

The Review of Migration Decisions — A Story of Borders and Orders

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Declaration

I, Joyce Kok-Won Chia, confirm that the work presented in this thesis is my own. Where information has been derived from other sources, I confirm that this has been indicated in the thesis.

Signed:

Dated:

Abstract

In the last decade in Australia and the United Kingdom, the review of immigration decisions in tribunals and courts has been marked by constitutional conflict between the executive and the judiciary; a crisis of confidence; and continual change. This thesis explores what this tumultuous story of immigration review tells us about the law — as a social practice, as an institution, and as a linguistic genre — in these jurisdictions, in these times.

This thesis argues that the story of immigration review is explained best not through the conventional story of a battle between the executive and the judiciary, but rather as a story of the fundamental challenges immigration poses to the social, institutional, ideological and linguistic dimensions of law, and of the attempt by judges and the legal community to defend their different conceptions of the legitimacy of the law from those challenges, in different ways.

Four fundamental challenges are identified. First, immigration challenges the coherence of the legal framework, as it exposes tensions within and between the different legal regimes. Second, the more reductive language used in legal contexts competes badly with more complex, and more socially powerful, discourses about immigration. Third, immigration challenges the capacity of law to perform the functions of resolving disputes and regulating behaviour. Fourth, immigration challenges our deepest concepts of legality.

The thesis examines these challenges, and the responses they provoke, by drawing on the insights of migration studies, contemporary political philosophy, language and the law, and regulatory theory, as well as examining important case law in detail. In doing so, it aims both to capture the story of immigration review more fully, and to illuminate some of the complexities of, and limits to, the contemporary social practice of law.

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Abbreviations

<i>1901 Act</i>	<i>Immigration Restriction Act 1901 (Australia)</i>
<i>1905 Act</i>	<i>Aliens Act 1905 (UK)</i>
<i>1971 Act</i>	<i>Immigration Act 1971 (UK)</i>
<i>1988 Act</i>	<i>Immigration Act 1988 (UK)</i>
<i>1993 Act</i>	<i>Asylum and Immigration Appeals Act 1993 (UK)</i>
<i>1996 Act</i>	<i>Asylum and Immigration Act 1996 (UK)</i>
<i>1999 Act</i>	<i>Immigration and Asylum Act 1999 (UK)</i>
<i>2002 Act</i>	<i>Nationality, Immigration and Asylum Act 2002 (UK)</i>
<i>2004 Act</i>	<i>Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (UK)</i>
<i>2005 Fast-Track Rules</i>	<i>Asylum and Immigration (Fast-Track) Rules 2005 (UK)</i>
<i>2005 Rules</i>	<i>Asylum and Immigration Tribunal Procedure Rules 2005 (UK)</i>
<i>2006 Act</i>	<i>Immigration, Asylum and Nationality Act (UK)</i>
<i>2007 Act</i>	<i>UK Borders Act (UK)</i>
AAT	Administrative Appeals Tribunal (Australia)
<i>AAT Act</i>	<i>Administrative Appeals Tribunal Act 1977 (Australia)</i>
<i>ACA 2007</i>	<i>Australian Citizenship Act 2007 (Australia)</i>
Act, the	<i>Migration Act 1958 (Australia)</i>
<i>ADJR Act</i>	<i>Administrative Decisions (Judicial Review) Act 1977 (Australia)</i>
ADR	Alternative dispute resolution
AIT	Asylum and Immigration Tribunal (UK)
ANAO	Australian National Audit Office (Australia)
ARC	Administrative Review Council (Australia)
BIA	Borders & Immigration Agency (UK)
<i>BNA 1948</i>	<i>British Nationality Act 1948 (UK)</i>
<i>BNA 1981</i>	<i>British Nationality Act 1981 (UK)</i>
BNP	British National Party (UK)
BN(O)	British National (Overseas) citizen (UK)
BOC	British Overseas citizen (UK)
BOTC	British Overseas Territories citizen (UK)
BPP	British protected person (UK)
CAC	Constitutional Affairs Committee (UK)
CAT	Convention against Torture and other Cruel, Inhuman or Degrading Treatment (UN)
CEAS	Common European Asylum System (EU)
CROC	Convention on the Rights of the Child (UN)
CUKC	Citizen of the UK and Colonies (UK)
Department, the	Department of Immigration (all incarnations) (Australia)
DIAC	Department of Immigration and Citizenship (Australia)
DILGEA	Department of Immigration, Local Government and Ethnic Affairs (Australia)
DIMA	Department of Immigration and Multicultural Affairs (Australia)
DIMIA	Department of Immigration and Multicultural and Indigenous Affairs (Australia)
DORS	Determination of Refugee Status (Committee) (Australia)
EC	European Community (EU)
ECHR	European Convention on Human Rights (Council of Europe)
ECJ	European Court of Justice (EU)
ECtHR	European Court of Human Rights (Council of Europe)
EEA	European Economic Area
ELR	Exceptional leave to remain (UK)
EU	European Union
<i>FCA Act</i>	<i>Federal Court of Australia Act 1976 (Australia)</i>
FGM	Female genital mutilation
FMC	Federal Magistrates Court (Australia)
HAC	Home Affairs Committee (UK)

HC	House of Commons (UK)
HL	House of Lords (UK)
HoR	House of Representatives (Australia)
<i>HRA</i>	<i>Human Rights Act 1998</i> (UK)
HRC	Human Rights Commission (Australia)
HREOC	Human Rights and Equal Opportunity Commission (Australia)
HSMP	Highly Skilled Migration Programme (UK)
IAA	Immigration Appellate Authority (UK)
IAT	Immigration Appeal Tribunal (UK)
ICCPR	International Covenant on Civil and Political Rights (UN)
ICJ	International Court of Justice (UN)
ILR	Indefinite leave to remain (UK)
IND	Immigration and Nationality Directorate, Home Office (UK)
IRT	Immigration Review Tribunal (Australia)
JCHR	Joint Committee on Human Rights (UK)
JCWI	Joint Council for the Welfare of Immigrants (UK)
JSCM	Joint Standing Committee on Migration (Australia)
<i>Judicial Review Act</i>	<i>Migration Legislation Amendment (Judicial Review) Act 2001</i> (Australia)
LCAC	Legal and Constitutional Affairs Committee (Australia)
L&CLC	Legal and Constitutional Legislation Committee (Australia)
LCRC	Legal and Constitutional References Committee (Australia)
MIAC	Minister for Immigration and Citizenship (Australia)
MILGEA	Minister for Immigration, Local Government and Ethnic Affairs (Australia)
MIMA	Minister for Immigration and Multicultural Affairs (Australia)
MIMIA	Minister for Immigration, Multicultural and Indigenous Affairs (Australia)
MIRO	Migration Internal Review Office (Australia)
MRT	Migration Review Tribunal (Australia)
NAO	National Audit Office (UK)
OECD	Organisation for Economic Cooperation and Development
Regulations, the	Migration Regulations 1994 (Australia)
RRT	Refugee Review Tribunal (Australia)
Rules, the	Immigration Rules (UK)
SIAC	Special Immigration Appeals Commission (UK)
SSHA	Secretary of State for Home Affairs (SSHA)
SSHD	Secretary of State for the Home Department (UK)
TEU	Treaty on European Union (EU)
Title IV regime	EU immigration and asylum regime (EU)
UDHR	Universal Declaration of Human Rights (UN)
UNCAT	UN Committee against Torture (UN)
UNHCR	UN High Commissioner for Refugees (UN)
UNHRC	UN Human Rights Committee (UN)

Update

Since this thesis was submitted, there have been a number of significant policy changes that affect this thesis. Rather than rewriting the various sections of this thesis, I note these changes here.

In Australia, the Rudd Government announced on 5 May 2009 it will adopt reforms recommended in a recent review of the federal justice system. This will entail abolishing the Federal Magistrates Court, and absorbing those magistrates into the two superior federal courts, the Family Court and the Federal Court. Whereas the previous immigration review structure involved an appeal to the Federal Magistrates Court, it will now involve an appeal to the 'second tier' of the Federal Court (constituting those magistrates).*

In Australia, the politics of compromise have become more evident, as a fresh flow of boat arrivals has prompted the Rudd Government to reopen the Christmas Island facility built by the former Howard Government; re-ignited debate about the value of temporary protection visas; and prompted strong statements about co-operation with the Indonesian authorities to impede human smuggling. The global financial crisis has also prompted the Rudd Government to reduce the permanent skilled migration intake (to 108,100 places, an overall drop of about 20%),[†] and tighten entry criteria. On the other hand, it has increased the quota for refugees and family members; introduced a new Multicultural Advisory Council; begun publishing the country of origin research used by the Refugee Review Tribunal; and replaced the regulating body for migration agents.

In the Budget announced on 12 May, several significant policy changes were introduced, including the introduction of complementary protection; the removal of work and welfare restrictions on the bridging visas granted to refugee claimants who apply 45 days after arrival; greater funding and support for refugee determinations in the community; the introduction of a four-year planning program for refugee quotas; and the redevelopment of a major detention centre. However, funding for language classes will be cut by over \$20 million.

* See http://www.ag.gov.au/www/ministers/RobertMc.nsf/Page/MediaReleases_2009_SecondQuarter_5May2009-RuddGovernmenttoReformFederalCourts.

[†] See <http://www.minister.immi.gov.au/media/media-releases/2009/ce02-budget-09.htm>.

In the UK, there has been a very significant change with the government announcing on 8 May 2009 that it will move (by early 2010) the Asylum and Immigration Tribunal's functions into the unified tribunal system (as foreshadowed in this thesis).[‡] The immigration review system will now involve a decision in the First Tier of the Tribunal and, with permission to appeal by either Tier of the Tribunal, an appeal to a separate chamber in the Upper Tier of the Tribunal, which will have the power to re-make the decision or remit the decision if it finds an error of law. The Upper Tribunal is not expected to be 'routinely' subject to judicial review, although the government is not presently proposing to restrict access to judicial review by legislation. There will not, however, be oral hearings for permission to appeal to the Upper Tribunal. The procedure rules will be made by the Tribunal Procedure Committee, rather than by the Lord Chancellor as originally proposed. The courts will have the power to decide, on a case by case basis, to transfer immigration and asylum judicial review cases downward to the Upper Tribunal, and there will be a power for the heads of the judiciary and the Lord Chancellor to agree to transfer a class of cases in like manner. The aim is for 90% of asylum applications to either have been granted or exhausted their appeal stages in 18 weeks.

Another important change has been that the draft consolidating bill referred to in the thesis was not introduced into the 2008-2009 Parliamentary session, and was postponed till autumn 2009. Instead, a smaller piece of legislation, the Borders, Citizenship and Immigration Bill, was introduced in January 2009. As of 19 May 2009, it was awaiting its second reading in the House of Commons (having passed through the third reading stage in the Lords). This includes the provisions on 'earned citizenship', the combining of customs and immigration powers, and the introduction of immigration controls in the Common Travel Area. The transfer of judicial review cases from the courts to the Upper Tier of the unified Tribunal is also a feature of this bill.

The rollout of the points system has continued, with the introduction of Tier 4 (Students) and a tightening of requirements for Tier 1 in March 2009. Similarly, the expansion of the national identity card system has continued for foreign nationals.

[‡] See Home Office UK Border Agency and Tribunals Service, 'Immigration appeals: Response to consultation — Fair decisions, faster justice', at <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/consultations/closedconsultations/immigrationappeals/immigration-appeals-response.pdf?view=Binary>.

The proposal to lift the minimum age to 21 for leave to enter as a spouse or partner was implemented in rules in November 2008.

The UK has also suspended (from 30 January 2009) its administrative policy of automatically suspending removal proceedings on a second application for judicial review, where the previous application was found to be merit or was withdrawn or otherwise concluded.

So nothing remains still, as usual, in the ever-changing field of immigration law and policy.

Introduction

You leave the faded neoclassical grandeur of the Victorian Supreme Court; pass through the knots of smoking men in ill-fitting suits outside the glossy County Court; and enter a glassed office block, where an elevator glides you to the twelfth floor. In the hush you enter a room not much larger, and marginally less bland, than a small office. You see the backs of three people, united by an air of quiet nervousness. Across from them, on an oversized table, is a tidy stack of files. A large Australian flag droops in the corner. A tape machine whirrs in the silence.

You leave the renovated cafes of Exmouth Market, and wend your way through a jumble of blank-faced premises to the dung-brown building on the corner. Emptying your pockets, you walk through the body scanner, and wait for the elevator to deposit you in the worn-out reception area. Young lawyers steam past clutching enormous sheaves of paper, trailed by anxious families. Through the warren of corridors, you make your way to a drab room, dominated by an elevated judge's bench and a horseshoe-shaped table. Sunlight filters weakly through the blinds, as time drains away.

Welcome to the shadowed world of immigration review, with its curious mix of borrowed symbolism and desperate banality. In these glorified offices, destinies are won and lost; families reunited and separated; safe haven granted and refused. These small rooms are the sites of one of the most complex interactions between the legal, political and administrative systems in Australia and the UK. They are places of paradox; of ambivalence; of plain old hypocrisy and double-speak. Moreover, they are places in which space itself is in contest — territorial space, political space, legal space, linguistic space. They are places in which borders and orders are constructed, imposed, and challenged.

In the last decade, these small rooms in Australia and the UK have become major sites of controversy. The tribunals that sit in them have been renamed and restructured; the courts that preside over them have had the scope and shape of their supervision continually altered. There have been torrents of amending legislation, endless streams of reports, and rivers of academic commentary. Judges and ministers have traded barbs. Constitutional conventions and traditions have been unmade, and re-made.

This thesis explores what this tumultuous story of immigration review has to tell us about the state and place of law in these jurisdictions. Predominantly, academic commentary has described this story in terms of a battle between the executive and the judiciary, and critiqued features of immigration law using other legal standards, such as constitutional and administrative law, refugee law, and human rights law. Yet, as I shall demonstrate, the story of immigration review is much more interesting, and much more challenging, than that.

This story is, I suggest, best captured in a central metaphor. As Dworkin insightfully put it, law is an empire.¹ Like all empires, it exhibits great variation and plurality which inevitably results in friction between its constituent parts. Like all empires, it expands and contracts; triumphs and retreats; wages epic battles and negotiates quiet truces. Like all empires, its vitality depends upon its power — physical, administrative, linguistic and ideological. Like all empires, it contests spaces and places, redrawing its borders continuously.

Read in this way, the story of immigration review reveals itself as a prism for understanding the increasing complexity of legal governance — its strengths and weaknesses, and the challenges it poses. The forms of law multiply and morph, posing insoluble challenges, and exposing inescapable weaknesses. It is a story, therefore, that illuminates the limitations of the law — common throughout law's empire, but particularly exposed in immigration — and our responses to them.

The story of immigration review reveals four fundamental challenges. Immigration challenges the coherence of the law, because immigration review invokes a dynamic and unstable constellation of legal regimes that depend upon different normative paradigms and political structures, producing irresolvable normative tensions and generating unsatisfactory judicial resolutions. Immigration also engages the law in a structurally unequal competition with other powerful discourses and social spheres, which is exacerbated by the richness and complexity of immigration, as well as its symbolic significance. Immigration also challenges the capacity of law to perform its core functions of dispute resolution and regulation.

Most importantly, however, immigration poses a deeper challenge to underlying concepts of legality. In doing so, immigration also exposes the weakness of legal tools

¹ Ronald Dworkin, *Law's Empire* (1986). As will be apparent, this thesis does not, however, follow a Dworkinian path.

and theory, for distinctively legal critiques fail either to conceptualise or counter this deeper challenge to legality adequately.

This analysis is inspired in part by Boswell's account of the relative failures of immigration policies in terms of the competing imperatives of the State.² The legitimacy of modern Western States, she argues, rests upon their performance of four functions: the provision of security; the provision of conditions for the accumulation of wealth; the promotion of fairness, broadly in the sense of redistributive justice but also dependent upon a latent ethic of universalist rights; and its compliance with certain formal conditions for the preservation of liberty and democracy (which she terms 'institutional legitimacy'). Immigration tends to raise conflicts between these functions, which States manage by compromising between imperatives ('fudging'), or 'trumping' one imperative with another. Adapting this account to the legal sphere, I argue that immigration exposes conflicts within and between imperatives of the law: the functional imperative of resolving disputes and regulating human behaviour; the normative imperative of reflecting and enforcing the norms of society; and, most importantly, the 'institutional' imperative of defending the legitimate role of the law.

In rewriting the story of immigration review in this way, this thesis performs several functions. First, it counters the myth that the controversies of immigration review merely reflect either political battles between refugee advocates and restrictionists or age-old battles between executive and judicial power. Rather, these controversies are intimately and ultimately controversies about the province and place of law itself.

Second, this thesis counters the myth that it is merely the bad faith, hypocrisy or mean-heartedness of governments that is responsible for the unsatisfactory nature of immigration law. Rather, I argue, many of these controversies arise out of inescapable limitations of the law.

Third, by tracing these limitations, and our anxieties about and responses to them, I develop an account of the contemporary legal sphere that captures its promises, practices, pitfalls and potential more accurately, an account that also comes closer to capturing the essence of the story of immigration review. The burden, and the primary value, of this thesis rest upon this account.

Fourth and finally, in more precisely diagnosing the pitfalls and potential of the law, the aim is to escape the trap of disillusionment and despair that envelops the

² Christina Boswell, 'Theorizing migration policy: Is there a third way?' (2007) 41 *IMR* 75.

story of immigration review. Acknowledging the fundamental limitations of the law allows us to begin to identify ways of ameliorating the effect of those limitations, and to begin learning the more profound lessons of the story of immigration review. It is not, however, the purpose of this thesis to make detailed recommendations for reform — a task performed elsewhere in greater depth by those with greater expertise. Rather, the purpose here is to identify how, by re-telling this story, we can begin to re-orient our strategies.

1 Definitions

1.1 The law

A number of terms first need to be explained, beginning with ‘the law’. It would, of course, be more analytically precise to distinguish between specific usages of the term, such as to identify the rules that have the status of law; to refer to legal institutions and processes; to describe a distinctive linguistic genre; or to indicate a corpus of legal values and normative claims. Most broadly, I use ‘the law’ to refer to the contemporary social sphere of activity focused upon distinctive legal processes in Australia and the UK.³

However, that approach misrecognises the central significance of the interrelations between these different usages of law. It is precisely the slippage between these different aspects of law in our everyday linguistic and conceptual practices, and the social significance of that slippage, that interests me. We talk about, think about, and evaluate the law in all these different senses. Thus, although in general I refer ‘to the law’ in the broadest sense outlined above, I wish to embrace rather than reduce the complexity of the term.

1.2 Immigration, migration and refugees

The terminology in the field of immigration is notoriously slippery. Since the almost exclusive focus of law and policy in both jurisdictions is immigration, I use ‘immigration law’ to refer to the domestic laws governing movement into the State, rather than ‘migration law’ as is traditional in Australia. I refer to ‘immigration’ where I am focusing upon entry into States, and ‘migration’ when referring to movement between States more broadly. Since immigration laws do not hinge upon the length of

³ Unlike the broadest sociological definitions, this embraces only State law.

residence, I do not use ‘immigration’ to denote only long-term immigration, as is conventional in social sciences. By ‘immigration review’, I refer primarily to the legal processes by which individual decisions on immigration status, or related to immigration, are reviewed (as described in the first chapter) although I acknowledge the significance of non-legal mechanisms for reviewing immigration policy and decisions.

I also use ‘immigration’ and ‘migration’ as an umbrella term, including within it streams of forced migration, addressing the distinctive issues of refugee movements separately when they arise. While I use the term ‘refugee’ in its narrow legal sense, as this is a legal thesis, the sharp legal divide between immigrants and refugees oversimplifies both the empirical reality and the intimate connections between immigration and refugee policy. Finally, I use ‘refugee claimant’ and ‘irregular immigrant’ in preference to the politically loaded and misleading terms ‘asylum seeker’ and ‘illegal immigrant’.

2 *Jurisdictions*

This thesis considers Australian and British immigration review, but it does not make claims to a distinctively comparative methodology. Nevertheless, it is necessary to explain the choice of jurisdictions. This, of course, is partly dictated by practical matters of access and familiarity with the legal systems.

However, the comparison between Australia and the UK is illuminating as well because of the patterns of convergence and divergence between the jurisdictions. While immigration patterns and policy have historically been very different (as discussed in chapter 5), contemporary patterns are converging, compelling a marked and often deliberate convergence in policy. On the other hand, the legal frameworks, traditions and climates of the jurisdictions are diverging, as UK immigration law is dramatically reshaped by European Union (‘EU’) law and the *Human Rights Act 1998* (UK) (‘HRA’).

3 *Orientation of thesis*

As is already evident, this thesis is not doctrinal, and does not stake its claims on legal exegesis, coherence and methodological purity. Rather, it takes a socio-legal approach that is informed by the insights of postcolonial theory (as discussed in chapter 5) in favouring the exposure of tensions and ambivalence; in emphasising the irreducibility of complexity; and in adopting an exploratory rather than

argumentative mode of scholarship — “scaveng[ing]”⁴ for insights in an eclectic fashion.

To demonstrate my claims, I employ insights from a range of disciplines and perspectives, an approach that better fits the complexity of the contemporary legal sphere by examining it at different angles, and at different levels of generality. In exploring the challenge of coherence, I both broadly describe the political structure and normative paradigms of the major legal regimes involved in immigration review, and descend in detail to examine significant judgments. In exploring the challenge of competition, I analyse key legal texts in a manner inspired by literary analysis, and contrast this analysis with a broad range of different perspectives and disciplines. In exploring the challenge of capacity, I apply the insights of disparate branches of legal theory and migration studies to immigration. In exploring the challenge to legality, I examine the weaknesses of distinctively legal critiques before assessing immigration law’s compliance with broader legal standards and values. While this varied methodological approach might sacrifice nuance and risk charges of over-ambition, it mitigates the biases and omissions of individual perspectives, allowing us to capture broader truths.

Lastly, I openly recognise that all scholars are embedded in their own cultural contexts, and exhibit their own predispositions, prejudices and preferences. Like most immigration law scholars, I have a great deal of sympathy for migrants. I am a migrant twice over, and come from a family of migrants: my father has been a forced migrant, an irregular migrant, and a legal migrant. As someone deeply marked by migration, I am all too aware that migration is a lived, unique, experience that cannot be adequately captured by classification and theorising.

4 *Outline*

All that remains is to signal the path ahead. The thesis is structured around the four different challenges, beginning with the narrower focus on the legal framework itself and widening gradually to the conclusion.

I begin by describing the story of immigration review, moving to the challenge of coherence in chapters 2 and 3. Chapter 2 demonstrates how the legal constellation governing immigration review embeds competing normative paradigms that generate an unusual degree of normative polyvalence. Chapter 3 then demonstrates how this

⁴ Peter H Schuck, *The Limits of Law: Essays on Democratic Governance* (2000), 424.

polyvalence is manifested, and unsatisfactorily resolved, through the examination of four landmarks of the story of immigration review.

Chapters 4 and 5 turn to the challenge of competition. Chapter 4 examines the impoverishment of legal discourse, with its simplified models of the person, migration, the State and power relations. This is contrasted in chapter 5 with richer and more socially powerful discourses which expose unusually acutely the limitations of legal discourse. In Chapter 6, I explore the difficulties of dispute resolution and regulation. I argue that, in immigration contexts, the paradigm of the 'dispute' is misleading, and the regulatory matrix unusually complex.

I turn in chapter 7 to discuss the ways in which immigration challenges a deeper account of legality, as expressed in relatively concrete legal standards and values, and underpinned by the broader claim of law to act as a counterweight to politics. Importantly, immigration also reveals the weakness of distinctively legal critiques, since these are ultimately premised on the very boundaries between law and politics that are in contest. Finally, in the conclusion I draw out the lessons we have learnt, and explore ways in which we can begin to address the challenges revealed by the story of immigration review.

Chapter 1 — The story of immigration review

1 *Introduction*

Let us begin by describing what I call the story of immigration review: that is, the story of the protracted ‘crisis’ enveloping immigration review over the past decade in Australia and the UK. However, it is first necessary to know the history of immigration review, for the story of immigration review is, above all, a narrative of loss and variation, a story of imperial retreat and decay.

This chapter thus begins by describing the development of immigration review, leading up to the ‘model’ of immigration review that pertained prior to the mid-1990s. In this part of the history, immigration is a barbarian territory, colonised by the law only in the 1970s, after which, for a period — gilded now by nostalgia — imperial rule held sway.

What follows is a story characterised by conflict, a crisis in confidence, and constant change. The story of immigration review is a story patterned by conflict between the executive and the judiciary; intense criticism expressing a crisis of confidence; and constant changes to the structure and jurisdiction of, and access to, immigration review.

This chapter not only describes the objective features of the crisis, therefore, but also seeks to evoke (and indeed exaggerate) the emotive undertones of this story — to bring out the plaintive note of loss and disillusion that, in the end, structures the story of immigration review.

2 *The development of immigration review*

Until the 1970s, immigration was a Wild West. Legal controls were extremely limited, judges showed great restraint, and there was very limited review by advisory bodies. Then came the brave new world of administrative law and immigration-specific tribunals, which eventually settled down into the ‘model’ of immigration law.

21 The prehistory of immigration review

Immigration review did not exist before the 20th century. There were no permanent immigration controls in the UK.⁵ While in Australia there were various colonial statutes restricting the entry of Chinese (and, in some jurisdictions, all non-whites), these were not subject to legal challenge. The reason for this was that, according to the Privy Council in *Musgrove*, the fact that an alien had no enforceable legal right to enter British territory meant he could not maintain an action in the courts.⁶

This changed at the turn of the century. In Australia, the *Immigration Restriction Act 1901* ('1901 Act') criminalised prohibited entry, and thus brought immigration decisions within the criminal jurisdiction of the courts. The Constitution also conferred original jurisdiction on the High Court to review administrative action (under s 75(v)), although this jurisdiction would only become practically significant much later.⁷

In contrast, the first modern British immigration statute, the *Aliens Act 1905* ('1905 Act'), created a short-lived specialist system of immigration appeal boards, in which the courts played almost no role.⁸ These boards, comprised of lay persons chaired by a lawyer, heard appeals very rapidly at the ports. The story of these boards provides a foretaste of what was to come: introduced to appease communities affected by substantive restrictions, they were criticised for their emphasis on speed, their secrecy, and their use of lay rather than legal members. The boards' surprisingly high rate of success angered the Home Office and they were suspended on the outbreak of World War I, never to be revived.⁹

For most of the 20th century, however, immigration decisions were treated by the judiciary as a great untouchable preserve of State sovereignty and executive

⁵ Temporary immigration controls were introduced in the Napoleonic era, and unimplemented legislation passed in 1848: see Dallah Stevens, *UK Asylum Law and Policy: Historical and Contemporary Perspectives* (2004), 19-28.

⁶ *Musgrove v Chun Teeong Toy* [1891] AC 272.

⁷ See also s 75(iii) of the Constitution. State courts also have jurisdiction to issue writs of habeas corpus: see, eg, *R v Governor of Metropolitan Gaol ex p Tripodi* [1962] VR 180.

⁸ The reports disclose only two cases: *Attorney-General v Sutcliffe* [1907] 2 KB 997; and *Falkirk Parish Council v Jensen* [1912] 1 SLT 87.

⁹ For excellent accounts, see Prakash Shah, *Refugees, Race and the Legal Concept of Asylum in Britain* (2000), 37-39; Ann Dummett and Andrew Nicol, *Subjects, Citizens, Aliens and Others: Nationality and Immigration Law* (1990), 151-152.

discretion.¹⁰ British courts consistently emphasised the wide nature of the discretion to deport.¹¹ Both jurisdictions excluded immigration from the rules of natural justice,¹² showing extreme deference in this pre-eminently political arena:

The Parliament in this legislation is dealing with a national interest of paramount importance, namely, the composition of the nation, determining who shall enter and who shall stay. The decision of those questions is not hedged, nor can it be hedged, around with principles of the kind that the judiciary are wont to consider: nor is it necessary, or convenient, or indeed desirable, that reasons be assigned for the determination of those questions.¹³

In the Australian case, this deference was buttressed by judicial support for the White Australia policy, vividly evidenced by the successes of white claimants and the losses of Chinese claimants in the High Court.¹⁴

However, a few immigration-specific advisory procedures were developed during this period. In both Australia and the UK, advisory committees or boards heard representations against deportations. The Australian version was infrequently used¹⁵ and the UK version during the 1930s lasted only four years, succumbing because of its high success rates,¹⁶ although a different procedure was introduced in 1956.¹⁷

Both the boards and these advisory procedures used oral hearings, involved judges and lawyers, and adapted court procedures. However, they were significantly limited: they covered only deportations; were advisory only; and, in the UK, were discontinued if too many decisions were overturned.

2.2 The brave new world

The tightening of immigration controls, pressures from immigrant communities and the influence of administrative law principles all combined in the 1970s to produce a brave new world of immigration review.

In the UK, the proximate cause was the introduction of immigration controls on Commonwealth citizens in the 1962 and 1968 *Commonwealth Immigrants Acts*. In

¹⁰ See esp Stephen Legomsky, *Immigration and the Judiciary: Law and Politics in Britain and America* (1987).

¹¹ *Ibid.* 38-39, 96-97. See, eg, *R v SSHA ex p Duke of Chateau Thierry* [1917] 1 KB 922.

¹² *R v Governor of Brixton Prison ex p Soblen (No 2)* [1963] 2 QB 243; *Schmidt v SSHA* [1969] 2 Ch 149; *Salemi v MacKellar (No 2)* (1977) 137 CLR 396; *The Queen v MacKellar ex p Ratu* (1977) 137 CLR 461.

¹³ *Salemi*, n12, 402.

¹⁴ Compare esp *Potter v Minahan* (1908) 7 CLR 277 with *Donohoe v Wong Sau* (1925) 36 CLR 404. See Mary Crock, *Immigration and Refugee Law in Australia* (1998), 17-18.

¹⁵ *1901 Act*, s 8A, as amended (continued presently as s 203). By 1985, it had been used 12 times: ARC, *Review of Migration Decisions* (1986), 26-27.

¹⁶ Committee on Immigration Appeals, *Report* (1967), 74-75.

¹⁷ Pursuant to the *European Convention on Establishment*, CETS No 19. The procedure provided for representations to the Chief Metropolitan Magistrate if the person had resided for at least 2 years, or otherwise to the Home Office.

their wake, the Wilson Committee recommended an immigration appeals system, inspired partly by the desire to mollify ethnic communities and partly by the norms of administrative law.¹⁸ This was largely implemented in the *Immigration Appeals Act 1969* and the *Aliens (Appeals) Order 1970*,¹⁹ and substantially replicated in the *Immigration Act 1971* ('1971 Act').²⁰

This system provided for a two-tier structure, known as the Immigration Appellate Authority ('IAA'). Single adjudicators reviewed immigration decisions, subject to an appeal, by leave and on the papers, to a three-member tribunal, the Immigration Appeal Tribunal ('IAT'). However, decisions made on national security grounds were excluded, although representations could be heard by 'Three Wise Men' in another advisory procedure with lesser procedural safeguards.²¹

Meanwhile, in Australia the mid-1970s saw the dawn of the 'new administrative law' at the federal level, comprising the Administrative Appeals Tribunal ('AAT'),²² the Federal Court,²³ an Ombudsman,²⁴ a supervisory Administrative Review Council ('ARC'), and a statutory codification and streamlining of the grounds and procedures of judicial review in the *ADJR Act*.²⁵ Subsequently, the Human Rights Commission ('HRC') was also established.²⁶

All of these institutions could review immigration decisions. The Ombudsman and HRC could investigate complaints. The AAT could make recommendations in relation to deportations of convicted criminals and the insane.²⁷ The Federal Court heard appeals from the AAT,²⁸ and could also judicially review immigration decisions and conduct under the *ADJR Act* and s 39B(1) of the *Judiciary Act 1903*.²⁹

This was complemented by the development of internal review procedures,³⁰ and the creation of two independent extra-statutory review procedures. The Determination of Refugee Status ('DORS') Committee, an interdepartmental

¹⁸ Committee on Immigration Appeals, n16, 27-28.

¹⁹ These both commenced on 1 July 1970.

²⁰ Pt II, Sch 5.

²¹ Described in *R v SSHD ex p Cheblak* [1991] 1 WLR 890, 901-903.

²² *Administrative Appeals Tribunal Act 1977* (Cth) ('AAT Act').

²³ *Federal Court of Australia Act 1976* (Cth) ('FCA Act').

²⁴ *Ombudsman Act 1976* (Cth).

²⁵ *Administrative Decisions (Judicial Review) Act 1977* (Cth).

²⁶ *Human Rights Commission Act 1981* (Cth).

²⁷ *Statute Law Revision Act 1981* (Cth), s 60. The AAT also had jurisdiction in relation to the regulation of migration agents, but this was never used: Crock, n14, 259.

²⁸ *AAT Act*, s 44.

²⁹ This provides jurisdiction equivalent to s 75(v) of the Constitution.

³⁰ Crock, n14, 35-36.

committee created in 1977, both advised on initial refugee determinations and reconsidered them on the papers.³¹ By 1982, specified classes of immigration decisions could also be considered by the advisory Immigration Review Panels, comprised of two lay members and chaired by a Departmental officer.³² However, during the mid-1980s pressure was building for review by the AAT, as evidenced by the recommendations of three independent reports.³³

The 1980s also saw the emergence of more searching judicial review in both jurisdictions. The Privy Council required the Hong Kong government to fulfil its promise to hear cases prior to deportation,³⁴ and held that courts could review the factual basis of a person's classification as an 'illegal entrant'.³⁵ The House of Lords imposed a higher standard of judicial review in refugee cases, that of the 'most anxious scrutiny'.³⁶

Meanwhile, the Australian High Court finally held that deportations attracted the requirements of procedural fairness;³⁷ and held that refugee determinations were reviewable under the *ADJR Act*.³⁸ By the early 1990s, the flow of cases had angered the government,³⁹ with the Minister refusing to accept the recommendations of the AAT⁴⁰ and the government removing the power to grant permits on 'compassionate and humanitarian' grounds.⁴¹

The final impetus in Australia was the spectacular rise of applications for immigration review and refugee status.⁴² A radical overhaul of the *Migration Act 1958* ('the Act') in 1989 included the creation of a two-tier statutory regime for immigration

³¹ This comprised representatives from the Departments of Immigration; Prime Minister and Cabinet; Foreign Affairs and Trade, and the Attorney-General, and an observer from UNHCR: DILGEA, *Review '89* (1989), 26. See also HRC, *Human Rights and the Migration Act 1958* (1985), 46-47.

³² Their jurisdiction is described in *MIEA v Akbas* (1985) 7 FCR 363, 368-369.

³³ HRC, n31; ARC, n15; Committee to Advise on Australia's Immigration Policies, *Immigration: A Commitment to Australia* (1988). See also Cheryl Saunders, 'In search of a system of migration review' in David Goodman, D J O'Hearn and Chris Wallace-Crabbe (eds), *Multicultural Australia: The Challenges of Change* (1991) 134.

³⁴ *Attorney-General of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629.

³⁵ *Khawaja v SSHD* [1984] AC 74.

³⁶ *Bugdaycay v SSHD* [1987] AC 514.

³⁷ *Kioa v West* (1985) 159 CLR 550.

³⁸ *MIEA v Mayer* (1985) 157 CLR 290.

³⁹ See generally Mary Crock, *Administrative Law and Immigration Control in Australia: Actions and Reactions* (PhD thesis, University of Melbourne, 1992).

⁴⁰ DILGEA, *Australia and Immigration: 1788 to 1988* (1988), 115. See, eg, *Haoucher v MIEA* (1990) 169 CLR 648.

⁴¹ Then s 6A(1)(e) of the Act: see Crock, *Immigration and Refugee Law*, n14, 133-134.

⁴² By 1987, there were 10,866 pending immigration review applications: DILGEA, *Review '87* (1987) 89. Between 1989-1990, refugee applications soared from 564 to 3,598: DILGEA, *Review '89*, n31, 44.

review, consisting of an internal review authority, the Migration Internal Review Office ('MIRO'), with an appeal to the Immigration Review Tribunal ('IRT').⁴³ The IRT generally sat alone, but could be constituted by multi-member panels.⁴⁴ The DORS Committee was reconstituted as a second tier of review, in the form of the Refugee Status Review Committee, but in 1993, in partial compensation for a tougher refugee policy, the IRT model was essentially duplicated for refugee decisions in the form of the single-member Refugee Review Tribunal ('RRT').⁴⁵ In the same year, the UK also introduced refugee appeals to 'special adjudicators' within the IAA.⁴⁶

2.3 The 'model' of immigration review

Thus, from the establishment of the IAA and the IRT/RRT until around 1996, there was in both jurisdictions what I call the 'model' of immigration review — a relatively stable system of immigration review, comprising two tiers of independent review and a third tier of judicial review. From 1993, the British courts were also empowered to hear appeals, by leave, on a question of law.⁴⁷ This neat picture was, however, complicated by the severe restriction of the Australian Federal Court's jurisdiction in 1994 (discussed below).

Occasional resort was also had to a 'fourth tier' — in the UK, in the form of the European Court of Human Rights ('ECtHR');⁴⁸ and in Australia, in the form of the Minister's personal, non-delegable, non-compellable, and non-reviewable statutory powers to substitute an adverse tribunal decision with a more favourable decision ('ministerial intervention').⁴⁹

This relatively mainstream legal model of review was complemented by other mainstream mechanisms for reviewing immigration policy and administration. These included the administrative law institutions (Ombudsmen, the HRC and its successor

⁴³ *Migration Legislation Amendment Act 1989* (Cth), ss 25, 27. The IRT had original jurisdiction in respect of some decisions.

⁴⁴ These formed 9-20% of the total: see IRT, *Annual Report 1992-1993* (1993), 1; IRT, *Annual Report 1994-1995* (1995), 5.

⁴⁵ *Migration Reform Act 1992* (Cth), s 31, with effect from 1 June 1993.

⁴⁶ *Asylum and Immigration Appeals Act 1993* (UK) ('1993 Act'), s 8.

⁴⁷ *Ibid* s 9. For ease of reference, I refer throughout this thesis to the English courts.

⁴⁸ See *East African Asians v UK*, 14 December 1973, (1981) 3 EHRR 76 (a decision of the European Commission of Human Rights, which the Committee of Ministers decided not to refer to the ECtHR: see Lord Lester, 'Thirty years on: The East African Asians case revisited' [2002] *PL* 52); *Abdulaziz, Cabales and Balkandali v UK*, 28 May 1985, Series A no 94; *Vilvarajah v UK*, 30 October 1991, Series A no 215; *Lamguindaz v UK*, 23 June 1993, Series A no 258-C.

⁴⁹ Presently ss 351 (MRT); 391 (AAT, on transfer from MRT); 417 (RRT), 454 (AAT, on transfer from RRT), 501J (AAT protection visa decision).

the HREOC,⁵⁰ and its UK equivalent, the Commission for Racial Equality); internal bureaucratic processes of review; and parliamentary accountability, including representations by MPs, parliamentary debates, and committees, particularly the UK Home Affairs Committee ('HAC') and the Australian Joint Standing Committee on Migration ('JSCM').⁵¹ Equally important was the scrutiny of the 'policy community', including international and regional bodies, non-governmental organisations, sector-specific organisations, and the media.

While the review systems were structurally similar, there were important differences between the IRT/RRT and IAA in terms of jurisdiction and procedure, as well as more minor differences in their powers and composition (for details, including legislative references, see Appendices, Tables 4-6).

The most significant difference was the IAA's comparatively generous jurisdiction which was determined by the class of decision. There was a right of appeal in relation to: refusals of entry and refusals to revoke deportation orders (albeit only from abroad); the conditions of admission; the issuing of removal directions; the making of deportation orders;⁵² and even the destination of removal. There were important omissions, however: there was no appeal against deportations following the recommendation of a criminal court; against removals of illegal entrants; or against the refusal of work permits.⁵³

The IRT/RRT's jurisdiction, on the other hand, was tied to proximity to the Australian community. While the original jurisdiction of the IRT⁵⁴ evinced no clear pattern, its jurisdiction was rapidly enlarged to cover essentially decisions affecting those already in Australia, and those sponsored or nominated by Australians, mostly on appeal from MIRO. The RRT could review all adverse refugee decisions, while the AAT could review decisions made on criminal or national security grounds, unless the Minister conclusively certified otherwise. The AAT also reviewed decisions concerning the regulation of migration agents and the cancellation of business

⁵⁰ *Human Rights and Equal Opportunity Act 1986* (Cth). In September 2008, HREOC changed its official title to the Australian Human Rights Commission.

⁵¹ Originally the Joint Standing Committee on Migration Regulations, established 1990.

⁵² *Immigration Act 1988* (UK) ('1988 Act'), s 5, also restricted deportation appeals for those who had arrived in the last 7 years.

⁵³ Ian Macdonald and Frances Webber (eds), *Immigration Law and Practice in the United Kingdom* (6th ed, 2006), 1160.

⁵⁴ Described in IRT, *Annual Report 1990-1991* (1991), 3-6.

permits. The IRT/RRT could also refer decisions to the AAT, although this power has been rarely invoked.⁵⁵

The other significant difference was in the innovation of an ‘inquisitorial’ model for the IRT/RRT. The IRT/RRT members had greater investigative powers, and questioned the applicant during the hearing without the benefit of a departmental representative. The applicant had no right to legal representation, to make submissions, or to cross-examine witnesses. However, in practice this inquisitorial model has been less radical than it appears.⁵⁶

The powers of the IRT/RRT were slightly broader. In line with the Australian merits review system, its role was effectively to re-make the decision again, while the IAA’s role was conventionally appellate, with adjudicators reviewing the evidence existing at the time of decision and allowing appeals if the decision was not in accordance with the law, or if an available discretion should have been exercised differently.

There were also some minor differences in the composition of the tribunals. Lay members played a more prominent role in Australia, with the UK appointing only legally qualified adjudicators from 1987.⁵⁷ In the same year, the Lord Chancellor’s Department, which had always appointed IAT members, took over the appointment of adjudicators from the Home Office. In comparison, the IRT/RRT members were appointed by the Australian Department of Immigration,⁵⁸ unlike AAT members who are appointed by the Attorney-General’s Department and presided over by Federal Court judges.

Finally, fees and time limits also varied. In Australia, it cost AU\$200 and AU\$300 to seek review at MIRO and IRT respectively, while the IAA was free. Time limits were roughly equivalent and, importantly, non-extendable, with 28 days for in-country appeals, and for appeals from abroad either 70 days (in Australia) or 3 months in the UK. However, there were significantly shorter time periods too — 7 working days for

⁵⁵ There appears to be only one such case: *SRPP v MIMA* [2000] AATA 878.

⁵⁶ See Robin Creyke, ‘Inquisitorial’ practice in Australian tribunals’ (2006) 57 *Admin Rev* 17. Written submissions are usually requested prior to the hearing, and representatives are commonly asked if there is anything they want to add.

⁵⁷ Macdonald and Webber (eds), 153, 165. At least one member of the IAT had to be legally qualified: *1971 Act*, Sch 5, para 12.

⁵⁸ The Department of Immigration has been associated over the years with other functions, including Multicultural or Ethnic Affairs, Indigenous Affairs, and latterly Citizenship. For clarity, I refer to it simply as ‘the Department’.

detainees in Australia, and 14 days against decisions of the Secretary of State and appeals against destination in the UK.

Perhaps the most obvious difference, however, was the sheer scale of review. Between 1990–1996, the IRT annually reviewed 2,000–4,000 cases (overturning 40–60% of decisions) and the RRT 4,000–7,000 (overturning 10–17%). In comparison, adjudicators heard approximately 25,000–35,000 cases, with 6,000–10,000 applications for leave and hearings at the IAT level.⁵⁹

3 *The story of immigration review*

The model of immigration review had its faults, primarily its deviations from standards adopted in other administrative fields, as discussed in chapter 7. Yet, a decade later, it looks like a lost golden age. For the story of immigration review that follows is largely a story of ‘decline and fall’, albeit with some important cross-cutting trends in the UK stimulated largely by European influence and early New Labour enthusiasms.

As with the introduction of the Australian immigration review system, a proximate cause was rising numbers. In Australia, between 1995–1996 and 2002–2003, the lodgements of immigration matters at the Federal Court soared from 331 to 1,836, while in 2002–2003 the High Court recorded an astonishing 2,105 lodgements.⁶⁰ In the UK, between 1996–2001 the number of asylum-related judicial review claims almost doubled, from 1,225 to 2,210,⁶¹ while by 1999 there was a backlog of nearly 65,000 asylum claims.⁶² This increase underlies the three major symptoms of this crisis: the conflict between the executive and the judiciary; a pervasive crisis of confidence; and continuous reforms and changes.

3.1 Battles with the Bench

The conflict between the executive and the judiciary took the principal forms of a war of words, and a pattern of executive defiance, peaking in the brazen attempts (in 2001, in Australia, and 2003–2004 in the UK) to largely exclude judicial review through ouster clauses, which is discussed in chapter 3.

⁵⁹ Figures from Annual Reports of the IRT/RRT and Council on Tribunals. No comparable success rates are available for the IAA during this period.

⁶⁰ Federal Court of Australia, *Annual Report 1999–2000* (2000), 140; Federal Court of Australia, *Annual Report 2002–2003* (2003), Appendix 5; High Court of Australia, *Annual Report 2002–2003* (2003), 8.

⁶¹ Robert Thomas, ‘The impact of judicial review on asylum’ [2003] *PL* 479, 560.

⁶² *R(S) v SSHD* [2007] EWCA Civ 546, [13].

3.1.1 WAR OF WORDS

In the UK, the stage was set by judicial attacks between 1995-1997 by the Conservative Home Secretary, Michael Howard,⁶³ but it was Home Secretary David Blunkett, during 2001-2004, who provided the real drama.⁶⁴ Similarly, while there had been thinly veiled attacks by Australian Labor Ministers,⁶⁵ the war of words climaxed under Philip Ruddock's tenure as Minister of Immigration, between 1996-2003.

The theme of their attacks was the judicial perversion of democratic processes of majoritarian decision-making.⁶⁶ Blunkett warned: "The law will be made by those who are held to account for both making it and changing it".⁶⁷ He implied that judges provided "justice [only] for the small few who use our democracy to hide in".⁶⁸ Most directly, he lashed out: "Frankly, I'm personally fed up with having to deal with a situation where Parliament debates issues and the judges then overturn them";⁶⁹ and asked: "do we have a democracy where we say, 'you can go so far but actually the real democracy is the judiciary'".⁷⁰ More recently, then Home Secretary John Reid attacked "inexplicable or bizarre" decisions as "reinforc[ing] the perception that the system is not working to protect, or in favour of, the vast majority of ordinary, decent hard-working citizens in this country".⁷¹

Ruddock began his attacks as early as 1992, when he complained of the "creative way in which the High Court of Australia got into the business of determining refugee claims."⁷² His challenge was even blunter: "Again, the courts have reinterpreted and re-written Australian law, ignoring the sovereignty of Parliament and the will of the Australian people. Again, this is simply not on."⁷³ In June 2002, as the Federal Court prepared to consider the ouster clause, Ruddock announced that the courts were

⁶³ Andrew Le Sueur, 'The judicial review debate: From partnership to friction' (1996) 31 *Gov Oppos* 8.

⁶⁴ Anthony Bradley, 'Judicial independence under attack' [2003] *PL* 397; Frances Gibb, 'Blunkett v the Bench: the battle has begun', *The Times*, 4 March 2003, 3.

⁶⁵ 'Justice Einfeld and Mr Hand', *Sydney Morning Herald*, 8 December 1992, 12; M Hardy, 'Court chief out of touch, says Bolkus', *Courier-Mail*, 20 July 1995, 6.

⁶⁶ Helen Pringle and Elaine Thompson, 'Tampa as metaphor: Majoritarianism and the separation of powers' (2003) 10 *AJ Admin L* 107.

⁶⁷ Joshua Rozenberg, 'Is David Blunkett the biggest threat to our legal system?' *Daily Telegraph*, 13 November 2001, 19.

⁶⁸ Alan Travis, 'On the brink of war', *The Guardian*, 4 October 2001, 2.

⁶⁹ Robert Verkaik, 'Asylum system flawed, rules High Court', *The Independent*, 20 February 2003, 4.

⁷⁰ Sarah Hall and Alan Travis, 'Lords vote: "a clash of wills"', *The Guardian*, 8 March 2004, 1.

⁷¹ 'Reid steps up the fight to kick out Afghan hijackers', *The Express*, 12 May 2006, 33.

⁷² Australia, *Hansard*, HoR, 16 December 1992, 3935 (Philip Ruddock, Shadow Minister for Immigration).

⁷³ Cited in LCAC, *Provisions of the Migration Amendment (Judicial Review) Bill 2004* (2004), 157-158.

“finding a variety of ways and means of dealing themselves back into the review game”, and that he did “remember a time when judges who wanted to be able to involve themselves in the political process saw it as being more appropriate to resign from the bench and stand for parliament.”⁷⁴ The Chief Justice demanded an explanation, effectively threatening the Minister with an action for contempt, averted by Ruddock’s subsequent ‘clarification’.⁷⁵

Judges, in their turn, have not been short of criticism. British judges have lamented wasteful litigation⁷⁶ and poor administration.⁷⁷ Both Australian and British judges have condemned refugee policies as intolerable to “civilised nation[s]”,⁷⁸ “barbaric”⁷⁹ and a “national disgrace”.⁸⁰ Munby J, in separate judgments, rebuked the Home Office for “at best an unacceptable disregard ... of the rule of law, at worst an unacceptable disdain by the Home Office for the rule of law, which is as depressing as it ought to be concerning”;⁸¹ and denounced them for “scandalous” and “profoundly shocking” behaviour that “expose[d] ... the seeming inability of that Department to comply not merely with the law but with the very rule of law itself.”⁸²

3.1.2 EXECUTIVE DEFIANCE

Executive disagreement spilled over into executive defiance, mainly through interference, or near-interference, with judicial process. Australian Ministers failed to inform lawyers that they had returned their client;⁸³ and deported two Kenyan boys despite a pending court application.⁸⁴ British Home Secretaries breached a court

⁷⁴ Benjamin Haslem and Amanda Keenan, ‘Butt out, Ruddock tells judges’, *The Australian*, 4 June 2002, 1.

⁷⁵ *Ibid.*

⁷⁶ Padraic Flanagan, ‘We’re swamped, says judge’, *The Express*, 23 October 2003, 11.

⁷⁷ Steve Doughty, ‘Judge delivers new blow to Blunkett’, *Daily Mail*, 5 May 2004, 15. See also *R (Anufrijeva) v SSHD* [2003] UKHL 36, [24].

⁷⁸ *R v Secretary of State for Social Security ex p JCWI* [1997] 1 WLR 275, 292.

⁷⁹ Justice Marcus Einfeld, ‘Detention, justice and compassion’ in Mary Crock (ed), *Protection or Punishment: The Detention of Asylum Seekers in Australia* (1993) 41, 42.

⁸⁰ Penelope DeBelle, ‘Judge condemns refugee’s detention’, *The Age*, 15 May 2002, 9.

⁸¹ *R (Karas) v SSHD* [2006] EWHC 747 (Admin), [87].

⁸² *R (SK) v SSHD* [2008] EWHC 98 (Admin), [2], [51].

⁸³ Peter Gill, ‘Bolkus contempt worry focuses spotlight on gaps in refugee policies’, *Australian Financial Review*, 20 June 1994, 4.

⁸⁴ Michael McKinnon, ‘Turn back packed jet, judge rules’, *Daily Telegraph*, 5 August 1998, 9.

undertaking by removing a client,⁸⁵ deported a woman in breach of the law,⁸⁶ and evaded legal action by removing people late at night and on weekends.⁸⁷

There was also a pattern of legislative reversal. In Australia, the Labor Government introduced a bill to reverse a decision on China's one child policy before the decision was overturned on appeal.⁸⁸ The Liberal Government limited the Ombudsman's and HREOC's access to detainees, reversing another decision.⁸⁹ The British government was even more active. It reversed decisions which, inter alia, invalidated regulations removing benefits for refugees;⁹⁰ precluded removal of refugee claimants to Germany and France;⁹¹ constrained the Secretary's power to renew indefinitely a refugee claimant's status of temporary admission;⁹² and required local authorities to house homeless refugee claimants contrary to dispersal policies.⁹³

In Australia, the pattern of executive defiance was sometimes flagrant. The Labor government pre-empted the release of Cambodians by rushing through mandatory detention legislation two days before the court hearing;⁹⁴ and then pre-empted compensation proceedings for their prior unlawful detention by rushing through legislation capping compensation to a dollar a day.⁹⁵ The succeeding Liberal government retrospectively validated all of its actions over the *Tampa* affair (discussed in chapter 3);⁹⁶ and when civil liberties groups had the temerity to challenge them, they aggressively pursued them for their court costs.⁹⁷ When refugee claimants landed on Melville Island, the government simply invalidated their refugee

⁸⁵ *M v Home Office* [1994] 1 AC 377.

⁸⁶ Richard Ford, 'Mother of three was deported after court ruled she could stay', *The Times*, 16 August 2006, 20.

⁸⁷ *Karas*, n81.

⁸⁸ Migration Legislation Amendment Bill (No 4) 1995 (Cth); *MIEA v A* (1994) 127 ALR 383, overturned in *MILGEO v A* (1995) 130 ALR 48.

⁸⁹ *Migration Legislation Amendment (No 1) Act 1999* (Cth), reversing *HREOC v Secretary of DIMA* (1996) 67 FCR 83.

⁹⁰ *Asylum and Immigration Act 1996* (UK) ('1996 Act'), s 11, reversing *JCWI*, n78.

⁹¹ *Immigration and Asylum Act 1999* (UK) ('1999 Act'), s 11, reversing *R v SSHD ex p Adan* [2000] UKHL 67, confirmed in *R (Yogathas and Thangarasa) v SSHD* [2002] UKHL 41.

⁹² *2002 Act*, s 67(2), reversing *R (Hwez and Khadir) v SSHD* [2002] EWHC 1597 (Admin). This proved unnecessary, under the House of Lords' contrary interpretation: *R (Khadir) v SSHD* [2005] UKHL 39.

⁹³ *Asylum and Immigration (Treatment of Claimants, etc) Act 2004* (UK) ('2004 Act'), s 11, reversing *Al-Asmeri v Kensington and Chelsea RBLC* [2004] UKHL 4.

⁹⁴ See *Chu Kheng Lim v MILGEO* (1992) 176 CLR 1, [5].

⁹⁵ Then s 54RA, inserted by *Migration Amendment Act (No 4) 1992* (Cth). See Nick Poynder, 'A (name deleted) v Australia: A milestone for asylum seekers' (1998) 4 *AJHR* 155.

⁹⁶ *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth).

⁹⁷ *Ruddock v Vadarlis* [2001] FCA 1865.

applications by ‘excising’ Melville Island from the migration zone through retrospective (and subsequently disallowed) regulations.⁹⁸

Least remarked, but no less a threat to separation of powers,⁹⁹ was the use of legislation to confine judicial interpretation¹⁰⁰ of the Refugee Convention,¹⁰¹ and to require adverse credibility inferences to be drawn in specific circumstances.¹⁰²

3.2 Crisis of confidence

The second thread in the story is that of a pervasive crisis of confidence both in immigration decision-making and review,¹⁰³ evidenced in a torrent of paper and forthright expressions of discontent.

Reports have issued unremittingly from parliamentary committees,¹⁰⁴ audit agencies,¹⁰⁵ and non-governmental organisations.¹⁰⁶ The UK has issued a number of consultation papers¹⁰⁷ and White Papers,¹⁰⁸ while several independent ad hoc reports

⁹⁸ Ron Fraser, ‘Developments in administrative law’ (2004) 40 *AIAL Forum* 1, 5-6. See *Cox v MIMIA* [2003] NTSC 111.

⁹⁹ Sir Stephen Sedley, *Bringing Rights Home: Is it Time to Start a Family?* (Speech presented at Annual Mishcon Lecture, University College London, 13 November 2007).

¹⁰⁰ Ss 91R-U in the Australian Act; 2002 Act, s 72; *Immigration, Asylum and Nationality Act 2006* (UK) (‘2006 Act’), ss 54-55.

¹⁰¹ *Convention relating to the Status of Refugees*, 189 UNTS 150, in conjunction with *Protocol relating to the Status of Refugees*, 606 UNTS 267 (‘Refugee Convention’). See chapter 2, part 4.

¹⁰² Ss 91V, 91W in the Australian Act; 2004 Act, s 8. See Jonathan Ensor et al, ‘Simple myths and complex realities – Seeking truth in the face of section 8’ (2006) 20 *IANL* 95.

¹⁰³ Inadequate primary decision-making has a pervasive flow-on effect that prevents a neat demarcation between decision-making and review.

¹⁰⁴ See esp, in the UK, HAC, *Asylum Applications* (2004); HAC, *Asylum Removals* (2003); HAC, *Immigration Control* (2006); CAC, *Asylum and Immigration Appeals* (2004); CAC, *Legal Aid: Asylum Appeals* (2005); JCHR, *The Treatment of Asylum-Seekers* (2007). In Australia, see esp L&CLC, *Migration Legislation Amendment (Judicial Review) Bill 1998 [1999]* (1999); LCRC, *A Sanctuary under Review: An Examination of Australia’s Refugee and Humanitarian Processes* (2000); LCAC, *Administration and Operation of the Migration Act 1958* (2006).

¹⁰⁵ In the UK: NAO, *The Home Office: The Immigration and Nationality Directorate’s Casework Programme* (1999); NAO, *Improving the Speed and Quality of Asylum Decisions* (2004); NAO, *Visa Entry to the United Kingdom: The Entry Clearance Operation* (2004); NAO, *Returning Failed Asylum Applicants* (2005). In Australia: ANAO, *Management of the Processing of Asylum-seekers* (2004); ANAO, *Management of Tribunal Operations—Migration Review Tribunal and Refugee Review Tribunal* (2007).

¹⁰⁶ See, eg, Amnesty International, *Get It Right: How Home Office Decision-making Fails Refugees* (2004); Bail for Immigration Detainees and Asylum Aid, *Justice Denied: Asylum and Immigration Legal Aid – A System in Crisis* (2005); Mayor of London, *Into the Labyrinth: Legal Advice for Asylum-seekers in London* (2005); Kazimierz Bem et al, *A Price Too High: The Cost of Australia’s Approach to Asylum Seekers* (2007); Nina Field, *Playing God with Sanctuary: A Study of Australia’s Approach to Complementary Protection Obligations Beyond the Refugee Convention* (2008); Oxfam (Community Aid Abroad), *Adrift in the Pacific: The Implications of Australia’s Pacific Refugee Solution* (2002).

¹⁰⁷ See, eg, IND and Lord Chancellor’s Department, *Review of Appeals* (1998); IND, *Fair, Effective, Transparent and Trusted – Rebuilding Confidence in Our Immigration System: An Independent and*

have been commissioned in Australia.¹⁰⁹ Remarkably, in both jurisdictions wide-ranging independent inquiries have been initiated by civil society, in the form of the UK Independent Asylum Commission¹¹⁰ and the Australian ‘People’s Inquiry into Detention’.¹¹¹

The crisis of confidence is most pithily conveyed by the players themselves. Reid famously declared the Home Office “not fit for purpose”,¹¹² while Blunkett admitted: “The asylum system doesn’t work. It is a mess from beginning to end”.¹¹³ In Australia, the Palmer report indicted the Department as “overly self-protective and defensive”, and “largely unwilling to challenge organisational norms or to engage in genuine self-criticism or analysis”.¹¹⁴

The poor quality of initial decision-making has been relentlessly attacked,¹¹⁵ in terms succinctly summarised thus:

Primary decision-makers ... are often woefully ignorant of the law and of conditions in the country against which they assess the applicant. Anecdotal evidence is that they are often arrogant, hostile and even abusive towards applicants. In some cases, they reveal attitudes of prejudice, xenophobia and racism.¹¹⁶

Meanwhile, Australian lawyers appeared to have lost faith in the RRT:

At the moment this system engenders confidence in no-one, certainly not the working practitioners. If I told you what their views were of the Refugee Review Tribunal and some of the members who operate on it—I do not think I can be that candid.¹¹⁷

In *Selliah*, two judges forthrightly condemned the practices of the RRT:

[H]earings before the Tribunal are virtually unique in Australian legal procedures and in the common law system generally. ... The Tribunal is both judge and interrogator, is at liberty to conduct the interview in any way it wishes, without order, predictability, or consistency of subject matter, and may use any outside material it wishes without giving the person being interrogated the opportunity of reading and understanding the material before being questioned about it. ... These methods contravene every basic safeguard established by our inherited system of law for 400 years.¹¹⁸

Transparent Assessment of Immigration (2006); BIA, *Simplifying Immigration Law: An Initial Consultation* (2007).

¹⁰⁸ Home Office, *Fairer, Faster and Firmer: A Modern Approach to Immigration and Asylum* (1998); Home Office, *Secure Borders, Safe Haven: Integration with Diversity in Modern Britain* (2002); Home Office, *Controlling Our Borders: Making Migration Work for Britain* (2005).

¹⁰⁹ Mick Palmer, *Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau* (2005); Neil Comrie for the Commonwealth Ombudsman, *Inquiry into the Circumstances of the Vivian Alvarez Matter* (2005). Hilary Penfold’s ad hoc report on migration litigation was not made public.

¹¹⁰ See <http://www.independentasylumcommission.org.uk/>.

¹¹¹ Published in Linda Briskman et al, *Human Rights Overboard: Seeking Asylum in Australia* (2008).

¹¹² ‘Reid: Home Office not fit for purpose’, *The Guardian*, 24 May 2006, 1.

¹¹³ Rachel Baird, ‘Refugee chief quits in new asylum chaos’, *Express*, 3 October 2001, 2.

¹¹⁴ Palmer, n109, ix.

¹¹⁵ See n106; HAC, *Asylum Applications*, n104; LCRC, n104, ch 4.

¹¹⁶ LCRC, n104, 123.

¹¹⁷ Evidence to L&CLC, Senate, Melbourne, 28 January 1999, (Michael Clothier), 51.

¹¹⁸ *Selliah v MIMA* [1999] FCA 615, [3]-[4].

British criticisms of the appeals process have been even more colourful. Home Secretaries and Ministers have proclaimed it: “the longest, most prevaricating process that anyone has ever devised”;¹¹⁹ “virtually unworkable”;¹²⁰ and an “endless process of challenge after challenge”.¹²¹ Primary decision-makers believed that “the appeal process, run by lawyers and judges who are ignorant of local conditions, regularly overturns ‘good’ decisions.”¹²² One Home Office lawyer described the system as “a complete waste of everyone’s time and money ... It’s just a farce”,¹²³ while a former IAT member called proceedings “often little more than a pantomime”, and the system “just an expensive, legalistic game.”¹²⁴ Even the tribunal’s President, Mr Justice Hodge, has expressed his frustration, saying: “Something like 65% of people who are refused by my first tier judiciary in asylum cases tr[y] the review system because there is absolutely no reason why they should not”.¹²⁵ This was compounded by the concern that “you work hard and you produce a result and it does not result in anything very much.”¹²⁶

Finally, and unforgettably, the British tabloids have waged a vociferous campaign against judges, complaining:

Britain’s unaccountable and unelected judges are openly, and with increasing arrogance and perversity, usurping the role of Parliament, setting the wishes of the people at nought and pursuing a liberal, politically correct agenda of their own, in their zeal to interpret European legislation.¹²⁷

3.3 From there to here: Reforms to the immigration review system

The third, most complicated, thread in the story involves the number and scale of changes made to the structure of the system, the jurisdiction of tribunals and courts, and access to the system.

¹¹⁹ Evidence to HAC, HC, 18 September 2002, HC 1186 (David Blunkett, Home Secretary).

¹²⁰ UK, *Hansard*, HC, 24 April 2002, vol 384 col 355 (David Blunkett, Home Secretary).

¹²¹ UK, *Hansard*, HC, 1 March 2004, vol 418 col 697 (David Lammy, Parliamentary Under-Secretary of State for Constitutional Affairs).

¹²² HAC, *Immigration Control*, n104, 85.

¹²³ Julia Hartley-Brewer, ‘Lost Home Office files leave judges no option but to grant entry’, *Sunday Express*, 21 January 2001, 6.

¹²⁴ The Countess of Mar, ‘For 21 years this woman was at the heart of our immigration system’, *Daily Mail*, 25 July 2006, 12.

¹²⁵ Quoted in HAC, *Immigration Control*, n104, 94.

¹²⁶ *Ibid.* 98.

¹²⁷ Michael Clarke and Sam Greenhill, ‘So what do our judges have against Britain?’ *Daily Mail*, 20 February 2003, 1.

3.3.1 STRUCTURAL CHANGE

3.3.1.1 The legal system

The most obvious structural change has been the replacement of two-tier structures with single-tier structures. While the RRT was always single-tier, the MIRO/IRT structure was replaced by the present Migration Review Tribunal ('MRT') on 1 June 1999,¹²⁸ and the IAA replaced with the single-tier Asylum and Immigration Tribunal ('AIT') in April 2005.¹²⁹ This was much more controversial in the UK than in Australia,¹³⁰ with UK parliamentary committees urging that decision-making should be improved first.¹³¹

Significantly, neither the MRT/RRT nor the AIT was subsumed into the mainstream administrative model, namely the Australian AAT or the newly centralised First Tier and Upper Tier Tribunals in the UK under the Leggatt reforms¹³² — although, very recently and despite earlier indications, the UK government has proposed exactly this.¹³³ The Australian government did propose to merge the MRT/RRT with the AAT into a new super-tribunal, the Administrative Review Tribunal, but this was stalled in the Senate by opposition to the reduction of the AAT's procedural safeguards.¹³⁴ In recent years, the MRT and RRT have effected a de facto merger, with co-location of the tribunals, sharing of staff and leadership, cross-appointment of members, and integrated financial management.¹³⁵

More importantly, the creation of the MRT signalled the practical elimination of multi-member panels, greater reliance on staff,¹³⁶ and the almost complete reconstitution of its membership.¹³⁷ In contrast, the AIT has turned out to be a less radical reform than it appeared. Existing members have been retitled, with adjudicators becoming Immigration Judges, and IAT members becoming Senior

¹²⁸ *Migration Legislation Amendment Act (No 1) 1998* (Cth).

¹²⁹ *2004 Act*, s 26.

¹³⁰ Since MIRO was perceived as a mere "rubber stamp": L&CLC, *Migration Legislation Amendment Bill (No 4) 1997 and Migration Legislation Amendment Bill (No 5) 1997* (1997), [1.46], [1.51].

¹³¹ CAC, *Asylum and Immigration Appeals*, 1104; HAC, *Asylum and Immigration (Treatment of Claimants, etc.) Bill* (2003).

¹³² Sir Andrew Leggatt, *Tribunals for Users: One Service, One System* (2003).

¹³³ UK Border Agency, *Immigration Appeals: Fair Decisions, Faster Justice* (2008).

¹³⁴ Benjamin Haslem, 'Labor and Democrats to block super tribunal', *The Australian*, 15 February 2001, 6. See L&CLC, *Inquiry into the Provisions of the Administrative Review Tribunal Bill 2000 and the Administrative Review Tribunal Bill (Consequential and Transitional Provisions) Bill 2000* (2001).

¹³⁵ MRT, *Annual Report 2004-2005* (2005), 2; MRT and RRT, *Annual Report 2005-2006* (2006), 4.

¹³⁶ IRT and MRT, *Annual Report 1998-1999* (1999), [16]-[17].

¹³⁷ According to the annual reports, 5 members continued in office.

Immigration Judges.¹³⁸ By default, three Immigration Judges hear substantive claims,¹³⁹ but a ‘transitional’ filter mechanism subjects this to further ‘reconsideration’, on the ground of an error of law, by Senior Immigration Judges.¹⁴⁰ The ‘reconsideration’ stage frequently involves another hearing, known as a ‘second stage’ reconsideration, introducing new legal complexities.¹⁴¹ It seems unlikely that the procedure envisaged by the statute, whereby High Court judges would review AIT cases on the papers,¹⁴² will ever be used.

While the IAA has been structurally downgraded, three new immigration-related tribunals have been established. In *Chahal*,¹⁴³ the Three Wise Men procedure was found to violate the European Convention on Human Rights (‘ECHR’),¹⁴⁴ and was replaced by the Special Immigration Appeals Commission (‘SIAC’) in 1997.¹⁴⁵ The 1999 *Act*, which created an independent system of asylum support and regulated immigration advisers, also established asylum support adjudicators¹⁴⁶ (now the Asylum Support Tribunal)¹⁴⁷ and the Immigration Services Tribunal.¹⁴⁸ These tribunals are small, with annual workloads of 1,000-2,000 cases¹⁴⁹ and 10-20 cases respectively.¹⁵⁰

SIAC has been by far the most controversial of these new tribunals,¹⁵¹ albeit largely because of the extension of its jurisdiction to reviewing the detention of suspected terrorists.¹⁵² It was relatively little used for immigration, with no deportations having resulted by March 2005,¹⁵³ although its workload has since increased.¹⁵⁴ However, there has been controversy over the procedures for non-

¹³⁸ Asylum and Immigration Tribunal (Judicial Titles) Order 2005 (UK). There is also provision for Designated Judges.

¹³⁹ AIT Practice Directions 2007, [2.2].

¹⁴⁰ 2004 *Act*, Sch 2, para 30.

¹⁴¹ See, eg, *DK (Serbia) v SSHD* [2006] EWCA Civ 1747; *MA (Pakistan) v SSHD* [2007] EWCA Civ 16.

¹⁴² 2004 *Act*, s 103A.

¹⁴³ *Chahal v UK*, 15 November 1996, ECHR 1996-V.

¹⁴⁴ *Convention for the Protection of Human Rights and Fundamental Freedoms*, ETS 5; 213 UNTS 221.

¹⁴⁵ *Special Immigration Appeals Commission Act 1997* (UK).

¹⁴⁶ Ss 102-103.

¹⁴⁷ Upon its transfer to the Tribunals Services from the Home Office in April 2007. This will be subsumed into the First-Tier Tribunal on 3 November 2008.

¹⁴⁸ S 87.

¹⁴⁹ Figures from the Appendices to the Council on Tribunals’ Annual Reports.

¹⁵⁰ See <http://www.immigrationstribunal.gov.uk/register.htm>.

¹⁵¹ See CAC, *The Operation of the Special Immigration Appeals Commission and the Use of Special Advocates* (2005).

¹⁵² *Anti-Terrorism, Crime and Security Act 2001* (UK), Pt 4. This has been replaced by the system of control orders, as discussed in chapter 3, 4.1.

¹⁵³ CAC, *SIAC Report*, n151, 14.

¹⁵⁴ See <http://www.siac.tribunals.gov.uk/outcomes2007onwards.htm>.

disclosure of evidence and the exclusion of the appellant and his representatives from hearings.

Finally, during this period, the use of the Australian ministerial intervention soared,¹⁵⁵ becoming an important fourth tier with its own administrative guidelines,¹⁵⁶ and causing a scandal over allegations of politically motivated decisions.¹⁵⁷ The Rudd government, however, has signalled its intention to confine greatly the use of these discretions.¹⁵⁸

3.3.1.2 Other accountability mechanisms

The expansive use of ministerial intervention chimed with a trend towards the use, both by advocates and government, of review mechanisms outside of the systems of immigration review described above. These included increased, but largely ineffective,¹⁵⁹ recourse by Australian advocates to the UN treaty monitoring bodies, the UN Human Rights Committee ('UNHRC'),¹⁶⁰ and the UN Committee against Torture ('UNCAT').¹⁶¹

The governments turned enthusiastically to more flexible review mechanisms, including (as we have seen) ad hoc reports, increased reliance on the audit agencies, as well as non-statutory advisory groups.¹⁶² In Australia, the Ombudsman's powers

¹⁵⁵ Over 4000 requests were made in 2006-2007: Elizabeth Proust, *Report to the Minister for Immigration and Citizenship on the Appropriate Use of Ministerial Powers under the Migration and Citizenship Acts and Citizenship Regulations* (2008), 8.

¹⁵⁶ Currently Migration Series Instruction 386, 'Guidelines on ministerial powers under sections 345, 351, 391, 417, 454 and 501J of the Migration Act 1958'.

¹⁵⁷ See Select Committee on Ministerial Discretion in Migration Matters, *Inquiry into Ministerial Discretion in Migration Matters* (2004).

¹⁵⁸ Minister for Immigration and Citizenship, 'Ministerial intervention powers under review', (Media Release, 9 July 2008).

¹⁵⁹ For an example of Australia's response, see Ryszard Piotrowicz, 'The detention of boat people and Australia's human rights obligations' (1998) 72 *ALJ* 417.

¹⁶⁰ Under Optional Protocol 1 of the *International Covenant on Civil and Political Rights*, 999 UNTS 171 ('ICCPR'). The UK has not ratified this. Australia's detention policy has consistently been found to violate the ICCPR: see, eg, *Shams v Australia* UNHRC Communication Nos 1255, 1256, 1259, 1260, 1266, 1268, 1270, 1288/2004 (11 September 2007).

¹⁶¹ Only 1 case has thus far succeeded: *Sheq Elmi* UNCAT Communication No 120/1998 (25 May 1999). The UK has not recognised the competence of UNCAT in respect of individual complaints.

¹⁶² In Australia, these included the Refugee Resettlement Advisory Council, established 1997; the Immigration Detention Advisory Group, 2001; and the Detention Health Advisory Group, established 2006: see DIMA, *Annual Report 2005-2006* (2006), Appendix 1. In the UK, these include stakeholder groups and the Migration Advisory Committee, which advises on occupational shortages.

were notably increased by a new power to review cases of long-term detention,¹⁶³ although HREOC's influence diminished.¹⁶⁴

The UK government was especially enthusiastic, creating a multiplicity of mechanisms both to review the quality of decision-making, and to monitor detention¹⁶⁵ (see Appendices, Table 7). Four part-time statutory positions of 'monitor' were created to review decisions and make recommendations,¹⁶⁶ largely as a cheap *quid pro quo* for reduced appeal rights, while UNHCR also reviewed the quality of decision-making under its 'Quality Initiative'.¹⁶⁷ In 2008, many of these bodies were merged in the new Chief Inspectorate, which took over the roles of the Race and Certification Monitors, the Complaints Audit Committee, and (most controversially) the Advisory Panel on Country Information.¹⁶⁸

In addition, the salience of immigration provoked an increase in institutional scrutiny, as well as a growth in the policy community. As already noted, parliamentary committee reports flowed thick and fast, from the Australian Senate Legal and Constitutional Affairs Committee ('LCAC') and its UK equivalent, the Constitutional Affairs Committee ('CAC'), as well as the more recently established UK Joint Committee on Human Rights ('JCHR') and the House of Lords' European Union Committee. Local and umbrella advocacy organisations mushroomed; mainstream advocacy organisations such as Amnesty increased their activities in this area; and the devolution of immigration control increased the range of sector-specific organisations involved.

¹⁶³ Part 8C, inserted by *Migration Amendment (Detention Arrangements) Act 2005* (Cth), Sch 1. Over 400 reports have been written so far: Commonwealth Ombudsman, *The Expanding Ombudsman Role: What Fits? What Doesn't?* (Speech presented at Australia Pacific Ombudsman Region meeting, Melbourne, 27 March 2008).

¹⁶⁴ HREOC's budget was savagely cut under the Howard government: Evidence to L&CLC, Senate, Sydney, 29 January 1999, (Des Hogan, Amnesty International), 110.

¹⁶⁵ In 2006, subject to review by Her Majesty's Inspectorate of Prisons, Independent Monitoring Boards (formerly visiting committees) and the Prisons and Probations Ombudsman (in a non-statutory role).

¹⁶⁶ The Entry Clearance, Race, Certification, and the Accommodation Centre Monitors. The first became a full-time position in 2006. The last was never established since no accommodation centres were ever instituted. For one Monitor's criticisms, see Fiona Lindsley, 'Monitoring the UK entry clearance system' in Prakash Shah and Werner Menski (eds), *Migration, Diasporas and Legal Systems in Europe* (2006) 302.

¹⁶⁷ See <http://www.unhcr.org/what-we-do/Quality-Initiative.html>.

¹⁶⁸ *UK Borders Act 2007* (UK), ss 48-56. See IND, *Fair, effective, transparent, and trusted – Rebuilding confidence in our immigration system: An independent and transparent assessment of immigration* (2007).

3.3.2 CHANGES TO JURISDICTION

Perhaps the most complex aspect of the story, however, has been changes in jurisdiction — in the UK, at tribunal level, and in Australia, at the court level.

3.3.2.1 Tribunals

There has been little change to the jurisdiction of the Australian tribunals,¹⁶⁹ with minor additions to the MRT's jurisdiction as new regulatory mechanisms were added, and one major extension (albeit with significant procedural variations) to the AAT's jurisdiction regarding strengthened powers to cancel visas on character grounds.

In contrast, the changes to the IAA/AIT's jurisdiction have been mind-bogglingly complex in detail, and cross-cutting. On the one hand, there have been a range of significant expansions, of which two (refugee appeals and SIAC) have already been noted. Appeals relating to European Economic Area ('EEA') rights were put on a statutory footing in 1994,¹⁷⁰ and an appeal right was conferred along with the newly created power to deprive a person of citizenship.¹⁷¹

The most significant expansions, however, were early New Labour's HRA and *Race Relations (Amendment) Act 2000*, which brought new freestanding appeals based on human rights¹⁷² and racial discrimination, transformed later into grounds of appeal.¹⁷³ Refugee and human rights claims also propelled an expansion in the IAA's powers to consider post-decision evidence,¹⁷⁴ now available in most cases.¹⁷⁵ In Art 8 ECHR cases, additionally, their powers amount to a re-making of the decision on proportionality.¹⁷⁶

However, the predominant trend was one of ad hoc abolition or restriction of appeal rights (Table 1). This incremental withdrawal has carved out a complicated

¹⁶⁹ See Appendices, Table 5.

¹⁷⁰ Immigration (EEA) Order 1994 (UK).

¹⁷¹ *British Nationality Act 1981* (UK), s 40A, inserted by *2002 Act*, s 4. This replaced the right of a hearing before a specially commissioned inquiry, which was never invoked: Macdonald and Webber (eds), n53, 1170.

