

[62] Jeremy Bentham in John Bowring (ed), *The Works of Jeremy Bentham* (Edinburgh: William Tait, 1843) vol 1, 1-32 as cited in Dean Alfange, 'Jeremy Bentham and the Codification of Law' (1969) 55(1) *Cornell Law Review* 58, 59.

[63] Jeremy Bentham 'Letter to the President of the United States of America 1811' in Schofield and Harris (n 59) 134.

[64] This was, for example, because the facts of the case could be used to distinguish it from previous decisions or, even if they could not, previous decisions could be 'overthrown': See Ibid 131.

[65] See, eg, Schofield and Harris (n 59) 5, 21–4.

[66] See Alfange (n 62) 65.

needed but in a far more constrained role. It would apply and enhance the clarity and intelligibility of the code,[67] but was not to have recourse to the common law, as to do so would taint the code with the common law's 'inbred and incurable corruption'.[68]

At the jurisprudential level, Bentham's ideas were built upon by John Austin.[69] However, although Austin described the common law as 'necessarily a monstrous chaos',[70] he was willing to admit that it was better than no law at all.[71] So while he saw codification as the answer to the faults of the common law, he was far more pragmatic than Bentham. He even doubted that a truly exclusive or exhaustive code was possible.[72] Rather, a code provided 'a series of rules applicable to cases'.[73] The judiciary would still apply those rules and in so doing would play a central role in implementing, explaining and supplementing a code.[74] It is this notion of supplementation, reminiscent of the incremental development of the common law, where Austin most clearly diverged from the ideals of Bentham and is more consistent with the Australian High Court's early interpretation of criminal codes. Codes which were inspired by the *Criminal Code Act 1899* (Qld),[75] a code aptly described as 'one of the significant, and arguably the best, 19th century utilitarian codifications of English criminal law'.[76]

IV Australian Interpretation of Criminal Codes

A code in its purest Benthamic form will both replace all existing law and be the sole source of law. To a limited extent this aim was acknowledged by the High Court in 1936 when Dixon and Evatt JJ observed, in relation to a section in the *Criminal Code 1913* (WA), that:

> it forms part of a code intended to replace the common law, and its language should be construed according to its natural meaning and without any presumption that it was intended to do no more than restate the existing law. It is not the proper course to begin by finding how the law stood before the Code, and then to see if the Code will bear an interpretation which will leave the law unaltered.[77]

However, as with so many judicial pronouncements, close examination reveals it is not as straight forward as it at first might seem. This is because there is only a presumption that a code does not intend to restate the existing law. While 'it is not a proper course to begin' with the common law, it may be possible to finish with it.[78] Cases since have allowed use of the common law where, in the absence of a definition, words in the code already had a well-established judicial meaning.[79] Further, it is obligatory to revert to the common law in cases

---

[67] Frederick Rosen, *Jeremy Bentham and Representative Democracy: A Study of the Constitutional Code* (Clarendon Press, 1983), 160.
[68] Schofield and Harris (n 59) 21.
[69] Austin has been described as Bentham's protégé: See Richard A Cosgrove, *Scholars of the Law: English Jurisprudence from Blackstone to Hart* (New York University Press, 1996), 90–1.
[70] John Austin, *Lectures on Jurisprudence, Or, The Philosophy of Positive La*w ed Robert Campbell (Henry Holt, 5th ed, 1875) 660.
[71] John Austin, *Austin: The Province of Jurisprudence Determined,* ed Wilfrid E Rumble (Cambridge University Press, 1995), 163.
[72] Austin (n 70) 1021, 1099–100. See also Peter J King, *Utilitarian Jurisprudence in America: The Influence of Bentham and Austin on American Legal Thought in the Nineteenth Century* (Garland Publishing, 1986), 367.
[73] Austin (n 70) 1032.
[74] Ibid 675.
[75] ('*Griffith Code*').
[76] Barry Wright, 'Self-governing Codifications of English Criminal Law and Empire: The Queensland and Canadian Examples' (2007) 26(1) *University of Queensland Law Journal* 39, 39.
[77] *Brennan v R* (1936) 55 CLR 253, 263.
[78] Ibid.
[79] See, eg, *Sungravure Pty Ltd v Middle East Airlines Airliban SAL* (1975) 134 CLR 1; *Gamer's Motor Centre (Newcastle) Pty Ltd v Natwest Wholesale Australia Pty Ltd* (1987) 163 CLR 236.

of ambiguity.[80] This predilection to resort to the common law and the impact it has had on the interpretation of criminal codes is starkly illustrated by the 1961 observations of Windeyer J in *Vallance v R*:

> The Code is to be read without any preconception that any particular provision has or has not altered the law … it was enacted when [there were established common law principles]. And for that reason we cannot interpret its general provisions concerning such basic principles as if they were written on a *tabula rasa*, with all that used to be there removed and forgotten. Rather is ch. IV of the Code written on a palimpsest, with the old writing still discernible behind.[81]

Bentham would have regarded such a statement as corroboration of his contemptuous view of the common law. A code exists on the very parchment upon which the judiciary had laboured, given birth, and nurtured the common law? The parent is no longer the scribe but remains the interpreter! Natural instinct would always be to protect the child. To channel Bentham, the common law is left 'unextirpated' to taint the code with its 'own corruption'.[82]

Further, Windeyer J's pronouncement arguably challenges the fundamental principle of parliamentary supremacy. How can Parliament be supreme if it is unable to erase the writing of the judiciary? It is perhaps for this reason that while his statement was not overtly criticised, other judges have felt the need to limit its generality. As Gibbs J (later to become Chief Justice and then later still to chair the committee tasked with designing the Commonwealth Criminal Code)[83] observed in 1974:

> If the Code is to be thought of as 'written on a palimpsest, with the old writing still discernible behind' … it should be remembered that the first duty of the interpreter of its provisions is to look at the current text rather than at the old writing which has been erased; if the former is clear, the latter is of no relevance.[84]

This statement was endorsed 17 years later by five High Court judges in *Mellifont v Attorney-General ('Mellifont')*[85] and then again by McHugh J in *R v Barlow*.[86] In *Mellifont* it was even stressed that in determining whether the meaning of a code is clear 'it is not permissible to resort to the antecedent common law in order to create an ambiguity'.[87]

While there was a clear jurisprudential retreat from Windeyer J's 'expressive metaphor',[88] the question remained whether the government's attempts to codify the procedures and judicial review in the *Migration Act* would be, or could be, sufficiently unambiguous to successfully achieve its stated aim of excluding the common law? Despite the government's confidence, experience with criminal codes suggested that the observations of Max Weber remained as insightful as they ever were:

> The status of being confined to the interpretation of statutes and contracts, like a slot machine into which one just drops the facts (plus the fee) in order to have it spew out the decision (plus opinion), appears to the modern lawyer as beneath his dignity; and the more universal the

---

[80] *Charlie v R* (1999) 199 CLR 387, 410 (Callinan J); *R v Barlow* (1997) 188 CLR 1, 31–3 (Kirby J) (*'Barlow'*).
[81] (1961) 108 CLR 56, 75-6 (*'Vallance'*).
[82] Jeremy Bentham 'Letter To the President of the United States of America 1811' in Schofield and Harris (n 59) 134; Philip Schofield (ed), *First Principles Preparatory to Constitutional code*, The Collected Works of Jeremy Bentham (Oxford: Clarendon Press, 1989) 184.
[83] *Criminal Code Act 1995* (Cth).
[84] *Stuart v R* (1974) 134 CLR 426, 437. Very shortly thereafter a similar approach was taken by Mason J in *Sungravure Pty Ltd v Middle East Airlines Airliban SAL* (1975) 134 CLR 1, 22 although no reference was made to either *Vallance* or *Stuart*.
[85] (1991) 173 CLR 289, 309 (Mason CJ and Dean, Dawson, Gaudron & McHugh JJ) *('Mellifont')*.
[86] (1997) 188 CLR 1, 19.
[87] *Mellifont* (n 85) 309.
[88] Ibid.

> codified formal statute law has become, the more unattractive has this notion come to be. The present demand is for 'judicial creativeness', at least where the statute is silent.[89]

Although it may not be a matter of 'dignity', but whether the code (statute) can ever approximate a slot machine and life (facts) ever approximate the uniformity of a coin. Accordingly, this article will now turn to the *Migration Act* to see just how creative the judiciary has been.

V The Migration Arena

A *From Almost Complete Discretion to Codification*

One of the first Acts passed by the new Australian Parliament in 1901 was the *Immigration Restriction Act 1901* (Cth). However, it contained little of substance, simply giving an almost unlimited discretionary power to the executive to set and enforce migration policy.[90] This discretionary approach continued after a substantial re-write in 1958 led to the *Migration Act 1958* (Cth).[91] It was not until 1989 that Parliament actually re-drafted the *Migration Act*[92] with the view of making it a code.

