

BUILDING BRIDGES IN AUSTRALIAN CRIMINAL LAW: CODIFICATION AND THE COMMON LAW

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This article seeks to promote effective discourse across the divide that exists in Australian criminal law between code and common law jurisdictions. It proposes two ways in which the pervasive, reified dichotomy — ‘code’/‘common law’ — can be rethought. First, certain barely articulated but well-known assumptions that help to maintain the dichotomy are re-examined. It is argued that the fixed ideas that the common law is flexible and a ‘richer’ or more nuanced law, while codes are rigid and ‘mechanistic’, are in critical respects wrong and entrench the divide. Second, the settled orthodoxy that codes should be interpreted by applying ‘special rules’ of interpretation is challenged. It is argued that these special rules can be seen, when examined, to be less than useful, and inconsistent with constitutional principles. Exactly the same principles of interpretation apply to all criminal statutes. Re-thinking in these ways brings all nine Australian jurisdictions into the same legal landscape.

I INTRODUCTION

For more than a century there have been two criminal law worlds in Australia: those jurisdictions which adopted a criminal code and those which remained based in the common law overlaid with numerous criminal statutes. Commonwealth criminal law forms a backdrop to both these worlds. The code jurisdictions are Queensland, Western Australia, Tasmania and, later, the Northern Territory. The so-called ‘common law states’ (those jurisdictions that have both a statutory source and a common law source of criminal law) are Victoria, New South Wales, South Australia and, until recently, the Australian Capital Territory.¹ The divide has been deep and persistent so that lawyers and legal academics can fairly be said to be either ‘code thinkers’ or ‘common law thinkers’.² The conceptual landscape in one is different from the other. Although there may be

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1 In 2002, the ACT enacted ch 2 (‘General Principles of Criminal Responsibility’) and some other chapters of the *Model Criminal Code*: see *Criminal Code 2002* (ACT) pt 2.2

2 Leader-Elliott describes the division between common law and the principles of criminal responsibility in the *Criminal Code Act 1995* (Cth) sch 1 as a ‘conceptual apartheid’: Ian Leader-Elliott, ‘The Australian Criminal Code: Time for Some Changes’ (2009) 37 *Federal Law Review* 205, 206. The same phrase might be applied to the division discussed here between the Griffith Codes and common law constructions of liability. See also Simon Bronitt and Miriam Gani, ‘Criminal Codes in the 21st Century: The Paradox of the Liberal Promise’ in Bernadette McSherry, Alan Norrie and Simon Bronitt (eds), *Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law* (Hart Publishing, 2009) 235, 235–6.

some knowledge of the other world, it is suggested here that, with few exceptions, such knowledge is rudimentary and the subtleties of the language of the other world are largely unknown. From a common law perspective there would seem to be plain inadequacies and incomprehensible conservatism associated with code jurisprudence. From a code perspective there are not infrequent, inadvertent expressions of ignorance about code jurisprudence, or disparaging dismissals of a kind associated with a dominant culture.³

The divide has existed since federation. The Code drafted by Samuel Griffith, known as the Griffith Code, came into force in Queensland in 1901.⁴ In Western Australia the same Code was enacted in 1902, then re-enacted with minor amendments in 1913.⁵ Tasmania enacted its Code in 1924,⁶ and the Northern Territory in 1983.⁷ Thus, the jurisdictions that enacted criminal codes in the early 20th century are the outlying states and territories. Perhaps the general political divide and the tyranny of distance has exacerbated the divide in criminal law.

There is an increasingly important third world of criminal law in Australia arising from the *Model Criminal Code*.⁸ This *Model Criminal Code* was devised through a national process begun in the early 1990s and led by a body, which came to be

- 3 See, eg, the palpable frustration in M R Goode, 'Constructing Criminal Law Reform and the *Model Criminal Code*' (2002) 26 *Criminal Law Journal* 152, 157–63, where the author criticises responses to the *Model Criminal Code* from members of the Queensland judiciary. See also the now famous passage of Dixon CJ in *Vallance v The Queen* (1961) 108 CLR 56, 58, concerning the *Tasmanian Criminal Code*: an examination of the *Code*, in an attempt to answer what might have been supposed one of the simplest problems of the criminal law, leaves no doubt that little help can be found in any natural process of legal reason. The difficulty may lie in the use in the introductory part of the *Code* of wide abstract statements of principle about criminal responsibility framed rather to satisfy the analytical conscience of an Austinian jurist than to tell a judge at a criminal trial what he ought to do. ... But whatever be the explanation a not very serious and somewhat commonplace incident has resulted in very learned and full examinations of the *Code* by the three judges of the Court of Criminal Appeal and an application to this Court for special leave to appeal therefrom which has caused us no little difficulty.

Illustrations of inadvertent dismissals of code jurisdiction are contained in Sir Anthony Mason, 'Intention in the Law of Murder' in Ngaire Naffine, Rosemary Owens and John Williams (eds), *Intention in Law and Philosophy* (Ashgate, 2002) 107, 126–7; David Ross, *Ross on Crime* (Lawbook, 3rd ed, 2007) 804–5. Both of these accounts describe the common law of homicide as the 'Australian law' without reference to the code law, which is different. The point here is obviously not to identify gaps in particular scholarship — comprehensive coverage is impossible. Rather, it is to point out the division itself and that Australian criminal lawyers think from different sides of it.

- 4 *Criminal Code Act 1899* (Qld) sch 1 ('*Queensland Criminal Code*'). Samuel Griffith was Premier of Queensland (1883–88, 1890–93), Chief Justice of the Supreme Court of Queensland (1893–1903) and first Chief Justice of the High Court (1903–19).
- 5 *Criminal Code Act 1913* (WA) sch 1 ('*Western Australian Criminal Code*'). The *Criminal Code Act 1913* (WA) is contained in *Criminal Code Act Compilation Act 1913* (WA) app B.
- 6 *Criminal Code Act 1924* (Tas) sch 1 ('*Tasmanian Criminal Code*').
- 7 *Criminal Code Act 1983* (NT) sch 1. The Northern Territory government adopted ch 2 of the *Model Criminal Code* in 2005. For an interesting history of the *Northern Territory Criminal Code*, see Andrew Hemming, 'The *Criminal Code* (Cth) Comes to the Northern Territory: Why Did the Original *Criminal Code* 1983 (NT) Last Only 20 Years?' (2010) 35 *University of Western Australia Law Review* 119, 120–3.
- 8 Parliamentary Counsel's Committee, *Model Criminal Code* (1st ed, 28 May 2009) ('*Model Criminal Code*').

known as the Model Criminal Code Officers' Committee (MCCOC).⁹ The *Model Criminal Code* was produced with the objective of providing all nine Australian jurisdictions — Commonwealth, states and territories — with the opportunity to enact uniform criminal legislation (or at least consistent legislation).¹⁰ To date, the Commonwealth,¹¹ the ACT,¹² and the Northern Territory (in 2005)¹³ have enacted substantial parts of the *Model Criminal Code*, most importantly ch 2 — General Principles of Criminal Responsibility.¹⁴ However, the political impetus to advance the unification of criminal law through a common code appears to have waned for the time being,¹⁵ and a profound divide between the two major worlds — the Griffith-based codes and the 'common law states' — remains. That divide is the subject of this article.