¹⁷² Previously, these attracted only judicial review: see, eg, *R v SSHD ex p Kebbeh* (30 April 1998, Hidden J); *R v SSHD ex p Gangadeen* [1998] Imm AR 106.

¹⁷³ *Race Relations (Amendment) Act 2000* (UK), ss 6, 19B, Sch 2, paras 32-40; *2002 Act*, s 84(1)(b).

¹⁷⁴ *Ravichandran v SSHD* [1996] Imm AR 97; *R v SSHD ex p Razgar* [2004] UKHL 27, codified in s 77(3) and extended to Art 8 in s 77(4) of the *1999 Act*.

¹⁷⁵ *2002 Act*, s 85. The exceptions are refusals of entry clearances and certificates of entitlement, and more recently in relation to points-based applications (new s 85A). See Macdonald and Webber (eds), n53, 1205.

¹⁷⁶ *Huang v SSHD* [2007] UKHL 11. See Gina Clayton, 'Prediction or precondition? The House of Lords judgment in *Huang & Kashmiri*' (2007) 21 *JIANL* 311.

hierarchy of appeal rights that depends upon three variables: on the class of decision;¹⁷⁷ on the ground of appeal,¹⁷⁸ and sometimes on the class of person (such as family visitors).¹⁷⁹ Further, appeal rights may be in-country, out-of-country, and subject to ad hoc limitations.

For the sake of space and the reader's comfort, I leave the details aside and concentrate on the broad outlines of the changes. Both refusals of entry and appeals against variations of leave have been greatly confined, with most such decisions either not appellable at all or not appellable in-country. On paper, claims based on asylum, human rights, or racial discrimination grounds ('the newer grounds') appear to attract greater protection, as they are often available in-country or result in the waiver of limitations. However, in practice these claims are greatly restricted by processes of 'certification' of 'unfounded' claims that expedite return and preclude claims (discussed below). Multiple appeals are also prevented through the use of a 'one-stop' procedure, in which subsequent appeals are excluded after the applicant is requested to state exhaustively the grounds of appeal.¹⁸⁰

Year of Act	Changes to jurisdiction	Section
1993	Removal of appeal for visitors, short-term or prospective students, and those failing to meet certain objective criteria	210-211
	Refugee claims certified as being 'without foundation' accelerated	Sch 2, it 5
1996	Out-of-country appeal for 'safe third country' claims; first-instance appeal for other 'certified' claims	1-2
1999	Removal of appeal for overstayers or those breaching conditions	10
	'One-stop' appeal	96
2002	Out-of-country appeals for asylum or human rights claims 'certified' as clearly unfounded	94
	IAT jurisdiction confined to points of law	101(1)
	Judicial review of IAT's refusals of permission to review replaced by paper-based 'statutory review'	101(3)
	Abolition of appeals against destination	82
2004	Replacement of IAA with AIT	26
	Extension and entrenchment of 'safe third country'	Sch 3
2006	Removal of appeals against refusal of leave to enter and entry clearance, excepting family visitors, and other 'straightforward' appeals abolished	4-6
2007	Out-of-country appeals against 'automatic' deportation for foreign criminals, unless well-founded asylum or human rights claim	35
2008	No appeal against designation of 'special immigration status' for foreign criminals and families thereof	Pt 10

Table 1: Restrictions and removals of appeal rights.

¹⁷⁷ 2002 Act, ss 82-83A.

¹⁷⁸ Ibid s 84.

¹⁷⁹ S 88A.

¹⁸⁰ 2002 Act, s 96.

In this hierarchy, European Community ('EC') law claims sit at the apex;¹⁸¹ claims based on the newer grounds receive notionally greater but practically lesser protection; and 'pure' immigration appeals sit at the bottom of the heap.

These trends are continued in the simpler, narrower, provisions of the 2008 draft bill (see Appendices, Table 8). This consolidates the various appeal rights in relation to refugee claims, other protection claims, immigration permission, and expulsion orders (covering removal directions and deportations),¹⁸² and remove the various exceptions based on 'newer grounds'. In general, the provisions shift appeal rights towards the initial decision to refuse permission, remove most out-of-country appeal rights, and strengthen certification powers. The grounds of appeal are narrower, with appeals no longer allowed on the ground that a discretion should have been exercised differently, and the removal of express reference to the 'newer grounds'.¹⁸³

3.3.2.2 Courts

The real battlefield in Australia concerned the courts' jurisdiction, beginning in 1994 with the insertion of a new Part 8 in the Act conferring a migration-specific jurisdiction and excluding its other powers of judicial review.¹⁸⁴ Most notably, this excluded the most relevant grounds of judicial review, such as denial of natural justice; *Wednesbury* unreasonableness; taking into account an irrelevant consideration, or failing to take into account a relevant consideration; bad faith; and abuse of power.¹⁸⁵ This was eventually upheld as constitutionally valid.¹⁸⁶

Some Federal Court judges responded creatively, by inferring the application of these grounds indirectly through statutory obligations to act "according to substantial justice",¹⁸⁷ or to set out its findings on any material question of fact, and refer to the supporting evidence or material.¹⁸⁸ These strategies were, however, overruled by the

¹⁸¹ These may all be brought in-country without limitation. S 92(4)(b).

¹⁸² Draft s 37.

¹⁸³ Draft s 174. These would normally fall under the provision that the decision is 'not in accordance with law', but it is possible this might not cover unincorporated parts of the Refugee Convention.

¹⁸⁴ *Migration Reform Act* s 33.

¹⁸⁵ S 476. See Charles Beltz, 'The *Migration Reform Act 1992* and changes to judicial review' (1994) *Admin Rev* 36; Mary Crock, 'Judicial review and Part 8 of the Migration Act: Necessary reform or overkill?' (1996) 18 *Syd LR* 267.

¹⁸⁶ *Abebe v Commonwealth* (1999) 197 CLR 510. See Mary Crock, 'Of Fortress Australia and castles in the air: The High Court and the judicial review of migration decisions' (2000) 24 *MULR* 190.

¹⁸⁷ S 420.

¹⁸⁸ S 430(1).

High Court.¹⁸⁹ The result, however, was merely to displace litigation to the High Court, with its constitutionally entrenched jurisdiction.

The Liberal government, however, went further by concocting a savage ouster clause (s 474),¹⁹⁰ eventually passed in circumstances described in chapter 3. As also detailed in that chapter, this clause did not have its intended effect: after surviving the Full Federal Court,¹⁹¹ it was defanged by the High Court's decision that the clause did not touch decisions infected by jurisdictional error.¹⁹² Thus, the Federal Court largely regained jurisdiction over the grounds of review excluded under the former Part 8.

The response of the government was to continue the process of displacing migration litigation to the newly created Federal Magistrates Court ('FMC'). This had received migration jurisdiction in 2001 and by 2002-2003 was already the principal migration court.¹⁹³ The *Migration Litigation Reform Act 2005* conferred upon the FMC the equivalent of the High Court's constitutional jurisdiction,¹⁹⁴ with the Federal Court instead hearing appeals from the FMC.¹⁹⁵ The present route, therefore, is to appeal to the MRT/RRT, with judicial review before the FMC, an appeal (as of right) to the Federal Court constituted usually by a single judge, and exceptionally to the Full Federal Court;¹⁹⁶ and finally, with special leave, to the High Court.

The focus in the UK has been on restricting judicial review at the High Court, first by replacing it with a faster, paper-based form of 'statutory review' by single High Court judges, with no further right of appeal. Shortly afterwards, as discussed in chapter 3, the UK government also brazenly proposed to oust judicial review altogether in its 2004 Bill, but was forced by an uproar to withdraw this proposal when the bill was introduced in the House of Lords. Instead, this was replaced by the reconsideration process and transitional filter mechanism already described, in which the Administrative Court is limited to reviewing, on the papers, applications for further review rejected by the Senior Immigration Judge,¹⁹⁷ again with no further right of appeal. The Administrative Court may also refer an application for review to the

¹⁸⁹ *MIMA v Eshetu* (1999) 197 CLR 611; *MIMA v Yusuf* [2001] HCA 30. See John McMillan, 'Judicial restraint and activism in administrative law' (2002) 30 *FL Rev* 335.

¹⁹⁰ Introduced by the *Migration Legislation Amendment (Judicial Review) Act 2001* (Cth) ('*Judicial Review Act*').

¹⁹¹ *NAAV v MIMIA* [2002] FCAFC 228.

¹⁹² *Plaintiff S157/2002 v Commonwealth of Australia* [2003] HCA 2.

¹⁹³ FMC, *Annual Report 2002-2003* (2003), 26.

¹⁹⁴ S 476B.

¹⁹⁵ S 476.

¹⁹⁶ Ss 476, 476A; *Federal Magistrates Act 1999* (Cth), s 39; *FCA Act*, s 24.

¹⁹⁷ *2004 Act*, Sch 2, para 30.

Court of Appeal.¹⁹⁸ Further, where the AIT is composed of three legally qualified members, or conducts a reconsideration, there is an appeal direct to the Court of Appeal (see Figure 1).¹⁹⁹ This is supplemented by judicial review, which remains available for interlocutory decisions in exceptional cases;²⁰⁰ decisions without appeal rights;²⁰¹ certifications of ‘clearly unfounded’ cases;²⁰² fresh claims;²⁰³ and refusals of asylum support due to ‘late’ claims.²⁰⁴

3.3.3 CHANGES TO ACCESS

Less visible, and most problematic, have been the myriad ways in which governments have reduced access to review through practices of interception, and the erection of legal and practical barriers.

3.3.3.1 Interception

The first, and most high-profile, approach is simply to stop people getting in. To that end, both governments operate multi-layered border controls, the effect of which is to create an obstacle course for unwanted migrants.

First, prior permission is required in the form of visas for all except New Zealand citizens in Australia,²⁰⁵ and for over ¾ of the world’s population in the case of the UK, while all intending to stay longer than 6 months must obtain entry clearance.²⁰⁶ In the UK, fingerprints are also now required.²⁰⁷ This information is checked against increasingly sophisticated passenger information databases.

¹⁹⁸ 2002 Act, s 103C.

¹⁹⁹ Ss 103E, 103B.

²⁰⁰ *R (AM (Cameroon)) v AIT* [2007] EWCA Civ 131.

²⁰¹ However, out-of-country appeal rights preclude use of judicial review: *SSHD v R (Lim)* [2007] EWCA Civ 773.

²⁰² 2002 Act, s 94(1A). However, the prospects of succeeding given the statutory presumptions are limited.

²⁰³ See *WM (DRC) v SSHD* [2006] EWCA Civ 1495.

²⁰⁴ 2002 Act, s 55.

²⁰⁵ S 42 of the Act.

²⁰⁶ Appendix 1, para 24 of the Immigration Rules.

²⁰⁷ 2002 Act, s 126; Immigration (Provision of Physical Data) Regulations 2006 (UK). UK Border Agency, ‘Ten point plan for border protection and immigration reform – First milestone met as fingerprint checks go global’, (Press release, 14 January 2008).

2004 ACT FILTER MECHANISM
(IN FORCE)

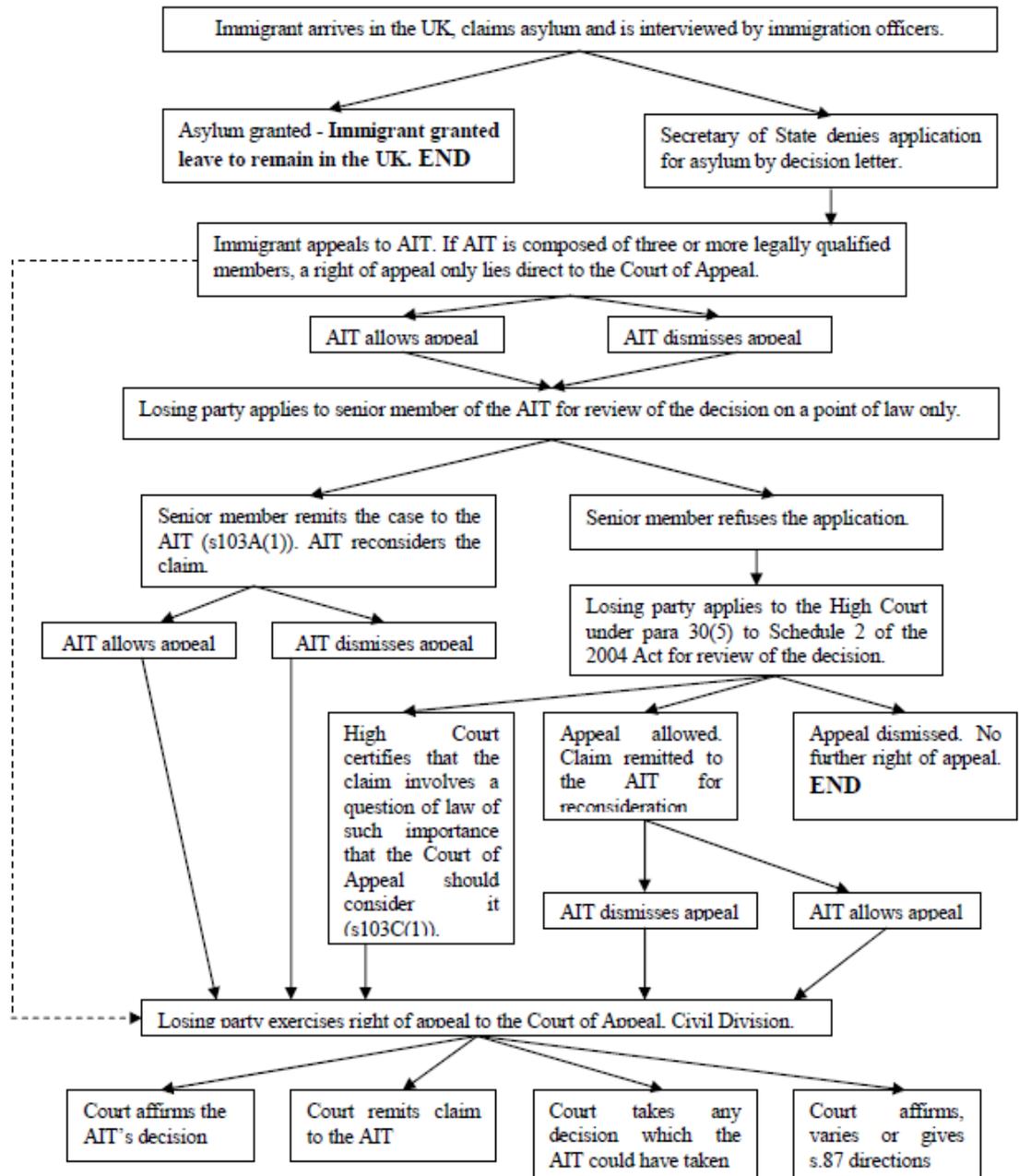


Figure 1: The present UK system.

Source: Jonathan Lewis, *Court of Appeal Immigration and Asylum Law Benchbook* (2007), [3-3], http://www.hmcourts-service.gov.uk/cms/files/Bench_Book_SEPTEMBER_2007.pdf.

Those without adequate documents will generally be turned away by carriers who are fined for bringing in unauthorised passengers,²⁰⁸ and are advised by governmental airline liaison officers in this regard.²⁰⁹ British immigration officers also perform immigration control in neighbouring sea ports and the Channel Tunnel (‘juxtaposed controls’),²¹⁰ and use ‘new detection technology’ to detect people hidden in vehicles crossing the Channel.

Those that arrive in Australian airports without authorisation are removed within 72 hours, after an initial interview to screen for refugee claims (the ‘turnaround’ procedure).²¹¹ The Rudd government has recently signalled they will greatly improve this procedure by providing publicly funded legal advice and assistance, access to independent merits review, and external scrutiny by the Ombudsman.²¹²

Most controversially of all, Australia began in 2001 to ‘interdict’ people who sought to bypass this system by trying to reach Australia by sea, with the navy intercepting and returning them to the country of origin or to detention centres in Nauru and Papua New Guinea where their refugee status would be determined, under the so-called ‘Pacific Solution’ policy.²¹³ Practices of interception had already been practised by the US²¹⁴ and Mediterranean countries.²¹⁵ In 2006, a proposal to extend this to refugee claimants who reached the Australian mainland was narrowly defeated.²¹⁶ The policy was immediately abolished by the Rudd government,²¹⁷ but unauthorised arrivals will still be processed at Christmas Island.²¹⁸

²⁰⁸ In the UK, see *1971 Act*, Sch 2, paras 19, 20 (costs of detention); *1999 Act*, s 40 (inadequately documented passengers), Pt II (civil penalty regime for clandestine entrants). In Australia, see s 213 (costs of detention); ss 229, 232 (inadequately documented passengers); s 230, modified by Reg 5.20, pursuant to s 504(1)(j) (concealed passengers).

²⁰⁹ In June 2007, there were 55 ALOs in 32 countries for the UK: Home Office, *Securing the UK Border* (2007), 17; Australia had “up to 21” positions at 16 locations in 2006-2007: DIAC, *Annual Report 2006-2007* (2007), [1.3.2].

²¹⁰ See Gbenga Oduntan, ‘Arriving before you depart: Law and fiction in juxtaposed control zones’ in Prakash Shah and Werner Menski (eds), *Migration, Diasporas and Legal Systems in Europe* (2006) 325.

²¹¹ Savitri Taylor, ‘Rethinking Australia’s practice of “turning around” unauthorised arrivals: The case for good faith implementation of Australia’s protection obligations’ (1999) 11 *Pac Rev PSGC* 43; LCAC, *Administration and Operation*, n104, 63-66.

²¹² Chris Evans, *New Directions in Detention – Restoring Integrity to Australia’s Immigration System* (Speech presented at Australian National University, Canberra, 29 July 2008).

²¹³ Later renamed the ‘Pacific Plan’. See Bem et al, n106.

²¹⁴ Bill Frelick, ‘Haitian boat interdiction and return: First asylum and first principles of refugee protection’ (1993) 26 *Cornell Int’l LJ* 675.

²¹⁵ See European Union Committee, *FRONTEX: The EU External Borders Agency* (2008) ch 5.

²¹⁶ Migration Amendment (Designated Unauthorised Arrivals) Bill 2006 (Cth). See LCAC, *Migration Amendment (Designated Unauthorised Arrivals) Bill 2006* (2006).

²¹⁷ DIAC, ‘Last refugees leave Nauru’, (Media release, 8 February 2008).

²¹⁸ Evans, n212.

This policy inspired the UK to propose, controversially, that the EU create ‘transit processing areas’ and ‘regional protection areas’, in which refugee claimants would be returned to safety zones for refugee determination. However, this proposal was eventually abandoned due to lukewarm EU support.²¹⁹

3.3.3.2 Legal exclusion

Restricting or abolishing appeal rights is only one of many legal tools that effect exclusion. The crudest, perhaps, is the Australian use of ‘invalidating clauses’, which simply deem certain visa applications to be invalid (with the possibility of ministerial waiver), most notoriously in the ‘excision’ of certain geographical areas from Australia’s ‘migration zone’.²²⁰

The most prominent methods in the UK have been the twin concepts of ‘safe third countries’ and ‘safe countries of origin’. The first idea is that the claimant can be adequately protected from persecution by another country, of which they are not a national; the second idea is that refugee claims from certain countries are usually not well-founded.

The ‘safe third country’ concept effectively enables the UK to return refugee claimants who have transited through another EU country (all of which are deemed ‘safe’) back to that country, under the EU’s Dublin II Regulation.²²¹ However, in one of the key battles between the executive and the judiciary, various versions of the legislation were rendered ineffective by judicial review,²²² leading to the relatively ‘bullet-proof’ version now in place in which the Secretary must, or may, certify claims where removal is possible to a country in one of the three lists provided, or other designated countries.²²³ Certification has a triple effect: it enables removal without consideration of the merits of the claim; it prevents in-country appeals on any grounds; and it applies a statutory presumption in out-of-country appeals and judicial review that such countries will not breach the Refugee Convention. The ‘safe third

²¹⁹ See Madeleine Garlick, ‘The EU discussions on extraterritorial processing: Solution or conundrum?’ (2006) 18 *IJRL* 601.

²²⁰ *Migration Amendment (Excision from Migration Zone) Act 2001* (Cth). See similar provisions in relation to mostly refugee-related circumstances: ss 91K, 48, 48A, 91A-91G.

²²¹ See chapter 2, part 8.

²²² See Thomas, n61, 502-505.

²²³ *2004 Act*, Sch 3. At 7 October 2008, there are 28 such countries on the first list, but none have been designated under the other two lists. See, most recently, the criticisms in *Nasseri v SSHD* [2008] EWCA Civ 464, overturning a High Court decision that this system was incompatible with the ECHR: *Nasseri v SSHD* [2007] EWHC 1548 (Admin).

country' concept was adopted in a more limited legislative form in Australia,²²⁴ although there is now an affiliated concept — judicially created,²²⁵ judicially overruled,²²⁶ but now legislatively entrenched²²⁷ — of 'effective protection' in which those with an effective right to enter and reside elsewhere may be excluded.

In the UK, the Secretary can enable the removal of those entitled to reside in 'safe countries of origin', listed on the statutory 'White List',²²⁸ through certification.²²⁹ The listing of countries is, however, judicially reviewable, and the inclusion of Pakistan and Bangladesh was successfully challenged in this way.²³⁰

Another, more subtle, legal technique has been the use of procedural means of restricting access. These include tougher sanctions for procedural non-compliance, such as non-appearance, and tighter requirements for adjournments.²³¹ However, the greatest focus has been on tighter time limits (see Appendices, Table 6).

In Australia, non-extendable time limits of 2 working days apply to immigration detainees, and 9 working days for those whose visas have been cancelled on character grounds. Again, however, it was the courts that attracted greater attention, with a non-extendable time limit of 28 days for the Federal Court, and 35 days for the High Court. Despite the later provision of a further extension of up to 56 days, however, the High Court ruled its time limit was unconstitutional,²³² and the Federal Court made the time limits for itself and the FMC unworkable.²³³ The Rudd government has introduced a bill providing for 35 days, with a broad power of extension.²³⁴

These time limits look comparatively generous when one turns to the UK's time limits, with 10 days to appeal to the AIT for in-country immigration appeals, 28 days for out-of-country appeals, and 5 days for detainees, although these time limits are

²²⁴ Reg 2.12A. The only country ever prescribed was China. See Savitri Taylor, 'Australia's safe third country provisions' (1996) 15 *U Tas LR* 196.

²²⁵ *MIMA v Thiyagarajah* (1997) 151 ALR 685.

²²⁶ *NAGV and NAGW of 2002 v MIMIA* [2005] HCA 6. See Andrea Hadaway, 'Safe third countries in Australian refugee law: *NAGV v MIMA*' (2005) 27 *Syd LR* 727.

²²⁷ Ss 91M-91Y.

²²⁸ 2002 Act, s 94(4). As at 6 October 2008, there are 24 countries listed.

²²⁹ Ss 94(5), 94(5A)-(5D), 94(6). S 94A empowers such certification in relation to those on the EU version of the White List.

²³⁰ *R v SSHD v Javed* [2001] EWCA Civ 789; *Husan v SSHD* [2005] EWHC 189 (Admin).

²³¹ MRT, 'Efficient Conduct of Merit Reviews', Principal Member Direction 2 (2005), [53]-[55]; RRT, 'Efficient Conduct of RRT Reviews', Principal Member Direction 3 (2005). For UK provisions, see Appendices, Table 6.

²³² *Bodruddaza v MIMA* [2007] HCA 14.

²³³ *MIAC v SZKCC* [2007] FCAFC 105. This ruled that time only ran from personal service of the reasons for decision.

²³⁴ Migration Legislation Amendment (No 1) Bill 2008 (Cth), Sch 1, it 30-35.

now extendable. However, decisions on time limits are taken as a preliminary decision on the papers, without further review; and the AIT must abide by strict time limits in urgent cases of ‘imminent removal’. There is a time limit of only 5 days to apply for reconsideration (28 if overseas), and although the normal judicial review time limits apply, there is no protection from removal until an application is instituted,²³⁵ and no practice of automatic stay at the Court of Appeal.²³⁶

The UK has also taken time limits to a new level, with the ‘fast-tracking’ of ‘easy’ claims, which involves the detention of refugee claimants and an extremely rapid timeline for interviews and appeals.²³⁷ In the procedure at Oakington, introduced in 2000, the aim was to make and serve the initial decision within 7-10 days (revised now to 10-14 days),²³⁸ with the process at Harmondsworth Removal Centre and Yarl’s Wood even tighter.²³⁹ Not surprisingly, 98-100% of such claims are initially refused, and only 4-7% of appeals allowed.²⁴⁰

This has been taken even further with the New Asylum Model, phased in from May 2005 and fully in operation from April 2007. Under this model, all refugee claimants are streamed into 5 processing categories, with varying timelines (see Table 2), with most initial decisions to be made within 30 working days, and an ultimate target of 6 months for all stages. This is to be achieved by the assignment of individual Case Owners and reporting requirements.²⁴¹ As the Refugee Council has reported, this has diminished access to legal advice.²⁴²

Segment	Screened	First Reporting ⁹	Asylum interview	Decision Served	Appeal	Removal ¹⁰
1. Third Country ¹¹	1	N/A	N/A	N/A	N/A	N/A
2. Minors	1 ¹²	10	25	35	35-115	N/A
3. NSA Detained	1	1	3	10	Post removal	
NSA Non detained	1	2	5	11	Post removal	
4. Detained Fast track	1	1	2-3	3-4	9-10	After 10
5. All other cases	1	3	8-12	30	30-100	After 100

Table 2: Timelines under the New Asylum Model.

²³⁵ There is an administrative practice of postponing removal directions for a few days.

²³⁶ *R (Pharis) v SSHD* [2004] EWCA Civ 654.

²³⁷ See generally Gina Clayton, *Textbook on Immigration and Asylum Law* (3rd ed, 2008), 420-423.

²³⁸ See UK, *Hansard*, HL, 16 September 2004, vol 664 WS129 (Baroness Scotland of Asthal, Minister of State, Home Office).

²³⁹ 2005 Fast-Track Rules. This process was unsuccessfully challenged in *R (Refugee Legal Centre) v Secretary of State* [2004] EWCA Civ 1481.

²⁴⁰ Research Development and Statistics Directorate, *Asylum Statistics United Kingdom 2007* (2008), 19-20.

²⁴¹ Refugee Council, ‘The New Asylum Model’, (August 2007).

²⁴² Refugee Council, *Asylum Seekers’ Experiences of the New Asylum Model: Findings from a Survey with Clients at Refugee Council One Stop Services* (2008).

Source: *Refugee Council, The New Asylum Model (2007)*.

Finally, there are other more subtle methods of precluding access. In Australia, for example, this may be done by requiring that some visas be applied for offshore,²⁴³ thereby precluding access to the MRT. In both jurisdictions, it is also done by confining the scope of executive discretion: Australia's regime of mandatory detention, for example, greatly reduces the potential for judicial intervention,²⁴⁴ while the UK has recently mandated the 'automatic' deportation of foreign criminals.²⁴⁵

3.3.3.3 Practical exclusion

Exclusion has also been effected by practical barriers, most significantly in the form of financial barriers, access to legal representation and evidential barriers.

3.3.3.3.1 Financial barriers

The most visible financial barrier in Australia is the huge increase in review fees to AU\$1400. The UK also experimented briefly, and unsuccessfully, with fees for family visitors.²⁴⁶ More indirect barriers include financial obligations on sponsors, the imposition of securities, huge increases in visa fees, and, perhaps most offensively, liability for the costs of one's own detention in Australia.²⁴⁷

Most controversial, however, have been policies that render refugee claimants effectively destitute, impeding effective access to immigration review.²⁴⁸ In Australia, those who claim refugee status more than 45 days after their entry, or those awaiting judicial review, are excluded from free medical care and cannot work.²⁴⁹ These claimants are thus reliant on State or Territory funded programs,²⁵⁰ or more usually community and charitable organisations.

²⁴³ See, eg, student visas: Regulations, Sch 1, it 1222.

²⁴⁴ S 189.

²⁴⁵ *2007 Act*, ss 32-35.

²⁴⁶ See Verity Gelsthorpe et al, 'Family visitor appeals: An examination of the decision to appeal and differential success rates by appeal type' (2004) 18 *IANL* 167. Fees were suggested again in a recent consultation, but were not ultimately proposed: UK Border Agency, *Government Response to the Consultation on Visitors* (2008).

²⁴⁷ Ss 209-212.

²⁴⁸ See esp JCHR, n104, ch 3.

²⁴⁹ This affected approximately 5,000-8,000 people annually: LCAC, *Administration and Operation*, n104, 253.

²⁵⁰ For example, Victoria allocated AU\$300,000 over 2002-2005 for asylum support agencies: *Ibid.* 59.

In the UK, asylum support is presently available to those awaiting initial decisions²⁵¹ with more limited support for those whose claims have failed but cannot leave immediately for reasons beyond their control,²⁵² and the small possibility of local authority support if there are other care needs.²⁵³ However, those who submit claims that are considered 'late' are excluded from asylum support,²⁵⁴ except to the extent necessary to prevent a breach of Art 3 ECHR.²⁵⁵ The resulting destitution of refugee claimants has, among other things, significant practical ramifications for access to justice.

3.3.3.2 Legal advice and representation

Another important battleground has concerned both access to, and quality of, legal advice and representation. In Australia, there is a hierarchy of access to legal advice and assistance. There is no access if intercepted, or until very recently in the 'turnaround' procedure.²⁵⁶ Detainees have access only if they expressly request it,²⁵⁷ and representatives have reported informal practices of obstruction.²⁵⁸ Expenditure on publicly funded legal advice has shrunk by more than half since 1996-1997, when it was governed by mainstream legal aid rules.²⁵⁹

Since then, the Department of Immigration has funded a specialist scheme for detained refugee claimants, disadvantaged refugee claimants in the community, and a small number of 'disadvantaged' immigrants. This only covers the preparation and lodgement of visa and merits review applications, and explanation of Tribunal reasons. In 2006-2007, this provided 'application assistance' for 343 detainees and 449 disadvantaged visa applicants, at a cost of AU\$1.6 million, with a meagre further AU\$700,000 for immigration 'advice' to (a somewhat astonishing) 6250 applicants.²⁶⁰

²⁵¹ 1999 Act, s 95. This provides 70% of income support, or less than £40 a week for single claimants over 25.

²⁵² 2004 Act, s 4. Known as 'hard case' support, this provides accommodation and vouchers of £35 a week. See generally James A Sweeney, 'The human rights of failed asylum seekers in the United Kingdom' [2008] *PL* 277.

²⁵³ *National Assistance Act 1948* (UK), s 21 ('destitution plus').

²⁵⁴ 2002 Act, s 55.

²⁵⁵ See *R (Adam) v SSHD* [2005] UKHL 66, upholding on the facts *SSHD v Limbuela* [2004] EWCA Civ 540, and cases therein cited.

²⁵⁶ See n212.

²⁵⁷ S 276.

²⁵⁸ LCAC, *Administration and Operation*, n104, 63.

²⁵⁹ In 1996-1997, this amounted to AU\$4.2 million. Evidence to L&CLC, Senate, Sydney, 29 January 1999, (Elizabeth Biok, Legal Officer, National Legal Aid, Legal Aid Commission of New South Wales), 120. In 2004-2005, it was \$1.9 million: LCAC, *Administration and Operation*, n104, 54.

²⁶⁰ DIAC, 'Immigration Advice and Application Assistance Scheme', Fact Sheet 63 (3 January 2008).

Some specialist legal centres receive limited philanthropic funding. Most claimants therefore privately fund their own agent,²⁶¹ for AU\$1,000-\$4,000.²⁶²

In the courts, legal aid is only available if there are differences of judicial opinion that have not been settled by either the Full Federal or High Courts, or where the lawfulness of detention is being independently challenged.²⁶³ Means and merits tests must also be fulfilled. Pro bono referral schemes, including court-sponsored panels,²⁶⁴ have taken up some of the slack, although their use appears to be declining.²⁶⁵ This has led to high rates of unrepresented applicants, estimated at over 50% in the Federal Court in NSW, and 95% in the High Court.²⁶⁶

The story was somewhat different in the UK, since early New Labour reforms extended access, while later reforms took away. In 2000, legal aid was extended to representation before the IAA, albeit in combination with a scheme restricting funding to contracted and audited providers. This early extension was soon whittled away. Both the 2002 Act and former Procedure Rules allowed judges and the IAT to certify cases as having no merit, with funding implications.²⁶⁷ In 2004, major changes were made, including a requirement for prior permission for any work done past a 5-hour threshold for an individual, and a withdrawal of representation at Home Office interviews, leading to an exodus of practitioners.²⁶⁸ The 2004 Act and 2005 Rules aggravated matters by providing for retrospective funding orders for reconsiderations,²⁶⁹ shifting the financial risk on to the representative.

These restrictions leave immigrants vulnerable to poor quality legal advice or, worse, exploitation. The effect of bad representation can obviously be disastrous, particularly as courts are not inclined to be lenient.²⁷⁰ The prevalence of these

²⁶¹ Around 70% were represented in Australia: RRT, *Annual Report 2004-2005* (2005), 1; MRT, *Annual Report 2004-2005*, n135, 1.

²⁶² See the table of agents' fees at <http://www.themara.com.au/Online/Default.asp?DeptID=275>.

²⁶³ Attorney-General's Department, *Commonwealth Legal Aid – Priorities and Guidelines* (2008), Sch 3, Pt 4, Guideline 3.

²⁶⁴ Pt 12 of the Federal Magistrates Court Rules 2001; Federal Court Rules Order 80 r 4. See Dr John Cameron, 'Order 80 pro bono panel in Federal Court: Who benefits?' (2001) 28 *Brief* 5; Justice RD Nicholson, 'Administrative issues in refugee law' (2001) 28 *AIAL Forum* 45, 50.

²⁶⁵ National Pro Bono Resource Centre, *Mapping Pro Bono in Australia* (2007), 83-84.

²⁶⁶ Evidence to L&CLC, Senate, Sydney, 29 January 1999, (John Mathieson, District Registrar for NSW and ACT, Federal Court of Australia), 81; High Court of Australia, *Annual Report 2006-2007* (2007), 11.

²⁶⁷ S 101; Immigration and Asylum Appeals (Procedure) Rules 2003 (UK), r 24.

²⁶⁸ Bail for Immigration Detainees and Asylum Aid, n106.

²⁶⁹ S 103D; r 33. See CAC, *Legal Aid*, n104.

²⁷⁰ Mistakes by representatives, and their elections, are not subject to judicial review: see *R v IAT ex p Newarun Nesa* [1985] Imm AR 131; *R v SSHD ex p Al-Mehdawi* [1990] 1 AC 876. Cf the more sympathetic approach in *FP (Iran) v SSHD* [2007] EWCA Civ 13.

problems has led to regulation in both countries, with advice restricted to registered individuals and, in the case of the UK, qualified lawyers. Both jurisdictions are also considering ways to regulate overseas advisers.²⁷¹ This regulatory regime, however, may also impede access to advice — with Australian registration costs of AU\$3,400, and ongoing costs of AU\$2,200, for non-profit advisers.²⁷² In 2004, the Australian Minister was also empowered to refer agents with high refusal rates for disciplinary action,²⁷³ enabling the punishment of agents considered to be ‘abusing’ the system — although no such referral has taken place.

3.3.3.3 Evidential barriers

These restrictions are made worse by the linguistic and cultural difficulties and legal inexperience of most immigrants. These same factors also strengthen the evidential barriers encountered by applicants, although, as with most tribunals, the rules of evidence used in courts do not apply.

In many appeals, applicants will not be conversant or fluent in the language used. While both jurisdictions provide free interpreters at hearings, there are practical difficulties: the availability of interpreters; potential conflicts of interest; and problems arising from differences of gender, class, ethnicity or dialect.²⁷⁴ Further, interpreters are not mere conduits, but rather change the meaning of, and the power relations in, the interaction.²⁷⁵ Perhaps most worryingly, the accuracy of any interpretation is generally not verifiable: a decision-maker or judge must simply rely upon it to convey accurately the meaning and nuance of the original, in appeals where context and nuance matter greatly.

Another endemic problem is the cross-cultural nature of most interactions. Human behaviour is inextricably embedded in and shaped by social and cultural norms, which guide any evaluation of what is ‘normal’. For example, a Filipino woman smiling as she discussed her rape may be misinterpreted as not attaching great significance to it.²⁷⁶ Decision-making may also be culturally biased: Asylum Aid

²⁷¹ 2008 Australian bill, Sch 4, it 4; HAC, *Immigration Control*, n104, [33]-[34].

²⁷² LCRC, *Legal Aid and Access to Justice* (2004), 147-148.

²⁷³ S 306AG, inserted by *Migration Legislation Amendment (Migration Agents Integrity Measures) Act 2004* (Cth), Sch 1, it 183.

²⁷⁴ See, eg, LCAC, *Administration and Operation*, n104, 29-31.

²⁷⁵ Roxana Rycroft, ‘Communicative barriers in the asylum account’ in Prakash Shah (ed), *The Challenge of Asylum to Legal Systems* (2005) 223.

²⁷⁶ Cited in Lesley Hunt, ‘Cross cultural issues – Implications for procedural fairness’ (1999) 20 *AIAL Forum* 13, 18.

documents several decisions in which the ratification of international conventions by Sudan, China, and the Czech Republic were thought to render improbable abusive practices.²⁷⁷ On the other hand, other decisions imply that “the only ‘genuine’ refugee is a dead one”:

You state that the men drove you to a place one-and-a-half hours away and told you to run before they opened fire on you. The Secretary of State ... considers that if the men intended to kill you they would have done so straight away, rather than give you a chance to escape.²⁷⁸

The nature of refugee determinations produces a uniquely difficult evidential matrix, consisting as they do largely of the claimant’s testimony, expert evidence, ‘country information’, and credibility inferences.²⁷⁹ The effects of these are, to some extent, mitigated by the lower standard of proof applied to refugee claims.²⁸⁰

Each of these types of evidence, however, raises particular evidential difficulties. The claimant’s testimony is obviously partial, often based on different cultural norms, sometimes exaggerated, misremembered or fabricated, and subject to the psychological pressures of memory and trauma.²⁸¹ Expert evidence is usually partial, often based on the claimant’s account, and difficult for non-experts to assess.²⁸²

There has been much discussion about the poor quality, accessibility and timeliness of country information,²⁸³ concerns that led to the establishment in the UK of the Advisory Panel on Country Information. Moreover, its use requires careful consideration of its source, nature, and currency. For example, State Department reports may reflect foreign policy imperatives;²⁸⁴ while a tourist guide is unlikely to provide a true guide to the persecution of homosexuals.²⁸⁵ Finally, it is tempting for most decision-makers to prefer the apparent ‘objectivity’ and ‘official’ nature of country information to oral testimony, with all its flaws of subjectivity, unreliability and bias.

²⁷⁷ Asylum Aid, *Still No Reason At All: Home Office Decisions on Asylum Claims* (1999), 41.

²⁷⁸ *Ibid.* 39.

²⁷⁹ Gregor Noll (ed), *Proof, Evidentiary Assessment and Credibility in Asylum Procedures* (2005).

²⁸⁰ Expressed as a ‘reasonable chance’ in *R v SSHD ex p Sivakumaran* [1988] AC 958; and a ‘real chance’ in *Chan v MIEA* (1989) 169 CLR 379.

²⁸¹ Juliet Cohen, ‘Questions of credibility: Omissions, discrepancies and errors of recall in the testimony of asylum seekers’ (2001) 13 *IJRL* 293.

²⁸² John Barnes, ‘Expert evidence – The judicial perception in asylum and human rights appeals’ (2004) 16 *IJRL* 349.

²⁸³ See, eg, Asylum Aid, n277, 49-54. Savitri Taylor, ‘Informational deficiencies affecting refugee status determinations’ (1994) 13 *U Tas LR* 43.

²⁸⁴ For examples, see Kristen Sellars, *The Rise and Rise of Human Rights* (2002), 143, 145, 149.

²⁸⁵ Cited in Catherine Dauvergne and Jenni Millbank, ‘Burdened by proof: How the Australian Refugee Review Tribunal has failed lesbian and gay asylum seekers’ (2003) 31 *FL Rev* 299.

Even greater concerns have been raised about the common use of credibility to determine refugee status²⁸⁶ since such decisions are very difficult to challenge on appeal.²⁸⁷ One Australian practitioner noted:

[C]redibility is like the magic formula for the RRT. They know that if they want to reject someone, all they have to do is say that they don't believe them and that won't be able to be easily reviewed in the Federal Court.²⁸⁸

There are, thus, myriad ways in which access to immigration review may be indirectly and practically excluded or significantly restricted. Evidential, financial, and legal barriers; restrictions on legal advice and representation; and interception practices combine with jurisdictional and structural changes to produce, in the end, a sorry tale.

4 Conclusion

This chapter has detailed the rise and fall of immigration review in Australia and the UK, although that neat story arc is more complicated in the UK where cross-cutting trends are also visible. The stories, however, share striking similarities. Both jurisdictions have a history of broad executive discretion, with small-scale advisory operations until the 1970s, which saw a flourishing of a specialist appeals system in one jurisdiction, and a generalist administrative law system in another. For a certain period, both operated two-tier tribunal structures prompted by increasing immigration restrictions.

In recent years, both jurisdictions have witnessed increased conflict between the executive and the judiciary, a gradual undermining of confidence in the system evidenced by endless critical reports, and incessant modification including multiple direct and indirect ways of restricting access to immigration review. Most strikingly, both stories include a constitutional stand-off over that fragile bastion of the rule of law, judicial review.

The history of immigration review, as described in this chapter, is a history of the sudden and spectacular expansion of law into the field of immigration — an expansion met with resistance — followed by a hard-fought, high-profile, retreat. We can learn much from this story about the nature of the hydra-headed challenges to

²⁸⁶ LCAC, *Administration and Operation*, n104, 98-100. This is now subject to guidelines: RRT, 'Guidance on the Assessment of Credibility', (October 2006).

²⁸⁷ See, eg, *R v IAT ex p Alam Bi* [1979-80] Imm AR 146, 149.

²⁸⁸ Peter Mares, *Borderline: Australia's Response to Refugees and Asylum Seekers in the Wake of the Tampa* (2nd ed, 2002), 207, citing Carolyn Graydon.

the law detailed in this chapter, and from the responses to them. It is a story that reveals much about the changing boundaries of law and politics, and in the emotive undertones of loss, disillusionment and frustration that I have emphasised in this chapter, we can learn much about our investments and beliefs in law.

The story of immigration review is thus an especially fertile field for investigating, and reflecting upon, the place and space of the contemporary legal sphere. The balance of this thesis seeks to explore the implications of this story, by explicating the different challenges to the law and the responses to them, and thus interrogating our hopes and fears about — and the limitations and potential of — law.

Chapter 2 — The legal constellation

1 Introduction

This chapter begins exploring what I call the challenge of coherence. That is to say, immigration review is governed by a constellation of normatively incoherent and polyvalent legal regimes,²⁸⁹ which provides multiple legal answers to the same questions. While this challenge presents itself in many legal fields, it is particularly acute in immigration review.

This is in part because immigration review involves a multiplicity of legal regimes — most relevantly, immigration law, citizenship and nationality law, refugee law, constitutional law, and common law principles of judicial review. In the UK, human rights law is also highly significant, as is EU law, which encompasses three separate regimes involving the movement of persons. This list is not exclusive: one might also include discrimination law, labour law, welfare law, and international treaties concerning the movement of persons,²⁹⁰ which have been omitted here for reasons of space.

This chapter gives a highly abbreviated sketch of the distinctive characteristics of each regime, beginning with those common to both jurisdictions, and emphasising the dynamic, complex and unstable interactions between them.²⁹¹ This hybridity, complexity and instability is accentuated in the UK, given its greater plurality of regimes.

The complexity of the legal constellation has several sources. First, there are often significant tensions between competing values, norms, and concepts within the legal regimes themselves.

Second, legal regimes also evince considerable historical dynamism, as underlying normative paradigms shift, new concepts evolve, and forms and structures alter. In recent decades, refugee law has been greatly elaborated at the domestic and regional level; the EU has rapidly developed its own immigration and asylum policy since 1999; and there have been profound constitutional changes under New Labour. The most rapid development has occurred within British immigration law, however. In 2008,

²⁸⁹ As I use the term, a ‘legal regime’ is merely shorthand for a cluster of laws sharing distinctive norms and concepts, and sharing a distinctive history.

²⁹⁰ See Richard Plender (ed), *Basic Documents on International Migration Law* (3rd rev ed, 2007).

²⁹¹ For a similar argument in a Canadian context, see Audrey Macklin, ‘The state of law’s borders and the law of states’ borders’ in David Dyzenhaus (ed), *The Unity of Public Law* (2004) 173.

the UK is introducing an admission policy structured around ‘five tiers’,²⁹² has proposed citizenship be ‘earned’,²⁹³ and is overhauling all its immigration legislation in its ‘simplifying’ project, manifested in its draft partial Immigration and Citizenship Bill 2008.²⁹⁴ Meanwhile, the new Australian Labor government has been busy issuing a stream of significant policy changes.

Tensions between the regimes provide a third source of complexity. Each legal regime has a different political structure, and is premised on different normative paradigms. The predominance of particular legal forms (legislation, case law, treaties, soft law) in different legal regimes affects the plurality of legal actors in those regimes and the relative degree of legal autonomy. Most notably, the predominance of the executive in immigration law provides a very thin dividing line between immigration policy and immigration law. The legal regimes also differ in the underlying normative claims they assume, maintain, and reinforce.

The relationships between legal regimes also vary, further complicating the picture. At the heart of the legal constellation is immigration law.²⁹⁵ Citizenship and nationality law is both driven by immigration law, and delimits its scope. Refugee law is partly incorporated into immigration law, but is rooted in international law, modified by EU law, and governed by a different normative paradigm. Immigration cases also drive the development of constitutional law and common law principles of judicial review,²⁹⁶ both of which provide the basic institutional framework of immigration review and also provide avenues for challenging immigration decisions. In the UK, human rights law and EU law modify the broader constitutional frameworks, and provide other avenues for legal challenge.

Finally, the complexity also arises because the legal constellation involves increasing interaction across domestic, regional, and international orders, as refugee law illustrates with its international heart, domestic elaboration, and more recent harmonisation at the EU level. As well, there is increasing influence across domestic legal orders as policies are rapidly borrowed, most strikingly in the recent wave of

²⁹² Pursuant to the Home Office, *A Points-Based System: Making Migration Work for Britain* (2005).

²⁹³ Home Office, *The Path to Citizenship: Next Steps in Reforming the Immigration System* (2008).

²⁹⁴ Home Office, *Draft (Partial) Immigration and Citizenship Bill* (2008).

²⁹⁵ Defined in the Introduction, 1.2.

²⁹⁶ As is evident, I treat human rights law and EU law separately, although these also constitute distinct streams of judicial review. In this chapter, henceforth, ‘judicial review’ is used to refer to the common law principles of judicial review.

citizenship tests introduced by the UK, Australia, the Netherlands, Germany, France and Austria.²⁹⁷

The relationships between and within these regimes are therefore neither straightforward, nor static. The regimes rub against each other, generating friction, change, and further development. The core of the constellation, immigration law, is displaced, modified, and reshaped by other legal regimes, creating a dynamic and complex web of law.

This has two important consequences. First, the legal constellation is diverse enough in its values and orientations (what I call its polyvalence) to provide multiple answers to the same legal question; and, second, this diversity produces inevitable tensions between and within the legal regimes that cannot be authoritatively resolved. As the next chapter illustrates, ‘hard’ immigration cases frequently invoke a haphazard legal constellation, leaving judges with the difficult task of managing and temporarily resolving the normative tensions and conflicts between regimes.

2 *Immigration law*

Immigration law is the most peculiar of these regimes, for several reasons. First, its political structure is both narrow and top-heavy, because there are relatively few creators of the law and because the greatest power is conferred on the executive, and relatively little power conferred on the judiciary.

This arises out of the predominance of executive forms of law-making. In Australia, this takes the form of the Migration Regulations 1994 (‘the Regulations’), supplemented by bureaucratic guidelines.²⁹⁸ In the UK, it takes the form of the Immigration Rules (‘the Rules’),²⁹⁹ rules of administrative practice which have the practical effect of law,³⁰⁰ and is supplemented by a mass of Instructions and individual policies, including concessions.³⁰¹ The all-important criteria for admission to the

²⁹⁷ Introduced on 1 November 2005 in the UK (and extended to applications for indefinite leave to remain on 1 April 2007); and introduced in Australia on 1 October 2007, along with a ‘Values Statement’ on 15 October 2007. For information on the European countries, see Human Rights Watch, *The Netherlands: Discrimination in the Name of Integration Migrants’ Rights under the Integration Abroad Act* (2008); ‘Integration and Immigration: What Role for the Law?’ Conference of the Migration and Law Network (4 June 2008).

²⁹⁸ The Procedures Advice Manuals, which consolidates individual Ministerial Series Instructions.

²⁹⁹ These are laid before Parliament and are subject to the negative resolution procedure.

³⁰⁰ *Pearson v IAT* [1978] Imm AR 212. See *2002 Act*, s 84(1)(a), (f). There are, however, some circumstances in which its legal status as policy are relevant: see *MO (Nigeria)* [2007] UKAIT 00057.

³⁰¹ These are also enforceable, if the policy is known: *R v SSHD ex p Amankwah* [1994] Imm AR 240; *Dhudi Saleban Abdi v SSHD* [1996] Imm AR 148.

country are mostly set out in the Regulations and the Rules, as well as in individual policies and concessions.

The mark of the executive is also heavily imprinted in legislation, because of the frequent and hasty amending legislation passed in the previous decade at a time of executive dominance. This pattern is more evident in the UK because, while Australia's amendments have been consolidated into the Act, the UK has not yet consolidated its 12 immigration-related Acts (listed in Table 3, and referred to henceforth by the year of enactment) — a situation due to be remedied in the next Parliament.³⁰²

The legislation, Regulations, Rules, and policy are both voluminous — with the Act and Regulations in Australia constituting 11 volumes — and tightly textured, relegating the judiciary to an extremely subordinate role in judicial interpretation.

Year	Name	Primary features
1971	Immigration Act	Basic structure of immigration control
1987	Immigration (Carriers' Liability) Act	Created system of carriers' sanctions for improperly documented passengers
1988	Immigration Act	Restriction of polygamous spouses; legislation for EC free movement
1993	Asylum and Immigration Appeals Act	Primacy of Refugee convention; right of appeal on asylum grounds
1996	Asylum and Immigration Act	Employer sanctions; new criminal offences; restricted appeal rights; safe third country
1997	Special Immigration Appeals Act	Creation of Special Immigration Appeals Commission for national security decisions
1999	Immigration and Asylum Act	Restriction of appeal rights; carriers' liability; asylum support; removal centres; marriage registration; new criminal offences
2002	Nationality, Immigration and Asylum Act	Deprivation of citizenship; asylum support; extension of powers of immigration officials; definition of Refugee convention terms; immigration procedure
2004	Asylum and Immigration (Treatment of Claimants, etc) Act	Merger of two-tier tribunal system; removal of asylum support for families; new criminal offences; applications for marriages
2006	Immigration, Asylum and Nationality Act	Changes to appeals; employer sanctions; obtaining and using information; cessation and exclusion clauses of Refugee Convention; deprivation of right of abode
2007	UK Borders Act	Biometric registration; asylum support; enforcement; deportation of foreign criminals; Chief Inspectorate; information
2008	Criminal Justice and Immigration Act	Special immigration status for foreign criminals who cannot be returned

Table 3: UK immigration legislation.

This volume, detail, complexity and frequent amendment gives immigration law the character of what I call 'hyper-law' — a regime of laws that proliferates and

³⁰² For updates, see <http://www.ukba.homeoffice.gov.uk/managingborders/simplifying>.

changes so rapidly that it is inaccessible to all but specialist practitioners. Yet this paradoxically co-exists with what Shah has identified as the “lawlessness”³⁰³ of immigration. Partly, this lawlessness is manifested in the interception practices and other methods of directly or indirectly bypassing the law discussed in the previous chapter.

Partly, however, this lawlessness derives from the normative paradigm underlying immigration law itself, which buttresses the political structure of immigration law. This normative paradigm dates from the turn of the 20th century, in the judicial affirmations of the foundational norm of immigration law: the sovereign right of the State to exclude.³⁰⁴ As judges in the Privy Council, Australia and the US confirmed during this period:

One of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the State, at pleasure, even a friendly alien.³⁰⁵

This expansive view of sovereignty was a natural accompaniment to the Westphalian model of nation-States prevailing at this particular historical moment, although in both the UK and Australia it was modulated and complicated by the imperial relationship. Importantly, these judicial pronouncements accord the State an *independent* moral status: the sovereign right to exclude derives not from the preservation of democracy or the benefits to its members, but flows directly from the existence of the State. This is reflected in the widely held judicial view that such power is prerogative in nature³⁰⁶ — a legal categorisation that gives primacy to the power of the executive.

These pronouncements also, importantly, model the relationship between the State and outsider entirely as one of privilege (the “pleasure” of the State), rather than in a framework of rights. The model is entirely binary: the State has all the power, and the outsider has none, as is dramatically highlighted by the decision in *Musgrove* that the outsider does not even have the right to maintain a legal action.³⁰⁷ This model of benefactor-beneficiary is still evident in the terminology of ‘leave’ in the UK: ‘leave to

³⁰³ Prakash Shah, ‘Introduction: From legal centralism to official lawlessness?’ in Prakash Shah (ed), *The Challenge of Asylum to Legal Systems* (2005) 1.

³⁰⁴ This originated in international law. See Satvinder Singh Juss, *International Migration and Global Justice* (2006) 11-15.

³⁰⁵ *Attorney-General for Canada v Cain* [1906] AC 542, 546. See also *Musgrove*, n6; *Robtelmes v Brennan* (1906) 4 CLR 403.

³⁰⁶ See, eg, *Soblen*, n12. See Black CJ’s extensive dissent on this aspect in *Ruddock v Vadarlis* [2001] FCA 1329.

³⁰⁷N6.

enter', 'leave to remain', 'indefinite leave to remain' ('ILR'), and the former category of 'exceptional leave to remain' ('ELR', previously the major category for refugees).³⁰⁸ The draft 2008 bill retains this flavour in its adoption of the terminology of 'permission'.³⁰⁹

By focusing on the relationship between outsider and the State, immigration law is founded on an 'external' perspective of the State, viewing its relationship vis-à-vis outsiders rather than within its own community. This 'external' perspective entirely erases two characteristics of people 'under the law' (and within the community) — their equality and their rights-bearing character.

This normative paradigm has persisted throughout the history of immigration law. Indeed, it was strengthened in the next epoch, the World Wars, most obviously in the UK with the suspension and eventual repeal of the 1905 Act by the *Aliens Restriction Act 1914* and its successor, the *Aliens Restriction Act 1919*. These Acts granted the executive all powers in relation to aliens — including, notoriously, that of internment or detention — an extremely opaque regime that lasted until the 1971 Act.

It was only in the third epoch of immigration law, with the introduction of more detailed legislation and appeals regimes from the 1970s onwards, that this paradigm became qualified by the acceptance of outsiders' procedural rights, as discussed in chapter 1, and by legislatively conferred rights of entry. The purely discretionary regimes of entry permits and visas previously operated in Australia were remodelled into a framework of rights, with the entitlement to enter and remain conferred by issuance of a visa.³¹⁰ The dual regime of entry clearance and leave to enter in the UK has recently converged in practice with the Australian approach, as entry clearances now typically also operate as leave to enter,³¹¹ and will converge in law through the single concept of 'permission' in the 2008 bill.

The Australian Act now requires the Minister to grant a visa if all the relevant criteria are fulfilled,³¹² and to grant a protection visa if satisfied that the Refugee Convention definition is fulfilled.³¹³ In the UK, a similar effect is produced by the provision that the AIT may reverse a decision that is "not in accordance with the law" including the Rules.³¹⁴ However, such rights depend upon the ever-changing

³⁰⁸ ELR was removed from 1 April 2003.

³⁰⁹ See, eg, draft ss 4, 6.

³¹⁰ S 29.

³¹¹ Pursuant to Immigration (Leave to Enter and Remain) Order 2000 (UK).

³¹² S 65.

³¹³ S 36.

³¹⁴ 2002 Act, s 84(1)(e).

conditions of admission — prescribed by the Rules in the UK, and in Australia by visa criteria in Sch 2 of the Regulations, including ‘primary’, ‘secondary’ and ‘common criteria’³¹⁵ — and are thus weakly entrenched. A more significant right is the right of abode (the right to enter and remain indefinitely, free from immigration control) granted to British citizens and certain Commonwealth nationals by the *1971 Act*,³¹⁶ although the 2008 bill proposes to remove this right, in favour of the simpler correlation between citizenship and right of entry, with non-citizens currently having the right of abode protected instead by executive designation.³¹⁷

The introduction of detailed legislation also made more explicit the other foundational norm of immigration law: the primacy of the national interest, articulated most clearly in s 4 of the Australian Act.³¹⁸ In this remodelling of the paradigm, immigration is conceived of as a benefit conferred upon outsiders, for the greater good of insiders, reflecting a broader political shift towards citizens as the primary units of moral concern. The rights of outsiders are thus derived from the interests of insiders, and immigration law therefore premised on an inherent inequality between outsiders and insiders.

While these changes significantly qualified the normative paradigm, they did not replace it. This is made clear in the legislative provisions expressly preserving executive or prerogative power in both jurisdictions,³¹⁹ and through the continued executive resistance to legal constraints displayed so vividly in the story of immigration review.

The legislation also reveals the different conceptions of immigration in Australia and the UK. In Australia, immigration has historically connoted permanent immigration, controlled by the government in the pursuit of ‘nation-building’. Visas are thus divided into temporary and permanent visas,³²⁰ the latter of which confer entitlement to permanent residence immediately, and the government sets annual targets for the migration program (which refers only to permanent immigration). The migration program is predominantly composed of independently skilled migrants,

³¹⁵ The visa applicant must fulfil the primary criteria, and their family the secondary criteria. Common criteria refer to common conditions relating primarily to health and character.

³¹⁶ S 1. See *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61 on the implications of the common law right of abode.

³¹⁷ Draft ss 1, 8.

³¹⁸ Subsection 1 provides: “The object of this Act is to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens.”

³¹⁹ S 7A of the Australian Act; *1971 Act*, s 33(5).

³²⁰ S 30.

namely those selected for their skills and qualifications via a system that allocates various points for educational qualifications, language, age, and occupation.³²¹

In the UK, historically immigration has been conceived of as a more fluid process of long-term movement, in which no one is entitled immediately to permanent residence. A significant consequence is that not all people are ‘migrants’ in these two jurisdictions — most notably, international students, who are not migrants in Australia, but constitute by far the largest category of migrants to the UK.³²² However, the UK is converging with the Australian model, having introduced independently skilled labour migration using an ‘Australian points style’ system.³²³ The mechanism of points is extended throughout the ‘five tier’ structure being introduced in the UK, a structure which represents a hierarchy of benefits, with the first three tiers based on a hierarchy of skill.³²⁴ The draft 2008 bill also divides temporary from permanent immigration permission.³²⁵ Nevertheless, as Figure 2 shows, the relative emphases of permanent and temporary migration in the jurisdictions differ significantly.

These general rules are subject to significant regional exceptions in both jurisdictions. As is discussed below, EEA citizens are effectively free from immigration control, and there are no immigration controls within the Common Travel Area, comprised of the UK, the Channel Islands, the Isle of Man, and the Republic of Ireland.³²⁶ There is also a Trans-Tasman Travel Agreement between Australia and New Zealand, which allows nationals of the two countries to enter, work and reside in the other country without prior permission.³²⁷

³²¹ Ss 92-96.

³²² In 2007, 358,000 students entered, compared with 124,000 work permit holders: Home Office, *Control of Immigration: Statistics, United Kingdom 2007* (2008), 10.

³²³ Under the superseded Highly Skilled Migrants Program (‘HSMP’), described in *HSMP Forum Ltd v SSHD* [2008] EWHC 664 (Admin).

³²⁴ The first tier caters for the highly skilled, replacing several earlier schemes on 29 June 2008. The second replicates the work permit system, and the third tier for low-skilled workers is intended only to operate if EU migrants cannot fulfil demand. Students and youth programs make up the last two tiers.

³²⁵ Draft s 4.

³²⁶ *1971 Act*, s 1(3). See Bernard Ryan, ‘The Common Travel Area between Britain and Ireland’ (2001) 64 *MLR* 855. However, the UK is presently proposing to introduce routine immigration checks on non-nationals of the Common Travel Area: UK Border Agency, *Strengthening the Common Travel Area* (2008).

³²⁷ This is implemented in Australia by s 32(2)(a) of the Act, which makes New Zealand citizens eligible for ‘special category’ visas. Provision is also made for traditional inhabitants in a protected zone: s 13(2).

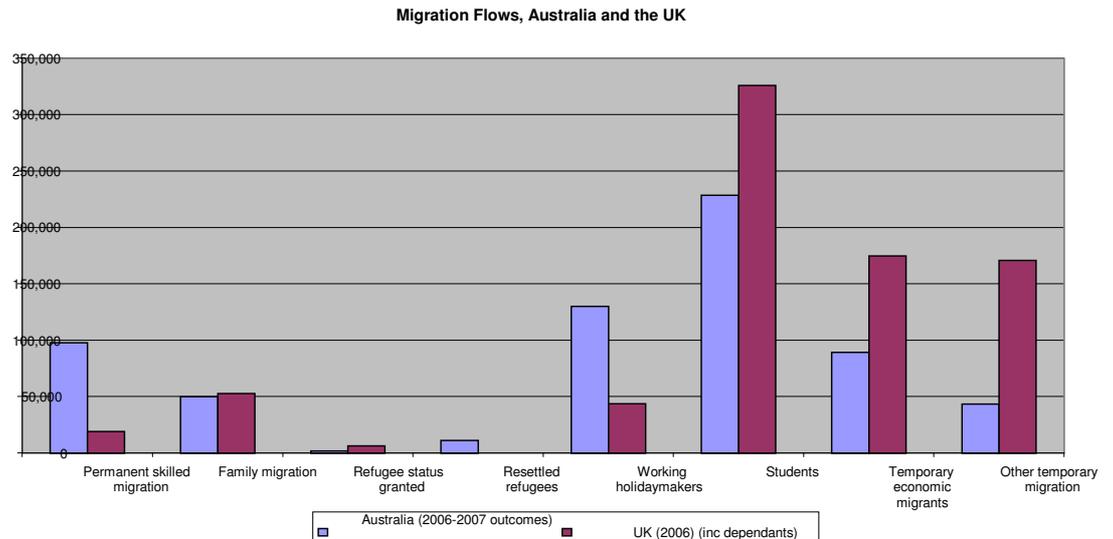


Figure 2: Australia and UK migration flows.

Figures from DIAC, Annual Report 2006-2007 (2007); Home Office, Control of Immigration: Statistics (2006); UK, Hansard, HL, 28 November 2006, WA 47 (Baroness Scotland).

The two countries also differ in their conception of refugee flows. First, while the Australian ‘protection visa’ for refugees is one of the few expressly provided for in the Act, asylum has historically been treated as an exceptional category in the UK.³²⁸ Second, Australia also sets annual targets for its ‘humanitarian program’, which includes a large number of refugees resettled from abroad, as well as people who apply onshore for refugee status. In contrast, almost all refugees in the UK apply onshore, although recently the UK has piloted a much smaller refugee resettlement programme along the same lines.³²⁹ Third, the UK also grants subsidiary or complementary protection to those who can demonstrate compassionate circumstances (Discretionary Leave) or whose return would breach human rights (Humanitarian Protection).³³⁰ Australia provides a small range of other offshore visas to accommodate those at special risk (usually sponsored by Australians), but otherwise humanitarian protection apart from refugee status is possible only by ministerial intervention.³³¹

These different categories of admission and conceptions of immigration buttress the political structure of immigration law and its foundational norms. The stress on

³²⁸ Asylum was first fully acknowledged in primary legislation in the 1993 Act. In *European Roma Rights Centre v Immigration Officer at Prague Airport* [2002] EWHC 1989 (Admin), [79]-[82], Burton J held that asylum was not a ‘purpose covered by the Rules’, indicating its status as an exceptional category.

³²⁹ ‘Gateway Protection Programme’, Asylum Policy Instruction. Around 500 refugees have been accepted annually, with an increase to 750 in 2008/2009.

³³⁰ ‘Discretionary Leave’, Asylum Policy Instruction; paras 339C-H of the Rules.

³³¹ Field, 1106.

‘controlling’ and ‘nation-building’ in Australia underpins the norm of the national interest, strengthens the nexus between sovereignty and immigration, and places the question of immigration policy, insofar as they relate to the migration and humanitarian programs, firmly in the hands of the executive. On the other hand, the UK’s historical laissez-faire approach left even greater discretion in the hands of the executive, since most immigrants entered without a permanent right of residence and had to wait several years for ILR. This laissez-faire approach also emphasised the power of the State to decide whom to admit or expel “at pleasure”.

The different categories of migrants also create an elaborate hierarchy of people, with highly skilled migrants at the top of the tree and those seeking humanitarian protection at the bottom. This differentiation therefore builds upon the premise of inequality already embedded in immigration law, constructing new inequalities that are largely congruent with class and nationality, with the rich from rich countries at the top of the tree and the poor from poor countries at the bottom.

The normative paradigm of the absolute power of the State is also vividly manifested in the enforcement of immigration law. The traditional forms of enforcement — criminalisation, detention and removal — empower the State to exercise physical control over the body of the migrant, in the most dramatic manifestations of State control one can imagine. These forms have been strengthened and extended in recent decades, most prominently with the proliferation of new criminal offences,³³² the Australian policy of mandatory detention, and record levels of removals in the UK.³³³

In Australia, by far the most political heat has been generated by the policy of mandatorily detaining all those without a valid visa,³³⁴ although detainees may be given ‘bridging visas’ or (since 2005) ‘residence determinations’ which allow entry into the community.³³⁵ Unlike in the UK, there is no provision for bail,³³⁶ and almost no judicial supervision. The remoteness of some detention centres, the inhumane conditions and treatment, and the detention of children have all been extremely

³³² There are at least 33 specific immigration offences in the UK: see Home Office, *Statistics 2008*, n322, Table 6.7.

³³³ MJ Gibney, ‘Asylum and the expansion of deportation in the United Kingdom’ (2008) 43 *Gov Oppos* 146.

³³⁴ S 189.

³³⁵ Ss 37, 197AA-AG.

³³⁶ See *Immigration Act 1971* (UK), Sch 2, para 22.

controversial,³³⁷ and the political mood changed decisively after over 100 cases of wrongful detention were publicly revealed.³³⁸ The issue is being revisited by the Rudd government, which has announced a significant move toward 'risk-based' detention,³³⁹ and requested a further parliamentary inquiry into immigration detention.³⁴⁰ However, so far changes have been administrative rather than legislative, and the mandatory nature of the detention looks likely to be retained.³⁴¹

Similar concerns have been raised in the UK in the context of a rapid increase in detention in the last few years.³⁴² However, the difficulty of implementing removals has been the most controversial issue in the UK.³⁴³ Notoriously, in 2004, Prime Minister Blair promised that the government would remove unsuccessful refugee claimants at a rate exceeding the predicted number of 'unfounded' claims in the same period, known as the 'tipping point' target. This claim proved impossible to fulfil except in 2007,³⁴⁴ although deportations have risen substantially.

The enforcement of immigration law has also been 'devolved' to secondary parties, with criminal offences now applying to employers,³⁴⁵ unregistered migration agents,³⁴⁶ those involved in the review regime,³⁴⁷ and administrating officers,³⁴⁸ while

³³⁷ See, eg, HREOC, *Those Who've Come Across the Seas: Detention of Unauthorised Arrivals* (1998); HREOC, *A Last Resort?: National Inquiry into Children in Immigration Detention* (2004); Briskman et al, n111.

³³⁸ 247 possible cases were referred to the Ombudsman: see Commonwealth Ombudsman, *Lessons for Public Administration – Ombudsman Investigation of Referred Immigration Cases* (2007). The Department has conceded there may be legal liability in 135 of them: Adam Gartrell, 'Dept maybe liable for at least 135 wrongful detention case', *AAP Newsfeed*, 28 May 2008. These were discovered after two cases of wrongful detention: see Palmer, n109; Ombudsman, n109. In the UK, see also Clare Dyer, 'Briton sues over deportation as failed asylum seeker', *The Guardian*, 7 June 2008, 13.

³³⁹ Evans, n212. There will be an administrative presumption against detention, although three categories will continue to be detained: unauthorised arrivals for health, security and identity checks; unlawful non-citizens presenting an 'unacceptable' risk to the community; and unlawful non-citizens who have repeatedly breached their visa conditions. Children will no longer be detained.

³⁴⁰ See <http://www.aph.gov.au/house/committee/mig/detention/index.htm>. The JSCM began the inquiry on 29 May 2008.

³⁴¹ David McLennan, 'Inquiry to scrutinise immigration detention', *Canberra Times*, 11 June 2008, 4.

³⁴² See, eg, Amnesty International, *Seeking Asylum is Not a Crime: Detention of People Who Have Sought Asylum* (2005).

³⁴³ Catherine Phuong, 'The removal of failed asylum seekers' (2005) 25 *LS* 117; Committee of Public Accounts, *Returning Failed Asylum Applicants* (2006).

³⁴⁴ James Slack, 'Blair's pledge on removal of asylum seekers lies in tatters', *Daily Mail*, 22 November 2006, 4; Home Office, 'Record high on removals of failed asylum seekers', (Press release, 27 February 2007); Ben Leach, 'Sharp fall in removals of asylum seekers' *Telegraph.co.uk*, 16 August 2008.

³⁴⁵ *Migration (Employer Sanctions) Act 2007* (Cth); *1996 Act*, s 8; *2002 Act*, s 137.

³⁴⁶ Pt III of the Australian Act; *1999 Act*, s 91.

³⁴⁷ Ss 334-335 of the Australian Act.

³⁴⁸ *1999 Act*, s 91.

sponsors bear an increasing financial burden. Finally, as discussed in chapter 1, there has been a rapid strengthening of border controls.

This extension and coerciveness of immigration enforcement reinforce the model of ‘absolute control’ implicit in the normative paradigm of immigration law, since they dramatise the executive’s power over the body of the migrant, both through the use of ‘hyper-law’ and, increasingly, through the ‘lawlessness’ of interception practices.

Finally, there is a notable absence in immigration law — the absence of a normative heart. The primary aim of immigration law is regulation in the national interest, as defined by the executive. It is to be judged by its efficacy rather than its justice (which remains the province of immigration policy), and it contains no internal criteria for judging the adequacy of those rules.

As I shall argue throughout this thesis, part of the challenge of coherence is caused precisely by these peculiar features of immigration law. Its political structure is narrow and top-heavy, emphasising the executive and providing for little legal autonomy; its structure is a paradoxical combination of ‘hyper-law’ and ‘lawlessness’, coupled with the absence of a normative heart; its normative paradigm is premised on the absolute power of the State and the absolute subjection of the outsider, on immigration as a privilege rather than a right, on the inequality between citizen and non-citizen, and on the primacy of the national interest. This normative paradigm is qualified by later legal developments, but it is also buttressed by several features of contemporary immigration law and practice. The strong nexus between nation-building, executive control and immigration; the elaboration of inequality through a hierarchy of categories; the ‘exceptionality’ of refugee streams; the physical control exercised over the body of the migrant; and the proliferation of other kinds of State control over the phenomenon of migration all entrench these peculiar features of immigration law.

3 *Citizenship and nationality law*

Citizenship and nationality law most closely resembles immigration law in its normative paradigm, although not in its structure. The predominant legal form is consolidated legislation, in the form of the recently enacted *Australian Citizenship Act*

2007 ('ACA 2007') and the *British Nationality Act 1981* ('BNA 1981'),³⁴⁹ which confers primary legal power on the legislature rather than the executive.

Unusually, Australian citizenship is not a constitutional concept, having been deliberately omitted by the drafters.³⁵⁰ This leaves the judiciary in its usual subordinate posture in relation to legislation, rather than in its superior role as guardian of the Constitution. However, the Constitution does provide a legislative power in respect of 'aliens',³⁵¹ and there has been significant judicial dispute about whether a constitutional alien corresponds exactly with a (legislative) non-citizen.³⁵² While some judges have thought there was room for an autonomous constitutional concept of alienage, the most recent decision effectively equated constitutional aliens with non-citizens,³⁵³ preserving the political structure of citizenship law.

As citizenship law in both jurisdictions primarily concerns the acquisition and loss of citizenship — rules that are relatively formal and determinate — the scope for judicial autonomy is further restricted. The rights and obligations of citizenship — that is, its substance — are instead scattered piecemeal throughout other legislation.³⁵⁴ Using Fransman's distinction, the law in both jurisdictions is in truth nationality law, rather than citizenship law, as the law is concerned with identifying the nationals of a country rather than their rights and obligations.³⁵⁵ Thus, in these jurisdictions, citizenship law adopts an 'external' perspective of the State, and also lacks a normative core.

The ambiguity between citizenship and nationality also arises in British terminology, since the category of British citizenship is supplemented by five other categories of British *nationality* — British Overseas Territories citizens ('BOTCs'),³⁵⁶ British Overseas citizens ('BOCs'), British subjects, British Nationals (Overseas) ('BN(O)s') and British protected persons ('BPPs'). Most unusually, these categories of British nationality do not confer the central right of citizenship: the right to enter and

³⁴⁹ Although there are various specific Acts relating to the Falkland Islands and Hong Kong.

³⁵⁰ Race played a part in this decision: see Brian Galligan and Winsome Roberts, *Australian Citizenship* (2004), 25-26.

³⁵¹ S 51(xix).

³⁵² See Michelle Foster, 'Membership in the Australian community: *Singh v The Commonwealth* and its consequences for Australian citizenship law' (2006) 34 *FL Rev* 161; Genevieve Ebbeck, 'A constitutional concept of Australian citizenship' (2004) 25 *Adel L Rev* 137.

³⁵³ *Ruddock v Taylor* [2005] HCA 48.

³⁵⁴ Collated in the Australian context by Kim Rubenstein, *Australian Citizenship Law in Context* (2002).

³⁵⁵ Laurie Fransman, *British Nationality Law* (2nd ed, 1998), [1.1].

³⁵⁶ Originally named British Dependent Territories Citizens.

reside.³⁵⁷ For the most part, these nationals also do not benefit from EU free movement provisions.³⁵⁸ This is the direct result of the influence of immigration law, for nationality was decoupled from the right of entry and residence by the 1962 and 1968 *Commonwealth Immigrants Acts*, and the category of nationality of BN(O) invented to preclude wholesale immigration from Hong Kong.³⁵⁹

This ambiguity in terminology reflects the shifting historical conceptions of the relation between the individual and the community that underpin citizenship and nationality law (hereafter, for the sake of convenience, citizenship law). The genesis of British, and thus also Australian, citizenship law lies in the concept of the ‘British subject’, grounded in the feudal relationship of obedience and protection between subject and sovereign, and most famously expressed in *Calvin’s Case*.³⁶⁰ This framework proved useful in the political integration first of the United Kingdom, and later of the British Empire.³⁶¹

It was only in 1948, near the end of Empire, after Canada had asserted its desire to create its own citizenship, that this largely unitary status of British subject began to fissure, in the form of the *British Nationality Act 1948* (‘BNA 1948’) and the Australian *Nationality and Citizenship Act 1948*. While Australia consolidated its own category of citizenship, the British took a path of fragmentation prior to consolidation. The *BNA 1948* distinguished between three categories within the overarching concept of British subject: ‘citizens of an independent Commonwealth country’, such as Australia; ‘citizenship of the UK and Colonies’ (‘CUKC’)³⁶² (for most other British subjects); and, in a smaller category, ‘British subjects without citizenship’.³⁶³ These categories were reorganised largely into the present categories by the *BNA 1981*, which moved partly

³⁵⁷ Compare Case 41/74 *Van Duyn v Home Office* [1974] ECR 1337, 1351. The citizen’s right of residence is enshrined, inter alia, in the UDHR, art 13(1); ICCPR, art 12(2) (see nn 419-420); Protocol 4 of the ECHR, arts 2(1), 3(2); *International Convention on the Elimination of All Forms of Racial Discrimination*, 660 UNTS 195, art 5(ii).

³⁵⁸ *New Declaration by the Government of the United Kingdom of Great Britain and Northern Ireland on the Definition of the Term ‘Nationals’*, OJ C 23/1, 28 January 1983 defines UK nationals for EU purposes as including British citizens, British subjects with the right of abode in the UK, and BOTCs who acquire that citizenship in relation to Gibraltar. See Case C-192/99 *R v SSHD ex p Manjit Kaur* [2001] ECR I-1237.

³⁵⁹ For the special position of Hong Kong, see Fransman, n355, 581-607.

³⁶⁰ *Calvin’s case* (1608) 7 Co Rep; 77 ER 377. This case held that Scots born after James I’s accession to the English throne were not aliens, as they owed allegiance to the same king. See especially Dummett and Nicol, n9, 59-63.

³⁶¹ Rieko Karatani, *Defining British Citizenship: Empire, Commonwealth and Modern Britain* (2003).

³⁶² *BNA 1948*, ss 4, 12. Citizens of independent Commonwealth countries could also originally register after a year’s residence in the UK or colonies as a CUKC. Fransman, n355, 84-185.