The 1989 changes were extensive, implementing a 'radically revised approach to immigration decision making'[93] in that a broad discretionary power was replaced with a code and hence, in theory, politically accountable migration system.[94] The new *Migration Act* prescribed in detail who would be allowed to enter and stay in Australia.[95] It reflected a recognition that in the politically charged arena of migration, government needed to be able to justify its decisions by reference to pre-existing criteria.[96]

Given a clean palimpsest upon which the 1989 changes were made,[97] the judiciary upheld Parliament's right to legislate as it did. In this respect, the codification of migration law was successful. However, as discussed, the judiciary increased its oversight of the procedures adopted to determine whether relevant criteria had been met, in particular the judiciary turned to the doctrine of natural justice. Of course, as also discussed, natural justice can be seen to be diametrically opposed to a prescriptive code with its rejection of fixed rules.[98]

The judiciary was able to utilise natural justice, as while the *Migration Act* had codified the criteria that would allow a person to enter and stay in Australia, it did not codify the

---

[89] Rheinstein (n 25) 309.
[90] A major motivation for this approach was to allow the implementation of the 'white Australia': Commonwealth, *Parliamentary Debates*, House of Representatives, 7 August 1901, 3497.
[91] *Migration Act* (n 2).
[92] *Migration Legislation Amendment Act 1989* (Cth).
[93] Commonwealth, Second Reading Speech, Migration Legislation Amendment Bill, Senate, 29 May 1989, 2958 (Senator Alston).
[94] In the second reading speech Senator Robert Ray made it perfectly clear that accountability was at the forefront of the decision to codify the *Migration Act* and in particular that policy decisions would now be subject to parliamentary oversight: Commonwealth, Second Reading Speech, Migration Legislation Amendment Bill, Senate, 5 April 1989, 921.
[95] In combination with formal regulations and policy advice manuals subject to parliamentary disapproval.
[96] While the vast majority of decisions under the *Migration Act* remain subject to highly prescriptive criteria, over time the *Migration Act* has been amended to grant a number of wide discretionary powers to the Minister for Immigration: See, eg, *Migration Act* (n 2) ss 351, 417, 495B, 501J. While it is beyond the scope of this article, it is suggested that these powers, and particularly the fact that they are drafted so that the Courts cannot compel the Minister to exercise them, illustrate that Parliament has been willing to use other methods than codification to restrict access to the courts.
[97] That is, the common law had played no real role in determining the actual criteria which would allow a non-citizen to enter and stay in Australia.
[98] *Ex parte Aala* (n 17) 110.

decision-making procedures used to determine whether such criteria had been met. In 1992 the *Reform Act* sought to remedy this oversight. It did so by seeking to codify judicial review, that is it stipulated the limited grounds upon which judicial review could be sought, and the procedures that the executive must follow, that is it sought to replace judicially created procedures with legislative prescribed ones.

B *Codifying Judicial Review*

The *Reform Act* introduced its own unique codified regime for the review of migration decisions by the Federal Court. It was clearly intended to be a comprehensive and exclusive statement of the relevant law.[99] The regime set out what decisions were and were not judicially reviewable, the limited grounds upon which they could be reviewed, what orders could be made, and strict time limits.[100] The limited grounds of review included review where the prescribed procedures set out in the *Migration Act* had not been followed but excluded some of the main common law grounds of review,[101] such as natural justice.[102] As Professor Mary Crock observed of the regime at the time, it 'reflect[ed] a narrow view of judicial review, with the role of the courts restricted to ensuring adherence to rules laid down by Parliament.'[103]

The regime was challenged but found by the High Court to be constitutionally valid in so far as it applied to judicial review by the Federal Court.[104] However, it was a hollow victory for the government. This was because the High Court also made it clear that the codified regime was not an exclusive one. It was not exclusive as the regime, as drafted, only applied to review applications before the Federal Court and not the High Court's original jurisdiction under s 75(v) of the *Constitution*. This meant that applicants could still challenge decisions made under the *Migration Act* in separate proceedings in the High Court using the traditional common law grounds of review.[105] Unsurprisingly, this is what applicants then did, thereby, 'outflank[ing] and collaterally impeach[ing]' Parliament's effort to codify judicial review.[106]

While s 75(v) of the *Constitution* with its 'entrenched minimum provision of judicial review'[107] provided an avenue for circumventing the regime that would not be available when interpreting other more ordinary codes, the 'death knell' for the regime was 'finally sounded'[108] two years later by the High Court applying more universal methods of statutory interpretation in *Minister for Immigration and Multicultural Affairs v Yusuf* ('*Yusuf*').[109] In *Yusuf*

---

[99] See *Migration Reform Act 1992* (Cth) s 33, inserting Part 4B into the *Migration Act* (n 2).
[100] Ibid.
[101] It should be observed that immediately prior to the *Reform Act*, the *Administrative Decisions (Judicial Review) Act 1977* (Cth) was utilised to seek judicial review of migration decisions. Its grounds of review generally reflected the grounds at common law.
[102] *Migration Reform Act 1992* (Cth) s 33.
[103] Mary Crock, 'Judicial Review and Part 8 of the Migration Act*:* Necessary Reform or Overkill?' (1996) 18(3) *Sydney Law Review* 267, 272.
[104] *Abebe v Commonwealth* (1999) 197 CLR 510.
[105] Even though s 75(v) does not stipulate the grounds under which such a challenge can be brought. Rather, It gives the High Court the jurisdiction to hear a matter 'in which a writ of Mandamus or prohibition or an injunction is sought …' *Australian Constitution* s 75(v).
[106] *Ex parte Aala* (n 17) 90.
[107] *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 513 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ) ('*Plaintiff S157*'). This was an implication which at the time was thought to apply to Commonwealth administrative decisions only. It was only after *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 ('*Kirk*') that a similar implication arose in respect of State administrative decisions.
[108] Stephen Gageler SC, 'Impact of Migration Law on the Development of Australian Administrative Law' (2010) 17 *Australian Journal of Administrative Law* 92, 101.
[109] (2001) 206 CLR 323 ('*Yusuf*').

it was observed that the regime did not constrain the Federal Court as much as it may have appeared to do so at 'first sight'.[110] In other words, it was not nearly as comprehensive as first thought. This was because the regime stipulated what decision-making conduct was or was not judicially reviewable by reference to traditional common law labels which were inherently flexible. This flexibility meant that not only did the judiciary decide under what label a decision maker's conduct fell but it also decided what conduct could come within that label and ultimately whether a new label, not excluded by the regime, should be recognised.[111] This meant, for example, that conduct by a decision maker that would be traditionally classified as a breach of natural justice, and under that categorisation would be excluded as a ground of review, could, within reason, now be categorised under another label and under that label it may not be excluded.[112] The foundations having been laid, this inherently flexible approach was perhaps most famously utilized 12 years later in *Minister for Immigration & Citizenship v Li* (*'Li'*).[113] In *Li* the High Court dealt with a refusal by the MRT to grant an adjournment on the common law grounds of unreasonableness rather than the more traditional grounds of natural justice.[114]

With the attempt to codify judicial review in tatters, Parliament then tried to exclude judicial review almost completely by introducing a privative clause that applied to judicial review applications in both the Federal and High Courts. The privative clause provided that decisions under the *Migration Act* were 'final and conclusive' and not to be challenged.[115] The intention being that while decision makers would still follow the codified procedures in the *Migration Act*, the courts would be severely limited in their ability to intervene and hence reintroduce common law grounds of review.[116]

Inevitably, the privative clause quickly became the subject of judicial scrutiny.[117] The most influential single Federal Court judgment was *NAAX v Minister for Immigration and Multicultural Affairs ('NAAX')*.[118] The effect of this judgment was that the privative clause was constitutionally valid and excluded common law grounds of review[119] although possibly not

---

[110] Ibid 349 (McHugh, Gummow and Hayne JJ).

[111] Kirby J was to later describe as misconceived the notion that the 'grounds of judicial review can be neatly compartmentalised into completely separate kinds of errors': *Re Minister for Immigration and Multicultural Affairs; Ex parte S20/2002* (2003) 77 ALJR 1165, [143] *('S20/2002')*.

[112] See particularly, *Yusuf* (n 109) 351; and Gleeson CJ's later discussion of illogicality, irrationality and unreasonableness in *S20/2002* (n 111) [20].

[113] (2013) 249 CLR 332 (*'Li'*).

[114] Ibid 347 (French CJ), 357 (Hayne, Kiefel and Bell JJ).