It is argued that there is a false dichotomy between these two kinds of jurisdictions. Part II of the article provides background on the purposes and functions of codification and identifies a problem in how the concept of a 'code' is used. In the broad discourse of politics, state administration and nation-building, the 'code' concept is transferred to the narrower discourse of criminal law doctrine and in this reified form supports the stark dichotomy between code and non-code jurisdictions. In Parts III–IV, a number of ways in which this false dichotomy between the two systems is maintained are explained and challenged. In Part III a philosophical argument is made that certain fixed, and precious, assumptions made by judges and academics about the differences between the common law and codes promote the idea that the two systems are entirely discrete when in fact the assumptions are incorrect in significant ways. In Part IV a doctrinal argument is made — that the 'special rules of interpretation' said to apply to codes contribute to the false dichotomy. They promote the idea that codes and criminal statutes in so-called 'common law states' occupy radically different worlds — and this is incorrect.

II CODIFICATION: PURPOSES AND FUNCTIONS

Historically the Australian criminal codes have been treated as islands in Australian criminal law but they are, in fact, part of a major 19th century

9 This was a committee established by the Standing Committee of Attorneys-General and comprised an officer from each jurisdiction with expertise in criminal law. Its name was later changed to the Model Criminal Law Officers' Committee.

10 See Goode, 'Constructing Criminal Law Reform', above n 3, 154–5, 163.

11 *Criminal Code Act 1995* (Cth) sch 1 ('*Commonwealth Criminal Code*').

12 *Criminal Code 2002* (ACT).

13 *Criminal Code Act* (NT) sch 1 ('*Northern Territory Criminal Code*').

14 Other jurisdictions have implemented specific clauses: see Goode, 'Constructing Criminal Law Reform', above n 3, 173–4.

15 This is not to say that nothing more will come of the *Model Criminal Code* project. See, eg, the historical accounts of other codifications in Alberto Cadoppi, 'The Zanardelli Code and Codification in the Countries of the Common Law' (2000) 7 *James Cook University Law Review* 119, 121–9.

European, American and colonial codification movement.¹⁶ England and the common law world did not enact general civil codes as European nations did, but it is during this period that a Draft Code of Criminal Law was presented to the British Parliament (1880) and criminal codes were enacted in some states of the United States of America, India (1860), Canada (1892), and New Zealand (1893). The Griffith Code was enacted in the colony of British New Guinea (later Papua) in 1903 and in the British Protectorate of Northern Nigeria in 1904.¹⁷ Therefore, albeit in a piecemeal way, the international codification movement of the late 19th century influenced the common law world, including the newly constituted Australia.¹⁸

A Accessibility for Those Working in the Field of Law and for Citizens

By gathering together the laws on a topic and presenting them as a systematic whole, codes facilitate access to the law for lawyers, judges and others working in the legal field.¹⁹ This value extends to the citizen not working in the law. A code ‘facilitates [the law’s] comprehensibility’.²⁰ Jeremy Bentham made this point:

when a man asks what ... [the] law is, he learns that there are two parts of it: that the one is called *Statute Law*, and the other *Common Law*, and that there are books in which these same two parts are to be found. That, when a man asks in what book the *Statute Law* is to be found, he learns that, so far from being contained in any *one* book, howsoever large, it fills books composing a heap greater than he would be able to lift. ... That, if he asks in what book the *Common Law* is to be found, he learns that the collection

16 See generally Barry Wright, ‘Self-Governing Codifications of English Criminal Law and Empire: The Queensland and Canadian Examples’ (2007) 26 *University of Queensland Law Journal* 39; Barry Wright, ‘Criminal Law Codification and Imperial Projects: The Self-Governing Jurisdiction Codes of the 1890’s’ (2008) 12 *Legal History* 19; Reinhard Zimmermann, ‘Codification: History and Present Significance of an Idea’ (1995) 3 *European Review of Private Law* 95, 98.

17 Robin S O’Regan, *New Essays on the Australian Criminal Codes* (Lawbook, 1988) 103–9, 121.

18 Even the term ‘codification’ is said to have been coined by the ‘great codifier’, Jeremy Bentham, in the 18th century: see Cadoppi, above n 15, 123.

19 Samuel Griffiths wrote in 1897 that the criminal law of Queensland was to be found in nearly 250 statutes as well as the case law on criminal responsibility: Letter from S W Griffith to the Queensland Attorney-General, 29 October 1897, iv. Cadoppi has said that the criminal law in England and the Australian colonies was ‘in substance true and proper “chaos”’: Cadoppi, above n 15, 122. See also Zimmermann, ‘Codification’, above n 16, 99.

20 Zimmermann, ‘Codification’, above n 16, 97. Zimmermann further states that ‘[p]ublicity of the law was another rather admirable philosophical and educational idea espoused ... by 18th century enlightened authoritarianism’: at 107. See also Cadoppi, above n 15, 148. Mason, Wilson and Deane JJ said in *Bouhey v The Queen* (1986) 161 CLR 10, 21: ‘A basic objective of any general codification of the criminal law should be, where practicable, the expression of the elements of an offence in terms which can be comprehended by the citizen who is obliged to observe the law’.

of the books in which, on each occasion, search is to be made for it, are so vast, that the house he lives in would scarcely be sufficient to contain it.²¹

B Parliamentary Sovereignty

Codes are said to embody a profound democratic value in that they are made by an elected Parliament. The role of an (unelected) judiciary is limited to interpretation.²² This is so at least where a code replaces the common law. Connected to this democratic value are the values of prospectivity and certainty that are said to come with codification. Codes, being an ultimate authority in the form of legislation, impose an essentially prospective governance in the sense that the existence of a rule (and the authority to sanction) emerges with the act of passing the legislation. Legal rules cannot be found to have existed where no declaration of them was made, as is the case in the common law.²³ And codes require deductive reasoning insofar as conclusions are reached from fixed premises (legislation) rather than inductive reasoning which draws general rules (for example the elements of an offence) from observed instances, as is the basis of the common law. These values of democracy, prospectivity and certainty which legislation is said to embody underpinned the great European codifications during the Enlightenment²⁴ and the Australian *Model Criminal Code* project.²⁵

Of course, the idea that Parliament creates a rule and judges may only interpret its language is a complex claim. Arguably this substance/interpretation dichotomy dissolves on close scrutiny. Substance, or meaning, is at least in part determined by interpretation, and not only in the case of bad or distinctly ambiguous drafting but as a reality in, arguably, all cases. Most modern philosophies of language accept, in some way or other, that meaning is created through language *use* and is not inherent, in an asocial sense, in the spoken or written word itself.²⁶ Meaning is determined by the interaction of an utterance (in this case the provisions of

21 Jeremy Bentham, *Justice and Codification Petitions* (Robert Heward, 1829) ch VII, 1–2 (emphasis in original). Concern for this value of accessibility is evident in the discourse surrounding the recent Australian codification project: see, eg, Matthew Goode, ‘Codification of the Criminal Law’ (2004) 28 *Criminal Law Journal* 226, 229–31.

22 The value in parliamentary sovereignty underlies Griffith’s account of the criticisms of the British Criminal Code Bill 1880. He presented this account in support of his draft criminal code for Queensland: see Griffith, above n 19, iv–vi. See also Zimmermann, ‘Codification’, above n 16, 96–7; Roscoe Pound, ‘Common Law and Legislation’ (1908) 21 *Harvard Law Review* 383, 406, quoted in Paul Finn, ‘Statutes and the Common Law’ (1992) 22 *University of Western Australia Law Review* 7, 19.