³⁶³ Ss 13, 16. *Ibid.*, n355, 186-187.

to a unitary concept of citizenship by removing British subject status from citizens of independent Commonwealth countries. A 2002 Act has further consolidated this category by converting most BOTCs into British citizens.³⁶⁴ British nationality law, therefore, has made a long, tortuous and incomplete journey to the international norm of citizenship as a unitary status defining membership of an independent and relatively closed polity. Yet this international norm is itself being challenged, most prominently by the concept of EU citizenship, but also by devolution and the rising numbers of ‘denizens’, or long-term residents.³⁶⁵

If one major driver of citizenship law has been the breakup of Empire, the other has been fear of immigration. As already noted, this led to the decoupling of nationality from right of residence in the UK. It has also fuelled significant changes to the rules of acquisition and loss of citizenship, such as the modification of the common law tradition of conferring birth by territory (*jus soli*) with the requirement of birth by a parent citizen or ‘denizen’, importing a kinship element to the conception of citizenship.³⁶⁶

More recently, in the context of political controversy over the integration of immigrants, linked also to fears of terrorism,³⁶⁷ there has been a significant tightening of naturalisation requirements, with the extension of the Australian residence requirement from 2 to 5 years,³⁶⁸ and with the UK’s proposed concept of ‘probationary citizenship’ extending the ordinary naturalisation from 5 to 8 years.³⁶⁹ Further, as already noted, both jurisdictions have introduced ‘citizenship tests’,³⁷⁰ extended in the UK to those applying for ILR, and in modified form to most Australian visa applicants.³⁷¹ Both countries have also recently strengthened their powers to deprive people of citizenship,³⁷² with the UK also introducing powers to revoke ILR³⁷³ and to

³⁶⁴ *British Overseas Territories Act 2002* (UK).

³⁶⁵ Tomas Hammar, *Democracy and the Nation State: Aliens, Denizens and Citizens in A World of International Migration* (1989).

³⁶⁶ *BNA 1981*, s 1(1); s 12 of the Act. However, one may gain citizenship by continuing residence of 10 years or more consequent upon birth: s 12(1)(b) of the Act; *BNA 1981*, ss 1(4), 1(8) (by registration).

³⁶⁷ The *ACA 2007* was prompted by the London bombings: Australia, *Hansard*, HoR, 31 October 2006, 1 (Christopher Bowen and Alan Cadman).

³⁶⁸ S 22. Prior to the *2007 Act*, it was 2 out of the previous 5 years: *Australian Citizenship Act 1948* (Cth), s 13(e).

³⁶⁹ Draft s 34; *BNA 1981*, Sch 1, it 2.

³⁷⁰ *ACA 2007*, ss 21(2A), 23; *BNA 1981*, Sch 1, its 1(1)(ca); 3(e); Rule 33B (for ILR).

³⁷¹ Ss 33B-33F of the Rules. In Australia, from 15 October 2007, most visa applicants must sign a ‘Values Statement’. See <http://www.immi.gov.au/living-in-australia/values/index.htm>.

³⁷² *ACA 2007*, s 34; *BNA 1981*, s 40, amended by *2002 Act*, s 4, *2006 Act*, s 56.

³⁷³ *2002 Act*, s 76.

deprive a person of the right of abode.³⁷⁴ Australia has always retained the right to cancel a permanent visa and has done so even where such people have lived virtually their whole lives in Australia.³⁷⁵

Citizenship law thus traces, imperfectly, the changing alignments of political structures, moving from the feudal notion of allegiance, to the sovereign nation-state, to a model of civic democracy and integration, intertwined with the exclusionary imperatives of immigration policy. Although citizenship law is often seen as the converse of immigration law, defining the outsiders implicitly by defining the insiders, neither its political structure nor its normative paradigm exactly matches that of immigration law. It shares with immigration law certain important features: a relatively narrow political structure, a conception of the State as a relatively closed and sovereign political community, and the absence of a normative core. However, the executive is much less dominant; there is no structure of hyper-law and lawlessness; and, finally, although it is crucially moulded by immigration law, citizenship law has historically performed an integrative and inclusive role — a role that emphasises the equality of citizens and, albeit indirectly, attaches rights to that status.

4 *Refugee law*

Refugee law contrasts with both immigration and citizenship law in its political structure. The heart of refugee law is an international treaty, the Refugee Convention, which has become increasingly embedded in domestic and now EU legislation. It has also been elaborated by domestic courts and, in the form of ‘soft law’, by a panoply of international and non-governmental actors, most notably the United Nations High Commissioner for Refugees (‘UNHCR’). This creates a much more open and plural political structure, a feature enhanced by the relatively open-textured nature of the treaty itself.

The plurality of this structure, however, masks the hierarchy implicit in the political structure of refugee law. Born in a time of transition, between the horrified rejection of the Holocaust and the new totalitarianisms of the Cold War, refugee law straddles uncomfortably the tension between the framework of state sovereignty and human rights. While the Refugee Convention marked a signal advance from the

³⁷⁴ 2006 Act, s 57.

³⁷⁵ Commonwealth Ombudsman, *Administration of s 501 of the Migration Act 1958 as it Applies to Long-Term Residents* (2006).

'absolute sovereignty' model of immigration law, marking an outsider as worthy of legal consideration, it is a child of its time and its political structure remains dominated by States.

Like all treaties, the text is a compromise between States, and its implementation a matter of choice by States — as its partial incorporation in Australia and the UK demonstrates.³⁷⁶ State practice is particularly influential in shaping the development of refugee law, and may also preclude its norms from attaining the status of customary international law.

This State bias is accentuated in the case of the Refugee Convention, partly because it includes no provisions on its implementation, including the procedures for refugee status determination, and partly because, unlike other human rights treaties, it creates no monitoring body, although UNHCR has a supervisory role.³⁷⁷ Thus, a supposedly universal system of protection is undermined by huge variations in national recognition rates.³⁷⁸ UNHCR itself is dependent upon a handful of donor States, and State representatives sit on its Executive Committee, which issues 'soft law' in the form of Conclusions.

This political hierarchy is further embedded by several textual features of the Refugee Convention. First, it is largely confined to defining the legal category of refugee, and attaching a set of rights to that status, leaving a great deal of room for State discretion in implementation.

Second, it is founded not on individual rights, but rather on the obligations and rights of the State: principally, the State's obligation of *non-refoulement*,³⁷⁹ and the

³⁷⁶ The Australian Act adopts the formula that a protection visa is to be granted if the Minister is satisfied Australia has 'protection obligations' under the Convention: s 36. In the UK, the Convention is given partial effect by including breaches of the Convention as grounds for appeal (2002 Act, s 84(1)(g)); by providing for the primacy of the Convention over the Rules (1993 Act, s 9); and providing a modified form of Art 31 in s 31 of the 1999 Act. For the current position, see chapter 3, part 3.3.3.

³⁷⁷ Walter Kälin, 'Supervising the 1951 Convention relating to the Status of Refugees: Article 35 and beyond' in Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (2003) 613. Other human rights monitoring bodies, however, receive refugee-related complaints within their own jurisdiction, as discussed in chapter 1.

³⁷⁸ Recognition rates for Iraqi refugees in 2007 ranged from 0% in Greece and Slovakia, to 97% in Hungary: European Council on Refugees and Exiles, 'Five years on Europe is still ignoring its responsibilities towards Iraqi refugees', AD1/03/2008/ext/ADC (March 2008).

³⁷⁹ Art 33. See Sir Elihu Lauterpacht and Daniel Bethlehem, 'The scope and content of the principle of non-refoulement: Opinion' in Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law* (2003) 87.

State's right to grant asylum.³⁸⁰ Most of the rights attached to the status of refugee are rights of equivalence — rights to be treated in line with citizens or lawful aliens, leaving the actual standard of treatment up to the States.³⁸¹

Third, as is well known, the definition of refugee in Art 1A(2) imports a particular normative paradigm into refugee law. It provides that a refugee is a person who:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

This definition is grounded upon the then-prevailing paradigm of Nazi and Cold War persecution, focusing on an individualised notion of persecution by the State that largely excludes the contemporary causes of forced migration, such as civil war, the collapse of States, and environmental degradation.³⁸² The State invoked here is either a Leviathan, crushing the puny refugee in its wake; or, in the alternative, a 'failed State', which is incapable of performing its usual duty of protecting its citizens. It is, thus, the relationship of the individual *to the State* that is critical.

Fourth, the definition also embeds a compromise in favour of States that preserves the cardinal value of sovereignty — namely, the requirement that the person be “outside his country of nationality”. This requirement had significant practical implications during the Cold War. Since exit controls prevented the escape of many, the Refugee Convention was a relatively cheap ideological victory for the West. It has proven equally significant in the present era, as States attempt to prevent access to their territory through interception practices.

The Refugee Convention also qualifies this definition by providing for both the cessation and exclusion (for reasons of national security or criminal activities) of refugee status.³⁸³ Security grounds may also exclude the obligation of *non-refoulement*, and the obligation not to expel a lawfully resident refugee.³⁸⁴ While, historically, the cessation and exclusion clauses were little-used, they have become

³⁸⁰ Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd ed, 2007), ch 7, esp 361-362.

³⁸¹ Comprehensively detailed in James C Hathaway, *The Rights of Refugees under International Law* (2005).

³⁸² See, eg, Patricia Tuitt, *False Images: Law's Construction of the Refugee* (1996).

³⁸³ Arts 1C, 1F.

³⁸⁴ Art 32.

popular recently.³⁸⁵ Both Australia and the UK began offering only temporary protection, with Australia requiring re-examination of refugee claims every 3 years³⁸⁶ and the UK after 5 years.³⁸⁷ However, the Rudd government has recently reversed this controversial policy.³⁸⁸

State practice has also exacerbated these tendencies, through the innovation of jurisprudential concepts such as the 'safe country' practices described in chapter 1, and the concept of 'internal relocation' (also known as 'the internal flight alternative'), which denies protection to a person who can reasonably be expected to relocate within their home State.³⁸⁹

Therefore, while the political structure of refugee law is more open and plural, the influence of the State still dominates. This influence is enabled not only by the internal features of the Convention created by the States themselves, but also by the relative autonomy of legal orders, the lack of centralised interpretative or enforcement machinery, and the centrality of State practice in international law. Ultimately, too, the normative paradigm underlying refugee law embeds the sovereignty of States while granting a very limited, although practically and theoretically significant, exception to it. The global rise in refugees, however, has seen States assert their influence in the creation and practice of refugee law, pressing ever greater on this limited exception.

5 *Constitutional law*

While immigration and refugee law are centrally concerned with the (external) sovereignty of States, constitutional law focuses on the internal distribution of power. The most important differences between the jurisdictions in this distribution arise because of the contrasting legal forms of constitutional law: the flexible unwritten

³⁸⁵ See, eg, *MIMIA v QAAH of 2004* [2006] HCA 53; *SRYYY v MIMIA* [2005] FCAFC 42; *R (Hoxha) v Special Adjudicator* [2005] UKHL 19; *T v SSHD* [1996] AC 742. See also Geoff Gilbert, 'Current issues in the application of the exclusion clauses' in Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (2003) 425.

³⁸⁶ See Alice Edwards, 'Tampering with refugee protection: the case of Australia' (2003) 15 *IJRL* 192; Hossein Esmaeili and Belinda Wells, 'Temporary Refugees: Australia's Legal Response to Arrival of Iraqi and Afghan Boat-People' (2000) 23 *UNSWLJ* 224.

³⁸⁷ 'Refugee Leave', Asylum Policy Instruction, for grants after 30 August 2005.

³⁸⁸ On 9 August 2008: http://www.immi.gov.au/refugee/tpv_thv/abolition/overview.htm.

³⁸⁹ James C Hathaway and Michelle Foster, 'Internal protection/relocation/flight alternative as an aspect of refugee status determination' in Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (2003) 357.

constitution of the UK, in which the constitution is “what happens”;³⁹⁰ and the “frozen continent”³⁹¹ of the written Australian Constitution.

These forms create different hierarchies of power, most notably in the orthodox subjection of the judiciary to parliamentary sovereignty in the UK, compared with the Australian judiciary’s role as guardian of the Constitution. However, as we shall see in chapter 3, the written Constitution also inhibits the Australian judiciary from straying too far from its text.

This posture of textual interpretation is highly significant in immigration because of the internal limitations of the Constitution, most notably the virtual absence of individual rights³⁹² and the breadth of the immigration and aliens powers.³⁹³ The Australian Constitution therefore ties constitutional law to the prevailing conception of the relation between the individual and the State at the turn of the century: a conception that included the ideal of a White Australia, and an expansive view of the plenitude of State power.

The result is that there are only four major avenues of constitutional challenge: through the interpretation of the division of legislative power within the Federation; through the doctrine of separation of powers, especially the exclusivity of judicial power;³⁹⁴ through the original judicial review jurisdiction of the High Court; and through the more fragile forays into protecting ‘implied’ individual rights, of which the most important is the implied freedom of communication.³⁹⁵ These provide rather indirect, and largely unpromising, avenues of challenge for immigrants.

While the largely unwritten form of the British constitution gives primacy to the politicians, the lack of a foundational text and the breadth of the major constitutional principles enable a more creative judicial approach. This was vividly manifested in the recent suggestion of some Law Lords that, in extreme cases, the constitutional principle of the rule of law³⁹⁶ may trump that of parliamentary sovereignty,³⁹⁷

³⁹⁰ John Griffith, ‘The political constitution’ (1979) 49 *MLR* 1, 19.

³⁹¹ Geoffrey Sawer, *Australian Federalism in the Courts* (1967), 208.

³⁹² Excepting s 116 (religious freedom); s 117 (equal treatment of British subjects between States); s 51(xxxi) (compulsory acquisition on just terms); s 92 (freedom of interstate trade and commerce).

³⁹³ Ss 51 (xxviii), (xix).

³⁹⁴ See, eg, *Chu Kheng Lim*, n94.

³⁹⁵ See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 and cases cited therein. This was used to challenge the regulation of migration advisers in *Cunliffe v Commonwealth* (1994) 182 CLR 272.

³⁹⁶ Now encoded in the *Constitutional Reform Act 2005* (UK), s 1.

³⁹⁷ See n550.

following extra-judicial comments to the same effect during the ouster clause saga, as discussed in chapter 3.

Importantly, however, these constitutional structures are mediated by constitutional climates. The textual and insular approach promoted by the Australian constitutional structure was importantly challenged by the Mason High Court in the 1980s, during a period of constitutional renaissance provoked in part by broader re-definitions of Australian identity.³⁹⁸ The Mason Court's innovations included the previously noted freedom of political communication; the recognition of Aboriginal land rights,³⁹⁹ and an expansion of judicial review⁴⁰⁰ — innovations that were difficult to draw from the text of the Constitution or legislation itself. However, it was this very perception of disobedience to the cardinal text that made the Howard government insist upon appointing “capital C” conservative judges.⁴⁰¹ This constitutional conservatism was also manifested in the Howard government's skilful termination of the republican debate,⁴⁰² its dismantling of multicultural and indigenous institutions, and its burial of the human rights agenda.

In contrast, the Blair government unleashed a “torrent of constitutional changes”,⁴⁰³ including devolution, the partial reform of the House of Lords, increased engagement with the EU, the introduction of the HRA and the *Freedom of Information Act 2000*. Also prominent in this landscape has been a more activist and human rights-oriented judiciary that is more receptive to international law and ‘soft law’ than hitherto. The establishment of a Supreme Court and the reform of the role of the Lord Chancellor, combined with statutory statements of the independence of the judiciary and tribunals, also institutionalise a more formal separation of powers.⁴⁰⁴ The high tide of this trend, however, seems to have passed, despite the Brown government's elevation of ‘constitutional renewal’ and bipartisan commitment to a British Bill of Rights,⁴⁰⁵ as economic woes dominate the agenda.

³⁹⁸ See, eg, Paul Kelly, *The End of Certainty: Power, Politics and Business in Australia* (Revised ed, 1994), Paul Keating, *Engagement: Australia Faces the Asia-Pacific* (2000).

³⁹⁹ *Mabo v Queensland (No 2)* (1992) 175 CLR 1; *Wik Peoples v Queensland* (1996) 187 CLR 1.

⁴⁰⁰ See, eg, *Kioa*, n37.

⁴⁰¹ Niki Savva, ‘Fischer sparks new High Court row’, *The Age*, 6 March 1997, 6.

⁴⁰² George Williams, ‘Why Australia kept the Queen’ (2000) 63 *Saskatchewan Law Review* 477.

⁴⁰³ Lord Woolf, ‘The rule of law and a change in the constitution’ (2004) 63 *CLJ* 317, 319. For an excellent discussion, see Jeffrey Jowell and Dawn Oliver, *The Changing Constitution* (6th ed, 2007).

⁴⁰⁴ See generally Lord Windlesham, ‘The Constitutional Reform Act 2005: The politics of constitutional reform’ [2006] *PL* 35.

⁴⁰⁵ See Joint Committee on Draft Constitutional Renewal Bill, *Draft Constitutional Renewal Bill* (2008); JCHR, *A Bill of Rights for the UK?* (2008).

As we shall see in the next chapter, these different structures and climates have important effects on the outcomes of cases. Nevertheless, this should not obscure their essential commonalities: the ways in which the political structure of constitutional law engages executive, legislature and judiciary more equally and directly; the ways in which changing normative paradigms of governance are reflected, imperfectly, in the constitutional structures and climates; and, crucially, the ways in which such normative paradigms articulate a normative core about the right ways to distribute political power within a State.

6 *Common law principles of judicial review*

Similarly, judicial review incorporates a normative core about the proper distribution of political power. This core is structured around a key tension — the tension between the *ultra vires* theory of judicial review, in which the ultimate aim of judicial review is to respect the legislative intent, and the ‘common law’ theory of judicial review, which emphasises instead the creative role of the judiciary in judicial review.⁴⁰⁶ This tension maps on to age-old debates about judicial activism, the appropriate degree of deference, and the political role of the judiciary.

These competing visions of judicial review construct different political structures, with judges acting as either the handmaidens of the legislature or as independent law-creators constraining the executive. Nevertheless, in both traditions and jurisdictions, judicial review is a judicial heartland, since its primary legal form is case law, notwithstanding important statutes such as the *ADJR Act*. (Indeed, the decoupling of immigration from the *ADJR Act* has revived the development of common law principles of judicial review.)⁴⁰⁷ Of all the legal regimes in the constellation, judicial review thus enjoys the greatest degree of legal autonomy.

Like citizenship and constitutional law, the normative paradigms underlying judicial review reflect changing, and competing, conceptions of the relationship between individual and the State. The limited State; the behemoth State; the welfare State; the State as service provider; and the State’s respect for the dignity and participation of the individual all inflect judicial review, and continue to shape its tensions. As Harlow and Rawlings famously argued, different traditions

⁴⁰⁶ Christopher Forsyth (ed), *Judicial Review and the Constitution* (2000); TRS Allan, ‘Doctrine and theory in administrative law: An elusive quest for the limits of jurisdiction’ [2003] *PL* 429.

⁴⁰⁷ Caron Beaton-Wells, ‘Australian administrative law: The asylum-seeker legacy’ [2005] *PL* 267, 284.

conceptualised judicial review either as a method of “controlling” the executive (revealing a preference for a minimalist State) or as a method of “facilitating” good administration (revealing a preference for an interventionist State).⁴⁰⁸ Like constitutional law, then, judicial review is ultimately an enterprise based on (admittedly broad) theories about the correct distribution of power.

The shifts between these theories is well illustrated by the history of immigration review, with the historic conception of immigration as the untouchable preserve of sovereignty contrasting with immigration’s dominant position in the modern judicial review caseload. In immigration review, as in judicial review, we see changing and competing conceptions of how governments should treat their citizens, and how judges should supervise that treatment.

These competing conceptions are reflected in the increasing divergence between Australian and British principles of judicial review. The three most significant divergences concern the standard of judicial review (and, in particular, the dominance of the *Wednesbury* reasonableness standard),⁴⁰⁹ the doctrine of legitimate expectations, and the distinction between jurisdictional and non-jurisdictional errors. In the UK, partly driven by the European influence of the proportionality standard of review, and partly driven by a shifting judicial philosophy in favour of greater legal scrutiny of decisions impacting on fundamental rights,⁴¹⁰ the *Wednesbury* standard has declined rapidly in popularity, with influential advocates arguing for its replacement by proportionality.⁴¹¹ However, in Australia, judicial support for proportionality has been, with the exception of Kirby J, “tentative”⁴¹² at best, while *Wednesbury* itself has been narrowly confined to discretionary decisions, with “extreme irrationality or illogicality” emerging as a separate ground of review.⁴¹³

This constriction of *Wednesbury* occurred in an effort to protect the Federal Court’s immigration jurisdiction after the introduction of Part 8, since that Part excluded *Wednesbury* reasonableness as a ground of review. Similarly, immigration has been the site of a major battle in Australia over the doctrine of legitimate

⁴⁰⁸ Carol Harlow and Richard Rawlings, *Law and Administration* (1984) ch 3. See also Martin Loughlin, *Public Law and Political Theory* (1992).

⁴⁰⁹ *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, 229-230.

⁴¹⁰ *Bugdaycay*, n36, adopted in *R v Ministry of Defence ex p Smith* [1996] QB 517.

⁴¹¹ See, eg, Jeffrey Jowell and Anthony Lester, ‘Proportionality: Neither novel nor dangerous’ in Jeffrey Jowell and Dawn Oliver (eds), *New Directions in Judicial Review Administration* (1988) 51. See generally Robert Thomas, *Legitimate Expectations and Proportionality in Administrative Law* (2000), 86-98.

⁴¹² Mark Aronson et al, *Judicial Review of Administrative Action* (3rd ed, 2004), 347.

⁴¹³ *Re MIMA ex p Applicant S20/2002* [2003] HCA 30. See Aronson et al, 263-268.

expectations (as chapter 3 details) with Australia's pioneering efforts being firmly rejected by the current Australian High Court.⁴⁴⁴ In stark contrast, the doctrine of legitimate expectations has flourished in the UK, extending even to the fulfilment of substantive expectations.⁴⁴⁵

Finally, while the UK has long abandoned the distinction between a jurisdictional and a non-jurisdictional error,⁴⁴⁶ it has remained relevant in Australia for constitutional reasons,⁴⁴⁷ and indeed the concept of jurisdictional error has been given renewed life by the High Court's decision in *Plaintiff S157*.⁴⁴⁸

These doctrinal debates reflect different political paradigms about the legitimacy of judicial intervention in the jurisdictions, mirroring the diverging constitutional climates in Australia and the UK. Again, however, these differences obscure the greater commonality: a political structure that grants the judiciary a central place; a normative core concerning the correct distribution of political power; and an articulation of the normative principles governing individual and the administration, within the State, founded on competing versions of a liberal political philosophy.

7 *Human rights law*

The political structure of human rights law is closest to that of refugee law, with its heart in the International Bill of Rights — the Universal Declaration of Human Rights ('UDHR'),⁴⁴⁹ the ICCPR⁴⁵⁰ and the International Covenant on Economic, Social and Cultural Rights.⁴⁵¹ It is elaborated, however, by a plethora of group-specific and subject-specific treaties, most relevantly the Convention against Torture and other Cruel, Inhuman or Degrading Treatment ('CAT')⁴⁵² and the Convention on the Rights of the Child ('CROC').⁴⁵³

⁴⁴⁴ See chapter 3, part 5.2.

⁴⁴⁵ *R v North and East Devon Health Authority ex p Coughlan* [2001] QB 213. For a recent discussion, see *R (Bhatt Murphy) v Independent Assessor* [2008] EWCA Civ 755.

⁴⁴⁶ *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147.

⁴⁴⁷ *Craig v South Australia* (1995) 184 CLR 163.

⁴⁴⁸ N192, discussed in chapter 3, part 1.

⁴⁴⁹ *Universal Declaration of Human Rights*, UNGA resolution 217 A (III) ('UDHR').

⁴⁵⁰ N160. UNHRC has interpreted Art 7 as preventing expulsion where there is a risk of torture or cruel, inhuman or degrading treatment: UNHRC, *CCPR General Comment No 20* (1992), [9].

⁴⁵¹ 993 UNTS 3.

⁴⁵² 1465 UNTS 85, art 3 (non-refoulement in cases of torture, inhuman or degrading treatment).

⁴⁵³ 1577 UNTS 3, art 3 (best interests of the child); art 22 (protection and assistance for refugee children). The UK has very recently lifted its reservation in respect of immigration: UNHCR, 'UK lifts reservation to the UN Convention on the Rights of the Child', (22 September 2008).

However, human rights law is also reflected at regional and domestic levels, most relevantly in the ECHR, the EU Charter of Fundamental Rights,⁴²⁴ and in the HRA. Most noticeably, however, human rights law as such is absent at the Australian federal level, although States are now incorporating their own bills of rights,⁴²⁵ and momentum for a federal Bill of Rights is increasing under the Rudd government.⁴²⁶

This creates a plural and open legal space, with an even greater range of creators of ‘soft law’ than in refugee law. Importantly, there is also a greater range of interpretative authorities and, most significantly, enforcement mechanisms in the form of independent regional courts, the ECtHR and the European Court of Justice (‘ECJ’). This enables a much greater degree of legal autonomy, enhanced by the breadth and open texture of the principles involved. The room for judicial manoeuvre is also expanded by several of the ECtHR’s interpretative principles,⁴²⁷ such as the principle that human rights must be interpreted so as to be “practical and effective”;⁴²⁸ that its terms may be interpreted independently of national classifications;⁴²⁹ and that they must be interpreted progressively.⁴³⁰

Most significantly, human rights law provides a powerful and relatively intuitive — if perhaps philosophically unconvincing⁴³¹ — conception of the relationship between the individual and the State, a conception which conflicts with the premises of immigration law. It does so by attenuating the significance of outsider status, making the question one about humans rather than citizens; by remodelling the relationship between outsider and State as one of rights and obligations; and by express application of the norms of equality and non-discrimination. Most distinctively, it envisages humans, not citizens, as the ultimate unit of moral concern. Less visibly, but importantly, the political strength of the human rights discourse, which has entrenched respect for human rights as a *sine qua non* of political

⁴²⁴ *Charter of Fundamental Rights of the European Union*, OJ C 364/1, 18 December 2000.

⁴²⁵ *Charter of Human Rights and Responsibilities 2006* (Vic); *Human Rights Act 2004* (ACT). WA and Tasmania have also initiated similar processes: see Consultation Committee for a Proposed WA Human Rights Act, *Final Report* (2007); Tasmania Law Reform Institute, *A Charter of Rights for Tasmania* (2007).

⁴²⁶ Matthew Franklin, ‘Summit backs Labor’s agenda’, *The Australian*, 21 April 2008, 1.

⁴²⁷ See Steven Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (2006), ch 4.

⁴²⁸ *Airey v Ireland*, 9 October 1979, Series A no 32, [24].

⁴²⁹ *Ezeh and Connors v UK [GC]*, 9 October 2003, ECHR 2003-X, [82]-[89]; *Engel v the Netherlands*, 8 June 1976, Series A no 22, [81]-[82].

⁴³⁰ *Dudgeon v UK*, 22 October 1981, Series A no 45, [60]; *I v UK [GC]*, 11 July 2002, (2003) 36 EHRR 53, [54].

⁴³¹ For an excellent overview of the philosophical debate, see Marie-Bénédicte Dembour, *Who Believes in Human Rights? Reflections on the European Convention* (2006).

legitimacy for liberal States, both buttresses human rights law and generates a degree of normative legitimacy *independent* of that derived from majoritarian decision-making.

The appeal of human rights law for immigration and refugee advocates is thus obvious. Human rights law provides a relatively concrete critical legal standard with which to assess, and ultimately dislodge, political practices. Perhaps the most visible manifestation of this tension is the interpretation of Art 3 ECHR as preventing the return of people where there are substantial grounds for believing they would face a real risk of torture, inhuman or degrading treatment,⁴³² and (very exceptionally) where it would deny a person urgent medical treatment.⁴³³ The unqualified nature of this right dislodges the centrality of immigration policy, unlike Art 8 ECHR where the impact of removal upon family and private life is normally considered proportionate to the legitimate aim of immigration policy.⁴³⁴ Significantly, there has only been one (very recent) case so far in which expulsion has been precluded because of anticipated breaches of Art 8 in the country of return.⁴³⁵

The ECHR rights have been extended by the EU Charter of Fundamental Rights. Relevantly, these include a right to asylum;⁴³⁶ an express codification of the *non-refoulement* obligation implicit in Art 3;⁴³⁷ a right to human dignity;⁴³⁸ a prohibition on human trafficking;⁴³⁹ a right to the protection of personal data;⁴⁴⁰ a freestanding non-discrimination provision;⁴⁴¹ a right to respect for cultural, religious and linguistic diversity;⁴⁴² express provision for the best interests of the child;⁴⁴³ rights to social security and health care;⁴⁴⁴ access to legal aid;⁴⁴⁵ and a right to an effective remedy and fair trial that, unlike its equivalent in the ECHR, is not restricted to civil rights and obligations, and is thus applicable to immigration decisions.⁴⁴⁶

⁴³² *Chahal*, n144. This is being challenged in the pending case of *Ramzy v Netherlands*.

⁴³³ *D v UK*, 2 May 1997, ECHR 1997-III.

⁴³⁴ *Huang*, n176, [20].

⁴³⁵ *EM (Lebanon) v SSHD* [2008] UKHL 64.

⁴³⁶ Art 18.

⁴³⁷ Art 19(2).

⁴³⁸ Art 1.

⁴³⁹ Art 5(3).

⁴⁴⁰ Art 8.

⁴⁴¹ Art 21.

⁴⁴² Art 22.

⁴⁴³ Art 24.

⁴⁴⁴ Arts 34-35.

⁴⁴⁵ Art 47.

⁴⁴⁶ *Ibid.* Cf *Maaouia v France [GC]*, 5 October 2000, ECHR 2000-X; *MNM v SSHD 00/TH/02423*, [15]-[16].

Nevertheless, human rights law carefully delimits the scope of its application to certain ‘core’ (and in the case of the ECHR and HRA, largely civil and political) rights. Immigrants largely engage these rights only indirectly and fitfully. Like refugee law, it embeds internal compromises, most clearly manifested in the ECHR in the specific and general qualifications to rights; in the power to derogate under Art 15; and in the jurisprudential ‘margin of appreciation’.⁴⁴⁷ The HRA embeds a further compromise in the mechanism of judicial declarations of ‘incompatibility’,⁴⁴⁸ articulating clearly the implicit premise of human rights law — its ultimate faith in political acquiescence. Like refugee law, too, State practice is crucial in determining the prevailing human rights standards at any particular time.

Nevertheless, human rights law produces the greatest normative tensions with immigration law, since it rejects in large part its premises. These tensions are minimised in part by the limited scope of those rights, by the internal compromises of the text and jurisprudential practice, and by the limitations of State practices themselves. Yet human rights law provides an alternative and politically powerful normative paradigm that brings, for the first time, the individual into the legal limelight. Unlike citizenship law, constitutional law, and judicial review, with their blends of overlapping paradigms, its normative paradigm is much more specific, coherent and intuitive; and unlike those regimes, its structure is more plural, open and autonomous. What it does is extend the normative rules of the ‘internal’ perspective of the State, embedded within other regimes, beyond the boundaries of the State itself, mediating the tension between these internal and external perspectives as best it can.

8 *EU law*

Finally, we turn to three specific regimes within the EU legal order: the free movement of EU citizens and their family members within the EU; the Schengen *acquis*, enabling the abolition of internal borders within the Schengen area by the creation of an external border; and the rapid development of the EU’s immigration and asylum law regime (‘Title IV regime’). These are, of course, affected and modified by the EU’s own regimes of citizenship, administrative law and human rights.

⁴⁴⁷ First enunciated in *Handyside v UK*, 7 December 1976, Series A no 24.

⁴⁴⁸ Ss 4, 10, Sch 2.

These regimes evince the most complex political structures of all, partly because of the internal complexity of the varying legislative processes and the plethora of legal forms that structure the relationships between the multiplicity of EU organs, and partly because of the external complexity of the EU's relations with its Member States and third States. These factors are exacerbated in these three legal regimes for three reasons. First, different institutional processes of law-making apply to each regime. Second, these arrangements have changed over time. Third, these regimes manifest dramatically the 'variable geometry' of EU law, with the free movement rights extending beyond the EU to the EEA; the Schengen States forming a smaller grouping within the EU and extending outside it to Switzerland, Iceland and Norway; and with Denmark, Ireland and the UK 'opting out' generally from the Title IV regime.

Thus, while the free movement of persons within the EU dates back to the Treaty of Rome, and has always been governed by EC institutions and laws, the Schengen *acquis* grew out of an intergovernmental agreement between a core nucleus of States in 1985,⁴⁴⁹ operating under its own institutional arrangements prior to its transfer into EU law in 1999.⁴⁵⁰ The Title IV regime, on the other hand, has more recent origins, first under the State-dominated 'Third Pillar' of the Maastricht Treaty regime, where only non-binding legal forms survived the need for State consensus, and latterly under arrangements under Title IV created by the Amsterdam Treaty.⁴⁵¹ This envisaged a five-year period in which institutional rules for harmonising elements of a common immigration and asylum policy granted greater influence to the States, prior to a second phase under the 'Community method' of co-decision, qualified majority voting and full judicial control by the ECJ. The political complexity of these regimes is further complicated by a hierarchy of Association and Co-operation Agreements with third States, most relevantly with the EEA and Switzerland (providing their nationals with virtually equivalent rights of free movement); with accession States; and with Turkey.⁴⁵²

⁴⁴⁹ *Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (1985)*, OJ L 239/1, 2000, followed by the *Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (1990)*, OJ L 239/19, 2000, 94.

⁴⁵⁰ Apart from in Denmark: Decision 1999/436/EC.

⁴⁵¹ Arts 62-63 EC, *Treaty on European Union (Consolidated)*, (2006) OJ C 321 E/3 ('TEU').

⁴⁵² Nicola Rogers and Rick Scannell, *Free Movement of Persons in the Enlarged European Union* (2005), Pt 3.

Thankfully, the labyrinthine details of these arrangements need not detain us here. It is only necessary to highlight how this has created both a hierarchy of regimes of movement with differing levels of State influence; and a new and visible European ‘space’ through the division of EU from non-EU citizens.

This hierarchy of regimes also, importantly, evinces different normative paradigms. The free movement of persons was originally connected to the creation of a European economic space, and was thus originally restricted to the free movement of workers, service providers and the freedom of establishment.⁴⁵³ However, the Maastricht Treaty connected freedom of movement to the project of EU citizenship,⁴⁵⁴ transforming it into a pillar of the broader political project of “ever closer union”, assisted by the generous interpretation of the ECJ.⁴⁵⁵ The Schengen *acquis* was also prompted by economic concerns as part of the single market project, but has been managed more as an intergovernmental co-operation project to facilitate the abolition of border controls than as part of the broader EU vision.

Finally, the tensions within the EU project have been most remarkably demonstrated in the Title IV regime, with the EU’s proclaimed foundation on human rights⁴⁵⁶ tilting it originally towards a liberal approach, but with the rising political salience of immigration and terrorism leading to much conflict between States within the Council, and the lopsided development of the Title IV regime. In the nine years of frenzied law-making since the 1999 Tampere summit, the greatest progress has been made on measures for irregular migration and enforcement, and the greatest enthusiasm evidenced for operational measures and readmission agreements with third countries. In contrast, the development of the Common European Asylum System (‘CEAS’) has been marked by dramatic conflict, the watering down of standards and the entrenchment of interception practices. Finally, there has been little progress on legal migration. Unsurprisingly, the UK has chosen to opt into most of the asylum measures and irregular migration measures, while opting out of the few legal migration measures.⁴⁵⁷

What is important here is that the CEAS measures elaborate refugee law; partly constrain UK law and practice; and add importantly to the patchwork of legal rights

⁴⁵³ TEU, arts 39, 43, 49.

⁴⁵⁴ Art 18(1) EC.

⁴⁵⁵ Dora Kostakopoulou, ‘Ideas, norms and European citizenship: Explaining institutional change’ (2005) 68 *MLR* 233.

⁴⁵⁶ Art 6(1) of the consolidated TEU.

⁴⁵⁷ See generally Steve Peers, *EU Justice and Home Affairs Law* (2nd ed, 2006).

in the legal constellation. The CEAS's first phase, recently completed, comprised four important pieces of legislation. The Dublin II Regulation,⁴⁵⁸ already noted, was a strengthened version of an earlier treaty,⁴⁵⁹ signed as part of the Schengen process, which enabled EU States to return refugee claimants to other EU States, based on a hierarchy of connecting criteria including transit through that State. The other three elements were new: the Reception Directive, conferring important rights to 'reception conditions' such as housing, health care and financial support on refugee claimants;⁴⁶⁰ the Qualification Directive, harmonising key aspects of the refugee definition;⁴⁶¹ and the Procedures Directive,⁴⁶² harmonising less successfully certain 'minimum standards' for asylum procedures.⁴⁶³ In its second phase, the European Commission proposes — ambitiously, in light of the protracted negotiations over the Procedures Directive — a common asylum procedure, as well as a uniform refugee status and greater convergence in standards of reception and refugee determination.⁴⁶⁴

Together, these entrench an important catalogue of rights into UK law. The Qualification Directive confers an enforceable entitlement to refugee status and subsidiary protection;⁴⁶⁵ a range of rights to recognised refugees and their family members;⁴⁶⁶ rights of guardianship and care and protection of family unity for unaccompanied minors;⁴⁶⁷ the right to an individual examination of the circumstances taking all facts into account;⁴⁶⁸ and a range of more limited procedural

⁴⁵⁸ Regulation 343/2003/EC. Dublin I remains in force as between Denmark and the Member States.

⁴⁵⁹ *Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities* (1990), OJ C254/1, 19 August 1997. See Andrew Nicol and S Harrison, 'The law and practice in the application of the Dublin Convention in the United Kingdom' (1999) 1 *EJML* 465.

⁴⁶⁰ Directive 2003/9/EC.

⁴⁶¹ Directive 2004/83/EC. This is implemented in the UK through Pt 11 of the Rules.

⁴⁶² Directive 2005/85/EC.

⁴⁶³ I exclude here the Temporary Protection Directive (Directive 2001/55/EC), since it has yet to be invoked.

⁴⁶⁴ Commission (EC), *The Future Common European Asylum System (Green Paper)*, COM (2007) 301 final, 6 June 2007; Commission (EC), *Policy Plan on Asylum – An Integrated Approach to Protection Across the EU*, COM (2008) 360 final, 17 June 2008.

⁴⁶⁵ Arts 13 and 18.

⁴⁶⁶ These include the right to a residence permit (Art 24) and a travel document (Art 25); rights to employment (Art 26); education (Art 27); social assistance (Art 28); health care (Art 29); accommodation (Art 31); freedom of movement (Art 32); provision for integration (Art 33); and financial assistance for repatriation (Art 34). These substantially supplement the rights in the Refugee Convention, of which only the right to a travel document and freedom of movement are broadly equivalent.

⁴⁶⁷ Art 30. This is paralleled in the Reception Directive, Art 19.

⁴⁶⁸ Art 4(3).

rights.⁴⁶⁹ The Reception Directive confers rights to adequate ‘material reception conditions’;⁴⁷⁰ access to emergency and essential health care;⁴⁷¹ evidence of refugee status;⁴⁷² rights to information about rights and support;⁴⁷³ rights to respect for family unity in the provision of housing;⁴⁷⁴ equal access to the education system for children after 3 months;⁴⁷⁵ and access to the labour market after a maximum of a year, albeit with significant restrictions.⁴⁷⁶ The Procedures Directive confers a general right to remain for the process of refugee determination (subject to important exceptions),⁴⁷⁷ and a range of important procedural safeguards: the right to a personal interview in most circumstances,⁴⁷⁸ including access to a written report of the interview;⁴⁷⁹ the right for an application to be examined “individually, objectively and impartially” by trained staff with access to quality country of origin information;⁴⁸⁰ the right to reasoned decisions for refusal including written information on how to challenge the decision;⁴⁸¹ the right to notice of the decision “in reasonable time”;⁴⁸² the right to publicly funded interpreters;⁴⁸³ the right to legal assistance at one’s own cost, and to free legal assistance after an adverse decision (with significant exceptions);⁴⁸⁴ the right to communicate with UNHCR;⁴⁸⁵ and rights to information.⁴⁸⁶ It also confers the right to “speedy judicial review” in cases of detention,⁴⁸⁷ although it provides no cap on the limit to detention, and the right to an effective remedy before a court or tribunal in relation to specified decisions.⁴⁸⁸

The limitations of this legislative framework have been exhaustively examined elsewhere, with most commentators highly critical of the watering down of the

⁴⁶⁹ See Arts 7(3); 8(2); 11(2); 19(4); 22.

⁴⁷⁰ Arts 13-14.

⁴⁷¹ Art 15.

⁴⁷² Art 6.

⁴⁷³ Art 5.

⁴⁷⁴ Art 8.

⁴⁷⁵ Art 10, although this may be extended to one year if specific education is provided to enable access to the education system.

⁴⁷⁶ Art 11.

⁴⁷⁷ Art 7.

⁴⁷⁸ Art 12.

⁴⁷⁹ Art 14.

⁴⁸⁰ Art 8.

⁴⁸¹ Art 9.

⁴⁸² Art 10(1)(d).

⁴⁸³ Art 10(2).

⁴⁸⁴ Art 15.

⁴⁸⁵ Art 10(1)(c).

⁴⁸⁶ Arts 9, 10(1), 14; Art 10(1)(a) and (e); Art 23(2).

⁴⁸⁷ Art 18.

⁴⁸⁸ Art 39.

Procedures Directive⁴⁸⁹ and its inclusion of so many exceptions, delegations to States, and weak minimum standards. Peers and Rogers said of it: “Never before in the history of the Community have so many human rights breaches — leaving aside the breaches of EC constitutional law — been committed by a single piece of legislation.”⁴⁹⁰

In many respects, therefore, the three legal regimes, together with the other EU regimes, mimic and magnify the complexity and normative incoherence of the domestic legal order. The Title IV regime, in particular, is structured like domestic immigration law on paradox and ambivalence; on a combination of hyper-law and lawlessness, exacerbated by the inherent structure of EU law as a compromise; and, finally, on an internal tension between the promise of transcendence, and the politics of mutual interest.

9 Conclusion

This whirlwind tour of the legal constellation gives us the flavour of the complicated interaction of several distinct legal regimes, and explores the way these create distinctive political structures and are based on different normative paradigms. Crucially, they empower different degrees of legal autonomy, are based on different paradigms of legitimacy, and exhibit an unusual degree of normative tension.

This normative tension is particularly marked in respect of immigration law, with its ‘external perspective’ of the State and its premises of the absolute subjection of the outsider to the power of the State; of the inequality between non-citizen and citizen; and of the absence of rights of the outsider. This paradigm, quite frankly, is obsolete: it has been qualified and modified out of existence by the strengthening of liberal principles in ‘internal’ regimes such as constitutional law and judicial review, and most prominently by human rights law.

Nevertheless, the hardened residue of this paradigm persists in the legal constellation, and creates everywhere normative tensions and exposes deficiencies. It continues to drive citizenship law, asserts itself in the internal compromises and political structure of refugee law, and re-emerges in the breadth of the constitutional powers in Australia and in the historical invisibility of immigration in judicial review. In the UK, it creates enormous tension with the paradigm of human rights, and

⁴⁸⁹ See Doede Ackers, ‘The negotiations on the Asylum Procedures Directive’ (2005) 7 *EJML* 1.

⁴⁹⁰ Steve Peers and Nicola Rogers, *EU Immigration and Asylum Law: Text and Commentary* (2006) 410.

emerges in, although it is mediated by, the complicated institutional dynamics of the EU.

Indeed, everywhere in the legal constellation we can see the residue of obsolescent paradigms, such as the complicated after-effects of Empire in citizenship law; the Cold War paradigm of the refugee; the virtual absence of individual rights in the Australian Constitution; and the orthodoxy of parliamentary sovereignty in the UK.

As the next chapter examines in detail, these residues and tensions have real effects, guiding judicial reasoning and undermining the acceptability of such reasoning. I examine this legal constellation in depth not merely to dissect their different logics, but because it explains part of the story of immigration review. What it explains is the challenge immigration poses to the coherence of the law — a coherence we prize for its ability to produce the relatively determinate rules necessary to guide human behaviour, and for its ability to produce ideologically coherent visions of the world that ground the legitimacy of judicial reasoning.

This challenge arises because, first, different elements of the legal constellation may be mobilised for different purposes and may logically point in different directions. The polyvalence of law thus enables a multiplicity of answers to the same legal question, undermining the determinacy of the rules and the ideological value of the law.

Second, the legal constellation therefore has enormous potential to create ‘hard’ cases, cases that will pivot on the tensions inherent within and between the legal regimes. These ‘hard’ cases cannot be authoritatively settled normatively, because of the co-existence and competition between these different legal regimes. There will, all too often, be a competing normative perspective, or a different balancing of priorities, that cannot be adequately addressed through the usual legal tools.

We turn, in the next chapter, to examine the operation of these usual legal tools, of which the most important are the vertical and horizontal drawing of boundaries, and the strategies of fudging and trumping. The vertical drawing of boundaries involves using the vertical legal hierarchy of form — using the Constitution to trump legislation, legislation to trump case law, and so forth — to resolve disputes. The horizontal drawing of boundaries involves delimiting the area of conflict, for each legal regime affects only a subset of immigration law. Thus, where the other legal regimes do not apply, we are left in the realm of immigration law *simpliciter*. The

strategy of ‘fudging’ involves an artful compromise in the instant case between the normative tensions, such as the incorporation of immigration policy into human rights via the qualifications clauses. The strategy of ‘trumping’, on the other hand, is more immediately intellectually attractive, since it ‘trumps’ one normative paradigm with another, preserving normative coherence but running the risks of political insensitivity.⁴⁹¹

What these usual legal tools do not, however, provide is an intellectually satisfactory solution. These manoeuvres foster disagreement since different people reasonably disagree on the *moral*, as opposed to the legal, priority of the normative paradigm. Those inclined to the positivist model of legitimacy may reasonably object to a legal hierarchy that privileges legal regimes based on increasingly abstract notions of State consent, over a legal regime (immigration law) that is most obviously based on specific, empirically verifiable, democratic consent. On the other hand, those inclined to be suspicious of the metaphysical claims of the State may reasonably object to the confinement of human rights principles in deference to the State.

Moreover, the legal hierarchy obscures the differing allocations of power underpinning different sources of law. We may thus also reasonably disagree upon the political legitimacy of the different forms of law, and about who should exercise law-making power. For example, by locating law-making power at the level of the EU, greater influence is granted to the bureaucracy through the European Commission, and to governments through the European Council and Council of Ministers. Access to policy-makers by NGOs and representative groups is more limited and variable, and different States have different political weight, with the newly acceding States on the frontier of the EU likely to suffer disproportionately from refugee burden-sharing.⁴⁹² We rightly contest the shifting of laws between regime and orders, since they are configured by different political structures.

What this analysis of the legal constellation reveals, therefore, is that ultimately this challenge of coherence can expose the precarious nature of legality itself. For if we may pick and choose between different traditions; if the haphazardness of the legal constellation and the happenstance of different judicial philosophies ultimately govern the multitude of ‘hard’ cases that arise; and if the legal strategies employed merely foster disagreement about the priority of normative paradigms, where then is

⁴⁹¹ Boswell, n2, 92-93.

⁴⁹² Catherine Phuong, ‘Enlarging ‘Fortress Europe’: EU accession, asylum and immigration in candidate countries’ (2003) 52 *ICLQ* 641.

our system of determinate rules based on a coherent normative framework, which we are guided by because judicial reasoning is normatively persuasive? This challenge may be mistranslated and oversimplified by politicians and judges into the tropes of judicial activism and the battle between the executive and the judiciary, but nevertheless there is a real challenge here to our deepest notions of impartial justice, in our faith in law as a system of rules, and in our ability to endorse judicial reasoning based on this hybrid, complex, and unstable interaction of norms.

Chapter 3 — Confronting the challenges

1 *Introduction*

This chapter turns to examine the ways in which the challenge to coherence is manifested, and to make good the claim that the haphazard application of the legal constellation leads to unsatisfactory judicial resolutions. I do so in respect of four landmarks in the story of immigration review: the sagas of the ouster clauses, and judgments on extraterritorial schemes, indefinite detention, and the enlargement of the scope of judicial review.

In part, these case studies have been chosen because they constitute the four most controversial elements of the story of immigration review;⁴⁹³ and, in part, because they illustrate the different kinds of challenges, and responses, that immigration throws up. The ouster clauses and indefinite detention manifest direct challenges to the rule of law and the cardinal legal value of liberty, respectively. The extra-territorial schemes expose a tension between the normative justifications of law and the institutional limits of law. The enlargement of the scope of judicial review exposes a tension between different justifications for, and thus different constitutional understandings of, judicial review.

As this chapter reveals, the different responses may be explained as the product of three factors: the nature of the challenge; the legal constellation; and judicial agency. As we shall see, even the most direct challenges often mask the weaknesses and incoherence of the legal constellation, which in turn is crucial in structuring the spaces for judicial agency.

This chapter reveals how the story of immigration review is a story of the tensions and conflicts within and about the law. The different responses can all be read as ways of defending different conceptions about the province and purpose of law, or what I have earlier called law's empire. Indeed, we can envisage these different responses as different kinds of imperial defences, including strategic retreat; the transmission of imperial values; the limited toleration of diversity; and last but not least, the pitched battle.

⁴⁹³ I have excluded asylum support cases from consideration because they are one step removed from the central issue of immigration, and also because there are no comparable Australian cases.

2 *The ouster clause sagas*

We turn first to the pitched battle, in the form of the ouster clause sagas. The introduction of ouster clauses in both jurisdictions is both the most striking similarity in the stories of immigration review, and their high-water mark. Their outcomes were hailed as victories for the rule of law,⁴⁹⁴ and as evidence of the strength and defensive capacity of the law. However, as we shall see, upon closer examination the picture is less rosy.

2.1 The Australian ouster clause

The Howard government pledged that it would restrict access to judicial review for immigration matters before the 1996 election,⁴⁹⁵ and the ouster clause was (together with the creation of the MRT) part of that package. Combined opposition in the Senate, however, left the ouster clause languishing after its introduction in two bills in 1997⁴⁹⁶ and 1998.⁴⁹⁷ The Senate committee reports on the bills were similarly divided along party lines.⁴⁹⁸

The key section of the proposed clause provided:

- (1) A privative clause decision:
 - (a) is final and conclusive; and
 - (b) shall not be challenged, appealed against, reviewed, quashed or called in question in any court; and
 - (c) is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account.

Subsections 2 and 3 widely defined the terms ‘privative clause decision’ and ‘decision’, so as to cover all immigration decisions except for those expressly excluded by subsection 4. However, the clause was not intended to be read literally (for this would patently violate s 75(v) of the Constitution), but rather, as the Explanatory Memorandum made clear, according to the High Court’s decision in *Hickman*.⁴⁹⁹ This would enable review, according to the Minister, only on the grounds of exceeding

⁴⁹⁴ See, eg, Caron Beaton-Wells, ‘Restoring the rule of law: *Plaintiff S157/2002 v Commonwealth of Australia*’ (2003) 10 *AJ Admin L* 125.

⁴⁹⁵ Australia, *Hansard*, HoR, 25 June 1997, 6281 (Philip Ruddock, Minister of Immigration and Multicultural Affairs).

⁴⁹⁶ Migration Legislation Amendment Bill (No 4) 1997 (Cth). The privative clause was shifted, by agreement, to the Migration Legislation Amendment Bill (No 5) 1997 (Cth).

⁴⁹⁷ Migration Legislation Amendment (Judicial Review) Bill 1998 (Cth).

⁴⁹⁸ L&CLC, *Nos 4 & 5*, 1130; L&CLC, *Judicial Review Bill 1998*, 1104.

⁴⁹⁹ *R v Hickman ex p Fox and Clinton* (1945) 70 CLR 598.

constitutional limits, narrow jurisdictional error or bad faith (the so-called ‘Hickman provisos’).⁵⁰⁰

This clause would have remained a dead letter but for the extraordinary political events of the *Tampa* (discussed below), and the Howard government’s seizure of the political momentum to pressure the Opposition into passing seven ‘urgent’ immigration bills (including the ouster clause) over two nights. The Opposition had already rejected the first *Tampa* bill⁵⁰¹ — a bill presented with only 40 minutes’ notice to the Opposition,⁵⁰² and which no MP saw before it was introduced in Parliament.⁵⁰³ However, the second time around, Labor gave in to its overwhelming fear of losing the imminent election, and the bills passed unamended.⁵⁰⁴

This episode dramatically illustrated the limitations of Parliamentary scrutiny in the face of party discipline. As Senator McKiernan, a dissident in both committee reports, commented: “At the end of the day, when these bills come to a vote, I will be supporting them, because that is what my party has determined, but I will not be doing it with any great deal of comfort.”⁵⁰⁵

When the ouster clause came to the Federal Court, the court found itself divided, a division replicated by a specially convened five-member Full Federal Court in *NAAV*.⁵⁰⁶ The majority of this Court effectively agreed with the Minister’s interpretation of the clause and upheld its constitutional validity, although they noted a *Hickman* proviso overlooked by the Minister — that the decision was subject to any ‘inviolable’ statutory limitations. As von Doussa J explained, these were few indeed: that the Minister consider the visa application; and that the visa application, review application, delegations of power, and the constitution of the Tribunal were valid.⁵⁰⁷

The minority, however, argued that Dixon J’s approach in *Hickman* was not one of subordinating all other sections to the ouster clause, but rather of reconciling the apparent contradiction between the clause and statutory limitations by reading them together to determine which limitations were indispensable. More significantly, the minority held that the term ‘privative clause decision’ did not reach decisions infected

⁵⁰⁰ L&CLC, *Nos 4 & 5*, n130, [1.115]. For a fuller explanation, see Dr Simon Evans, ‘Protection visas and privative clause decisions: *Hickman* and the *Migration Act 1958* (Cth)’ (2002) 9 *AJ Admin L* 45.

⁵⁰¹ Border Protection Bill 2001 (Cth).

⁵⁰² Australia, *Hansard*, HoR, 29 August 2001, 30572 (Kim Beazley, Leader of the Opposition).

⁵⁰³ Described in David Marr and Marian Wilkinson, *Dark Victory* (2nd ed, 2003), 127-129.

⁵⁰⁴ *Ibid.*, 208-209.

⁵⁰⁵ Australia, *Hansard*, Senate, 24 September 2001, 27698.

⁵⁰⁶ N191.

⁵⁰⁷ [625].

by jurisdictional error, since these were ‘no decisions at all’ in the eyes of the law.⁵⁰⁸ The High Court essentially, and unanimously, agreed with the minority in *Plaintiff S157*, a different appeal on the same constitutional point.⁵⁰⁹

The minority of the Federal Court, and the High Court, captured the central paradox of hyper-law and lawlessness in their discussion of the “contradiction” between, on the one hand, an elaborate legislative structure that seeks to structure and confine discretion, and on the other, attempts to ‘expand’ the power of decision-makers beyond those limits.⁵¹⁰ As Wade and Forsyth put it, the ‘reconciliatory’ approach was a “brave endeavour to strike some sort of balance between legislative intention and constitutional logic”.⁵¹¹ Manoeuvring between the competing imperatives of deference to the democratic legitimacy of the courts, and upholding the rule of law, their Honours’ strategy was a classic ‘fudge’. The executive and the judiciary had stood toe to toe, and the judiciary had simply chosen to walk around its antagonist.

2.2 The UK ouster clause

A few months afterward, the UK repeated the experiment by proposing “the mother of all ouster clauses”,⁵¹² alongside the merger of the IAA, in its 2004 Bill. Proposed s 108A provided that no court should have supervisory or other jurisdiction, whether statutory or inherent, in relation to the Tribunal, and prohibited courts from entertaining proceedings for question, by way of appeal or otherwise, in relation to almost all immigration decisions.⁵¹³ Further, subsection 3 expressly prohibited all grounds of judicial review excepting bad faith, and subjected claims under the HRA to the ouster clause. Unlike in Australia, where the written Constitution constrained any such ouster, this clause meant what it said.

⁵⁰⁸ Incidentally, the High Court had recently determined that the Federal Court’s previous jurisdiction under Part 8 similarly included all decisions infected by jurisdictional error: *Yusuf*, n189.

⁵⁰⁹ N192. There is a voluminous literature on this case: see, eg, Beaton-Wells, ‘Restoring the rule of law,’ n494; Duncan Kerr, ‘Deflating the *Hickman* myth: Judicial review after *Plaintiff S157/2002 v The Commonwealth*’ (2003) *AIAL Forum* 1; Cheryl Saunders, ‘*Plaintiff S157/2002*: A case study in common law constitutionalism’ (2005) 12 *AJ Admin L* 115.

⁵¹⁰ Emphasised by French J at [399], and repeated by Gleeson CJ at [36].

⁵¹¹ Sir William Wade and CF Forsyth, *Administrative Law* (9th ed, 2004), 727.

⁵¹² Quoted in Clare Dyer, ‘Top judge condemns asylum proposals’, *The Guardian*, 11 February 2004, 5.

⁵¹³ Judicial review of safe third country certificates was permitted.

However, unlike in Australia also, the clause received critical scrutiny and, indeed, condemnation by three parliamentary committees,⁵¹⁴ and there was strong dissent within government, expressed by Labour backbenchers,⁵¹⁵ within Cabinet,⁵¹⁶ and (crucially) by the former Lord Chancellor, Lord Irvine.⁵¹⁷

As in Australia, however, the bill's passage revealed deficiencies in the legislative process. The ouster clause was not included in the consultation document, surfacing only in the draft bill published 9 working days after consultation closed;⁵¹⁸ and was thus not considered in HAC's rushed report.⁵¹⁹ In any event, the government rejected the report "within hours, if not minutes".⁵²⁰

The ouster clause saga did demonstrate the vitality of the legal community. The clause was "roundly condemned by many respected organisations, including the General Council of the Bar, the Law Society, the Immigration Law Practitioners Association, the Refugee Council and the Immigration Advisory Service."⁵²¹ In the newspapers, eminent professors called the clause a "constitutional outrage",⁵²² and intimated that it might be ruled unconstitutional.⁵²³ On 3 March 2004, in an apparently co-ordinated attack, both Lords Woolf and Steyn attacked the clause as contrary to the rule of law in extra-curial speeches. Lord Woolf revealed that the judiciary had, when consulted, advised the clause was unworkable, but the government had merely removed the loopholes.⁵²⁴ Lord Steyn condemned the Bill as attempting "to immunise manifest illegality".⁵²⁵

On 15 March, with a long list of Law Lords, former Lord Chancellors and barristers due to speak against the clause, Lord Falconer withdrew the clause at the

⁵¹⁴ Standing Committee B, convened January 2004; CAC, *Asylum and Immigration Appeals*, n104; JCHR, *Asylum and Immigration (Treatment of Claimants, etc) Bill (2003-2004)*.

⁵¹⁵ See, eg, UK, *Hansard*, HC, 1 March 2004, vol 418 cols 680 (Diane Abbott).

⁵¹⁶ The Attorney-General opposed it: Joshua Rozenberg, 'Labour U-turn on asylum Bill', *The Daily Telegraph*, 16 March 2004, 2.

⁵¹⁷ Nicholas Watt, 'Reprieve for asylum appeals', *The Guardian*, 16 March 2004, 9.

⁵¹⁸ UK, *Hansard*, HC, 17 December 2003, vol 415 col 1608 (Humfrey Malins).

⁵¹⁹ HAC, *2004 Bill Report*, n131.

⁵²⁰ See UK, *Hansard*, HC, 17 December 2003, vol 415 col 1632 (John Denham).

⁵²¹ UK, *Hansard*, *Asylum and Immigration (Treatment of Claimants etc, Bill) Standing Committee B*, 20 January 2004, col 230 (Humfrey Malins).

⁵²² Vernon Bogdanor, 'Strike out the clause that makes a mockery of our basic rights', *The Times*, 9 January 2004, 30.

⁵²³ Jeffrey Jowell, 'Immigration wars', *The Guardian*, 2 March 2004, 16.

⁵²⁴ Woolf, n403, 328.

⁵²⁵ Quoted in Joshua Rozenberg, 'Law lords raise stakes on asylum', *Daily Telegraph*, 5 March 2004, 2. See also John McGarry, 'Parliamentary sovereignty, judges and the Asylum and Immigration (Treatment Of Claimants Etc.) Bill' (2005) 26 *Liverpool LR* 1.

beginning of its second reading in the House of Lords.⁵²⁶ It was eventually replaced with the transitional ‘filter’ mechanism already discussed. In this saga, then, the executive and the judiciary had dramatically confronted each other — and the executive had blinked first.

2.3 Explaining ‘success’

Three factors promoted the eventual outcomes of the ouster clause sagas: the nature of the challenge; the adequacy of the constitutional concepts involved; and constitutional design.

2.3.1 THE ‘CONSTITUTIONAL OUTRAGE’

First of all, there was no mistaking the nature of the challenge. The clauses clearly threatened the constitutional role of the courts in ensuring the legality of administrative action, and struck directly at the heart of the rule of law.

The clarity of the challenge was matched by the significance of judicial review in immigration. Immigration decisions involved important rights and legal issues, and its consequences were momentous for the individual. Immigration decisions also constituted the lion’s share of judicial review, which had exposed the significant extent of inadequate decision-making and maladministration in this field. The ouster clause would thus remove a significant part of law’s empire from people who needed the protection of the law more than most.

Nor were there compelling political imperatives. The justifications for the clauses were primarily that of cost and delay, translated into moral arguments about abuse of process and the unfair burden placed on the citizen.⁵²⁷ These were, as an MP pointed out, arguments of administrative inconvenience balanced against arguments of constitutional principle.⁵²⁸ In any case, these justifications were not necessarily convincing, since cost and delay could be attributed to other causes and the statistics were far from robust. Indeed, in *NAAV* two Federal Court judges went so far as to prescribe alternative recommendations for reform.⁵²⁹

Importantly, the compelling imperative that had stayed the hands of judges for most of the 20th century, namely the political importance and sensitivity of

⁵²⁶ UK, *Hansard*, HL, 15 March 2004, vol 659 col 51 (Lord Falconer of Thoroton).

⁵²⁷ See, eg, Philip Ruddock, ‘Narrowing of judicial review in the migration context’ (1997) *AIAL Forum* 13.

⁵²⁸ UK, *Hansard*, HC, 17 December 2003, vol 415 cols 1638 (Neil Gerrard).

⁵²⁹ [284]-[285] per Wilcox J, [594] per French J.

immigration, was virtually invisible in the debates. It was no longer possible to return to the days of yore, before immigration had been absorbed into law's empire. The values transmitted by law's empire — the need for accountability, the need for protection of the vulnerable, the existence of human rights — had taken root too firmly.

The vociferous defence of law's empire was also provoked by the sense that these values were being undermined elsewhere, by anti-terrorism laws and incursions on civil liberties, by increasing attacks on the judiciary, and in the UK in the context of fundamental constitutional reforms. The ouster clause sagas therefore became a totemic struggle over the preservation of the authority of the law itself, and a symbol of the law's power to tame irrepressible governments. As Lord Woolf put it a decade ago in a classic piece of British understatement, the law was merely taking up the slack "during a period when the other restraints on the executive were not as great as ideally they should be".⁵³⁰

2.3.2 THE RULE OF LAW REDUX

The second, less visible, factor promoting the outcomes was that the ouster clauses engaged the regime of constitutional law. Significantly, this reconfigured the dispute as a dispute about the balance between executive and judicial power. This had long been a central concern of constitutional law, and there was thus a readily applicable legal framework, and a readily available legal tradition, which captured the nature of the challenge.

In Australia, as Gleeson CJ's judgment in *Plaintiff S157* concisely evidenced, this legal framework was captured very clearly by the Constitution's overriding constraints on parliamentary power; the Constitution's express provision for judicial review;⁵³¹ the constitutional 'assumption' of the rule of law;⁵³² and the doctrine of separation of powers.⁵³³ These principles were buttressed by interpretative presumptions in favour of rights and international obligations,⁵³⁴ and supported by a long tradition of

⁵³⁰ Lord Woolf, 'Judicial review – The tensions between the executive and the judiciary' (1998) 114 *LQR* 579, 579.

⁵³¹ [5].

⁵³² [9]. See also [103], citing *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 193.

⁵³³ [9].

⁵³⁴ [29]-[30]. See also *NAAV*, n191, [290],[443]-[450], [528], [555].

defending judicial power, as reference to high judicial authority testified.⁵³⁵ As Wilcox J noted, in the 57 years since *Hickman*, no court had in fact applied it to protect an otherwise invalid act.⁵³⁶

Further, the constitutional status of the regime encouraged courts to elevate the significance of the dispute, and look beyond the technicalities to the “real and substantive dispute”.⁵³⁷ As Wilcox J noted, the boundary between text and non-text was more permeable in the case of a Constitution, requiring judges to go beyond its text to its “normative” background.⁵³⁸

This more permeable and open-textured nature of the constitutional legal regime was critical, since — despite the clarity and coherence of the constitutional principles — the *text* of the Constitution itself provided no direct or obvious path, especially as the ouster clause was virtually identical to that upheld in *Hickman*. Witnesses testifying to the Senate committee candidly admitted that, while the clause might be unconstitutional, it was not clear exactly how:

It is my submission that the High Court—I am guessing; I am chancing my arm—would simply say, ‘Look, this has simply gone too far. Sure, the clause looks the same as everything else, you are using the same language, but stand back from it. The government has been a little too cheeky on this decision.’⁵³⁹

Indeed, the route eventually taken was not one of constitutional invalidity, but rather through the classic judicial back-door of restrictive interpretation. Despite all the constitutional thundering, *Plaintiff S157* in fact exposed the gap between the normative constitutional framework and its manifestations in constitutional text and precedent.

Finally, the invocation of the constitutional legal regime was also highly significant because of its status in the legal hierarchy and its political structure. This allowed the court to resolve the dispute through vertical boundary-drawing, since the Constitution ‘trumped’ legislation; and it positioned the court as guardian of the Constitution. Thus, instead of being “activist”, the Court was rather “obedient to its constitutional function.”⁵⁴⁰

This combination of the normative strength of the law masking the weaknesses of its manifestations was also evident in the UK, where the legal path was even less

⁵³⁵ [8], citing *R v Medical Appeal Tribunal ex p Gilmore* [1957] 1 QB 574, 586; [31], citing *Church of Scientology v Woodward* (1982) 154 CLR 25, 70.

⁵³⁶ [297]. See also [465].

⁵³⁷ *Plaintiff S157*, n192, [98].

⁵³⁸ *NAAV*, n191, [443].

⁵³⁹ Evidence to L&CLC, Senate, Sydney, 9 October 1997, (John McMillan), 360.

⁵⁴⁰ *Plaintiff S157*, n192, [104].

straightforward. Surprisingly, the HRA did not provide a “knock out blow”,⁵⁴¹ as one might have expected. As the JCHR noted, Art 13 ECHR (effective remedy) did not necessarily require judicial review in addition to a tribunal,⁵⁴² while Art 6 ECHR (fair trial) did not apply to immigration decisions.⁵⁴³ Instead, the best case invoked the more indirect arguments that inadequate Tribunal decision-making rendered it an ineffective remedy;⁵⁴⁴ that the removal of judicial review discriminated against non-citizens;⁵⁴⁵ and that removal of judicial review left the rights provided by Arts 2, 3 and 8 unprotected, except by appeal to the ECtHR.⁵⁴⁶

As the JCHR recognised, the challenge was best captured instead by the principle of the rule of law.⁵⁴⁷ However, there were two difficulties: the vertical hierarchy of the constitutional framework, and a gap in institutional design.

In the orthodox conception of the British constitutional hierarchy, the principle of the rule of law was ‘trumped’ by the principle of parliamentary sovereignty.⁵⁴⁸ However, in a prescient article, Lord Woolf had postulated that the courts could act in an unprecedented fashion in extreme cases, such as the abolition or substantial impairment of judicial review, by making it clear that there were “ultimately ... limits on the supremacy of Parliament which it is the courts’ inalienable responsibility to identify and uphold.”⁵⁴⁹ This slip of extra-curial dicta was evoked by Lords Woolf and Steyn in their speeches attacking the ouster clause, and (as noted earlier) was provocatively raised in a subsequent House of Lords decision.⁵⁵⁰

This ‘nuclear option’⁵⁵¹ was most extensively considered in Fordham’s brief for the Refugee Council on the ouster clause.⁵⁵² Fordham’s argument depended centrally upon the rule of law, but also brought together recent constitutional developments including the articulation of constitutional rights; the principle of legality; the common law origin and constitutional role of judicial review; and the notion of the

⁵⁴¹ Richard Rawlings, ‘Review, revenge and retreat’ (2005) 68 *MLR* 378, 401.

⁵⁴² JCHR, *Asylum and Immigration (Treatment of Claimants, etc.) Bill* (2004), n514, [64]-[66].

⁵⁴³ See n446.

⁵⁴⁴ [64]-[66].

⁵⁴⁵ [68].

⁵⁴⁶ [70].

⁵⁴⁷ [57]-[61].

⁵⁴⁸ See, eg, *Madzimbamuto v Lardner Burke* [1969] 1 AC 645, 723.

⁵⁴⁹ Lord Woolf, ‘Droit public – English style’ [1995] *PL* 57, 69. See also Laws LJ, ‘Law and democracy’ [1995] *PL* 72, and McGarry, n525.

⁵⁵⁰ *Jackson v Her Majesty’s Attorney General* [2005] UKHL 56, [102], [107], [159]. Cf [9] per Lord Bingham. See Jeffrey Jowell, ‘Parliamentary sovereignty under the new constitutional hypothesis’ [2006] *PL* 562.

⁵⁵¹ Rawlings, n541, 401.

⁵⁵² Michael Fordham, ‘Common law illegality of ousting judicial review’ [2004] *JR* 86.

‘dual sovereignty’ of the courts. Fordham also relied upon a revival of earlier common law traditions; cited *Marbury v Madison*⁵⁵³ as evidence of the inherent judicial power to ask questions of constitutional legality; and suggested that *Anisminic*,⁵⁵⁴ and other decisions circumscribing ouster clauses, could provide a foundation for converting an interpretative presumption into a ‘constitutional principle’.

Fordham’s analysis evidences both the resilience and the fragility of the British constitutional framework. On the one hand, it evidences the dynamic nature of the common law tradition: its ability to draw upon alternative traditions, and its responsiveness to changing constitutional climates. On the other, it strings together disparate and still developing constitutional doctrines. As an MP observed, an ouster clause would “force the judiciary to become ever more creative and imaginative in finding a way round it”, “undermining the rationality and logic of the rule of law”⁵⁵⁵ — meeting the challenge to the law would involve undermining the methodology of the common law.

The problem of hierarchy has received greater attention than the problem of institutional design — namely the lack of any institutional mechanism to resolve conflict in the event the usual constitutional constraints failed. In one sense, this lack promoted the eventual outcome. The ouster clause “left the courts with little option, but to lie down like pussycats, or alternatively to take constitutional law to new places”.⁵⁵⁶ By endangering the constitutional balance, the government endangered itself, making the stakes too high for the government to proceed. The constitution operated as a political ‘No trespassing’ sign, behind which lurked an indefinable and, thus more dangerous, threat.

On the other hand, overruling the legislation would be akin to jumping off a constitutional cliff. There was no written Constitution conferring authority to do so; there was no legal tradition of doing so; and there was no knowing exactly how the judiciary would go about it, or what would happen if they did. Lord Donaldson later asserted that he was “quite confident that if [the ouster clause] had been passed, the judges would have said, ‘We’re not having this’”. However, his Lordship continued: “How the judges could have done that is a different matter”.⁵⁵⁷ The lack of a specific

⁵⁵³ 5 US (1 Cranch) 137 (1803).

⁵⁵⁴ N416.

⁵⁵⁵ UK, *Hansard*, HC, 1 March 2004, vol 418 col 682 (Richard Bacon).

⁵⁵⁶ Macdonald and Webber (eds), n53, vii.

⁵⁵⁷ UK, *Hansard*, HL, 7 December 2004, vol 667 col 746 (Lord Donaldson).

institutional mechanism renders all such threats of unconstitutionality nebulous, although not unreal.

In both jurisdictions, therefore, the conceptual toolbox was ready and waiting, but the technical instructions left much to be desired. These victories for the rule of law demonstrated the strength of the normative concepts of constitutional law; but what they masked was their textual, hierarchal and institutional fragility.

2.3.3 CONSTITUTIONAL DESIGN

Although, as we have seen, the sagas vividly demonstrate the limitations of parliamentary scrutiny, some elements of constitutional design also promoted the eventual outcomes. The committee reports and parliamentary debates at least enabled the intervention of lawyers and lobby groups and promoted public debate. However, in both cases, the most important element was the differing composition of the second chamber. It was the proportional system of the Australian Senate that enabled the Opposition and minor parties to stall the clause for four years; and, when the clause was passed, it was the Senators from minor parties who stood up and spoke out.

In the UK, as members of the House of Commons correctly observed, it was the “other place” that refused to countenance the ouster clause.⁵⁵⁸ The House of Lords, with its much weaker party discipline and its insulation from electoral pressure, its tradition as the house of the ‘good and the great’, and its Law Lords and Bishops, proved critical in forcing the climb-down. As one MP observed, such a clause may well have been passed by a wholly elected upper House⁵⁵⁹ — and the relevant example (although quoted nowhere) is that of Australia.

2.4 Qualified celebrations

The simplistic depiction of the ouster clause sagas as victories for the rule of law obscures the fact that the outcomes were never certain. Lurking in these sagas is the contrary decision in *NAAV*, and the haunting probability that, had the ouster clause been enacted in the UK, the judges would ultimately have blinked rather than pressed the nuclear button.

⁵⁵⁸ See, eg, UK, *Hansard*, HC, 1 March 2004, vol 418 col 673 (Tony Wright); UK, *Hansard*, HC, 1 March 2004, vol 418 col 683 (David Winnick); UK, *Hansard*, HC, 1 March 2004, vol 418 col 686 (John Gummer).

⁵⁵⁹ Abbott, n515.

The sagas also expose a range of serious institutional deficiencies: the inadequacies of constitutional text, precedent and mechanisms; the potential suspension of the normal gravitational laws of politics; the dangers of a dominant government and opposition; and the weakness of legislative scrutiny. Consultation periods are abridged; committee reports are ignored; dissent is contained by the whip of party discipline.

Two institutional deficiencies deserve special comment. First, the political under-representation and exclusion of immigrants is mitigated by, but not cured by, the efforts of advocacy organisations. These groups perform a valuable but ultimately a surrogate function. Nothing is as effective at protecting rights as the vote itself,⁵⁶⁰ as the differential treatment of terrorist suspects in the UK (discussed below) demonstrated. Second, the judicial advice given on the ouster clause was not only “naïve”,⁵⁶¹ but also starkly reveals the dangers of the co-operative approach of the British judiciary. In Australia, with its stricter doctrine of separation of powers and its constitutional power to strike down legislation, such co-operation would be unthinkable. Unwritten constitutional arrangements depend more heavily upon the mutual respect of the government and the judiciary, but it renders the judiciary vulnerable when the respect is not, indeed, mutual.

Finally, the success is qualified. The Australian ouster clause has forced lawyers into the narrow gateways of ‘jurisdictional error’, distorting immigration cases into procedural disputes.⁵⁶² The shift in immigration jurisdiction to the FMC has effectively minimised the effect of a more liberal Federal Court. The UK ouster clause drew the heat and fire away from the abolition of the IAT. The transitional filter mechanism in the UK still provides lesser procedural protection, and has added an extraordinary layer of legal complexity. Most significantly, the governments have found other, more indirect, ways of restricting access to the courts, as chapter 1 described more fully.

What, then, can we learn from the ouster clause sagas? We learn that in the face of a direct threat to the *raison d’être* of the courts, our legal and political systems are capable of mobilising and capturing the challenge adequately, but not without

⁵⁶⁰ David Cole, *Enemy Aliens* (2003) 216-217.

⁵⁶¹ Rawlings, n541, 400.

⁵⁶² In recent years, most notably by the definition of ‘adverse information’ that must be communicated in written form: see *SAAP v MIMIA* [2005] HCA 24, legislatively reversed by ss 359AA, 424AA.

difficulty. Even in this case, the legal constellation may prove haphazard and deficient in its formal reach, and may still point in different directions, making the outcomes far from inevitable. These legal deficiencies and tensions are most exposed when the usual political constraints do not operate effectively. Worst of all, once the constitutional heat is off, smaller, less recognisable, threats tend to slip past exhausted combatants.

3 *Exporting the border*

As already discussed, one more indirect, albeit highly visible, way of restricting access is through interception schemes. Here I compare the judicial examination of two interception schemes: the *Tampa* litigation in Australia, and the *Prague Airport* scheme, in which British immigration controls were performed prior to embarkation to preclude the arrival of Roma refugee claimants.⁵⁶³ Although the schemes are not directly comparable, they share similar purposes and raise similar challenges.

3.1 *The Tampa case*

The facts of the infamous *Tampa* affair can be recounted briefly.⁵⁶⁴ In late August 2001, the Australian government refused to allow a Norwegian freighter (the *MV Tampa*) into Australian waters, after having requested that it rescue 438⁵⁶⁵ potential refugee claimants from a sinking boat. Facing an imminent election, the Howard government declared: “We will decide who comes to this country and the circumstances in which they come.” An international crisis brewed as the *Tampa* idled just outside Australian waters, with the Australian government hastily cobbling together the ‘Pacific Solution’, until on 29 August an Australian military squad boarded the *Tampa* as it attempted to enter Australian waters.

The next day, Melbourne’s *pro bono* community applied to the Federal Court for habeas corpus on behalf of those on the *Tampa*. On 11 September, just hours before the Twin Towers fell, North J upheld the claim;⁵⁶⁶ but a week later, a majority of the

⁵⁶³ Pursuant to s 3A; Art 7 of the Leave to Enter Order, n311; r 17A of the Rules.

⁵⁶⁴ For the best account, see Marr and Wilkinson, n503.

⁵⁶⁵ *Ibid.* 35. However, different accounts give slightly different figures.

⁵⁶⁶ *Victorian Council for Civil Liberties Inc v MIMA* [2001] FCA 1297. In the interim, the *Tampa* survivors were taken by agreement to Port Moresby: [42].