[115] *Migration Act* (n 2) s 474. Although it was recognised that there would be very limited exceptions based on the decision of *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598 (*'Hickman'*) which over 50 years earlier considered a similar privative clause. Other limited exceptions were provided for at s 474(4), while s 474(5) provided the government with the ability to pass a regulation specifying that a decision was not a privative clause decision.

[116] On a literal reading the privative clause forbade judicial review completely, however the legislature understood that this was not the actual effect of the amendments. Rather the aim was that the privative clause would be interpreted by the judiciary in light of existing High Court authority, in particular a judgment of Dixon J in the 1945 decision of *Hickman,* so that it drastically reduced the grounds of review available: *Hickman* (n 115).

[117] See *Walton v Minister for Immigration and Multicultural Affairs* (2001) 115 FCR 342 (Merkel J); *SAAA v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 101 (Mansfield J); *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597, 633 (Kirby J).

[118] (2002) 119 FCR 312 (*'NAAX'*).

[119] Examples of cases that followed it include: *Ratumaiwai v Minister for Immigration and Multicultural Affairs* [2002] FCA 311, (Hill J); *NABM v Minister for Immigration and Multicultural Affairs* [2002] FCA 335, (Beaumont J); *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 123 FCR 298 (Hill J) (*'NAAV'*); *Turcan v Minister for Immigration and Multicultural Affairs* [2002] FCA 397 (Heerey J); *NACL v Refugee Review Tribunal* [2002] FCA 643, (Conti J); *NAAP v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 805, (Manfield J); *SBAP v Refugee Review*

review for a breach of an 'express prescriptive provision'.[120] Based on this interpretation, Parliament had finally succeeded in having the procedures set out in the *Migration Act* treated like a code in that the common law was excluded.[121] Judicial review would no longer be available for 'judicially developed areas [meaning grounds or principles] of review'[122] but would only be available where there was a breach of a specific section of the *Migration Act* and only then when a reading of that section pointed to it being a mandatory requirement. A similar conclusion was ultimately reached by a majority in the Full Federal Court decision of *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs ('NAAV')*,[123] albeit with, as it was to turn out, powerful dissents by French and Wilcox JJ.

With hindsight, the split between the majority and dissidents in *NAAV* provides a classic example of the incremental nature of the common law. The majority's approach can be seen as more accepting of a traditional Austinian proposition that Parliament was supreme and that the judiciary had to accept its 'command' to revert to what could be viewed as the more traditional and limited role of determining whether the decision maker had actual authority to make a decision.

On the other hand, the dissenters were not willing to accept that the judicial role could be so limited. This is particularly evident in French J's denial that his task was to find Parliament's actual intent.[124] He instead saw the judicial task as far more nuanced, requiring the consideration of higher common law principles such as the principle of legality and the rule of law.[125] These higher principles were supported by more traditional observations that it was the judiciary's responsibility to ensure the executive complied with the power given to it by Parliament and in this regard there could not be 'such [a] thing as an absolute or unlimited statutory power'[126] and that '[e]very statutory power … is confined by the subject matter, scope and purpose of the legislation'.[127] This approach is one which French J continued to utilise when he ascended to Chief Justice of the High Court and perhaps can be most famously identified in the majority judgment in *Kirk v Industrial Court of NSW* where it was observed that legislation seeking to exclude judicial oversight by State Supreme Courts was impermissible as it would 'create islands of power immune from supervision and restraint'.[128]

While the majority's decision in *NAAV* was a significant legal victory for the government, it was soon reversed by the High Court in *Plaintiff S157*.[129] The joint judgment of Gaudron, McHugh, Gummow, Kirby and Hayne JJ applied what was said to be two 'basic' and important common law rules of statutory interpretation (constitutional coherence[130] and court jurisdiction[131]) to uphold the constitutional validity of the privative clause but at the same time render it ineffective. It was ineffective as their interpretation meant it only protected decisions the judiciary found to be valid anyway. A decision would not be valid if there had

---

Tribunal [2002] FCA 590, (Heerey J); *NAAG of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 195 ALR 207, (Allsop J); *Applicant VBAB of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 121 FCR 100, (Ryan J).

120 *NAAX* (n 118) [34].

121 As long as a decision maker acted *bona fide*.

122 *Turcan v Minister for Immigration and Multicultural Affairs* [2002] FCA 397, [44].

123 *NAAV* (n 119) (Black CJ, Beaumount and Von Doussa JJ).

124 Ibid 430.

125 Ibid 415–18.

126 Ibid 418.

127 Ibid.

128 (2010) 239 CLR 531, 581 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

129 *Plaintiff S157* (n 107).

130 Ibid 504.

131 Ibid 505.

been a jurisdictional error.[132] In a similar fashion to the judgment of French J in *NAAV*, although not mentioning it, the majority continued that to determine whether there was a jurisdictional error required 'an examination of limitations and restraints found in the Act'.[133] Natural justice was such a restraint,[134] but not the only one that would be imported from the common law. This is because a jurisdictional error is in reality a term of judicial conclusion[135] and, in direct contrast to the aims of a code, extremely flexible in that it has a reach that is both 'uncertain and open ended'.[136]

The term jurisdictional error is not mentioned in the *Constitution*. Rather, it is a creature of the common law. It is a concept that now ensures, as recently explained by Kiefel CJ, Gageler and Keane JJ in *Hossain*, that the judiciary always has a substantive role to play in enforcing 'the limits which Parliament has expressly or impliedly set on the decision-making power which Parliament has conferred on the' executive decision maker.[137] This substantive role may vary depending on the relevant legislation under which an executive decision is made but will not be limited to acting merely like the proverbial slot machine as Bentham, and the government when codifying the *Migration Act*, may have desired.

VI The Codification of Procedures

A *Overview*

The *Reform Act*[138] also sought to codify the procedures that the executive was to follow. It did so by introducing a new subdivision under the heading 'Code of procedure for dealing quickly and efficiently with visa applications' ('the codifying sub-division').[139] The judiciary's response to this amendment can be viewed in three parts. First, an unwillingness to accept that decision making procedures had actually been codified. Second, interpreting sections of the code to provide grounds of review similar to that available under the common law. Third, the approach taken when there was a technical breach of one of the codified procedures.

B *The Unwillingness to Accept Codification:* Miah

At the time the *Reform Act* was enacted, it was generally presumed that natural justice would apply to decisions made by the executive under a statute. To overcome this presumption there needed to be a 'strong manifestation of contrary statutory intention'.[140] As previously mentioned, by seeking to codify the procedures to be followed under the *Migration Act*, the government believed it was manifesting such an intention. A majority of the High Court disagreed.

When the High Court considered the codifying sub-division for the first time in *Minister for Immigration and Multicultural Affairs, Re; Ex parte Miah* (*'Miah'*), it split three to two on whether

---

[132] Ibid 506. The proposition that a decision affected by jurisdictional error was not a decision under the *Migration Act* (n 2) had been the reason for the earlier decision of *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597.
[133] *Plaintiff S157* (n 107) 506.
[134] Ibid 508.
[135] Mark Aronson, 'Jurisdictional Error without the Tears' in Matthew Groves & HP Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007) 330; Aronson, Groves and Weeks (n 35) 20.
[136] Matthew Groves, 'Federal Constitutional Influences on State Judicial Review' (2011) 39(3) *Federal Law Review* 399, 417.
[137] *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1, 26 [46].
[138] *Migration Reform Act 1992* (Cth).
[139] Commonwealth, Second Reading Speech, Migration Reform Bill, House of Representatives, 4 November 1992, 2620.
[140] *Kioa* (n 16), 585 (Mason J).

there was in fact a code that excluded natural justice.[141] The minority of Gleeson CJ and Hayne J, who found the legislation did create a code, can, like the majority in *NAAV*, be said to have adopted a more literal approach focusing on the actual wording of the statute to determine the intention of Parliament.[142] However, the majority of Gaudron, McHugh and Kirby JJ, who said there was not a code, undertook a more complex process of statutory interpretation.