23 See Cadoppi, above n 15, 124; Zimmermann, ‘Codification’, above n 16, 108.

24 Cadoppi, above n 15, 123–4.

25 Goode, ‘Codification of the Criminal Law’, above n 21, 232.

26 See, eg, Michael Morris, *An Introduction to the Philosophy of Language* (Cambridge University Press, 2007) 3–4; Chon Tejedor, *Starting with Wittgenstein* (Continuum, 2011) chs 4, 12; Andy Blunden, *Concepts: A Critical Approach* (Brill, 2012) 57–60.

a code) and reception (judicial interpretation).²⁷ However, those who would promote codifications would say their legislative source firmly shifts the balance of authority to the Parliament and away from the judiciary.

C Coherence and Reform

A code aims to be systematic. It requires laws to be presented not merely as a compilation of unrelated rules in one enactment but as a systematic or ‘organic whole’.²⁸ The same claim, of course, is made of a common law regulation of crime. The common law is a system of laws, not a random collection of decisions. But the gathering function of a code and its legislative form highlight its systematic nature. In Cadoppi’s words:

Contrasting the criminal law of Queensland [before it was codified] with some codified European systems of the time, the first was able to bring to mind a dusty old attic in which everything was poorly stacked whilst the second evoked images of refined parlours, clean and elegant where each piece of furniture and knick-knack was to be found in its right place.²⁹

Codifications can also be sought with the aim of reforming the law. On the specific level they provide an opportunity to remedy inconsistencies in the old law or create new, updated or revised rules. They are restatements of the law, retaining what is working and altering what is not.³⁰ Codes can represent more general reform also in that they are often ‘part of larger trends around constitutional change and modernizing the exercise of state power’.³¹ The European codes aimed to reform the law in this way as did, arguably, the Australian criminal codes of the early 20th century.³² This kind of quasi-constitutional reform that codes can effect (where they overtake the common law) overlaps of course with the aim of asserting parliamentary sovereignty discussed above, and also with that of ‘uniformity’, which is explained below.

Thus, accessibility, parliamentary sovereignty, internal coherence and reform are often cited as the aims of codifications. But there is another aim which is very

27 For a discussion of this point, see generally Zenon Bankowski and D Neil MacCormick, ‘Statutory Interpretation in the United Kingdom’ in D Neil MacCormick and Robert S Summers (eds), *Interpreting Statutes: A Comparative Study* (Dartmouth, 1991) 359; Justice James Spigelman, ‘The Common Law Bill of Rights’ in *The McPherson Lecture Series: Statutory Interpretation and Human Rights* (University of Queensland Press, 2008) 3, 45–9.

28 Zimmermann, ‘Codification’, above n 16, 107.

29 Cadoppi, above n 15, 122.

30 The Griffith Codes are an example of reform in this way. It aimed to restate the common law in some respects (for example, the offence of assault) and in other respects reform it (for example, the creation of the defence of provocation for assault, unknown to the common law). See Griffith, above n 19, xi.

31 Wright, ‘Self-Governing Codifications’, above n 16, 40.

32 Ibid 40–1

often central to codification projects but which is not often listed as a purpose or rationale.³³ This is the aim of uniformity and nation-building.

D Uniformity and Nation-Building

A crucial effect of codification is an assertion of jurisdictional identity or uniformity between formerly distinct jurisdictions. ‘Uniformity’, in this sense, is different from the idea of coherence that a code can bring to an area of law; it is unrelated to the subject matter of the code. Rather, it refers to the political impetus for state or nation-building and identity creation. It refers to the reformulation that codes can help to effect of political/jurisdictional boundaries. There is an administrative aspect to this — the aim of convenience in the smoother administration of disparate jurisdictions — and also an empire, nation or state-building aspect.

The major European codes were enacted as part of the great 18th and 19th century white nation-building era.³⁴ They asserted dominion, entrenched national boundaries and enabled the unified administration of the law between provincial boundaries. They were enacted with the purpose of unifying disparate legal systems, both for political and pragmatic reasons. Discussing the *French Civil Code* of 1804, Zimmermann writes: ‘The multiplicity of [provincial] legal systems had become as annoying to the enlightened mind as the hierarchical structure of society and its subjection to the traditional feudal and religious authorities had become odious’.³⁵

Codification of the criminal law in Australia was, and is, also driven by an aim of uniformity, political identity and state or nation-building.³⁶ The older criminal codes came into force with the constitution of the nation or shortly afterwards and as one of the first enactments of the newly constituted states. They have shaped the federation by encouraging the ‘conceptual apartheid’ between code

33 The essential elements of a code are that they are enacted by a legislature, comprehensive and systematic: Cadoppi, above n 15, 122–9; Zimmermann, ‘Codification’, above n 16, 96–7. Goode lists four reasons to codify: easy to find; easy to understand; cheap to buy; and democratically made and amended: Goode, ‘Codification of the Criminal Law’, above n 21, 229–33. See also Miriam Gani, ‘Codifying the Criminal Law: Implications for Interpretation’ (2005) 29 *Criminal Law Journal* 264, 269. Gani’s summation reflects the view that what I have called ‘uniformity’ or nation-building is a subsidiary objective of codification:

It would appear, then, that the principles underpinning the [*Model Criminal Code*] are very similar to those underlying the Griffith Codes of the 19th century: the clarity, certainty and ascertainability of the law, in addition to the crucial value that it be legislatively rather than judicially created. Bolstering and complementing these principles was the broader aim of the codification project: the achievement of consistency, if not uniformity, of the criminal law across all Australian jurisdictions.

See also Andrew Ashworth, ‘Interpreting Criminal Statutes: A Crisis of Legality?’ (1991) 107 *Law Quarterly Review* 419, 420. Cf Wright, ‘Self-Governing Codifications’, above n 16, 39–41.

34 See, eg, the *Prussian Code* of 1794, the *French Civil Code* of 1804, the *Austrian Code* of 1811 and the *German Code* of 1900. See Reinhard Zimmermann, *Roman Law, Contemporary Law, European Law: The Civilian Tradition Today* (Oxford University Press, 2000) 6–11.

35 Zimmermann, ‘Codification’, above n 16, 100.

36 See Wright, ‘Self-Governing Codifications’, above n 16, 39–41, 56–7, 61–3; Wright, ‘Criminal Law Codification and Imperial Projects’, above n 16, 30–1, 40–6.

jurisdictions and the common law states.³⁷ Moreover, the codification movement was far more widespread in Australia than is generally known. Efforts were made in both South Australia and Victoria to codify the criminal law. In South Australia attempts were made in 1901 and 1902 to enact a Code drafted by Dr F W Pennefather, and a persistent effort was made in Victoria to introduce a criminal code influenced substantially by the Griffith Code between 1904 and 1912.³⁸ The fault lines in Australian criminal law would have been very different had either of these draft codes been enacted. So, too, would the legal character of the nation.

Codes define, ultimately, the identity of their specific jurisdiction.³⁹ This is, of course, a result of parliamentary sovereignty. The fact that a code (or any statute) is enacted by a Parliament means that its reach is limited to the clear boundaries of that legislature. This is in contrast to the common law where boundaries do not necessarily follow precisely sovereign parliamentary limits. The common law crosses political boundaries. Zimmermann writes: 'Unlike the European *ius commune*, [a code] is applicable only within the confines of the state for which that legislature is competent to make laws'.⁴⁰

In Australia, the *Model Criminal Code* project that began in the 1990s was also driven by an aim for uniformity,⁴¹ or at least consistency,⁴² between the nine jurisdictions — a desire for consistent, smooth justice.⁴³ The need for greater communication between Australian jurisdictions is probably the same as that which drove the drafters of the *French Civil Code* and other European codes. Moreover, although Australia in the 20th and 21st centuries is not in the grip of nation-building to the same extent as were the European powers in the 19th

37 This is Leader-Elliott's description: Leader-Elliott, 'The Australian *Criminal Code*', above n 2, 206.

38 Greg Taylor, 'The Victorian *Criminal Code*' (2004) 23 *University of Queensland Law Journal* 170, 170.

39 The alliance between 'code states' in Australia (for example, that between Queensland and Western Australia, where there is a convention of treating each state's judicial authority as virtually binding on the other) is a different thing. That alliance results from the *content* of codes being, to a greater or lesser extent, the same. The point here is that *each* code has a distinct sovereign limit.