Full Federal Court (Black CJ dissenting) reversed this decision.⁵⁶⁷ The High Court refused special leave to appeal on 27 November.⁵⁶⁸

The twin *Tampa* judgments evidence extremely well both the haphazardness and deficiencies of the legal constellation, and the influence of competing normative paradigms on judicial reasoning. Before North J, the applicants had also claimed that the government had infringed the constitutional freedom of communication by refusing the solicitors access to the refugee claimants, and argued that ss 245F(9) and 189 of the Act required that the *Tampa* survivors be brought into, and detained, in Australia.⁵⁶⁹ An unlikely coalition of arguments thus invoked the regimes of judicial review, constitutional law, and immigration law. However, these arguments were never examined, because the applicants failed to satisfy the overly restrictive ‘special interest’ test of standing⁵⁷⁰ and because the constitutional freedom did not require the facilitation of communication⁵⁷¹ — exposing two deficiencies of the legal constellation. By refusing access to the refugee claimants, the government could effectively preclude anyone from satisfying the standing test, and thus partly immunise its own actions. In a curious aside, Beaumont J exposed another deficiency: his Honour emphasised that the Federal Court, as a statutory court, had no jurisdiction to issue writs of habeas corpus but rather orders in ‘the nature of habeas corpus, which (his Honour suggested) meant the Federal Court had greater discretion to refuse claims of habeas corpus.’⁵⁷²

The challenge was more adequately captured by the key issues of habeas corpus: was there detention, and was it lawful? Here, North J and Black CJ disagreed with Beaumont and French JJ (as he then was).⁵⁷³ North J’s approach was straightforward: on the evidence, the government “took to themselves the complete control over the bodies and destinies of the rescuees”,⁵⁷⁴ and this restraint on liberty amounted to detention. Black CJ found this conclusion was “inevitable”, since “viewed as a practical, realistic matter, the rescued people were unable to leave the ship”.⁵⁷⁵

⁵⁶⁷ N306.

⁵⁶⁸ Transcript of Proceedings, *Vadarlis v MIMA M93/2001* (High Court of Australia, 27 November 2001).

⁵⁶⁹ [138]-[160].

⁵⁷⁰ [123]-[137]. The High Court left this issue open for later consideration.

⁵⁷¹ [162]-[168].

⁵⁷² [101]-[108]. His Honour also noted that the failure to add the captain was a “serious procedural defect”: [105].

⁵⁷³ Now French CJ of the High Court.

⁵⁷⁴ [81].

⁵⁷⁵ [80].

French J, with whom Beaumont J agreed, questioned this, suggesting that the detention was “incidental” to the main objective of preventing the rescuees from landing, and not in truth attributable to the Commonwealth’s actions.⁵⁷⁶

North J gave short shrift to the argument that the detention was authorised by prerogative power, holding that any such power had been supplanted by the comprehensive provisions of the Act.⁵⁷⁷ It was this argument, however, that held centre stage on appeal.

French J, holding that the detention was authorised by the executive power in s 61 of the Constitution, emphasised the centrality of exclusion to the sovereignty of the State:

The power to determine who may come into Australia is so central to its sovereignty that it is not to be supposed that the Government of the nation would lack under the power conferred upon it directly by the Constitution, the ability to prevent people not part of the Australian community, from entering.⁵⁷⁸

Given this centrality, even the comprehensive scope of the Act did not manifest an intention to displace powers in this “specific area”.⁵⁷⁹ Beaumont J made the majority’s privileging of the normative model of immigration law even more explicit. His Honour also held that since there was no common law right to enter, there was no foundation for habeas corpus⁵⁸⁰ — evidencing the continued vitality of the normative paradigm evidenced in *Musgrove*.

In contrast, Black CJ’s dissent adopted a ‘public law’ normative paradigm, favouring the transparency and accountability of statute over the prerogative, and thus subjecting to greater scrutiny the executive’s claims to an untrammelled power of coercion. Reviewing the historical record, Black CJ doubted whether a prerogative power to expel existed at the time of Federation, and had thus been incorporated into the executive power.⁵⁸¹ Even if it had, this power had been displaced by statute. Such a conclusion was favoured by several factors: the coerciveness of the power; the doubtfulness of the existence of the prerogative power; the fact that immigration had “been the concern of the Parliament for a very long time”; the fact that no such executive power had been exercised in a long time; and the fact that such a power

⁵⁷⁶ [213].

⁵⁷⁷ [122].

⁵⁷⁸ [193].

⁵⁷⁹ [202].

⁵⁸⁰ [97], [109]-[112]. Rejected firmly by Black CJ: [73]-77].

⁵⁸¹ [29]-[31].

could be exercised incompatibly with treaty obligations.⁵⁸² Most importantly, the Act was very comprehensive, evincing no gaps, and including a parallel regime for chasing, searching and detaining ships.⁵⁸³ Thus, the eventual outcome in *Tampa* was resolved through the majority's privileging of the immigration law model, with its focus on the 'external' perspective of the State and its relationship of sovereignty and subjection, at the expense of the 'public law' model, with its focus on the 'internal' perspective and its focus on executive accountability.

These substantive issues were left unresolved by the High Court, which refused special leave to appeal because, by then, events had overtaken the claim. The rescuees had all been transferred to Nauru or New Zealand and were outside Australian jurisdiction, including the control of Australian officers. There was no longer any present duty to found mandamus, and a bare declaration as to past conduct was not sufficient. Finally, any dispute as to whether the detention had in fact been unlawful was, in the Court's view, now "hypothetical".

As luck would have it, however, the High Court had jurisdiction to hear appeals from the Supreme Court of Nauru, where most of the *Tampa* survivors ended up.⁵⁸⁴ It was thus able to entertain, in *Ruhani (No 2)*,⁵⁸⁵ the claim that detention in Nauru under the Pacific Solution was unlawful. However, the claim was narrowly based on the statutory interpretation of the power to detain, and ultimately failed (Kirby J dissenting).

3.2 The Prague Airport case

Barely a month prior to *Tampa*, the UK had begun its pre-clearance pilot in Prague Airport, and within 3 weeks, more than 110 people had been intercepted.⁵⁸⁶ While the European Roma Rights Centre (together with individual claimants) failed in its challenge to the scheme both at first instance⁵⁸⁷ and on appeal,⁵⁸⁸ it succeeded spectacularly at the House of Lords, which ruled unanimously that the scheme violated the prohibition on racial discrimination.⁵⁸⁹

⁵⁸² [40].

⁵⁸³ [42]-[64].

⁵⁸⁴ Upheld as constitutionally valid: *Ruhani v Director of Police* [2005] HCA 42.

⁵⁸⁵ *Ruhani v Director of Police (No 2)* [2005] HCA 43.

⁵⁸⁶ *Prague Airport (EWHC)*, 1328, [20].

⁵⁸⁷ *Ibid.*

⁵⁸⁸ *R (European Roma Rights Centre) v Immigration Officer at Prague Airport* [2003] EWCA Civ 666.

⁵⁸⁹ *R v Immigration Officer at Prague Airport ex p European Roma Rights Centre* [2004] UKHL 55.

Once again, an unlikely constellation of arguments was invoked. (Notably, the HRA was not engaged, because the agreed facts did not engage either Arts 2 or 3, and because of the primarily territorial nature of the jurisdiction.)⁵⁹⁰ The two major grounds invoked anti-discrimination law and refugee law, while two lesser grounds concerned the interpretation of the Rules and the fettering of discretion.

These lesser grounds evidenced the haphazardness and deficiencies of the legal constellation. The first argument was that asking for asylum was a ‘purpose covered by the Rules’, and thus the officers should have permitted those claimants who had openly admitted a desire to claim asylum to do so — a rather ingenious (and ingenuous) legal argument, which ultimately could not be reconciled with the ‘exceptionality’ of asylum in the Rules.⁵⁹¹ The second, similarly ingenious and ingenuous, argument was that the officers had illegitimately fettered their discretion by refusing to consider requests for asylum abroad under extra-statutory concessions⁵⁹² — revealing, in their exposure of these obscure concessions (one of which was entirely unwritten),⁵⁹³ the inaccessibility of immigration law.

The *Prague Airport* judgments also revealed clearly the limitations of the political structure and cardinal text of refugee law. Counsel argued that by effectively precluding the obligation of *non-refoulement* from arising, the UK breached its obligation of good faith. Here, again, the normative logic of the regime — the protection of people from persecution — extended beyond the text of the Convention, which embedded the fateful internal compromise that the person be ‘outside his country’. That compromise, so ruled all the judges, could not be defeated by the combination of a generous and purposive interpretation and the invocation of good faith.

The plural sites of refugee law were also engaged, as the House of Lords was asked to consider the customary international legal status of the obligation of *non-refoulement* beyond the frontiers of the State.⁵⁹⁴ Here, too, the political structure of refugee law — in which State practices of interception and carriers’ sanctions readily pointed to the conclusion that there was no such customary international norm — defeated the claim.⁵⁹⁵

⁵⁹⁰ Ibid. [21].

⁵⁹¹ *Prague Airport (EWHC)*, n328, [53]-[55].

⁵⁹² [75].

⁵⁹³ [14].

⁵⁹⁴ [22].

⁵⁹⁵ [27].

Instead, it was the ground of racial discrimination that proved critical. In the Court of Appeal, Laws LJ had dissented upon this issue, while Simon Brown LJ confessed he had changed his mind “more than once”.⁵⁹⁶

The principal claim rested on the extension of the prohibition of racial discrimination to public authorities, including immigration officers, under s 19B of the *Race Relations Act 1976*, a section inserted by the early New Labour amendments of 2000.⁵⁹⁷ The success of this claim depended upon two strokes of luck: the fortuitous timing of this extension; and the even more fortuitous refusal of the government to rely on its ministerial authorisation permitting racial discrimination.⁵⁹⁸

Most crucially, it depended upon the logic of anti-discrimination law. As Laws LJ and the House of Lords identified, it was abundantly clear that in cases of direct discrimination the *motive* for acting on racial grounds was irrelevant.⁵⁹⁹ Thus, the fact that the officers were discriminating against Roma because they were more likely to be refugee claimants, even though this stereotype may have been true, did not help the Home Office.⁶⁰⁰ As Baroness Hale pointed out, “[t]he object of the legislation is to ensure that each person is treated as an individual and not assumed to be like other members of the group.”⁶⁰¹

It was the desire to reconcile the strong principle of individual equality that structured anti-discrimination law with the premise of group-based controls inherent in immigration control that had swung Burton J and Simon Brown LJ the other way. Burton J considered the differences were referable to permissible purposes of immigration control; Simon Brown LJ found himself unable to accept that there could be racial discrimination when the “common sense”⁶⁰² view was that the officers were not rejecting “Roma as Roma”,⁶⁰³ but rather as prospective asylum seekers.

The eventual result was therefore broader than initially envisaged. Burton J had noted that success would affect only the mode of operation of the scheme⁶⁰⁴ but, as Baroness Hale emphasised, such a scheme carried an inherently high risk of racial

⁵⁹⁶ [69].

⁵⁹⁷ *Race Relations (Amendment) Act 2000*, s 1 and para 3 of Sch 2.

⁵⁹⁸ [23]-[26].

⁵⁹⁹ [103]-[106].

⁶⁰⁰ [109].

⁶⁰¹ [82].

⁶⁰² [87].

⁶⁰³ [84].

⁶⁰⁴ [38].

discrimination, and would require “enormous care” to be operated without racial discrimination.⁶⁰⁵ The Home Office has not run such operations since.

3.3 The challenge of extraterritoriality

These two cases differed significantly in terms of legal frameworks, judicial reasoning and eventual outcomes. In both cases, however, the principal challenge was effectively displaced and distorted by the legal constellation.

3.3.1 DOING IT ELSEWHERE

The principal challenge of interception schemes is that they enable States “to perpetrate violations [of the law elsewhere] ... which it could not perpetrate on its own territory”⁶⁰⁶ — to do things abroad that they could not do at home.⁶⁰⁷ Here, the normative justifications for legal scrutiny stretch beyond the institutional limits (in the form of the jurisdictional reach) of the domestic legal order.

Like the ouster clauses, these schemes precluded access to domestic systems of appeal and review. The *Tampa* affair also undermined the major legal value of liberty. These schemes also posed a challenge to legal coherence, exposing tensions between domestic and international legal obligations, and revealing the gulf between what States profess to do in treaties, and what they do in practice. It is hardly a morally coherent position to accept that refugees require protection from persecution, but only when they arrive and not a minute before. Finally, as the *Prague Airport* case manifests, these schemes expose the tension between the premise of inequality in immigration law, and the premise of equality in other legal regimes.

These are challenges which cannot ultimately be resolved since they are embedded in the legal structure. Like all empires, law’s empire may aspire to universality but must exist, at least primarily, within territorial limits. We may also aspire to legal coherence, but the diversity of legal regimes, concepts, and histories precludes that. Extraterritorial schemes pose a more subtle and complex challenge than the ouster clauses, one that exposes fissures both in legal constellations and judicial reasoning.

⁶⁰⁵ [97].

⁶⁰⁶ *Issa v Turkey*, 16 November 2004, (2005) 41 EHRR 27, [71].

⁶⁰⁷ Comparisons with the Guantanamo Bay litigation are suggestive: see David Golove, ‘United States: the Bush administration’s “war on terrorism” in the Supreme Court’ (2005) 3 *ICON* 128; Sadat Sayeed, ‘Guantanamo Bay – Five years on’ (2007) 21 *JIANL* 109.

3.3.2 CONFIGURING THE LEGAL CONSTELLATIONS

An obvious effect of the legal constellations was the influence of the deficiencies of its legal regimes, such as the restrictive standing test and the limitations on freedom of speech in the *Tampa* litigation, and in the treatment of the lesser grounds of appeal in *Prague Airport*.

However, their most important effect was to obscure the nature of the challenge. In the *Tampa* case, the question of *non-refoulement* was only glancingly noticed,⁶⁰⁸ and the extra-territorial challenge emerged only in the High Court, since prior to that the refugee claimants were within territorial jurisdiction. However, in the High Court the legal constellation rendered the challenge of extra-territoriality “hypothetical”, and thus invisible. The procedural limits of the prerogative writs meant that the Australian legal system was finally unable to ‘see’ beyond its borders.

Indeed, the *Tampa* judgments are remarkable for their insularity, especially when contrasted to the extensive reference to international law in *Prague Airport*. The *Tampa* judgments focused almost exclusively on domestic law, and emphasised governmental powers rather than individual rights. The legal constellation re-framed the challenge in terms of some of the more arcane questions of constitutional and administrative law: the existence of the royal prerogative, the difference between executive and prerogative power, the different rules of standing for habeas corpus and mandamus, and the distinction between the writ of, and orders in the nature of, habeas corpus.

In stark contrast, the *Prague Airport* case invoked a more plural, rights-oriented framework that focused on the constraints on State power — in the form of international legal obligations and customary international law, including the prohibition of racial discrimination. The principal challenge of extraterritoriality also emerged much more clearly in the refugee law ground in the *Prague Airport* case, although it was ultimately obscured by the conceded extraterritorial application of the *Race Relations Act*.⁶⁰⁹

The second important effect of the legal constellations was the way their configuration structured both the fissures within, and the borders between, the different legal regimes. The different privileging of the immigration law and public

⁶⁰⁸ Beaumont J referred in passing to the fact that Art 33 of the Convention did not require resettlement: [126]. French J considered the question moot because nothing Australia had done amounted to a breach of Art 33: [203].

⁶⁰⁹ Although Burton J suggested a contrary argument was available: *Prague Airport (EWHC)*, n328.

law models in the *Tampa* litigation constructed different borders between the regimes, with the majority constructing a constitutional power that matched the breadth of the foundational norm of immigration law, and the minority constructing immigration law as subject to the constraints of public law. In *Prague Airport*, the premise of equality in anti-discrimination law trumped the premise of inequality in immigration law. While anti-discrimination law demanded that all be treated equally on the merits, immigration law was premised on risk-based differentiation between ethnic groups and nationalities, creating a “wholly inevitable”⁶¹⁰ tension. Simon Brown LJ’s solution was to attempt to fudge the tension by taking somewhat distorted “jurisprudential paths”,⁶¹¹ while the House of Lords and Laws LJ took the jurisprudentially straightforward, albeit politically sensitive, approach of ‘trumping’.

The *non-refoulement* argument, on the other hand, was dealt with by drawing a horizontal boundary between the terms of the Convention and its larger humanitarian purpose,⁶¹² a boundary between text and non-text which mapped both on to the international border and the boundary between judicial legitimacy and illegitimacy. As Lord Bingham said:

[T]he court's task remains one of interpreting the written document to which the contracting states have committed themselves. It must interpret what they have agreed. It has no warrant to give effect to what they might, or in an ideal world would, have agreed.⁶¹³

The ‘vertical’ boundary between the *non-refoulement* obligation and domestic law was more contested. While Simon Brown LJ held that domestic law prevailed since the Convention was not fully incorporated,⁶¹⁴ Lord Steyn considered that the Convention was in practice fully incorporated,⁶¹⁵ although this appears to have been rejected subsequently.⁶¹⁶

Vertical boundaries were also involved in considering whether the obligation of *non-refoulement*, and the prohibition on racial discrimination, had the status of customary international law. These vertical boundaries reflect the tension between internal and external perspectives of sovereignty, since the incorporation of customary international law defers to executive action in its external guise as State action, while the incorporation of treaties defers rather to the legislature.

⁶¹⁰ [66].

⁶¹¹ [87].

⁶¹² See esp [63].

⁶¹³ [18]. See also [58].

⁶¹⁴ [98].

⁶¹⁵ [42]. This appeared to be endorsed: see [7], [50].

⁶¹⁶ *R v Afsaw* [2008] UKHL 31, [29].

Further, while the House of Lords held the extended version of *non-refoulement* had not attained the status of customary international law, the prohibition on racial discrimination was accorded such status, although it is almost certainly less respected in practice. This status was accorded because of the repetition of the norm in human rights treaties, and also because the International Court of Justice ('ICJ') and commentators had pronounced it as such.⁶¹⁷ The reasoning therefore demonstrates the methodological respect of the law for text (in the form of treaties) and vertical hierarchies (in its deference to the ICJ).

3.3.3 JUDICIAL REASONING

The above analysis demonstrates how legal constellations fissure processes of judicial reasoning. Tensions within legal constellations both produce and structure spaces for judicial agency. Judges may seek to reconcile or trump, may weight normative frameworks differently, and may perform vertical or horizontal boundary-work. They may seek congruence between domestic, regional and international legal orders — as the House of Lords did in relation to racial discrimination — or they may emphasise the boundaries between them. They may descend into the subtleties of the differences between writs of habeas corpus, and orders in the nature of habeas corpus; or they may prefer the uncompromising but clear route of anti-discrimination principles.

Judges even, occasionally, seek to re-frame the question, acknowledging the distortions of the legal constellation. For example, Wilcox J in *NAAV* re-framed non-citizens in inclusive terms, noting that these were people potentially “very close to home: the woman our son wishes to marry, the father of our daughter’s child”.⁶¹⁸

Even more striking, however, is the re-framing engaged in by Kirby J in *Ruhani* (No 2). His Honour sought to re-frame the arguments more broadly, arguing that the extraordinary arrangements of the Pacific Solution were simply not contemplated by the Nauruan Act.⁶¹⁹ Further, his Honour sought to take advantage of both the differences and the similarities between the domestic regimes of Nauru and Australia. On the one hand, these differences allowed him to follow the minority decision in *Al-*

⁶¹⁷ [46]. See *In re Barcelona Traction, Light and Power Co Ltd (Belgium v Spain) (second phase)* [1970] ICJ Rep 3, [33]-[34].

⁶¹⁸ [90].

⁶¹⁹ [86]-[89].

Kateb,⁶²⁰ to rely upon Nauru's constitutional guarantee of liberty,⁶²¹ and to invoke the interpretative presumption in favour of coherence with international law, a principle the "extent and application" of which had been disputed in Australia but was well-established "in the Commonwealth of Nations".⁶²² On the other hand, the commonalities evinced the fundamental nature of the protection of liberty in the common law.⁶²³

Of course, judicial agency is not unconstrained. Rather, underlying these different approaches is the desire to defend law's empire, differently interpreted. While North J and Black CJ sought to defend the value of liberty and the accountability of the State, the majority sought to defend State sovereignty; while Simon Brown LJ sought to defend the law from counter-intuitive results, the House of Lords and Laws LJ sought to defend anti-discrimination law from tortuous jurisprudential paths.

These contingent defences map on to an underlying tension between, on the one hand, the defence of the institutional legitimacy of the law — as manifested in deference to the political branches, respect for the contractual agreements of the States, and an acknowledgment of the territorial limits of the law — and, on the other, the defence of the normative legitimacy of the law, as manifested in underlying principles of equality, the rule of law, liberty, and human rights. While these two imperatives are not always in competition, at times — and, in the case of immigration, quite often — their tensions are exposed. Those tensions are resolved not merely through judicial predispositions, but also through the configuration of the particular legal constellation.

4 *Indefinite detention*

The role of judicial agency emerges most clearly in the cases on indefinite detention because of the marked divergence between the two jurisdictions. In the UK, the path of judicial resistance to indefinite detention has been, since the seminal case of *Hardial Singh*,⁶²⁴ onward and upward, culminating in the famous *Belmarsh* case.⁶²⁵ In Australia, judicial resistance has been more fractured, with the Federal Court

⁶²⁰ Discussed below. [88].

⁶²¹ Art 5(4). See [80].

⁶²² [67].

⁶²³ [63]-[80].

⁶²⁴ *R v Governor of Durham Prison ex p Hardial Singh* [1984] 1 WLR 704.

⁶²⁵ *A v SSHD (No 1)* [2004] UKHL 56.

following the *Hardial Singh* path,⁶²⁶ but the High Court overruling this approach in *Al-Kateb*.⁶²⁷ In that case, the High Court concluded indefinite detention was both constitutional and, in the circumstances of that case, mandated by the Act.

This divergence cannot readily be accounted for by the nature of the challenge — that of protecting the value of liberty, and ensuring judicial supervision of deprivations of liberty — since that challenge is both common, direct and fundamental. Indeed, the challenge is more acute because the justification for immigration detention is mere administrative efficiency, and judicial supervision is relatively minimal.

Indefinite detention does, however, expose a tension between immigration law and public law. Immigration law requires enforcement through deportation and thus, practically, requires detention in some cases. Up to a point, therefore, administrative detention is in the interests of the law. However, it is not this tension between administrative efficacy and legal control that accounts for the divergence between the two jurisdictions, but rather judicial agency, as structured by the legal constellation.

4.1 From *Singh* to *A*

The trajectory of British case law is largely one of elevation. In *Hardial Singh*, Woolf J sought to resolve the tension between the administrative imperative and constitutional values by interpreting the statutory power to detain as implicitly restricted to effecting the administrative imperative. Thus, the power of detention had to be exercised for the purpose of effecting removal. As a consequence, the power was limited to a period reasonably necessary to enable deportation; the Secretary must exercise “all reasonable expedition” to ensure removal within a reasonable time; and the Secretary could not continue to detain if it became apparent that removal could not be effected within a reasonable period.⁶²⁸

The six-page judgment is strikingly modest. The principles are simply stated without any exegesis of the legislative text or policy, statements of high constitutional principle, or even invocations of statutory presumptions. However, subsequent cases have elevated and constitutionalised these principles.⁶²⁹

⁶²⁶ *Al Masri v MIMIA* [2002] FCA 1009; *MIMIA v Al Masri* [2003] FCAFC 70.

⁶²⁷ *Al-Kateb v Godwin* [2004] HCA 37.

⁶²⁸ 706.

⁶²⁹ These were also endorsed by the House of Lords in *R v SSHD ex p Saadi, Maged, Osman and Mohammed* [2002] UKHL 41, [26].

Thus, in *Re Wasfi Suleman Mahmud*, Laws J held that powers to detain would be “narrowly and strictly construed” and supervised by the courts “according to high standards”.⁶³⁰ In *Tan Te Lam*,⁶³¹ the Privy Council elevated the phrase “pending removal” to a jurisdictional fact, and emphasised that “very clear”⁶³² words would be needed to exclude or modify the principles. In *R(A)*,⁶³³ the Court forcefully held that it would determine the reasonableness of detention for itself, rather than review the reasonableness of the Secretary’s decision. For Toulson LJ, this was mandated both by the common law libertarian tradition, and by the court’s duty to determine the issue of proportionality for itself under the HRA, re-characterising the *Singh* ‘reasonableness’ test as an exercise in proportionality, and thereby demonstrating the harmony of the common law and the ECHR.⁶³⁴

However, the tension between the administrative imperative and constitutional values surfaces in judicial disagreement over the weighting of factors in the application of the principles. Differently constituted Courts of Appeal have, thus, disagreed about the weight to be given to the factors of a refusal to return voluntarily, and the risks of absconding and re-offending.⁶³⁵

This trajectory of constitutionalisation and convergence reached its apogee in the *Belmarsh* case. There was, however, a significant contextual difference, since *Belmarsh* concerned legislation which authorised potentially indefinite detention of non-citizens suspected of being international terrorists.⁶³⁶ Thus, although the regime depended upon immigration categories, and resulted from the constraint of Art 3 ECHR on immigration policy,⁶³⁷ its objective was not to enforce immigration law but to prevent crime.

The case involved two key issues. On the first, the nine-member⁶³⁸ House of the Lords, with the exception of Lord Hoffmann, held that the government’s derogation from Art 5(1) ECHR, on the basis that the Al-Qaeda threat amounted to an ‘emergency threatening the life of the nation’, was valid. On the second issue, however, eight

⁶³⁰ [1995] Imm AR 311.

⁶³¹ *Tan Te Lam v Superintendent of Tai A Chau Detention Centre* [1997] AC 97.

⁶³² [27].

⁶³³ *R(A) v SSHD* [2007] EWCA Civ 804.

⁶³⁴ [71], [75].

⁶³⁵ Compare *ibid* with *R(I) v SSHD* [2002] EWCA Civ 888, esp [52].

⁶³⁶ *Anti-Terrorism, Crime and Security Act*, Pt 4.

⁶³⁷ *Chahal*, n144.

⁶³⁸ The constitution of a nine-member committee had occurred only one other time since the end of World War II, underlining the constitutional significance of the case: Sangeeta Shah, ‘The UK’s anti-terror legislation and the House of Lords: The first skirmish’ (2005) 5 *HRLR* 403, 406.

Lords, reversing the Court of Appeal, agreed with SIAC below⁶³⁹ that the regime violated Art 5 ECHR in combination with Art 14 ECHR. The House held that distinguishing between suspected terrorists by nationality was not rationally connected to the purpose of protecting national security, and thus disproportionately interfered with non-citizens' right to liberty.

This case therefore exposed an acute tension between the executive's privileged role in the field of national security, and the constitutional role of judges in supervising deprivations of liberty.⁶⁴⁰ This tension was sharpened by the heightened importance of terrorism; the prolonged political process and controversy involved in the development of the regime; and the fact that detention could be justified merely on 'suspicion' of terrorism. The different outcomes in the courts reflected different judicial resolutions of this tension, as well as the tension between the inequality implicit in immigration law and the premise of equality in human rights law (including the common law's commitment to equality in the context of habeas corpus).⁶⁴¹

On the critical question of discrimination, the Court of Appeal, giving due deference to the executive in matters of national security,⁶⁴² had accepted the Secretary's submission that he considered it only necessary to detain non-national suspects.⁶⁴³ Further, it accepted that there "were objective, justifiable and relevant grounds for selecting only the alien terrorists",⁶⁴⁴ namely that aliens had no right of abode.⁶⁴⁵ Thus, the legally justifiable discrimination inherent in immigration law *also* justified the detention of non-nationals. The House of Lords found differently because the legislative object was the control of terrorism, not immigration. Thus, the correct comparison was between suspected terrorists who were nationals, and those were not, and in this context the equality-based model of human rights, including the common law tradition, applied.

⁶³⁹ *A v SSHD* [2002] HRLR 45.

⁶⁴⁰ [81], [192].

⁶⁴¹ *Khawaja*, n35.

⁶⁴² [40].

⁶⁴³ [39], [151].

⁶⁴⁴ [47].

⁶⁴⁵ [47]-[48].

The House's decision was promoted by the HRA in a number of ways. First, the HRA provided an explicit and apt formulation both of the principle of equality and of the constitutional value of liberty.⁶⁴⁶

Second, the ECHR itself re-weighted the balance between national security and liberty. As Lord Brooke noted, it was part of:

a distinct movement away from the doctrine of the inherent power of the state to control the treatment of non-nationals within its borders as it will towards a regime, founded on modern international human rights norms, which is infused by the principle that any measures that are restrictive of liberty, whether they relate to nationals or non-nationals, must be such as are prescribed by law and necessary in a democratic society.⁶⁴⁷

This re-weighting is reflected in the more intense scrutiny of the proportionality standard, and also in the more sceptical attitude of the House of Lords based on "admonitory"⁶⁴⁸ memories of the historical abdication of courts in cases of internment,⁶⁴⁹ and of the absence of weapons of mass destruction in Iraq.⁶⁵⁰

Third, the HRA introduced into the legal constellation the traditions of European and international human rights law, as evidenced by Lord Bingham's litany of references to international instruments.⁶⁵¹ Here the preference for coherence between domestic and other legal orders was marked. The international, regional and comparative perspectives shed light on the adequacy of the domestic order, as evidenced in the weight given to the fact that the UK was the only country to derogate from the ECHR in the wake of September 2001.⁶⁵²

Fourth, the greater plurality of the human rights law regime, evidenced in the citations of the reports of domestic, international, and non-governmental organisations, both de-centres the discursive role of the State, and enables indirect judicial criticism of executive actions. Law becomes therefore more autonomous of the State, and of domestic politics. Normative legitimacy may be sourced not only from the democratic processes of the State, but also from international consensus in the international community.

Fifth, the HRA also re-ordered the internal balance of governmental power, through its conferral of a democratically legitimated mandate upon the judiciary.⁶⁵³

⁶⁴⁶ See, eg, [86], [100], [155], [177], [193].

⁶⁴⁷ [130].

⁶⁴⁸ Thomas Poole, 'Harnessing the power of the past? Lord Hoffmann and the *Belmarsh Detainees* case' (2005) 32 *J Law & Soc'y* 534, 542.

⁶⁴⁹ [41].

⁶⁵⁰ [94], [154].

⁶⁵¹ [23]-[24], [34], [57]-[62].

⁶⁵² [23].

⁶⁵³ [42].

Even Lord Scott, who was uncomfortable with the fact that a declaration of incompatibility amounted to a ‘political’ act, felt that the court’s duty was thrust upon it by the HRA.⁶⁵⁴ Like the High Court in *Plaintiff S157*, therefore, the House of Lords could characterise itself as obedient to its constitutional function.

Sixth, and perhaps most importantly, the HRA’s position in the legal hierarchy allowed it to ‘trump’ domestic legislation, albeit through the political processes of the HRA. Although the content of the HRA was assumed to converge with the common law libertarian tradition, it was superior in re-ordering the legal hierarchy.

The importance of judicial agency becomes most evident, however, in the contrast between the judgments of Lords Bingham and Hoffmann. For Lord Hoffmann, al-Qaeda was not a threat to the ancient, redoubtable British society, in the sense of its existence as a distinct society,⁶⁵⁵ and thus there was no ‘emergency’ validly founding the derogation.

The keynote of Lord Hoffmann’s short speech was a highly strategic, highly rhetorical appeal to the common law libertarian tradition, in preference to the ECHR. Of indefinite detention without trial or charge, his Lordship proclaimed: “Nothing could be more antithetical to the instincts and traditions of the people of the United Kingdom.”⁶⁵⁶ In his view, the interpretation of Art 15 ECHR was a “technical issue”,⁶⁵⁷ and the ECHR itself merely the gift bequeathed by the common law tradition to the oppressed countries of Europe:

Freedom from arbitrary arrest and detention is a quintessentially British liberty, enjoyed by the inhabitants of this country when most of the population of Europe could be thrown into prison at the whim of their rulers. It was incorporated into the European Convention in order to entrench the same liberty in countries which had recently been under Nazi occupation.⁶⁵⁸

As Poole suggests, the insistence upon congruence between human rights and common law involves a “judicial sleight-of-hand”.⁶⁵⁹ The equation between human rights and common law constitutionalism grants Lord Hoffman the advantages of both.⁶⁶⁰ On the one hand, the HRA enables a court’s declaration of incompatibility with “our constitutional traditions”,⁶⁶¹ although those constitutional traditions would

⁶⁵⁴ [145].

⁶⁵⁵ [91].

⁶⁵⁶ [86].

⁶⁵⁷ [88].

⁶⁵⁸ *Ibid.*

⁶⁵⁹ Poole, n648, 538.

⁶⁶⁰ For a critique, see David Dyzenhaus, ‘An unfortunate outburst of Anglo-Saxon parochialism’ (2005) 68 *MLR* 673.

⁶⁶¹ [90].

not have permitted such a declaration. On the other, the invocation of the common law has several benefits. Rhetorically, his Lordship reframes a case about (relatively new) alien rights for (terrorist) aliens as a case about the distinctively British libertarian tradition being threatened by overweening governments:

The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve. It is for Parliament to decide whether to give the terrorists such a victory.⁶⁶²

In a tabloid world where the HRA has become the “terrorists’ charter”,⁶⁶³ this was clearly a strategic attempt to defend the legitimacy of the court’s action.

There are legal benefits too. By insisting on the ‘Britishness’ of liberty, Lord Hoffmann took advantage of the margin of appreciation to hold British laws — and, by implication, those of the common law world — to a higher standard.⁶⁶⁴ Further, his reasoning foreclosed the possibility that the government could simply extend the detention regime to British nationals.⁶⁶⁵ However, the most important benefit was recognising that the key challenge was indefinite detention itself, rather than irrationality or discrimination.

Paradoxically, therefore, this judgment soaked in appeal to nation and tradition — the very instruments of anti-foreigner discourse — was an attempt to defend the rights of foreigners. It was an attempt to redeem the discourse of rights in indigenous terms, and to reclaim the patriotic prerogative from Parliament. Yet it is precisely this parochialism and emotionalism which jars with the legal model of human rights as universal and rational, as opening outwards rather than turning inwards, a model that is expressed so well by Lord Bingham’s judgment.

While the *Belmarsh* case perfectly exemplifies the strategy of trumping in the face of a direct challenge, its aftermath illustrates the ways in which more complex and subtle challenges produce greater judicial divergence and agonising compromises. As is well known, the system of control orders that replaced the detention regime sparked its own voluminous body of litigation,⁶⁶⁶ including three further House of Lords decisions.⁶⁶⁷ The strong affirmation of the values of liberty and equality in the

⁶⁶² [97].

⁶⁶³ ‘Terrorists’ charter’, *Daily Mail*, 19 June 2008, 14.

⁶⁶⁴ [92].

⁶⁶⁵ [97].

⁶⁶⁶ Compare *Thomas v Mowbray* [2007] HCA 33.

⁶⁶⁷ *SSHD v JJ* [2007] UKHL 45 (invalidating some control orders); *SSHD v MB* [2007] UKHL 46 (compatibility of closed evidence with Art 6 ECHR); *SSHD v E* [2007] UKHL 47 (relationship between prosecution and control orders).

Belmarsh case is diluted when it comes to drawing more precise boundaries — such as whether a curfew of 16, as opposed to 18, hours amounts to a deprivation of liberty.⁶⁶⁸ The strategy of ‘trumping’ becomes increasingly less viable as the challenge becomes increasingly less clear.

4.2 From *Al Masri* to *Al-Kateb*

While the original Australian legislation providing for mandatory detention capped the length of detention,⁶⁶⁹ the present legislation does not. Subsection 196(1) of the Act provides instead:

An unlawful non-citizen detained under section 189 must be kept in immigration detention until he or she is:

- (a) removed from Australia under section 198 or 199; or
- (b) deported under section 200; or
- (c) granted a visa.

The question of whether this mandated indefinite detention first arose in *Al Masri*,⁶⁷⁰ when a Palestinian detainee was, despite his request, unable to be removed for eight months. Merkel J granted an order in the nature of habeas corpus, on the basis of the *Hardial Singh* principles, and supported by *Chu Kheng Lim*⁶⁷¹ and the US case of *Zadvydas*.⁶⁷²

Several judges disagreed with Merkel J’s reasoning before the Full Court ruled on the appeal.⁶⁷³ The Full Court found that, while the *Hardial Singh* principles were not directly applicable, the power to detain must be used bona fide for removal, so that it could only be exercised where “there is a real likelihood or prospect of the removal of the person from Australia in the reasonably foreseeable future”.⁶⁷⁴ The Court held that the legislation proceeded upon the false assumption that removal would be possible.

Both *Al Masri* judgments followed an orthodox ‘progressive’ path that cohered with the UK line of authority, relying upon restrictive statutory interpretation, and supplemented by reference to international, comparative and human rights law. This path obviated the more difficult constitutional issues, as I discuss later. However, in 2004, the High Court rejected several legal challenges to the mandatory detention

⁶⁶⁸ See *JJ*, *ibid.*, [105]. As a result, several curfews were increased to 16 hours: JCHR, *Counter-Terrorism Policy and Human Rights: Annual Renewal of Control Orders Legislation* (2008), 14.

⁶⁶⁹ *Then* s 54Q.

⁶⁷⁰ *Al Masri*, n626. *Al Masri* was subsequently deported and killed in 2008: Penelope DeBelle Adelaide, ‘Plea to save family of killed Palestinian deportee’, *The Age*, 5 August 2008, 4.

⁶⁷¹ *Chu Kheng Lim*, n94.

⁶⁷² *Zadvydas v Davis* 533 US 678 (2001).

⁶⁷³ *Al Masri* (FCAFC), n626. See dissenting cases cited at [136].

⁶⁷⁴ *Ibid.* [136].

regime,⁶⁷⁵ including challenges to indefinite detention in the twin cases of *Al-Kateb* and *Al Khafaji*.⁶⁷⁶

The *Al Masri* judgments, and those of the minority in *Al-Kateb*, prove that the path marked out by the UK was available and arguably applicable in Australia. Instead, the difference in outcome is best explained by the use of judicial agency. Rather than defending the constitutional value of liberty and grounding the normative legitimacy of the law in human rights, the majority sought to defend the methodological legitimacy of law, in terms of a positivist vision of textual fidelity and judicial subservience.

The legal constellation promoted this vision. Literally read, s 196 provided only three avenues by which detention could be terminated. This was not open-textured language, conditioned on the power to remove, and the majority gave short shrift to the statutory interpretation issue, holding that the language was simply “too clear” and “intractable”.⁶⁷⁷ That conclusion is contestable, since seven other judges disagreed on the meaning of that ‘clear’ language. For the majority, however, textual fidelity trumped the value of liberty, for the text was ‘there’, visible and concrete, and the value at best vague and interstitial.

This ‘plain meaning’ approach to statutory interpretation also informed the approach taken to the constitutional issue. The main difficulty was the absence of any straightforward textual route for the protection of liberties in the Australian Constitution.⁶⁷⁸ The constitutional argument consisted of linking together a set of propositions. First, the doctrine of separation of powers required that judicial powers only be exercised by the judiciary; second, the power to judge criminal guilt and to detain was a judicial power; third, the power to impose punitive detention thus offended the exclusivity of judicial power; fourth, the Commonwealth’s power to detain was an incident of its executive power to deport; and fifth, if detention was no longer ‘appropriate or adapted’ or ‘reasonably necessary’ to achieve deportation, it became punitive and thus offended the exclusivity of judicial power. Part of this argument had been mapped out earlier in *Chu Kheng Lim*, but its *ratio* was far from clear and it had been subsequently criticised.⁶⁷⁹ What is evident, however, is that the

⁶⁷⁵ See *MIMIA v B* [2004] HCA 20, overruling the decision of the Family Court in *B v MIMIA* [2003] FamCA 451; *Behrooz v Secretary of DIMIA* [2004] HCA 36.

⁶⁷⁶ *Al-Kateb*, n627; *MIMIA v Al Khafaji* [2004] HCA 38.

⁶⁷⁷ [33], [241]. See also [298].

⁶⁷⁸ See, eg, [47] per McHugh J.

⁶⁷⁹ See *Kruger v Commonwealth* (1997) 190 CLR 1, 109-111.

constitutional path was tortuous rather than straightforward, and creative rather than literal. As McHugh J tartly observed, it is difficult to see how the provision of a separate chapter devoted to judicial power may have the result of invalidating indefinite executive detention of non-nationals.⁶⁸⁰

The closed language of the legislation and the glaring absence of rights in the written Constitution thus precluded any straightforward textual route to invalidity. Normatively, too, the outcome was shaped by an Australian constitutional framework that promoted a particular conception of the legal/political boundary, and a positivist methodology.

The virtually exclusive focus of the Australian constitution on governmental power translated the issue of indefinite detention through the prism of the constitutional concepts of legislative power, the doctrine of separation of powers, and the interpretative role of the High Court. The central issue was thus not the law's protection of individual vulnerability from State oppression, but rather the law's role in demarcating governmental power. Coupled with the omission of rights in the Australian Constitution, this placed rights on the wrong side of the boundary between politics and law. Instead, the majority asserted, legal protection of human rights must be achieved the "hard" way, through constitutional amendment.⁶⁸¹

More subtly, the focus of the Constitution on governmental power rather than human rights enabled the majority to imagine the detainee not as a rights-bearer, but as a wrongdoer. It is the detainee's arrival without permission that has triggered the eventual situation.⁶⁸² Detainees frustrate removal because of their blameworthy conduct, such as destroying identity documents and refusing to co-operate.⁶⁸³ As well, detainees take the 'gamble' when they arrive that they will not be admitted.⁶⁸⁴ This is transformed into the language of contract: it is a "term of [their] admission" that such a thing may happen,⁶⁸⁵ and thus their detention is "self-inflicted".⁶⁸⁶

These images grow naturally out of the exclusivist tendencies of Federation, preserved in the broad immigration and aliens power in the Constitution and in the exclusivist doctrines of early judicial precedents. Thus, as Hayne J noted, the power to

⁶⁸⁰ [47].

⁶⁸¹ [73].

⁶⁸² [261].

⁶⁸³ [261], [281].

⁶⁸⁴ [269].

⁶⁸⁵ [289].

⁶⁸⁶ As the government submitted in *Tampa*, n306, [88], [212].

detain was not an ‘incident’ of, but rather at the ‘centre’,⁶⁸⁷ of the constitutional legislative power with respect to aliens, so the formula of ‘appropriate and adapted’ (which determined whether a matter fell within legislative power) was irrelevant.⁶⁸⁸ Further, when Kirby J sought to argue that indefinite detention was “alien to Australia’s constitutional arrangements”,⁶⁸⁹ McHugh J was able to point to a string of authorities permitting internment in wartime.⁶⁹⁰ Similarly, the majority’s argument that detention also served purposes of ‘exclusion’ and ‘segregation’⁶⁹¹ echoes the exclusivist tendencies of earlier case law.⁶⁹²

The Australian Constitution is also a text that promotes an insular and parochial outlook. While the strategy of convergence and coherence was readily available in the issue of statutory interpretation, it was less readily applicable in relation to a ‘unique’ constitutional context.⁶⁹³ Foreign and international law was thus dismissed as not “part of the law of this country”,⁶⁹⁴ and their use in aiding interpretation condemned as a heretical attempt to amend the Constitution.⁶⁹⁵ The exclusivist bias of the Australian Constitution thereby matches well the insularity of the constitutional framework, in which Australia is constructed as a distinct and closed community, rather than as part of a fraternity of civilised nations.

Finally, the written Constitution itself enables the majority’s positivist methodology. It is impossible to be faithful to the text of an unwritten constitution, and thus impossible to construct the judiciary as merely interpretative handmaidens of the über-text. The constitutional text becomes privileged as the ultimate ‘source’ of authority, even for progressive judges, displacing unwritten constitutional norms and traditions.⁶⁹⁶ Judicial legitimacy thus rests upon the faithful interpretation of the text, and judges trespass beyond the parameters of the text at their peril. Thus, the “tragic”⁶⁹⁷ consequences of the decision, along with rights, foreign and international law, were firmly placed in the political, and not the legal, sphere.

⁶⁸⁷ [38]-[41].

⁶⁸⁸ [253].

⁶⁸⁹ [146].

⁶⁹⁰ [55]-[60].

⁶⁹¹ [45]-[46], [255], [289].

⁶⁹² See, eg, *Koon Wing Lau v Calwell* (1949) 80 CLR 533.

⁶⁹³ [51]-[54], [61]-[71], [238]-[240], [296]-[297].

⁶⁹⁴ [73].

⁶⁹⁵ [68] per McHugh J. Cf Kirby J at [191].

⁶⁹⁶ Michael Kirby, ‘Deep lying rights: A constitutional conversation continues’ (2005) 3 *NZJPIL* 195.

⁶⁹⁷ [31].

Al-Kateb reveals the majority's vision of the Australian legal order as an isolated island, remote from the constitutional contexts of the UK and the US. In this simpler legal world, the Constitution is the textual foundation of legal authority; and in this world, judges can imagine — and construct — a “clear” and “intractable” boundary between victim and violator; non-citizen and citizen; text and non-text; between judicial legitimacy and illegitimacy; and between law and politics.

5 *The scope of review*

Finally, I turn to a more recurrent and humdrum challenge of immigration review, the pressures to expand the scope of judicial review generated by a field notorious for maladministration, hostility and opaqueness. This challenge exposes another tension: while the common law origins of judicial review empower judges to shape the grounds of judicial review, there must be constraints on that power to ensure that judges do not become administrators themselves. Those constraints have traditionally comprised an attitude of deference; a distinction between legality and the merits; and the common law methodology of incrementalism by analogy to precedent.

This tension is most readily exposed, therefore, in cases where underlying norms are not covered by existing heads of judicial review. Like the cases on indefinite detention, this manifests a tension between the normative and methodological legitimacy of the law.

In this section, I focus on two landmark cases, *Rashid*⁶⁹⁸ and *Teoh*,⁶⁹⁹ and the subsequent judicial criticism of these cases in *R(S)*⁷⁰⁰ and *Lam*.⁷⁰¹ However, in the UK case of *R(S)* the judges, while criticising *Rashid's* reasoning, applauded its result; while in Australia, the High Court went out of its way to bury the legacy of *Teoh* in *Lam*.

These differing outcomes are, once again, explained by the influence of judicial agency as structured by the legal constellation. The shift to the domain of judicial review reduces constitutional tensions, given the judiciary's virtually sole authorship of law in this 'self-regulated' field. However, the political controversy provoked by *Teoh* undermined this model, endangering the constitutional balance.

⁶⁹⁸ *R (Rashid) v SSHD* [2005] EWCA Civ 744.

⁶⁹⁹ *MIEA v Teoh* (1995) 183 CLR 273.

⁷⁰⁰ N62.

⁷⁰¹ *Re MIMIA ex p Lam* [2003] HCA 6.

This political backlash, along with other examples of the activist Mason era, provoked the Howard government's appointment of judicial conservatives. Thus, while recently judicial review in the UK has become increasingly grounded in broader notions of fairness and the protection of the individual, the Australian High Court has staunchly resisted this trend, a resistance promoted by the disavowal of rights-based discourse which, as we have seen, is considered both foreign and late to the constitutional discourse.

5.1 *Rashid and R(S)*

Rashid vividly exposes the tension between this shift towards broader notions of normative legitimacy and common law incrementalism. When *Rashid*, an Iraqi Kurd, had arrived in the UK, he had been entitled to refugee status under an existing policy. However, dramatically illustrating the inaccessibility of immigration law, no-one involved in his claim or appeal was aware of this policy until an identical case was brought before the Court of Appeal. *Rashid's* advisers sought reconsideration, but shortly afterward, on the outbreak of the Iraqi war, the Home Office suspended processing. *Rashid's* case was not reconsidered until nearly a year later, when the policy no longer applied.

The legal difficulty was that the case fell outside the “typical case of legitimate expectations”.⁷⁰² There was no “promise of asylum”⁷⁰³ — there was no representation, assurance, or departure from a pre-existing policy. At the time of the reconsideration, the policy no longer existed so no legitimate expectation could be generated. This much was recognised by *Rashid's* counsel. He argued that the “court should not be fixated with labels and should take an overall view”,⁷⁰⁴ seeking refuge instead in the general principle of “conspicuous unfairness” amounting to an “abuse of power”, of which the doctrine of legitimate expectations was only an application.⁷⁰⁵

The Court of Appeal accepted that argument, emphasising the “gross nature”⁷⁰⁶ of the errors of the Home Office,⁷⁰⁷ and noting that there was no countervailing public

⁷⁰² [34].

⁷⁰³ [16].

⁷⁰⁴ [18].

⁷⁰⁵ [34].

⁷⁰⁶ [30], [32].

⁷⁰⁷ [13].

interest, excepting that refugee status depended upon future risk.⁷⁰⁸ Instead of remitting the case, the Court declared that Rashid was entitled to ILR.

The legal argument made plain the conflict between methodological legitimacy and the broader normative justification of fairness. Several aspects of the case were unfair, although these went largely unexamined.

First, the person who makes the errors ought to bear the consequences. Second, the errors were peculiarly within the knowledge of the Home Office, especially as the Iraqi Kurd issue had been very prominent at the time.⁷⁰⁹ Third, nearly four years had elapsed by the time Rashid reached the Court of Appeal. Perhaps most significantly, other people in identical situations had been granted refugee status, undermining the principle that like should be treated alike.

However, the case did not fit neatly into any existing head of judicial review, and was not readily susceptible to analogical incrementalism. Counsel's argument simply combined two very broad and vague notions, that of "conspicuous unfairness" and "abuse of power". These notions are conclusory labels rather than methods of reasoning, and their combination neither increases their clarity nor generates a rationale. The court left unarticulated the doctrinal elements that made this unfairness either conspicuous or an abuse of power. As Elliott suggested, the case could therefore be analysed as suggesting that the court had power to intervene because "something has gone badly wrong, even if the court cannot quite put its finger on it"⁷¹⁰ — a power which would radically undermine the claim that judicial review is concerned with the legality, rather than the merits, of administrative action.

The analysis preferred by Elliott, however, is one that characterises the strategy more narrowly, and more traditionally, as that of analogical incrementalism, in which the underlying principle may be used in exceptional circumstances:

to liberalise the application of existing heads of review (thus ensuring the protection of the norms underpinning them) by facilitating intervention in circumstances closely analogous to, but technically outwith, those in which such heads of review would usually operate.⁷¹¹

However, as both Elliott and Clayton have persuasively argued, the unfairness lies not in the grossness of the errors, but rather in the failure to treat like cases alike, and

⁷⁰⁸ [35]. This is known as the *Ravichandran* principle: *Ravichandran*, n174.

⁷⁰⁹ [31].

⁷¹⁰ Mark Elliott, 'Legitimate expectations, consistency and abuse of power: The *Rashid* case' [2005] *JR* 281, [15].

⁷¹¹ *Ibid.*

thus the better conceptual ground may be the principle of consistency.⁷¹² This would, however, require the judges to abandon the methodological orthodoxy of analogical incrementalism, demanding a further degree of boldness. Why should courts be empowered to insist upon consistency (and to what extent)? At least “conspicuous unfairness” and “abuse of power” have the merit of referring to the courts’ legitimating principles. Any such principle would also be in tension with the principle of individualised justice underlying the rule prohibiting the fettering of discretion.

These methodological difficulties were exposed in *R(S)*. In this case, an Afghani was deprived of the benefit of a policy that would have resulted in ELR status because of the government’s prolonged administrative delay. The unfairness was made vivid by the fact that his cousin, who had entered the UK at the same time, had received ELR and subsequently ILR status.

Immigration cases frequently raise problems of administrative delay, in which maladministration (typically considered an issue for the executive) shades into injustice, most acutely in the case of immigration since delay results in great insecurity and disruption. These tensions are dealt with in judicial review by the establishment of a nexus between delay and an accepted ground of judicial review (or under the HRA), including an assessment of the responsibilities for and effects of delay, and in particular their proximity to the border between law and politics.⁷¹³ However, this re-working can distort both the complaint of delay and the doctrine, as *R(S)* illustrates.

In *R(S)*, several factors weighed in favour of protection: the inordinate length of the delay (nearly eight years);⁷¹⁴ the fact that the cause was an “arbitrary” policy to pursue a Public Service Agreement target for timely decisions on new claims, at the expense of older claims;⁷¹⁵ the potential consequences of return to Afghanistan; and the contrast with the cousin.⁷¹⁶ As in *Rashid*, however, there was no legitimate expectation at the time of the later decision, because it was clear by then that the policy had changed.⁷¹⁷

⁷¹² Elliott, n710; R Clayton, ‘Legitimate expectations, policy and the principle of consistency’ (2003) 62 *CLJ* 93.

⁷¹³ Suzanne Lambert and Andrea Lindsay Strugo, ‘Delay as a ground of review’ [2005] *JR* 253.

⁷¹⁴ He entered in September 1999, and the Court of Appeal judgment was handed down in June 2007.

⁷¹⁵ [52].

⁷¹⁶ [17].

⁷¹⁷ [34].

The judges in *R(S)* were candid both about their desire to reach a favourable outcome,⁷¹⁸ and their unease with *Rashid*, which they felt blurred the line between illegality and maladministration.⁷¹⁹ Carnwath LJ rejected its transformation of ‘abuse of power’ into a “magic ingredient” and its “considerable extension of the existing authorities”.⁷²⁰ The Court instead characterised the decision as one in which the decision to put on hold earlier applications amounted to an unlawful fettering of discretion.⁷²¹ The unsatisfactory nature of this solution is illuminated by the fact that Elliott’s reading of *Rashid* as grounded in a principle of consistency is here re-framed as unfairness grounded in the *opposing* principle of individualised justice.

The Court also re-interpreted the unusual remedy in *Rashid* of granting ILR as a decision that it was “plain and obvious” that the exercise of the discretion, in which correction of justice was a legally material factor, could only be exercised by the grant of ILR.⁷²² It is, however, perhaps more natural to infer that the remedy was chosen to relieve the poor claimant of the necessity of dealing with the administration once again.

Rashid and *R(S)* are graphic examples of the tension between normative and methodological concerns in judicial review, manifested in the desire to achieve administrative justice and the limitations of the heads of judicial review. While *R(S)* attempted to reconcile the tension by paying greater attention to the doctrinal concerns, ultimately neither judgment resolved the tension satisfactorily.

5.2 *Teoh and Lam*

A similar tension is evident in the Australian cases of *Teoh* and *Lam*, again in the field of legitimate expectations. However, these cases were further complicated by the interaction of judicial review with international human rights law.

In *Teoh*, the government sought to deport Teoh on the basis of his criminal convictions. Teoh was the sole breadwinner of a large Australian family, and it was acknowledged that the family would face a “very bleak and difficult future” if Teoh were deported.⁷²³ The Full Federal Court, by majority, upheld the argument that there was a want of procedural fairness in the failure to fulfil the legitimate expectation that

⁷¹⁸ [59].

⁷¹⁹ See [41], [54], [71], [74].

⁷²⁰ [39].

⁷²¹ [50].

⁷²² [46].

⁷²³ *Teoh*, n699, 281.

the decision-maker would regard “the best interests of the child” as a primary consideration, as required by Art 3 of CROC, a treaty which Australia had ratified but not incorporated into domestic law.⁷²⁴

In the High Court, the majority (McHugh J dissenting) upheld the judgment, albeit on slightly different grounds. All the judges rejected the finding that the decision-maker was required to initiate inquiries, but the majority agreed a legitimate expectation had been generated which required procedural protection.

Two aspects of the case posed challenges to the law. First, it is desirable in the interests of ‘good administration’ that governments comply with their international legal obligations in exercising their discretionary powers. More fundamentally, the failure to comply with international legal obligations undermines the binding nature of laws, making international law mere “window-dressing”.⁷²⁵ The reasoning of the majority posed a challenge, however, to the methodological legitimacy of the law, because it significantly extended the doctrine of legitimate expectations.

First, the source of the legitimate expectation extended the sphere of the application of the doctrine in three ways: because the audience of the representation was “the world at large”;⁷²⁶ because it could potentially apply to any decision that affected the interests of children;⁷²⁷ and because it could also extend to over 900 other unincorporated treaties.⁷²⁸ Second, an unincorporated treaty could engender legitimate expectations even though neither the affected person nor the decision-maker had actual knowledge of that treaty. This extended the rationale of the doctrine from protecting the actual and induced expectations of people.⁷²⁹ Third, the doctrine was used here not to extend the application of natural justice, or mitigate the effects of the reluctance to permit estoppel in public law, but rather to determine the content of the duty of procedural fairness.⁷³⁰ Fourth, the source of the expectation was a legal norm, rather than conduct or representations.

The majority judgments did not clearly address these doctrinal difficulties. Rather, the principal debate concerned the challenge to the legal status of

⁷²⁴ Black CJ agreed with the outcome but on different grounds. The argument was not raised in the primary decision of the Federal Court.

⁷²⁵ 300.

⁷²⁶ 301.

⁷²⁷ The majority also held that Art 3 should be read liberally as applying to any decision affecting the interests of children, and not necessarily *directly* relating to children.

⁷²⁸ 316.

⁷²⁹ 311.

⁷³⁰ Aronson et al, n412, 395-396.

international law, with Mason CJ and Deane J emphasising that international law was to be given some weight rather than becoming “a merely platitudinous or ineffectual act”.⁷³¹

Gaudron J sought to overcome the objections as to the ‘foreign’ source by indigenising the expectation. She posited that there may be a “common law right” deriving from citizenship to have the child’s best interests taken into account, relegating the Convention to “subsidiary status”.⁷³² Her Honour considered that “quite apart from the Convention” there would have been a reasonable expectation that the best interests of the child would be a primary consideration.⁷³³ Thus, not all unincorporated treaties would be capable of giving rise to such an expectation, but only those “in harmony with community values and expectations”.⁷³⁴

McHugh J, in dissent, took the historic, State-centric, view of international law. In his view, the ratification of a treaty was *not* a representation to the Australian people, but rather “a statement to the international community”.⁷³⁵ This simplistic ‘external’ perspective of international law also fatefully combined with the crudity of the vertical hierarchy: since treaties have formally equal legal status, all treaties are capable of generating legitimate expectations.

Underlying McHugh J’s dissent, however, is an inverse concern with the internal complexity of the State, in the form of the separation of powers. If ratification has the consequence of engendering legitimate expectations, the executive may by ratifying a treaty “effectively amend ... the law”.⁷³⁶ Further, this could have federal complications, for if the doctrine was extended to State officials then the federal executive could bind the States.⁷³⁷

Teoh illustrates not only the doctrinal complexities but also the political sensitivities involved in such judicial extensions. Both the Labor and succeeding Liberal governments issued executive statements intended to reverse its effect,⁷³⁸ and

⁷³¹ 291. See also Toohey J, 301.

⁷³² 304.

⁷³³ *Ibid.*.

⁷³⁴ 305.

⁷³⁵ 316.

⁷³⁶ *Ibid.*.

⁷³⁷ 317.

⁷³⁸ Minister for Foreign Affairs and Attorney-General, ‘Joint Statement’, (10 May 1995); Minister for Foreign Affairs and Attorney-General, ‘Joint Statement’, (25 February 1997).

legislation overturning *Teoh* was passed in South Australia, and proposed federally.⁷³⁹ While *Teoh* has been embraced elsewhere,⁷⁴⁰ it has not attracted universal support.⁷⁴¹

Most significantly, *Teoh* was effectively buried by a more conservative Australian High Court in *Lam*. Lam's case against the government was less compelling than *Teoh*'s. The 'best interests' of his Australian children had been addressed specifically in the decision to deport, and his claim was based instead on a legitimate expectation that his children's carer would be contacted, although the carer had already submitted a letter in support. Lam, therefore, could point to no unfairness, in the sense of a loss of an opportunity to make representations or detrimental reliance, a point upon which the High Court unanimously agreed.

Although reliance upon *Teoh* was expressly disclaimed,⁷⁴² four judges nevertheless severely questioned *Teoh*. They suggested that the doctrine of legitimate expectations served little purpose in Australian law, since it had historically developed as a way of extending the application of natural justice, and had thus lost its purpose since *Kioa* held that natural justice "presumptively applied".⁷⁴³ Their Honours considered that the doctrine should not be used to determine the content of the duty,⁷⁴⁴ and appeared to endorse McHugh J's concerns in *Teoh* about separation of powers.⁷⁴⁵ Callinan J further endorsed the criticism that *Teoh* was not justified by the underlying rationale, namely that of actual or at least reasonably inferred expectations.⁷⁴⁶ Indeed, Callinan J dismissed *Teoh* in most forthright terms, calling the use of legitimate expectations in *Teoh* "a complete misnomer".⁷⁴⁷

Their Honours also expressly rejected the doctrine of substantive legitimate expectations, considering that this had emerged in the UK as a result of an uncomfortable assimilation of European doctrines.⁷⁴⁸ The case thus reflects a widening gap between Australian and British principles of judicial review.

⁷³⁹ *Administrative Decisions (Effect of International Instruments Act) 1995* (SA); *Administrative Decisions (Effect of International Instruments) Bill 1999* (Cth).

⁷⁴⁰ *R v SSHD ex p Ahmed* [1999] Imm AR 22, 36-38; *R v Uxbridge Magistrates Court ex p Adimi* [1999] EWHC Admin 765; *Musaj v SSHD* [2004] ScotCS 119; *Kavanagh v Governor of Mountjoy Prison* [2002] IESC 13.

⁷⁴¹ *Prague Airport (EWCA)*, n588, [100]-[101] per Laws LJ. It was also pointedly not referred to in *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817.

⁷⁴² [84].

⁷⁴³ [121] per Hayne J; [140] per Callinan J. See also *Teoh*, n699, 311.

⁷⁴⁴ [116]-[121] per Hayne J; [102] per McHugh and Gummow JJ.

⁷⁴⁵ [147].

⁷⁴⁶ [144]-[145].

⁷⁴⁷ [140].

⁷⁴⁸ [73].

These four cases illustrate the challenge of forms of administrative unfairness that fall between the gaps of judicial review. Partly, this dilemma results from the common law method of analogical incrementalism, since the piecemeal development of judicial review makes lacunae in the law inevitable. Partly, too, the problem reflects the unsettled nature of the normative foundations of judicial review.

Most importantly, however, the dilemma arises because the legitimating principles of the law are often in tension. Methodological legitimacy may be preserved, but at the expense of securing fairness, or vice versa. In resolving the tensions between these principles, the classic judicial strategy is to fudge.

6 Conclusion

These four landmarks reveal the multiple ways in which immigration exposes tensions between competing interests and visions of the law, inviting competing defences of law's empire. These defences are largely the product of three factors: the nature of the challenge; the legal constellation involved; and judicial agency.

As we have seen, the more direct the challenge, the more coherent the response tends to be. However, challenges are rarely one-sided, more often exposing tensions between legal regimes, within legal regimes, between normative legitimacy and institutional limits, and between normative legitimacy and methodological legitimacy.

Judges may respond to tensions between and within legal regimes, and between normative and methodological legitimacy, by privileging one over another, attempting to reconcile the two, identifying horizontal and vertical boundaries, or simply 'trumping' one legal regime with another. Judges may also be confronted by the institutional limits of their power, and be unable to 'see' beyond its borders, or may be able to extend law's empire beyond those borders.

These judicial responses, however, are structured by the legal constellation, which creates the architecture within which judges navigate. The legal constellation may capture the challenge directly, as in the ouster clause sagas. Or it may distort the dispute, an effect that is particularly obvious in the constitutional configuration in Australia.

However, judicial agency is not only structured by the legal constellation, but structured by the competing interests and visions of law. This is most vividly revealed in *Al-Kateb*, in which the High Court articulates clearly a tension between the vision of law as text, with judges as faithful interpreters, and a 'progressive' vision of law in

which the text is interpreted by judges within a matrix of constitutional values that converge and cohere with an international consensus on liberal democratic principles.

The battle here is over the construction of a defensible boundary between the role of the judiciary and the executive, and more broadly between law and politics. However, that boundary shifts between different legal regimes, mapping on to a series of other boundaries, both specific to regimes (such as the fundamental compromises of refugee law) and more general ones such as the one between text and non-text; between 'hard' legal validity and 'soft' political desirability; and between legitimacy in the form of democratic process (or, in the international sphere, the contractual bargain), and the normative principles of law.

Like most international boundaries, these boundaries are fiction rather than fact, constructed rather than natural, selectively recognised and negotiable. Yet, as with international boundaries, when these boundaries become more tenuous, imprecise or contestable because of increasing legal complexity and normative evolutions, these boundaries are paradoxically insisted upon all the more strongly.

Traced at the micro-level, we can see the interaction of these different elements in the key landmarks of immigration review. What is also revealed is how this judicial management is, in the end, normatively unsatisfactory. Too often, immigration fissures judicial responses, and too often judicial responses fudge competing normative paradigms. Multiple, and normatively incoherent, legal answers are produced, created by normative tensions within and between regimes, and by competing visions of the boundaries of, and justifications for, law's empire.

The story of immigration review, traced at the judicial level, is captured best in the geographical metaphor of empire, in stories of advances and retreats, consolidation and abandonment, and the digging of new trenches behind shifting boundaries. Thinking of the British empire, we might see analogies between the unstable paradox of imperial brotherhood, and imperial superiority; between empire as brute force for the pursuit of commercial interests, and between empire as civilising mission. These competing visions of law's empire leave judges vulnerable to attacks from all sides: open to charges of hypocrisy and bad faith; of political insensitivity, liberalism or conservatism; and of formalist decision-making that ignores the underlying political sensitivities or normative difficulties. This, of course, is true to a certain degree of all judicial resolutions, but is particularly acute in

immigration, partly because of the challenge of coherence, and partly (as is discussed next) because of the challenge of competition.

Chapter 4 — The law imagines

1 Introduction

In this and the next chapter, we turn to the challenge of competition. I argue that a significant, neglected, aspect of the story of immigration review is the impoverished nature of legal language, and the consequent difficulty legal language has in establishing normative authority over competing, more socially powerful, discourses.

Again, while the challenge of competition is not unique to immigration law, it is unusually acute in it for several reasons. As is explored in the next chapter, these include the mobility and multiplicity of the connotations of immigration; the salience of immigration in the construction of individual, group, State and global identities; and the relationship of immigration to two most important sources of anxiety: change and difference.

The contrast between the discursive complexity and richness of the phenomenon of immigration, and the reductiveness of legal language, is thus especially stark. The legal imagination of immigration, just like the judicial management of normative incoherence, ultimately fails to convince.

This chapter employs the key insights of disparate branches of legal scholarship in a textual reading of three primary forms of legal text in the migration field: legislation, the Refugee Convention, and case law. This analysis focuses on the ways in which legal language constructs and frames people, migration, the State and power relations within the community, allowing a comparison with the same elements in the competing social discourses discussed in the following chapter. While this chapter seeks to substantiate the claim that the legal imagination of immigration is impoverished, the next chapter examines how this impoverished language compares and competes badly with other, more powerful, social discourses.

2 *Legal language*

2.1 Legal scholarship

Although legal language appears unproblematic in orthodox legal scholarship, legal language has been subjected to greater scrutiny in several branches of legal scholarship, including linguistic analyses of the law, law and literature, the sociology of law, and law and economics.

Linguistic analyses of the law have drawn attention to legal language as a ‘register’ or genre of language, formed in a specific historical and social context, with its own distinctive features.⁷⁴⁹ In particular, the common law judgment and legislation share distinctive linguistic features.⁷⁵⁰ They are characterised by monologue; by an authoritative tone; by an appearance of autonomy from the political, moral and ethical sphere; and by their translation of the infinite variety of context into the abstractions of relevant classifications, rules, principles, and doctrine.

Law and literature has also focused on the textual nature of the law, by ‘reading’ law using literary techniques, highlighting the rhetorical nature of the judgment, and (more importantly, for present purposes) emphasising the limitations of judicial language.⁷⁵¹ These limitations are especially apparent if we compare it with literature, which constructs denser and more sophisticated understandings of the self and our relations with the outside world. Literature can draw upon a much wider range of our human faculties, most prominently our emotions, aesthetics, and ‘common sense’ or even ‘uncommon sense’ ways of viewing the world. The literary reader is not required to abstract, weigh, eliminate irrelevancies, reason, classify or, ultimately, judge. Rather, the reader is usually invited to empathise, to share in it and understand it from the inside. Literature can live inside the paradox, tension or ambivalence; it need not come to an ultimate result or have tangible effects in the social world.

⁷⁴⁹ See especially Peter Goodrich, *Reading the Law: A Critical Introduction to Legal Method and Techniques* (1986); Peter Goodrich, *Legal Discourse: Studies in Linguistics, Rhetoric and Legal Analysis* (1987).

⁷⁵⁰ This analysis is restricted to legal language in common law jurisdictions. I exclude from consideration here the features of courtroom speech, which exhibits greater variation and, for reasons of space, legal literature.

⁷⁵¹ James Boyd White, ‘The judicial opinion and the poem: Ways of reading, ways of life’ in Lenora Ledwon (ed), *Law and Literature: Text and Theory* (1996) 5; James Boyd White, *The Legal Imagination* (Abridged ed, 1985); Peter Brooks and Paul Gewirtz (eds), *Law’s Stories: Narrative and Rhetoric in the Law* (1996)

The sociology of law has also recently turned to the ‘constitutive’ aspect of legal language. Legal language provides “a way of organizing the world into categories and concepts which, while providing spaces and opportunities, also constrains behaviour and serves to legitimate authority.”⁷⁵² Scholars have examined the communicative aspect of law,⁷⁵³ including prominently through the analysis of ‘legal consciousness’, or the prevailing cultural ideas and beliefs about law. Legal language is envisaged as symbolically central “in the struggle among social groups to develop authoritative definitions of community, of social order and belonging, of appropriate behaviour, and of law itself.”⁷⁵⁴

In particular, the analyses of Cotterrell and Teubner⁷⁵⁵ (drawing on Luhmann’s theory of autopoiesis)⁷⁵⁶ tie together the characteristics of law as a linguistic genre with its sociological function in relation to other fields of knowledge. Cotterrell argues that legal thinking (and, implicitly, language) is distinguished by the appearance of unity and autonomy. Legal language speaks “unilaterally and without consideration of other knowledge fields; by seeing the world from within a self-contained framework of discourse which constructs its own objects of analysis and declares irrelevant, because it cannot even recognize (let alone comprehend), other discourses and their objects.”⁷⁵⁷ This appearance of unity and autonomy is caused by a “discipline effect”,⁷⁵⁸ in which legal language seeks to construct itself as an autonomous discipline, as part of the historically situated struggle for power between academic disciplines.

More radically, Teubner conceives law as normatively ‘closed’, in the sense that law responds only to parts of its environment that it recognises as constituting legal norms. In this sophisticated theory, this selectivity enables the management of legal complexity and the development of legal autonomy. However, law remains ‘cognitively open’, in that it is capable of responding to its environment, such as scientific advances. Legal language, therefore, is limited in the range of inputs it

⁷⁵² Bryant G Garth and Austin Sarat, ‘Studying how law matters: An introduction’ in Bryant G Garth and Austin Sarat (eds), *How Does Law Matter?* (1998) 1, 2.

⁷⁵³ See David Nelken (ed), *Law as Communication* (1996).

⁷⁵⁴ David M Engel, ‘How does law matter in the constitution of legal consciousness?’ in Bryant G Garth and Austin Sarat (eds), *How Does Law Matter?* (1998) 109, 138.

⁷⁵⁵ See eg Gunther Teubner, *Autopoietic Law: A New Approach to Law and Society* (1987); Gunther Teubner and Zenon Bankowski, *Law as an Autopoietic System* (1993).

⁷⁵⁶ Niklas Luhmann et al, *Law as a Social System* (2004). See also John Paterson, ‘Reflecting on reflexive law’ in Michael King and Chris Thornhill (eds), *Luhmann on Law and Politics: Critical Appraisals and Applications* (2006) 13.

⁷⁵⁷ Roger Cotterrell, *Law’s Community: Legal Theory in Sociological Perspective* (1995), 51.

⁷⁵⁸ *Ibid.*, 57-58.

recognises as 'legal'. Its impoverished nature is caused by a filtering process that enables law to manage the irreducible complexity of life, and to gain its own autonomy.

Lastly, another (somewhat unlikely) branch of scholarship, that of law and economics, has stimulated research into the 'expressive function' of the law.⁷⁵⁹ Turning away from the traditional emphasis of law and economics on sanctions, expressive theorists focus on the way the law's expression of values may affect attitudes, norms and social meanings, and the way the law recognises 'expressive' harms, such as discrimination.

2.2 Insights

Increasing focus on legal language has thus come from different directions, with different emphases and concerns. It is not my purpose here to evaluate or engage theoretically with these diverse and difficult topics. Instead, I draw upon some of the key insights as a foundation for what is, ultimately, a straightforward argument about the limitations of legal language.

The first insight is that language is central to the work of the law. Legal texts *speak*, as well as act. Language and power are at the core of the law; the normative and coercive aspects of law work together to produce its authority.⁷⁶⁰ These approaches remind us that language is not a transparent or neutral medium; instead, the way we speak constrains the way we think, and constrains how we act.

However, law cannot be treated simply as a text. Rather, legal texts are both 'constitutive', in the sense that it creates actors, relations, rules, and mechanisms, or changes relationships between them; *and* communicative, in the sense that they communicate the concerns, values, and views of the political or legal community (or, more accurately, various segments of it). The communication is not, however, straightforward — it may be ambivalent, incoherent, and unconscious. Nor does it emanate in a straightforward way from a 'community', however defined. Rather, the legislation is shaped and mediated by institutions, cultures, and processes.

⁷⁵⁹ Matthew D Adler, 'Expressive theories of law: A skeptical overview' (2000) 148 *U PaLRev* 1363; Elizabeth S Anderson and Richard H Pildes, 'Expressive theories of law: A general restatement' (2000) 148 *U PaLRev* 1503; Lawrence Lessig, 'The regulation of social meaning' (1995) 62 *U ChiLRev* 943.

⁷⁶⁰ Cf Boaventura de Sousa Santos, *Toward a New Legal Common Sense* (2002).

The second point is that legal language is distinctive. This distinctiveness serves particular purposes and has particular effects. The unity and autonomy of law, and the claim to authority implicit in its style, are designed to legitimate the law.

The third point is that one of the distinctive features of legal language is its selectivity. Often, what is noteworthy in a judgment or in legislation is what is left out. Complex relations are simplified, contextual features of cases are eliminated, matters of degree are converted into binary judgments. This simplification ultimately derives from the structural logic of the law. The purpose of legislation is to classify and apply general rules to individuals; the purpose of cases is to enable judgments and resolve disputes. Therefore, the complex reality of the world must be flattened out in order to attain clear or binary results.

There are three prominent ways in which legal language achieves this selectivity. The first is the application of the test for 'relevance'. This may raise problems at different levels. As the previous chapter demonstrated, the legal framework determines what facts are or are not relevant, and it may be deficient in its identification of such facts. For example, the roots a migrant has established in a community may be irrelevant in an immigration law framework, but highly relevant in a human rights framework. Judges may also frame the question of relevance narrowly or widely. In *Al-Kateb*, as discussed in the previous chapter, McHugh J considered the possibility of indefinite detention irrelevant to the question of statutory interpretation, whereas Gleeson CJ thought the issue central.

Legal language also achieves its selectivity through its simplification of power relations. An immigrant is subject to the sovereign power of the State; the judiciary must defer to the democratically legitimated policies of the government; the State's obligations to the international community can be defined (in relation to treaties) by its consent in express language. Further, the coercive power of law is generally effaced in the language of the law: the law is portrayed not as might, but as right. Judges typically present their reasoning as ineluctable, the outcome of unassailable logic, and therefore render invisible the manifold choices that are available.

A particularly important mode of simplification is the way legal language abstracts and universalises. Individuals are abstracted from their rich individual context, and generalised: people become 'non-citizens' and 'aliens', attached to a small set of relevant legal attributes. The phenomenon of migration is shrunk to the

fact of crossing a legal border; a community is homogenised into an undifferentiated nation.

Finally, legal language achieves its selectivity through the hierarchy of sources of authority. Above all else, legal language privileges the text; and it privileges them in accordance not with their content, but with the authoritativeness of their form. As chapter 2 stressed, this privileging of authority and the text constructs and reinforces certain power relations, with different creators of the law empowered in different legal regimes.

2.3 The structure of the argument

These preliminary comments set the foundation stone for the argument to follow. In essence, the critique is that the language of law is too simplistic to capture the complexity of the situations that give rise to immigration review; and that this failure to capture complexity undermines the claim of law to normative authority, when set in the context of the competition between social discourses. The law is legitimated by the perception that it acts fairly, is right, and accords with ideas of justice. When the language of the law is unable to capture important dimensions of a dispute that affect people's perceptions of fairness and justice, its normative power is weakened.

In order to make good this argument, it is necessary first to detail the discursive features of law. Given the limitations of space, I will proceed by way of example and generalisation, analysing immigration legislation, the Convention, and selected judgments.

The approach I take merely extends a common technique in standard legal literature: that of examining a way a legal text is constructed upon particular assumptions, and itself constructs the objects within the legal text and the relations within them. What are the premises of the legal text? What assumptions does it make about people, norms, and concepts? How does it conceive of relations between them? This kind of approach takes seriously the claim that law 'expresses' (in various complicated ways) our society; a claim quite commonly made especially in relation to immigration law, as elaborated by Dauvergne.⁷⁶¹ The technique is in essence that performed by most literary analyses, and thus requires no theoretical expertise.

⁷⁶¹ Catherine Dauvergne, *Humanitarianism, Identity, and Nation: Migration Laws of Australia and Canada* (2005).

3 *Legislation*

3.1 The shape of legislation

In this section, I focus only upon legislation as a text, ignoring for the moment the way the legislation may work in practice. The text of legislation, regardless of its legal validity or practical utility, remains important as an expression and communication.

Of all legal texts, legislation is the most discursively constrained. Authorship is collective, and signs of individuality are deliberately erased in favour of an endorsed drafting style. Drafting styles, of course, have changed over time, as is evident in the much amended immigration legislation of both jurisdictions. In the early stages, immigration legislation tended to set broader rules, rely heavily on prescriptions and the criminal law, and submerge the expression of values and attitudes into a deliberately mechanical and objective language. The legislation has tended to become more specific over time, and the modalities of regulation much more complex, while the language has become less neutral, with emotive language and declarations of values becoming more prevalent. Yet there is no doubt that, notwithstanding movements to plain English, legislation is predominantly dull and difficult.