The approaches of McHugh and Kirby JJ in particular meant that excluding common law principles such as natural justice is not a simple task. This is because they said there are a number of matters external to and beyond the actual wording used by Parliament that have to be considered and weighed. It is for the judiciary to decide how much 'weight' should be given to the inclusion of the word 'code' in the codifying sub-division, which, as it transpired in *Miah*, was not much. In this regard, and despite its historical significance, Kirby J declared that the use of the term 'code' did not mean that there was an 'exhaustive statement' of the law,[143] while McHugh J observed that its use was 'too weak a reason to conclude that Parliament intended to limit the requirements of natural justice…'.[144]

From an interpretive perspective the reasoning of Kirby and McHugh JJ can be seen as 'traditional' in that judicially created principles of statutory construction were applied to implement Parliament's directive. That is, Parliament did not 'intend to work serious procedural injustice'[145] and consequently would not normally want a decision maker to 'deprive himself or herself of relevant information'[146] which would be obtained if natural justice rules were complied with. What was more contentious was that the starting point for their interpretive analysis did not provide for any presumption that Parliament intended to displace the common law, despite the historical rhetoric to the contrary in respect of criminal codification. Instead they insisted that Parliament placed as great an importance upon common law principles as they did. This could be seen as reflecting judicial values onto Parliament. It certainly illustrates the inherent flexibility of the judicially created principles underlying the interpretation of statutes. It is a methodology that was adopted by the High Court five years earlier in *Coco v The Queen*[147] when construing a statute, and is now referred to as the principle of legality.[148] This principle specifies that a fundamental common law right will not be excluded or over-ridden by Parliament other than in the clearest possible language.[149] It is an approach even *Miah's* dissentients were to embrace, as illustrated by Gleeson CJ's later observations:

> [a] statement concerning the improbability that Parliament would abrogate fundamental rights by the use of general or ambiguous words is not a factual prediction … In a free society, under the rule of law, it is an expression of a legal value, respected by the courts, and acknowledged by the courts to be respected by Parliament …[150]

---

[141] (2001) 206 CLR 57 ('*Miah*').
[142] Ibid 75.
[143] Ibid 113 (Kirby J).
[144] Ibid 94 (McHugh J).
[145] Ibid 113 (Kirby J).
[146] Ibid 114 (Kirby J).
[147] (1994) 179 CLR 427, 436 (Mason CJ, Brennan, Gaudron and McHugh JJ), 446 (Deane and Dawson JJ).
[148] The term 'principle of legality' was used in a High Court judgment for the first time in *Al-Kateb v Godwin* (2004) 219 CLR 562, 577 (Gleeson CJ).
[149] This is a commonly accepted but not universal definition of the principle. Given the large number of common law rights to which it has been applied, its breadth and strength is subject to conjecture: see Francis Cardell-Oliver, 'Parliament, the Judiciary and Fundamental Rights: The Strength of the Principle of Legality' (2017) 41(1) *Melbourne University Law Review* 30.
[150] *Al-Kateb v Godwin* (n 148).

The key to this statement is the term 'legal value'. By necessity the common law imposes a 'methodology or legal framework for addressing interpretative issues'.[151] Legal values are part of this framework. Consequently, the important issue is the degree of influence a particular value has in particular circumstances,[152] which is determined by the judiciary making qualitative judgments (a term, as will be seen, used in *Hossain*). Kirby and McHugh JJ's approach in particular suggests that some common law values can be seen to be so important that they come pre-entered on, rather than being merely discernible behind, any palimpsest upon which Parliament scribes.

C *Legislating Away* Miah*?*

In response to *Miah*, Parliament again amended the *Migration Act* with the aim of making it clear that the *Migration Act* contained codes of procedure that replaced 'the common law requirement of the natural justice hearing rule'.[153] It did so by inserting a number of 'codifying clauses'.[154] Each clause provided that the relevant division in which they were placed 'is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with'. Once again the wording used and the judicial treatment of it created considerable uncertainty and demonstrated how the qualitative judgments of individual judges influence their conclusions.

Initially judges who were inclined to interpret the codifying clause to exclude natural justice tended to focus on the words at its beginning, being 'an exhaustive statement'. This meant that the only natural justice-like obligations that existed were those explicitly reproduced in the *Migration Act* itself.[155] This approach sat most comfortably with the explanatory memorandum's stated aim.[156] Those judges who believed the codifying clause had a far more limited operation focused on its concluding words, being 'in relation to the matters it deals with'.[157] This was the approach championed by French J and its circularity is evident when broken down into its two component steps.[158] First, if a section reproduces a natural justice obligation, the codifying clause means that there is not a breach of natural justice, but there is nevertheless a breach of that section and therefore the decision could be set aside. Second, if the natural justice obligation is not reproduced in a section of the *Migration Act*, it is not a matter which the codifying clause 'deals with', and therefore the common law continues to operate and, if breached, the decision can be set aside. Consequently, unless a section expressly stated that a natural justice obligation was not owed, the codifying clause made little difference.[159] In support of the choice he was making, French J, like McHugh and Kirby JJ in *Miah*, continued to reply upon the principle of legality.[160]

---

[151] *Small v New Brunswick Liquor Corporation* 2012 NBCA 53, [31] (Robertson JA).

[152] For a discussion of values underlying the principle of legality, see: Brendan Lim, 'The Normativity of the Principle of Legality', (2013) 37(2) *Melbourne University Law Review* 372.

[153] Commonwealth, *Parliamentary Debates*, Senate, 27 June 2002, 2790–1 (Ian Campbell).

[154] *Migration Legislation Amendment (Procedural Fairness) Act 2002* (Cth) introduced sections 51A, 97A, 118A, 127A, 357A and 422B into the *Migration Act*.

[155] See Enzo Belperio, 'What Procedural Fairness Duties Do the Migration Review Tribunal and Refugee Review Tribunal Owe to Visa Applicants' 54 *AIAL Forum* 81, 85; *VXDC v Minister for Immigration & Multicultural & Indigenous Affairs* (2005) 146 FCR 562 (Heerey J) ('*VXDC*'); *SZEGT v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCA 1514 (Edmonds J); *Minister for Immigration and Multicultural and Indigenous Affairs v Lay Lat* (2006) 151 FCR 214 (Heerey, Conti and Jacobson JJ) ('*Lay Lat*').

[156] Commonwealth, *Parliamentary Debates*, Senate, 27 June 2002, 2790–1 (Ian Campbell).

[157] Belperio (n 155) 84; *WAJR v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 204 ALR 624 (French J) ('*WAJR*'); *Moradian v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 142 FCR 170 (Gray J) ('*Moradian*').

[158] *WAJR* (n 157).

[159] There were approaches that could be said to sit between these two extremes: see, eg, *NAQF v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 130 FCR 456 (Lindgren J) ('*NAQF*'); *Wu v*

So, once again there was a split in the Federal Court.[161] The split had its genesis in whether, or to what degree, individual judges chose or felt compelled to defer to the supremacy of Parliament and look for the actual legislative intent, or alternatively, utilised common law statutory presumptions to limit the operation of what could be termed an 'ambiguous perhaps also obscure' clause.[162] These differences in opinion continued until a joint judgment of the Full Federal Court came down firmly in favour of the view that the codifying clause excluded the common law.[163] Despite initial resistance,[164] this quickly came to be the accepted view[165] even though it was seen by the judiciary as operating harshly[166] and 'a matter of shame for every Australian citizen'.[167]

Consequently, there was again a period in which Parliament's code succeeded in excluding natural justice but, like the privative clause, this success was not to last. Eventually the High Court in *Saeed v Minister for Immigration and Citizenship* ('*Saeed*'),[168] with French now as Chief Justice, again relied on the principle of legality,[169] together with an acknowledgement that the Court was seeking to find the meaning of legislation rather than trying to divine Parliament's actual intent;[170] to reject *Minister for Immigration and Multicultural and Indigenous Affairs v Lay Lat* and endorse an approach similar to what French J had advocated when on the Federal Court. This approach is now the accepted norm. Indeed, it was repeated recently in *SZMTA*.[171]

While *Saeed* dashed any hope of achieving a Bentham like procedural code, in practice its significance was more limited. This was because the judiciary had already imported into the code many natural justice-like obligations through an expansive interpretation of what its express procedures required.

VII Interpreting the Code to Find Common Law-Like Obligations

A *An Expensive Approach to Interpretation*

Minister for Immigration and Multicultural and Indigenous Affairs (2002) 123 FCR 23 (Sackville J). See Belperio (n 155).

[160] See, eg, *WAJR* (n 157) [59] where he set out the test in *Annetts v McCann* (1990) 170 CLR 596, 598. This approach was also adopted by Gray J in *Moradian* (n 157) [36]. The principle of legality featured prominently in the High Court after French became its Chief Justice: See D Meagher, 'The Common Law Principle of Legality in the Age of Rights' (2011) 35(2) *Melbourne University Law Review* 449; Hooper, 'The Rise of Judicial Power'(n 3) 113–17, 124 and Cardell-Oliver (n 149) 31.

[161] *NAAV of 2002 v Minister for Immigration and Multicultural Affairs* [2002] FCA 443.

[162] *VXDC* (n 155) 567; *Lay Lat* (n 155) [64].

[163] *Lay Lat* (n 155) (Heerey, Conti, Jacobson JJ); the same bench simultaneously handed down *SZCIJ v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCAFC 62 ('*SZCIJ*'). *SZCIJ* dealt with s 422B while *Lay Lat* dealt with s 51A.