40 Zimmermann, 'Codification', above n 16, 96–7. See the description of the legal isolation which resulted from the European codifications of the 18th century, resisted by a continued reliance on the common Roman law which the codes superseded, in Zimmermann, *Roman Law, Contemporary Law, European Law*, above n 34, 6–11. In the Australian context, Cadoppi found that

[a]t times the colonial code was very clear in decisively 'breaking' its links with the *common law* — whose developments would have been in any case difficult to keep abreast of in such remote regions in an era still technologically backward — sanctioning the independence of the rule of the code from the principles of the *common law* and from their evolution.

Cadoppi, above n 15, 126 (emphasis in original).

See also Finn, above n 22, 7–8, where Finn finds that the proliferation of statutes in 19th century Australian colonies helped create a socialist character for Australia while the 'common law retained its distinctly English character'. Although Finn's article discusses statutes generally, the point was about their parliamentary source — and that applies to codes also. Moreover, as argued in Part IV(C), codes should be understood as statutory instruments no different from other enactments.

41 Model Criminal Code Officers' Committee of the Standing Committee of Attorneys-General, *Model Criminal Code — Chapters 1 and 2: General Principles of Criminal Responsibility* (Report, 1992) i–iii.

42 Goode, 'Constructing Criminal Law Reform', above n 3, 152–4, 163–5.

43 Gani, above n 33, 264, 280.

century, the pragmatic need for uniformity and efficiency between jurisdictions is the same and, undoubtedly, nation-building is at stake.⁴⁴

Moreover, the desire for uniformity is becoming greater with the increasing pressure and opportunities arising from globalisation. Again, this involves nation-building. With far greater travel and communication within Australia and internationally, the difficulties in maintaining disparate jurisdictions are more and more apparent, and more frustrating.

Thus, the often-stated reasons why jurisdictions codify laws revolve around the aims of accessibility for legal workers and lay citizens, the ideal of parliamentary sovereignty and coherence and reform of the area of law involved. But the aspirations of state/nation-building and uniformity between jurisdictions are also major motivations.

This Part has been aimed at providing background on codification as well as laying groundwork for all the arguments in Parts III–IV. That groundwork is an observation that can be made about the concepts of ‘code’ and ‘codification’ based on this analysis of why codes are enacted. As can be seen, these concepts emerge from the broad discourse of politics and administration, and are then transported to the narrower doctrinal discourse of adjudication. It is true that all statutes begin in politics and end in law,⁴⁵ and that ‘[l]aw reform and codification is above all a political process’.⁴⁶ But there is something different about the ‘politics’ that produces a code — ie the politics that motivates a Parliament to name an Act a ‘code’ — from the politics associated generally with all enactments. The point here is that not all of the reasons why a parliament ‘codifies’ the law are relevant — or even cognisable — once the ‘code’ moves to the judicial phase of justice.

Of the functions and purposes examined above, the aims of coherence and reform, which relate to the subject matter of the enactment, may be relevant for a court in understanding the statutory scheme as a whole, its divergence from or alliance with the pre-existing law and therefore its proper construction and application. But an interest in ‘accessibility’, as discussed above, is advanced, more or less successfully, when the citizen or lawyer *needs to access* the law, before the exercise of judicial power is relevant. The purposes of asserting parliamentary sovereignty, and certainly what has been called here the aim of uniformity or nation-building, are not within the province of the judicial process because those very broad interests are achieved by *enacting the law itself*.

Again, the point to be made here is that the concepts of ‘code’ and ‘codification’ derive their meaning and coherence, at least in significant part, from the spheres

44 For example, after considerable reflection the MCCOC drafted the criminal responsibility provisions of the *Model Criminal Code* in line with those of the common law, not those of the Griffith Codes. This decision was a good one — and it is an important act of nation-building. To the extent of their influence, such decisions determine the national culture. That codification is nation-building is also evident in the tensions surrounding the *Model Criminal Code* process itself. See Goode, ‘Constructing Criminal Law Reform’, above n 3, 157.

45 This idea underlies a discussion of the content of statutes in Bankowski and MacCormick, above n 27, 361. The same observation is made for present purposes of the form a statute takes.

46 Goode, ‘Codification of the Criminal Law’, above n 21, 232 (emphasis in original).

of politics and administration — in the sense of broad-scope state or constitutional politics and state administration. Yet the conceptual divide in Australian criminal law between ‘code’ and ‘non-code’ jurisdictions persists in the judicial sphere — in the exercise of judicial power. It is in this *judicial* sphere in which we say there are two discrete systems of Australian criminal law in existence, the ‘code’ and ‘common law’ jurisdictions (the subject of Part III) and that different primary rules of interpretation apply as between codes and the ‘ordinary statutes’ of the ‘common law states’ (the subject of Part IV). This reification of the notion of a ‘code’ (ie its abstraction and with that an assumption that it carries a consistent meaning), and the introduction of that reified notion into doctrinal discourse brings with it the problems examined in the remainder of the article.

III THE NATURE OF CODES AND THE COMMON LAW: RE-EXAMINATION OF TWO MISLEADING ASSUMPTIONS

This Part argues that certain unexamined, but fixed, assumptions about the distinction between the so-called code and common law jurisdictions prop up a simplistic and unhelpful dichotomy. Ideas that, first, the common law is flexible (codes are inflexible) and, second, that codes are shallow and mechanistic so that a spare, perfunctory style of reasoning is all that can be hoped for, are part of what maintains the division in Australian criminal law. The aim here is not to assess the merits of either system, nor to suggest there are no differences, but to problematise the simplicity of the dichotomy — to suggest that mythologies form part of the substance of the great divide in Australian criminal law.

A *Assumption 1:* *Codes are Inflexible, the Common Law Responsive*

This section aims to problematise each of three ways in which the idea is expressed that codes are ‘inflexible’ and the common law responsive.

First, the offence-creating power of the judiciary in a common law system is pointed to as one measure of its adaptability. The case of *Shaw v Director of Public Prosecutions (UK)* has become an iconic illustration of the common law’s evolutionary capacity in this regard.⁴⁷ There, the House of Lords reinstated a criminal offence of ‘conspiracy to corrupt public morals’. The publishers of a business directory of prostitutes were convicted. Viscount Simonds said:

In the sphere of criminal law I entertain no doubt that there remains in the courts of law a residual power to enforce the supreme and fundamental purpose of the law, to conserve not only the safety and order but also the moral welfare of the State, and that it is their duty to guard it against attacks which may be more insidious because they are novel and unprepared for.⁴⁸

47 [1962] AC 220 (*‘Shaw’*).

48 Ibid 267.

The claim is that the common law is flexible because courts can create offences when necessary to uphold the fundamental principles of the law: to protect the order, safety and morals of the state.