This partly results from the fact that the style is directed towards producing legal certainty, through the creation of (to the extent linguistically possible) a clear and singular legal meaning.⁷⁶² The drafting style is designed to create a text that is “logical and reasonable, impersonal and impartial”.⁷⁶³ As a result, the language tends to complexity and over-precision.⁷⁶⁴

Legislation also enjoys unique authority since, provided it is properly enacted and within constitutional limits, it has the unchallenged force of law. In contrast, what counts as ‘law’ in case law depends on the determination of its *ratio*, its conflict with other authority, and other indicators of its authority. The unique authority of legislation also derives from its legitimation by the democratically elected legislature; and thus it claims to represent, or express, the views of Parliament, and through Parliament, the people — although that claim is, of course, made problematic by the workings of the political process. Thus a citizen, although having no personal

⁷⁶² Goodrich, *Reading the Law*, n749, 100.

⁷⁶³ *Ibid.*, 122.

⁷⁶⁴ *Ibid.*, 52.

involvement in the matter, can claim to be ‘ashamed’ of the passing of an Act, and be understood.

Nevertheless, the primary function of immigration legislation is instrumental: it seeks, inter alia, to create, regulate, and empower; and to prohibit, invalidate, and constrain. Its discursive power is rarely directly utilised; indeed, the drafting style seeks to make its discursive power ‘invisible’. The image of the law therefore created is one of unquestioned authority and power: the State *says* it should be so, and it is. The authority relied upon is that of the State, and only to a lesser extent that of language.

Lastly, legislation has multiple audiences. In a very general sense, its audience is the community: thus, for example, immigration legislation is often proposed as a way of being ‘seen’ to be taking political action. In a fairly general sense, too, its audience is those that it proposes to regulate: for the most part, this audience is barely aware of the detail, although this naturally varies with the audience. In a much more specific sense, it also has three quite important but disparate audiences: the bureaucracy, the legal profession, and the judiciary. Again, the bureaucracy’s reception of the law will vary depending on context, but bureaucrats generally rely upon administrative guidance rather than on the text of the legislation itself. Much of the detail of the law, therefore, is directed towards the legal profession and the judiciary, and thus encoded in legal language for the purposes of decoding by specialised readers. The purpose of this is to constrain the possible readings of the text — to corral the infinite ambiguities of language.

3.2 The Migration Act 1958(Cth)

The Australian Act is, as I have already noted, enormous, complex and frequently amended. Distinctive changes in the style of language, and the mode of regulation, are discernible through the amending history.

We can usefully compare this behemoth with the first ‘immigration’ legislation in Australia, the *Chinese Exclusion Act 1855* (Vic). This consisted of fourteen provisions, prescribing a landing fee for Chinese immigrants and a Chinese immigrant tax, with attached criminal sanctions. We should note four points: the brevity of the provisions; the transformation of the racist policy into a mechanical one, such that the Act purported to concern ‘immigration’ but defined ‘immigrants’ solely as Chinese; the open identification of the persons to be regulated by way of race; and the simple modes of regulation — a financial penalty enforced by the criminal law, and a tax.

The legislation thus constructs 'the person' solely in terms of race; immigration as the arrival of persons on to the territory; and the 'community' as non-Chinese. The legislation also constructs the interrelations between the various manifestations of State (the Governor, the Legislative Council, the Collector or Customs Officer), the masters of the ships, and the immigrant as one of hierarchical command. Finally, the Supreme Court is excluded from exercising its jurisdiction to issue certiorari and "or any other writ or process whatsoever".⁷⁶⁵ This is a top-down society, in which the judiciary is expressly excluded.

3.2.1 PERSONS

In contrast, the current Act presents a much more complex picture. The persons who are subject to regulation are identified, principally, by two binary legal classifications: 1) citizen and non-citizen; and 2) 'lawful non-citizen' (one holding a visa in effect) and 'unlawful non-citizen'.⁷⁶⁶

This fundamental structure is muddled by a range of intermediate categories, most prominently that of 'denizens'.⁷⁶⁷ More recently, specific classes of 'undesirables', with quite strange names, have also been created. Examples include the 'behaviour concern non-citizen' (those convicted of certain crimes); a 'health concern non-citizen' (a person suffering from prescribed disease, mental or physical condition); and an 'offshore entry person' (a person entering Australian territory that has been excised for the purpose of migration).⁷⁶⁸ The criteria for these categories are based on empirically verifiable facts or upon anterior legal definitions. For example, whether a person is a 'transitory person' depends upon whether they are either an 'offshore entry' person; or a person taken outside Australia upon a specified legal base; or, most interestingly, a non-citizen during "the period 27 August 2001 to 6 October 2001", transferred to a named ship from the *Tampa* or the *Aceng*; and then taken by the named ship and disembarked in another country. Thus the controversial events of the *Tampa* are rendered into the language of legislation: the identities of the *Tampa* refugee claimants are reduced to the mundane questions of time, presence on certain named ships, and movement therefrom.

⁷⁶⁵ S 11.

⁷⁶⁶ Ss 13, 14.

⁷⁶⁷ See chapter 2, part 2. The Act also privileges certain New Zealand citizens (defined in s 5).

⁷⁶⁸ See s 5.

The person is also constructed by visa criteria. For example, the criteria for a ‘visiting academic’⁷⁶⁹ include the place of application; current visas; his or her academic status; evidence of an ‘invitation’ by a specified kind of institution; the purpose of the visit; financial conditions; and the validity of passport.⁷⁷⁰ In addition, other general elements are prescribed: character (assessed in various ways); financial obligations to the Commonwealth; health; ability to become established without ‘undue difficulty’, if the person remains for 12 months; previous visa history; and the legal status of an accompanying child.

The person constructed here is much more multi-dimensional, but these dimensions are disaggregated into minutely specified elements. In place of ‘race’ as the identifying attribute, we have a series of carefully calibrated ‘conditions’ that may, in general, be satisfied by empirical evidence rather than subjective appraisal.

Clearly, the criteria are based on the idea of ‘national interest’: that the purpose of stay is of benefit to Australia, serving the interests of Australians (such as tertiary institutions); that the person does not impose undue burdens; and that the person is likely to obey the visa terms. Thus, the person is assessed in terms of their relationship to Australia by the gold standard of a ‘perfect’ migrant as one who adds to Australia, without taking anything away.

Even the more open-textured refugee definition is transformed. Section 36 of the Act requires that “the Minister is satisfied that Australia has protection obligations” to the person under the Convention,⁷⁷¹ omitting entirely the focus on protection and persecution at the heart of the refugee definition. Again, it is their relationship to Australia, as determined by the Minister, which is key; the State, and the text of a treaty, subsume the person involved.

More emotive language comes into play with refugee claimants. In Subdivision AI-AK, it is declared that these subdivisions have been enacted because “Parliament considers that certain non-citizens ... should not be allowed to apply for protection visa or, in some cases, any other visa.”⁷⁷² Here, an implicit moral claim is made: that these people do not deserve protection or even access to the visa system. Nor are they to be trusted: s 91V provides various ways in which adverse credibility inferences may be drawn.

⁷⁶⁹ Subclass 419.

⁷⁷⁰ Certain elements relevant to particular subclasses are omitted.

⁷⁷¹ Or is a family member thereof.

⁷⁷² See, eg, s 91A.

Most remarkable is the complete absence of race from the legislation, in stark contrast to the *Chinese Exclusion Act*. In fact, the person here is genderless, nationless, ageless (almost), and, if homosexual, sexless. (The class of visa providing for homosexual partners labels them ‘interdependent’.)⁷⁷³ All of these elements of identity are eliminated in the text of the legislation, if not in its application. So, for example, the recognition of overseas qualifications, English language proficiency, and the ‘risk factors’ invoked for certain categories of applicants do the work of filtering through ‘neutral’ mechanisms: continuing the tradition begun by the infamous dictation test in the *1901 Act*.

Other actors are identified solely by their formal status as ‘officer’, ‘Minister’, or tribunal ‘member’. They exist in relation only to their relation to the State, a relationship composed largely of powers and duties. However, the simple faith in bureaucracy in the *Chinese Exclusion Act* has been transformed, in stages. Parts 3-8C, which establish the immigration review regime, constructs official actors as subject to oversight and the discipline of the law. The suspicion that underlay the exclusion of the Supreme Court’s jurisdiction in the *Chinese Exclusion Act*, however, resurfaced in the addition of Part 8 and the ouster clause. The repeated formula that a section is an ‘exhaustive statement of the natural justice rule’,⁷⁷⁴ strict non-extendable time limits, and provisions directing courts on the interpretation of ‘particular social group’⁷⁷⁵ are other examples of this mistrust.

3.2.2 MIGRATION

The first, often overlooked, point about the construction of migration is that while the title refers to migration, its sole focus is *immigration*.⁷⁷⁶ People appear to come from ‘nowhere’, voluntarily. As already discussed, there is no mention of nationality, and the reference to persecution in the refugee definition is rendered invisible. This image is in stark contrast to that evoked by policy documents, in which Australia constructs itself as actively seeking migrants to contribute to its community, setting huge numerical targets, and collating world-leading amounts of information as to the characteristics of its intake.

⁷⁷³ Subclass 110.

⁷⁷⁴ See, eg, s 51A.

⁷⁷⁵ S 91S.

⁷⁷⁶ Cf the original Pt III of the Act, repealing the *Emigration Act 1910* (Cth).

Second, migration is defined as “the arrival and presence of non-citizens”,⁷⁷⁷ namely confined to the activity of border crossing. This both extends beyond the popular understanding of migration as involving permanent arrival; and excludes the broader migration process such as integration, the limited reference there was having been repealed.⁷⁷⁸ Nor is immigration expressly connected to citizenship, both appearing as self-contained Acts with no relation to each other.

Nor is migration conceived of as primarily a group activity, since applications are dealt with individually, or at the family level. There are notable exceptions: the exclusion of the Sino-Vietnamese under the ‘safe third country’ provision;⁷⁷⁹ and the grant of ‘temporary safe haven’ to groups such as the East Timorese and Kosovars.⁷⁸⁰

Migration streams appear relatively undifferentiated in the Act itself. It is only in the Schedules that one might discern that there are different streams of migration, but even then this is obscured by the specificity of the criteria. Moreover, streams are differentiated solely by the sanctioned *purpose* of entry, effacing the causes of emigration, the nationalities of group movements, the historical or communal ties to Australia, and the incentives for coming.

Third, the purpose of immigration itself is never enunciated. Section 4 states that the “object of the Act is to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens.” The three following paragraphs state that the Act provides for visas, requires person to identify themselves, and provides for removal or deportation “to advance its object.” The object of the Act, therefore, is the control of immigration; immigration itself serves some numinous purpose in the ‘national interest’, an all-encompassing and almost meaningless reference. However, the implicit formula of national interest has already been noted: ‘Australia gains, and doesn’t lose anything’. The national interest is also discernible amid the morass of visa conditions: the interests of family reunion, economic productivity in relation to businesspeople, investors, the highly skilled and those in under-populated areas, and (most dimly) as providers of compassionate refuge. The absence of any statement of principle was criticised in the 1980s, but never remedied.⁷⁸¹ However, s 4 is more

⁷⁷⁷ Heading to Part 2.

⁷⁷⁸ Original s 58, providing for immigrant centres.

⁷⁷⁹ Div 3A, Subdivision A1.

⁷⁸⁰ S 37A. Cf the more group-based approach under the Migration Regulations 1959, as amended in 1989, esp regs 22A-22B, 107, 107A, 119D-119G, 142A.

⁷⁸¹ HRC, n31, 5-6.

revealing in its present form: as commentators have noted, it is *control* itself that is the obsession of the government.⁷⁸²

Indeed, the legislation *assumes* perfect control is possible, mostly through tight management and rigid application of rules. The never-ending list of subclasses of visas in Schedule 2 implies that the phenomenon of migration can be minutely differentiated. The proliferation of visa conditions assumes an ongoing and detailed management of entry and presence. The universal visa system is premised on, and desirous of, complete control, while the points mechanism allows Australia to achieve substantially its numerical annual ‘targets’ for migrants.

Although the basic structure is one of mind-boggling prescription, there are ‘pockets’ of Ministerial discretion, most prominently the powers of ministerial intervention.⁷⁸³ On the one hand, the minutely detailed legislative prescription evinces a belief in the value of confining official discretion through law; on the other, the legislation also testifies to the need for unconfined political discretion.

More recent legislation evinces a belief in ongoing regimes of regulation as an alternative. The shift to a self-regulatory system for migration agents; the strengthening of the sponsorship system; the ‘supervisory’ system in relation to fingerprinting; and the creation of a ‘cancel-now-question-later’ approach to student visas are examples.⁷⁸⁴

Finally, the legislation renders invisible particularly problematic types of migration through the ‘invalidating clauses’ discussed in chapter 1.⁷⁸⁵ These people become phantoms in the system of information-gathering, ghosts in the legislation.

3.2.3 COMMUNITY

The image of the community in the Act is dim. To the extent that the community figures, it is largely to be protected from undesirable migrants. For example, the word “community” arises in the power to exclude people who might (inter alia) represent a danger to the Australian community.⁷⁸⁶

The legislation emphasises instead the institutions of the State. For example, s 7A provides:

⁷⁸² Kathryn Cronin, ‘A culture of control: An overview of immigration policy-making’ in James Jupp and Marie Kabala (eds), *The Politics of Australian Immigration* (1993) 83.

⁷⁸³ See n49.

⁷⁸⁴ Parts 2, Subdivision AG, 3, 3A, 4A.

⁷⁸⁵ See n220.

⁷⁸⁶ S 500A.

The existence of statutory powers under this Act does not prevent the exercise of any executive power of the Commonwealth to protect Australia's borders, including, where necessary, by ejecting persons who have crossed those borders.

Here, it is the Commonwealth, and specifically the *executive*, which are identified; and it is the borders of the State rather than the community that are to be protected. The State is simply equated with the community.

One might compare this to the proclamation of Canadian identity in s 3 of their Act.⁷⁸⁷ This proclaims Canada's "federal, bilingual and multicultural character", its aspirations to a "strong and prosperous ... economy, in which the benefits of immigration are shared across all regions of Canada"; its aim to facilitate "trade, commerce, tourism, international understanding and cultural, educational and scientific activities"; and its desire to promote "international justice ... by fostering respect for human rights". In respect of refugees, Canada recognises that the "refugee program is in the first instance about saving lives and offering protection to the displaced and persecuted"; aims to "fulfil Canada's international legal obligations ... and affirm Canada's commitment to international efforts to provide assistance to those in need of resettlement", to grant "fair consideration" to those claiming persecution "as a fundamental expression of Canada's humanitarian ideals" and uphold Canada's "respect for the human rights and fundamental freedoms of all human beings". This is, despite its tensions,⁷⁸⁸ a much more articulate and positive construction of the Canadian community.

Cotterrell, in an illuminating analysis, contrasts the American image of society as a "morally cohesive association of politically autonomous people", which he calls community, with the English "image of individual subjects of superior political authority", which he calls imperium.⁷⁸⁹ Neither of these seems to pertain here: the relationship is not between the community and strangers, but the State and non-citizens; and to the extent that a community is envisaged, it is a dimly perceived, numinous entity that is equated with, or protected by, the State.

3.2.4 INTERRELATIONS

Many features of the model of relations in the *Chinese Exclusion Act* remain: the migrant or refugee is still entirely an object, and is indeed subject to scrutiny on more levels than ever before. Ultimate power still resides in the State, from which power

⁷⁸⁷ *Immigration and Refugee Protection Act 2001* (Canada).

⁷⁸⁸ Dauvergne, *Humanitarianism*, n761, 14-15.

⁷⁸⁹ Cotterrell, n757, ch 11.

flows downward. The judiciary is still conceived of as an unruly beast, as are the tribunals through the elaborate codification of procedures.

Power flows primarily to officers, but those powers have massively increased. Officers are given powers to fingerprint, chase and board vessels, and detain people and property.⁷⁹⁰ However, regimes of accountability (most prominently, immigration review itself) circumscribe their power.

Increasingly, as already described, secondary actors are co-opted into the regime of immigration controls, extending State power insidiously. Least visible, but most remarkable, is the extension of regulation outside of law, as discussed in chapter 1.

3.3 The UK legislation

The UK's failure to consolidate its legislation means its legislation bears its historical marks more clearly. Much of the detail in the Australian Act is, in UK legislation, left to Schedules and Statutory Instruments. The lack of consolidation also imbues the legislation with an air of chaos, exacerbated by the cross-cutting nature of much of the legislation.

The *1971 Act* stands as a model of clarity in comparison to the later Acts. It presented itself as a largely mechanical, and comprehensive, set of rules creating a new regime. The *1988 Act* was a miscellany, but defined the community negatively, in the form of excluding polygamous wives;⁷⁹¹ and, in a muted fashion, indicated the shifting alignment of the State in its provision for EEA freedom of movement.⁷⁹² The *1993 Act* and its successors have been more explicitly normative, albeit in a cross-cutting way, so that (for example) the primacy of the Refugee Convention is wedded to a concept of the 'unfounded' application;⁷⁹³ and the introduction of human rights appeals comes with a barely concealed attack on fraudulent claimants.⁷⁹⁴

3.3.1 PERSONS

A key difference in the UK legislation is that it expresses a much more complex formula of belonging, reflecting the categories of nationality and regional and imperial arrangements. Further, the categories of ILR and settlement mark

⁷⁹⁰ Divs 7, 12A, 13, 13AA of the Australian Act; *2007 Act*, ss 5-15, 24-25; *2002 Act*, *1999 Act*, Pts VII-VIII.

⁷⁹¹ S 2.

⁷⁹² S 7.

⁷⁹³ *1993 Act*, s 2, Sch 2, it 5.

⁷⁹⁴ *1999 Act*, ss 65, 112, Sch 4, 9.

intermediate points of belonging. Nor is the person who does not belong marked out as such: instead of being a 'non-citizen', the British phrase is the person 'subject to immigration control'.⁷⁹⁵ The prominence of territory and blood in the categories of British nationality and in the former category of 'patrials' and the existence of ancestry visas⁷⁹⁶ means that belonging is also a matter of place, blood, and residence.

With this more fluid conception of belonging, however, is a more limited vision of the potential of the migrant. Whereas Australia grants permanent residence visas from the outset, the British legislation generally conditions longer-term residence upon prior residence; and in so doing marks all persons as 'transitory', visitors rather than members of the community.

Unlike in Australia, there are rival conceptions of the person. The incorporation of human rights imports the conception of a person as a rights-holder, and the State as owing obligations such as financial support and accommodation.⁷⁹⁷ This at times jars with the earlier conception, as in Australia, of these persons as mere objects of regulation, although this conception has also been reinforced in the UK with the massive extension of powers.

In contrast to Australia, the person is not divested of nationality, gender, sexuality, or race. Nationality is crucial to the immigration hierarchy, with EEA nationals and Commonwealth citizens at the top. The nationality of refugee claimants is also important for the purposes of the White List and the visa list. The ban on polygamous wives remains. Race is still evident in the general prohibition on racial discrimination.

The Rules differentiate between persons on the basis of purpose, as with the Australian Regulations. The list of categories, while substantial and at times very specific, is not nearly as long or as prescriptive as in Australia. The language is much more accessible, less bureaucratic, and more subjective than in the Australian equivalent, although it is moving towards the objectivity of the Australian model, most obviously in its focus on 'points'. The construction of persons is therefore quite different than in the Australian version: the person is not disaggregated into various dimensions and subjected to binary and objective tests, but rather sorted into administrative categories, allowing room for broader assessments.

⁷⁹⁵ 1971 Act, s 1(2).

⁷⁹⁶ In 2008, the continued existence of this category was confirmed despite earlier proposals to abolish them: 'Ancestry visas for UK to stay', *Weekend Australian*, 19 July 2008, 10.

⁷⁹⁷ 1999 Act, Pt VI; 2002 Act, Pt 3; 2004 Act, ss 9-13.

Another important difference is that the close connection with the ‘national interest’ in the Australian legislation is much less evident. Clearly, grounds mandating or permitting exclusion are motivated by national interest, as is the introduction of independently skilled migration. However, many of the Rules, particularly the older parts, evince no such connection.

Despite this generally more inclusive picture, more recent legislation constructs the refugee claimant negatively, with the use of pejorative labels such as ‘failed asylum-seeker’⁷⁹⁸ and ‘unfounded claims’.⁷⁹⁹ New offences of failing to have an identity document at a leave or asylum interview,⁸⁰⁰ provisions requiring adverse credibility inferences⁸⁰¹ and electronic monitoring,⁸⁰² and a new regime for ‘suspicious marriages’ all construct migrants as untrustworthy.⁸⁰³ As well, the increasingly Byzantine structure of appeal rights indicates the creation of new hierarchies.

As in the Australian legislation, the British legislation identifies other actors by their formal status. The lack of elaborate codes of procedure paints a picture of somewhat greater confidence in bureaucrats. However, the merging of the two tiers of the IAT, and the move towards monitors and advisory groups, betray a similar suspicion of immigration review, although it is much less discernible in the text.

3.3.2 MIGRATION

The UK legislation, like the Australian equivalent, imagines migration primarily as an activity of individualised border-crossing. However, more recent legislation evidence a vision of migration as a longer-term process, through the provisions for refugee ‘integration loans’,⁸⁰⁴ accommodation and asylum support,⁸⁰⁵ and the direct linkage with citizenship and the emphasis on knowledge of the ‘life in the UK’.⁸⁰⁶ This has its darker side, such as in the linkage between the legislation and the *Race Relations Act*; namely, that the problem with migration is one of race relations, and a lack of ‘integration’ on the part of migrants.

⁷⁹⁸ 2004 Act, ss 9-10.

⁷⁹⁹ Ibid., s 27.

⁸⁰⁰ Ibid., s 2.

⁸⁰¹ Ibid., s 8.

⁸⁰² Ibid., s 36.

⁸⁰³ 1999 Act, s 24.

⁸⁰⁴ 2004 Act, s 13.

⁸⁰⁵ See n 797.

⁸⁰⁶ See n370.

More recent legislation also evidences a vision of refugee flows through the continuing addition of visa requirements on certain countries, the 'safe third country' provisions and the White List. The removal of support for some refugee claimants constructs a view of the refugee as an economic migrant. So, too, the ban on polygamous wives is directed towards a specific group movement.⁸⁰⁷ The restrictions on refugee claimants also help create clear hierarchies of migration. Highly skilled migrants are one thing; asylum-seekers quite another.

In contrast to the firm emphasis on control in Australia, the UK attitude towards immigration is more complex. As already noted, the traditional phraseology of 'leave to enter' indicates an earlier attitude of 'discretionary benevolence', although the infusion of EEA rights and human rights juxtaposes this with the image of 'rights-holder'.

The patchwork of legislation, and the pattern of recurrent legislation in recent years, also presents immigration as chaotic and fast-changing, and the State as trying, through a panoply of shifting, proliferating and ever more drastic policies, to reassert 'management' or control. Like the Australian legislation, there is no enunciation of the object of the legislation; but lacking even the guiding concept of 'national interest', and with the cross-cutting purposes of more recent legislation, the picture is one of incoherence rather than control.

3.3.3 COMMUNITY

Given the multiple immigration statuses in the UK legislation, the sense of community here is not of a unified community of citizens, but rather of a stratified community enmeshed in regional and imperial arrangements. Further, the legislative provision for Scotland's legal system and devolution reminds us of the distinct national identities within the UK itself.

However, a sense of community is figured in the requirement of knowledge of 'life in the UK', in the ban on polygamous wives, the introduction of citizenship ceremonies, and in the recent proposals for 'earned citizenship'. None of these, however, provides a coherent vision of a community. The questions on the citizenship tests range from the mundane (such as the numbers for emergency services) to the

⁸⁰⁷ Namely, the movement of South Asians and in particular those from Bangladesh: see Prakash A Shah, 'Attitudes to polygamy in English law' (2003) 52 *ICLQ* 369, 389–392.

bizarre (the number of bank holidays).⁸⁰⁸ Citizenship ceremonies celebrate the fact of citizenship without giving it any real content. More significant is in the negative identification with polygamous wives, and the conception of ‘active (civic) participation’ underlying the recent proposals for ‘earned citizenship’.

In contrast to the Canadian legislation, no sense of community is developed around the principles of human rights and racial discrimination. Instead, human rights are awkwardly fitted into the pre-existing structure, and the discursive effect is undermined by the whittling away of asylum support until the point of a breach of human rights.⁸⁰⁹

The image of community, then, is less one of ‘imperium’ than of the growing pains of a society based on formalist bonds of State moving towards a more normatively substantive conception of community: an uneasy mix of human rights and high principle, combined with a very unfocused sense of a distinctive British identity.

3.3.4 INTERRELATIONS

As with the Australian legislation, British legislation is structured by the triad of command, duty and power, but this has become increasingly complicated by the vision of a State limited by human rights, international obligations, and a strengthened commitment against racial discrimination. This has produced a more dialogic view of authority: unlike in Australia, authority does not all rest in the State, for the State owes specific obligations to the international community and directly to individuals on its territory.

Simultaneously, however, the State’s powers have expanded enormously, often by strengthened criminal or financial sanctions, but also (as in Australia) by the introduction of new forms of regulation, such as subsidiary regulatory regimes for carriers and migration advisers as well as the use of monitors.

While the internal dimension of immigration legislation becomes more complicated, with devolution, human rights, and more polycentric forms of regulation, so too does its external dimension — that is, the relation of the State to actors outside it. The primacy of the Refugee Convention asserted in the *1993 Act*, the introduction of human rights, and multiple references to the EEA and the

⁸⁰⁸ *Life in the UK Test* (2nd ed, 2007), 97, 135.

⁸⁰⁹ *2002 Act*, s 55(5)(a).

Commonwealth construct the State as located within several overlapping international regimes: the EU, the Commonwealth, the Council of Europe, and the UN. This construction of the State within a web of international commitments is significantly more polycentric than the insular construction of Australia, although (as the safe third country provisions indicate) its benefits for refugees are not all one way.

3.4 The Refugee Convention

This legislation may be contrasted with the Refugee Convention, discussed in chapter 1. As discussed there, the refugee definition in the Convention is both rooted in an individualistic, gendered paradigm of persecution; and the relationship between the State and the refugee remains one of benevolent sovereignty premised on the exceptional failure of the State to protect. Nevertheless, it does at least imagine the person both as central, and as a rights-holder. Moreover, it is their attributes of fear and persecution which are relevant, not their suitability for the nation or conformity with prescribed purposes.

As also discussed in chapter 1, the Refugee Convention is more open-textured than domestic legislation, since a treaty aims for sufficient ambiguity to enable States to agree; and the basis of its legitimacy is not 'the people', but the observance and participation of States and, in the case of humanitarian treaties, upon the validity of humanitarian norms. In this respect, unlike domestic legislation, it constructs an international moral community.

3.5 The judgment

The common law judgment is obviously a more fluid genre, exhibiting greater variety between jurisdictions, courts, and individual judges. However, they share a tone of authority, and characteristics of coherence, logic, and impartiality. The structure of most judgments is similar: isolating a legal issue, setting out the facts, reviewing the legal context, and logically organising the arguments. The judgment, however, allows room for discussion, opinion and justification, for *obiter dicta* as well as *ratio*, and even occasionally for doubt. It also marries the facts of the individual case with the identification and application of a general rule, thus demanding more contextualisation than legislation.

The audiences of a judgment vary with its position in the legal hierarchy, with lower-level judgments primarily addressed to the parties and appellate judges, and higher-level judgments addressing also the legal profession, other judges, and (less

commonly) the general public. In administrative law, the government and its officials are clearly part of the audience. The different audiences may be observable in the style of address: statements of high principle are often self-contained, and in plainer language, for the benefit of a wider audience.

As demonstrated in the previous chapter, the legal constellation engaged is critical to the kind of perspective and language used. A broad distinction may be drawn between human rights and Refugee Convention appeals; constitutional claims; and appeals based on other legal matters, such as evidence or procedure. Human rights and Refugee Convention cases focus upon the person (and their rights); constitutional claims focus upon the allocation of governmental power; while other appeals typically focus upon internal features of the legal system.

The change in focus entails different sets of relations, and different constructions of the actors. In a judgment concerning procedure, the person is almost effaced, in favour of a detailed reading of the principles and texts of procedure. In a judgment concerning the Constitution, the key relationship is almost inevitably that between the branches of government. In a Refugee Convention judgment, the person is more visible, but abstracted into the particular characteristic that is the subject of legal interpretation (for example, whether she is part of a 'particular social group'); and the key relationship is between the State and the international community. In a judgment concerning human rights, however, the circumstances and facts of the person are detailed in much greater depth, albeit in relation to a confined 'box' representing the relevant Article. The person is recognised as an individual, deserving of treatment as such; the relationship between the State and the international community is transformed into a triad, with the person constituted as the moral unit of both State and international community.

There are also clear differences between jurisdictions, with a remarkable divergence between the present Australian High Court and the House of Lords. These differences, of course, are not eternal: the language of the present High Court can readily be contrasted with that of the Mason High Court in the late 1980s and early 1990s; and the House of Lords has also seen a sea-change in the opposite direction.⁸¹⁰ As the previous chapter highlighted, the most dramatic differences relate to their receptiveness to international law, and the breadth of their rhetorical style.

⁸¹⁰ Legomsky, 110.

3.5.1 *KHADIR* AND *SZAYW*

I illustrate here some fairly typical features of judgments, beginning with two cases that do not deal with human rights or the Convention, *Khadir*⁸¹¹ and *SZAYW v MIMIA*.⁸¹²

In *Khadir*, an Iraqi Kurd challenged the Secretary's refusal to grant him exceptional leave to enter, arguing the Secretary could not indefinitely renew his temporary admission. *Khadir* succeeded at the High Court, but this judgment was legislatively overturned,⁸¹³ which the Court of Appeal (reversing) found decisive. The House of Lords ruled unanimously, however, that the extension of temporary permission had been lawful even prior to legislative reversal. Lord Brown of Eaton-under-Heywood, giving the leading judgment, held that the power to detain "pending" removal, which founded the power to grant temporary admission, meant that there was a power to detain until removal, which did not lapse although detention itself might become unlawful after a period.⁸¹⁴

Lord Brown began by describing the appellant. The key facts were his age, nationality and ethnicity, his date and mode of arrival, and his legal history.

This is the standard construction of the person in immigration cases. Nationality and date of arrival are invariable elements of the description, and the introduction of other elements depends almost entirely upon their subsequent legal relevance. The ethnicity of the appellant is relevant to the ground of refusal and the subsequent practical problem of removal; his mode of arrival is relevant to subsequent attempts to deport him as an illegal entrant. This de-emphasis of the person is reinforced by the rest of the judgment, which makes no reference to him at all and rather (as is inevitable in a case on statutory interpretation, but standard elsewhere) focused on the statutory text.

The person, therefore, is constructed as a set of legally cognisable attributes that frame a particular legal question. The background of migration, the context of the person's circumstances, and the social phenomenon of migration itself are excised. In her very brief judgment, Baroness Hale however points in a different direction:

There may come a time when the prospects of the person ever being able safely to return, whether voluntarily or compulsorily, are so remote that it would irrational to deny him the

⁸¹¹ *Khadir*, n92.

⁸¹² [2006] HCA 49.

⁸¹³ 2002 *Act*, s 67.

⁸¹⁴ [32].

status which would enable him to make a proper contribution to the community here, but that is another question.⁸¹⁵

Here, there is an indication, albeit slight, of an awareness that conditions in the country of origin may prevent return; and a construction of a relationship between the appellant and the community. That relationship, presently, is one of exclusion; but could be more positive in the future. Here, immigration is a phenomenon with causes, and long-term consequences, including ultimately the need to accept integration and inclusion of those unable to return.

Lord Brown was not unaware of the implications for the appellant. As his Lordship noted, a person temporarily admitted would not receive cash benefits, be able to work, or be able to choose where to live.⁸¹⁶ After stating his reasoning on the interpretation, Lord Brown stated:

None of this, of course, is to say that the regime governing temporary admission as presently administered is other than harsh. But that harshness has been sanctioned by Parliament and cannot affect the true construction and application of paragraphs 16(2) and 21 of Schedule 2.⁸¹⁷

The case law is littered with this kind of statement, expressing the orthodox view of the limited function of the courts. The courts are not there to provide justice, in any substantive sense. Rather, the courts are the handmaidens of the legislature. The text, therefore, is framed as an explication of a superior text, the legislation, and the focus is switched from the relation of the person to the community, to the appropriate relationship of the courts to the legislature.

The key relations within the judgment, therefore, are between the legal texts — the legislation, and prior judgments — and between the various branches of government. The relationship between the appellant and the community (equated with the State), on the other hand, is conceptualised as one of complete power: the State has the undoubted right to control the life of the appellant, including his place of residence, his ability to work, and his dignity; the appellant has no enforceable rights. The problem of the *failure* of state power — that is, the inability of the State to remove the person — is transformed into an administrative hiccup.

In *SZAYW*, the complaint was that the appellant's application for review by the RRT had not been heard "in private", as required by s 429 of the Act, and that this amounted to a jurisdictional error. The applicant's case had been heard together with three friends, with whom he had travelled to Australia, and who were represented

⁸¹⁵ [4].

⁸¹⁶ [7].

⁸¹⁷ [34].

together. No objection had been made to the hearing being conducted together, and each appellant had been questioned separately and given an opportunity to raise issues privately. The High Court unanimously dismissed the case.

The appellant first appears briefly, after the statutory framework, in the same format as in *Khadir*: nationality, date of arrival, legal history.⁸¹⁸ The appellant then reappears in the facts at more length:

The appellant, and three of his friends who were described as applicants 226, 228 and 229, were stateless Palestinians who had been living in Lebanon. They all left Lebanon and travelled to Australia. They all claimed to fear that, if they returned to Lebanon, they would be persecuted by Hezbollah or Islamic Jihad. The basis of that fear was said to be that together they had become involved with Hezbollah, and had received military training for the purpose of attacking Israel or Israeli interests in South Lebanon. They had lost their enthusiasm for the conflict, and left Lebanon. They feared that, if they returned, they would suffer reprisals for desertion. The Tribunal rejected their claims that they had a well-founded fear of persecution. The Tribunal's reasons for that conclusion are not presently material. A substantial part of their evidence was disbelieved.⁸¹⁹

There is the germ of an interesting story here, but the language forecloses exploration of it. Again, the facts are selected for their legal relevance. It is relevant that the appellant travelled with these three people and had a common story with them, as this explained why the hearing was still “in private”. The language also frames the context entirely within the terms of the Convention: that is, the ‘well-founded fear of persecution’. There is something jarring about the forced neutrality of the language: the appellant “lives in Lebanon” (rather than seeks refuge there); they “travelled” to Australia (rather than ‘fled’ or ‘escaped’); they “had become involved” with (rather than recruited by) Hezbollah; and, most notably, they “had lost enthusiasm for the conflict” (rather than realised its evils). The language re-frames this story almost as a Boy’s Own adventure, with its persistent language of free agency, and with its individualisation and decontextualisation of the situation of Palestinians. In any event, the story is “not presently material”; and, undermining the germ of sympathy that may have been generated, the paragraph concludes abruptly with the blunt suggestion that much of the story had been fabricated.

The judgment then returns to the powerful legal actors: the Tribunal member, the Federal Magistrate, their migration agents, and counsel, submerging the appellant again in a sea of more authoritative voices and in the key segment of text, the legislative phrase “in private”. Once again, the context is framed in terms of the legal background, in a world of individualised free agents. Despite the fact that the

⁸¹⁸ [2].

⁸¹⁹ [9].

appellant arrived in 1998, and the case was heard in 2006, there is no hint of the appellant having any kind of a relationship with the community. Nor is the fact that the appellant is stateless warrant any extra thought. Throughout, there is an assumption that now the appellant has gone through the relevant procedures, the role of the courts is finished. The authority of the government and the courts is untroubled, and the argument of the appellants dismissed with force, in a series of clipped sentences, and perhaps even a touch of tetchiness:

The procedure adopted by the Tribunal member in the present case did not infringe the privacy to which the appellant was entitled under the Act. It was consistent with the purpose of s 429. The proceedings were not open to the public. The other applicants were witnesses upon whose evidence the appellant intended to rely. Their presence at the hearing of his application was necessary at least for the purpose of enabling them to give evidence in his support. He knew that his evidence was intended to be used in support of their claims. As Weinberg J pointed out in the Federal Court, the argument for the appellant seems to contemplate the use of some kind of "revolving door" process to accommodate the requirements of procedural fairness. This seems impossible to reconcile with the objectives stated in s 420.⁸²⁰

Thus, outside the context of constitutions, human rights, or the Convention, immigration judgments construct the person as a small set of attributes, filtered by relevance. Even where some context is necessarily drawn in, it is constrained by a legal framework and transmuted into the liberal language of the law — a language that presumes agency, that foregrounds the individual at the expense of the social, and that presumes the ability to judge and determine the truth of the person, notwithstanding widely differing social and cultural backgrounds.

Here, too, immigration is an activity of border crossing, in which people 'arrive' and are processed by the legal system. The assumption is that there can be a relatively trouble-free application of state power to the problems that do arise. Nor is 'the appellant' conceived of as a person in relation to the community. If the community arises, it does so solely in the form of the State. In doing so, the interrelation that is the subject of focus is that between the court, the executive and the legislature. The focus of the judgment is always, squarely, on the law itself — on its manifestations as text (legislation, case law, counsel's arguments) and procedure.

3.5.2 *K AND AL-KATEB*

The picture changes significantly when one turns to Refugee Convention cases, such as the recent House of Lords decision in *K*.⁸²¹ This involved two joined appeals

⁸²⁰ [29].

⁸²¹ *K v SSHD* [2006] UKHL 46.

concerning the interpretation of the ‘particular social group’ part of the refugee definition. In the first appeal, an Iranian woman claimed persecution as the wife of a man who had been detained for no apparent reason without charge or trial. The question was whether she could claim persecution as a family member, where there was no evidence her husband was detained for a Convention reason. The second appeal concerned a 15-year-old girl from Sierra Leone, who claimed persecution in relation to the practice of female genital mutilation (‘FGM’) in her home country, the legal question turning on which ‘particular social group’ she belonged to. The House of Lords unanimously held that both women could avail themselves of the ‘particular social group’ category.

Lord Bingham’s judgment provides an elegant example of the format of legal reasoning. He begins by concisely isolating the legal issue, and notes the superior benefits of Refugee Convention status. He then turns to the facts of the first appeal in some detail, before continuing:

About two or three weeks after B's disappearance Revolutionary Guards, agents of the Islamic Iranian state, searched the first appellant's house and took away books and papers. About a week later the Revolutionary Guards again visited the first appellant's house: they searched the house further, and insulted and raped her. Following this incident the first appellant made herself scarce. She was not again approached by Revolutionary Guards and nor were members of her family. But the school year began on 23 September 2001 and on the following day the headmaster of the school attended by her son, then aged 7, told her that the Revolutionary Guard had been to the school to make enquiries about the boy. The Adjudicator found that the Revolutionary Guards had approached the school in an open manner knowing that this would come to the attention of the first appellant and that it would cause her great fear. She was indeed very frightened, and fled from Iran with her son.⁸²²

The language of this is clearly sympathetic, with the occasional use of emotive language (“insulted and raped”, “very frightened, and fled”), the detailing of the events of persecution; and the emphasis on the appellant as wife and mother.

The language is even more sympathetic in the case of the second appellant:

In 1998 the second appellant and her mother were living in her father's family village to escape the civil war, and she overheard discussions of her undergoing FGM as part of her initiation into womanhood. In order to avoid this she ran away, but she was captured by rebels and repeatedly raped by a rebel leader, by whom she became pregnant. An uncle had arranged her departure from Sierra Leone to the United Kingdom. She resisted return on the ground that, if returned, she would have nowhere to live but her father's village, where she feared she would be subjected to FGM.⁸²³

This language tells the story of a girl suffering multiple forms of harm: the civil war, the prospect of FGM, rape and a consequent pregnancy. She is the agent of the story: “she overheard”, “she ran away”, “she resisted return”. Even more interesting,

⁸²² [2].

⁸²³ [5].

however, is that this story is then immediately located within the wider context of the practice of FGM. We are told where and whom is involved in the practice; we are told of the pain and the consequences of the practice; and of its perception by the community. The next paragraph shifts powerfully into a normative tone:

The practice of FGM powerfully reinforces and expresses the inferior status of women as compared with men in Sierra Leonean society. The evidence is that despite constitutional guarantees against discrimination, the rights of married women, particularly those married under customary and Islamic laws, are limited. Their position is comparable with that of a minor. Under customary law, a wife is obliged always to obey her husband, with whom she can refuse sexual intercourse only in limited circumstances. She is subject to chastisement at his hands.⁸²⁴

Thus, FGM is squarely put into the context of pervasive sex discrimination within that society, and also framed by a strong commitment to gender equality. In contrast to the earlier cases, in this case the appellants are conceived of within their social context — as women, as members of families, as members of particular societies — and their actions are explained in terms of circumstance as well as free will. These people come *from* somewhere, and are not merely a set of attributes for legal categorisation. Moreover, the causes of migration are the centre of focus, and, certainly in the case of the second appellant, migration is partly caused by social conditions in other countries. These changes are driven by the change in legal framework: almost all of the facts are legally relevant, because the Refugee Convention requires a more holistic assessment of the circumstances.

The judgment still devotes the bulk of its attention to texts, beginning with the refugee definition and the leading cases. The texts called in aid extend well beyond the traditional range of legal materials, reflecting the more pluralistic nature of the legal regime. The ICCPR; CAT; CROC; the *Convention on the Elimination of All Forms of Discrimination against Women*,⁸²⁵ the Qualification Directive; and the Vienna Convention on the Law of Treaties⁸²⁶ are cited, as are the legal interpretations of the US, NZ, Canada and Australia. What is truly remarkable, however, is the range of ‘soft law’ cited, including reports by UN Special Rapporteurs,⁸²⁷ UNHCR materials,⁸²⁸ resolutions by the European Parliament,⁸²⁹ gender guidelines in Canada and

⁸²⁴ [6].

⁸²⁵ 1249 UNTS 13.

⁸²⁶ 1155 UNTS 331.

⁸²⁷ [8].

⁸²⁸ [15], [26], [45].

⁸²⁹ [26].

Australia,⁸³⁰ and the Michigan Guidelines,⁸³¹ as well as leading refugee law textbooks.⁸³²

The authority of the judgment, however, principally rested on the ‘common sense’ approach taken to interpretation. It was clear beyond doubt that a family was a ‘particular social group’. If the first appellant was persecuted because she was a member of a family, then that satisfied the causal link. The Convention did not additionally require that the family member was also targeted for a Convention reason.⁸³³ In relation to the second appeal, it was agreed by the parties that FGM could constitute persecution, which was, as Lord Bingham emphasised, “all but inevitable”.⁸³⁴ The only question was whether the second appellant fell within a ‘particular social group’. Lord Bingham’s approach was that a social group could be widely defined, and that the evidence made it clear that “women in Sierra Leone are a group of persons sharing a common characteristic which, without a fundamental change in social mores, is unchangeable, namely a position of social inferiority as compared with men.”⁸³⁵ Indeed, Lord Bingham saved his strongest rhetoric for this aspect of gender inequality:

The contrast with male circumcision is obvious: where performed for ritualistic rather than health reasons, male circumcision may be seen as symbolising the dominance of the male. FGM may ensure a young woman’s acceptance in Sierra Leonean society, but she is accepted on the basis of institutionalised inferiority. ... FGM is an extreme expression of the discrimination to which all women in Sierra Leone are subject ...⁸³⁶

Lord Bingham’s judgment is an exemplar of what might be called ‘progressive jurisprudence’, in its reliance on international norms and a diverse range of legal materials, in its sympathetic engagement with the facts, and in its affirmation of strong norms such as gender equality. However, this occurs largely because of the change in legal framework. The humanitarian and human rights law framework require a focus on individual circumstances; the purposes of the law invite a human-oriented and sympathetic approach; and the international character of the law demands an engagement with international norms. Of course, such an approach is not inevitable, and can only go so far.

⁸³⁰ [26].

⁸³¹ [17].

⁸³² [13].

⁸³³ Cf s 91S of the Migration Act, which precludes this reading: see *STCB v MIMIA* [2006] HCA 61.

⁸³⁴ [25].

⁸³⁵ [31]. However, Lord Bingham accepted, in the alternative, a narrower formulation of “intact women in Sierra Leone.”

⁸³⁶ *Ibid.*

The person is more visible, more complex, but must still ‘fit’ into the boxes of the refugee definition. Text remains central, albeit a greater diversity of texts. The causes and consequences of migration must still be processed through the abstract categories of the limited exceptions to sovereignty. Here, however, the community is constructed as part of an international moral, human rights-respecting, community, which finds FGM an “abhorrent”⁸³⁷ practice. Finally, this community is conceived of as primarily a network of norms, rights and self-limited sovereignty, rather than the sovereign-object paradigm of immigration law.

Lord Bingham’s approach can be contrasted neatly with Baroness Hale’s ‘empathetic jurisprudence’ in the same case. While Lord Bingham’s prose is lucid, Baroness Hale’s tone is refreshingly frank: “The answer in each case is so blindingly obvious that it must be a mystery to some why either of them had to reach this House.”⁸³⁸ Baroness Hale then launched straight into what was, for her, the key to the case: the gender-specific nature of the persecution. Unlike Lord Bingham, Baroness Hale drew attention to the partial and gendered nature of the Refugee Convention, and to the progress since made on the question of sex equality.⁸³⁹

As a result, the judgment emphasises the gender-specific elements of the facts, such as the rape so quaintly de-emphasised in Lord Bingham’s reference to being “insulted and raped”, and the gender-sensitive⁸⁴⁰ approach taken by the adjudicator. Unusually, Baroness Hale quotes from the appellant herself, giving the woman a ‘voice’ in the text.⁸⁴¹

Even more remarkable is the treatment of FGM. Whereas Lord Bingham had noted the operation caused “excruciating pain”,⁸⁴² Baroness Hale does not let us off so easily. She excerpts a statement by the World Health Organisation, UNICEF and the United Nations Population Fund, detailing the types of FGM in graphic detail (“includes cauterization by burning of the clitoris and surrounding tissue ... introduction of corrosive substances or herbs into the vagina to cause bleedings or for the purposes of tightening or narrowing it”), and its horrific consequences (“cysts and abscesses, keloid scar formation, damage to the urethra resulting in urinary incontinence, dyspareunia (painful sexual intercourse) and sexual dysfunction”, not to

⁸³⁷ [70].

⁸³⁸ [83].

⁸³⁹ [86].

⁸⁴⁰ [88]-[89].

⁸⁴¹ [88].

⁸⁴² [6].

mention cutting open to enable birth or intercourse, and risk of maternal death or still birth).⁸⁴³ Moreover, she states explicitly the purposes of FGM: “to lessen the woman’s sexual desire, maintain her chastity and virginity before marriage and her fidelity within it, and possibly to increase male sexual pleasure.”⁸⁴⁴ Finally, she situates the practice in its historical context: its re-assertion after the civil war to re-establish the traditional social order.⁸⁴⁵

This aspect of the judgment highlights a consequence of the privileging of the text in legal language — the invisibility of the body. As Scarry has eloquently argued, the practice of torture is frequently transformed from the primary fact of bodily pain into speech ‘about’ torture, and attention is thereby switched from the victim of torture to those in authority.⁸⁴⁶ Baroness Hale’s judgment is remarkable because it resists this shift from body to speech, in its attempt to draw our reluctant attention to the fact of bodily pain (albeit through the speech of international institutions). However, the more orthodox judicial approach is that of Bingham LJ, who refers to authoritative texts condemning the practice of female genital mutilation.⁸⁴⁷

While this detail may not be ‘legally necessary’, it enriches the context in which one reads the judgment. The appellants’ gender, and its social significance and consequences, are emphasised. The textual limits of the Refugee Convention are emphasised. Social practices are put into social and historical context. We hear the voice of the person. In forcing us to confront the graphic details of the practice of FGM, the judgment gives the female body real significance. The gender relations of this society are highlighted. In these ways, Baroness Hale’s judgment stretches the boundaries of judgment-writing. We are invited to endorse the judgments not simply on the authority of the welter of texts, or on the basis of strong arguments of linguistic interpretation. We are instead drawn into a position of empathy with the women; we are forced to gaze on the female body in pain. We are drawn into a relation with the appellant, not as part of a community that owes obligations as defined by an authoritative text, but as humans.

The jurisprudence of the House of Lords has been far from uniformly progressive, but it is currently distinguished by an openness to international law and statements of

⁸⁴³ [91]-[92].

⁸⁴⁴ [93].

⁸⁴⁵ [95].

⁸⁴⁶ Elaine Scarry, *The Body in Pain: The Making and Unmaking of the World* (1985).

⁸⁴⁷ [8], [26].

values. By contrast, the constitutional jurisprudence of the present Australian High Court is marked by an insularity, nowhere better demonstrated than in *Al-Kateb*, discussed in the previous chapter. That case evinced a plurality of approaches, with the dissenting Kirby J exhibiting a ‘progressive jurisprudence’ akin to Lord Bingham’s at one extreme, and McHugh J’s textual approach at the other. For the purposes of illustration, I focus on McHugh J’s ‘textual approach’.

McHugh J simply adopts the facts recited by Gummow J.⁸⁴⁸ As such, the person is rendered entirely invisible in his judgment. This is reinforced by his framing of the legal question:

The principal issue in this appeal concerns the power of the Parliament to order the detention of an unlawful non-citizen in circumstances where there is no prospect of him being removed from Australia in the reasonably foreseeable future.⁸⁴⁹

The focus, therefore, is on the power of the Parliament, not the restraint on the individual, who is submerged entirely into his legal classification.

Most interestingly, for the purposes of this analysis, his Honour observed:

Nor is it possible to hold that detention of unlawful non-citizens — even where their deportation is not achievable — cannot be reasonably regarded as effectuating the purpose of *preventing them from entering Australia or entering or remaining in the Australian community*. Indeed, detention is the surest way of achieving that object. If the Parliament of the Commonwealth enacts laws that direct the executive government to detain unlawful non-citizens in circumstances that prevent them from having contact with members of or removing them from the Australian community, nothing in the Constitution — including Ch III — prevents the Parliament doing so. For such laws, the Parliament and those who introduce them must answer to the electors, to the international bodies who supervise human rights treaties to which Australia is a party and to history. Whatever criticism some — maybe a great many — Australians make of such laws, their constitutionality is not open to doubt.⁸⁵⁰ (emphasis added)

In this paragraph, we have a neat summary of McHugh J’s approach. A person is merely ‘an unlawful non-citizen’, divested of any other characteristics. More disturbingly, the purpose of detention is envisaged as keeping the ‘foreign person’ away from the Australian community. This is a relatively rare invocation of the community in immigration jurisprudence, and it is invoked in the sense of ‘protecting’ the community from “unwanted entrants”,⁸⁵¹ a phrase redolent of ‘undesirable elements’. The purpose of detention is not punitive, but protective, and in a later analogy the ‘protection’ of the community from stateless Palestinians is equated to the ‘protection’ of the community during the World Wars from enemy aliens.⁸⁵² A

⁸⁴⁸ [32].

⁸⁴⁹ [31].

⁸⁵⁰ [48].

⁸⁵¹ [74].

⁸⁵² [61].

radical separation is required, and the borders are clear. The community is given unquestioned priority and is specifically conceived of as autonomous from the international community. It is not, indeed, the international community that we are linked to, but only the monitoring bodies of treaties “to which Australia is a party to”. The community, however, is not unified in their views, as McHugh J acknowledges. However, the appropriate way for such views to be expressed is through the electoral process; the democratic legitimacy of Parliament is prevailed upon. For McHugh J, the text of the Constitution constitutes the four square corners of the limits of its protection, and he is merely obedient to this text, and the lines of power it draws.

McHugh J stamps his authority in terms of unequivocalty. The text is “too clear”,⁸⁵³ there “is nothing in the Constitution”, and his analysis of it is (presumably) “not open to doubt”. In his view, there is nothing fuzzy about power relations.

Of course, these analyses are but a very small selection of the divergent approaches available. The divergence emphasises the plasticity of the judgment, but the plasticity is limited.

3.6 Conclusion

Some general points may be drawn out about the limits of the legal imagination. Where the law does not require it, the person is often rendered invisible, excepting a set of legally relevant attributes. The community exists very dimly, for the most part, whereas the State and its institutions dominate legal thought. Migration is not conceived of as a social phenomenon, but rather as an activity of border-crossing, although other elements may emerge depending on the legal context and upon the approach to judgment-writing. Thus, much of the context is submerged in the judgments, presenting a distorted view of human actions and interrelations.

The focus of the text is on the law, as manifested especially in texts; and the mode of discourse is one of authority, of marking authority and also of demarcating spheres of authority. Law is clearly differentiated from justice, compassion, or sympathy; it is in general a positivist law, a law that at least begins (and, in some approaches, practically ends) with the authoritative text. However, values or principles, particularly those that are near to the legal heart (such as certainty, procedural fairness, or equality) may well inform interpretations, although such values or principles are usually transformed into textual authorities as well. The focus on

⁸⁵³ [33].

interrelations therefore is primarily between texts. The focus may also be on the relation between the State and the international community, and between the domestic community and the State, but the connections are generally articulated in orthodox conceptions of the separation of powers, of the democratic legitimacy of Parliament, and of the self-limited sovereignty of States.

As the short analysis of Baroness Hale's judgment demonstrated, these widely accepted structures, and indeed constraints, of thought can be challenged in judicial discourse. Such challenges are more likely where the legal context demands a re-orientation to the human. However, they remain exceptional, and cannot overturn the three fundamental limitations of legal language: the filter of relevance, the simplification of power relations, and the privileging of text and authority.

In exposing these limitations, I do not mean to suggest merely that the law could be written better. Rather, these limitations arise out of the structural logic of the law. In order to create rules, one must abstract and generalise. In order to resolve disputes, one must reduce the complexity of social life by filtering out the legally irrelevant. Ultimately, what I call the limitations of legal language are necessary in order to achieve the primary objects of legislation or judgments: to regulate and to decide.

However, although this filtering enables these purposes, it does raise a real problem. The law's authority is premised largely on its normative authority, as the expression of reason and right, although backed up in the last instance by might. The ultimate aim of a judgment is to convince its audience of its rightness; and so too we evaluate legislation in terms of right rather than might.

This general limitation of law is accentuated in immigration by the challenge of coherence. The deficiencies of the legal regimes often result in important matters being rendered irrelevant or de-emphasised. The normative incoherence of the legal constellation embeds competing normative paradigms that are exposed by judicial resolutions between them.

The challenge of coherence thus exacerbates the challenge of competition. Legal discourse is intuitively compared with other available social models, as is recognised in judgments that stress the separation of law from justice, and that acknowledge the 'harshness' of the law and its 'tragic' consequences. We all evaluate legislation and judgments from within a social context in which different discourses circulate and compete. We commonly complain that a decision is 'legalistic', 'technical', 'unrealistic'

and ‘simplistic’. Legal language, in its reduction of the complexity of the world, simply misdescribes the issues at stake, enabling outcomes but failing to convince.

Chapter 5 — The discursive constellation

1 *Introduction*

The impoverishment of legal language poses an acute challenge of discursive competition because of the richness, diversity and greater social power of competing social discourses. This chapter examines this broader discursive constellation, surveying in turn the political, historical, and geographical perspectives on migration, and the disciplinary perspectives of migration studies, contemporary political philosophy, and postcolonial studies.

As in the previous chapter, I focus here on the ways these discourses construct different models of people, migration, the State, and power relations within the community. These discourses, I argue, do not merely give colour, texture and background to immigration law. Rather, they provide alternative and more convincing ways of capturing and understanding the world, which therefore both greatly complicate and undermine the premises of legal discourse. Further, these competing discourses are also more socially powerful than legal discourse, making the competition structurally unequal.

2 *The hi(story) of migration*

Of the three broader perspectives, the historical account of migration provides the greatest contrast to the legal account, in its emphasis on specificity, diversity and complexity. In the historical account, diverse groups of people come, and go, for a variety of overlapping reasons; communities, States and power relations within and without them are continually reconfigured and redefined; and the causes and consequences of migration are the product of unique combinations of structure and agency.⁸⁵⁴

⁸⁵⁴ The following is drawn from Robert Winder, *Bloody Foreigners* (2004); Dummett and Nicol, 19; and Norman Davies, *The Isles: A History* (1999). For Australia, see James Jupp, *From White Australia to Woomera: The Story of Australian Immigration* (2002); DILGEA, *Australia and Immigration*, n40.

21 Empire and colony: A story of divergence and convergence

The British historical account of migration exemplifies these characteristics. In the early period, immigration is an incident of waves of invasion, conquest and settlement. Celts, Romans, Angles, Saxons, Jutes, Frisians, Franks, Vikings and Normans come, settle, and sometimes leave. These waves partly define the community as part of a wider community — as a Roman colony, as part of the Viking domain, or as part of the Norman realm. These waves also constitute the community as an ethnically mixed populace, a ‘mongrel’ community bound by political rather than racial ties — an orientation that is reinforced by the later unions with Scotland and Ireland.

In the medieval era, immigration appears as an incident of foreign policy, read through a prism of religious community and commercial interest. Thus, the French Huguenots were welcomed as fellow Protestants; Jews originally arrived as the financial backers of the Norman Conquest; merchants from the Low Countries and the Hanseatic League were welcomed as part of a trading network; and Africans were imported by British slaving interests. Here, the British community is configured as part of a wider Protestant community, and a wider commercial network.

The era of the British Empire, however, heralds a quantitative shift in migration, and a global expansion of its reach. It is within this era that Australia is born, and it is the logic of Empire that accounts for the historical divergence between Australian and British immigration patterns and controls. Mass emigration from the UK meant there was no need for immigration controls; mass immigration into Australia required early governmental control, and fostered a conception of immigration as permanent nation-building. Here, again, the community is reconfigured into an imperial, multi-ethnic, community, tied by financial and political bonds.

This imperial model, however, was increasingly challenged by nation-building movements. Nation-building in Eastern Europe prompted the influx of Eastern European Jews into the UK that precipitated the *1905 Act*. The emergence of a radical nationalist movement in Australia, based on strong labour and economic controls, was directly responsible for the development of the White Australia Policy in the 19th century, and its most famous product, the *1901 Act*. Drawing together the threads of a belief in racial superiority, fear of labour competition, and the political harmony of an ethnically homogeneous democracy, the White Australia Policy forged an indissoluble

link between immigration, nation-building, the labour market, and racism.⁸⁵⁵ In contrast, British immigration policy remained tempered by the model of capitalist imperialism and minimalist government, a model whose slow decline was manifested in the tortuous disentanglement of empire in immigration and nationality law.

This slow decline was hastened by the irresistible momentum of the independence movements during the World Wars, a period which also strengthened the nexus between immigration and security, and thus fostered traditions of executive discretion and administrative control.⁸⁵⁶ Passport controls were entrenched,⁸⁵⁷ work permits invented,⁸⁵⁸ enemy aliens interned⁸⁵⁹ and wartime refugees expelled.⁸⁶⁰ Post-war, fears of Japanese invasion and the under-development of the economy (aptly described by the slogan ‘populate or perish’) drove a policy of massive immigration in Australia.⁸⁶¹ The rise of industrial economies and post-war labour shortages prompted more diverse immigration into both jurisdictions, with Southern Europeans arriving in Australia and Caribbean labour arriving in the UK.

The increasing racial diversity of immigration — stimulated in Australia by the belated abolition of the White Australia Policy in 1973,⁸⁶² and by the break-up of Empire in the UK — inflamed racial tensions in both jurisdictions. The 1958 Notting Hill riots and Enoch Powell’s 1968 ‘rivers of blood’ speech formed the background for legislative controls on Commonwealth immigration in the *Commonwealth Immigrants Acts 1962* and *1968*.⁸⁶³ In Australia, the 1980s were dominated by a debate over the ‘Asianisation’ of Australia, and the Hawke government’s ‘multicultural’ policies.⁸⁶⁴

The 1990s and onwards, however, were dominated by a different kind of debate, caused both by increased and increasingly diverse refugee movements,⁸⁶⁵ and by increasing convergences in patterns of skilled migration as Australia and the UK

⁸⁵⁵ See generally AC Palfreeman, *The Administration of the White Australia Policy* (1967); Myra Willard, *History of the White Australia Policy to 1920* (1974); AT Yarwood, *Asian Migration to Australia: The Background to Exclusion, 1896-1923* (1964); Paul Anthony Jones, *Alien Acts: The White Australia Policy, 1901 to 1939* (PhD thesis, The University of Melbourne, 1998).

⁸⁵⁶ See, eg, Stevens, n5, ch 2.

⁸⁵⁷ John C Torpey, *The Invention of the Passport: Surveillance, Citizenship and the State* (2000), 117.

⁸⁵⁸ Aliens Order 1920 (UK), art 2(b).

⁸⁵⁹ As described in *Al-Kateb*, n627, [56]-[60].

⁸⁶⁰ *War-time Refugees Removal Act 1949* (Cth). See Palfreeman, n855, 20-22.

⁸⁶¹ Jock Collins, *Migrant Hands in a Distant Land* (2nd ed, 1991), 20-23.

⁸⁶² Gwenda Tavan, *The Long, Slow Death of White Australia* (2005).

⁸⁶³ See, eg, I Spencer, *British Immigration Policy Since 1939: The Making of Multi-Racial Britain* (1997), chs 4-5.

⁸⁶⁴ James Jupp and Marie Kabala, *The Politics of Australian Immigration* (1993).

⁸⁶⁵ Shah, *Refugees and Race*, n9, 139-166.

moved to post-industrial economies and embraced free trade ideologies. The causes of this rise in refugees have been much debated, but include the collapse of the Communist bloc, increasing immigration restrictions, continuing and increasing repression and conflict, the demographic and economic demand for labour, and the increasing division between poor and rich countries.⁸⁶⁶ Yet, at the same time, both the UK and Australia have encouraged historically unprecedented levels of legal (largely skilled) migration (see Appendices, Figs 1 and 2), including the strong promotion of overseas education. Australian and British immigration patterns are also converging, as Australians increasingly emigrate⁸⁶⁷ and promote temporary, rather than permanent, immigration.⁸⁶⁸ Importantly, immigrants in both jurisdictions are now much more ethnically diverse, although almost a third of Australian immigrants come from the UK and New Zealand,⁸⁶⁹ and both Europe and the Commonwealth remain substantial contributors to UK immigration.⁸⁷⁰ Indeed, the accession of countries to the EU was responsible for a recent large, but apparently more transient, wave of immigration from Poland.⁸⁷¹

Finally, the politics of immigration has also increasingly converged, with the heightened fear of terrorism and military intervention in Afghanistan and Iraq coinciding with increased flows of refugees and the increasing prominence and power of far-right parties.⁸⁷² This has produced a highly visible backlash against Muslims in the UK, which was more than matched by the spectacular enactment of popular racism in the Sydney beach riots in December 2005.⁸⁷³

2.2 The story of history

The specificity, diversity and complexity of people, communities, States, and power relations within them are evident even in this brief historical account. In this account, the nationality, ethnicity, age and religion of people are significant, since

⁸⁶⁶ Timothy Hatton, *The Rise and Fall of Asylum: What Happened and Why?* (2008).

⁸⁶⁷ LCRC, *They Still Call Australia Home: Inquiry into Australian Expatriates* (2005). Cf Dhananjayan Srisankarajah and Catherine Drew, *Brits Abroad: Mapping the Scale and Nature of British Emigration* (2006).

⁸⁶⁸ Graeme Hugo, *A New Paradigm of International Migration: Implications for Migration Policy and Planning for Australia* (2004).

⁸⁶⁹ Australian Bureau of Statistics, *Migration Australia 2004-2005* (2006), 6.

⁸⁷⁰ See Office of National Statistics, *International Migration: Country of Last or Next Residence* (2008).

⁸⁷¹ Naomi Pollard et al, *Floodgates or Turnstiles? Post-EU Enlargement Migration Flows to (and from) the UK* (2008).

⁸⁷² See Michael Leach et al, *The Rise and Fall of One Nation* (2000).

⁸⁷³ Scott Poynting, 'What caused the Cronulla riot?' (2006) 48 *Race & Class* 85.

migratory movements are patterned, the products of both structure and agency. Although people move in groups, their individuality — the multiplicity of their motivations, diversity of reactions, their accidental migrations and reluctant returns — are attested to through their testimony, artefacts, anecdotes and life stories. This individuality highlights the subjectivity and complexity of self-identity.

Similarly, the nation-State is a specific historical phenomenon, with different models of community having prevailed and competed in different eras. States are not singular, monolithic entities but rather individual, contingent and ‘imagined’ political communities, riven by cleavages. The reactions of governments are far from inevitable, resting on a constellation of factors including foreign policy, political ideology, and the complexion of those who come. While the longer historical perspective illuminates the continuity of xenophobic reactions, this pattern is mediated by human agency and historical accident. The Fraser government’s reaction towards the Indochinese,⁸⁷⁴ and the Liberal government’s implementation of the 1905 Act,⁸⁷⁵ exemplify this mix of happenstance and fundamentals.

The historical account also highlights the diversity of communities, and the role of migration in forming nations and communities. Historical examination reveals the weakness of a unified ‘British’ identity as both a historical and contemporary concept. Rather, the historical account emphasises how different segments of a community have differing attitudes to, and effects on, immigration policy, and how immigration itself renegotiates relations between, and redefines, the communities within a State. Tensions and ambivalences are revealed. Australia is a ‘nation of migrants’, albeit one that insists on ‘controlling who comes’. The UK boasts of its long tradition of humanitarian refuge and tolerance, and has undergone a process of re-inventing itself as a State of immigration rather than emigration, and as a (somewhat ambivalent) European State rather than the heart of Empire.

Finally, the historical account is premised on a view of power relations as highly specific, complex and diverse. Immigrants are differently received depending on a range of factors, including class, race, religion, age, economic and demographic context, and political leadership. Similarly, the power exercised by immigrants, and the power of States is highly varied and contingent. The internal diversity of States is complemented by the diversity of relationships of States to other States (Empire to

⁸⁷⁴ As recently revealed by the release of Cabinet papers: Mike Steketee, ‘Howard in war refugee snub: Fraser’, *The Australian*, 1 January 2008, 1.

⁸⁷⁵ Jill Pellew, ‘The Home Office and the Aliens Act, 1905’ (1989) 32 *Hist J* 369.

colony; allies to enemies), in contrast to the legal imagination of the formal equality and sovereignty of States.

3 *The islands*

At its heart, migration is about space, and place. The oft-overlooked geographical account of migration adds to the historical account, by contributing this specificity of place, and its effects on identities and on the constraints on States.

3.1 No island is only an island

Australia and the UK are both islands; but, while Australia is a vast, underpopulated island, with few close neighbours, the UK is a relatively small island and a half, overshadowed by its continental neighbour.

The first consequence of these differences is their effect on immigration flows. Many immigrants come from neighbouring countries, in both Australia and the UK; and neighbouring countries profoundly influence foreign and immigration policy, with fear of invasion justifying high immigration intakes in Australia and the UK increasingly enmeshed in Europe-wide immigration arrangements.

Geography also shapes the parameters of immigration policy. As islands, Australia and the UK are relatively insulated from immigration flows. The great cordon of sea around Australia has made it physically possible to retain a tight control over its borders, since almost all arrivals are by plane. This used to apply to the UK, until the opening of the Channel Tunnel, which as a significant channel of refugee flows proved an apt symbol of the UK's erosion of independence from Europe.

Australia's physical isolation is also largely responsible for the tradition of subsidised passages and orientation towards permanent immigration, while the relative proximity of the UK accounts partly for its historically laissez-faire immigration policies. The UK's land borders with Ireland and the physical proximity of other islands also accounts for the Common Travel Area.⁸⁷⁶

Third, geography has also shaped the attitudes of immigrants. Immigrants who were willing to move permanently to Australia tended to be young and adventurous, and often driven by economic circumstances.⁸⁷⁷ As well, migrants were drawn by the image of Australia as the bountiful sunny land, rich in agriculture and minerals and

⁸⁷⁶ Ryan, n326.

⁸⁷⁷ A James Hammerton and Alistair Thomson, *Ten Pound Poms: Australia's Invisible Migrants* (2005), 35-36.

bathed in sunshine. In contrast, the relative proximity of the UK to major sources of immigration made transient migration more likely, while its image as a cramped, damp country made it a less attractive destination than the major immigration countries.

3.2 Exile and home, insider and outsider

Geography has also shaped reactions to immigration. Although the sea enables Australia's tight immigration control, paradoxically the sheer size of the coastline also creates a feeling of insecurity, for it is impossible to patrol such a large space effectively. This feeling of insecurity fuels the desire to retain a tight control over the borders. A nation is protected by being an island; yet it is also ever-aware of the threat from outside. The proximity of the UK to Europe has also led to a similar sense of threat, one that has a strong factual basis given the history of invasions and migrations, with the sea often acting less as a barrier than as a channel of communication.⁸⁷⁸

On the other hand, the two States differ in the relationship between the geographical and political community. Unlike most nations, the natural borders of Australia mirror its political borders. The nation, thus, is 'naturalised', the political fiction obscured by the physical fact. There is a very tangible, and permanent, divide between 'us' and 'them'.

In contrast, the UK's borders — internal and external — have waxed and waned during its long history, and thus the political entity is neither naturalised nor unified. This complexity and contingency of the political state is most obviously reflected in the loose and varied terminology adopted to describe it: Great Britain, England, the UK, confusing even historians.⁸⁷⁹ Devolution has only underlined that the United Kingdom is not a nation-state, but rather a State of nations.

The political construction of the UK reveals itself vividly in the debate about the existence of a 'British' identity, and its competition with English, Scottish, Welsh and Irish identities. The vagueness and contested nature of this identity is manifest in the handbook for the UK citizenship test, both in its careful attention to Scottish and Welsh traditions, and in its branding as a practical document for learning about 'Life in the UK'. Immigration, thus, exposes the soft centre of British identity.

⁸⁷⁸ Davies, n854, 8-9.

⁸⁷⁹ Ibid. xxvii-xl.

The landscape itself has also influenced reactions to immigration. In Australia, there is a deep-seated ambivalence to the austere geography of the land, dramatically manifested in the predominantly coastal patterns of settlement. The 'outback' remains a figure of menace, a place of mystery and danger. These geographical features account for the official encouragement of migration to rural areas, and for the environmental argument that the large areas of desert and dwindling supply of water preclude higher levels of immigration.⁸⁸⁰

This image of the harsh and hostile continent is also intimately linked with the pioneers' fear of the Aborigines' spiritual relationship with the land, and thus evokes the shameful dispossession of the Aborigines upon which modern Australia rests. The Aborigines' strong attachment to the land contrasts with the uneasy relationship of immigrants to their new country. Almost a quarter of Australians were born overseas;⁸⁸¹ most Australians can claim a pedigree only, at best, a few generations long. Australians continue to go 'home', permanently or temporarily, in large numbers. Our attachments to the land, therefore, are shallower; and our experiences of it often shaped by knowledge of other ancestral lands. The feeling of exile recurs in pro-immigration discourse, with the theme 'we are all migrants'. Importantly, immigration is not perceived as a threat to the right to land; rather, it is a threat to the political and social community.

In contrast, in the UK immigration is not a foundational part of the national mythology. Instead, as the title of a splendid account of British immigration history has it, immigrants are "[b]loody foreigners"⁸⁸² — evincing a ready dislike, perhaps a grudging acceptance, but not a self-identification.

There is a paradox here. Although the congruence of the natural and political borders in Australia tends to naturalise the nation, the fictiveness of the relatively new nation is still all too apparent. Australia does not have a historical core; rather, it is a mongrel offshoot of a mongrel empire. What binds the nation is a common territory, not a common people. In contrast, the United Kingdom may be a state of nations, but it is composed of distinctive peoples who *experience* themselves as English, Scottish, Welsh, and (more problematically) as Ulstermen. These felt

⁸⁸⁰ John Warhurst, 'The growth lobby and its opponents: business, unions, environmentalists and other interest groups' in James Jupp and Marie Kabala (eds), *The Politics of Australian Immigration* (1993) 181.

⁸⁸¹ Australian Bureau of Statistics, n869.

⁸⁸² Winder, n854.

nationalities influence the perception of immigration paradoxically: on the one hand, immigration is a threat to an established identity, and thus may be a greater challenge; yet on the other, the established identity may be more secure and thus may be more resistant to the threat.

Further, long feudal traditions and agricultural history have fostered a deep attachment to the land itself. The most famous encomium of England, for example, emphasises its character as territory: “This blessed plot, this earth, this realm, this England.”⁸⁸³ Land has been an important element of class. This longer, more regionalised, attachment to the land results in paradoxical reactions to immigration: it may threaten one’s ‘homeland’, on the one hand, and yet, since most immigration takes place in London, it may be experienced as a threat to the State rather than ‘my place’. Thus, a distinctive attribute of the recent Polish migration is that the Polish moved to non-traditional migrant areas, exposing some communities to migration for the first time, and thus threatening their sense of place.⁸⁸⁴

It is in the cultural effects of geography, however, that the starkest difference between the two States lies. Australia feels very far away from the sources of its cultural inspiration, mostly British but latterly also American — perhaps most vividly illustrated by the reported declaration of a former Prime Minister that Australia was “at the arse end of the world”.⁸⁸⁵ Australia, it seems, is in Asia (just barely), but its heart is elsewhere.

In contrast, the UK’s proximity to Europe and North America, and its own historical role as the heart of a far-flung Empire, has made it seem at the ‘heart’ of things. This has been reinforced by its accession to the EU, although its ambivalent relationship to the EU is manifested most clearly in its ‘opt-out’ on immigration matters.

These distinctive geographical contexts have created distinctive national identities, identities that have been shaped by the isolationist tendencies of island nations; by their relationships with their neighbours and with the colonial network; and by the contrasting sense of exile and home, of outsider and insider.

⁸⁸³ William Shakespeare, *King Richard II*, Act 2 Scene 1.

⁸⁸⁴ Pollard et al, n871, 28-29.

⁸⁸⁵ Geoffrey Barker, ‘Keating remains silent on his reported description of Australia’, *The Age*, 23 June 1994, 9.

3.3 The story of geography

The geographical story highlights the specificity of place and space, and its relations to personal and national identity. Migration is not only the activity of crossing a border, but also the experience of moving home, of being elsewhere. People relate to States, and land, differently, depending partly upon geography, and these different reactions influence reactions to immigration. Borders are not merely legal constructs, but also physical barriers; countries are not merely interchangeable States, but different lands. Power relations between and within countries are also affected by proximity and distance, by under-settlement and overcrowding, and by harsh and temperate climates.

The geographical story also highlights the constraints of geography on immigration policy, as well as the ways which immigration flows, and the reactions they provoke, are shaped by geography. In doing so, it highlights the localised experience of immigration.

The geographical story therefore highlights both the physicality of the State and our existences within them. This is in contrast to legal discourse, in which borders are legal fictions, a 'safe third country' can be exchanged readily for another, and in which land, community and State are conflated.

4 *The politics of migration*

The most prominent, and socially powerful, discourse in competition with legal discourse is political discourse. Of course, the divide between the two is far from watertight. Legal discourse includes within it elements of political discourse, and vice versa. Legal and political discourse in the two jurisdictions share certain political premises, and both tend to abstraction and simplification. It is sometimes hard, and sometimes impossible, to distinguish between immigration policy and immigration law, and between the politics of immigration and the politics of immigration law. Indeed, as I elaborate later, it is the very slipperiness of this divide that constitutes a key anxiety in the story of immigration review.

Nevertheless, political accounts of migration offer a richer and more complex account of the internal complexities of people, and of the contemporary configurations of the State that are implicated in, and complicated by, immigration. I offer here four (overlapping) political accounts pitched at different levels of analysis, beginning with the most specific account, namely that of the politics of scandal.

4.1 The politics of scandal

The account of the politics of scandal is a portrayal of (mal)administration, scandals, ministerial oustings and incessant reform.

Reference has already been made to the Australian scandals of the *Tampa* affair, the alleged abuse of ministerial discretion, and wrongful detention. This picture is incomplete without reference also to the ‘children overboard’ affair, when the government falsely alleged that refugee claimants aboard a sinking boat had deliberately thrown their children into the ocean, and the drowning of people aboard the SIEV X.⁸⁸⁶ More recently, there has been scandal over the apparent misuse of ministerial powers to detain a suspected terrorist, despite there being insufficient evidence to prosecute. The Federal Court reversed that decision,⁸⁸⁷ and the incoming Rudd government has commenced an inquiry into the matter.⁸⁸⁸

In the UK, two scandals led directly to the ousting of Ministers — Blunkett’s fast-tracking of a visa for a nanny;⁸⁸⁹ and the breakdown of the system for deporting foreign prisoners, which led to the downfall of Charles Clarke.⁸⁹⁰ More generally, long-term incompetence was vividly demonstrated by the failure to stem cross-Channel irregular migration (symbolised by the Sangatte Red Cross camp);⁸⁹¹ the woeful underestimation of the numbers of East European migrants likely to arrive as a result of the enlargement of the EU;⁸⁹² the growth of the asylum backlog;⁸⁹³ the allegations that visas were traded for sex;⁸⁹⁴ and the tragic deaths of irregular migrants at Morecambe Bay.⁸⁹⁵ These scandals have led to ministerial oustings and incessant reform. During the lifetime of this thesis, the Immigration and Nationality Directorate (‘IND’) has been replaced first by the Borders and Immigration Agency

⁸⁸⁶ Marr and Wilkinson, n503, chs 14-15; Tony Kevin, *A Certain Maritime Incident: the Sinking of SIEV X* (2004); Select Committee on a Certain Maritime Incident, *A Certain Maritime Incident* (2002).

⁸⁸⁷ *Haneef v MIAC* [2007] FCA 1273, upheld on appeal: *MIAC v Haneef* [2007] FCAFC 203.

⁸⁸⁸ ‘Govt confirms Haneef inquiry’ ABC News, 13 March 2008.

⁸⁸⁹ George Jones, ‘Prescott admits Blunkett ‘found guilty’ over visa’, *The Daily Telegraph*, 23 December 2004, 4.

⁸⁹⁰ Alan Travis, ‘Charles Clarke: Released terror suspect sealed home secretary’s fate’, *The Guardian*, 6 May 2006, 3.

⁸⁹¹ Liza Schuster, ‘Asylum seekers: Sangatte and the tunnel’ (2003) 56 *Parliament Aff* 506.

⁸⁹² See, eg, Bronwen Maddox, ‘Ministers haunted by miscalculation on Polish influx’, *The Times*, 23 October 2006, 14.