[164] *Antipova v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 151 FCR 480 (Gray J) ('*Antipova*').

[165] *NBKT v Minister for Immigration and Multicultural Affairs* (2006) 156 FCR 419, [85] (Young J); *MZXFN v Minister for Immigration and Citizenship* [2007] FCA 362, [17] (Bennett J); *MZXGB v Minister for Immigration and Citizenship* [2007] FCA 392, [51] (Lander J); *SZHWY v Minister for Immigration and Citizenship* (2007) 159 FCR 1, [93]–[96], [113] (Graham J), [189] (Rares J) ('*SZHWY*'); *SZEQH v Minister for Immigration and Citizenship* (2008) 172 FCR 127, [27] (Dowsett J). Although see the observation in the joint judgment of Emmett, Kenny and Jacobson JJ in *Minister for Immigration and Citizenship v SZMOK* (2009) 247 FCR 404, [10]–[12] which proposes an individual section approach, although due to the broad way in which they define the nature of each section it in turn gives the codifying clause a very broad reach.

[166] *SZHWY* (n 165) [189] (Rares J).

[167] *SZHMM v Minister for Immigration and Multicultural Affairs* [2006] FCA 1541, [7] (Madgwick J).

[168] (2010) 241 CLR 252 ('*Saeed*').

[169] Ibid 258–9 (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

[170] Ibid 264.

[171] *SZMTA* (n 7) [35]–[36].

Of the actual procedures introduced by the *Reform Act*,[172] what was to become known as the 'invitation to appear clause'[173] had one of the closest resemblances to an obligation imposed by natural justice. It initially provided that the relevant Tribunal:[174]

> (a) must give the applicant an *opportunity to appear* before it to give evidence;[175]

The Explanatory Memorandum stated that the purpose of the invitation to appear clause was to give an applicant 'an opportunity to put his or her case to the Tribunal in person before any negative decision is reached' while not affecting the Tribunal's ability to conduct the hearing in the manner it wished to.[176] It was believed that judicial interference would be minimal as a plain reading of the clause suggested the Tribunal was only obliged to give an 'opportunity to appear', which would only involve allocating a hearing day, notifying the applicant of it and sitting on that day.

Over time the Federal Court's interpretation of the invitation to appear clause became noticeably more expansive. While on one hand the Federal Court warned against importing 'into the Tribunal's proceedings the full range of natural justice requirements',[177] more and more decisions began to find that it applied to the procedures adopted during the hearing itself.[178] Examples of where it was suggested that the invitation to appear clause could be breached included when: evidence was not admitted;[179] misleading statements were made by the decision-maker that discouraged the calling of evidence;[180] the applicant was not allowed to give evidence about an aspect of his or her claim;[181] the Tribunal did not try to obtain information it identified as important;[182] and a hearing proceeded when, due to a medical condition or incapacity, an applicant could not fully comprehend what was occurring.[183]

Discontent with the importation of so many natural justice-like obligations, Parliament amended the invitation to appear clause to read:

> (1) The Tribunal *must invite* the applicant to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the decision under review.[184]

With the removal of the words 'opportunity to appear', the new wording was initially interpreted as imposing little more than an obligation to send an invitation.[185] However, like previous amendments this interpretation was not to last.

---

[172] *Migration Reform Act 1992* (Cth) s 32; as introduced it was s166DB of the *Migration Act* (n 2).
[173] *Migration Act 1959* (Cth), ss 425, 360.
[174] Which, at the time, was the Refugee Review Tribunal or the Immigration Review Tribunal.
[175] Section 360 used the words 'shall give the applicant' rather than 'must give the applicant'.
[176] Explanatory Memorandum, Migration Reform Bill 1992, Migration (Delayed Visa Applications) Tax Bill 1992, 74.
[177] *Minister for Immigration and Multicultural Affairs v Cho* (1999) 92 FCR 315, 322 (Tamberlin and Katz JJ).
[178] Ibid, 322–3 (Tamberlin and Katz JJ), 332 (Sackville J). See also discussion of Lehane J in *Q v Minister for Immigration and Multicultural Affairs* [1999] FCA 1202, [19]–[24].
[179] *Hettige v Minister for Immigration and Multicultural Affairs* [1999] FCA 1084, [15] (Moore J) ('*Hettige*'); *Gebeyehu v Minister for Immigration and Multicultural Affairs* [1999] FCA 1274, [64] (Weinberg J) ('*Gebeyehu*').
[180] *Hettige* (n 179) [15] (Moore J); *Gebeyehu* (n 179) [64] (Weinberg J).
[181] *Q v Minister for Immigration and Multicultural Affairs* (n 178) [19] (Lehane J).
[182] *Li Yuqin v Minister for Immigration and Multicultural Affairs* [2000] FCA 172 (Drummond J).
[183] *Amankwah v Minister for Immigration and Multicultural Affairs* (1999) 91 FCR 248, [12]–[13] (Hill J).
[184] *Migration Legislation Amendment Act (No 1) 1998* (Cth).
[185] *Minister for Immigration and Multicultural Affairs v Mohammad* (2000) 101 FCR 434 (Branson J); *Xiao v Minister for Immigration and Multicultural Affairs* [2000] FCA 1472; *Sreeram v Minister for Immigration and Multicultural Affairs* (2001) 106 FCR 578 (Beaumont J); *Kola v Minister for Immigration and Multicultural Affairs* (2002) 120 FCR 170, 183 (Whitlam, Sackville and Kiefel JJ); *De Silva v Minister for Immigration and Multicultural Affairs* (2000) 98 FCR 364 (Hill, Carr and Sundberg

A unanimous decision of the Full Federal Court in *Minister for Immigration and Multicultural and Indigenous Affairs v SCAR ('SCAR')*,[186] held that the invitation to appear clause required both the giving of an invitation and the provision of a 'real and meaningful' opportunity for an applicant to appear and present their case.[187] This opportunity would not be satisfied if the applicant 'was not in a fit state to represent himself at the hearing' even if the Tribunal did not know of, or contribute to, the applicant's condition.[188]

Despite a few strongly expressed exceptions,[189] *SCAR* was soon utilised by other federal court judges to impose more and more natural justice-like obligations on the Tribunal. Examples of the varying obligations read into the clause included: a need to provide an interpreter of a reasonable quality;[190] the need to raise at the hearing (and give the applicant an opportunity to respond to) those issues that the Tribunal may consider determinative,[191] a requirement that the Tribunal not unreasonably interrupt and place arbitrary time limits on the applicant's evidence;[192] and that the Tribunal not mislead the applicant during the hearing as to what evidence was needed.[193] Even the High Court in *Minister for Immigration and Multicultural and Indigenous Affairs v NAFF*[194] intimated that despite its austere drafting, the interpretation of the invitation to appear clause was to be informed by existing common law principles. This meant that the obligations it imposed extended to the conduct of the hearing where the Tribunal had to consider the arguments presented by the applicant and in that way 'afford the appellant procedural fairness'.[195] As Crock and Berg observed, this finding came 'close to ruling that [the invitation to appear clause] mandates compliance with the essential elements of the common law rules of procedural fairness'.[196] Any doubt that this may have been what the High Court intended was dispelled in *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs*[197] where the joint judgment held that the invitation to appear clause would not be complied with if the Tribunal based its decision on an issue it had not brought to the applicant's attention.[198]

While *SZBEL*, *NAFF* and *SCAR* did not need to, and did not, consider the codifying clause,[199] a concern that the codifying clause may hinder the continuation of this expansive interpretation was dispelled in *SZFDE v Minister for Immigration and Citizenship* ('*SZFDE*').[200] The High Court unanimously held that, if anything, the introduction of the codifying clause increased, or at the very least emphasised, '[t]he importance of the requirement in [the invitation to appear clause] that the Tribunal invite the applicant to appear to give evidence and present arguments …'[201] In other words, the interpretation of the invitation to appear and other procedural clauses were from now on to be inextricably linked with common law

---

JJ).

[186] (2003) 128 FLR 553, 561 (Gray, Cooper, Selway JJ) ('*SCAR*').

[187] Ibid 561.

[188] Ibid 562.

[189] *M17/2004 v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 86 (Ryan J); *Minister for Immigration and Multicultural Affairs v SZFDE* (2006) 154 FCR 365 (Graham J).

[190] *WACO v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 131 FCR 511; *Appellant P119/2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 230.

[191] *WAJR* (n 157) [58].

[192] *Antipova* (n 164)

[193] *NAQF* (n 159) (Lindgren J).

[194] (2004) 221 CLR 1.

[195] Ibid 8.

[196] Crock and Berg (n 1) 587.

[197] *SZBEL* (n 17) (Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ).

[198] Ibid 164, 166.