The problems with this claim, insofar as it is asserted as an important difference between the common law and ‘codified’ jurisdictions are that, in reality, this common law capacity is extremely rarely resorted to, evidenced by the continuing reference to *Shaw* as the example of its use. Moreover, the claim that the common law is more flexible because courts can create offences when necessary to protect public safety or morals subsumes two more specific claims. First, that the judicial process *is* more flexible (can act more quickly or target problems more effectively) than the parliamentary process and, second, that, at least where quick action is required, the courts are the appropriate bodies to protect the public (have capacity to identify problems accurately and determine solutions). An argument based on the value of fast judicial process may have some foundation where principles of criminal responsibility or defences are concerned because an accused’s liberty may be at stake. This is the province of a common law Bill of Rights. But it is questionable whether it has any foundation with respect to offence creation. An assertion of the value of judicial offence creation requires the argument that there are social harms, perpetrated by individuals, which could require sudden criminalisation by the state; harms which could not be dealt with better by the democratic parliamentary process required for creating legislation which would criminalise the conduct.

Furthermore, if fast judicial action could ever be said to be a value, the second specific claim — that judges are the right people to identify and assess the claims involved in devising a solution — alters the inquiry by raising the bigger constitutional question underpinning the claims themselves. Is it *judges* who should be deciding the social and moral claims that go into criminalising citizens’ behaviour? (In *Shaw*, whether the publication of a business directory of prostitutes is a criminal act.) To suggest that judges are the right people is a very difficult constitutional argument to make today. Our claims to representative democracy are too strong. Moreover, expressed in this way, it can be seen that the idea that the common law is *flexible* because judges can create offences is the shadow of the ‘parliamentary sovereignty’ value underpinning arguments *for* codification. This was the nub of the argument of Samuel Griffith in his letter to the Queensland Parliament in 1897.⁴⁹

Thus, that judges in a common law system maintain an offence-creating power cannot be sustained as a mere ‘flexibility’ argument. The idea itself is far more profound. However, and most importantly for the purposes of the current argument, it is a power that is virtually never used.

A second way in which the idea that the common law is flexible and codes are inflexible is expressed focuses on the legislative form of codes and the capacity of the common law to evolve (short of offence creation as discussed above) through re-evaluation and restatement. The fixed nature of legislation and the complexity of drafting are understood to limit their capacity to change, while judge-made

49 Griffith, above n 19, v–vi, quoting the Report of the British Royal Commissioners on the Draft Code of Criminal Law 1878.

common law can reflect changing community values and conditions.⁵⁰ This is the claim that the capacity of the criminal law to respond to demands for social change is affected by the source of the law — code or common law. It is argued here that law reform is far more complex and that the same factors operate in each kind of jurisdiction. The recent history in the development of self-defence illustrates this argument.

In the past 30 years, development of the defence of self-defence has occurred in all Australian jurisdictions, code and non-code. In the early 1980s, academic critiques of self-defence began to emerge in Australia. The prolific, and now well-known criticism was that self-defence in homicide cases operated in a gender biased way. A defendant needed to show they had retaliated immediately to a physical attack from the deceased — a model of human behaviour derived from, generally, men's experience and not, generally, women's.⁵¹ Taking Western Australia as the illustration, in the 1980s self-defence was contained in ss 248 and 249 of the *Western Australian Criminal Code*⁵² and, for the common law, in the case of *Zecevic v Director of Public Prosecutions (Vic)*.⁵³ The Code defence was fixed in that it had existed without amendment since its enactment in 1913. The common law, on the other hand, was reformulated in *Zecevic*. Moreover, the form of the defence in ss 248 and 249 was far more complex than that of the common law, and the provisions were subject to trenchant criticism.⁵⁴

However, in understanding the process of legal reform and social change a distinction needs to be made between form and substance. The real demand for change arose from the laws' failure to represent women's social experience. Both s 248 and the common law failed to do this, to the same extent and for the same reasons. That is, the common law formulation of the defence in *Zecevic* did not allow any greater reform of the defence in its application to particular circumstances than did the Code formulation. This was because both defences were (and still are) based on the concept of 'reasonableness' of response. The

50 See, eg, Griffith, above n 19, iv–v; Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Lawbook, 3rd ed, 2010) 82; Leader-Elliott, 'The Australian *Criminal Code*', above n 2, 219–20.

51 See generally Alison Wallace, New South Wales Bureau of Crime Statistics and Research, *Homicide: The Social Reality* (August 1986); Stella Tarrant, 'Something Is Pushing Them to the Side of Their Own Lives: A Feminist Critique of Law and Laws' (1990) 20 *University of Western Australia Law Review* 573; Ian Leader-Elliott, 'Battered but Not Beaten: Women Who Kill in Self-Defence' (1993) 15 *Sydney Law Review* 403; Patricia Weiser Easta, *Killing The Beloved: Homicide between Adult Sexual Intimates* (Australian Institute of Criminology, 1993); Australian Law Reform Commission, *Equality Before the Law: Justice for Women*, Report No 69 (1994); Julie Stubbs and Julia Tolmie, 'Falling Short of the Challenge? A Comparative Assessment of the Australian Use of Expert Evidence on the Battered Woman Syndrome' (1999) 23 *Melbourne University Law Review* 709; 'Gender Specific Response Patterns in Criminal Defences' (1996) 20 *Criminal Law Journal* 185; Rebecca Bradfield, 'Is Near Enough Good Enough? Why Isn't Self-Defence Appropriate for the Battered Woman?' (1998) 5 *Psychiatry, Psychology and Law* 71; Zoe Rathus, 'There Was Something Different about Him That Day: The Criminal Justice System's Response to Women Who Kill Their Partners' (Brisbane Women's Legal Service, 2002); Julie Stubbs, 'Domestic Violence and Women's Safety: Feminist Challenges to Restorative Justice' in Heather Strang and John Braithwaite (eds), *Restorative Justice and Family Violence* (Cambridge University Press, 2002) 45; Victorian Law Reform Commission, *Defences to Homicide*, Final Report (2004); Law Reform Commission of Western Australia, *Review of the Law of Homicide*, Report No 97 (2007) chs 4, 6.

52 See also *Queensland Criminal Code* ss 271–2.

53 (1987) 162 CLR 645 ('*Zecevic*').

54 See Law Reform Commission of Western Australia, above n 51, 162–4.

fetter on reform consisted of the social experiences and attitudes which inhabit that abstract concept of ‘reasonableness’ (what does a reasonable human response, in which circumstances, look like?) and was the same at common law and in the code jurisdictions.⁵⁵

Moreover, not only was the problem the same but the process of reform was the same in each jurisdiction. In both Victoria (a ‘common law state’) and Western Australia, legal reform followed social, and then legal/academic activism. Change was effected by the same combination of judicial interpretations (or ‘reforms’),⁵⁶ and reports by law reform agencies and policy makers.⁵⁷ Ultimately, the response in code and non-code jurisdictions was legislation.⁵⁸

The recent history of the reform of self-defence is well documented and the fact that the mechanisms by which change occurred in each jurisdiction are the same is an everyday reality. The point here is to identify the disjuncture between that everyday reality and the mythologies that construct the codes as intransigent and the common law as malleable and responsive.

Finally, the inflexible code/flexible common law dichotomy can be found in the characterisation of the common law as responsive and stable, rather than ‘inflexible’. It is suggested that *both* codes and the common law can be seen to be, in important ways, inflexible and yet in our legal culture the common law’s inflexibility is known as stability. There is a common sense understanding that the common law is not inflexible, but it is designed to resist change. Whether a phenomenon is ‘stable’ or ‘inflexible’ is determined in part by the standpoint from which the phenomenon is viewed.