⁸⁹³ See, eg, Ian Burrell and Colin Brown, ‘Immigration – Ministers say asylum backlog could take two years to clear’, *The Independent*, 26 May 2000, 10; Joshua Rozenberg and Philip Johnston, ‘Drive to clear asylum backlog ‘in chaos’’, *The Daily Telegraph*, 1 March 2006, 13.

⁸⁹⁴ Philip Johnston, ‘Sex for visas: the Brazilian girls only had to smile and lean forward’, *Daily Telegraph*, 4 January 2006, 11.

⁸⁹⁵ Steve Bird, ‘Police learn lessons from another Chinese tragedy’, *The Times*, 10 February 2004, 9.

(‘BIA’), and then by the UK Border Agency, while the Home Office itself has split in two.

The politics of scandal has undermined public confidence in the Department and Home Office, as the story of immigration review revealed. Meanwhile, the administration feels besieged, demoralised and defensive. This political account therefore complicates the legal image of the bureaucracy as the faceless and neutral administrators of policies. While the law clearly recognises, and can remedy, instances of maladministration through the heads of judicial review, these heads of judicial review also implicitly assume that such maladministration is exceptional, rather than endemic.

This political account also reveals the institutional dependence of the legal system on a functional administration. Backlogs, lost appeal files, failures to provide enough Home Office representatives, and failures to enforce judgments through removal all undermine the credibility of the system of immigration review, as the story of immigration review revealed.

Finally, and most importantly, this political account calls into question the constitutional commonplaces of the law. Judges commonly defer to the executive on the basis of its democratic accountability and on the basis of their superior competence; but this story of administrative chaos undermines both claims. Decreasing judicial faith in these commonplaces is evident in the House of Lords’ reference to the weakness of the democratic claim in the immigration context,⁸⁹⁶ and in the IAT’s condemnation of backlogs as a “public disgrace”.⁸⁹⁷ However, while this decreasing faith is seeping into judicial language, it has not led to any serious revision of these constitutional commonplaces. To call into question the truth of these constitutional commonplaces would, after all, greatly complicate the judicial task and threaten to undermine the distinction between the legal and political sphere. Yet what the politics of scandal reveals so vividly is the inadequacy of these constitutional commonplaces.

4.2 Governments without opposition

At the structural level, another political account may be written. In the mid-1990s, both jurisdictions exchanged one dominant government for another. Strong

⁸⁹⁶ Huang, n176, [17].

⁸⁹⁷ Quoted in *SSHD v Akaeke* [2005] EWCA Civ 947, [6].

governments have also been complemented by dominant Prime Ministers, supported by a long economic boom. Further, the policy convergence of both dominant parties has disenfranchised and disaffected voters on both left and right.⁸⁹⁸ Widespread cynicism and distrust⁸⁹⁹ have encouraged politicians to displace that cynicism and distrust elsewhere, including on migrants. These general trends are manifested in immigration: in the convergence of immigration policies, the relative ineffectiveness of parliamentary scrutiny, and in the prominence of ‘sound-bite’ policies, such as the ‘tipping point’ target.

Thus, this is a story of the weaknesses and failures of democracy, embedded in the larger story of political malaise — a story of the demise of political parties and of class-conscious political engagements, of the rise of the authoritarian right, of mass apathy and complacency, and of the declining influence of liberal elites.

This story, too, undermines the constitutional commonplaces of the law. The absence of real policy choices; the lack of public engagement with the democratic process; the weakness of parliamentary accountability and scrutiny; and the political motivations that drive the passage of controversial legislation all undermine the claim to normative authority underpinning legislation. The counter-majoritarian democratic principle of the protection of minorities, always more vulnerable to the majoritarian bias of the legislative process, warrants less respect for the constitutional competence of the Parliament. As with the first story, therefore, these factors influence legal decisions, and even occasionally inflect legal discourse, but cannot be fully acknowledged without undermining the constitutional compact.

4.3 Secure borders, safe havens

Another political account may be told at the level of the complex and shifting debates in which immigration is located or invoked. Of these, the four most constant themes are race, national identity, control, and the economy.

As the historical account emphasises, the politics of race has always been entangled with the politics of immigration.⁹⁰⁰ Racism underlay the White Australia

⁸⁹⁸ See Matthew Taylor, ‘The future of progressive politics’ in Glenn Patmore and Gary Jungwirth (eds), *The Vocal Citizen* (2004) 10.

⁸⁹⁹ Only 40% of Australians trusted the government to do what was right almost always or most of the time: Andrew Markus and Arunachalam Dharmalingam, *Mapping Social Cohesion: The Scanlon Foundation Surveys* (2008) viii.

⁹⁰⁰ See generally Shah, *Refugees and Race*, n9; Liza Schuster and John Solmos, ‘Race, immigration and asylum: New Labour’s agenda and its consequences’ (2004) 4 *Ethn* 267.

Policy, and British responses to ‘new’ Commonwealth migration. The influence of race continues today to inflect debates about cultural integration, and in the anti-racist rhetoric of pro-immigration advocates.

The debate about race feeds into the wider debate about national identity. Immigration forces a re-assessment of self, forcing us to redefine the community. Those who welcome immigration use it to define their country as a non-discriminatory society with a proud humanitarian heritage,⁹⁰¹ with a dynamic economy and a hospitable people.⁹⁰² Those who wish to restrict immigration perceive it, conversely, as a threat to national identity, since it dilutes homogeneity; undermines the special obligations ties to, and bonds of, citizens; and exposes the weakness of the community.

Immigration’s highly symbolic role in the formation of identities drives States to demonstrate ‘control’ or ‘management’ of immigration:⁹⁰³ to demonstrate the competence and capacity of governments to defend their communities. This defensive element has been underlined by increasing irregular immigration, and the strengthened nexus between crime and immigration in the forms of human smuggling and trafficking, and international terrorism — a shift marked well by the (post-September 2001) title of the White Paper, ‘Secure Borders, Safe Haven’.

However, restrictionist policies may also threaten the State’s economic interest. Long-term economic prosperity, ageing populations, sector-specific labour shortages, and the economic potential of tourism and overseas education bolster the economic argument for migration.⁹⁰⁴

In this political account, like the historical account, the racial, cultural and economic identity of the person — the specificity of the individual — is of crucial significance. It also reveals the internal complexity of the State — in particular, its diverse and conflicting imperatives; and the competition between different conceptions of the State.

Most importantly, however, this political account reveals that migration is not only an objective, and global, fact of movement across international borders, but also a subjective, highly localised, experience, varying across time and nations. Migration

⁹⁰¹ Dauvergne, *Humanitarianism*, n761.

⁹⁰² See, eg, Home Office, *Fairer, Faster, Firmer*, n108; Home Office, *Secure Borders, Safe Haven*, n108.

⁹⁰³ Cronin, n782.

⁹⁰⁴ Schuster and Solmos, ‘New Labour’s agenda,’ n900.

both denotes, and connotes. The Polish worker provokes not only the very common anxieties of job competition, pressure on local services, and integration, but also specific anxieties about the role of Britain in the EU; the ideology of free trade; and concerns about the drive and work ethic of local workers. Refugees from areas of protracted conflict symbolise the fragility of our own peace and stability, and remind us of the unjust distribution of resources and power that structure our world. It is this very multiplicity, and mobility, of connotations that makes migration such a prominent signifier of broader anxieties, and thus amplifies the challenge of discursive competition in migration law.

Significantly, migration in this political story is constructed as a problem, largely one of North-South immigration. Immigrants from the South are less readily integrated and more of a burden on resources, while the sheer weight of numbers of those in the South evoke fears of being 'flooded'. Compassion for their plight, and recognition of the injustice pulls one way; but on the other hand, excepting some radical advocates,⁹⁰⁵ we think we need to draw a 'line' on the acceptable limits of immigration from the South, in order to preserve the benefits of the North. Yet, as is discussed below, contemporary political philosophy has struggled to come up with satisfactory justifications, or criteria, for this approach, leaving us in the realm of pure political pragmatism.

4.4 Anxiety in the age of globalisation

While the first three stories focus on the internal complexity of the States and the communities that constitute them, the last story concerns the relationship of States to other States, and the present refashioning of the international system. Globalisation has become the catch-all buzzword of these changes, but allied to this are equally profound changes in the deregulation and privatisation of world economies, and the re-badging of States as multicultural civic States, bound by formal ties of citizenship. As immigration has been one of the most visible accompaniments, and drivers, of these enormously significant changes, it is thus also a symbol of the changing place and shape of the State in a (relatively) new world order.

The paradoxical effects of globalisation have influenced the paradoxical structuring of this symbol. The facilitation of international travel, international communications, and exposure to immigrants (particularly in global cities) has made

⁹⁰⁵ Steve Cohen, *No One Is Illegal: Asylum and Immigration Control, Past and Present* (2003).

more people aware and appreciative of cultural diversity. Globalisation has thus emphasised our common humanity, and promoted deeper and stronger international and transnational linkages. However, these benefits of globalisation are predominantly enjoyed by social elites, whose education, job mobility and financial status allow them to take advantage of the flexibility and opportunities offered by globalisation.

However, these enormous changes have also undermined the stability and security of citizens. We see a more insecure world, in the virtual elimination of the 'job for life'; the weakening of trade unions; the increasing divergences between classes; and the rapidity of technological changes. The social and cultural changes implicit in more diverse forms of immigration compound this instability. These larger anxieties are often displaced upon the outsider; and control over immigration, therefore, also signifies a desire to control the pace and direction of change.

The responses to these changes in the two jurisdictions have partly been structured by the place of the State in the international order. The UK's enmeshment within Europe and the Anglo-American alliance enables it to benefit more from, and help shape the structure of, globalisation. These factors tend to constrain an isolationist approach, as the failure of its proposals for 'regional protection' exemplify.⁹⁰⁶ In contrast, Australia's neighbours are largely in the global South, and it has no obvious regional partners, with the consequence that its policy options are less constrained. For example, while a version of the Pacific Solution was later adopted as Conservative immigration policy, this was derided as the 'fantasy island' policy, since the UK did not have Australia's choice of weaker and impoverished nations as potential sites.⁹⁰⁷

The other major factor has been the differing strategies of the political parties. The Hawke government's strategy of re-orienting Australian identity towards a more open, multicultural, civic society, managed through consultative mechanisms and peak institutions, sparked a backlash which favoured the Howard government and led to its promotion of a less inclusive sense of national identity. While this was clearly a more popular strategy, liberal elites were often disillusioned and hostile to this move back to insularity and isolationism.

⁹⁰⁶ See n219.

⁹⁰⁷ Gaby Hinsliff, 'Howard steps up attack on asylum', *The Observer*, 23 January 2005, 2.

The shift has largely been in the other direction in the UK, with the isolationist tendencies of the Thatcher government — most prominent in its ambivalent attitude towards the EU — reversed by New Labour's more inclusive policies. Further, the early push to create more plural political structures, through devolution, the reinvigoration of local government, greater public consultation, and greater engagement with Europe, pulled at the power of central government from opposite ends.

In this political account, migration is affiliated with globalisation and an unequal international order; people are redefined by their interactions with outsiders; and the community is an anxious and divided community, subjected to rapid and constant change in its mode of governance and in the way its people understand the world. Finally, this story 'de-centres' the State. Globalisation, deregulation, and devolution create a polycentric regime of multiple and competing powers, as reflected in the increasingly polycentric structure of law.

This political account therefore importantly challenges the predominance of, and the monolithic nature of, the State in the legal imagination. It also exposes the gap between the foundational principle of the formal equality and sovereignty of States, and the real inequalities of the international order and the political constraints on the exercise of sovereignty.

Finally, even where legal discourse reveals the competition between differing visions of national identity — most vividly in the divergence between the minority and the majority in *Al-Kateb* — these judicial responses do not recognise these competing strands as such, rather assuming the correctness of one or another. While the political accounts emphasise complexity, divergence and competition, therefore, the legal account subsumes, obscures and ignores them.

4.5 The political imagination

While the political imagination generalises and categorises more than the historical story, it nevertheless produces a much more complex picture of migration, people, communities, the State, and power relations.

In particular, it offers a rich account of the connotative aspects of migration, as a highly visible symbol of anxieties about the adequacy and efficiency of the political system; about personal, communal and national identities; about race, government control, and the economy; and about the changing shape and place of the State in the

international order. The discursive competition is much more challenging for law because of the way migration is located on the fault lines of so many significant and changing anxieties.

It also offers a more complex account of the diversity and motivations of people, and the changing structure of the relationships between them. Like the historical story, the political story emphasises the significance of differences between people — differences of race, culture, and social status — and accounts for their differential reactions to immigration. The political story emphasises the way in which changes in global, economic and political structures continue to shape relationships between people, creating diverse communities that increasingly correspond less well to nations or States, and which create significant cleavages within States.

Most importantly, however, the political story emphasises the internal and external complexity of States, and how these relations do not work, in practice, as legal discourse assumes. The simple assumption of the democratic legitimacy of the legislature is weakened by evidence of democratic deficits, functional incompetence, and internal contradictions and tensions. Externally, States are located in an unequal and unjust international order, which both significantly constrains and enables the direction of immigration policy. These external and internal aspects of States also have consequences for personal identities, and for the felt, localised, experience of migration.

5 *Migration studies*

As well as these three broader perspectives, three disciplinary perspectives importantly challenge the assumptions of legal discourse. The most obviously relevant of these is migration studies, an interdisciplinary field that brings together geography, sociology, anthropology and political science. Somewhat surprisingly, this field has only penetrated migration law scholarship to a limited extent, but it has significantly penetrated the public policy debate.

I discuss here three major aspects of migration studies: the measurement and mapping of migration flows; theories about the causes of migration and its perpetuation; and the implications of migration for nation-states and the international order.⁹⁰⁸

⁹⁰⁸ See Alejandro Portes and Josh DeWind, 'A cross-Atlantic dialogue: The progress of research and theory in the study of international migration' (2004) 38 *IMR* 828.

5.1 Mapping migration

Mapping who goes where is a foundational part of migration studies. Broadly speaking, a global map of migration flows⁹⁰⁹ demonstrates the variability and increasing complexity of migration patterns, consisting partly of ‘regional systems’ and a “truly global movement”.⁹¹⁰ The latter is most evident in the classical countries of immigration, including Australia, which have the highest proportions of foreign-born residents and immigration flows, and the most diverse migrant stock.

However, for the most part immigration patterns are regionally patterned. The Arab region and Asia experience significant streams of immigration, emigration, and regional and circular migration. Africa remains a major area of emigration, although with significant regional migration caused in part by conflict and socio-economic circumstances. Europe is an area of net immigration, with varying patterns of immigration from former colonies and labour migration. These broad outlines are increasingly complicated, however, by increases in temporary and circular migration, and an increasing diversity in source countries.

Like the historical story, this mapping of flows depicts migration as a highly complex, patterned system of group movements, with widely differing impacts. In doing so, it provides an important corrective to a number of migration myths. For example, the quantitative effect of migration is smaller than popularly imagined, involving only 3% of the world’s population, with only a small proportional rise in the last few decades although the absolute number has doubled.⁹¹¹ It corrects the impression of migration as predominantly a North-South problem. It also provides an important corrective to the popular belief that most refugees come to Europe, with the developed countries having the smallest proportion of the 32.9 million ‘persons of concern’ to the UNHCR.⁹¹² Migration studies therefore evidences the disjuncture between the denotative and connotative phenomenon of migration, and the gap between the global and localised experience. It also provides evidence of the powerful

⁹⁰⁹ For general accounts, see Stephen Castles and Mark J Miller, *The Age of Migration: International Population Movements in the Modern World* (3rd ed, 2003); Wayne A Cornelius et al (eds), *Controlling Immigration: A Global Perspective* (2nd ed, 2004).

⁹¹⁰ Douglas S Massey et al, *Worlds in Motion: Understanding International Migration at the End of the Millennium* (1998), 62.

⁹¹¹ Global Commission on International Migration, *Migration in an Interconnected World: New Directions for Action* (2005), 83.

⁹¹² UNHCR, *Statistical Yearbook 2006: Trends in Displacement, Protection and Solutions* (2007), 25.

influence of geography and colonial links on immigration flows, emphasising the specificity of place.

Migration studies also supports the historical and political stories in the conclusion that it is the type of immigration and the type of receiving State, rather than the act of immigration itself, that proves politically challenging. Despite large volumes of immigration in the Arab States, for example, there is little political fallout over the very limited freedoms and rights of its immigrants. Immigration is also much less of a salient political issue where immigrants do not threaten ethnic homogeneity, weaken the economy (or particular subclasses of it), or conflict with basic structural values.

5.2 Migration theory

In migration studies, migration is conceived of as a complex and dynamic social process, a conception most evident in the development of migration theory.⁹¹³ Migration theory began with a simple economic model of migration, in which migrants were 'pushed' by shifts in capital and 'pulled' by wage differentials, making voluntary individual choices on a rational cost-benefit basis. This was modified in the 'new economics of migration' in the 1980s which reframed this as a choice taken by families, partly to diversify risk. Later theories implicated developed countries into a global economy that perpetuated and fostered inequalities, with 'dual' or 'segmented' labour market theory suggesting immigration was caused by a permanent structural demand for immigrant labour, and 'world systems theory' positing that migration grew out of the uneven process of capitalist development.

Other disciplines focused on the role of human agency, with an emphasis on migration histories and the cultural dimension of migration, and a focus on the role of human 'chains' or 'networks' and a 'culture of migration' in perpetuating migration. Political scientists emphasised the political dimension, including the effects of nation-building; the need for flexible labour markets and the political demand for integration in liberal welfare States; and the effect and consequences of immigration on international relations.⁹¹⁴

The increasing direction of complexity and multidisciplinary is reflected well in Weiner's analysis of four 'clusters' of variables affecting international migration:

⁹¹³ For an excellent overview, see Massey et al, n910.

⁹¹⁴ Myron Weiner, 'On international migration and international relations' (1985) 11 *Popul Dev Rev* 441.

1) economic differentials; 2) spatial variables (the province of geography); 3) 'affinity' variables such as religion, race and national identity (the province of sociological and anthropological research) and 4) 'access' variables, focusing on entry and exit rules (the province of political scientists).⁹¹⁵

This multi-variable approach offers a multidimensional picture of the person, and mediates between the role of structure and agency in the shaping of migration flows. Similarly, it offers a much richer and more complex account of migration as an interaction of economic, social, political and psychological processes. This is reinforced by other work done on the long-term impact of migrants in society, including their economic impact (especially the role of remittances and ethnic entrepreneurship); their legal, political and social incorporation;⁹¹⁶ and the lived experiences of migrants.⁹¹⁷

The State is also much more closely implicated in its immigration flows. Migration flows are produced by, inter alia, nation-building processes, structural reliance on immigrant labour, and patterns of colonial and neo-colonial exploitation and impoverishment. Developed nations are thus not innocent victims of unwanted flows of labour, but deeply implicated in patterns of economic injustice that render so much of that migration unstable, irregular and exploitative. This requires us to rethink the image of immigration as an act of benevolence and privilege, as explicitly recognised by Sedley LJ in the context of overseas students,⁹¹⁸ and reveals the gap between the State's legal and moral responsibility for immigration. This gap is particularly glaring when the UK condemns genocide in Darfur and oppression in Zimbabwe, and considers Iraq and Afghanistan too unstable to pull out of, yet continues to attempt to deport their citizens.⁹¹⁹

5.3 States of migration

Similarly, the debate over the capacity of States to regulate immigration has emphasised both the internal and external complexity of States. Most prominently,

⁹¹⁵ Ibid., 94.

⁹¹⁶ See, eg, Yasmin Soysal, *Limits of Citizenship: Migrants and Postnational Membership in Europe* (1994).

⁹¹⁷ Caroline B Brettell, 'Theorizing migration in anthropology: The social construction of networks, identities, communities and globalscapes' in Caroline B Brettell and James F Hollifield (eds), *Migration Theory: Talking Across Disciplines* (2000) 99.

⁹¹⁸ *OO v SSHD* [2008] EWCA Civ 747, [4].

⁹¹⁹ See, eg, Emily Dugan and Robert Verkaik, 'Government sends back hundreds of asylum-seekers to Mugabe's Zimbabwe', *The Independent on Sunday*, 16 March 2008, 6.

some have argued that globalisation has diminished this capacity, pointing to the way liberal welfare states have accorded many of the political and social benefits of citizenship to non-citizens, and accommodate large numbers of 'denizens'.⁹²⁰

Others have pointed to the internal complexity of States. Freeman has focused on the structure of the competing interests within the US policy-making process to explain the failure of immigration policy to reflect the restrictive temper of the electorate.⁹²¹ Hollifield has focused on the 'liberal paradox': international economic forces push states towards greater openness, while the international state system and domestic forces push states towards greater closure.⁹²² Joppke argued that the legal sphere, shielded from populist pressure and wedded to non-discrimination and universalism, accounts for the expansiveness of immigration policies in liberal States.⁹²³ Liberal states accept unwanted immigration because they have limited their own sovereignty, not because of a lack of capacity to manage borders.⁹²⁴ As noted in the Introduction, Christina Boswell focuses on the conflicting imperatives of States to explain the failures of immigration policy.⁹²⁵

Like the political story, then, this aspect of migration studies provides a more complex model of the State, both in relation to the external effects of globalisation, and in relation to the internal interplay between different arms of government and the electorate, and between the multiple roles and underlying imperatives of the State.

6 Contemporary political philosophy

The anxieties and increased complexity of the State are also centre stage in contemporary political philosophy, of which four aspects are highly pertinent here. First, as already noted, the re-theorising of the relationship between the nation-state and the international order provoked by globalisation has provided an account of the increased external complexity of States. Second, this has provoked re-theorising of the

⁹²⁰ Soysal, n916; David Jacobson, *Rights Across Borders: Immigration and the Decline of Citizenship* (1996); Rainer Baubock, *Transnational Citizenship: Membership and Rights in International Migration* (1994); Hammar, n365.

⁹²¹ Gary P Freeman, 'Modes of immigration politics in the liberal democratic states' (1995) 29 *IMR* 881. See also Peter H Schuck, 'The disconnect between public attitudes and policy outcomes in immigration' in Carol M Swain (ed), *Debating Immigration* (2007) 17.

⁹²² James F Hollifield, 'The emerging migration state' (2004) 38 *IMR* 885.

⁹²³ Christian Joppke, 'Why liberal states accept unwanted immigration' (1998) 50 *World Polit* 266.

⁹²⁴ Christian Joppke, *Immigration and the Nation-State: The United States, Germany, and Great Britain* (1999), 263-271.

⁹²⁵ Boswell, n2.

boundaries of justice, and the justifications for borders. Third, it has also provoked re-theorising of the nature of personal identities and their relationship to communities. Fourth, investigation into the increased diversity of many states and the increased prominence of group-related conflict has provided an account of the increased internal complexity of States.

6.1 Globalisation

Much debate in globalisation theory has centred on whether globalisation weakens or strengthens the power of States.⁹²⁶ In this debate, migration is a key case study.⁹²⁷ On the one hand, the rise of free trade agreements, multinational corporate structures, global migration movements and irregular migration suggest a weakening of State capacity to control migration. On the other hand, strengthened border control policies evidence the continuation of, or even the increase of, State power in this area. Multilevel governance structures, such as the EU, the UN, and the proliferation of intergovernmental fora, tend to supplement rather than diminish State power in this area.

These multilevel governance structures point to another effect of globalisation — the movement of decision-making and control both upward to international or transnational actors, and downward to smaller regional or local units. Slaughter, for example, argues that the State is not disappearing, but “disaggregated” and “hydra-headed”.⁹²⁸ Mathews argues that hierarchies are being replaced by networks, as the communications revolution multiplies players and increases the power of information.⁹²⁹ Rosenau argues that the clash between forces of globalisation, centralisation and integration, on the one hand, and localisation, decentralisation and fragmentation (what he calls ‘fragmeigrative’ forces) are responsible for these new global governance structures.⁹³⁰

These accounts of the contemporary State help account for some aspects of the legal constellation, and some aspects of the politics of immigration. Globalisation

⁹²⁶ Michael Mann, ‘Has globalization ended the rise and rise of the nation-state?’ (1997) 4 *Rev Int Polit Econ* 472.

⁹²⁷ See, eg, Kim Rubenstein, ‘Globalization and citizenship and nationality’ in Catherine Dauvergne (ed), *Jurisprudence in an Interconnected Globe* (2004) 159; Catherine Dauvergne, *Making People Illegal: Migration Laws for Global Times* (2008).

⁹²⁸ Anne-Marie Slaughter, ‘Governing the global economy through government networks’ in David Held and Anthony McGrew (eds), *The Global Transformations Reader* (2nd ed, 2003) 189.

⁹²⁹ Jessica T Mathews, ‘Power shift’ (1997) 76 *Foreign Aff* 50.

⁹³⁰ James N Rosenau, ‘Governance in a new global order’ in David Held and Anthony McGrew (eds), *Governing Globalization* (2002) 74.

theory accounts better for some aspects of the legal constellation — the plurality of actors in newer legal regimes, and the increased involvement of international and regional actors — and explains why States are desperate to be seen as in ‘control of’, or ‘managing’ migration, in order to demonstrate the continued power and authority of the State in the face of globalisation. The growth of local and transnational identities, meanwhile, contributes to the contested nature of immigration politics. Most importantly, however, these more sophisticated accounts of the contemporary State challenge the simplistic image of the sovereign State, with its absolute power to expel, at the heart of immigration law.

6.2 Global justice and open borders

Globalisation also impeaches immigration law’s account of sovereignty in another way, for globalisation both makes outsiders more proximate, and enables us to affect increasingly distant others in increasingly important ways.⁹³¹ This has undermined the assumption of immigration law that immigration is a mere ‘privilege’.

It has thus become possible to argue for ‘global justice’, in the sense of a global redistribution, with Beitz and Pogge for example adapting Rawls’ theory of justice to a global plane,⁹³² although Rawls himself has disagreed with this.⁹³³ This moves the question of our relations with outsiders from the realm of charity and compassion to that of justice and obligations, moving closer to the sphere of rights and law. Others have argued against this shift, preferring instead ‘humanitarianism’ as a less contentious middle ground.⁹³⁴

This wider shift has translated specifically into the field of migration through the ‘open borders’ debate, with Joseph Carens the most prominent exponent of the argument that liberalism requires open borders, subject to qualifications based on public order.⁹³⁵ This argument takes the liberal principles of equality and non-discrimination to an (apparently) logical conclusion — after all, it is difficult to justify in the abstract the huge global inequalities in resources. This has challenged other

⁹³¹ Peter Singer, ‘Famine, affluence, and morality’ (1972) 1 *Philos Public Aff* 229.

⁹³² Charles R Beitz, *Political Theory and International Relations* (1979); Thomas Pogge, *Realizing Rawls* (1989).

⁹³³ John Rawls, *The Law of Peoples* (2001). There are many critiques: see, eg, Charles R Beitz, ‘Rawls’s Law of Peoples’ (2000) 110 *Ethics* 669; Allen Buchanan, ‘Rawls’s Law of Peoples: Rules for a vanished Westphalian world’ (2000) 110 *Ethics* 697.

⁹³⁴ Matthew J Gibney, *The Ethics and Politics of Asylum* (2004); Catherine Dauvergne, ‘The dilemma of rights discourses for refugees’ (2000) 23 *UNSWLJ* 56.

⁹³⁵ See, eg, Joseph Carens, ‘Aliens and citizens: The case for open borders’ (1987) 49 *Rev Polit* 251.

liberal thinkers to justify restrictions on immigration, principally by way of the self-determination and preservation of distinctive political communities and the special obligations owed to citizens.⁹³⁶

The theoretical justifications for immigration restrictions, however plausible, suffer from a major defect: they gloss over many of the factors that have in fact influenced the imposition of immigration restrictions, such as racial prejudice, fears and anxieties over globalisation and declining political faith. They sacrifice the specificity of these other stories, compartmentalising instead the ‘ideal type’ liberal state from ‘real world’ political constraints.⁹³⁷

Nevertheless, this wider re-theorising of the insider/outsider relationship is important, because it competes with legal discourse in the following ways. First, the clear dichotomy of citizen/non-citizen, structured around benefit and privilege, is undermined by an account that suggests there may be some normative obligations towards outsiders. Rather, the unsettled state of the debate suggests that there is no consensus on how we reconcile liberal principles with immigration restrictions. Contemporary liberal values sit uneasily with, and do not convincingly account for, the assertion of a State’s sovereign right to expel.

Second, the vocabulary of justice highlights the weak normative legitimacy of the law in this arena, undermining the strong association of law and justice in its heartlands — in criminal law and civil law, most prominently. Immigration law may have the formal status of law, but it has very little to do with the idea of just relations between people.

Third, the weakness of the philosophical foundation for immigration restrictions can be used to openly challenge the foundation of immigration law.⁹³⁸ It highlights the discrepancy between our commitment to equality within a bounded political community, and the presumption of inequality embedded in immigration law. It highlights the arbitrary nature of borders and States, and questions our entitlement to the lion’s share of resources. The open borders debate thus provides a more powerful rhetoric with which to contest immigration restrictions, since it invokes and

⁹³⁶ See, eg, Michael Walzer, *Spheres of Justice: A Defence of Pluralism and Equality* (1983), ch 2; Jules L Coleman and Sarah K Harding, ‘Citizenship, the demands of justice, and the moral relevance of political borders’ in Warren F Schwartz (ed), *Justice in Immigration* (1995) 18; David Miller, *National Responsibility and Global Justice* (2007) 203-229.

⁹³⁷ See, eg, Howard F Chang, ‘Liberal ideals and political feasibility: Guest-worker programs as second-best policies’ (2002) 27 *NCJInt’l L& ComReg* 465.

⁹³⁸ See Kevin R Johnson, ‘Open borders?’ (2003) 51 *UCLA L Rev* 193.

translates pre-existing political commitments, and challenges us to demonstrate our good faith.

By emphasising the increasing proximity and entanglement of communities and the normative dimension of States' obligations to outsiders, the global justice and opens borders debate openly challenges the model of immigration law, and pinpoints the normative void within it — making it the most direct discursive competitor to legal discourse.

6.3 Liberals, communitarians and cosmopolitans

Allied to this is a broader shift in the conceptions of personal identity, with competition between three models of the self. First, the liberal model of self is often caricatured as a highly individualist, abstract and pre-social sense of self, said to be typified by Rawls' thought-experiment of a person 'in the original position' without any cultural, religious or other identity characteristic.⁹³⁹ Despite these critiques, this liberal self remains the basis for much public policy and political discussion.

The cosmopolitan model of self is inspired by, but not a necessary corollary of, this liberal approach. The cosmopolitan position, as Pogge puts it, is premised on the belief that the ultimate units of moral concern are individual human beings; that this status attaches to every living human being equally; and that this status has global force, with the person as the ultimate unit of moral concern for everyone.⁹⁴⁰

On the other hand, a range of other people, loosely but not uncontroversially labelled 'communitarians', have emphasised that individuals exist not in the abstract, but are constituted in part by communities, and that the aspirations and attachments of individuals were central to that sense of self and thus could not be discarded in the 'original position'.⁹⁴¹

Of course, we can recognise truths in each of these perspectives, and we may experience each of these senses of selves.⁹⁴² The relevance of this debate is that they provide different models of personal identities which partly underlie the different legal regimes, and also explicate the politics of immigration. As political scientists

⁹³⁹ John Rawls, *A Theory of Justice* (Revised ed, 1999).

⁹⁴⁰ Thomas Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* (2002), 169.

⁹⁴¹ See Stephen Mulhall and Adam Swift (eds), *Liberals and Communitarians* (2nd ed, 1992).

⁹⁴² William James Booth, 'Foreigners: Insiders, outsiders and the ethics of membership' (1997) 59 *Rev Polit* 259, 291-292.

have evidenced, cosmopolitans tend to be pro-immigration,⁹⁴³ partly explaining the pro-immigrant bias in the scholarly world.⁹⁴⁴

This debate therefore provides a richer account of people and their affiliations, one that highlights the different attitudes and orientations of people towards immigration policy, and which helps explain the irresolvable nature of the immigration debate. Here, too, globalisation may play a paradoxical role, with increased travel and international communication promoting a cosmopolitan perspective in social elites on the one hand, and fostering a stronger communitarian sense of self among those whose ways of life are irreversibly changing.

6.4 Multiculturalism

Both the fact and theory of multiculturalism also provide a richer account of people, and of the internal complexity of States. The increased cultural diversity caused by immigration, combined with increasing recognition of indigenous peoples and minorities, has forced recognition of the special claims of cultural identity. States have thus developed policies on language, recognised different religious holidays and customs, and debated political recognition of, and empowerment of, different cultural groups.

The importance of cultural affinities has been articulated more clearly in multicultural theory. Liberals have justified minority rights in terms of the importance of cultural membership in framing choices and enabling the exercise of autonomy.⁹⁴⁵ While these claims for the distinctiveness and necessity of cultural membership have not gone uncriticised,⁹⁴⁶ the general insight of the importance of cultural membership both complicates our understanding of personal identity, and our understanding of community. People are not merely individuals, but members of cultural groups. Immigrants form their own ethnic communities, but they have ties to their host State as well as to their home States and communities. Multiculturalism thus points to the cleavages and power relations within States, and highlights the way immigrants are both inside and outside the State.

⁹⁴³ Katharine Betts, 'Cosmopolitans and patriots: Australia's cultural divide and attitudes to immigration' (2005) 13 *P&P* 29; Clive Bean, 'Open or closed boundaries? Attitudes towards sovereignty issues in Australia' (2002) 21 *Pol Org Soc* 25.

⁹⁴⁴ Schuck, 'The disconnect,' n921.

⁹⁴⁵ For a short overview, see Will Kymlicka, *Contemporary Political Philosophy: An Introduction* (2002) ch 8.

⁹⁴⁶ See, eg, Jeremy Waldron, 'Minority cultures and the cosmopolitan alternative' in Will Kymlicka (ed), *The Rights of Minority Cultures* (1995) 93.

The importance of cultural identity also points to the way various brands of liberalism, including cosmopolitanism, and human rights discourse, tend to under-emphasise our stake in cultural identities, and thus fail to generate the emotional charge of identity politics.⁹⁴⁷ The language of liberalism, in which legal discourse is embedded, thus tends both to neglect the need for cultural recognition, and to gloss over the real anxieties of cultural threat.

The sense of threat is complicated by the fact that the contemporary liberal orthodoxy precludes the use of race or ethnic homogeneity to justify political closure. Further, the fact of cultural diversity undermines the ethnic justification of community, with the result that 'British' and 'Australian' identity are formally tied instead to vague civic ideals. The felt threat to an ethno-cultural community thus also invokes the fragility and amorphousness of State-sponsored identities.

This is compounded by the fact that, as multicultural theory has pinpointed, group rights fit awkwardly into the individualistic discourse of liberalism.⁹⁴⁸ Liberal theorists of multiculturalism have, as described above, sought to retain the primacy of individuals as the ultimate units of moral concern, deriving the need for group rights not from the moral status of the group but rather from the importance of group membership for individuals. Thus, multicultural theory points to a dimension of communities and States missing from the orthodox legal description, namely the composition of the State by various, overlapping, groups which are not entirely reducible to groups of individuals.

7 *Postcolonial studies*

Finally, postcolonial studies moves away from the abstractions of liberal language, and back to the specificity, complexity and diversity of the historical perspective. Its foundation was the examination of the historical encounter of the coloniser and the colonised, emphasising its discursive dimension and effects on subjectivity. Authors such as Frantz Fanon, Chinua Achebe and Salman Rushdie spoke eloquently of their complex relationship with the English language and the power relations embedded in it, exploring the interrelation between economic and

⁹⁴⁷ Andrew Dobson, 'Thick cosmopolitanism' (2006) 54 *Polit Stud-London* 165.

⁹⁴⁸ Vernon Van Dyke, 'The individual, the state, and ethnic communities in political theory' in Will Kymlicka (ed), *The Rights of Minority Cultures* (1995) 31.

political structures and human agency within the context of their own unique identities.⁹⁴⁹

Here, the competition between, and the dynamism of, the different ‘selves’ of contemporary political philosophy is traced at the micro-level. The person in postcolonial studies is always and everywhere politically, economically, and historically inscribed. Identity becomes a site in which hegemony and resistance are played out. The person of postcolonial studies is particular and specific, irreducibly and holistically complex and constantly renegotiated — a matter of “‘becoming’ as well as of ‘being’”.⁹⁵⁰

Crucial to this project is the notion that our selves are constructed in relation to an ‘Other’, founded on a dynamic of desire and fear.⁹⁵¹ This encounter may, like globalisation, paradoxically promote both the affinity of common humanity, and the rejection of the stranger through non-identification. This insight is now broadly shared by a range of disciplines,⁹⁵² and has obvious implications for the nexus between immigration and citizenship law. This relational formation of identity is embedded in, but not recognised explicitly by, the language of immigration law. In determining who is or is not an “immigrant”, or a “non-citizen”, we implicitly define the political community; but legal discourse treats these categories as self-evident truths, rather than contingent, constructed and dynamic.

Postcolonial studies, moreover, provides a much more complicated vision of power relations. Contemporary postcolonial studies is founded on post-structuralism’s examination of the nexus between power, language and knowledge, emphasising the way language is used to assert, establish, and reinforce colonial power. Language, therefore, is deeply implicated in the construction of hierarchies and in the structures of oppression. This contrasts with conventional judicial rhetoric (as discussed in chapter 4) which aims at logic and clarity, and appeals to reason, the lucidity of language and the neutrality of the arbiter.

⁹⁴⁹ Frantz Fanon, *Black Skin White Masks* (1967); Chinua Achebe, ‘The politics of language’ in Bill Ashcroft, Gareth Griffiths and Helen Tiffin (eds), *The Postcolonial Studies Reader* (2nd ed, 2006) 268; Salman Rushdie, *Imaginary Homelands: Essays and Criticism, 1981-1991* (1991).

⁹⁵⁰ Stuart Hall, ‘Cultural identity and diaspora’ in Jonathan Rutherford (ed), *Identity: Community, Culture, Difference* (1990) 222, 225.

⁹⁵¹ See Edward W Said, *Orientalism* (1978).

⁹⁵² Michéle Lamont and Virág Molnár, ‘The study of boundaries in the social sciences’ (2002) 28 *Annu Rev Sociol* 167.

This insight also explains the significance of legal language. The law is language buttressed by the power (or, as de Sousa Santos would have it, the violence)⁹⁵³ of the State. It is therefore a coercive form of discourse, a discourse that not only centrally frames our reality but one that can delegitimise or undermine other discourses; and one that can be enforced and imposed. The power of the law is in its combination of discursive *and* coercive power.

This explains why the language in which refugees and migrants are described are of such importance, because it frames the way we think of them, and thereby enables certain responses. Governments have consistently framed refugees as ‘asylum-seekers’, ‘bogus’ refugees, and ‘queue jumpers’; whereas critics have tended to emphasise the humanity of such people, and their relationships with ‘insiders’ (wives, neighbours, friends). The legal definition of refugee competes with broader notions of refugee in popular discourse; and our legal obligations compete with the popular view of asylum as an act of unilateral generosity. Thus, the story of immigration review is in part a battle over discursive primacy, and the language of the law itself acts to maintain, reinforce and legitimise unequal global structures.

Further, in its investigation of power relations, postcolonial studies is theoretically biased in favour of the suppressed and oppressed; of the peripheral and marginal, and of ambivalences, tensions and paradox. Part of the project involved ‘writing back to the Empire’ through, for example, re-writing canonical texts from the perspective of the colonial subject, or re-examining canonical texts in the light of colonialism.⁹⁵⁴ This focus on ‘reading against the grain’ makes us question omissions and de-emphasis, makes us ask who speaks with authority, and what entitles them to it — an orientation that informed the analysis of the previous chapter. A postcolonial reading of immigration law, thus, is alert to the tendency of academic scholarship and public policy to ‘write’ over, and drown out, the voices of migrants themselves,⁹⁵⁵ and to de-emphasise human agency and over-privilege structure. Such a reading would also recognise the ambivalences and paradoxes within legal language, and within liberal accounts of identity, community, and the State. It would support the insight that we all, daily, live with apparent contradictions and incoherence, and that this

⁹⁵³ de Sousa Santos, n760.

⁹⁵⁴ Bill Ashcroft et al, *The Empire Writes Back: Theory and Practice in Post-Colonial Literatures* (2nd ed, 2002).

⁹⁵⁵ Gayatri Chakravorty Spivak, ‘Can the subaltern speak?’ in Gayatri Chakravorty Spivak (ed), *Toward a History of the Vanishing Present* (1999).

normative incoherence is an inescapable social fact that cannot ultimately be resolved by philosophical debate.⁹⁵⁶

Finally, postcolonial studies is also biased towards the experiential and subjectivity, focusing on the exercise of power as an intimate and subjective experience with profound effects on our own self-identity. Adopting the Foucauldian vision of power, postcolonial studies focuses on the percolating and pervasive nature of power, and especially on the power of disciplines to construct our view of the world.⁹⁵⁷ It thus highlights the politically loaded preference of the social sciences for objectivity and data, over subjectivity and experience, which is translated in refugee law in the preference of ‘objective’ country information to the lived experience of the refugee.

More radically, an experiential bias (evident also in the ‘bottom-up’ approach to administrative law,⁹⁵⁸ and studies of ‘legal consciousness’⁹⁵⁹) re-frames the power relations inherent in immigration review. Viewing immigration review from the immigrant’s perspective provides an important corrective to arguments about ‘legal merit’. As an Australian practitioner argued:

You have someone who genuinely feels that they should have been granted refugee status—because they have not got access to lawyers and because they were tortured, for example—and the tribunal is telling them, ‘Everything is all right back in the Punjab now.’ To say that is a frivolous case is really straining the meaning of the word ‘frivolous’.⁹⁶⁰

Similarly, the experiences of practitioners and judges are also obscured in legal discourse. Part of the story of immigration review is explained by the frustration practitioners and judges feel with the lived contradiction between the upholding of legal values, and the experience of a system that generates serious challenges to those values.

Postcolonial studies, therefore, provides an account of people and power relations that challenges the biases of legal discourse — that insists on the irreducible complexity of people, that emphasises their subjectivity, and, most importantly, critiques the linguistic and political biases of law. As will already be evident, the argument of this thesis (especially in chapter 4) is partly inspired by these postcolonial orientations.

⁹⁵⁶ Alasdair MacIntyre, *After Virtue: A Study in Moral Theory* (1981) 6.

⁹⁵⁷ Michel Foucault, *Discipline and Punish: The Birth of the Prison* (1977).

⁹⁵⁸ Michael Adler, ‘Tribunal reform: Proportionate dispute resolution and the pursuit of administrative justice’ (2006) 69 *MLR* 958.

⁹⁵⁹ Engel, n754.

⁹⁶⁰ Evidence to LCRC, Senate, Melbourne, 28 January 1999, (Erskine Rodan) 55.

8 *The social power of discourses*

The discursive competition between these accounts and the legal account is also, and importantly, unequal because of the greater social power of these discourses. Part of this is due to the greater complexity of these competing accounts, which capture a greater range of truths.

However, other factors also promote the social power of these discourses. First, these discourses have a broader range of circulation. The political story, for example, is repeated ad nauseam in the media, and migration studies and contemporary political philosophy are translated readily into public policy. Both the historical and geographical accounts also circulate in popular narratives of immigration. Postcolonial studies has been hugely influential in the academy, and has perceptibly infiltrated public discourse. Legal discourse circulates more narrowly. Few ordinary people read judgments or legislation, and instead these are re-interpreted and often misinterpreted by the media.

A second, related, point is that the competing discourses are more accessible to the ordinary public, and pollinate each other more readily. No special training is required to understand the historical, political or geographical stories. While the disciplinary perspectives are more specialised, both contemporary political language and migration studies speak in a relatively accessible fashion. Postcolonial studies, however, is frequently jargon-laden and thus less accessible. This is true also of legal language, which uses a specialised vocabulary which is often intimidating to the uninitiated.

Third, as already noted, there is a prevailing bias towards objective and empirical 'expertise', towards hard data and objective accounts. Migration studies, as the most obviously 'empirical', benefits from this prevailing bias.

Fourth and finally, as emphasised in the previous chapter, the aims of legal discourse are different from those of competing accounts. The aim of legal discourse is, ultimately, to simplify and reduce a complex social reality in order to apply rules and determine outcomes. In contrast, the competing perspectives aim at understanding, and are thus open rather than closed in their orientations, and can deal at greater or lesser levels of specificity and complexity. Thus, it should be emphasised, my critique here is not that legal discourse is impoverished and can be made better by more imaginative language; rather, it is that the discursive

competition surrounding migration is *structurally* unequal, and that legal discourse is thus *inevitably* and *particularly* vulnerable to such competition.

9 Conclusion

This chapter has argued that migration is embedded in a ‘discursive constellation’ which discursively competes, and thus challenges, immigration law. In these accounts, migration is a complex, patterned, social process, caused and perpetuated by an equally complicated range of factors. It is a phenomenon which, while having global implications, is differently experienced by different communities at different times. Migration is also a connotative phenomenon, one that unerringly locates the fault lines of a number of significant contemporary anxieties. These anxieties may be conveniently labelled as “identities, borders and orders”.⁹⁶¹

Identities, which are assumed as relatively unproblematic in legal discourse and fixed by legal categories, prove highly complex in other accounts. The accounts of liberal, communitarian and cosmopolitan selves indicate alternative conceptions of identity; multiculturalism emphasises the significance of group identities for personal identities; the political story evidences cleavages in, and competing visions of, national identities. The historical perspective and postcolonial studies go further in emphasising the specificity and irreducible complexity of identities, tracing at the micro-level the interaction between structure and agency that shapes individual identities.

The easy equation between community and State in legal discourse is also revealed as simplistic. The internal and external complexity of States is repeatedly emphasised in historical and political accounts, while the geographical story emphasises the specificity and physicality of territory, and its relation to the community and State. The apparent unity of the State in legal discourse is ‘disaggregated’ by globalisation theory. The simple legal model of power relations is challenged not only by the increased complexity of these accounts, but also more explicitly by the global justice and open borders debate, and by postcolonial studies.

The failure of legal discourse to deal adequately with the complexity of the phenomenon of migration renders legal discourse vulnerable to attack on different fronts. Decisions that obscure the politics of migration are described as “bizarre or inexplicable”, and judges “out of touch”. On the other hand, describing claims as

⁹⁶¹ A Mathias et al (eds), *Identities, Borders and Orders* (2001).

“frivolous” or as of “no legal merit” runs the risk of linguistic (and also physical) oppression — a risk captured in the slogan “No one is illegal”, a slogan that openly challenges the adequacy and power of legal classifications.

While this analysis applies to other fields of law, it is more acute in immigration law. Immigration law is more susceptible to the challenge because of its normative weakness and the haphazard nature of the legal constellation. Further, the mobility and multiplicity of the connotations of migration, the prominence and significance of the anxieties it symbolises and evokes, and the life-changing and potentially death-causing implications of immigration decisions, make the gap between the legal imagination of migration and those in richer, more complex accounts, both more obvious and significant.

Chapter 6 — Regulating disputes

1 Introduction

Whereas the previous chapters have emphasised the challenge of coherence and competition, this chapter turns to the challenge of capacity. I argue here that immigration exposes several significant limitations to the capacity of the social practice of law to resolve disputes and regulate human behaviour. While some of these limitations are unique to immigration law, most of these are general limitations whose effect is exacerbated in immigration.

The chapter focuses on dispute resolution and regulation because they are core social functions of law. Both domestic immigration law and EU immigration and asylum law have a predominantly regulatory character, while the main objective of adjudication, and thus immigration review, is to resolve disputes. The difficulties of the law in performing these social functions underlie, and explain much of, the story of immigration review. It is, in large part, a story about the misrecognition of, frustration with, and responses to these fundamental limitations to the capacity of the law.

It is important to clarify that I do not argue that the law in this field is inherently incapable of resolving disputes or regulating human behaviour. It is clear enough that some disputes are indeed resolved adequately through immigration review, and that there are real effects on human behaviour, although the extent of its effectiveness is much debated, and very difficult to measure. Moreover, the effectiveness of the law varies greatly across different kinds of disputes and human behaviour. Rather, I argue that, for a range of reasons peculiar to immigration, there are significant structural limitations that render immigration law and review less capable of resolving disputes and regulating behaviour than in other spheres of law.

I begin first with dispute resolution, touching briefly on the insights of different scholarly traditions before examining the ways in which the function of dispute model resolution is inappropriate and misleading. The second section of the chapter, on regulation, follows a similar structure, beginning with the insights of regulatory studies and the literature on policy failure, before turning to three major limitations: the regulatory context; the constraints of policy-making and law-making processes; and the design and implementation of policy.

This framework both organises and illuminates the complaints made of immigration law and review described in chapter 1. It provides a structured way of thinking through these complaints, and this structure illuminates how these complaints manifest more general limitations of law, and the different causes of these limitations. This chapter concludes by examining how the different causes of these various limitations may be disentangled, and how these different causes invite different approaches to these limitations. However, the logical conclusions to be drawn from this analysis will be transformed, and probably frustrated, by political and institutional dynamics.

2 *Dispute resolution*

2.1 Approaches to dispute resolution

Dispute resolution has been a focus in three distinctive fields of legal theory: anthropology of law, socio-legal studies, and alternative dispute resolution ('ADR') studies. Central to these fields is the insight that a core function of law is to resolve disputes over conflicting interests within a community. How it does this, whether it does this effectively, and the influences of social factors are underlying themes of the research.

Anthropologists have long described the customs, reasoning and procedures for resolving disputes in different cultures, and the cross-cultural concept of disputing "displac[ed] [the ethnocentric concept of] law as the subject of study" in the 1970s.⁹⁶² In the anthropological field, a dispute was defined as "the public assertion, usually through some standard procedures, of an initially dyadic disagreement".⁹⁶³

The extension of anthropology of law to studies of advanced Western societies has overlapped with the closely affiliated traditions of 'law and society' scholarship (predominantly used in the US), 'socio-legal studies' (predominantly used in Britain), and the more theoretically inclined 'sociology of law'.⁹⁶⁴ These studies, revealing as they do the inequalities and inaccessibility of litigation, have also fed into the 'access

⁹⁶² Francis G Snyder, 'Anthropology, dispute processes and law: A critical introduction' (1981) 8 *BJLS* 141, 145.

⁹⁶³ PH Gulliver, 'Case studies of law in non-Western societies: Introduction' in Laura Nader (ed), *Law in Culture and Society* (1997) 11, 14-15.

⁹⁶⁴ The nuances of these different terms is explained more fully in Roger Cotterrell (ed), *Law and Society* (1994) xi-xvii.

to justice' movement.⁹⁶⁵ In these fields, the focus is on the empirical investigation of dispute settlement as a social process.

The process-oriented approach is exemplified in Felstiner, Abel and Sarat's classic analysis of disputes as a process of 'naming' (recognising the dispute); 'blaming', and 'claiming'.⁹⁶⁶ The social dimension of this process is emphasised in investigations of the influence on litigation of social factors including the form of social organisation,⁹⁶⁷ the difference between 'one-shot' and 'repeat players' as litigants,⁹⁶⁸ and the role of participants in defining and transforming the dispute.⁹⁶⁹

As noted earlier, the subjectivity of legal processes has been investigated through the concept of 'legal consciousness'.⁹⁷⁰ This turn towards subjectivity is also evident in research examining the independent legitimating effect of different aspects of procedural justice.⁹⁷¹

The various emphases of the socio-legal approach is epitomised best in the UK by the major *Paths to Justice* project, which examined empirically the incidence of "justiciable problems" and the ways in which these justiciable problems were, or were not, translated into legal problems.⁹⁷² Part of this research also involved qualitative interviewing, which allowed examination not only of what "people do" but also what people "think about law", as the subtitle of the book has it. A similar study in relation to administrative law has been initiated.⁹⁷³

The influence of this work and concerns about access to justice have fed into the field of ADR studies, which centres on the notion of courts as resolving (or, more

⁹⁶⁵ For a short review, see RL Kidder, 'The end of the road – Problems in the analysis of disputes' (1980) 15 *LSR* 717, 717-718.

⁹⁶⁶ William L F Felstiner et al, 'The emergence and transformation of disputes: Naming, blaming, claiming ...' in Roger Cotterrell (ed), *Law and Society* (1994) 77. See also Sally Engle Merry, 'Going to court: Strategies of dispute management in an American urban neighbourhood' in Richard L Abel (ed), *The Law & Society Reader* (1995) 36.

⁹⁶⁷ William L F Felstiner, 'Influences of social organization on dispute processing' in Roger Cotterrell (ed), *Law and Society* (1994) 46.

⁹⁶⁸ Marc Galanter, 'Why the "haves" come out ahead: Speculations on the limits of legal change' (1974) 9 *LSR* 95.

⁹⁶⁹ L Mather and B Yngvesson, 'Language, audience, and the transformation of disputes' (1980) 15 *LSR* 775.

⁹⁷⁰ See n754.

⁹⁷¹ See generally Tom R Tyler, *Procedural Justice* (2005); Tom R Tyler, *Why People Obey the Law* (2006).

⁹⁷² Hazel Genn, *Paths to Justice: What People Do and Think about Going to Law* (1999). Compare also the Civil Litigation Research Project in the US, in the articles in the special 1980-1981 issue of the *Law and Society Review*.

⁹⁷³ Michael Adler, 'Constructing a typology of administrative grievances: Reconciling the irreconcilable?' in Reza Banakar and Max Travers (eds), *Theory and Method in Socio-Legal Research* (2005) 283; Adler, 'Tribunal reform,' n958.

generally, inadequately resolving) disputes. However, as Twining notes, ADR studies is largely atheoretical,⁹⁷⁴ drawing instead from the paradigm of the dispute already developed in anthropology of law and socio-legal studies. Notably, however, the focus of ADR itself — on forms of mediation, arbitration and informal dispute resolution — assumes the possibility of an accommodation or compromise of interests.

2.2 The paradigmatic dispute

Together, these fields have constructed a paradigm of ‘dispute’ which, as Kidder argues, has its own “baggage of assumptions” — namely: 1) egalitarianism, 2) individualism, 3) the discreteness of cases, and 4) the function of dispute resolution in restoring harmony.⁹⁷⁵ Disputes are conceptualised primarily as involving two individuals within a community, in a state of approximate equality, in discrete conflicts of interests, with the objective of producing “a settlement in the specific case which permits the group to return to normal”.⁹⁷⁶ In this paradigm, the adjudicator is a third ‘neutral’ party (in aspiration, if not in practice). This paradigm marries the structure of civil law with a structural-functionalist tradition which (as later critiques noted)⁹⁷⁷ emphasised stability, harmony and consensus at the expense of dissensus, conflict, and coercion.

The first, and most fundamental, limitation of immigration review is that the nature and structure of an immigration dispute does not fit within this paradigm. The very notion of ‘dispute’ is, I argue, inapposite and misleading, obscuring several significant features of immigration ‘disputes’: the ‘outsider’ status of the migrant; the individual-State relationship; and the rights, interests and values at stake.

2.2.1 ‘IN’ AND ‘OUTSIDE’ THE COMMUNITY

The notion that dispute resolution processes work to defuse conflict and restore social harmony is itself premised on the assumption that the dispute arose within the community, rather than between insiders and outsiders. Of course, this characterisation of immigrants as outsiders oversimplifies, for most immigrants who can avail themselves of immigration review are physically within, and to greater or

⁹⁷⁴ William Twining, ‘Alternative to what? Theories of litigation, procedure and dispute settlement in Anglo-American jurisprudence: Some neglected classics’ (1993) *MLR* 380, 380-381.

⁹⁷⁵ Kidder, 1965, 721.

⁹⁷⁶ *Ibid.* 719.

⁹⁷⁷ For a review, see A Javier Treviño, *The Sociology of Law: Classical and Contemporary Perspectives* (1996) 349-370.

lesser degrees integrated in, the society. Nevertheless, this structural feature has two important implications.

The first important implication is that participants in immigration review are likely to be socialised differently — to carry with them different cultural norms and expectations, and to behave and interpret behaviour differently. As anthropological work has demonstrated, processes of dispute resolution are highly culturally contextual, and often dependent upon unifying cultural norms.

Some of the consequences that arise from this feature are obvious. As noted earlier, the presentation and evaluation of evidence and the interpretation of credibility is made much more difficult once we take away many of the shared assumptions about what is important, and how one should behave. ‘Legal consciousness’ and attitudes towards government and the law vary considerably. This is exacerbated in immigration review because of the diversity of cultural contexts involved.⁹⁷⁸ Further, the persecution or failure of governments that founds refugee status unavoidably shapes the refugee claimants’ perception of governments and the law. Indeed, the very restrictiveness of refugee policies encourages refugee claimants to evade or breach the law.

Many of the social norms that usually result in compliance with the law may be absent: the desire to avoid the interruption of a peaceful life; the desire to maintain one’s reputation within a social community; the belief that overall the system of law is beneficial for one’s peace and well-being; the belief that the law generally provides justice; or the belief in the legitimacy of a democratic government in which one participates. Many migrants’ experiences are also more likely to be coloured by the coercive aspects of the law, in the forms of detention, criminal punishment, and removal. Further, those that enter irregularly may perceive themselves as ‘outside’ the protection of the law altogether. As one Guatemalan irregular migrant said: “I’m illegal, I have no rights. I’m nobody in this country. Just do whatever you want with me.”⁹⁷⁹

While the differential socialisation of migrants has an important practical effect upon the effectiveness of immigration law and review, another effect of the insider-outsider structure of immigration review is normative. Implicit in the paradigm of

⁹⁷⁸ W Kalin, ‘Troubled communication: Cross cultural misunderstandings in the asylum hearing’ (1986) 20 *IMR* 230.

⁹⁷⁹ Quoted in Julia Preston, ‘An interpreter speaking up for migrants’, *New York Times*, 11 July 2008, 1.

dispute resolution is the recognition of the importance of retaining harmony within a community, a factor which has less force when the person is 'outside' the community.

The claims to procedural justice of non-citizens are thus weaker, as is evident in the late development of immigration review, and the long judicial tradition of excluding natural justice from immigration decisions. The link between the community and the claims to procedural justice is manifest in the structure of review rights, which privileges those present in Australia and British family visitors, and in the different standards of access to courts depending on residence in Art 16 of the Refugee Convention. As Ruddock put it: "You do not have to give people who arrive on your shores, and are in all senses foreigners, access to your courts in the same way you give your own people".⁹⁸⁰

This normative difference partly explains the special susceptibility of immigration review to continual reforms and attacks, and the toleration of procedural variation in this field. Importantly, this normative difference also makes the State's interest in resolving the dispute, and in recognising the interests of the immigrant, much weaker.

2.2.2 THE INDIVIDUAL AND THE STATE

Another aspect of the distortion of the paradigmatic dispute is that the dispute is not between equal individuals but between the individual and that of the State. Two other implications flow from this: a gross disparity of power, and more fundamentally, the fact that the 'dispute' is an artificial creation of the State.

While all administrative fields are afflicted by a stark disparity in power, immigration review exhibits perhaps the most gross inequality of power visible. As socio-legal studies has graphically demonstrated, the processes and outcomes of dispute resolution are crucially shaped by factors such as linguistic and cultural competence, access to financial and legal resources, and experience of legal processes.

While the variable social characteristics of migrants produce much variation in the extent of the disparity, in general the migrant is at a greater disadvantage than a citizen. They are much less likely to be linguistically and culturally competent; less likely to have access to financial resources including legal aid; and more likely to be experiencing the legal system for the first time. These effects are partly mitigated by

⁹⁸⁰ Quoted in Melissa Fyfe, 'Law to stop asylum seeker appeals may fail', *The Age*, 9 November 2001, 17.

various features of immigration review, such as the more inquisitorial procedure; translation and interpretation; legal representation, including pro bono counsel; court waivers and (in the UK) free tribunal hearings, as discussed in chapter 1.

However, the State does not simply have more resources and additional benefits as a 'repeat player'. Rather, it is the State that generates, frames and judges the dispute. It is the State that makes the rules that generate the dispute in the first place; it is the State that creates and modifies the laws which govern the dispute; it is the State that creates and modifies the review structure through which the dispute is processed; and it is the State that enforces the judgment.

To a certain extent, this all-pervasive power is partly restricted by the more autonomous legal regimes of refugee law and, in the UK, human rights law. Famously, article 3 of the ECHR has been interpreted as preventing States from returning people to States where there is a real risk they will suffer torture or inhuman or degrading treatment.⁹⁸¹

However, while these qualifications on sovereignty are both important theoretically and practically, the implications of these ought not to be overstated. In theory, these apparent 'exceptions' are consequences (albeit unforeseen, in the case of Art 3) of the States' decisions to ratify these Conventions; and the rules in the Conventions were also framed by States.⁹⁸² In theory, too, the effect of these Conventions is binding on an international plane, but not directly binding domestically, and the States retain the power to legislate in breach of those Conventions. In practice, too, it is relatively rare for a claim under Article 3 ECHR to succeed where no refugee claim is made out,⁹⁸³ and there are, as Chapter 1 discusses, many indirect ways in which those claims may be prevented or restricted.

While the general picture of the all-pervasive power of the State is true of many civil and administrative disputes, its effects are magnified in immigration review, for several reasons. First, the rules by which disputes are generated are important. Thus, although civil disputes may be governed by positive laws made by manifestations of the State, those rules commonly work to accommodate the different interests within a community. In administrative disputes over (for example) social security, tax and

⁹⁸¹ *Cruz Varas v Sweden*, 20 March 1991, Series A no 201, applying *Soering v UK*, 7 July 1989, Series A no 161 to the case of asylum-seekers.

⁹⁸² See Geoffrey Marston, 'The United Kingdom's part in the preparation of the European Convention on Human Rights, 1950' (1993) 42 *ICLQ* 796.

⁹⁸³ See generally Public Law Project, *The impact of the Human Rights Act on judicial review: An empirical research study* (2003).

planning, the rules seek to distribute benefits and burdens across the community. These rules, therefore, govern relations as between individuals or segments of the community, whereas immigration law governs relations directly between the State and the migrant, and is made expressly in the 'national interest', namely in the interests of the State.

Second, as was described in chapter 2, the rules themselves are weighted heavily against the migrant. This is exacerbated by the fact that immigration law is largely made by the executive, and is subject to rapid change and political volatility. This both undermines the protective function of legal certainty and makes the State's role in generating the rules of the dispute and the procedures of the dispute more visibly political.

Third, the pervasive power of the State in the dispute is made more evident by its exclusionary and coercive aspect in immigration, in contrast to the aspect of welfare protection in, say, social security. It is the oppressive aspects of the State — its powers to exclude, detain, and deport — that loom large in immigration disputes.

Fourth, while in other administrative disputes the claim is in truth made against one manifestation of the government — the Department of Social Security, for example — in immigration the claim is in truth one of right of residence in the State itself, further magnifying the role of the State in immigration disputes.

The relationship between the individual and the State in immigration disputes, therefore, is misleadingly analogised to a dispute between individuals, obscuring both the gross disparity of power and the pervasive role of the State in constructing and framing the 'dispute'.

2.2.3 RIGHTS, INTERESTS AND VALUES

The third feature of the structure of immigration disputes that reveals the inappropriateness of the dispute paradigm is the differing nature of the rights, interests and values in immigration disputes. In the paradigmatic dispute, the conflict usually arises over interests that may be accommodated, compromised, or set off against competing interests, and is governed by a normative framework of rights and obligations — features that are particularly clear in tort law, contract law and criminal law, the heartlands of law's empire.

This is not true, for several reasons, in immigration disputes. First, the major interest in an immigration dispute — the right to enter or remain — is not readily

subject to compromise or accommodation, since it is the ‘interest of all interests’. As Walzer has noted, *all* interests in a community are affected by, and incorporated in, the right to remain; membership of the community is a *precondition* to all other social goods.⁹⁸⁴ The dispute thus has an ‘all-or-nothing’ character, and is not typically ‘balanced’ by offsetting interests and obligations.

Second, as I outlined earlier, immigration law does not encode a coherent normative framework of rights and obligations; it excludes or de-emphasises factors that are normatively, though not legally, significant; and is largely premised on a model of immigration as a ‘privilege’. Both the inadequacy of the legal constellation to capture the substantive disputes in issue, and the lack of normative consensus upon what rights should be accorded to migrants, differentiate the immigration case from the paradigmatic dispute.

Third, in many immigration cases, what is at stake is closer to what Aubert calls a ‘conflict of values’, which is “based upon a dissensus concerning the normative status of a social object”, and which is therefore less amenable to dispute resolution.⁹⁸⁵ As I have already argued, what underlies many immigration disputes is a disagreement not about the application of the rules themselves, but rather about the fairness of those rules. This varies widely according to the dispute, but in the most problematic kind — that of North-South irregular immigration — this is very likely, since what is really in dispute is the fairness of global inequality, expressed eloquently by Kingsley Ofose:

I don't want my son to live the same life I have led. I don't want my family to suffer. We are all in the same world. Some people are suffering and some people are enjoying and I don't know the reason why.⁹⁸⁶

2.2.4 THE MISLEADING DISPUTE

These three structural features of immigration ‘disputes’ — the migrant as outsider; the relationship between the individual and the State; and the different structure of rights, interests and values — are distorted and obscured by the characterisation of immigration cases as disputes susceptible to resolution in the same manner as other disputes.

The paradigm of the dispute misleads us in important ways. It encourages comparisons with other administrative or legal fields that downplay the distinctive

⁹⁸⁴ Walzer, 1936, ch 2.

⁹⁸⁵ Wilhelm Aubert, ‘Competition and dissensus: Two types of conflict and of conflict resolution’ in Michael Freeman (ed), *Alternative Dispute Resolution* (1995) 151, 154.

⁹⁸⁶ Quoted in Nick Davies, ‘The cruellest voyage’, *The Guardian*, 3 December 2007, 6.

characteristics of immigration disputes, and consequently overrate the capacity of immigration review to resolve disputes. For example, the frequent complaint that the high rates of appeal, the lack of legal merit of many cases, high withdrawal rates, and low success rates are manifestations of abuse fails to recognise that these features are probable outcomes of the structure of migration disputes. The high stakes involved are likely to lead to high appeal rates, and this is compounded by the gross disparity in power, perceptions of bias, the inadequacy of the legal constellation, and the probability of an underlying conflict of value. Low success rates and cases lacking legal merit are probable outcomes of a legal constellation that offers limited avenues for successfully challenging migration disputes.

Further, comparisons are misleading because the high stakes and the lack of interests that may be accommodated or compromised mean that dispute management strategies common in other fields — in Galanter’s terminology, ‘lumping it’, ‘exit’ or informal modes of dispute resolution⁹⁸⁷ — are not usually available. The only real possibilities are that migrants ‘accept the verdict’ or are coerced into compliance.

The first possibility is real, but varies widely across types of migrants, because the acceptance of the dispute resolution process often depends on shared values and norms governing the dispute, and the stakes involved. It is least likely in refugee contexts, where the stakes involved may well be life or death, and where values and norms are most likely to differ. Furthermore, as Felstiner argues, the effect of losing in adjudicative contexts is to alienate the loser by rendering “what [they] consider as history ... either an illusion or a lie”.⁹⁸⁸ The focus on credibility and the disjuncture between the popular understanding of a refugee and the legal definition exacerbate this, since the rejection of their claims appears to invalidate their experiences.

The second option of coercion raises its own difficulties. Deportation is a “cruel power” that “requires the coercive hand of the state on what are often extremely vulnerable men, women and, perhaps most controversially of all, children.”⁹⁸⁹ As refugee advocates often point out, these are people who have generally committed no crime, yet they are granted more limited legal protections than criminals: in the

⁹⁸⁷ Galanter, 1968, 124-126.

⁹⁸⁸ Felstiner, ‘Influences of social organization,’ 1967, 53.

⁹⁸⁹ Gibney, ‘Asylum and the expansion of deportation,’ 1933, 147. See also M Gibney and R Hansen, *Deportation and the Liberal State: The Forcible Return of Asylum Seekers and Unlawful Migrants in Canada, Germany and the United Kingdom* (2003).

words of one Amnesty report, “seeking asylum is not a crime”.⁹⁹⁰ Coercion is also complicated and resource-intensive, as I will discuss further later, and thus impractical as a routine form of enforcement.

Finally, and perhaps most importantly, the dispute resolution model misleads immigrants as to the limitations of immigration review, as is revealed time and again in observations of unrepresented applicants. For example, in one tribunal hearing, after an applicant had detailed the sad story of his failed marriage, he disarmingly told the member that “I don’t understand the law” but asked “[i]s it fair that she gets to go back and leave me with nothing?” The member explained that the law did not always protect against injustice, and that it was not fairness that was in issue — a confusion made more vivid by the fact that the only legal issue before the member was whether the applicant had suffered domestic violence.⁹⁹¹

Frustrated judges have spoken of this disjuncture between the expectations of migrants and their limited function, some more sympathetically than others.⁹⁹² As one judge put it:

He appears, understandably enough, to have been under some misunderstanding as to the very limited ability of the Court to intervene to correct what he thinks is an injustice that he has suffered at the hands of the Tribunal. He has no legal or procedural criticisms of what the Tribunal did. He simply wants the Court to “consider his plight”.⁹⁹³

2.3 The displacement of the ‘dispute’

Here I briefly note an additional limitation on the dispute resolution model that has been discussed at length earlier, namely the way in which the legal constellation serves to displace and transform the underlying dispute into its own, more limited, legal categories.

Underlying most immigration cases is a desire by migrants to enter or remain, driven by factors that are not recognised or given due weight by the legal constellation. Often, there is no real ‘dispute’ between the individual and the State, but rather a mismatch between the substantive claims to entry or residence — the fact that some people are “suffering” while others “enjoying”; personal links to the State; fear of return — and the legal rules and procedural rights that govern entry and residence.

⁹⁹⁰ Amnesty International, *Seeking Asylum*, n342.

⁹⁹¹ MRT hearing in Melbourne, observed 2 October 2007.

⁹⁹² See, eg, *Nguyen v MIMA* [1999] FCA 740, [23]-[24].

⁹⁹³ *NAQZ v MIMIA* [2003] FCA 1298, [5].

We see the displacement of these substantive disputes in, for example, *SZAYW*, where the Palestinian issue was transformed into the very narrow question of whether the hearing was ‘in private’.⁹⁹⁴ In *K*, the practice of FGM was transformed into the technical question of whether she was a member of a ‘particular social group’.⁹⁹⁵

As already noted, these transformations enable decisions to be made, but the distortions compound the original problem — that the underlying dispute is not resolved in the process. Australian judges have vociferously condemned the “meaningless gobbledegook”⁹⁹⁶ of submissions that recite the “rehearsed catchwords”⁹⁹⁷ of the grounds constituting jurisdictional error, overlooking the fact that unrepresented applicants simply do not understand the ways in which their dispute have been transformed by the legal constellation. As a result, applicants frequently do not understand why they have failed or succeeded; even if they do, they often see their grievance as not being adequately addressed.⁹⁹⁸ This perpetuates frustration and disillusionment.

The limitations of the law also frustrate decision-makers and judges, as is evident both in their remarks about the “harsh” and “tragic” outcomes of their cases,⁹⁹⁹ and in their comments about applicants “playing the system”.¹⁰⁰⁰ Such comments strongly suggest that judges are discomfited, on the one hand, by the dissonance between the limitations of the law and its aspirations to justice; and, on the other, by the failure of some applicants to use the review process ‘correctly’, namely as a way to resolve (legally cognisable) disputes.

The frustration and disillusionment perpetuated by the transformation of disputes by the legal process is also felt by the wider public, as the legal decision is re-transformed into a broader social context. This was vividly exemplified by the case of the Afghan hijackers,¹⁰⁰¹ which the tabloid press re-interpreted as providing a “welcome mat for terrorists”.¹⁰⁰² The case sparked calls for the HRA to be scrapped,¹⁰⁰³

⁹⁹⁴ *SZAYW*, n812.

⁹⁹⁵ *K*, n821.

⁹⁹⁶ *SZAUU v MIMIA* [2005] FCA 85, [7].

⁹⁹⁷ *SZAEM v MIMIA* [2004] FCA 66, [5].

⁹⁹⁸ Ross Cranston, ‘What do courts do?’ in Michael Freeman (ed), *Alternative Dispute Resolution* (1995) 123, 69.

⁹⁹⁹ See chapter 6, part 3.5.

¹⁰⁰⁰ See, eg, Jo Butler, ‘Asylum cheats ‘are playing the system’; Judge’s court plea for Blunkett to speed up the deportation process’, *Daily Mail*, 10 April 2003, 32.

¹⁰⁰¹ *S v SSHD* [2006] EWCA Civ 1157.

¹⁰⁰² Padraic Flanagan, ‘Welcome mat for terrorists’, *The Express*, 24 May 2003, 4.

demonstrating the potential for the legal transformation of disputes to undermine the legitimacy of the law.

The capacity of the law to resolve disputes in immigration is therefore limited to a greater degree than in other fields, both because we proceed, mistakenly, on the assumption that immigration review functions to resolve disputes, and because the transformation wrought by the legal constellation tends to create artificial disputes that misrecognise the underlying issues. These structural limitations create a dynamic of negative feedback. The failure of migrants to ‘accept the verdict’ is perceived by governments and judges as “abuse”, which may affect the impartiality of the decisions and the faith of migrants, their advisers and advocates. It also forces greater reliance on the coercive power of the law, paradoxically exposing both the weakness of the threat of coercion and the “cruel power” of the State. Further, the transformation of the ‘dispute’ increases the probability that migrants fail to ‘accept the verdict’, as well as increasing the frustration of tribunal members, judges, and the wider public. The story of immigration review, therefore, is partly explicable as a story of frustration and disillusionment generated and perpetuated by these limitations on the capacity of the review process to resolve disputes.

3 Regulation

Frustration and disillusionment also result from the limitations on the capacity of law to regulate human behaviour. I use regulation in the broad sense of “deliberate state influence ... cover[ing] all state actions designed to influence industrial or social behaviour”.¹⁰⁰⁴

The regulatory function of law has become more prominent in recent decades as demands on States have increased, and correspondingly the scholarship on regulation has flourished.¹⁰⁰⁵ However, regulatory studies has emphasised regulation in the narrower sense of “the promulgation of a binding set of rules to be applied by a body devoted to this purpose”,¹⁰⁰⁶ focusing on fields such as civil aviation, telecommunications and environmental regulation. Only latterly has the regulatory

¹⁰⁰³ See JCHR, *The Human Rights Act: the DCA and Home Office Reviews* (2006), [9]-[21]; Clayton, *Textbook*, n237, 59-61.

¹⁰⁰⁴ Robert Baldwin and Martin Cave, *Understanding Regulation: Theory, Strategy, and Practice* (1999) 2.

¹⁰⁰⁵ For general introductions, see Bronwen Morgan and Karen Yeung, *An Introduction to Law and Regulation* (2007); Robert Baldwin et al, *A Reader on Regulation* (1998).

¹⁰⁰⁶ Baldwin and Cave, *Understanding Regulation*, n1004, 2.

perspective been brought to bear on more mainstream fields of law,¹⁰⁰⁷ and the regulatory perspective has not yet been brought to bear on immigration law.¹⁰⁰⁸

Yet, as chapter 1 demonstrated, the most potent criticisms of migration law concern regulatory failure. Of these, the two most prominent criticisms concern the capacity of the State to ‘say who comes’; and to enforce those rules by removal.

A caveat is necessary here. Clearly, the effectiveness of laws is only one aspect of the legitimacy of laws. In general, the more effective a law, the greater its legitimacy; and the greater the normative legitimacy of a law, the more effective it is. However, these general propositions do not always hold true. A law that is extremely effective in achieving its purpose — such as mandatory detention — may not achieve normative legitimacy. So too the normative legitimacy of a law — for example, racial equality — may not find effective expression in law.¹⁰⁰⁹ In arguing that there are limitations to immigration law’s effectiveness, I am not implying that perfect effectiveness is either necessary nor, indeed, desirable, for such regulation has its “dark side”.¹⁰¹⁰

This section applies what I call the ‘regulatory lens’ to immigration law, and examines the structural limitations on the capacity of law to regulate immigration. I begin by describing the features of the ‘regulatory lens’ and the literature on ‘policy failure’ in migration studies, before examining three major limitations: policy design and implementation; the regulatory context; and the constraints of the policy and law-making processes. The argument is simple: immigration provides a highly complex regulatory challenge for law, and it is this complexity which has encouraged governments to adopt other regulatory modalities. It is this move away from regulating immigration through law, and instead toward regulation through ‘code’, which accounts for the ‘lawlessness’ of contemporary immigration law,¹⁰¹¹ and which has provoked the anxieties about the loss of law’s empire that partly explain the story of immigration review.

¹⁰⁰⁷ Christine Parker et al (eds), *Regulating Law* (2004).

¹⁰⁰⁸ It has, however, been incidentally considered in the EU immigration law context in relation to impact assessments: Helen Toner, ‘Impact assessments: A useful tool for ‘better lawmaking’ in EU migration policy?’ in Anneliese Baldaccini, Elspeth Guild and Helen Toner (eds), *Whose Freedom, Security and Justice?* (2007) 109, 119-120.

¹⁰⁰⁹ J Roland Pennock, ‘Introduction’ in J Roland Pennock and John W Chapman (eds), *The Limits of Law* (1974) 1, 2.

¹⁰¹⁰ Lawrence Lessig, ‘The new Chicago school’ (1998) 27 *JLS* 661, 691.

¹⁰¹¹ Shah, ‘From legal centralism,’ n303.