[199] The initial judicial review applications predated the introduction of the codifying clause on 4 July 2002.

[200] (2007) 232 CLR 189 ('*SZFDE*').

[201] Ibid 201.

natural justice obligations and as such, were viewed as 'critically important'.[202] This link was strengthened further when in *SZMTA*, it was observed that the codifying clause is:

> consistent with the implication of an obligation to afford procedural fairness through the operation of a common law principle of interpretation as a condition of the performance by the Tribunal of its duty to conduct the review.[203]

B *A Strict Approach to Interpretation*

Other provisions in the procedural code were also interpreted expansively. One such provision was the information in writing clause,[204] which was described as a surrogate for,[205] although not entirely synonymous with,[206] natural justice. However, the impact of this expansive interpretation paled into insignificance when compared with the strict approach taken by the judiciary for a time when a breach of a statutory procedure occurred.

For present purposes it is sufficient to observe that the information in writing clause requires the provision in writing of any information that is considered to 'be the reason, or a part of the reason' for rejecting a person's claim for a visa under the *Migration Act.* It also requires an explanation of why the information may be relevant.

Initially the approach taken by the Federal Court when it found that relevant information was not put in writing was a very flexible, common law-like one, based on an assessment of whether the breach had unfairly affected the decision-making process. If it had not, then the Tribunal's decision was upheld despite the breach.[207] This flexible approach was rejected by the High Court in 2005 in *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs.*[208] It was a High Court decision that, like many of the controversial cases already considered, was decided by a majority of one. The majority again included McHugh and Kirby JJ, this time joined by Hayne J.

Hayne, McHugh and Kirby JJ's decisions were all to the effect that even the most minor breach of a procedure in the *Migration Act* would invalidate a decision. It did not matter if any unfairness resulted from the breach or even if the information that the Tribunal failed to give in writing was only a minor or subsidiary part of the Tribunal's reasoning.[209]

---

[202] Ibid 201, 206; *Kaur v Minister for Immigration and Border Protection* [2019] FCAFC 53 (Murphy, Mortimer and O'Callaghan JJ); *Singh v Minister for Immigration* [2018] FCCA 3427, [71] (Kelly J); *SZRJS v Minister for Immigration and Citizenship* [2013] FCA 682, [21] (Farrell J); *SZOIN v Minister for Immigration and Citizenship* [2011] FCAFC 38, [80] (Rares J).

[203] *SZMTA* (n 7) [34].

[204] Found in section 359A of Part 5, Division 5 and section 424A of Part 7, Division 4 of the *Migration Act* (n 2).

[205] *NAHV of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 102, [22] (Carr, Kiefel and Allsop JJ) ('*NAHV*'); *NADN v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 572, [34] (Allsop J) ('*NADN*'); *NAMB v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCA 718, [74] (Jacobson J).

[206] *VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 678, [30] (Gray J).

[207] *NAHV* (n 205) [22]–[23] (Carr, Kiefel, Allsop JJ); *NADN* (n 205) [36] (Allsop J); *NADN v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 291, [38] (Selway, Bennett and Lander JJ); *SZANH v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 1280, [56], [58] (Sackville J); *MZQAV v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FMCA 803, [35] (Hartnett FM).

[208] (2005) 228 CLR 294 ('*SAAP*').

[209] Ibid [68], [83] (McHugh J), [173] (Kirby J), [208] (Hayne J).

The strict approach in *SAAP* was soon applied by the Federal Court to other procedural steps in the 'code',[210] causing enormous difficulties for decision makers. These difficulties were only magnified further when a majority of the Federal Court held that the information in writing clause required the Tribunals to put in writing even minor issues if they could be construed as forming part of the relevant Tribunal's decision and even if they had discussed the matter ad nauseam with the applicant.[211] Consequently, the procedures in the codes became far more onerous than the obligations imposed at common law. This led the Principal Member of the Migration and Refugee Review Tribunals to lament that if 'the procedural code ever had any usefulness, it has outlived that usefulness. It is the source of much unproductive and unnecessary litigation …'[212]

C *The End of the Vision for a Benthamic Like Code*

While Parliament did not abandon its code, with French CJ as Chief Justice the High Court in 2009 signalled a willingness to limit the strict application of *SAAP* to the information in writing clause.[213] When other procedures in the code were breached it instead took a more functional and practical approach. Practical in the sense that the impact of the breach on the decision-making process was considered. If there was no real impact then the decision would not be set aside.[214]

This change in approach benefited decision makers as their decisions were no longer set aside for technical breaches that caused no unfairness. However, it foreshadowed the end of any hope for a Benthamic like code.[215] It did so because rather than placing an overriding importance on compliance with the legislatively prescribed procedures, it now started from the premise that the *Migration Act* as a whole is designed to not only ensure that a person who is entitled to a visa receives it but also that a person who is not entitled does not get it.[216] The High Court was now considering a larger range of underlying values, some which favoured the executive and some which did not. While the procedural code in the *Migration*

---

[210] For example, in *SZDMC v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 763 (Stone J) it was applied to s 424(1) which is a power for the RRT to obtain further information; in *NAJT v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 147 FCR 51 (Hill, Madgwick and Conti JJ)) it was applied to s 57 which is in some ways similar to the information in writing clause but applies to the Minister (ie the primary decision maker); in *SZFOH v Minister for Immigration and Citizenship* (2007) 159 FCR 199 (Besanko, Moore and Buchannan JJ) it was applied to s 441A to find an error occurred when a notice of a hearing was not sent to the current address for the applicant's authorised recipient even though a copy of the invitation was sent to the Applicant; in *SZKTI v Minister for Immigration and Citizenship* (2008) 168 FCR 256 where it was applied to s 424(3) (a case which was overturned as discussed below); in *SZIZO v Minister for Immigration and Citizenship* (2008) 172 FCR 152 it was again applied to s 441A when a letter was sent to the applicant, even though the authorised recipient was the applicant's daughter who lived at the same address (a case which was also overturned as discussed below).

[211] *SZEEU v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 150 FCR 214 [158] (Weinberg J) and [215] (Allsop J). See also *NBKT v Minister for Immigration and Multicultural Affairs* (2006) 156 FCR 419, 428 [32] (Young J) and David Bennett AO QC, 'Is Natural Justice Becoming More Rigid Than Traditional Justice?' (Conference Paper, Australian Institute of Administrative Law Third National Lectures Series, 13 September 2006), 13.

[212] Denis O'Brien, 'Controlling Migration Litigation' (2010) 63 *AIAL Forum* 29, 37.

[213] With the result that compliance with the information in writing clause was considered mandatory and any breach of it continued to lead to the subject decision being set aside. See for example: *SZTGV v Minister for Immigration and Border Protection* [2015] FCAFC 3, [8] (Perram, Jagot and Griffiths).

[214] *Minister for Immigration and Citizenship v Kumar* (2009) 238 CLR 448 ('*Kumar*'); *Minister for Immigration and Citizenship v SZKTI* (2009) 238 CLR 489 ('*SZKTI*'); *Minister for Immigration and Citizenship v SZIZO* (2009) 238 CLR 627 (French CJ, Gummow, Hayne, Crennan and Bell JJ) ('*SZIZO*').

[215] Hooper, 'From the Magna Carta' (n 40) 35–6.

[216] *Kumar* (n 214) 455.

Act had an important role to play in providing the applicant with natural justice, it also had to be balanced against a need to ensure that decisions could be made efficiently and effectively.[217]

It was now clear that like the interpretation of an ordinary statute, the literal meaning of a provision in a code may give way to 'context … the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction'.[218] It was just that the context did not seem to take into account what could be described as the government's Benthamic purpose to exclude the common law.

This change in interpretative approach was undoubtedly better for decision makers than the strict approach previously taken, but it was a win that came at a cost. The procedural code was not to be treated as a self-contained code and as such the content of and effect of a breach of one of its sections would be interpreted in a similar way to a procedure required of a decision maker by natural justice.[219] Indeed it would seem that this was now the position accepted by and indeed proposed by the government as evidenced by the exchange in *Minister for Immigration and Citizenship v SZIZO*[220] between French CJ, Gummow J and Senior Counsel for the Minister for Immigration:

> [Senior Counsel for the Minister]: **[T]**hese are statutory procedural provisions to be read in light of the scope and object and purpose of the Act consistently with **ordinary principles of statutory** construction.
>
> French CJ: But like the rules of procedural fairness, you would say that the question whether **non-compliance with a particular procedure means that there has been unfairness of a vitiating character depends upon the circumstances**? [Senior Counsel for the Minister]: Yes. The statutory procedures are to be **read flexibly and applied to the circumstances** - read in light of scope, object and purpose.
>
> …
>
> Gummow J: What about this phrase 'codes of procedure'?
>
> [Counsel for the Minister]: Well, **'***codes'* was a word that, as my friend pointed out, I eschewed. It is a category of illusory reference, or at least indeterminate reference*, that conceals more than it assists.*[221]

The last observation was, after a somewhat painful period of experimentation, a significant concession. It was a concession that revealed the government now accepted that its codes had a symbiotic relationship with the common law like Windeyer J foreshadowed decades earlier in respect of a criminal code. At the very least, the concession clearly flew in the face of Parliament's attempts since 1992 to specify exactly what procedures the Tribunals did and did not have to follow.