That the common law is inflexible but in a way generally understood as stable and resilient is illustrated by the foundational case of *Director of Public Prosecutions*

55 There was one distinct legal difference between the common law and Griffith Code formulations of self-defence. In the Code formulation it was necessary for the accused to have been defending themselves against an ‘assault’ and in addition to that reality, to have held an honest and reasonable belief that they needed to defend themselves. The common law formulation did not require the threshold ‘assault’. However, how this difference was dealt with itself points out the importance of substance over form. The absence of the requirement at common law did not result in fewer convictions. Indeed, that the Code requirement amplified the need for an immediate response to a physical attack only emerged in argument as late as 1996 in the Northern Territory case *Secretary v The Queen* (1996) 5 NTLR 96. And the judicial response there was to interpret the statutory concept of ‘assault’ to cover an extended period of time. For the idea that the social movement about domestic violence and not the law was the primary impetus for legal reform, see Kate Fitz-Gibbon and Julie Stubbs, ‘Divergent Directions in Reforming Legal Responses to Lethal Violence’ (2012) 45 *Australian and New Zealand Journal of Criminology* 318, 318–19; Gary N Heilbronn et al, *Introducing the Law* (CCH, 7th ed, 2008) 204, quoting Justice Philip Cummins (Paper presented at the Courts and the Media Conference, Melbourne Law School, 27 July 2007). See also Elizabeth Sheehy, Julie Stubbs and Julia Tolmie, ‘Defences to Homicide for Battered Women: A Comparative Analysis of Laws in Australia, Canada and New Zealand’ (2012) 34 *Sydney Law Review* 467, 488, 492.

56 Key common law decisions include: *Zecevic* (1987) 162 CLR 645; *R v Runjanjic* (1991) 56 SASR 114; *R v Chhay* (1994) 72 A Crim R 1; *Osland v The Queen* (1998) 197 CLR 316. Key code decisions include: *R v Muratovic* [1967] Qd R 15; *R v Gunnarsson-Wiener* (Unreported, Supreme Court of Tasmania, Zeeman J, 13 August 1992); *Secretary v The Queen* (1996) 5 NTLR 96.

57 See above n 51.

58 *Western Australian Criminal Code* s 248; *Queensland Criminal Code* ss 271–3, 304B; *Crimes Act 1958* (Vic) ss 9AC–AD, 9AH; *Criminal Law Consolidation Act 1935* (SA) s 15; *Crimes Act 1900* (NSW) ss 418, 421; *Northern Territory Criminal Code* s 43BD; *Tasmanian Criminal Code* s 46; *Criminal Code 2002* (ACT) s 42.

(UK) *v Morgan* and the commentary it provoked.⁵⁹ There, a majority of the House of Lords restated the common law principle that the mental element required in the offence of rape is purely subjective. That is to say, each of the four accused was guilty of rape if he intended to have intercourse with the complainant without her consent or with indifference as to whether or not she consented.⁶⁰ The trial judge in *Morgan* had directed the jury that an unreasonable (even if honestly held) belief that the complainant was consenting could also be the basis of a conviction. The House of Lords held that the trial judge was wrong in law but the appeal was nevertheless dismissed. The four convictions were upheld by an application of the proviso, on grounds that there was no miscarriage of justice.

An orthodox analysis of *Morgan* is that it exemplifies the stability and proper, protective principles of the common law. A fundamental, liberatory principle was upheld (subjectivity is necessary for criminal responsibility) while atrocious conduct in a particular case was dealt with appropriately. Where there is no contest between different conceptions of justice, the confluence between stability and inflexibility is difficult to see. Where there is such contest, the confluence is exposed. That is why *Morgan* is a good illustration of the point. For some (including a majority of the House of Lords), there was no justification in these circumstances to depart from the principle that criminal responsibility requires a fundamentally subjective state of mind. Perversity in the facts of a case, as occurred in *Morgan*, only serves to produce the ‘difficult case’ that requires a more conscientious adherence to principle. On this account, *Morgan* is an illustration of the strength and stability of the common law.⁶¹ On another account, the fair and proper administration of criminal justice can best be achieved by including an objective limit on a subjective state of mind — the objective limit being society’s minimum standard of conduct. Extreme facts, from this standpoint, constitute a different general category of events, rather than a perversity that falls outside of the one category. From this latter standpoint the common law as formulated by the House of Lords can more readily be characterised as inflexible.

As it happens, the mental state required in rape under the Griffith Codes is the one rejected in *Morgan*.⁶² However, the point here is not which mental state should be necessary for the offence of rape, nor even to insist that the common law be recognised as ‘inflexible’. It is to point out that the idea that the common law is *not* inflexible, only stable and consistent, is part of a mythology which helps emphasise an unreal distinction between it and codes. In other words it is suggested that Howard’s defence of *codes*, that ‘[r]igidity is sometimes a virtue’,⁶³

59 [1976] AC 182 (*‘Morgan’*).

60 Ibid 203–4, 209–10, 236.

61 Goode, ‘Constructing Criminal Law Reform’, above n 3, 157. The same general approach is evident in Kirby J’s reasoning in *DPP (NT) v WJI* (2004) 219 CLR 43, 61–3, 73–7.

62 A person is guilty of sexual penetration without consent under *Western Australian Criminal Code* s 325 (or rape under *Queensland Criminal Code* s 349) if they make an honest but unreasonable mistake that the complainant was consenting to sex. This is constructed by the elements of: sexual penetration without consent (*Western Australian Criminal Code* s 325; *Queensland Criminal Code* s 349); and no criminal responsibility for an honest and reasonable belief about the existence of a state of things (*Western Australian Criminal Code* s 24; *Queensland Criminal Code* s 24). See also Thomas Crofts, ‘Identifying the Criminal Act in Rape’ (2005) 29 *Criminal Law Journal* 237.

63 Colin Howard, ‘The Protection of Principle under a Criminal Code’ (1962) 25 *Modern Law Review* 190, 196.

can also be the way in which we describe the common law's virtue — *and*, that if this is the perspective we take, then 'code' and 'common law' worlds are not so far apart.

B Assumption 2: Codes are Shallow and Mechanistic — Loss of the Common Law's Depth

Objections to codification invoke not only the idea that it is difficult for codes to adapt but also the idea that, when replacing the common law, they sacrifice a better, richer legal process. This involves a lament about the loss of the eloquence in common law legal reasoning to the mechanistic analysis associated with codes and about the disengagement from deep questions of principle and morality that is assumed to come with codification. The common law is somehow a truer, subtler rendition of a human society. Blackstone described judges as the 'living oracles' who discern the law from custom performed from time immemorial⁶⁴ and Pollock described codes as a 'brutal interference with the natural process of legal reason'.⁶⁵

Judicial discourse from code jurisdictions does tend to be sparse and enters the field of moral philosophy less often than does the discourse of the common law.⁶⁶ Take, for example, judicial analysis of the state of mind a citizen must have to be convicted of murder. If in the act of killing another person, a citizen foresaw that person's death as an inevitable outcome but had as their purpose in acting an outcome unrelated to the death, is the citizen guilty of murder, or only manslaughter? What if the citizen foresaw the person's death as a virtual certainty (or as probable, or possible) but had a purpose unrelated to the death? The simple construct of foresight/purpose is, in reality, a very rough model for understanding our lived experience of agency.⁶⁷ Nevertheless, a series of English common law cases grappled with some of the underlying philosophical issues.⁶⁸ The same

64 Sir William Blackstone, *Commentaries on the Laws of England* (Cadell and Davies, 15th ed, 1809) vol 1, 68.

65 Letter from Frederick Pollock to Oliver Wendell Holmes, 21 July 1877, 7, quoted in *Vallance v The Queen* (1961) 108 CLR 56, 58. See also Jeremy Horder, 'Criminal Law' in Peter Cane and Mark Tushnet (eds), *The Oxford Handbook of Legal Studies* (Oxford University Press, 2003) 226, 228.