3.1 The regulatory lens

The 'regulatory lens' comprises five distinct emphases evident in, although neither discovered by nor exclusive to, regulation studies. The first, most obvious, emphasis is its focus on the effectiveness of law in achieving its policy aims. As Rubin has cogently argued, the orthodox emphasis on legal doctrine ignores the post-war quantitative shift in legislation and instrumental laws at its peril.¹⁰¹²

Second, law is conceived of as merely *one* form of regulation which interacts with non-legal forms of regulation. Lessig identifies four modes of regulation, which differ in their characteristics and values: law, (social) norms, market, and architecture (or code), such as physical and electronic infrastructures.¹⁰¹³ Most notably, they differ in their relation to subjectivity: while the law must be 'internalised' for breaches of law to be prevented, code requires no subjective adjustment: either there is a door that allows entry and exit, or there is not. These different forms of regulation are conceptualised as interacting with different regulatory actors in a play for power in a 'regulatory space'.¹⁰¹⁴

Third, regulation studies focuses on the strengths and weaknesses of modalities of regulation other than the 'command' paradigm of legislation, such as self-regulation; the distribution of wealth; the use of market mechanisms; the provision of information; direct action by States and their agencies; and the conferral of rights.¹⁰¹⁵

Fourth, regulatory studies emphasises the need for regulation to be responsive to its regulatory context, to recognise and use the social practices of the field, and seek to harness the regulatory capacities, interests and norms of its actors.¹⁰¹⁶ This insight may be fruitfully applied to immigration law, a major feature of which is the diversity and extent of its social context and practices.

Fifth, regulation theory focuses specifically on the constraints of the policy-making and legislative process.¹⁰¹⁷ Different theories place different emphases on the

¹⁰¹² Edward L Rubin, 'The concept of law and the New Public Law scholarship' (1991) 89 *MichLR* 792.

¹⁰¹³ Lessig, 'The new Chicago school,' 11010; Lawrence Lessig, *Code and Other Laws of Cyberspace* (1999).

¹⁰¹⁴ L Hancher and M Moran, 'Organizing regulatory space' in Robert Baldwin, Colin Scott and Christopher Hood (eds), *A Reader on Regulation* (1998) 148; Colin Scott, 'Analysing regulatory space: Fragmented resources and institutional design' [2001] *PL* 329.

¹⁰¹⁵ Morgan and Yeung, 11005, 4, 80; Baldwin and Cave, *Understanding Regulation*, 11004, 34-53.

¹⁰¹⁶ Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (1992); Robert Baldwin and Julia Black, 'Really responsive regulation' (2008) 71 *MLR* 59.

¹⁰¹⁷ For an overview, see Morgan and Yeung, 11005, 16-53.

role of the public and private interest, as well as the self-promoting role of institutional dynamics.

Applying the regulatory lens to immigration law re-frames immigration law as one form of regulation, interacting with norms, the market, and 'code'. While the 'command' paradigm remains prevalent, later legislation uses different modalities of regulation, such as policies of destitution, regulatory schemes for migration agents, and regulation through contract of detention centres.¹⁰¹⁸ The regulatory lens directs attention to the way regulatory actors and institutional dynamics constrain and shape the processes of making policy and law. Most importantly, the regulatory lens focuses our attention on the (in)effectiveness of immigration law.

3.2 'Policy failure'

Migration studies has extensively considered the ineffectiveness of migration laws, seeking to explain the "significant and persistent gaps ... between official immigration policies and actual policy outcomes".¹⁰¹⁹ These gaps comprise both unintended consequences of policy, and inadequate implementation or enforcement,¹⁰²⁰ although, as Castles warns, stated policy objectives cannot always be taken at face value, and may be internally ambivalent or contradictory.¹⁰²¹

The most high-profile policy gap is the continuation of streams of 'unwanted' immigration. Most spectacularly, the US is estimated to host 11.9 million irregular immigrants.¹⁰²² The Home Office has estimated that in the UK there were between 310,000 and 570,000 irregular immigrants in 2001,¹⁰²³ with a much smaller stream of irregular immigration in Australia, estimated at 46,400 as at 30 June 2007.¹⁰²⁴ Most important, perhaps, has been the continued high levels of refugee claims. A recent

¹⁰¹⁸ Savitri Taylor, 'Protecting the human rights of immigration detainees in Australia: An evaluation of current accountability mechanisms' (2000) 22 *Syd LR* 50.

¹⁰¹⁹ WA Cornelius and Takeyuki Tsuda, 'Controlling immigration: The limits of government intervention' in WA Cornelius et al (eds), *Controlling Immigration: A Global Perspective* (2nd ed, 2004) 3, 4.

¹⁰²⁰ *Ibid.* 4-5.

¹⁰²¹ Stephen Castles, 'The factors that make and unmake migration policies' (2004) 38 *IMR* 852, 855.

¹⁰²² Estimated at March 2008: Jeffrey S Passel and D'Vera Cohn, *Trends in Unauthorized Immigration: Undocumented Inflow Now Trails Legal Inflow* (2008), 1.

¹⁰²³ HAC, *Immigration Control*, n104, 22.

¹⁰²⁴ DIAC, *Annual Report 2006-2007*, n209, 116. The estimate is more reliable because Australia requires people to register entry and exit.

Home Office research study concluded that to a large extent asylum was “policy-resistant”.¹⁰²⁵

Other policy gaps are evident in skilled migration, such as the “taxi driver syndrome”¹⁰²⁶ in which immigrants recruited for their skill are unable to get appropriate jobs, with substantially less than half of Australian skilled migrants remaining in their nominated occupation.¹⁰²⁷

High-profile policy gaps also exist in the sphere of enforcement, especially in the field of removals and illegal employment. In the UK, record annual deportation rates of over 15,000¹⁰²⁸ must be compared with the above estimate of irregular immigrants and the estimated 283,500 failed refugee claimants liable to removal.¹⁰²⁹ In Australia, only 6,768 removals and departures were recorded against the 46,400 estimated overstayers in 2007.¹⁰³⁰

Illegal employment is also under-enforced: in the UK, between 2003-2007, only 54 people were found guilty of illegal employment.¹⁰³¹ While in Australia, 3,870 people were detected working unlawfully in 2004-2005, it is likely most of the 48,000 estimated overstayers were also working illegally.¹⁰³² Evidence has also emerged of patterns of under-payment of students¹⁰³³ and temporary labour.¹⁰³⁴

However, there are two important caveats to this picture of ineffectiveness. First, the effectiveness of policies varies greatly depending on the sphere being examined. In some spheres, such as detention and interception policies, the complaint is instead one of too great effectiveness.

The second caveat is that the evaluation of effectiveness poses significant methodological problems. The primary issue is one of determining the appropriate criteria for evaluation, since no methodology of evaluation can be entirely value-free.

¹⁰²⁵ Professor Roger Zetter et al, *An Assessment of the Impact of Asylum Policies in Europe 1990-2000* (2003).

¹⁰²⁶ JSCM, *To Make a Contribution: Review of Skilled Labour Migration Programs 2004* (2004), 129.

¹⁰²⁷ DIAC, *New Migrant Outcomes: Results from the Third Longitudinal Survey of Immigrants to Australia* (2007), 33.

¹⁰²⁸ 16,330 in 2006: Kerry Bennett et al, *Asylum Statistics: United Kingdom 2006* (2007), 83.

¹⁰²⁹ NAO, *Returning*, n105, 2.

¹⁰³⁰ DIAC, *Annual Report 2006-2007*, n209, 116-121. This does not, however, include voluntary departures or regularisations.

¹⁰³¹ Home Office, *Statistics 2008*, n322, 98-99.

¹⁰³² DIMIA, *Managing the Borders: Immigration Compliance, 2004-2005 edition* (2005), 60-62.

¹⁰³³ Tom Arup, ‘Foreign students being exploited’, *The Age*, 12 June 2008.

¹⁰³⁴ Leo Shanahan, ‘Nurses demand overhaul of 457 visa’, *The Age*, 16 August 2008, 7.

As Thomas argues, there may be competing normative models of evaluation.¹⁰³⁵ These may lead to biases in the criteria of evaluation: as audits have shown, the performance indicators adopted are often too reliant on quantitative rather than qualitative outcomes.¹⁰³⁶

I do not attempt to formulate such a methodology here. As Thomas' analysis shows, the fruitfulness of such an approach is limited, partly because the criteria themselves are in tension and no consensus exists on their priority, and partly because of the difficulty of assessing these criteria in any truly objective sense. Rather, here I simply seek to highlight the myriad obstacles to the effectiveness of migration law.

Some of these obstacles have already been referred to in chapter 3, such as globalisation, the internal complexity of liberal States, and the functional imperatives of the State. The range of obstacles may be conveniently classified into three categories: policy design and implementation; features of the regulatory context; and the constraints of the policy-making process. It is to these three major limitations that I now turn.

3.3 Obstacles to effectiveness

3.3.1 POLICY DESIGN AND IMPLEMENTATION

Immigration policies often fail because of inadequate knowledge; unarticulated, incoherent or ambivalent aims; and poor implementation. These are general limitations of policy design, but in the case of immigration these limitations are acute.

3.3.1.1 Knowledge

As migration studies has demonstrated, immigration is a highly complex, variable, long-term phenomenon. These features make it difficult to understand and predict migratory behaviour.

For example, people often migrate for multiple reasons. People may be fleeing oppressive circumstances and also seeking a better life; people may agree to be smuggled only to be exploited without their consent; and marriages may be contracted partly on the status of a person's residence in a country. These multiple

¹⁰³⁵ Robert Thomas, 'Evaluating tribunal adjudication: Administrative justice and asylum appeals' (2005) 25 *LS* 462. See also Gabriel Fleming, 'Review of migration decision-making: Rival goals and values' (1999) 10 *PLR* 131.

¹⁰³⁶ See, eg, NAO, *Visa Entry*, n105, 22. Cf HAC, *Home Office Target-Setting 2004* (2005), [39]-[52].

motivations make it difficult to distinguish between refugees and economic migrants; between smuggling and trafficking; and between ‘genuine’ and ‘sham’ marriages. These multiple motivations may also make it difficult for policies to have their intended effect: as an Australian review into skilled migration concluded, “whatever Australia’s perception might be, skilled migration was not primarily about jobs — at least for the migrant.”¹⁰³⁷

The variability of immigration also poses difficult problems. The nationality, ethnicity, age, gender and class of immigrants, and the economic and political circumstances, affect the ways they migrate and integrate.¹⁰³⁸ Immigration policies therefore need to be exceptionally sophisticated and responsive to changing immigration streams.

Further, migratory behaviour must be considered over a long-term scale, as intentions change during the life cycle. The settlement of guestworkers in Germany is a prominent example of how temporary migration may convert into permanent migration,¹⁰³⁹ but it may also work in the other direction, as is evidenced by the return migration of subsidised British passengers from Australia.¹⁰⁴⁰

3.3.1.2 Aims

As already noted, effectiveness is evaluated in accordance with aims. However, the aims of a policy are more likely in immigration to be ambivalent, unclear, in competition with other objects, unachievable, or simply objectionable.

As has been observed, neither Australia nor the UK has a clearly articulated set of overarching policy aims. However, the lengthy Canadian legislative statement of goals, discussed in chapter 4, merely demonstrates the inevitable tension between these goals.¹⁰⁴¹ This occurs, as Boswell suggests, because immigration exposes tensions between the competing imperatives of the State.¹⁰⁴² For example, the pursuit of economic growth is in tension with the protection of the labour market and environmental sustainability, while the objective of family reunion may be tension

¹⁰³⁷ JSCM, n1026, [2.18], 10.

¹⁰³⁸ As detailed exhaustively in the Longitudinal Survey of Immigrants in Australia: see <http://www.immi.gov.au/media/research/lisia/index.htm>.

¹⁰³⁹ Joppke, *Immigration and the Nation-State*, n924, ch 3.

¹⁰⁴⁰ An estimated quarter of ‘Ten Pound Poms’ returned: Hammerton and Thomson, n877, 264-323.

¹⁰⁴¹ Dauvergne, *Humanitarianism*, n761, 14.

¹⁰⁴² Boswell, n2.

with economic growth and social cohesion. Inherent in immigration policy, therefore, are conflicting aims, resulting in paradox and compromise.

If we take ‘national interest’ as a proxy for the aim of immigration policy, some of these tensions become clearer. At the micro-level, there may be competing tensions in a particular decision since different dimensions of an individual may point to different conclusions. For example, in *Teoh* the applicant’s deportation would have promoted the national interest in preventing crime, but would also have involved reducing a large Australian family to subsistence level.¹⁰⁴³

At a higher level, there is likely to be dissensus about what is, or is not, in the national interest. As Dauvergne argues, refugee admissions may be in the national interest in the sense that it affirms the nation as humane and good.¹⁰⁴⁴ However, this may be contested by individuals who see no benefit in refugee admissions, such as the young male from Cardiff who opined: ‘There was that boat full of refugees which the Australian government was going to blow up rather than let it land, which I think is right personally.’¹⁰⁴⁵

That dissensus is also related to the fact the burdens and benefits of migration are unevenly distributed, both across regions and across different measures of ‘benefit’, resulting in variation of attitudes between age groups, classes, and residences. For example, Australian studies have shown the university-educated are 35% more positive towards immigration, and Melburnians are especially pro-immigration.¹⁰⁴⁶ In the UK, 75% of Londoners were positive about multiculturalism, compared to 39% in the North East.¹⁰⁴⁷ Indeed, cosmopolitans may also contest the assumption that national interest should be the ultimate aim of immigration policy.

Tensions are also apparent in the stated policy objectives of immigration tribunals — in Australia, that of “providing a mechanism of review that is fair, just, economical, informal and quick”,¹⁰⁴⁸ and in the UK, that of being ‘fair, fast, firm’.¹⁰⁴⁹ While these tensions are evident in any adjudicative system, it is exacerbated in immigration because of the mismatch between the ‘informal’ and ‘cheap’ ideal of justice in tribunals, and the inherent complexity and significance of immigration

¹⁰⁴³ N699, [7].

¹⁰⁴⁴ Dauvergne, *Humanitarianism*, n761.

¹⁰⁴⁵ Quoted in Miranda Lewis, *Asylum: Understanding Public Attitudes* (2005), 41.

¹⁰⁴⁶ Markus and Dharmalingam, n899, 72-73; Betts, n943, 35, 37.

¹⁰⁴⁷ MORI, *British Views on Immigration* (2003).

¹⁰⁴⁸ Ss 353 (MRT); 420 (RRT).

¹⁰⁴⁹ Home Office, *Fairer, Faster, Firmer*, n108. See also proposed s 184 of the 2008 Bill: “fairly, quickly and efficiently”.

decisions. Less obviously, as described in chapter 3, there is ambivalence about the purpose of the courts in immigration review — with competing roles as guardian of common law freedoms, or as the handmaidens of the legislature.

Another difficulty is that some aims remain officially unarticulated, such as the political desire to reduce refugee applications, or the desire to placate BNP or One Nation voters. In the US, it has been suggested that tight immigration policies and lax enforcement achieve the unarticulated goal of enabling flexible labour markets while appeasing the electorate.¹⁰⁵⁰

One unarticulated purpose of immigration review has been its use as part of the *quid pro quo* for the tightening of immigration policies, as evident in the story of immigration review. Another significant unarticulated goal of immigration review is the desire to insulate governments: both from legal challenges (most obviously in the 1989 reforms in Australia, and in the creation of SIAC and asylum appeals in the UK), and also from political backlash. Ministers have, time and again, repeated the formula that a refugee claimant has been determined not to be a refugee, or that the Department has been vindicated by the review process. Ministerial attacks on tribunals and courts also serve to displace political pressure, relocating highly sensitive political decision-making into the apparently more ‘neutral’ sphere of the law. In relation to these hidden purposes, therefore, the story of immigration review may in part be read as a ‘success’.

Finally, some aims may simply not be achievable, given the constraints of the regulatory context or finite resources. Although the British ‘deportation gap’ is a function of many factors,¹⁰⁵¹ the NAO’s estimate that an enforced removal cost an average of £11,000,¹⁰⁵² for a total of £4.7 billion,¹⁰⁵³ makes it obvious that the aim of removing all those liable to removal is simply not practically feasible.

3.3.1.3 Implementation

Lastly, I merely note here that implementation continues to be a chronic problem in immigration, as discussed in chapter 1. Political volatility, the complexity of

¹⁰⁵⁰ See, eg, Brendan Mullan, ‘The regulation of international migration: The US and Western Europe in historical comparative perspective’ in Anita Böcker et al (eds), *Regulation of Migration: International Experiences* (1998) 27; Rogers M Smith, ‘Alien rights, citizen rights, and the politics of restriction’ in Carol M Swain (ed), *Debating Immigration* (2007) 114.

¹⁰⁵¹ See NAO, *Returning*, n105; Committee of Public Accounts, n343; Gibney, ‘Asylum and the expansion of deportation,’ n333.

¹⁰⁵² NAO, *Returning*, n105, 4.

¹⁰⁵³ Institute for Public Policy Research, *Irregular Migration in the UK: A Factfile* (2006), 12.

legislation and policy, and media misinformation and scandal-mongering are part of the policy-making constraints discussed below, but also adversely affect the capacity to implement policies effectively.¹⁰⁵⁴

3.3.2 THE REGULATORY CONTEXT

While policy design and implementation are subject to unusual constraints in immigration, a more significant constraint is the regulatory context of immigration. In particular, four features of the regulatory context provide a complex of challenges: the audience of regulation; the natural and structural constraints in regulating migration; the transnational logic of migration; and conflicts and tensions with other modes of regulation.

3.3.2.1 Audience

Migration laws attempt to regulate one of the most diverse audiences that can be imagined. Migrants come from all over the world, with different cultural expectations and norms, different languages, and different motivations and personalities.

This audience creates three problems for regulators. First, as discussed earlier, the responses of migrants to policies and laws may diverge from the expectations of the host society. While skilled migrants from the North may readily seek to comply with the law, the more diverse streams of refugees, humanitarian entrants and irregular immigrants may simply see immigration policies as an “opportunity structure”, an obstacle one must navigate.¹⁰⁵⁵

Second, migratory behaviour is much more complex than in classic regulatory fields, such as telecommunications or competition. The multiple motivations at work, and the complexity of the migratory process, make it difficult for regulatory tools to have their intended effect. For example, it is often suggested that the introduction of stricter immigration controls may be counter-productive, since immigrants then feel unable to return, or are obliged to stay longer in order to compensate for the higher costs of entry.¹⁰⁵⁶ An example was the introduction of restrictions on Commonwealth

¹⁰⁵⁴ See B Jordan et al, ‘Contextualising immigration policy implementation in Europe’ (2003) 29 *J Ethn Migr Stud* 195.

¹⁰⁵⁵ Castles, ‘The factors,’ n1021, 860.

¹⁰⁵⁶ See, eg, Douglas S Massey, ‘Borderline madness: America’s counterproductive immigration policy’ in Carol M Swain (ed), *Debating Immigration* (2007) 129, 135-137.

immigration, which probably increased immigration at least in the short-term as immigrants rushed to beat the ban and temporary migrants sought family reunion.¹⁰⁵⁷

Third, migratory behaviour may simply be beyond the regulatory reach of domestic laws, since the policies of destination countries play a smaller role in the decision to move than is commonly recognised. Refugees' choices of destination are motivated less by policies than by cost, access to migration networks and the smugglers' interests.¹⁰⁵⁸ Very often, refugee claimants know nothing more than that their destination is a "free country".¹⁰⁵⁹ Even Australian skilled migrants rarely consulted government information in their decision.¹⁰⁶⁰

This makes the modification of the behaviour of migrants very difficult, and explains the shift towards devolving immigration control as secondary actors are more amenable to the law, within the territorial jurisdiction, share similar social and cultural values, and (most importantly) have greater incentives to comply with the law. However, this devolution creates its own problems. Most obviously, it creates the problem of 'lawlessness', since the effect is to transfer decision-making powers away from States to secondary actors whose actions are not susceptible to processes of legal or political accountability. There is almost no information available, for example, on how many people carriers refuse to board, and no legal or political scrutiny of those decisions.

The devolution of control also results in over-inclusive enforcement. Carriers' sanctions inevitably exclude genuine refugee claimants;¹⁰⁶¹ certificates of approvals jeopardise genuine marriages as well as 'marriages of convenience';¹⁰⁶² regulating immigration advisers drives out good-quality practitioners.¹⁰⁶³ This is caused both because cruder rules are easier to implement, and because other factors are introduced into the decision-making process, such as secondary actors' financial interests and desires to maintain a harmonious relationship with the State. Devolution of control also introduces the power and interests of secondary actors into the policy-making and legislative process, as was vividly demonstrated by the

¹⁰⁵⁷ Spencer, n863, 131; Vaughan Bevan, *The Development of British Immigration Law* (1986), 78.

¹⁰⁵⁸ Zetter et al, n1025.

¹⁰⁵⁹ Quoted in Vaughan Robinson and Jeremy Segrott, *Understanding the Decision-making of Asylum Seekers* (2002), 29.

¹⁰⁶⁰ Only a tenth used the Internet or government sources: JSCM, n1026, 20.

¹⁰⁶¹ As recognised in *R v SSHD ex p Hoverspeed* [1999] EWHC Admin 95, [24]-[26].

¹⁰⁶² *R (Baiai) v SSHD* [2008] UKHL 53.

¹⁰⁶³ Bail for Immigration Detainees and Asylum Aid, n106.

mobilisation of the legal community in the debates over the ouster clauses, and in carriers' challenges to legislation.¹⁰⁶⁴

The two broad audiences of immigration regulation — the immigrants themselves, and secondary actors involved in immigration control — therefore pose different regulatory difficulties. Reaching the immigrants poses significant problems caused by the diversity of the audience and the limitations of regulatory reach. While these problems are reduced significantly in relation to secondary actors, devolution creates further problems of 'lawlessness', over-inclusiveness, and political mobilisation.

3.3.2.2 Natural and structural constraints

A second distinctively difficult feature of the regulatory context is the extent to which migration is constrained by non-legal factors, as migration studies has revealed. The most difficult problems are caused by natural (inherent and irremovable) constraints, and structural constraints.

As discussed in chapter 5, the natural constraint of geography and the structural constraints of global inequality and globalised labour patterns powerfully influence migration patterns. Migration is also driven by natural desires and aversions which are very difficult for a destination State to modify. For some refugee claimants, the fear of return is so strong that not even experiences of destitution and detention can persuade them to return. As Louisa, a refugee claimant, said: "[E]ven if I wanted to go home I would be killed. Either way you can't win. You are not allowed to be here. You are not allowed to be there. You are nowhere."¹⁰⁶⁵

Again, the extent of the difficulty varies across streams of migration, with skilled migration more susceptible to inducements and policy changes. Changes to Australian selection criteria in 1999, for example, showed significant improvement in employment outcomes.¹⁰⁶⁶ There remains evidence, however, of policy gaps, with only 66% of those with degrees in 2001 in employment in Australia, and 26.2% of these not

¹⁰⁶⁴ *Air Caledonie International v The Commonwealth* (1988) 165 CLR 462; *Hoverspeed*, n1061; *Cunliffe*, n395; *International Transport Roth GmbH v SSHD* [2002] EWCA Civ 158.

¹⁰⁶⁵ Quoted in Louise France, "It is as if I am dead already", *Observer Magazine*, 22 July 2007, 30.

¹⁰⁶⁶ Leslyanne Hawthorne, *Labour Market Outcomes for Migrant Professionals: Canada and Australia Compared* (2006).

in the labour force.¹⁰⁶⁷ The very low levels of intra-EU mobility provide further evidence of the difficulty in inducing ‘wanted’ streams of migration.¹⁰⁶⁸

The difficulties of dispute resolution discussed earlier may also be reconfigured as natural constraints. Natural desires to achieve a favourable outcome and to seek fairness may conflict with legal rules that preclude such outcomes and weight fairness differently, and with bureaucratic imperatives to limit the number of reversed decisions and reduce demands on resources. The natural desire to prolong residence produces high rates of appeal and legally weak claims, and is thus in tension with the bureaucratic (and political) demand of efficiency. Indeed, the desire to prolong residence may simply override the law, as the notorious fact of ‘disappearances’ from the system suggest.

3.3.2.3 Transnational logic

A particularly important structural constraint is that “state migration control efforts still follow a national logic, while many of the forces driving migration follow a transnational logic”.¹⁰⁶⁹ Migration flows are increasingly driven by North-South movements generated by global inequality; communication and transport technologies foster migration flows; and the development of transnationalism all evince the transnational logic of migration.

Policies and laws, on the other hand, remain primarily based at the domestic level, although (as already noted) there is increasing regional and international regulation and co-operation. While much emphasis has been placed on these efforts, there are inevitable limits. Countries of emigration have their own interests, including substantial financial interests by way of remittances, which militate against co-operation or require substantial ‘carrots’ to entice them into co-operation.¹⁰⁷⁰ Even where they do co-operate, the States may have limited capacity to regulate irregular immigration.¹⁰⁷¹ As a result, destination States have little effective control over the

¹⁰⁶⁷ Ibid. These statistics refer to degree-qualified entrants between 1996-2001.

¹⁰⁶⁸ Only 1.5% of working-age EU citizens live in another EU country: OECD, *Economic Survey for the European Union 2007* (2008), 154.

¹⁰⁶⁹ Castles, ‘The factors,’ 11021, 864.

¹⁰⁷⁰ Annabelle Roig and Thomas Huddleston, ‘EC readmission agreements: A re-evaluation of the political impasse’ (2007) 9 *EJML* 363; Antje Ellermann, ‘The limits of unilateral migration control: Deportation and inter-state cooperation’ (2008) 43 *Gov Oppos* 168.

¹⁰⁷¹ Imke Kruse, ‘EU readmission policy and its effects on transit countries: The case of Albania’ (2006) 8 *EJML* 115.

initiation of migration streams and also experience problems in returning ‘unwanted’ migrants.¹⁰⁷²

Regional and transnational schemes may also conflict with the liberal norms of States. The Dublin II scheme, for example, is open to the criticism that other States — such as Greece¹⁰⁷³ — do not comply in fact with the Refugee Convention or ECHR. A primary criticism of the ‘Pacific Solution’ policy was that the processing system, as well as access to review, was different from that on mainland Australia. As discussed in chapter 3, the sleight of hand involved in doing something elsewhere that would not be acceptable in one’s own country is not politically convincing. Indeed, such regional and transnational attempts may undermine the application of those norms within one’s own country, as was demonstrated by the Indonesian outrage that provoked the 2006 Australian proposal to extend offshore processing to all claimants who arrived in Australia irregularly.¹⁰⁷⁴

In immigration review, the limitation of the national logic of policies and laws is most clearly revealed in the primarily territorial principles of jurisdiction. As discussed in chapter 3, the jurisdictional limitations of the law enable the policies of extra-territorialisation that exclude or weaken access to review and, more generally, legal accountability. The Pacific Solution, the Prague pre-clearance pilot, out-of-country appeals, and the practice of ‘turnaround’ at airports are obvious examples. Here, then, the capacity of governments is *expanded* by the transnational logic of migration, but the risks of over-inclusiveness and the tension with liberal norms remain significant hurdles, as the eventual demise of the Pacific Solution and the Prague pre-clearance pilot evidence.

3.3.2.4 Other modes of regulation

The natural and structural constraints of immigration are compounded by conflicts and tensions with the three other modes of regulation identified by Lessig: social norms, the market, and ‘code’.

The social norms prevailing both in countries of emigration and immigration may be in tension with the regulation of immigration. In many countries of high emigration, a ‘culture of emigration’ has developed. The UK, for example, promotes

¹⁰⁷² HAC, *Asylum Removals*, n104; NAO, *Returning*, n105.

¹⁰⁷³ Achilles Skordas and Nicholas Sitaropoulos, ‘Why Greece is not a safe host country for refugees’ (2004) 16 *IJRL* 25; UNHCR, *UNHCR Position on the Return of Asylum-Seekers to Greece under the ‘Dublin Regulation’* (2008).

¹⁰⁷⁴ Designated Unauthorised Arrivals Bill, n216.

emigration with programs such as 'A Place in the Sun'. A culture of emigration may benefit, and be encouraged by, the receiving country, but in contemporary North-South movements, they are likely to conflict.

As has been detailed throughout this thesis, the liberal norms of many destination States, including Australia and the UK, are also a source of tension.¹⁰⁷⁵ The discursive competition of cosmopolitanism and open borders, and the standards of human rights and liberal norms implicit in constitutional and administrative law, inflect and constrain the actions of States.

Immigration laws may also conflict with the regulatory mode of the market. Global inequality acts as a market mechanism to promote irregular migration, while globalised economic structures require globalised States to develop stratified migration policies to facilitate the movement of multinational employees.¹⁰⁷⁶ On the other hand, immigration law may also utilise market methods to regulate migration, such as the rapid increase in visa fees in both countries, and the introduction of high review fees in Australia. Immigration law may also conflict with 'code', or architectural forms of regulation, such as geography (as already discussed) and technology which makes migration easier to imagine, achieve and sustain.

These conflicts are applicable also to immigration review. As already noted, the diversity of social norms of countries of origin has manifold effects in migration review, while the liberal norms of the receiving society have clearly influenced the development of immigration review. On the other hand, other modes of regulation have been used to support immigration laws, such as the mobilisation of market mechanisms in aid of migration law through the reduction of legal aid, and the enforced destitution of refugee claimants.

In sum, then, the regulatory context of immigration presents a range of unique or unusually difficult challenges: the diversity and complexity of the audience; the conflict with natural and structural constraints; the mismatch between the transnational logic of migration and the national logic of immigration policy; and conflicts with other modes of regulation.

¹⁰⁷⁵ See, eg, Gibney and Hansen, *Deportation in the Liberal State*, 1989. For a review and critique, see George Gigauri, *Resolving the Liberal Paradox: Citizen Rights and Alien Rights in the United Kingdom* (2006).

¹⁰⁷⁶ James Hampshire, *Regulating Migration Risks: The Emergence of Risk-Based Border Controls in the UK* (2008). See also Julia Black, 'The emergence of risk-based regulation and the new public risk management in the United Kingdom' [2005] *PL* 512.

3.3.3 POLICY-MAKING AND LAW-MAKING

The shape and dynamics of the policy-making and law-making processes constrain and transform responses to the unique challenges of the regulatory context of immigration. These constraints and transformations are products of institutional design, the distribution of political power, the high salience of immigration, institutional deficiencies, and institutional biases.

3.3.3.1 Constitutional designs

An obvious constraint is the overall structure of a balance of powers between the courts, the executive and the Parliament. The separation of powers deliberately builds tension and conflict within a system, with the effectiveness of governmental policies occasionally subordinated to other constitutional values.¹⁰⁷⁷ Hence, as judges are wont to emphasise, conflict between the executive and the judiciary is both inevitable and a sign of a healthy democracy.¹⁰⁷⁸ This tension and conflict is more apparent in immigration because, as has been discussed, immigration often exposes competing constitutional values.

Further, immigration exposes the fundamental tension between liberal principles and majoritarian democracy: the protection of minorities. While majoritarian decision-making may work well for most areas of government, it has the obvious potential to oppress minorities.

This is even more true where, as in immigration, the minorities are under-represented or absent in the political process, and is compounded by the fact that immigrants do not constitute a cohesive political bloc, since immigrants come from different countries, different classes and educational backgrounds. Contemporary trends towards greater diversity of source countries, and more mixed streams of immigration, further diffuse the political cohesiveness, and thus the political power, of the immigrant lobby.

In both Australia and the UK, the protection of minorities has not historically been entrenched through, for example, a bill of rights. This gap in institutional design has been obscured in part by prevailing liberal traditions and norms, and by periods of bipartisan consensus on immigration. However, as immigration has become more

¹⁰⁷⁷ Joppke, 'Why liberal states accept unwanted immigration,' n923.

¹⁰⁷⁸ See esp Woolf, 'Judicial review,' n530. Cf MH McHugh, 'Tensions between the executive and the judiciary' (2003) 76 *ALJ* 567.

politically salient, the weakness of these countervailing factors has been exposed, nowhere more dramatically than in the *Tampa* affair. This institutional weakness has the consequence of displacing the pressure to protect minorities on to the courts, squarely exposing the unresolved tension between the courts' subordinate role in a majoritarian democracy and its constitutional role of preserving legal values such as the rule of law and basic concepts of fairness.

3.3.3.2 Power distributions

The imbalance in constitutional design is mirrored by imbalances in the distribution of political power. Contemporary immigration is characterised by a disjuncture between concentrated and politically powerful support among the elite for immigration, and diffuse popular support for immigration restrictions.¹⁰⁷⁹ This explains, as Freeman has demonstrated in the context of the US, why programmes of unskilled labour continue despite popular demands for immigration restriction.¹⁰⁸⁰

This structural feature is evident in most developed countries.¹⁰⁸¹ Australian surveys demonstrate that since the early 1970s there has been “virtually no consistency for a larger intake”.¹⁰⁸² However, since 1998 there has been a significant shift, with only a minority (in the latest survey 35%) believing immigration was too high, although paradoxically the net intake almost doubled during the same period.¹⁰⁸³ In the UK, between 1995-2003, there was a marked increase in those wanting a reduction in immigration,¹⁰⁸⁴ with 78.11% of respondents concurring in 2005.¹⁰⁸⁵ Nevertheless, net migration has reached historic highs during this period (see Appendices, Figs 1 and 2). While labour migration continues despite restrictive immigration tempers, placatory measures are taken in the refugee and family streams of migration, streams that have more diffuse support and which tend to diverge more culturally and ethnically.

¹⁰⁷⁹ Katharine Betts, *The Great Divide* (1999). See also Schuck, ‘The disconnect,’ n921.

¹⁰⁸⁰ Freeman, n921.

¹⁰⁸¹ Rita J Simon and James P Lynch, ‘A comparative assessment of public opinion toward immigrants and immigration policies’ (1999) 33 *IMR* 455.

¹⁰⁸² Bob Birrell and Katharine Betts, ‘Australian attitudes to migration’ (2001) *Review* 1, 3.

¹⁰⁸³ Markus and Dharmalingam, n899, viii, 27.

¹⁰⁸⁴ The *British Social Attitudes Survey* indicates that in 1995, 23.58% wanted it reduced a little, 39.27% a lot; in 2003, the equivalent figures were 22.81% and 48.59%. See variable IMMNUMB, <http://www.britsocat.com/Body.aspx?control=HomePage>.

¹⁰⁸⁵ *Ibid.*, Q1056.

3.3.3.3 The salience of symbolism

As discussed more fully in chapter 5, immigration is highly salient to several significant contemporary anxieties, including the decline of politics, personal and national identities, and the role of the State. Immigration thus symbolises underlying anxieties about change and difference. However, the salience of immigration is contingent, rather than inherent. Since the late 1990s in the UK, immigration has been perceived to be one of the top 3 issues of national concern, but prior to this as few as 5% of the population identified it as a national concern.¹⁰⁸⁶

The contemporary symbolism and salience of immigration structures the policy-making and law-making process, resulting in the volatility and complexity of immigration policy and law, and the ambivalences, tensions and compromises identified by Boswell. Its symbolism and salience preclude coherence in immigration policy, make it difficult to articulate coherent objectives, and affect the capacity of governments to implement policies effectively.

3.3.3.4 Institutional deficiencies

Immigration also exposes more acutely the various institutional deficiencies already familiar to public lawyers. As explored in chapter 3, the limitations of parliamentary scrutiny — including the limited time for scrutiny and consultation, and the dominance of party — were dramatised in the ouster clause sagas. The toxic combination of resource limitations and political imperatives produce poor quality decision-making imbued with a ‘culture of refusal’.¹⁰⁸⁷ The institutional limits of courts — the limits of jurisdiction, institutional competence, and administrative capacity — are all peculiarly revealed in immigration, as this thesis has emphasised.

Immigration also reveals the structural deficiencies of the media. The media prefers simple stories about controversies that fit neatly into pre-existing frames,¹⁰⁸⁸ and tends to simplify and distort the complex issue of immigration¹⁰⁸⁹ — and, in the case of tabloids, simply tells outright lies.¹⁰⁹⁰ The high symbolic salience of the asylum

¹⁰⁸⁶ B Page, *The Second Death of Liberal England?* (2004).

¹⁰⁸⁷ See, eg, HAC, *Immigration Control*, n104, 35.

¹⁰⁸⁸ For a discussion of media frames in the refugee context, see Henri Charles Nickels, ‘Framing asylum discourse in Luxembourg’ (2007) 20 *JRS* 37.

¹⁰⁸⁹ See, eg, ICAR, *Media Image, Community Impact* (2004); S Buchanan and B Grillo, ‘What’s the story? Reporting on asylum in the British media’ (2004) 19 *FMR* 41.

¹⁰⁹⁰ See Roy Greenslade, *Seeking Scapegoats: The Coverage of Asylum in the UK Press* (2005).

issue means that it is both over-represented as well as misrepresented in the media.¹⁰⁹¹ The result is that the public are extremely misinformed about asylum and immigration issues. As one study concluded, people held very strong views while admitting they had very little knowledge.¹⁰⁹² Many people described all non-white people as asylum-seekers; believed that all people who entered illegally were not 'genuine' asylum-seekers; and had little knowledge of international affairs. People also wildly overestimated the numbers of migrants and asylum-seekers, with more than a quarter guessing they constituted the majority of the population, although in fact it was closer to 5%.¹⁰⁹³ Another poll revealed that people believed Britain hosted nearly a quarter of the world's refugees, although in reality it hosts under 2%.¹⁰⁹⁴

The limitations of executive action, parliamentary and judicial scrutiny, together with widespread public confusion compounded by media misrepresentations, create inherently and significantly flawed policy-making and law-making policy processes. Government reactions to ill-informed but highly charged public sentiment are inadequately scrutinised by Parliament and the courts, and inaccurately and confusingly reported by the media, perpetuating the cycle of misinformation and overreaction.

3.3.3.5 Institutional biases

Finally, the policy-making and law-making processes privilege certain kinds of information. While these institutional biases are common, their application in the immigration context is more problematic.

Documents written in the language of government and policy are the primary method of conveying information, tending therefore to entrench the interests of the powerful. This effect is exaggerated in immigration because of the relative disadvantages of immigrants in linguistic and cultural competence, as well as political and social capital. Again, there is variation here across streams of immigration, as the recent court victory (and political mobilisation) of skilled immigrants evinces.¹⁰⁹⁵

¹⁰⁹¹ Articles about asylum made up a third of articles in national dailies, with an emphasis on 'chaos': Kate Smart et al, *Reporting Asylum: The UK Press and the Effectiveness of PCC Guidelines* (2007) 12, 17.

¹⁰⁹² Lewis, n1045, 14.

¹⁰⁹³ ICM, *Asylum Seekers Poll* (2001).

¹⁰⁹⁴ MORI, *Attitudes to Asylum Seekers for 'Refugee Week'* (2002).

¹⁰⁹⁵ *HSMP Forum*, n323.

Further, as already noted, quantitative information is processed more easily than qualitative information, and 'objective' information preferred to subjective information. We see this in the over-emphasis of quantitative targets, and in the privileging of country information over oral testimony.

Thus, while the constraints of policy-making and law-making processes apply to all legal fields, their effect is unusually pronounced in immigration. Constitutional designs, imbalances in power distributions, the symbolic salience of immigration, institutional deficiencies and institutional biases are structural constraints that impede the effectiveness of the regulation of immigrants.

4 Conclusion

The limitations of immigration law in performing the functions of dispute resolution and regulation are legion, as this survey demonstrates. At best, the effects of immigration law are partial; at worst, they are counter-productive. These different limitations have different causes, which invite different approaches to them. I sketch in a preliminary way these different approaches here, fleshing their implications out more fully in the conclusion.

Most fundamental are the limitations inherent to any sphere of society or human activity, limitations which may be exacerbated by particular features of immigration. This includes matters such as our limited knowledge; the ambivalence of our aims; the complexity and agency of humans; and the necessity of over-simplification and transformation for the purposes of human action and judgment.

These are limitations that we must live with, but which we can recognise and minimise. We can draw on the rapidly amassing body of research into the phenomenon of migration in developing improved, and more responsive, forms of regulation. We can be clearer about our aims, recognising explicitly their tensions and building them, and the trade-offs involved, into our decision-making frameworks. We can be more attentive to the gap between the irreducible complexity of humanity, and the frameworks by which we attempt to govern them, seeking to minimise that gap where possible, and to acknowledge the shortfall where not.

Limitations also occur at the institutional level, due to gaps, deficiencies and biases in institutional design. These factors are more contingent, but still very difficult to reform. The different socialisation of immigrants and much of the discussion on the constraints of policy-making and legislative processes fall into this category. The appropriate approach here would be to identify these limitations and, where feasible,

redesign or ameliorate those features. Moves have already been made in this direction, with cross-cultural training, improved quality assurance processes,¹⁰⁹⁶ the reform of administrative cultures,¹⁰⁹⁷ and media training and regulation.¹⁰⁹⁸

A third category of limitations is peculiar to, and sometimes unique to, immigration law. The ‘insider’ and ‘outsider’ divide; the direct relationship between the State and the individual; the diversity of the audience; some of the natural and structural constraints; the symbolic salience of immigration; and the transnational logic of migration all come to mind.

The most fruitful approach here seems to be one of awareness and understanding, and of re-engineering our yardsticks accordingly. We should recognise the distinctiveness of the regulatory context, and save ourselves frustration and disillusionment when immigration proves different, with the consequent danger of undermining faith both in government and the law.

However, we should also be careful not to *over-emphasise* this difference, but to subject divergences to justification. Thus, for example, whether we locate the justification of procedural fairness in the dignity of the individual or the promotion of better administration,¹⁰⁹⁹ these justifications apply equally to immigrants, although the instrumental approach allows greater room to justify restrictions based on pressure on resources.

Yet, of course, there is a sense that the call for greater awareness and understanding is either trite or over-optimistic. Logic, reason and analysis are helpful only up to a point. As this analysis has shown, there are a range of powerful interests, as well as structural constraints, which greatly constrain the potential for awareness and understanding. It is all too easy to blame immigration for the travails of the modern world, and there are politicians and media owners who benefit from exploiting and displacing that blame.

The gravitational force of these interests and constraints will, however, wax and wane over time, and the outcome is capable of being mediated by leadership and by changing circumstances. A pervasive labour shortage, the decline in refugee numbers,

¹⁰⁹⁶ See, eg, the Quality Initiative Project: UNHCR, *Quality Initiative Project: Fourth Report to the Minister* (2007).

¹⁰⁹⁷ DIMIA, *Report from the Secretary to Senator the Hon Amanda Vanstone MIMIA: Implementation of the recommendations of the Palmer Report of the inquiry into the circumstances of the immigration detention of Cornelia Rau* (2005).

¹⁰⁹⁸ See, eg, the MediaWise project: http://www.mediawise.org.uk/display_page.php?id=83.

¹⁰⁹⁹ See DJ Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures* (1996); TRS Allan, ‘Procedural fairness and the duty of respect’ (1998) 18 *OJLS* 497.

and a change in government has seen a dramatic shift in immigration policy in Australia in the past year. Nevertheless, the structure of paradox, compromise and ambivalence will remain essential features of immigration policy, as the tentative embrace of the Pacific guestworker pilot scheme,¹¹⁰⁰ the boost in temporary labour along with plans for greater control,¹¹⁰¹ and the commitment to retain mandatory detention (albeit transform it into a risk-based model) all testify. The challenge of capacity is, although variable, ultimately a fundamental one.

¹¹⁰⁰ Paul Kelly, 'Pacific solution to welfare reform', *The Australian*, 20 August 2008, 10.

¹¹⁰¹ Paul Maley, 'Rise of nearly a quarter in 457 program', *The Australian*, 23 July 2008, 5.

Chapter 7 — Deconstructing and reconstructing law's empire

1 Introduction

This last chapter turns from the challenges of coherence, competition and capacity to the challenge of 'institutional legitimacy', to borrow Boswell's term. That is to say, immigration law importantly engages and challenges certain normative foundations of the social practice of law. It is this challenge, above all others, that has animated the story of immigration review.

Implicit in the story of immigration review is a critique of immigration law that articulates a core understanding of the purpose and province of the law, revealing what might be called, despite its old-fashioned overtones, the ideological dimension of law. By defining what is wrong with immigration law and immigration review, critics are also giving an internal, contextual and contemporary account of the conditions which confer legitimacy upon the law.¹¹⁰²

On the one hand, then, this chapter challenges the belief that legal critiques are merely disguised political rants, suggesting that there is a deeper sense in which these legal critiques are ultimately concerned with conditions of legality. However, these legal critiques offer only a weak critical purchase on immigration law, a deficiency that this deeper account of legality cannot remedy.

I begin by briefly examining the strengths and weaknesses of the common standards used in the critical literature, before turning to the deeper account of legality. This account comes in two parts, the first concerning specific major legal standards: the conditions of a 'fair trial'; the legal values of clarity, coherence and certainty; and the principle of access to justice. These are relatively concrete common law standards, reflected in regional and international law, which are central to our understanding of justice.

The second half maps the broader normative concern underlying these standards — namely, the role of the law in acting as a counter-weight to the realm of politics.

¹¹⁰² I adopt here the empirical usage of legitimacy adopted in social sciences, rather than investigating the philosophical conditions of legitimacy: David Beetham, *The Legitimation of Power* (1991), 3-8.

Just as we define ourselves against the Other, law defines itself against politics: the rule of law as opposed to the power of politics.

This second half consists of three interrelated claims. First, the law is unlike politics in that its treatment of people is not primarily dictated by their power. Second, law claims to act autonomously from politics. Third, the law controls the power of the State, as captured in the principle of the rule of law. This is not intended to be a watertight classification or categorisation, or any kind of universal philosophical statement. Rather, it is a useful way of capturing the internal, contextual, understandings of legitimacy implicit in the story of immigration review.

Immigration law challenges these normative claims, and thus the deeper account of legality, in various ways. However, critiques grounded on this deeper account ultimately fail to convince, because — as I shall demonstrate — in the end the account of legality must ultimately regress to the very question it is meant to resolve: the boundaries between law and politics.

2 *Comparisons and evaluations*

In the critical literature, the story of immigration review is portrayed as a story of loss and variation, as assessed against a variety of different standards. Here, I briefly discuss and critique some of the more common comparators: historical standards; other jurisdictions; judicial procedures; other fields of administrative law; and the standards of human rights law, refugee law, and constitutional and administrative law.

2.1 Historical comparisons

Chapter 1 described the story of immigration review by comparing the ‘model’ of immigration review with subsequent changes. The historical comparison with the model of immigration review has two strengths.

First, it is concrete. We are not comparing it to an ideal, or outside of its context; rather, we are saying this was what used to exist, and does not any longer — a narrative of loss. Thus, the loss of appeal rights in the UK is lamented, although the much smaller jurisdiction of the MRT evokes no similar anxiety. The story of immigration review can thus be plausibly constructed as a conservative one of ‘defending’, rather than expanding, law’s empire.

The second strength is its appeal to the still prevalent assumption that time and progress go hand-in-hand. Thus, reductions in procedural standards are described as

'backward' steps; human rights must be interpreted 'progressively'; and we 'learn' not to repeat earlier judicial mistakes.¹¹⁰³ The story of immigration review does not fit this narrative, and it thus provokes an anxiety also underlying other 'rollbacks' in the legal sphere, such as the debates about 'new public management' and the role of contract in administrative law, or more prominently the return of practices of executive detention.

There are, however, weaknesses. All depends on the choice of comparator: a comparison between contemporary immigration review and the very limited recourse available for most of the 20th century produces an entirely different, and much more favourable, picture. Further, the model of immigration review itself is open to criticism. From the beginning, the systems have been troubled by backlogs and exceptionalism. In many ways, there have been improvements, such as the introduction of refugee and human rights appeals, which have come together with reductions in procedural protection. Historical critiques, therefore, are undermined by the plasticity and weakness of historical standards.

2.2 Comparisons with other jurisdictions

The same criticisms may be made of arguments based on comparisons with other jurisdictions. These comparisons are prevalent in the literature, partly because the jurisdictions are increasingly borrowing policies from each other, and partly because there are striking parallels with the story of immigration review in other jurisdictions.¹¹⁰⁴ The UK has been notably influenced by Australian policy: it has adapted Australia's 'points-style' system (itself adapted from the Canadian model); introduced an Australian-style scheme to retain international students;¹¹⁰⁵ proposed a system of offshore processing inspired by the Australian Pacific Solution;¹¹⁰⁶ introduced a refugee resettlement scheme;¹¹⁰⁷ and proposed the unified concept of 'permission', equivalent to the Australian 'visa'.¹¹⁰⁸

¹¹⁰³ See Poole, n648.

¹¹⁰⁴ See, eg, Catherine Dauvergne, 'Chinese fleeing sterilisation: Australia's response against a Canadian backdrop' (1998) 10 *IJRL* 77; James Renwick, 'Constitutional aspects of detention without trial in Australia, the United States and the United Kingdom' (2006) 9 *Constitutional Law Pol Rev* 37.

¹¹⁰⁵ The International Graduates Scheme, now subsumed under Tier 1. This trend is global: see Brigitte Suter and Michael Jandl, *Comparative Study on Policies towards Foreign Graduates* (2006).

¹¹⁰⁶ See n219.

¹¹⁰⁷ See n329.

¹¹⁰⁸ See n309.

The story of immigration review has echoes elsewhere. For example, in Canada there is now a single-person, single-tier system of refugee appeals,¹¹⁰⁹ with limited legal aid,¹¹¹⁰ which is suffering unprecedented staffing shortages amid allegations of political interference.¹¹¹¹ In the US, there has been a proliferation of different appeal procedures, restrictions on access to judicial review, and a recent upsurge in judicial review applications.¹¹¹²

However, for present purposes, the most important use of other jurisdictions is to argue for both increases and reductions in procedural protection. The progressive reduction of UK legal aid, for example, can be justified by comparison to the more limited legal aid available in other countries.¹¹¹³ The scope of immigration appeal rights in Canada,¹¹¹⁴ New Zealand,¹¹¹⁵ and the US¹¹¹⁶ is more limited in most respects than in both Australia and the UK. On the other hand, advocates often point to better models elsewhere, with the Canadian refugee determination system commonly considered the ‘Rolls Royce’ in refugee status determination procedures.

This kind of argument has several weaknesses. First, as with the historical comparison, all depends on the comparator. Second, useful comparisons between models of immigration review are notoriously difficult to make, because of the varying legal frameworks, different caseloads, and the necessity of a detailed, up-to-date, contextual knowledge of their operation.

¹¹⁰⁹ The provisions for a refugee appeal division in *Immigration and Refugee Protection Act 2001*, ss 110-111, were never commenced.

¹¹¹⁰ Catherine Dauvergne, ‘Evaluating Canada’s new *Immigration and Refugee Protection Act* in its global context’ (2003) 41 *AltaLRev* 725.

¹¹¹¹ Cristin Schmitz, ‘Bar condemns Conservatives’ treatment of refugee board’ *The Lawyers Weekly*, 11 May 2007.

¹¹¹² Lenni B Benson, ‘Back to the future: Congress attacks the right to judicial review of immigration proceedings’ (1997) 29 *ConnLRev* 1411; John RB Palmer et al, ‘Why are so many people challenging Board of Immigration Appeal decisions in federal court? An empirical analysis of the recent surge in petitions for review’ (2005) 20 *GeoImmigrLJ* 1.

¹¹¹³ See, eg, UK, *Hansard*, HL, 10 September 2003, vol 652 col 297 (Lord Filkin) 297.

¹¹¹⁴ There is a right of appeal to the Canadian Immigration and Refugee Board against decisions that a person is ‘inadmissible’; decisions on detention; refusals of family-sponsored entry; removal orders; orders for the removal of refugees and permanent residents; and decisions regarding the failure to fulfil residency obligations. The primary decision on refugee status is made by the Board, and is subject only to judicial review. See generally http://www.irb-cisr.gc.ca/en/index_e.htm.

¹¹¹⁵ There are currently four tribunals covering refugee, refusal of residence, removal and deportation decisions, although the Immigration Bill 2007 proposes to streamline these into a single Immigration and Protection Tribunal: *Immigration Act 1987* (New Zealand), Pt 5, ss 103, 107, 129N-129Q. This Bill has not yet received its Second Reading (as at 21 October 2008).

¹¹¹⁶ The structure is extremely complicated, but the ‘standard’ procedure involves an independent Immigration Judge making the decision to expel, with an appeal on the papers to the Board of Immigration Appeals. These decisions are challengeable before the US Court of Appeals through petitions for review or habeas corpus. For a useful overview, see Palmer et al, ‘Why are so many people challenging BIA decisions,’ 11112.

Most importantly, comparisons with other jurisdictions provide both an elastic and a weak standard for procedural norms, because of the huge variations in the scope and structure of appeal systems. In the field of asylum, most European countries use administrative courts, with some including a specialist tribunal or interdepartmental advisory committee (see Appendices, Table 9). The interdepartmental committee model also prevails in other jurisdictions such as Brazil.¹¹¹⁷ Even within the common law world, in which the model of tribunal plus judicial review prevails, there are wide procedural variations.

This diversity demonstrates the variability of the content of procedural fairness. Some common procedural norms may be deduced: the principle of an independent review on the facts as well as the law; the requirement of an oral hearing in most cases; the possibility of representation; the participation of UNHCR; and some form of judicial oversight. Art 39 of the Procedures Directive, dealing with appeals, illustrates this variability starkly, providing only the “right to an effective remedy before a court or a tribunal” against specified decisions, with everything else — including the suspensive effect of decisions, time limits, procedures for withdrawal or abandonment — left up to Member States. The Directive, and its negotiating history,¹¹¹⁸ thus demonstrates the lack of consensus on procedural issues, which weakens the bite of any evaluation.

2.3 Comparison with judicial procedures

Alternatively, as the Federal Court judges did in *Selliah*,¹¹¹⁹ one might compare systems of immigration review instead with judicial procedures, which remain the ‘gold standard’ of fair decision-making in legal thought. Judicial standards are well-developed, evince greater consensus, and incorporate stronger procedural safeguards.

However, the obvious weakness in this approach is that tribunals were expressly developed as an alternative to judicial procedures. Indeed, the MRT/RRT model was deliberately chosen to avoid the quasi-judicial procedures of the AAT.¹¹²⁰ Thus, we see judges warning against the evaluation of tribunal reasons against judicial standards of

¹¹¹⁷ An interdepartmental committee, including an NGO representative, determines refugee status subject to an appeal to the Minister for Justice: see Liliana Lyra Jubilut, ‘Refugee law and protection in Brazil: A model in South America?’ (2006) 19 *JRS* 22.

¹¹¹⁸ Ackers, n489.

¹¹¹⁹ *Selliah*, n118.

¹¹²⁰ Saunders, ‘In search of a system’, n33.

reasoning.¹¹²¹ This well-worn debate evinces a conflict between the well-defined dominant judicial standard of fairness, and the varied and vaguer definition of fairness in the context of a tribunal. Those favouring the flexibility of tribunals are deprived of any sharp-edged evaluative standard, capable only of invoking open-textured administrative values or principles, or invoking the practice of other tribunals.

2.4 Comparison with other administrative fields

Comparing immigration with other administrative fields provides a stronger standard of evaluation, since these fields provide stronger procedural protections. Immigration review has significantly departed from the mainstream model of administrative law in both jurisdictions, although its 'exceptionalism' has been more consistent in Australia.

This exceptionality is marked most prominently by their structural divergence. The MRT and RRT remain the only significant exceptions to the centralisation of administrative law in the AAT.¹¹²² The only other non-AAT tribunals, the Social Security Appeals Tribunal and the Veterans' Review Board, are first-tier tribunals, with rights of appeal to the AAT. The immigration field is also the only major administrative field to be excluded from the scope of the *ADJR Act*.

The MRT and RRT are also unusual in being single-tier tribunals in mass volume jurisdictions, in comparison to the three-tier appeal system for social security (with the additional tier of internal review) and the two-tier system in veterans' affairs. The MRT/RRT and the AIT also exclude more categories of decisions. Further, the other tribunals normally sit in panels of between 2 and 3 members; have more generous (and extendable) time limits; and are free or cost substantially less than the MRT/RRT.¹¹²³ At the AAT, members are appointed by the Attorney-General for longer terms,¹¹²⁴ and there are a significant number of judicial members.

In the UK, the IAA was originally unusual in that the adjudicators (and, originally, asylum support adjudicators) were appointed by the Home Secretary rather than the Lord Chancellor; time limits were not extendable; appeals were lodged with the Home Office; and there was no right of appeal to the courts, all matters criticised

¹¹²¹ *MIEA v Wu Shan Liang* (1996) 185 CLR 259, 272; *Slimani (Content of Adjudicator Determination) Algeria* [2001] UKIAT 00009, [8].

¹¹²² Criticised in ARC, *Better Decisions: Review of Commonwealth Merits Tribunals* (1995), 187-188.

¹¹²³ AAT review currently costs \$639, while review at the other tribunals is free.

¹¹²⁴ The maximum term is 7 years: *AAT Act*, s 8A.

by the Council on Tribunals.¹¹²⁵ The brief introduction of a fee for family visitor appeals was also exceptional. In these matters, the present model moves immigration review back into the mainstream. However, the present exclusion of the AIT from the recent unification of tribunals into the First and Upper-Tier Tribunals (under review);¹¹²⁶ the reduction of the two-tier model; the non-suspensive effect of many decisions; the very tight time limits; and the highly complicated appeals routes have moved in the other direction.

These exceptional features are said to be justified by exceptional features of immigration review, principally the volume of decision-making; the inherent incentive to appeal in order to prolong stay; high rates of legal challenge; low rates of success and high rates of withdrawal or settlement; backlogs and delays; and the lesser entitlements of non-citizens to procedural justice. However, other exceptional features point the other way: the importance and complexity of the decision, especially in refugee contexts; high error rates and poor quality decision-making; and, in the case of refugees and humanitarian situations, the existence of international legal (and ethical) obligations.

Comparisons with other administrative fields provide a stronger standard for critique, and appear to have influenced the movement of immigration review back into the mainstream in the UK. However, one of the primary difficulties in devising a model of immigration review is precisely the cross-cutting nature of its exceptional characteristics.

25 Comparisons with other legal standards

Perhaps the most dominant comparison is the explicit evaluation of these models against the obligations and norms of human rights law, refugee law, and public law.¹¹²⁷ As noted earlier, immigration law itself provides no internal evaluative standard, excepting the troubled, and minimalist, one of effectiveness.

Human rights law provides stronger and more detailed norms, including rights to a fair trial (Arts 6 ECHR, 14 ICCPR), an effective remedy (Arts 13 ECHR, 2(2) ICCPR),

¹¹²⁵ See, eg, Council on Tribunals, *Annual Report 1972-1973* (1973), 15-17; Council on Tribunals, *Annual Report 1985-1986* (1986) 48-50; Council on Tribunals, *Annual Report 1988-1989* (1989), 31-33.

¹¹²⁶ See UK Border Agency, *Immigration Appeals*, n133.

¹¹²⁷ See, eg, Savitri Taylor, 'The right to review in the Australian on-shore refugee status determination process: Is it an adequate procedural safeguard against refoulement?' (1994) 22 *FL Rev* 300; Simon Evans, 'The rule of law, constitutionalism and the *MV Tampa*' (2002) 13 *PLR* 94; Taylor, 'Protecting the human rights of detainees,' n1018.

equality and non-discrimination (Arts 14 ECHR, 14 and 26 ICCPR), and access to a court (Art 16 of the Refugee Convention). Arts 5 ECHR and 9 ICCPR also relevantly provide limits to detention. The *non-refoulement* obligation under both the Refugee Convention and CAT also enables a critique of inadequate procedural protection. Other standards may be drawn from constitutional and administrative law, such as the constitutional principles of separation of powers and the rule of law, and the principles of judicial review.

These legal standards have a common strength, and a common weakness. The strength is that they are *legal* standards, which may have legal (real-world) implications. Importantly, they invoke the expertise of legal scholars and remain firmly on the right side of the law/politics divide.

The weakness, however, is that, as described in chapter 2, these legal standards are haphazard, normatively incoherent, open-textured, and embed compromises. In Australia, critiques using human rights and refugee law standards suffer from the additional disadvantage that such standards are not, for the most part, ‘hard law’.

3 *An account of legality*

The norms of specific legal regimes, however, are often discrete and historically contingent manifestations of broader legal norms and values, which together constitute a deeper account of legality. This account includes most prominently major legal norms, such as the procedural requirements of a fair trial; conditions of clarity, certainty, consistency and coherence; and the principle of access to justice. However, these relatively specific and concrete norms are themselves based on a broader normative claim: the claim of law to act as a counterweight to politics.

3.1 Fair trials

The most concrete standards in the account of ‘legality’ are embodied in the concept of the ‘fair trial’. This concept extends beyond the standards of common law judicial procedures, although the affinities are obvious. The fundamental importance of this concept is evident from its iteration in multiple legal regimes and orders: in the common law principles of procedural fairness or natural justice; and in both regional and international human rights law.¹¹²⁸ Its relevant features can be extracted from

¹¹²⁸ In addition to those mentioned earlier, see EU Charter of Fundamental Rights, art 47; UDHR, arts 8, 10, 11.

domestic and international jurisprudence, and are helpfully summarised in the Draft UN Body of Principles on a Fair Trial and a Remedy,¹¹²⁹ and by Boeles.¹¹³⁰

Some of these features might be considered ‘enabling’ features, in that they facilitate a fair trial: for example, notice of the nature and purpose of proceedings; the opportunity to prepare a case; the availability of legal representation; and the availability of interpretation and translation. Others relate to the features of the trial itself: the principle of equality of arms; the opportunity to present and meet arguments and evidence; the independence of the judiciary; and the general principle of an open hearing. A third set of features relate to ‘curative’ powers: the reasonable expedition of a decision; the availability of powers to suspend administrative action; and the availability of appeal.

The strong consensus underpinning these procedural principles, and their concreteness, bolsters one prevalent form of critique, in which immigration review is shown to depart from these principles as a result of political pressure or pressure on resources (the critique of the ‘unjustified departure’). This critique may be levelled against many of the practically important challenges in immigration review, such as tight time limits; the inadequacy of legal representation and interpretation; restrictions on appeals and judicial review; and allegations of bias. (This last matter is especially relevant in Australia, given that members are appointed for short terms¹¹³¹ amid allegations of political interference under Labor and Liberal governments.¹¹³²) These are contingent features of immigration review which are more susceptible to change.

The critique of the unjustified departure is an eminently legal critique, since it takes as its point of departure a strongly affirmed legal norm and relegates political or resource-based justifications to a second tier. Its prevalence, however, obscures structural problems. These problems are less popular partly because, in an age which places a premium on the utility of research, they are less readily capable of resolution.

Such fundamental problems are akin to ‘dirty secrets’: things we keep in the closet because we don’t know what to do with them. For example, we must assume

¹¹²⁹ ‘The Administration of Justice and the Human Rights of Detainees’ UN doc E/CN4/Sub2/1994/24 of 3 June 1994.

¹¹³⁰ Pieter Boeles, *Fair Immigration Proceedings in Europe* (1997).

¹¹³¹ Recent practice has been to appoint for 3 years: MRT, *Annual Report 2003-2004* (2004).

¹¹³² JSCM, *The Immigration Review Tribunal Appointments Process* (1994); LCAC, *Administration and Operation*, n104, 2-103; Stephen Legomsky, ‘Refugees, administrative tribunals, and real independence: Dangers ahead for Australia’ (1998) 76 *Wash ULQ* 243.

interpretation is accurate, despite evidence of poor quality interpretation; and we must accept the perils of cross-cultural communication. Similarly, the gross disparity in power between the State and the individual is glossed over because there is no practicable alternative.

There are two avenues of attack here. First, we can argue that there is indeed utility in the exercise, albeit less direct and obvious. By drawing attention to the problem, we can be more alert, sensitive and sympathetic to its effects. Thus, judges and tribunal members who are alert to the perils of interpretation, cross-cultural communication, and the disparity of power will be less ready to make adverse inferences, and conduct inquiries with greater sensitivity. There is, indeed, ample evidence of this.¹¹³³ Further, by diagnosing the problem we can adopt a strategy of amelioration, such as accrediting and auditing interpreters, providing cross-cultural training, and increasing the evidential onus on the State.

Second, we can challenge the assumption that knowledge is not valuable in and of itself. There is independent value in pointing out the fundamental limitations of our social structures and organisations, and seeking to understand them. Such recognition promotes both humility and insight. To recognise that there are limits in the law does not imply the law is valueless, but allows us to see more clearly what it can and cannot achieve.

Another, even more important, reason why such structural problems tend to be neglected is because the standards articulate partial criteria of evaluation. Boeles, for example, argues that a key aspect of a fair trial is the capacity of the forum to take into account all aspects of the dispute.¹¹³⁴ The narrow and distorted framing of immigration disputes and the limitations on the jurisdiction of the courts can thus be rewritten as challenges to a fair trial.

However, while Boeles captures the sense in which a dispute resolution mechanism must capture the substance of the dispute, dispute resolution must also delimit the issues in order to resolve it. In that sense, Boeles' claim captures only a partial truth, and the legal standard he offers is thus fuzzy at the edges. To the argument that immigration disputes are artificially distorted, one might well reply:

¹¹³³ For such evidence in the UK, see Amanda Weston, 'A witness of truth' – Credibility findings in asylum appeals' (1998) 12 *I&NL&P* 87; in Australia, see Steve Norman, 'Assessing the credibility of refugee applicants: A judicial perspective' (2007) 19 *IJRL* 273.

¹¹³⁴ Boeles, n1130, 6-7.

but aren't all legal disputes? The argument relies not upon a distinction of category but rather on a (more contestable) distinction of degree.

A similar concern arises when fundamental problems are caused by competing principles. For example, the criticism that litigants misunderstand the limitations of judicial review engages two competing principles: that a person should be aware of the nature and purpose of the proceedings, and that judges must refrain from jumping into the "abyss of substantive review".¹¹³⁵ These principles are not equally weighted: while the latter directly concerns the legitimacy of the judiciary, the former is procedural in character and considered capable of being remedied by accurate information, decent legal advice, and clear explanations of their limited functions. Such criticisms, therefore, are compromised.

Thus, while the fair trial standard enables a distinctively legal form of critique, there are two weaknesses in this approach. First, the unequal competition between the legal norm and the political or resource-based justifications means that the latter might qualify, but will never defeat, the first-order legal norm. While this may be logically and normatively preferable, it is disconnected from the political realities of immigration law-making, and thus fails to engage policy-makers, limiting the political efficacy of the solutions offered.

Second, the predominance of the 'unjustified departure' critique obscures more fundamental problems. These are less prominent in the literature because there are no easy solutions to them, because they engage more open-textured standards, and because they arise from tensions between competing principles.

3.2 Clarity, certainty, consistency, and coherence

Another form of critique invokes the legal values of clarity, certainty, consistency, and coherence. These legal values are most directly manifested in the ECtHR's interpretation of the phrase 'in accordance with the law' as including requirements of accessibility and foreseeability.¹¹³⁶ The ECJ has adopted a like approach.¹¹³⁷ In the common law, these values are similarly given effect in judicial interpretative

¹¹³⁵ David Dyzenhaus, 'Baker: The unity of public law?' in David Dyzenhaus (ed), *The Unity of Public Law* (2004) 1, 11.

¹¹³⁶ See, eg, *Sunday Times v UK (no 1)*, 26 April 1979, Series A no 30, [49]; *Malone v United Kingdom*, 2 August 1984, Series A no 82, [66]-[67].

¹¹³⁷ In the requirements of legal certainty and legitimate expectations: see Case 350/88 *Societe Francaise des Biscuits Delace v Commission* [1990] ECR I-418; Case C-368/89 *Crispoltoni v Fattoria Autonoma Tabacchi* [1991] ECR I-3715.

presumptions.¹¹³⁸ The value of certainty may also be given effect through statute, such as in transitional arrangements or the protection of ‘accrued’ rights from repeal in Australia.¹¹³⁹ The doctrine of legitimate expectations may also be seen as a manifestation of that value, while Art 8 ECHR may also indirectly protect certainty in immigration contexts, as the example of the litigation over recent changes to the HSMP illustrates.¹¹⁴⁰

The evaluation of laws with respect to these values is almost instinctive, and rife in immigration law because of its notorious obscurity, uncertainty, inconsistency and incoherence. As an Australian expert observed:

I lecture in this area, and I do not understand the stuff. I am chairman of the specialisation committee. I examine other lawyers to see whether they are good enough to be immigration law specialists. I do not understand this stuff. I guarantee that every migration officer I have spoken to does not have a complete knowledge of their own immigration laws.¹¹⁴¹

As this thesis has elaborated, there are many causes of this complexity. The volume of legislation, its frequent amendment, the technicality of the refugee definition, the limited jurisdiction of the courts, and the interaction of various legal regimes are all special features of this field of law. Refugee law poses additional challenges since it is ultimately premised on future risk.¹¹⁴² As *Rashid* and *R(S)* evidence, this may lead to refugee claimants living in uncertainty for years. Further, the Convention’s promise of a universal system of protection is greatly undermined by procedural and interpretative variations, resulting in an “asylum lottery”.¹¹⁴³

These structural features partly arise out of, and are exacerbated by, four underlying features of immigration law. The high political salience of immigration encourages perpetual amendment, micro-management, and compromise. Competing tensions in the ‘national interest’ also promote compromise and ambivalence. The fluidity of the regulatory environment, described in chapter 6, encourages amendments to respond to new patterns and challenges. Finally, the inherent administrative tensions between discretion and rule-making are magnified in the immigration context because of the tension between the high volume of decisions and

¹¹³⁸ See, eg, *Coco v The Queen* (1994) 179 CLR 427, [8]-[13]; *Plaintiff S157*, n192, [30].

¹¹³⁹ Under s 8 of the *Acts Interpretation Act 1901* (Cth).

¹¹⁴⁰ *HSMP Forum*, n323.

¹¹⁴¹ Evidence to L&CLC, Senate, Melbourne, 16 September 1997, 320 (Michael Clothier).

¹¹⁴² *Hoxha*, n385.

¹¹⁴³ European Council on Refugees and Exiles, ‘Europe must end asylum lottery – Refugee NGOs’, PR6/11/2004/EXT/RW (Press Release, 4 November 2004).

greater pressures on time, on the one hand, and the complexity of human beings and the national interest on the other.

Given these challenges, it is not surprising that criticisms based on these values are frequent. These are distinctively legal criticisms grounded in uncontroversial legal values. However, they run into the same problems as those based on a fair trial: there are no easy solutions; these are partial standards; and these are standards that may engage competing principles.

3.3 Access to justice

A third prominent form of critique takes as its legal standard the principle of access to justice, which is also entrenched in multiple legal orders and regimes. In international and regional human rights law, it is captured in the rights to an effective remedy¹¹⁴⁴ in addition to a fair and public hearing.¹¹⁴⁵ In the Australian Constitution, it is partially captured by s 75. It has also been resoundingly affirmed as a “fundamental and constitutional principle” in the UK,¹¹⁴⁶ with the rights of access to a court and legal advice “inherent and fundamental to democratic civilised society.”¹¹⁴⁷ Lord Woolf captured the issue pithily: ‘What is the use of courts, if you cannot access them?’¹¹⁴⁸

The challenge of access to justice is squarely and centrally raised in the story of immigration review, manifested in various forms. Issues of legal representation, interpretation and translation, and time limits, as discussed in chapter 1, practically impede access to justice. The unusually restrictive conditions on appeals and judicial reviews — including accelerated appeals, non-suspensive appeal, tight time limits, and jurisdictional restrictions — challenge the principle of access to justice more directly. Policies of extra-territorialisation pose an enormous practical challenge, with such policies precluding access to the UK for over 70,000 people between 2006 and early 2008.¹¹⁴⁹ Such policies not only greatly affect rights of appeal, but create important practical barriers in exercising such rights even where they do exist. Finally, the least visible challenge is that of migration policies themselves. It is the policies, ultimately, that determine the rules of admission and thus the viability of legal challenge, but the substantive justice of these policies is largely not justiciable.

¹¹⁴⁴ Art 2(3) ICCPR, Art 13 ECHR.

¹¹⁴⁵ See 11128.

¹¹⁴⁶ *Anufrijeva*, 1177.

¹¹⁴⁷ *R (Daly) v SSHD* [2001] UKHL 26, [30]-[31].

¹¹⁴⁸ Woolf, ‘The rule of law,’ 1403, 329.

¹¹⁴⁹ UK Border Agency, ‘UK Border Agency Business Plan, April 2008 – March 2011’ (2008), 16.

Strong critiques of this kind abound,¹¹⁵⁰ but once again they run into the difficulty that access to justice is a partial standard. No system of law can adjudicate all disputes, an observation particularly apt in immigration, which has historically provided few avenues of legal challenge, and which generates a disproportionately large caseload. Indeed, the ICCPR expresses the partiality of the standard by providing in Art 13 that aliens are, subject to security grounds, entitled to submit reasons against a decision to expel, and have that decision reviewed by a competent or specially designated authority. Clearly, therefore, Art 2(3) of the ICCPR does not entitle aliens to the right of legal challenge against expulsion, let alone a decision refusing admission.

The partiality of the standard returns us to the dilemma of first-order legal norms and second-order political justifications. For, while the standard is partial, the normative justifications for the standard — crucially, ensuring the interests, rights and fair treatment of the individual; ensuring the accountability, accessibility and transparency of the administration; and the improvement of administrative processes¹¹⁵¹ — all point toward extensive access to justice in immigration. The interests involved are most significant; there is empirical evidence of poor decision-making and a lack of public confidence; and there is an inherently strong desire to challenge decisions. The ARC's guidelines as to which decisions should be subject to appeal point to the same conclusion.¹¹⁵² Rather than being normatively grounded, therefore, it is blindingly obvious that restricted access to justice in immigration is the product of political and resource pressures, returning us to the unequal competition between legal norms and political constraints — or, even worse — to a purely pragmatic distribution of limited resources between different legal fields.

As this overview has demonstrated, distinctively legal critiques, based on relatively concrete legal standards, benefit from an underlying normative consensus and their distinctively legal character. This gives legal scholars a position of relative authority, while preserving the distinction between a legal and a political critique of immigration law. Further, the methodology of the law — reasoning from legal

¹¹⁵⁰ See, eg, Savitri Taylor, 'Sovereign power at the border' (2005) 16 *PLR* 55; Gregor Noll, *Negotiating Asylum: The EU Acquis, Extraterritorial Protection and the Common Market of Deflection* (2000).

¹¹⁵¹ See Committee on Immigration Appeals, n16; ARC, *Review of Migration Decisions*, n15, [91]-[96]; Galligan, *Due Process*, n1099.

¹¹⁵² ARC, 'What Decisions Should be Subject to Merit Review?' (1999).

principles and legal values — is employed effectively to contest and ultimately displace the methodology of politics.

However, as we have seen, such critiques suffer from four major defects. They obscure more fundamental problems by favouring those that can readily be resolved. They provide little guidance when competing principles are in play. They pit normative principles against second-order political constraints and thus fail to engage with political imperatives. Finally, they expose the partiality of the broader legal principles that they rely upon.

4 *Law as a counter-weight to politics*

We turn now from the relative precision of these legal standards to the deeper and murkier territory of the broader normative claim underpinning those standards: that law acts as a counter-weight to politics. It is here that we meet the greatest challenge of immigration to the law.

This general claim may be disentangled into three separate, and distinctive, claims. First, law constructs people differently from politics. Second, the law differentiates itself by its autonomy from politics, distinguishing itself by its independent institutions, framework and methodology. Third, and intimately related to the second, law claims to control or check executive power, as expressed in the principle of the rule of law. This goes one step further than the previous claim: not only is law not merely a branch of politics, but it also acts as a counterweight to politics.

4.1 The people of the law

While law focuses on the equality and rights of people, and seeks to protect their vulnerability, politics focuses on their differential social power and interests, and vulnerability is a marker of political weakness. Of course, politicians and political scientists subscribe to the principles of equality and rights, and may also seek to protect political vulnerability; and, conversely, lawyers and judges are influenced greatly by social power and interests. However, distilled to their essence, law and politics are distinguished by different methodologies that *claim* to distribute power according to these attributes.

This is most obviously manifested by the law's commitment to the twin principles of equality before the law and the prohibition of discrimination, and the democratic commitment to majoritarian rule and the distribution of political power between

different groups and classes. The norms of equality before the law and non-discrimination, as noted earlier, are manifested in specific regimes, most prominently human rights. Indeed, as Lord Steyn emphasised in *Prague Airport*, “[t]he great theme which runs through subsequent human rights instruments, national, regional and international, is the legal right of equality with the correlative right of non-discrimination on the grounds of race.”¹¹⁵³ As Lord Bingham also noted in the *Belmarsh* case,¹¹⁵⁴ and Lord Scarman in *Khawaja*,¹¹⁵⁵ these principles have constitutional importance in the common law.

As has been emphasised throughout this thesis, immigration poses a challenge to this claim of equality since it is fundamentally premised not only on inequality, but inequality based on one of the ‘suspect’ grounds of discrimination, that of nationality (and, indirectly, race). It is also exacerbated because this legal inequality is attached to a social inequality, since migrants are inherently likely to be less socially and financially powerful. This inequality is at its starkest in the differential treatment of citizen and non-citizen in relation to the coercive practice of detention.

Clearly, there is a tension between the equality of citizens, and the equality of humans, since the institution of citizenship itself demands exclusion, and since greater bonds of co-operation and obligation arise between citizens.¹¹⁵⁶ A further difficulty arises because, as discussed earlier, neither Australia nor the UK has a clearly defined sense of the entitlements of citizenship.

Another tension arises in the distinction between social citizenship and legal citizenship,¹¹⁵⁷ manifested in the debates over migrants’ access to health care and welfare.¹¹⁵⁸ The extension of many of the substantive benefits of citizenship to ‘denizens’ follows the logic of a welfare state, but not the logic of the citizen/non-citizen dichotomy of the law.¹¹⁵⁹

This debate articulates clearly the competition between the principle of equality of citizens, and the principle of equality as humans, and evidences the difficulty in locating the logical boundary between these two principles, since the founding

¹¹⁵³ N589, [46].

¹¹⁵⁴ N625, [46].

¹¹⁵⁵ N35, 111-112.

¹¹⁵⁶ See Stephen Macedo, ‘The moral dilemma of US immigration policy’ in Carol M Swain (ed), *Debating Immigration* (2007) 63.

¹¹⁵⁷ The locus classicus of this distinction is TH Marshall, *Citizenship and Social Class, and Other Essays* (1950).

¹¹⁵⁸ See the debate concerning *R (A) v West Middlesex University Hospital NHS Trust* [2008] EWHC 855 (Admin).