VIII Aligning the Treatment of Express Statutory Procedures with Procedures Implied by Common Law

The flexibility inherent in the common law process of adjudication underlies the dismantling of both the attempt to codify judicial review and procedures in the *Migration Act*.

---

[217] *SZKTI* (n 214) 503–4.
[218] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 384 (McHugh, Gummow, Kirby and Hayne JJ).
[219] See for example the approach taken in *VEAL* (n 18).
[220] *SZIZO* (n 214).
[221] Transcript of Proceedings, *Minister for Immigration and Citizenship v SZIZO* [2009] HCATrans 71 (23 April 2009) (emphasis added).

Nevertheless, the reasoning was quite distinct, with *Plaintiff S157* using a constitutional argument and focusing intently on the concept of jurisdictional error and what it meant while the French Court in 2009 applied broader rules of statutory interpretation without seeking to link them back in any substantive way to the concept of jurisdictional error.[222] An alignment of this reasoning and how the consequences will be determined for a breach of either an explicit requirement or procedure in the *Migration* Act or an obligation implied through the common law has recently been undertaken by Kiefel CJ, Gageler, Keane and Edelman JJ in the decisions of *Hossain* and then *SZMTA* (the aligning majority).[223] There was an alignment as the majority used jurisdictional error as an overarching principle[224] to allow it to treat all three types of breaches in the same way, despite their rather different treatment in the past.

In *Hossain* the majority's reasoning started by re-emphasising, as the High Court had done in *Plaintiff S157* and *Kirk*, both the central importance of and flexibility of jurisdictional error.[225] Equal emphasis was then placed on both express and implied statutory conditions as determinants of a decision maker's jurisdiction. The existence and scope of such conditions being determined by the judiciary through the application of common law principles of statutory construction. The reasoning to this point was not particularly controversial, although the acknowledgement that common law principles of construction 'reflect longstanding qualitative judgments about the appropriate limits of an exercise of administrative power' highlighted in a more forthright manner than usual the key normative role the judiciary plays in supervising the quality of executive decision making.[226] This is particularly so when it is recognised, as discussed previously, that qualitative judgments include presumptions that in the absence of clear words to the contrary Parliament: does not intend to limit access to judicial review; expects decision makers to comply with the common law principles of natural justice; and generally intends for express legislative procedures to be interpreted so that they reflect natural justice like obligations.

Having established an overarching framework to justify the imposition of both express and implicit conditions on an executive decision maker, the aligning majority then explain that ordinarily a breach of such conditions will be treated similarly in that they will only give rise to a jurisdictional error if there is a 'material' breach.[227] A breach will be material 'if compliance could realistically have resulted in a different decision' being reached[228] or it could operate 'to deprive the applicant of the possibility of a successful outcome'.[229] This brings breaches of express statutory conditions into line with breaches of common law grounds of review which have traditionally required errors to be of sufficient gravity to warrant judicial intervention.[230] For example, it is commonly accepted that a breach of natural

---

[222] For example in *SZIZO*, the term jurisdictional error does not feature in the section of the judgment titled 'consideration'. This is not to suggest that jurisdictional error was not an important background concept. Rather, it is suggested that due to the explicit procedures in the *Migration Act* the Court felt sufficiently comfortable in *SZIZO* to simply use ordinary principles of statutory interpretation.

[223] *Hossain* was concerned with an admitted legal error in the application of the statutory criteria for the granting of a visa. *SZMTA* was concerned with a misapplication of a statutory procedure and an admitted breach of procedural fairness implied by the common law as a consequence of that procedure being followed.

[224] *Hossain* (n 6) [17]–[31].

[225] Ibid [17]–[26].

[226] Ibid [28].

[227] Ibid [29].

[228] *SZMTA* (n 7) [45].

[229] *EVS17 v Minister for Immigration and Border Protection* [2019] FCAFC 20, [42] (Allsop CJ, Markovic and Steward JJ) ('*EVS17*'); *Minister for Immigration and Border Protection v CPA16* [2019] FCAFC 40 [32] (Yates, Murphy and Moshinsky JJ); see also *SZMTA* (n 7) [45], [48].

[230] This is in turn consistent with an overarching theme of jurisdictional error as: 'jurisdictional error is an expression not simply of the existence of an error but of the *gravity* of that error': *Hossain* (n 6) [25] (Kiefel CJ, Gageler J and Keane J).

justice is only established where there is 'true practical injustice'[231] or the applicant has been denied 'the possibility of a successful outcome'.[232]

Although not overtly described as such, the notion that a breach of an express condition must be material to be a jurisdictional error is an implied statutory presumption, and as such a more recent rather than longstanding qualitative judgment. It is a qualitative judgment that not only presumes that Parliament intends executive decision makers to act fairly but also that in 'the real world'[233] they will have to make both favourable and unfavourable decisions and do so in an efficient manner. Efficiency being seriously undermined by 'unproductive and unnecessary litigation'[234] in which decisions are set aside on purely technical grounds.

Reflecting the flexibility offered by the imposition of a common law presumption, the multiple references to 'ordinarily' in the judgment of Kiefel CJ, Gageler and Keane JJ in *Hossain*[235] make it clear that while a materiality requirement will be the norm, it need not always apply. In other words it may give way to another qualitative judgment. It may give way, for example, when the wording used by the legislature is sufficiently clear to necessitate strict compliance,[236] or the breach of either an express or implied condition so undermines a person's sense of dignity that it is to be presumed that Parliament would want the decision set aside even if the subsequent decision will reach the same conclusion.[237]

IX Fast Track Review Process

Codification efforts since 1992 to reduce judicial influence having largely failed, in 2014 the government introduced a completely new codified review scheme. The scheme is called the Fast Track Review process. It applies, at least initially,[238] to approximately 30,000 asylum seekers who arrived in Australia by boat between August 2012 and December 2013.[239] Under the scheme any initial decision refusing a refugee visa is automatically referred to and then reviewed by a new body, the Immigration Assessment Authority (IAA).[240]

The Fast Track Review process is different to previous codification attempts in a number of significant ways. This article will focus on three differences in particular. These differences if viewed individually could significantly, if not completely, reduce the judiciary's ability to impose natural justice like obligations on the decision making process but do not do so when viewed against the move to a more overarching, or holistic, view of jurisdictional error as evident in *Hossain*, *SZMTA* and *Plaintiff M174*.

First, and presumably directed at the judiciary's inclination to interpret Parliament's intentions through a lens of fairness, it is openly acknowledged that Fast Track Review is not of the same quality as that offered by the RRT and MRT or typically available to a person affected by a government decision. Indeed, the stated objectives of Fast Track Review do not

---

231 *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 311 ALR 387 [108]; see also *Bhusal v Catholic Health Care Ltd* [2018] NSWCA 56.
232 *Hossain* (n 6) [30]; *Stead v State Government Insurance Commission* (1996) 161 CLR 141, 147.
233 *Hossain* (n 6) [28].
234 O'Brien (n 212) 37.
235 *Hossain* (n 6) [29]–[31].
236 This can be seen as the reason why it was not necessarily to formerly overturn *SAAP*: Ibid [30]
237 Ibid [72] (Edelman J); [40] (Nettle J).
238 There is provision for regulation to be passed expanding its application although one regulation attempting to do so was rejected by the Senate: Commonwealth, *Parliamentary Debates*, Senate, 13 November 2018, 8009–8016.
239 Commonwealth, Second Reading Speech, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, House of Representatives, 25 September 2014, 10546; *Migration Act* (n 2) s 473BA.
240 *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) pt 7AA.

contain any reference to fairness, instead focusing on efficiency, speed, a lack of bias and compliance with its codified procedures.[241] Yet despite the failure to mention it, it is inherent in any decision making process applying a specified criteria that there be a base level of fairness. For if there is not, the decision maker can act arbitrarily, which is impermissible as arbitrariness leads to 'islands of power immune from supervision and restraint'.[242]

Second, rather than its codifying clause applying to '*the matters [the codified provisions] deals with*', it has a more global operation as it is said to be 'an exhaustive statement of the requirements of the natural justice hearing rule *in relation to reviews conducted* by the Immigration Assessment authority'.[243] As explained by the High Court in *BVD17 v Minister for Immigration and Border Protection ('BVD17'),*[244] it is therefore much clearer that the only procedural obligations to be imposed are those expressly provided for by Parliament.