66 The way law students in Australia are taught reflects this. In common law jurisdictions textbooks follow the traditional British approach of examining the fundamental principles of criminal responsibility, the general part, followed by specific offences. Exciting questions of moral responsibility and the make-up of criminal responsibility are among the first things a student of criminal law encounters. In code jurisdictions a prosaic approach is generally taken. For example, on the first page of one first-year student text the authors refer to the criminalisation of homosexuality, euthanasia and prostitution as 'vital' social issues which are of little concern to code lawyers 'because the legislatures have codified those communities' views in this regard': Eric J Edwards, Richard W Harding and Ian G Campbell, *The Criminal Codes: Commentary and Materials* (Lawbook, 4th ed, 1992) 3.

67 See, eg, Frank Jackson, 'How Decision Theory Illuminates Assignment of Moral Responsibility' in Ngairé Naffine, Rosemary Owens and John Williams (eds), *Intention in Law and Philosophy* (Ashgate, 2002) 19; Grant Gillett, 'Intention and Agency' in Ngairé Naffine, Rosemary Owens and John Williams (eds), *Intention in Law and Philosophy* (Ashgate, 2002) 57.

68 *Hyam v DPP (UK)* [1975] AC 55; *R v Maloney* [1985] AC 905; *R v Hancock* [1986] AC 455; *R v Nedrick* [1986] 3 All ER 1; *R v Woollin* [1999] 1 AC 82.

questions were answered in Australian code jurisdictions in a perfunctory way in *R v Willmot [No 2]*,⁶⁹ *R v Glebow*⁷⁰ and *R v Reid*.⁷¹ In *Willmot [No 2]*, Connolly J wrote:

The mental element which must be proved when a case of murder goes to the jury under s. 302(1) [of the *Queensland Criminal Code*] is intention to cause death or to do grievous bodily harm. The ordinary and natural meaning of the word ‘intends’ is to mean, to have in mind. Relevant definitions in *The Shorter Oxford English Dictionary* show that what is involved is the directing of the mind, having a purpose or design.⁷²

The conceptual elegance in the code interpretation of ‘intention’ is perhaps overlooked. It may be that a simple, textual approach is desirable but the question here is — is such an approach dictated by the fact that the source of the law is a code? In these cases dealing with the mental state required for murder, the same social question was at issue as in the common law cases: what part does a citizen’s foresight, in the absence of purpose, play in the legal requirements of murder? The same underlying question was at stake in both and nothing in principle, it would seem, precluded a more thorough-going discussion of the meaning of ‘intent’ in order to interpret the term in the codes. If there are limitations on philosophical discourse which arise because the law is contained in a code, then those limitations are probably less significant than is assumed in the current legal culture. Engagement with social and moral issues through a legal lens is not precluded merely because the criminal law associated with them is codified. It is language, whether in legislative or judicial form, that embodies meaning. As discussed above, the social discussions of gender bias are embodied in the legal concept of reasonableness of response in the code laws on self-defence just as they are at common law. Perhaps statutes need not be so ‘brutal’.

Although code jurisprudence tends to be sparse there are examples of code analyses that do engage in a form of moral philosophy. Judicial discourse around the defences of provocation⁷³ and mistake⁷⁴ are examples of courts grappling with issues of race and gender equality and multiculturalism through the statutory concepts of the ‘ordinary person’ and a ‘reasonable belief’. In these instances the statutory interpretation of a criminal code provided the opportunity for what I have referred to as philosophical discourse which, at least in the case of provocation, became the foundation of the jurisprudence in both code and common law

69 [1985] 2 Qd R 413 (*Willmot [No 2]*).

70 [2002] QCA 442 (25 October 2002).

71 [2006] QCA 202 (9 June 2006).

72 [1985] 2 Qd R 413, 418. See also Campbell J at 416. Connolly J’s judgment was affirmed more recently in *R v Glebow* [2002] QCA 442 (25 October 2002) [25], [30]–[31].

73 *R v Stingel* (1990) 171 CLR 312 (*Stingel*).

74 *R v Mrzljak* [2005] 1 Qd R 308; *Aubertin v Western Australia* (2006) 33 WAR 87. For another illustration of the way ‘the law of statutory interpretation protects fundamental rights’, see Spigelman, ‘Common Law Bill of Rights, above n 27, 13. Yet another notable illustration of philosophical discussion in code interpretation is found in Wheeler J’s analysis of the objective component of provocation as applied to an assault offence in *Verhoeven v The Queen* (1998) 101 A Crim R 24. This concerned the question of how we should understand, objectively, what was ‘said’ in a racial slur.

jurisdictions.⁷⁵ It would seem that although the richness of discourse associated with common law jurisprudence is largely absent from code jurisprudence, discussions of that nature are not necessarily precluded because the task is one of code interpretation.

Thus, the simple ‘code/common law’ dichotomy relies on ideas about the nature of the common law and codes. Yet those ideas — such as the idea that the common law more easily follows the needs of the society it serves or that codes eliminate the opportunity for engaging with moral philosophy — are not, when examined, nearly as robust as they appear.

IV THE ‘SPECIAL RULES OF INTERPRETATION’ SAID TO PERTAIN TO CODES

In this Part a doctrinal argument is made: that the ‘special rules’ of interpretation said to pertain to codes are another way in which the false dichotomy between code and common law jurisdictions is maintained. The special rules of code interpretation promote the idea that the codes and the other criminal law statutes, including major legislation such as the *Crimes Act 1900* (NSW) and the *Crimes Act 1958* (Vic), occupy two radically different legal worlds. Although the rules have perhaps served an historical purpose, it is argued that, when examined, they can be seen to be almost meaningless and that exactly the same fundamental principles of statutory interpretation apply to criminal law statutes in common law jurisdictions and the criminal codes.

A The ‘Special Rules’ of Interpretation for Codes

The Griffith Codes contain no provisions setting out general principles of interpretation.⁷⁶ Therefore, rules of interpretation come from outside the codes, from other statutes, the common law or written, and perhaps unwritten, constitutional principles.⁷⁷ Early cases that were required to apply the Griffith Codes in the early 20th century referred to the fact of codification and that this now meant the common law had been replaced.⁷⁸ These references developed

75 *Stingel* was followed by the High Court five years later in *Masciantonio v The Queen* (1995) 183 CLR 58.

76 There is very limited guidance in s 3 of the *Criminal Code Act Compilation Act 1913* (WA), titled ‘Construction of Statutes, Statutory Rules, and Other Instruments’. That section deals with how the specific terms ‘felony’, ‘larceny’ and ‘murder’ in statutes other than the Code should be understood for the purposes of the Code.

77 Gani considers it ironic that the development of the rules of interpretation of codes in Australia is largely within the purview of the courts given that ‘one of the rationales for codification is to confine judicial lawmaking’: Gani, above n 33, 273. The argument in Parts IV(B)–(C) leads to a different view: that it is proper that rules of interpretation should be outside a code because, so far as principles of interpretation go, there is no special case to be made for codes, as distinct from other statutes.