¹¹⁵⁹ Soysal, n916.

principle of democracy that “each individual has equal value”¹¹⁶⁰ is logically applicable across political boundaries. As I described in chapter 5, nationalism and cosmopolitanism co-exist and compete: we can understand, and respond to, the appeal of ‘British jobs for British workers’,¹¹⁶¹ as well as the cry that “some people are suffering and some people are enjoying and I don’t know the reason why”.¹¹⁶² There are, therefore, internal tensions in principle of equality concerning its sphere of application — tensions that are most exposed in relation to *non*-citizens.

The principle of equality is also a partial standard. Outside of a delimited sphere of application — where human rights are not engaged, and where no ‘internal’ legal regimes is invoked — the premise of inequality in immigration law reasserts itself.

Immigration also exposes the weakness of the law’s methodological focus on rights, because of the model of immigration as a privilege and the relative weakness of the patchwork of rights. As discussed earlier, the patchwork of rights include legally enforceable rights of entry upon fulfilment of the visa criteria or Rules; the States’ obligations of *non-refoulement* and respect for family or private life; procedural rights, and the corpus of EU rights. These rights have important limitations. The rules of admission are weakly entrenched, frequently amended, and qualified by a range of statutory provisions. The *non-refoulement* obligations are carefully limited and respect for right to private or family life outweighs immigration control only in a “very small minority” of cases.¹¹⁶³ Procedural rights are greatly weakened if they are not attached to substantive rights: in *Kioa*, for example, the finding of a breach of procedural fairness amounted to a “very slender technical victory”,¹¹⁶⁴ since the substantive decision was unlikely to be changed. Indeed, the history of immigration review evidences that the conferral of procedural rights is usually accompanied by a substantive reduction in protection. The rights conferred by EU law are substantial, but, as commentators have observed, these rights often have significant exceptions attached, are sufficiently open-textured to permit of many variations, and often permit States to continue invidious practices.¹¹⁶⁵

¹¹⁶⁰ *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [132] per Baroness Hale.

¹¹⁶¹ ‘Test the nation: Brown and Britishness’, *The Guardian*, 11 September 2007, 38.

¹¹⁶² N986.

¹¹⁶³ *Huang*, n176, [20].

¹¹⁶⁴ N37, 602.

¹¹⁶⁵ See, eg, Dr Helene Lambert, ‘The EU Asylum Qualification Directive, its impact on the jurisprudence of the United Kingdom and international law’ (2006) 55 *ICLQ* 161; Cathryn Costello, ‘The Asylum Procedures Directive and the proliferation of safe third countries practices: Deterrence, deflection and the dismantling of international protection?’ (2005) 7 *EJML* 35.

Weak rights lead to the under-protection of immigrants, as we see in decision after decision. In *Musgrove*, an immigrant could not maintain an action without a legal right of entry,¹¹⁶⁶ echoed in Beaumont J's finding in *Tampa* that a claim for habeas corpus was similarly precluded.¹¹⁶⁷ The absence of a right to residence meant that natural justice did not apply to deportations.¹¹⁶⁸ Immigration decisions did not affect 'civil right(s) or obligation(s)' and thus did not attract the fair trial guarantees under Art 6 ECHR.¹¹⁶⁹ The ECJ found that the Family Reunification Directive did not breach fundamental rights because, inter alia, there was no human right to family reunification.¹¹⁷⁰

What is troubling is the disjuncture between the importance of the interest, and its non-recognition as a right. As noted earlier, the interest in one's residence is a precondition to the exercise of all other kinds of rights.¹¹⁷¹ We are accustomed to thinking that the more important an interest is, the more likely it will be recognised as a right; and, indeed, the more fundamental it is, the more likely it will be recognised as a human or, in the phraseology of the EU, a fundamental right.

This disjuncture is even more troubling if we believe, as Dworkin does, in rights as being sourced in the ideas of human dignity and political equality, which protect the weaker members of the political community.¹¹⁷² The idea of human dignity surely applies equally to all humans; and the idea of political equality, although Dworkin limits it to the political community, is (as we have seen) logically capable of extension beyond the political community. Why then is the immigrant peculiarly divested of rights?

The framework of rights is, of course, a pervasive manifestation of the law's ultimate concern about the vulnerability of people to the politics of power. Other examples of this protective function of the law abound: we see it in the development of most of equity; the development of the tort of negligence; and most obviously, in the development of human rights law. It is the responsiveness of the law to that vulnerability, and its ability to counteract the pure effects of political power, that indelibly links law to justice and makes the law, for all its limitations, a principal

¹¹⁶⁶ N6.

¹¹⁶⁷ *Tampa*, n306, [109]-[125].

¹¹⁶⁸ *Salemi*, n12; *In Re HK (An Infant)* [1967] 2 QB 617.

¹¹⁶⁹ *Maaouia*, n446.

¹¹⁷⁰ Case C-540/03 *European Parliament v Council of the European Union* ECR I-5769.

¹¹⁷¹ N936.

¹¹⁷² Ronald Dworkin, *Taking Rights Seriously* (1977), 198-199.

avenue for challenging political power. Rights are therefore particularly necessary in the case of immigrants and refugees, since they are by definition weaker, more vulnerable, members of the community; yet, as we have seen, the rights of immigrants and refugees are sparse indeed.

Thus, the premise of inequality in immigration law, the relative weakness of the framework of rights, and the relative failure of the law to respond to the vulnerability of the immigrant all create tension with the claim of the law to protect the equality and rights of the vulnerable. Here, indeed, we see some convergence between the political and legal construction of the person, as the political weakness of immigrants is translated into legal weakness, giving an impression of oppression.

Thus, as Dauvergne has argued, the legal vocabulary of rights may in fact be dangerous for refugees, providing not enough critical bite but also constructing a conflictual paradigm on the basis of 'hard' rights, rather than seeking consensus on the 'softer' and more generous basis of humanitarianism.¹¹⁷³ Yet, as Savitri Taylor has replied, the alternative is to deprive oneself of the only discourse powerful enough to challenge that of politics, and practical enough to have real effects in the lives of immigrants and refugees.¹¹⁷⁴

4.2 Law's autonomy from politics

Dauvergne's argument, however, underlines the intimate connection between law and politics in the field of immigration, a connection which undermines law's claim to its autonomy from politics. As this thesis has emphasised, much of the story of immigration review can be explained as a struggle over the boundaries of law and politics, a struggle that is fiercer in immigration because of its high political salience of immigration and the relative absence of legal autonomy.

Claims for the autonomy of the law point to the distinctive methodology of the law (the focus on equality, rights and protection; the use of logical reasoning and rules); the distinctive nature of the legal framework (centring on enacted laws and adjudication to develop a consistent and coherent set of obligations and rights); and the distinctive character of its political structure, with its different actors and institutions and relationships between them.

¹¹⁷³ See n934.

¹¹⁷⁴ Savitri Taylor, 'Importance of human rights talk in asylum seeker advocacy: A response to Catherine Dauvergne' (2001) 24 *UNSWLJ* 191.

Immigration challenges those claims to autonomy in ways that extend beyond its claim to construct people differently. Historically, immigration law has been characterised by the refusal to apply the ‘judicial method’ of reasoning and rules to the same extent as in other fields. The sovereignty of States and their right to exclude has been used to foreclose judicial reasoning in a stream of cases, beginning with *Musgrove*, continuing in the declaration that questions of immigration cannot be “hedged [...] around with principles of the kind that the judiciary are wont to consider”;¹¹⁷⁵ and more recently in the decision in *Tampa* that the only question worth answering was whether the executive power authorised non-statutory expulsions. That tendency reaches its apogee in the US, where the plenary power doctrine demands an extreme level of judicial deference.¹¹⁷⁶ As Schuck put it, in terms that resonate in Australia and the UK:

Immigration has long been a maverick, a wild card, in our public law. Probably no other area of American law has been so radically insulated and divergent from those fundamental norms of constitutional right, administrative procedure, and judicial role that animate the rest of our system. ... [I]mmigration law remains the realm in which government authority is at the zenith, and individual entitlement is at the nadir.¹¹⁷⁷

The claim to legal autonomy is also undermined in immigration because of the relative lack of judicial autonomy in immigration law. As discussed in chapter 2, the volumes of tightly worded legislation greatly confine judicial discretion, a confinement that is exacerbated by the pattern of legislative reversals and the legislative confinements of judicial interpretation.

The problem is greater in Australia, because of the absence of human rights law, the near-invisibility of international law, the more conservative approach to judicial review, and the constitutional emphasis on the powers of the State. Judicial agency is also key: part of the story of immigration review is the divergence between the two highest courts in both jurisdictions, with a more liberal Federal Court and House of Lords willing to assert their legal autonomy, in contrast to a more ‘obedient’ High Court of Australia and English Court of Appeal. However, as the example of the ouster clause reminds us, the autonomy of the judiciary is less institutionally entrenched in the UK than in countries in which the Constitution, rather than Parliament, is sovereign.

¹¹⁷⁵ *Salemi*, n12, 402.

¹¹⁷⁶ Meredith K Olafson, ‘The concept of limited sovereignty and the immigration law plenary power doctrine’ (1999) 13 *GeoImmigrLJ* 433.

¹¹⁷⁷ Peter H Schuck, ‘The transformation of immigration law’ (1984) 84 *ColumLRev* 11.

Indeed, while the House of Lords' approach has generally enabled a more liberal approach, it has come at the cost of constitutional conflict. The reappraisal of the role of the courts and constitutional arrangements following the HRA has been marked by conflict over high-profile immigration cases, which have provoked damaging calls for repeal of the HRA.¹¹⁷⁸ The growth in sources of 'soft law', and the movement of the EU into this field, enable greater legal autonomy but engender further controversy over the democratic credentials and legitimate role of such actors in this highly sensitive sphere.

These challenges to the claim of law's autonomy must be located in the wider context of the changing boundaries of law and politics. In Australia and the UK, the historical tradition of the common law has traditionally granted the judiciary a central role, and it continues to play a central and creative role in certain heartlands, such as tort and judicial review. However, the 20th century saw an explosion in legislative and regulatory activity, diminishing the role of the judge. Whole fields of law have emerged that are the province of regulatory regimes, with comparatively little judicial involvement.

Even in its heartlands, the authority of the judiciary has been increasingly challenged. The flourishing of ADR, policies of mandatory or less discretionary sentencing, and debate about the creation of a 'compensation culture' driven by the expansiveness of negligence law¹¹⁷⁹ are disparate manifestations of the decreasing political deference to the judiciary.

This has accompanied major social changes which have diminished the professional status of the legal community and undermined its cohesiveness, while also diversifying the values and orientations of the political elite. This has produced greater friction between the values of the judiciary and Parliament, a disjuncture evidenced again and again in the story of immigration review — in Simon Brown LJ's astonishment that a government would do such an "uncivilised" thing as to render refugee claimants destitute;¹¹⁸⁰ at the Federal Court's obvious outrage at the government's pursuit of the pro bono community for costs in *Tampa*;¹¹⁸¹ and perhaps most revealingly, in Lord Woolf's sense of betrayal at the ungentlemanly conduct of

¹¹⁷⁸ N1003.

¹¹⁷⁹ CAC, *Compensation Culture* (2006).

¹¹⁸⁰ JCWI, n78.

¹¹⁸¹ *Tampa (Costs)*, n97.

the government in its misuse of judicial consultations over the ouster clause.¹¹⁸² We can similarly trace the decay of a mutually supportive consensus between the judiciary and Parliament in the decline of the convention that the Lord Chancellor or Attorney-General would protect the judiciary from attack¹¹⁸³ and, in Australia, in the slanderous attack on the integrity of Kirby J by an MP.¹¹⁸⁴

This disjuncture has been dramatically exposed not only by the governments' harsh, previously unthinkable, refugee policies, but by the attacks on civil liberties in the name of the 'war against terror'. In an influential speech, Lord Steyn attacked the Guantanamo Bay camp as a "legal black hole".¹¹⁸⁵ It is no coincidence that the House of Lords' most important constitutional case for decades was one that combined immigration and terrorism, for nothing dramatised the weakness of law's claim to autonomy better.

The story of immigration review thus becomes a story about the assertion of legal autonomy, and the defence of law's empire. In defending law's empire, however, different players rely on different elements of law's empire, revealing the ambiguity of the concept of law. For empires, of course, are partly methods of exercising authority; partly institutions; and partly ideals. Law's empire may similarly be disaggregated. It may merely denote the existence of positive legal rules. It may refer to distinctively legal institutions, especially the judiciary. It is in this sense that judicial authority is affiliated with the defence of law's empire; and it is this institutional sense that engaged the majority in *Al-Kateb*. However, law's empire also crucially *connotes* the ideological dimension of the law: its commitment to legal standards and values, and to the central claim that law acts as an important counterweight to politics.

Immigration has an unusual ability to expose tensions between these three aspects. Harsh immigration laws provoke tensions with the ideological dimension of law's empire; but attempts to assert legal autonomy and mediate the harshness of those laws provoke tensions with the legitimacy of judicial institutions. Immigration exposes the fact that these three aspects of law's empire do not inevitably travel together, and provides ammunition for damaging charges of illegitimacy and hypocrisy.

¹¹⁸² Woolf, 'The rule of law,' n403.

¹¹⁸³ See, eg, Craig Skehan and Penelope DeBelle, 'Williams scolds critics on Bench', *Sydney Morning Herald*, 11 June 2001, 2.

¹¹⁸⁴ John Lyons, 'The plot to destroy Michael Kirby' Sunday (Channel Nine), 14 July 2002.

¹¹⁸⁵ Johan Steyn, 'Guantanamo Bay: The legal black hole' (2004) 53 *ICLQ* 1.

It is those alternative charges of illegitimacy and hypocrisy that lie behind the paradigm of the battle between the executive and the judiciary. For those who subscribe to the democratic theory of judicial legitimacy, expansive judicial review is illegitimate; for those who privilege the ideological dimension of the law, immigration law betrays those ideological values. It is this tension that animates most legal criticism, and which charges academic debate.

The difficulty, however, of a legal critique based on the inadequate degree of autonomy of law from politics in this field is that this claim is a classic example of a partial truth. For law is after all intimately bound up with politics; it is sustained and nourished by it. The word 'autonomy' is carefully chosen: law is not independent of politics. To borrow from the political arrangements of the two jurisdictions, law may be conceived of as a unit of devolution, or a Territory within a federal State; it enjoys a limited sphere of competence that is conferred by the national government, but exists within and depends upon the larger political structure. Like all such arrangements, the boundaries between the law and politics are not sharp-edged; there is a certain amount of inevitable slippage. The dynamism of the boundaries reflects the dynamism of the different legal spheres, and much depends upon how such power is exercised in practice.

There is, thus, no hard-edged standard of legal autonomy, and there are no fixed boundaries that enable us to distinguish precisely when one sphere illegitimately trespasses on another. Perhaps more importantly, we are still somewhat vague as to *why* and *when* law should remain autonomous from politics. The historical shift of immigration from the exclusive preserve of politics to a colony of law's empire suggests that it is not so much the inherent characteristics of a field but rather changing perceptions of governance that determine these matters. For, ironically, although on the one hand law's empire has been on the defensive, as I have suggested, the reach of law has in fact expanded greatly in the 20th century, as is evident in the 'legalisation' of immigration itself. Changing normative paradigms, evident in the historical dynamism of the legal constellation, underlie our intuitive judgments about the appropriate place and purpose of law as much as the State.

Thus, inevitably, criticisms grounded on insufficient autonomy soon flail in political quicksand. For while certain normative paradigms may be hegemonic in one field, the stubborn truth remains that these normative paradigms co-exist and compete in the terrain of political, and legal, discourse. These fundamental

disagreements about the normative premises of law's empire mean that such legal critiques will always be contestable on a political level, sapping such critiques of much of their critical purchase. It will, in short, always be possible to dismiss liberal or restrictive arguments as *political* rather than *legal* arguments, embodying a policy preference upon which there is no normative consensus; and thus the critic is deprived of any distinctively legal authority and any conclusive argument.

4.3 Controlling power

Finally, intimately related to the claim of autonomy is the more substantial claim that law 'controls' or 'checks' power, as expressed directly in the principle of the rule of law. At its heart, it is a claim about the supremacy of law over politics, a supremacy that may be limited in application but which captures the ultimate subjection of politics to law.

The field of immigration provides plenty of examples to counter that claim. For most of the 20th century, judges refused to touch immigration, reserving it to the special field of politics, as we have seen. More dramatically, interceptions on the high seas and administrative detention provide rare examples, in our modern democratic societies, of the exercise of the coercive power of the State on vulnerable individuals with little legal restraint. Indeed, the high seas might be seen as another kind of 'legal black hole', a space where the law literally seems not to run. An outstanding example of the failure of law to control executive power is the case (referred to earlier) of the refugee claimants who arrived in Melville Island, which was retrospectively excised from the migration zone by regulations later disallowed by the Senate.¹¹⁸⁶ The regulations were, however, still legally effective during the relevant period and thus precluded a claim for habeas corpus,¹¹⁸⁷ with the judge also following Beaumont J's view in *Tampa* that the claim would effectively force the claimants to be brought into Australian territory. Here, the law signally failed to 'subject' politics to any real constraint.

Indeed, the story of immigration review testifies to the way in which the law may be navigated around, undermined or bypassed. Governments escape the mesh of domestic law by exporting the border; by escaping to friendlier and more secretive

¹¹⁸⁶ Migration Amendment Regulations (No. 8) 2003 (Cth), made 4 November 2003, disallowed 24 November 2003.

¹¹⁸⁷ See n98.

intergovernmental avenues;¹¹⁸⁸ and by fireproofing their attacks on the law by enacting ouster clauses and ‘validating’ legislation.

As the battle over the ouster clauses demonstrated, this is not to say that the rule of law is (depending upon one’s perspective) an empty threat or a hollow promise. Rather, it is to say that the rule of law is another partial truth. Not every field is subject to the full rigour of the law; and, ultimately, the rule of law works because of political acquiescence, not because of the coercive powers of the law itself. Political acquiescence is normal, because (as Boswell points out) conformity to the rule of the law is a condition of institutional legitimacy. Nevertheless, these counter-examples expose the fragility of the rule of law.

The imperial metaphor is useful here. Just like imperial rule, the rule of law is real but variable, and its strength weakens the further its rule extends beyond the heart of empire. If immigration is a colony of law’s empire, it is ruled like a colony: with fewer guards and less centralised control, and with more opportunity for resistance and evasion, through the uneasy co-existence of informal practices with the formal rules of Empire, and through greater reliance on coercive rather than ideological power.

To say, therefore, that immigration is ‘lawless’, or conflicts with the rule of law, thus courts the dangers common to all critiques based on partial truths: it lacks a ‘hard edge’; it lacks a normative consensus with which to define when and where the rule of law should apply; and it destabilises the legal authority upon which one stands, dragging one instead into the quicksands of political theory.

Unlike the concrete and limited legal standards canvassed earlier, therefore, the broader normative claims do not provide a secure legal base for criticism. Those wishing to argue in this vein must confront the criticism that they are simply pro-refugee or legal romantics.

5 Conclusion

Embedded in the large critical literature of immigration and refugee law is an implicit critique based on this broader account of the ideological dimension of the law. Immigration departs from a variety of concrete legal standards; its logic is in tension with some of the broader legal standards; but, most critically, it undermines the normative claim of law that it acts as a counterweight to politics.

¹¹⁸⁸ Virginie Guiraudon, ‘European integration and migration policy: Vertical policy-making as venue shopping’ (2000) 38 *JCMS* 251.

One may, therefore, move beyond the limited critical purchase of evaluating immigration laws by reference to international law, refugee law or constitutional and administrative law. However, the further we move away from the relative precision of these standards, the closer we come to the boundary between law and politics and to exposing the soft centre of law's empire. For, while liberal democratic societies rest fairly securely upon a normative consensus on the desirability of majoritarian control, a degree of vagueness and ambiguity pervades the sphere of the law. We may subscribe to the broad principles of law's ideological dimension, but we lack any secure normative consensus, or hard-edged tools, to enable us to delimit accurately and uncontroversially the sphere of their application. Wishing to defend law's empire from the safe ground of legal authority, ground we think of as decontaminated from the toxins of politics, we neglect the fundamental problems in favour of visible, severable deformities. Wanting to attack the fundamental problems, we find ourselves sliding into the murky and marshy borderlands between law and politics.

This accounts for the peculiar disjuncture between the underlying passion of many legal critics, and the comparative weakness of their legal critiques. It explains the divisiveness of immigration within the legal community, and the underlying reasons for the conflict between the legal and political spheres. It explains why the story of immigration review is most fruitfully re-read not within the conventional paradigm of executive and the judiciary, but rather as a cautionary tale about law itself. Immigration review is a site in which lawyers, judges and politicians construct, deconstruct, and reconstruct our understandings of law's empire. Its story, in the end, acts as a mirror reflecting our deepest anxieties about, and our deepest investments in, the law, and its darker, longer, shadow — that of politics.

Conclusion

1 Introduction

This thesis began with the question: What does the story of immigration review in Australia and the UK tell us about the contemporary legal sphere? This thesis has drawn from the story of immigration review four key lessons. First, we can explain why immigration poses a challenge for law. Second, we can perceive more acutely the strengths and weaknesses of law and politics. Third, we can re-tell the story of

immigration review more accurately as a struggle over law's empire. Fourth, we can begin to re-imagine and retool our strategies for defending law's empire.

2 *Four challenges*

First, immigration law is *not* controversial merely because it is politically controversial, but also because it poses four major challenges for the law: the challenges of coherence, competition, capacity and, most significantly, the challenge to the normative claim that law acts as a counterweight to politics.

As chapter 2 demonstrated, immigration exposes an unusual degree of normative tension within the legal constellation. These tensions are, as chapter 3 revealed, managed by judges through normatively unsatisfactory strategies of fudging, trumping and boundary-drawing.

Immigration also exposes the reductiveness of legal discourse and its relative inability to compete with more powerful social discourses, as explored in chapters 4 and 5. It exposes the limits of its capacity to resolve disputes and regulate, as was discussed in chapter 6. Finally, as I argued in chapter 7, immigration exposes the fluidity and fictiveness of the boundary between law and politics, which undermines the claim of law to act as a counterweight to politics, and its capacity to act as a critical standard.

These challenges have different, and multiple, causes. Significantly, the causes are both common to all spheres of law, but unusually pronounced in the case of immigration. Thus, by pushing law to its limits, immigration law sheds light on inescapable, and basic, limitations of the law in general. Immigration is a special case that, by exaggerating the basic limitations, illuminates them more vividly.

For example, the legal constellation of immigration review reflects the haphazard embedding of shifting, competing and co-existing normative paradigms. This is complicated by the increasing plurality and diversity of legal actors, and the increasing polyvalence of values that partly reflects growing normative dissensus. These are features that are evident throughout the legal sphere, but the challenge is particularly acute in immigration because of the degree of difference between the political structures of the legal regimes and the peculiar premises of immigration law.

The reductiveness of legal discourse, so evident in the challenge of competition, arises partly out of the structure of logic and reason, and the language of liberal individualism, that mark legal discourse. Ultimately, however, it is the product of the

function of the law to determine, decide and resolve. The law's relative incapacity to compete with more powerful social discourses arises partly from this reductiveness, but also as a consequence of its limited communicative sphere, relative inaccessibility, and relative closure from other social discourses. Again, these reflect basic limitations of the law, but they are made vivid in the case of migration because of the richness and complexity of the phenomenon, and its high symbolic salience.

Similarly, immigration reveals the premises underlying the model of dispute resolution more clearly because of the absence of some of those premises — the assumption that it relates to those 'within' the community; the assumption of a 'natural' dispute between relatively equal individuals mediated by a neutral arbiter; and the capacity of the interests involved to be compromised or resolved through a normative framework of rights and obligations. It also reveals the regulatory constraints on the law imposed by the peculiarly complex regulatory context, and generated by the high political salience of migration and the complexity of the social phenomenon.

Finally, while some of the challenges to the deeper account of legality arise partly out of contingent political outcomes, the fundamental challenge arises out of the peculiarly intimate connection in immigration between law and politics, which dramatises the ultimate dependency of law upon politics.

3 *Law — what is it good for?*

These challenges expose the strengths and weaknesses of law. Law provides an attractive venue for challenging the power of politics because of its distinctive methodology, institutions and norms. The political vulnerability of migrants and refugees is offset in part by the legal focus on the individual, equality and rights; by the methodology of logic, reason and rules that displaces the politics of power; and by the distinctive commitment to countervailing legal norms, including the counter-majoritarian principle of legal equality.

Crucially, it is also attractive because the crystallisation of normative paradigms into laws serves the function of (apparently) 'depoliticising' those paradigms. Law functions both to construct, and to mark, normative consensus. The (contested, malleable) political claim is transfigured into a legal standard that claims a consensus, providing a more secure ground for both criticism and defence. We see this, for example, in the strong affirmation of equality in *Prague Airport*, buttressed by

multiple legal authorities; and in the very persistence, and continued invocation, of the legal category of refugee itself.

Perhaps most importantly, however, law remains an attractive venue for challenging political power because of its capacity to counteract or mitigate political outcomes directly. While education, political activism and lobbying, the production of a more favourable political climate, and re-imaginings of the refugee and irregular immigrant in political science, sociology and literature may ultimately be more effective, they cannot, in the end, directly invalidate legislation or, in the case of the UK, render it politically unviable.

However, the focus of this thesis has rather been on the weaknesses of the law. A prominent thread of this thesis has focused on the tensions between and within the legal regimes that make up the legal constellation, as well as between and within the imperatives of the law.

As detailed in chapter 2, the degree of tension is marked because of three unusual premises of immigration law — the premise of inequality between citizen and non-citizen; the premise of unfettered State power; and the premise of immigration as a political privilege rather than a legal right. These premises reflect the predominantly ‘external’ perspective of the State in immigration law, and directly conflict with other predominantly ‘internal’ legal regimes that are commonly premised on equality, constraints on executive power, and a coherent framework of rights.

The legal constellation is also structured by tensions between shifting normative paradigms that are reflected in the different legal regimes. While, at its inception, immigration law treated the immigrant as a ‘non-person’, unable even to access the courts, refugee law envisaged a particular kind of person as having a valid claim to State protection, while human rights envisages the person as being attached to a carefully delimited but fundamental bundle of rights. However, we also see in immigration legislation, and most evidently in the developing EU immigration regime,¹¹⁸⁹ the emergence of the ‘denizen’ of the State — a person entitled to a more substantive set of rights, including a (contested) set of procedural rights in relation to their residence.

The legal regimes also reflect different conceptions of the State, with the feudal conception of allegiance to the sovereign morphing into the Westphalian conception

¹¹⁸⁹ See esp Directive 2003/109/EC.

of 'sovereignty' entrenched in immigration law, which in turn gives way to the 'welfare' and 'liberal democratic' notions of the State implicit in other regimes. Shadowing these shifts are shifts in the conception of 'community', from an ethnically grounded conception (manifested directly in 'White Australia') to alternative traditions of civic liberalism, communitarianism, and cosmopolitanism, and from a clearly discrete, relatively closed and cohesive political community to a more diverse, plural and interconnected political community. These in turn construct different compromises within the legal regimes between the rights of the individual and State power, varying from the virtual absence of individual rights in the Australian Constitution; to the internal compromises embedded in the refugee definition, and the qualifications, derogations and the 'margin of appreciation' in human rights; and the even more vivid compromises evident in the multitude of enabling provisions and minimum standards in EU asylum law.

This legal constellation does not make a pretty picture. This is, in part, because the hardened residue of obsolescent normative paradigms in these legal constellations may simply be offensive. It offends our contemporary notions of equality and human rights that a vulnerable non-citizen may be detained indefinitely in Australia (and with no statutory limit in the UK), for the purposes of administrative convenience,¹¹⁹⁰ while criminals enjoy a well-developed regime of judicial supervision and capped detention. As Black CJ in *Tampa* intimated, it offends our notion of the rule of law that Australia may resort to an undefined 'executive power' to repel vulnerable refugee claimants, when the legislature has laid down a precise code governing exactly the same activities. It offends our notions of fair dealing and legal certainty that people can be induced to settle in a country on the promise of certain conditions, but are unable to continue their residence because of sudden changes in those conditions, as happened to immigrants under the HSMP programme in the UK.¹¹⁹¹

Indeed, immigration law's structure of hyper-law coupled with lawlessness undermines the promise of the law to provide relatively certain and stable rules which enable us to structure our lives accordingly. Of course, flexibility and change is inherent in the law; but the rapidity of amendment of immigration law, its

¹¹⁹⁰ Compare the EU's pending Returns Directive, which allows for a 6-month initial detention period, extendable for another 12 months. See Steve Peers, 'The Returns Directive' Statewatch, 9 June 2008. The UK has not opted in.

¹¹⁹¹ N323.

inaccessibility and complexity, the importance of security of residence, and the relatively small pool of enforceable rights mean that that promise is not merely qualified, but illusory. In *Rashid* and *R(S)*, policies are withdrawn while applications are mired in endless backlogs; in *Prague Airport*, extra-statutory concessions may be written in thin air; and, throughout, claims may be submitted one day and judged by different criteria the next.¹¹⁹²

These tensions are affiliated with the broader tensions between and within the imperatives of the law, of which the most obvious is the tension between the imperative of regulation and the ideological imperative of legitimacy. Perfectly effective regulation ultimately conflicts with the foundational liberal values of autonomy, freedom, and human dignity. There is, after all, a slippery slope between modifying a person's choices, and making those choices for them. In the context of immigration, regulation also slips easily into physical coercion and exclusion, as we see in the practices of surprise deportations at dawn; in the pitched battles over immigration detention; and in the images of navies and coast guards herding vulnerable refugee claimants back to unstable and poor lands.

A most prominent tension within an imperative of the law, rather than between imperatives, is the tension between rival conceptions of judicial legitimacy so effectively dramatised in the contrasting decisions of McHugh J in *Al-Kateb* and Lord Bingham in the *Belmarsh* case. These conceptions, as we saw in chapter 3, are shaped by the clarity of the challenge to the law and, importantly, structured by the legal constellation. For, as we saw, "obedience" to a legal text may have very different outcomes: obedience to a closely confined text such as the *Migration Act 1958* may mandate indefinite detention, while obedience to the HRA has the opposite effect.

These tensions between rival conceptions of judicial legitimacy expose a major weakness of law: its dependence upon normative consensus, and its relative inability to either generate it or resolve it. Of course, just as flexibility and change are inherent in law, so too law lives with, and copes with, a relative degree of normative dissensus. Indeed, the forms of law flourish in a climate of normative dissensus, since the declining force of social norms encourage a turn to law.

¹¹⁹² See, eg, *MO (Nigeria)*, n300. In Australia, this is systematised in the form of criteria that must be satisfied 'at the time of decision', in addition to criteria that must be satisfied at time of application.

Yet the law's power is, as I have insisted throughout, a combination both of might *and* right. We will, perhaps, never agree exactly on what is right; but history has shown us in abundance that there may be disagreements so deep and profound that they fundamentally undermine the normative force of law. Nazi laws, the laws of apartheid, and the laws of segregation are prominent examples, and notably they are all examples of disagreements about the rights of minorities and claims to equality. It is this fundamental disagreement about the moral status of the human that also underpins the peculiarly volatile politics of immigration, and generates the unusual degree of normative dissensus that leads, on the one hand, to the unprecedented formation of networks 'harbouring' refugees in Australia;¹¹⁹³ and the threats of the Conservative Party to withdraw from the Refugee Convention,¹¹⁹⁴ scrap the HRA and even 'temporarily' withdraw from the ECHR.¹¹⁹⁵ One may dismiss both examples as a fringe reaction, with the latter examples amounting to mere populist pandering. However, although we may disagree with these reactions, there is a social significance to this polarisation of debate, and to their consequent challenges to the legitimacy of the law from different directions. For immigration stretches the law's capacity to resolve disputes, both individually and normatively, to breaking point.

As we saw in chapter 3, these tensions may be judicially managed, but in a way that merely papers over rather than conclusively resolves the underlying dissensus. Rather, the peculiar degree of polyvalence that permeates the legal constellation enables multiple legal answers that are therefore also subject to multiple legal criticisms. These legal answers and criticisms are themselves undermined by the social power and complexity of competing discourses, a powerful challenge of competition that makes it easier to spot the cracks under the legal façade.

This disjuncture between the flourishing of forms of law and the challenge to the norms of law — between what law denotes and connotes — lies at the heart of the story of immigration review. It is precisely the *conflation* between the various elements of empire — the method of exercise, the institution, and the ideological or 'soft' power that legitimates it — under the identical denomination of 'law' that

¹¹⁹³ Murray Mottram, 'A network prepares to hide escapees', *The Age*, 2001, 15.

¹¹⁹⁴ As the Conservatives pledged before the 2005 election: James Chapman, 'Howard: I'll give Britain back its borders', *Daily Mail*, 30 March 2005, 1.

¹¹⁹⁵ Andy McSmith, 'Cameron threatens to scrap Human Rights Act', *The Independent*, 2006, 4.

provokes defences of law's empire. Just as it is the mobility and multiplicity of the connotations of migration that gives it its peculiarly high political salience, it is the mobility and multiplicity of the connotations of 'law' that animates the story of immigration review.

For, as with real empires, the 'soft' power of law — its ideological dimension — stretches beyond that of its institutional reach, or 'hard' power, of law. While the gap between the institutional limits of a national legal system, and the normative claims of the rule of law and access to justice, is most vividly revealed in the extra-territorialisation of immigration control, more mundane institutional limits also proliferate in the story of immigration review: in the limitations on legal aid; in the restrictions on judicial review; in the gap between concrete heads of judicial review and their underlying norms; and in the institutional limits of resources, capacity and political will that constrain the full application of legal norms in immigration review.

However, this thesis also reveals — more subtly and indirectly — the weaknesses of politics. Immigration exposes the inherent tension within the concept of a liberal democracy — the process of majoritarian decision-making tending to undervalue the liberal principle of protection of minorities. It reveals the disjuncture between the public language of civic liberalism and the competing and co-existing constructions of identity and community. It also exposes the gap between the State's claim to full legal sovereignty, and the actual limitations on its capacity to exercise it. Indeed, as Agamben (drawing on Arendt) has argued, the figure of the refugee has exposed the "originary fiction of sovereignty" — the link between man and citizen, nativity and nationality that forms the implicit premise of human rights.¹¹⁹⁶

Significantly, it has exposed deficiencies in the operationalisation of democracy in these jurisdictions, nowhere more vividly than in the ouster clause sagas. The story of immigration review exposes how two-party political structures fail to provide any real accountability in times of electoral dominance. It exposes the relative poverty and fragility of the judicial tools available to counteract oppression of minorities; the defects of parliamentary scrutiny; the surrogate and under-representation of immigrants; and the mediation of 'popular will' through the interactions and effects of interest groups and corporatist decision-making structures.

¹¹⁹⁶ Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (1995) 131.

Importantly, immigration also reveals the weak foundation of policy-making in reality rather than perception. ‘Migration myths’ about the scale and level of asylum, the benefits that accrue and the motivations that lie behind them, and the attribution of personal immorality evident in pejorative adjectives such as ‘bogus’ and ‘fraudulent’ have shaped migration policy in both jurisdictions. Nor is there any straightforward correlation between the scale of migration and its unpopularity, with hostility to immigration *declining* in Australia during a period of record growth.¹¹⁹⁷

Immigration, therefore, exposes the gap between the claims of both law and politics and their practice, revealing the inadequacy of the constitutional commonplaces which structure our legal and political reasoning.

4 *Law’s empire*

The story of immigration review also reveals the competition between politics and law which is at the heart of this story of struggle over law’s empire. The ouster clause episodes, the cases on indefinite detention and extra-territorial processing schemes, and the expansion of judicial review — the key landmarks of the story of immigration review — reflect strategies of trumping and fudging in the defence of law’s empire, differently interpreted. The outcomes reflect interactions between the nature of the challenge, the legal constellation and judicial agency. Read carefully, these are less stories of liberal against conservative judges, than of different judicial interpretations of what the law stands for, which emerge out of the polyvalence and normative incoherence of the legal constellation.

The story of immigration review reveals that immigration law is not merely controversial in the legal sphere because it is politically controversial, but that immigration law challenges our conceptions of legality, expressed in the relatively concrete standards of a fair trial, access to justice, and the values of clarity, consistency, coherence and certainty, and access to justice, as well as in the broader normative claims of law that it constructs people differently, is autonomous from, and ultimately a counterweight to, politics. It does so because of the many unjustified variations of immigration review from fair trial standards; because of its notorious complexity, incoherence and inaccessibility; and because of the many tools of exclusion employed in immigration review. It does so because immigration law

¹¹⁹⁷ Katharine Betts, ‘Migrants’ attitudes to immigration: 1990-2004’ (2005) 13 *P&P* 21.

incorporates a premise of inequality and a relatively small pool of rights that leads to the under-protection of the politically vulnerable; because of the predominance of the executive in law-making and attempts to confine judicial discretion that limit the autonomy of the law; and because of the many ways in which politics appears to trump the law and thus undermines the claim of law to ultimate authority over politics.

The strength and depth of these fundamental challenges, however, generate surprisingly weak critiques of the distinctively legal kind. Despite the multiple challenges immigration law poses, distinctively legal critiques have largely been based on relatively concrete legal standards, often adopted from other legal regimes. These legal standards tend to obscure the political dimension of the critique, placing critics on superficially 'safe' legal ground. Yet this strategy also obscures the more fundamental problems of immigration law, and ultimately rely upon broader normative claims that are, in reality, partial truths. The essential difficulty with distinctively legal critiques is that they must presume, or advocate, the very boundaries between law and politics that are being fought over in the struggle over law's empire.

In doing so, these critiques reveal the soft centre of law's empire: the piecemeal, open-textured and partial nature of the deeper account of legality that passes for a theory of legitimacy. As chapter 1 discussed, Blunkett and Ruddock both pointed to the intuitive and relatively concrete appeal of majoritarian decision-making as the core of the democratic methodology. While such an appeal is politically simplistic, it does point up the much weaker, much less concrete, and much more contested claims of the legal methodology. Is the law ultimately there to provide justice? Or is the law merely a set of formal rules? Do judges supply the wisdom of the common law, or are they merely handmaidens to the legislature? It is the dynamic between this irresolvable tension that animates the related debates between the liberal constitutionalists and the functionalists in administrative law; between the progressives and the paragons of textual fidelity; and between those, like Gaudron J in *Teoh*, who see international human rights law as a manifestation of our deepest values, and those who, like McHugh J, see it as merely an promise of the executive that can only be made good by its transformation into domestic legislation.

5 *Where from here?*

To acknowledge these fundamental problems invites the charge of futility. If the problems are fundamental and inescapable, then the analysis leads to a dead end. This embraces two fallacies: first, that insight is not in itself valuable; and second, that simply because something cannot be made perfect, it is pointless to try and make it better.

This is not to run away from the fact that immigration will continue to generate difficult policy and legal questions and continue to push at the limits of the law. Indeed, the diagnosis I have made so far of those limitations has emphasised the very powerful social forces and structures that make most reform proposals look either puny or pathetically optimistic. This is, as I underlined at the outset, not a thesis disguising a policy proposal. Nor is it one that promises that salvation will follow enlightenment.

Nevertheless, it is useful to sketch some of the ways we can use the lessons we have learnt thus far. First, we can save much time, energy and intellectual frustration and disillusionment by recognising the basic limitations of the law. By recognising the polyvalence of the legal constellation, we can avoid falling into the trap of seeking an illusory normative coherence and of offering purely doctrinal solutions. By recognising the limitations of legal discourse, we are encouraged to look at other disciplines and to redress the law's biases and omissions through them. By recognising the limitations of distinctively legal critiques, we can realise that greater gains can be made elsewhere.¹¹⁹⁸ By refusing to believe in the law as a white knight, we can save ourselves from despairing each time this belief is falsified.

Second, we can tailor our strategies more appropriately. We can disentangle the contingent variations from the fundamental limitations, and address our critiques accordingly. There are abundant contingent variations that are difficult to justify normatively or pragmatically: the high review fees and extremely stringent legal aid rules in Australia; retrospective funding orders and the drying up of legal aid in the UK; blunt restrictions on jurisdiction; prolonged detention; and attacks on the judiciary, to name just a few. The inclusion of a *de facto* refugee status in Australia would also reduce pressure on the refugee definition, and enable compliance with

¹¹⁹⁸ As, indeed, North American scholarship sometimes does: see, eg, Chang, n937; Johnson, n938. See also Juss, n304.

international conventions.¹¹⁹⁹ Perhaps the most important, in Australia, is the continued resistance to the creation of human rights law at the federal level. That is an important step in reframing the legal constellation, and reshaping the legal imagination.

We can also begin from stronger ground, bypassing the limitations and compromises of other legal standards by arguing from the premise of strong legal norms and the deeper account of legality. For example, as Cole argues convincingly in the context of US anti-terrorism laws and policy, beginning from the strong legal norm of equality, we can attack the slippery slope by which the inequalities inherent in the citizen/non-citizen divide are used to justify other kinds of differential treatment, or to mask prohibited forms of discrimination. As Cole says, “[t]he significance of the citizen-noncitizen distinction is more often presumed than carefully examined.”¹²⁰⁰

We can subject the competing principles of equality between citizens, and equality between humans, to reasoning and analysis. As Cole details, there are strong reasons for equality in procedural rights, equal protection under the laws, and most civil and political rights.¹²⁰¹ As a starting point, one could consider the rights in the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live¹²⁰² which extends most civil and political rights equally to immigrants, with the usual exceptions in international law being the right to vote, run for elective office, and the right to enter and reside.

This, however, is premised on the assumption that the aliens are within the territory. As a preliminary, it would be most useful to move away from the fixation on the legal binary between citizens and non-citizens, and instead identify the differential claims of citizens, lawful residents, irregular residents, those outside the country with special ties to the country, and those outside the country without such ties. As the jurisprudence of the ECtHR attests, what is needed most is attention to the individual circumstances that create greater or lesser interests in residence, and greater or lesser claims to security of residence, such as the length of residence; the circumstances of return; the age of entry; the interests in their continued life; their

¹¹⁹⁹ Field, n105.

¹²⁰⁰ Cole, n560, 212.

¹²⁰¹ Ibid. 212-222.

¹²⁰² GA res 40/144, annex, 40 UN GAOR Supp (No 53) at 252, UN Doc A/40/53 (1985).

impact upon a community; and their ties to those within the community. To a great extent, these more subtle hierarchies are already expressed in immigration law and policy, but there is no overarching set of principles, or any legal entrenchment, of these underlying factors.

This example suggests two important strategies which build upon the strengths of the law: the strategy of principled justification, and the strategy of embedding values into the legal framework. The first builds upon the critique of unjustified departure by taking strong legal norms — most prominently, the principle of equality; the principle of a fair trial, access to justice and the legal values of certainty, consistency and coherence — and requiring principled justification for departures from them. The second takes factors that affect our evaluation of fairness outside of the realm of pure policy and embeds them into the legal structure, at a level of generality that enables us to take advantage of the hidden secret of legal methodology: the exercise of human judgment. The trend towards ‘objectified’ and routinised immigration decision-making evident in the UK and manifested so vividly in Australia is thus a trend in the wrong direction.¹²⁰³

Let me give some concrete examples of how these strategies might work. One value that is chronically under-protected in immigration is the value of legal certainty. The value of legal certainty must be considered in relation to the flexibility the State needs to preserve in order to respond effectively to its regulatory context. One can appreciate that a number of different factors will weight the competing interests differently. One would give greater weight to the value of legal certainty if a person was already in the country; if a person had resided in the country a long time; if the person had no real life to return to; if a person has formed significant attachments; if a person had been induced to treat the country as one’s ‘home’; and if a person would suffer disproportionately as a result of removal. One would give greater weight to flexibility if the category of entry was one of labour, rather than humanitarian or family, migration; if the outcome of the case was likely to result in a considerable number of people being allowed entry; or if the person was outside the country and had no particular interests in residing. Thus, the legal values of clarity, certainty,

¹²⁰³ See Sean Cooney, ‘The codification of migration policy: excess rules? – Part I’ (1994) 1 *AJ Admin L* 125; Sean Cooney, ‘The codification of migration policy: excess rules? Part II’ (1994) 1 *AJ Admin L* 181.

consistency and coherence could provide valuable ballast to an analysis of the competing values and tensions within the legislation and decision-making structure.

The balance of competing considerations will lead to clear outcomes in certain cases, and these could readily be transformed into rules of law. Thus, for example, after a certain period of residence, irregular immigrants could be regularised (a position that currently obtains in the UK).¹²⁰⁴ Those who have had children with a citizen or denizen of the host State, where it would be unreasonable to expect that person to return to the country of origin with them, would be allowed to stay. Those who have lived most of their life in the country could not be deported on the basis of criminal convictions. In the case of refugee claimants, those who have waited more than a certain period for processing would be entitled to remain, removing most of the hardest cases from the system and providing an incentive to determine more quickly. In general, applications should be considered according to the law and policy at the time of application, with any departures from that principle subject to greater political and legal scrutiny.

One might similarly develop a more principled framework for access to immigration review, by according greater weight to those with family ties, to whom international obligations are owed, and who have ties of prior residence. Such a hierarchy is implicit in the Australian tribunals' jurisdiction, and is also implicit in the proposals for appeal rights in the UK's draft Immigration and Citizenship Bill. Further, given the rationale of improving the administrative process, one might seek to identify which kinds of decisions provoke appeals, and which are more frequently set aside, as well as identifying which appeal rights would be merely displaced to judicial review.

Further, if the justifications for restricting access to review are resource-based, then the solutions should be resource-based. In effect, after a long journey, this sensible approach appears to be prevailing, with the shift in Australia of migration cases to the FMC, and the very recent proposed shift of judicial review to the First and Upper Tier Tribunal.

The strategies of principled justification and the embedding of norms and values into the legal structure are based on an overall approach of convergence. This

¹²⁰⁴ After 14 years of residence: para 276B of the Rules.

recognises that the law is strongest when law as authority and law as ideology travel together — when the forms of the law cohere with the norms of the law.

The most effective strategy, therefore, would be to ‘mainstream’ the principles of human rights, refugee law and constitutional and administrative law into our immigration law frameworks. This would require a thorough re-examination of the legislation and decision-making structures, rather than a quick and futile ‘fix’ of inserting a compendium of legislative objectives. In an ideal world, this examination would work through the legislation and policy and scrutinise its compatibility with other legal standards, and with broader legal values and norms, and seek to harmonise them. It would also explicitly articulate that decision-making, and immigration review, should be guided by these legal standards and values, and that departures from them must be justified.

What would such ‘mainstreamed’ legislation look like? It would begin by identifying the broad, and sometimes diverging, interests served by an immigration policy, and identifying the principal considerations by which individual interests and rights are weighed in policy. These would include reference to important human rights, such as the obligations of *non-refoulement*, the right to respect for family and private life, the right to equality in all except specified spheres of activity and freedoms, the right to liberty, and the right to administrative justice. It would affirm a right to protection from persecution or for humanitarian reasons, and a right to family reunification, subject to express qualifications. It would include the legal norms and values discussed earlier, in particular the rule of law, the value of legal certainty, and a reasonable degree of proportionality between the purpose to be achieved, and the method used. It would also include reference to the various factors discussed earlier that differently weight a person’s claim to residence. The most important of these would be physical presence, length of residence, proximity and integration with the local community, and the proportionality and impact of return.

What the ‘mainstreaming’ would do, in essence, is remodel immigration law on a bedrock of rights, and rely on broad principles subject to express qualifications that guide the evaluation of the competing interests more directly and accurately. It would entrench long-standing factors guiding the development of policy into the law, and thus align the legal with the political criteria of admission. It may sound idealistic, but the truth is there would be less shift in practice than one might imagine, since many

of these principles will already be reflected in policy, case law, or practice. Indeed, one might rationally expect that there would be benefits for the administration, since decisions that reasonably reflected these decision-making principles would be less subject to challenge.

At the same time, we can pursue a twin strategy of disaggregation: that is, we can distinguish carefully between the denotations and connotations of law. The refrain that the law is not there to do justice is misleading: the law is intimately concerned with justice, although the manifestations of law may not themselves produce it. Moreover, the law does have a limited normative content that may, in the right circumstances, ‘trump’ the positive manifestations of law, as is evidenced by the decision in *Anufrijeva* that the principle of access to justice required communication of a decision prior to the withdrawal of asylum support.¹²⁰⁵

What we need to do, therefore, is make clear we distinguish between the forms of law, and the norms of law. Judges can articulate more clearly, and more honestly, the tensions between these. There is no need to suggest, as McHugh J did, that indefinite detention is not only legally authorised, but also normatively authorised by the ‘segregation’ of people from the community. One can simply state that the specific manifestations of law cannot be overridden, although those manifestations may also be offensive to other legal norms. Or, as Baroness Hale did in *K*, one can draw attention to the historical limitations of the law, and seek to ameliorate the position as best one can through generous and purposive interpretation. One can simply own up to the fact that the law is not always right, or stretches far enough, or is adequate for contemporary values. It does no good to say that the law is not there to provide justice; rather, we should emphasise that *this* law does not provide justice. It is bare law, not good law.

Yet one can also prevail upon the tradition of the common law in treating this as a last resort. There are many other ways in which laws can be interpreted and other choices made, as we have seen. What judges need to do is look beyond the text to the normative background, and begin their judicial reasoning from the broader norms and legal values rather than seeking refuge in boundary-drawing, fudging and trumping. As Baroness Hale has shown, judges can do a lot with empathy, a refusal to reify the law and a solid grasp of principle.

¹²⁰⁵ N77.

Judges can also be more sceptical of the validity of the constitutional commonplaces in this sphere. The step made in *Huang*, where the House of Lords noted that the democratic process worked less effectively in this sphere, was a step in the right direction. It need not lead down a path of scrutinising exactly how much democratic debate was had, and how many immigrants involved, as some fear. Rather, it is merely judicial recognition of the incontestable fact that in this field, as Lord Woolf put it, “the other restraints on the executive [a]re not as great as ideally they should be”.¹²⁰⁶ Or, as the US Supreme Court put it more forcefully: “Aliens as a class are a prime example of a ‘discrete and insular’ minority for whom ... heightened judicial solicitude is appropriate.”¹²⁰⁷

This is an important example of the kind of more sophisticated and nuanced legal thinking that we need to encourage. Legal language, as I have suggested, is structurally impoverished, but it is also capable of amelioration. We have seen examples of judicial re-framing, of more and less sympathetic constructions of the individual, as well as of legislative articulations of national identity.

Along with legal language, we need to challenge the categories of legal thinking embedded in it. We should resist and challenge the binary divisions between citizens and non-citizens; plenary sovereignty or no sovereignty; mere interests and privileges and fully enforceable rights; and law and justice.

These divisions distort our thinking, with dangerous implications. As noted earlier, the equation between non-citizen and non-person is all too readily made, and obscures the much more fluid political spectrum of belonging that exists. As Cole has eloquently argued, too, measures originally justified by reference to the more limited rights of the non-citizen tend also to presage restrictions on the rights of citizens.¹²⁰⁸

Similarly, the mere adherence to the concept of sovereignty tends to blind us to the fact that we can legitimately require liberal States to exercise its sovereignty consistently with those liberal commitments.¹²⁰⁹ In like fashion, we need to recognise that the State to whom we defer in international law is (in the Anglo-Australian system) merely the legal personality of the executive, which constitutionally is subject to the rule of law.

¹²⁰⁶ Woolf, ‘Judicial review,’ n530, 579.

¹²⁰⁷ *Graham v Richardson* 403 US 365 (1971), 372.

¹²⁰⁸ Cole, n560.

¹²⁰⁹ Miller, n936, 221-222.

So, too, we need to recognise that although an outsider may not have a right of abode, that does not mean there are not interests, values and other rights at stake, and that indeed those interests and values may be worthy candidates for conversion into legal rights. Legal rights, after all, are created, not merely discovered.

We also need to broaden our legal perspectives, to take in both the forms of non-legal regulation and the multiple forms of political and legal governance, both locally, regionally and globally. Rather than obsessing about the primacy or decline of nation-states, we need to apply the same kind of scrutiny to more plural arrangements as we have done in domestic arenas, and to ask why certain aspects of regulation should be located at this, rather than that, level.

We need to recognise that we cannot blithely ignore the claims of justice and the ideological dimension of the law. In recognising the intimate connection between law and its ideological dimension, we need to move away from our fixation on the simple binary of law and non-law, and recognise that there are differing degrees and models of legitimacy, and different political structures, within the varying legal forms and structures. We need to demythologise the law as sacrosanct simply because of its status as law. Rather, we need to subject laws to critical scrutiny and ask: Who does this law speak for? How does this law speak? How was it made? What values does it declare? How is it legitimised? Who wields its power — and how, and why?

In so doing, we should be careful not to invest too much, or expect too much, of the law. As chapter 3 showed, even the most apparently resounding of ‘victories’ for law often mask fragilities. The gap between the normative claims of law and its institutional reach may be artfully obscured, just as the rhetoric of equality in *Prague Airport* masked the jurisdictional limitations of courts, or the constitutional rhetoric in *Plaintiff S157* masked the difficulty of impeaching the ouster clause through constitutional routes.

Nor should we accept the reification of the boundaries between law and politics. As the history of immigration review proved, these boundaries advance and retreat over time. There is nothing God-given either in the vision of judges as handmaidens of the legislature, or of judges as dispensing the wisdom of the common law. Similarly, there is nothing God-given in a strict separation between law and politics, or in our understanding of what is eminently ‘political’ and eminently ‘legal’.

Boundaries are fact and fiction; constructed, deconstructed, reconstructed; there to be transgressed and contested as well as defended.

However, finally, we should resist the temptation to be seduced by the power play of law and politics, with the struggle over law's empire effectively erasing the site of the struggle — the body of the migrant. Instead, we should be alert to the ways the discursive power of law and politics obscure and misidentify the highly complex social phenomenon of migration, and its real effects on human beings. We should be alert to the possibilities of empathy and imagination, and remain aware that in the end the law exists to serve humans, and not itself.

6 Conclusion

The peculiar features of immigration law — its marked incoherence; its entanglement in an increasingly complex legal constellation and creation by an increasingly plural landscape of legal actors; and the paradox of the progressive broadening of the extent of law's forms and the parallel thinning of the norms of law — are not unique. They are features of an increasingly complex contemporary legal landscape, as new fields of human action become subject to more intensive regulation, and as our societies become ever more diverse and complex, producing ever-greater normative dissensus that undermines the binding power of social norms and encourages a turn to law.

What does this foretell for the future of law? Extrapolating from the story of immigration review, it suggests the increasing disenchantment of and with law, as paradoxes, compromise and conflict become increasingly evident, and as the disjuncture between the forms of law and the norms of law becomes ever more apparent. We are seeing this already in the persistent complaints about the fragmentation of international law.¹²¹⁰

What we also see is the way in which the rough and ready legal categories and tools with which we all work are coming under increasing strain. The simple model of domestic law, regional law, and international law misses the intimate interactions between the three spheres. Our law/non-law distinction is challenged by the intermediate and burgeoning category of 'soft law', by structures of hyper-law and

¹²¹⁰ See, eg, Martti Koskeniemi and Päivi Leino, 'Fragmentation of international law? Postmodern anxieties' (2005) 15 *LJIL* 553.

lawlessness, and by the growth of tensions between legal regimes. Our assumptions of the democratic legitimacy of law-making are not only inadequate to describe domestic processes, but inapplicable to regional and global contexts. Most critically, our assumption of closed liberal societies is revealed for the paradox that it is.

How do we approach a world of decreasing normative coherence, and increasing institutional complexity? We need to avoid the frustration and disillusionment that can result not by engaging in Herculean efforts to produce coherence, but by recognising the polyvalence and partiality of legal traditions and concepts. The history of empires suggests that an ideology of unity is necessary, although diversity must be tolerated and resistance is inevitable. We need not lose faith in the ideology of empire merely because its practice fails to live up to it, but we need to be honest about the flaws both of practice and ideology, and flexible and creative in response.

In the end, the story of immigration review is a story that reveals both the fragility and the tenacity of the law. It reveals the fundamental challenge to our deepest concepts of legality, but it also reveals the depths of our commitment to them. In confronting the increasingly complex and incoherent future of the law, we will need a better account of legality; a more sophisticated understanding of constitutional arrangements and the limits of legal logic and practice; and an awareness of the variety of strategies at our disposal and their efficacy in different circumstances. Most of all, however, what we need is a more nuanced and muscular understanding of the province and the purpose of law itself.

Appendices

Decisions	Restrictions	Sections
Refusal of leave to enter	Out-of-country, unless held entry clearance or work permit	13(1); (3)
	No appeal on ground of patriality based on ordinary residence of 5 years or for citizens by descent, and wives thereof	13(3)
	No appeal if Secretary's personal decision to exclude as conducive to public good	13(5)
	Appeal dismissed if an illegal entrant	13(4)
Refusal of certificate of patriality		13(2)
Refusal of entry clearance	To be dismissed if a deportation order in force	13(2), (4)
	No appeal if Secretary's personal decision to exclude as conducive to public good	13(5)
Variations of leave, or refusal of variations	No appeal against duration if certified that Secretary's personal decision departure conducive to public good based on national security or foreign relations	14(1)-(3)
	No appeal against variation made by statutory instrument, or refusal to make a statutory instrument	14(4)
Deportation orders	For breaching conditions, or conducive to public good, or family members thereof.	15(1)(a)
	No appeal against deportation order if certified that Secretary's personal decision departure conducive to public good based on national security or foreign relations	15(3)
	Family member appealing cannot dispute evidence of family membership relied upon for entry	15(6)
	Appeal to I if deportation conducive to public good, or deportation of family member, or where related appeal by family member	15(7), (8)
Refusal to revoke deportation order	Out-of-country	15(5)
	No appeal if Secretary certifies exclusion conducive to public good, or revocation refused on that ground	15(1), (4)
	Family member appealing cannot dispute evidence of family membership relied upon for entry	15(6)
	Appeal to I if appeal against refusal to revoke deportation of family member, or where related appeal by family member	15(7), (8)
Removal directions	Out-of-country, unless directions given because of deportation order and appealing on ground of mistaken identity	16(2)
	Only on grounds that in law no power to give such directions	16(1)
	No power to dispute validity of deportation order	16(3)
	To be dismissed if no power to remove crew members but power to give like directions on ground of illegal entry	16(4)
Destination	Must be exercised on related appeal against refusal of leave to enter or deportation order	17(1)-(3)
	No appeal if a refusal of leave to enter, unless decision that he requires leave to enter or was refused leave while holding entry clearance or work permit	17(5)

Table 4: Jurisdiction of the IAA under the 1971 Act.

	Jurisdiction of the Australian tribunals	Original	Current
MIRO/IRT/MRT		From 1994	
Visa refusals	Applications within 'migration zone' and not during 'immigration clearance', for onshore visa	337(a), 338, 346	338(2)
	Offshore visa applications sponsored by Australian citizen, permanent resident, New Zealand citizen residing in Australia, or a company or partnership operating within the migration zone	337(e), 338, 346	338(5)
	Visitor visa for purpose of visiting nuclear family member, who is an Australian citizen or permanent resident	337(g), 338 346	338(7)
	Applications for a 'special eligibility' visa on the basis of previous permanent residence, when a nuclear family member is an Australian citizen or permanent resident	337(f), 338, 346	338(6)
Visa cancellations	Visa cancellations within the migration zone, excepting: during immigration clearance, or cancellations made on character grounds	337(b), 338, 346	338(3)
	Refusals or cancellations of bridging visas that result in the person being detained	337(c), (d), 346	338(4)
	Automatic cancellation of student visas		s 338(3A)
Other decisions	Decisions as to points score by person offshore sponsored by Australian citizen, permanent resident or New Zealander	337(h), 338, 346	338(8)
	Sponsorship or nomination decisions		137B; 140E(1); 140J(2), 140K(2); 338(9), 339(2)(d); regs 4.02(4)(c)-(i); 1.20H; 5.19(1B)
	Securities		s 338(9), reg 402(4)(f);
Exclusions	Conclusive ministerial certification that review not in national interest	346(2)(a), (4)	338(1)(a), 339
	Refusals and cancellations of temporary safe haven visas		338(1)(c)
RRT			
Visa refusals	Refusals of protection visas, and refusals of visas prior to 1 September 1994 for which satisfaction of refugee definition is required	411(b), (c)	411(b), (c)
Visa cancellations	Cancellations of protection visas, and of earlier visas as above	411(b), (d)	411(b), (d)
Other decisions	Refusal of refugee status prior to 1 September 1994	411(a)	411(a)
Exclusions	If person is not physically in migration zone at time of decision	411(2)(a)	411(2)(a)
	Conclusive ministerial certification	411(2)(b), (3)	411(2)(b), (3)

AAT (after 1989)		From 1989	
Deportations	Non-citizens present in Australia for less than 10 years sentenced for crimes for at least a year	55, 180(1)(a)	
	Review of security assessments leading to deportation on character grounds	56	
	Strengthened powers to cancel on character grounds		s 500(6A)-(6L).
Referrals	Referred decisions from IRT/MRT/RRT	381, 443*	381, 443
Other decisions	Regulatory decisions concerning migration agents	306*	
	Cancellation of business visas	136*	
Exclusions	Must be permanent resident or Australian citizen	180(2)	
	Must have entered and not left Australia	180(3)	
	Deportations of those convicted of certain serious offences, subject to inquiry by Commissioner	57	

Table 5: Jurisdiction of the Australian tribunals, with original sections and corresponding current provisions in the Act.

*Sections originally inserted by the *Migration Reform Act 1992*. Italicised provisions indicate subsequent amendments.

Provision	Australia (IRT/MRT;RRT)	Section	UK	Section
Composition	Single-member for both MRT/RRT, although powers to constitute MRT by 2 or 3 members	354(1); 421;	Adjudicators sit alone; IAT a 3-member tribunal; now, AIT to be constituted by direction, with default 3-member tribunal	1971 Act, Sch 5, para 12; 2002 Act, Sch 5, para 7, AIT Practice Directions, [2.2]
Qualifications	Not specified		Legal qualifications for at least one IAT member; now, qualifications must exclude either legal experience or “non-legal experience which makes him suitable for appointment”	1971 Act, Sch 5, para 12; 2002 Act, Sch 5, para 2
			Now, President must hold or have held high judicial office	2002 Act, Sch 5, para 5
Appointment	Governor-General (in reality, the Minister)	395, now 396; 459	Originally, adjudicators by Secretary of State and IAT by Lord Chancellor; now, AIT by Lord Chancellor (<i>Ministry of Justice</i>)	1971 Act, s 12; 2002 Act, Sch 4, para 1
Term of appointment	Maximum renewable term of 5 years	397, now 398; 461	No minimum or maximum, but renewable	1971 Act, Sch 5, paras 2, 8
Grounds for removal	Misbehaviour; mental or physical incapacity; bankruptcy etc; pecuniary conflict of interest; prolonged absence; unauthorised extra-curricular activities; failure to disclose interests	404, now 403; 468	Not specified; now, specified in terms of appointment	2002 Act, Sch 5, para 3
Objectives	“providing a mechanism of review that is fair, just, economical, informal and quick”	353(1); 420(1)	Originally, not specified; now, to handle proceedings “fairly, quickly and efficiently”	2005 Rules, r 4
	“to act according to substantial justice and the merits of the case	353(2)(b); 420(2)(b)		
Powers	“exercise all the powers and discretions that are conferred by this Act on the person who made the	349(1); 415	Allows appeals if not in accordance with law (including Rules), or if an available discretion should have been exercised differently	1971 Act, s 19(1); 2002 Act, 86(3)

	decision”			
			Now, also, violates Race Relations Act, HRA, EEA rights, or Refugee Convention	2002 Act, s 84
			Reviews facts on which decision or action is based	1971 Act, s 19(2)
			For many decisions, may consider post-decision evidence	2002 Act, s 85(4)
			Originally, could make recommendations	1971 Act, s 19(3)
	Summon and take evidence from person under oath or affirmation, or require person to produce documents	363; 427(1), (3)	Summon and take evidence from person under oath or affirmation, or require to produce documents, as in court of law	1984 Rules, rr 27, 29; 2005 Rules, rr 50-51
Conduct of investigation	Tribunal empowered to “get any information that it considers relevant”, including by invitation for additional information	360(1)(b), now 359; 425(1)(b), now 424	Powers to require particulars; otherwise, by usual adversarial procedure	R 25;
	May require investigation or medical examination	363(1)(d); 427(1)(d)		
Hearings	Invitation to appear at hearing	360(1)(a), now 360-360A; 425(1)(b), now 425-425A	Notice of hearing	1984 Rules, r 24; 2005 Rules, r 46
			Hearing in absence of party if not in UK; suffering from communicable disease or mental disorder; if cannot attend because of illness or accident; or if impracticable to give notice and no representative; <i>now, also for unexplained absence; if representative present; risk of violent or disorderly conduct; notification that he does not wish to attend</i>	1984 Rules, r 34; 2005 Rules, r 19
	MRT hearings to be in public, unless not in public interest or impracticable to take evidence in public; RRT hearings in private	365; 429	Hearings in public, except in cases of forged documents, <u>or where exclusion requested by party, where conduct likely to interfere with proceedings or in cases of third party interests</u> ; <i>now, exclusion in interests of public order, national security or to protect private life of party or interests of a minor, or exceptionally to protect interests</i>	1984 Rules, r 32; 2005 Rules, r 54

			<i>of justice</i>	
	Entitlement to access written material before MRT	362A	Opportunity to inspect and copy documentary material	1984 Rules, r 30
	Obligation to disclose, and allow opportunity to comment on, adverse information	359AA, 359A-C; 424AA, 424A-C;	Evidence not available to all parties not to be considered	2005 Rules, r 51(7)
			Now, adjournments only if appeal cannot otherwise be justly determined, esp in relation to evidence	2005 Rules, r 21; 2005 Fast-Track Rules, r 28
Representation	Not entitled to representation, although before MRT entitled now to assistant	363(7), now 336A; 427(6)	Entitled to representation; now, restricted to registered representatives	1984 Rules, r 26; 2005 Rules, r 48
	Other persons not entitled to assistant or representative	366B; 427(6)		
	Assistant not entitled to present arguments unless exceptional circumstances	366A(3)	Entitled to address authority	R 28
Interpretation	Interpretation required if not sufficiently proficient in English	363(7), now 336C; 427(7)	Now entitled to interpreter when giving evidence and otherwise as necessary	2005 Rules, r 49A
Evidence	Not bound by “technicalities, legal form or evidence”	353(2)(a); 420(2)(a)	May receive oral, documentary or other evidence inadmissible in court of law	1984 Rules, r 29; 2005 Rules, r 51
	Applicant may request Tribunal to call witnesses or obtain evidence	361-362; 426	Applicant may call witnesses	R 28
	May obtain evidence by telephone or video link	366; 429A		
	No examination or cross-examination permitted	363(6)(b), now 366D; 427(6)(b)	Examination and cross-examination allowed	R 28
	Non-disclosure of certified or confidential evidence	375-378; 437-440;	Non-disclosure of matters relating to forgery	R 30(2)
	Only new information for subsequent applications to RRT	416		
Determination	Tribunal may decide if applicant fails	362B; 426A	If not requested by party; if appeal allowed on papers; if	1984 Rules, r 12; 2005

without applicant	to appear		applicant outside UK and impracticable and no representative; if <u>objection to destination not warranted</u> ; if <u>no submission or hearing not warranted on preliminary issue</u> ; and if respondent has withdrawn or reversed decision; now, also if appeal lapses, is abandoned, or finally determined; procedural non-compliance; Tribunal considers it may justly determine	Rules, r 15
Determination without hearing	Originally, if more favourable decision available on papers	359; 424	Where not materially different from previous review decision	R 35
			Where written agreement between parties	R 37(c)
Preliminary issues			Where no appeal right; where forged documents; out of time; or no signature	Rr 8(3), 11
			Late notices of appeal	2005 Rules, r 10
			Imminent removal cases	2005 Rules, r 11
Decision	Written decision	368; 430	Written decision	1984 Rules, R 39; 2005 Rules, r 22
	Notification of decision within 14 days	368, now 368A, 368D; 430, now 430A, 430D	Notification as soon as practicable; now, notification within 10 days, and if respondent serves, within 28 days	Ibid, also 2005 Rules, r 23(4), (5)
	Publication of decisions, now only those of particular interest	369; 431		
Time limit for decisions	Prescribed period for MRT bridging visa decisions (7 days); 90 days for RRT decisions with obligation to report otherwise	367, 1994 Regs, reg 4.27; 414A, 440A	Originally no limit; now, for asylum claims, 35 day limit for fixing hearings and making decision	2005 Rules, r 23
Time limits – in-country appeals	Originally 28 days, now 21 days for MRT, 28 days for RRT	1959 Regulations, regs 4.02(2), 4.10(1), 4.31(2); 1994 Regulations, regs 4.10; 4.31(2)(b)	Originally 28 days; now 5 days but extendable	1984 Rules, r 4; 2005 Rules, rr 7, 10
Appeals from abroad	70 days	As above	Originally 3 months; now 28 days but extendable	Ibid
Appeal to courts	28 days for FMC, Federal Court, 35 days for High Court, with extension	477, 486A	14 days to IAT; now, 5 days for reconsideration; 5 days if in detention, 10 days otherwise, to appeal court	1984 Rules, r 15; 2002 Act, s 103A(3)(a)(c)

	to 56 days			2005 Rules, r 35
Other decisions	Detainees – 7 working days, now 2 working days in case of bridging visas and securities for MRT	As above; 1994 Regs, reg 4.31(2)	Originally 14 days for Secretary’s decision and appeals against destination	1984 Rules, r 4
	Visa cancellations and failure to revoke automatic cancellations – 7 working days	1994 Regulations, reg 4.10(1)(b)		
	Cancellation on character grounds – 9 working days at AAT	500(6B)		
Fees	Originally, \$200 and \$300 at MIRO/IRT, with waiver in case of personal hardship; now, \$1,400 for MRT/RRT if unsuccessful except for bridging visas and securities	1959 Regulations, regs 4.014(1); 1994 Regulations, regs 4.13-4.14, 4.31B-C	None	
Offences	Failure of witness to attend	370; 432	Failure to attend or give evidence	<i>1971 Act, s 22(6)</i>
	Refusal to be sworn or to answer questions	371; 433		
	Contempt of Tribunal	372; 434		

Table 6: Powers and procedures of the Australian and UK immigration tribunals.

Australian legislative references refer to provisions after the Migration Reform Act 1992, and any subsequent changes, for the MRT and RRT respectively. UK legislative references refer to original provisions under the 1971 Act and 1984 Rules, and subsequently the current provisions. Italicised provisions have been inserted subsequently; underlined provisions have been removed.

Review body	Scope	Year established and Act
Entry Clearance Monitor	Reviews entry clearance decisions	1993; s 10, 1993 Act
Complaints Audit Committee	Monitors procedures for investigating complaints	1994 (non-statutory)
Her Majesty's Chief Inspector of Prisons	Inspects immigration removal centres	1999 (original powers extended to immigration removal centres), s 152(5) of the 1999 Act; extended to short-term holding facilities and escort arrangements in s 46 of the 2002 Act
Visiting Committees/Independent Monitoring Boards	Regular visits and monitoring of immigration removal centres	1999; s 152 of the 1999 Act
Race Monitor	Monitors ministerial authorisations in relation to racial discrimination	2002; s 19E of Race Relations Act 1976 (as inserted by 2000 amending Act)
Advisory Panel on Country Information	Expert advice on country information; assessment of countries for White List	2003; s 142 of 2002 Act
Advisory Board on Naturalisation and Integration	Assessment of citizenship requirements	2004 (non-statutory)
UNHCR, Quality Initiative	Reviews quality of initial decision-making	2004 (non-statutory)
Certification Monitor	Monitors cases certified as clearly unfounded	2004; s 111 of the 2002 Act
Prisons and Probation Ombudsman	Investigates deaths of immigration detainees; ad hoc investigations	Non-statutory; established 1994, with jurisdiction over immigration removal centres April 2004
Chief Inspector	General remit to inspect and report on UK Border Agency	2008; s 48 of 2007 Act
Accommodation Centre Monitor	Monitors accommodation centres	Never established; s 34 of 2002 Act

Table 7: Establishment of review bodies.

Decision	In-country	Out-of-country	Sections
Refusal of non-refugee protection claims	Only if decision results in no permission, and not 'certified'	No	164(2)(a), 165
Refusal of refugee permission	Yes, if not 'certified'	No	164(2)(b), 166
Refusal of family life application	Yes, if in UK at time of decision and effect is no permission, and not 'certified'	Yes	164(2)(c), 167
Refusal of other immigration permission	Yes, if application not infected by person's deception; if in UK at time of decision; if had permission not infected by deception; and if effect is no permission	No	164(2)(d), 168
- other restriction	No appeal on 'straightforward' grounds, including sponsorship information, and failure to comply with Rule as to prior permission		175(3)
Cancellation of	Yes, if permission not infected by person's	Yes	164(2)(e),

non-refugee immigration permission	deception; was cancelled upon arrival; and if temporary permission not seeking entry for other purpose		169
- other restriction	No appeal on 'straightforward' grounds, including sponsorship information, and failure to comply with Rule as to prior permission		175(3)
Cancellation of refugee permission	Yes, if in UK at time of decision	No	164(2)f), 170
Making of expulsion order	Yes, if in UK at time of decision; permission not infected by deception; and order either on breach of condition of permission, automatic expulsion of foreign criminals, or family member thereof	No	164(2)(g), 171
Refusal to cancel expulsion order	No	Yes	164(2)(h), 172

Table 8: Proposed jurisdiction under the 2008 Bill.

Structure	Countries
Tribunal alone	Denmark; Malta; Sweden until 2006; Switzerland
Administrative courts alone	Finland; Germany; Hungary (Metropolitan Court); Luxembourg; Poland; Portugal; Sweden
Civil courts alone	Hungary
Administrative review + courts	Iceland; Spain
Tribunal + administrative courts	Austria; Belgium
Interdepartmental committee + courts	Greece; the Netherlands; Norway
Territorial commission+ courts + appeal to the President	Italy

Table 9: Refugee appeals systems in Europe.

Compiled from ECRE Country Reports 2000-2005, available at www.ecre.org.

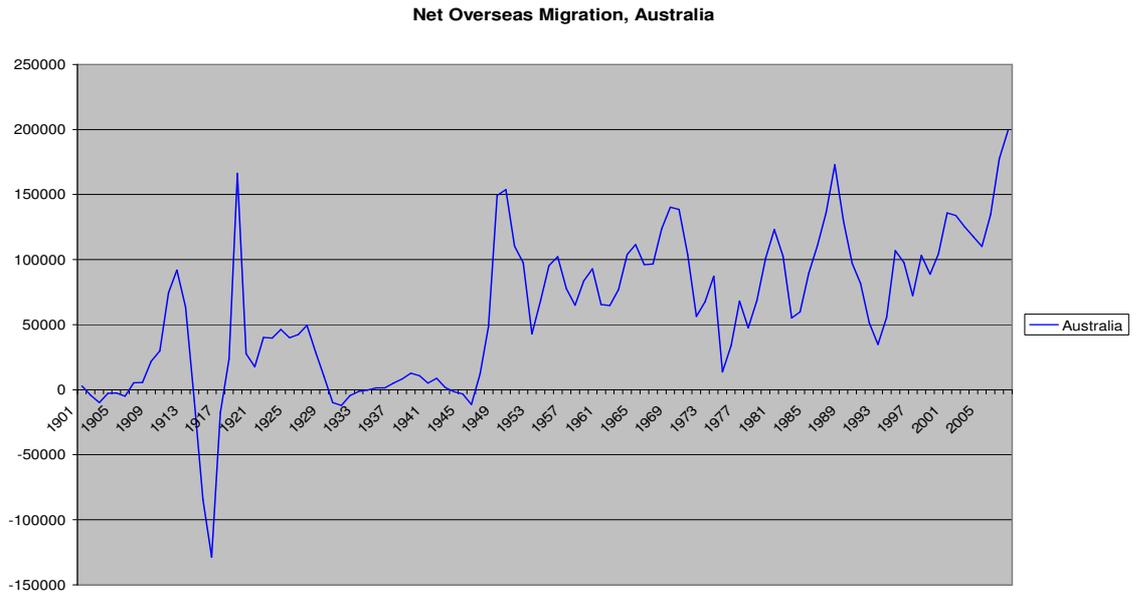


Figure 3: Net overseas migration, Australia 1901-2008.

Source: DIMA, *Immigration, Federation 1901-2000*, 23; ABS, *Catalogue Number 3412*.

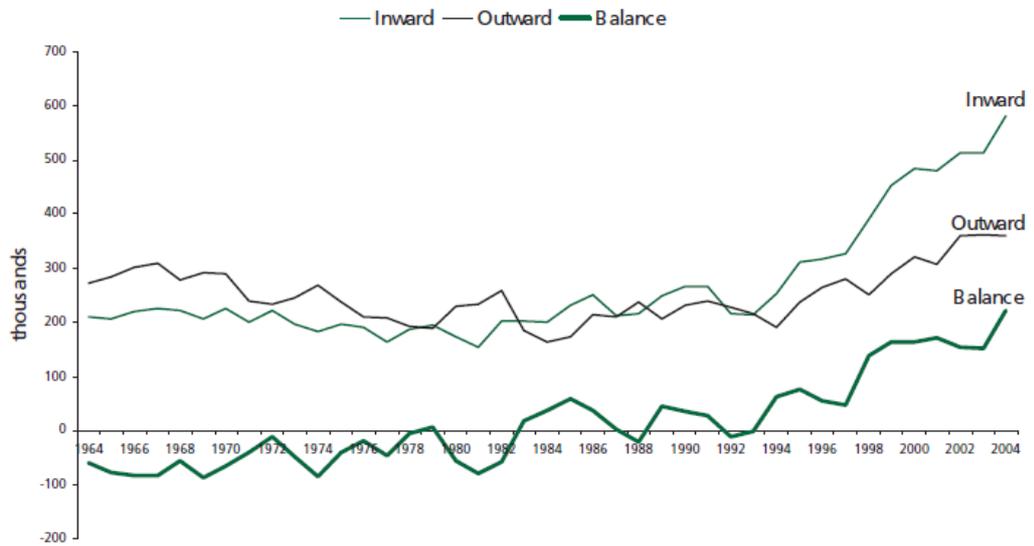


Figure 4: Migration patterns in the UK since 1964.

Source: HAC, *Immigration Control (2006)* 9.

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