However, this does not mean that all common law grounds of review are excluded. In particular, the Court will still, as it did in *Plaintiff M174*, focus on whether the powers conferred on the IAA's were 'exercised within the bounds of reasonableness'.[245] As *Yusuf* foreshadowed and *Li* and now *BVD17* confirmed, the grounds of review utilized by the judiciary are flexible enough to allow at least some natural justice obligations to be imposed under different judicial review labels.[246]

Third, the codified procedures to be followed by the IAA under the Fast Track Review process are, read in isolation, truly limited.[247] This is because in normal circumstances the review will be one 'on the papers' which means it will only consist of a review of documentation before the initial decision maker[248] or other documents forwarded by the Department of Immigration.[249] The IAA will not have the benefit of, and indeed is normally prohibited from speaking to or interviewing the applicant or considering any further information put forward by the applicant unless that information could not have been provided, or known of, at the time of the initial decision.[250] It is only in 'exceptional' circumstances that further information can be considered.[251] Consequently, as there are minimal steps the IAA can take to obtain further information, there is minimal scope to impose upon it directly common law natural justice like obligations. However, this does not mean a jurisdictional error that infects the IAA's decision cannot be found elsewhere.

Viewing jurisdictional error as an overarching concept with practical implications, as occurred in *Hossain* and *SZMTA*, allows the judiciary to look for an error of sufficient gravity not only in the specific actions of the IAA but also in any step taken in the overall legislated decision making scheme leading up to the IAA's decision.[252] This, for example, has allowed

---

[241] *Migration Act* (n 2) ss 473BA, 473FA.
[242] *Kirk* (n 107) 581 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
[243] *Migration Act* (n 2) s 473DA.
[244] [2019] HCA 34 [33] (Kiefel CJ Bell, Gageler, Keane, Nettle and Gordon JJ) ('*BVD17*').
[245] *Plaintiff M174* (n 8) [20]–[21] (Gageler, Keane, Nettle J), [86] (Gordon J).
[246] *BVD17* (n 244) [34] (Kiefel CJ Bell, Gageler, Keane, Nettle and Gordon JJ) and see in particular [61] (Edelman J).
[247] It is openly acknowledged that the Fast Track Review process is a 'limited form of review': *Migration Act* (n 2) s 473BA.
[248] *Migration Act* (n 2) s 473CB(1)(b).
[249] Information which is held by the Secretary and considered relevant by the secretary: *Migration Act* (n 2) 473CB(1)(c).
[250] *Migration Act* (n 2) ss 473CA, 473DD. The applicant is only able to submit a written submission up to 5 pages long setting out why they disagree with the initial decision and if any claim was made that may have been overlooked: Immigration Assessment Authority, *Practice Direction for Applicants, Representatives and Authorised Recipients* (17 December 2008), [23]-[24].
[251] *Migration Act* (n 2) s 473DD(a).
[252] Strictly speaking this is not a new approach as it has been previously applied when there has been a breach of an explicit statutory obligation. For example, in *Wei v Minister for Immigration and Border*

the Federal Court to set aside a decision of the IAA when the Department of Immigration did not provide the IAA with documents that may have been relevant as: 'conduct of the [IAA] review is intended to be, to a degree, restricted, but fair'.[253] Even more significantly, and based on the High Court's reasoning in *Plaintiff M174*, it may be unreasonable for the IAA to not use its limited powers to seek to address, for example, a breach of natural justice by the initial decision maker.[254] The code of procedure to be followed by the initial decision maker is more extensive than that for the IAA (it includes for example the ability to conduct interviews if desired[255]), increasing the possibility of it being interpreted in a way that incorporates greater natural justice like obligations. Further, as discussed by *Saeed* and *SZMTA*, the ability of the initial decision maker's code to exclude other common law natural justice obligations is reduced as its 'codifying clause' incorporates the words 'in relation to the matters it deals with'.[256]

Precisely what type of errors by the initial decision makers will be sufficiently material to infect the IAA's decision with a jurisdictional error will only become evident as the judiciary continues to address matters on a case-by-case basis. Qualitative judgments will be made by the judiciary which will increase or decrease the likelihood it will intervene. In the interim the IAA is in the unenviable position of not only having to decide on 'the papers' whether or not the criteria for the granting of a visa is satisfied but also having to be acutely conscious of the possibility that a jurisdictional error has been made by another and then, if it has, whether it can be remedied with the limited powers at its disposal. Once again, it seems likely that the government's codification efforts to 'streamline review arrangements'[257] and thereby reduce judicial involvement in migration decision making may actually be the 'source of much unproductive and unnecessary litigation'.[258]

X Conclusion

While special rules of statutory interpretation derived from criminal code cases support to a degree the proposition that the influence of the common law may be reduced when Parliament enacts laws in the form of a code, it is the judiciary that decides how the rules are applied and how much weight they will be given.[259] As three decades of migration decisions illustrate, these rules appear to become more and more emaciated when a code seeks to undermine important common law principles. This is not to suggest that a code cannot change or modify the common law. It can if its meaning is sufficiently clear and direct, but this is no different to an ordinary statute.

Further, even when the judiciary does accept that a code excludes the common law, it will interpret the code through a prism of legal values founded in the common law. Such an approach can be criticised for failing to examine the codes language by asking 'what is its

---

Protection (2015) 257 CLR 22, 32 the breach of an explicit statutory obligation by a third-party university led to a jurisdictional error despite no error being made by the decision maker themselves. However, since what I have referred to as the alignment of jurisdictional error in *Hossain* and *SZMTA* it is an approach that also applies to both explicit and implicit statutory procedures (including natural justice like obligations).

[253] *EVS17* (n 229) [41] (Allsop CJ, Markovic and Steward JJ).

[254] *Plaintiff M174* (n 8) [20]–[21] (Gageler, Keane, Nettle J), [86] (Gordon J), [97]–[98] (Edelman J). Any new information obtained to remedy the breach could be considered as ordinarily the initial decision maker would comply with any jurisdictional obligations and if they did not this would in itself be an exceptional circumstance.

[255] *Migration Act* (n 2) pt 2, div 3, sub-div AB.

[256] Ibid s 51A.

[257] Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, 2.

[258] This is an extract of the quotation used earlier from O'Brien (n 212).

[259] Most obviously this involves the judiciary determining whether there is ambiguity and how that ambiguity will be resolved.

natural meaning, uninfluenced by any considerations derived from the previous state of the law'.[260] It can also be criticised for weakening the key advantages offered by a code such as increased certainty and accessibility of the law to both the public and lawyers. Yet, as Austin and early Australian jurisprudence recognised, in a common law system a code will not always provide a definitive answer, there will almost always be times when a judge must 'relapse into the methods of case-law'.[261] This is particularly so as experience has shown that the precise meaning of a word is often contentious as:

> Words are ideas wrapped in language. The perception of the meaning of words is influenced by the understanding, experience and attitudes of those who hear or read them.[262]

The person ultimately reading and applying a code is a judge. A judge's understanding has been shaped by, their experience is with, and their attitude has been informed by, the common law. This axiom is revealed in the judicial methodology championed by Robert French AC and others when addressing the codification of procedures in the *Migration Act*, a methodology with its emphasis on common law values and, most recently, broader qualitative judicial judgments.

Through a thousand paper cuts, or more literally a thousand cases, the codification efforts of Parliament to comprehensively and exhaustively specify how the judiciary will review executive decisions made under the *Migration Act* have been weakened. Instead, those thousand cases have led to the establishment of an overarching judicial review framework centred on the inherently flexible concept of jurisdictional error. It is a framework that places equal emphasis on both express and implied statutory obligations and procedures. Express procedures often being interpreted to include natural justice like obligations and implied procedures often including other natural justice like obligations or at least a base level of fairness premised on the constitutionally entrenched supposition that the executive cannot decide arbitrarily. If three decades of litigation suggest anything it is that the respective energies of both Parliament and the judiciary will be better spent if it is acknowledged that:

> [t]he basic strength of the legal system lies in the combination of the democratic element through legislative enactments with judicial sensitivity to the detailed needs of individual cases—the combination of legislation with the ever-growing common law.[263]

---

[260] *Bank of England v Vagliano Brothers* [1891] AC 107, 144.
[261] *Vallance* (n 80) 61 (Dixon J).
[262] *Yusuf* (n 109) 358 (Kirby J).
[263] Kenneth Culp Davis, 'Administrative Common Law and the Vermont Yankee Opinion' [1980] (1) *Utah Law Review* 3, 14.