78 See, eg, the early cases dealing with ‘assault’ under the codes: *Brady v Schatzel* [1911] St R Qld 206; *R v McIver* (1928) 22 QJPR 173.

into the 'rules of interpretation' in later cases such as *Brennan v The King*,⁷⁹ *Stuart v The Queen*,⁸⁰ *Boughey v The Queen*,⁸¹ *R v Barlow*,⁸² and *Director of Public Prosecutions (NT) v WJI*.⁸³ The rules appear to be exhortations not to be distracted by the common law. They operate as a kind of mantra: 'the common law is no longer the source; the law is now contained in this Code'.

The special rules derive from the *Bank of England v Vagliano Brothers*,⁸⁴ an English case dealing with the *Bills of Exchange Act 1882*, 45 & 46 Vict, c 61, which was said to codify the law dealing with negotiable instruments. The rules were restated in the later Australian case of *Brennan* where, in the context of interpreting s 8 of the *Western Australian Criminal Code*, Dixon and Evatt JJ wrote:

The section appears to be based in some respects upon the often cited statement of Sir Michael Foster in reference to accessories before the fact ... But it forms part of a code intended to replace the common law, and its language should be construed according to its natural meaning and without any presumption that it was intended to do no more than restate the existing law. It is not the proper course to begin by finding how the law stood before the Code, and then to see if the Code will bear an interpretation which will leave the law unaltered.⁸⁵

Thus, the 'first loyalty' is to the enactment, and not the pre-existing law.⁸⁶ However, this does not mean that

resort may never be had to the previous state of the law ... If, for example, a provision be of doubtful import, such resort would be perfectly legitimate. Or, again, if ... words be found which have previously acquired a technical meaning, or been used in a sense other than their ordinary one ... the same interpretation might well be put upon them in the code.⁸⁷

These two categories of exception (ambiguous language and language which is the same as a technical, common law concept) which justify resort to pre-existing law were expressed by Lord Herschell in *Bank of England* as non-exhaustive examples of situations in which this resort could be made. The categories have, however, ossified and are now the two classic circumstances in which one is said to be permitted to resort to the prior common law when interpreting the criminal codes: ambiguity and 'technical meaning'.

Thus, the special rules formulated in *Bank of England* and *Brennan* can be stated in this way:

79 (1936) 55 CLR 253 ('*Brennan*').

80 (1974) 134 CLR 426 ('*Stuart*').

81 (1986) 161 CLR 10 ('*Boughey*').

82 (1997) 188 CLR 1 ('*Barlow*').

83 (2004) 219 CLR 43.

84 [1891] AC 107 ('*Bank of England*').

85 (1936) 55 CLR 253, 263, citing *Bank of England* [1891] AC 107, 144–5 (emphasis altered).

86 *DPP (NT) v WJI* (2004) 219 CLR 43, 66 (Kirby J).

87 *Bank of England* [1891] AC 107, 145.

- codes replace the common law;
- their language should be construed according to its natural meaning; and
- pre-existing law should only be resorted to, to aid interpretation, where either the code's words are ambiguous or the words had previously acquired a technical meaning.

The early case of *Brennan* serves as a good illustration of how statements about how codes should be approached differently have, on the one hand, had some effect in resisting the grooves of common law reasoning but, on the other hand, are limited in that effect. There is some 'resistance' to common law method in this sense in parts of Dixon and Evatt JJ's judgment and none at all in the judgment of Starke J. After making their now famous statement about interpreting codes quoted above, their Honours reached their decision by analysing the terms of the relevant section of the *Western Australian Criminal Code*, s 8. It is worth quoting the passage that follows their general statement to show how their Honours' reasoning adheres closely to the text of the provision.

The expression 'offence ... of such a nature that its commission was a probable consequence of the prosecution of such purpose' fixes on the purpose which there is a common intention to prosecute. It then takes the nature of the offence actually committed. It makes guilty complicity in that offence depend upon the connection between the prosecution of the purpose and the nature of the offence. The required connection is that the nature of the offence must be such that its commission is a probable consequence of the prosecution of the purpose.⁸⁸

The reasoning continues in this vein, identifying through the terms and concepts of the Code the conundrum at the heart of the case: whether the liability of a party to an offence who has acted as lookout can constitute a manslaughter conviction when the main actors were convicted of murder.⁸⁹ Their Honours' decision, at least with respect to s 8 of the Code, thus avoids slipping into common law concepts as a primary framework.⁹⁰

In Starke J's reasons there is no general statement about principles of interpretation of codes and his Honour's method is purely that of the common law. The relevant Code provisions are quoted but only *after* 'the English law' on 'aiders and abettors' and 'principals in the second degree' is set out.⁹¹ Virtually no reference is made to the terms of the section and none to the statutory context or purpose of the legislation.⁹²

88 (1936) 55 CLR 253, 263–4

89 Ibid 265. The term 'party' is the equivalent of a common law 'accomplice'.

90 This is not so with respect to their reasoning about s 7 of the Code. Dixon and Evatt JJ rely on general common law concepts of 'aiding and abetting', citing no authority: ibid 264–5.

91 Ibid 259. These terms appear nowhere in the Code.

92 There is no textual analysis of s 7. The one instance with respect to s 8 concerns the term 'probable consequence' which his Honour describes as 'that which a person of average competence and knowledge might be expected to foresee as likely to follow upon the particular act': ibid 260–1. This is described as 'only a guide to the exercise of common sense' and not 'a determination'.

Thus, there has been a consciousness from the time of enactment of the Griffith Codes that they ‘replaced’ the common law and from there grew what are understood to be the rules for interpreting codes. And, although that consciousness appears to have encouraged a greater focus on the provisions of the codes in some instances, in others the statutory provisions were ignored.

B Problems with the ‘Special Rules of Interpretation’ of Codes

Something more is argued here than that the ‘special rules of interpretation’ for codes have been ineffective. It is argued that they positively obscure and obstruct a proper approach to the interpretation of the codes. They suggest codes have a quasi-constitutional nature, they command analytical attention while the well-developed general rules of statutory interpretation are largely ignored and they create a dissonance which, arguably, also distracts attention from a proper process. The specialness of codes created by the rules further isolates code jurisdictions from common law jurisdictions because even the statutes in common law jurisdictions are constructed as being in a different constitutional world from that of the criminal codes.

1 The ‘Special Rules of Interpretation’ suggest Codes have a Quasi-Constitutional Nature

It is clear that a code is the same as any enactment in its source of authority (a Parliament) and the procedure for enactment (passed by a majority of each House of Parliament and given Royal Assent). Codes have the same constitutional nature as any statute and statements to this effect sometimes begin a court’s discussion of the special rules for codes.⁹³ However, notwithstanding these expressions, it is argued here that judicial and academic discourse on what a code is, suggests inaccurately that codes *do* have a quasi-constitutional character different from and more profound than other Acts. Five aspects of this discourse are set out here, with some examples and analysis aimed at clarifying why the discourse is misleading.

1. Judges describe the criminal codes as a different kind of legislation. For example in *Barlow*, Kirby J describes codes as a ‘species of legislation’, ‘subject to a paramount rule’.⁹⁴ And in *Boughey*, Brennan J refers to a ‘paramount rule’ specific to codes.⁹⁵
2. Statutory effect is often assigned to an Act because it is designated a ‘code’ when in reality it can only ever be the terms of the Act that create the statutory effect. For example, it is sometimes assumed that all offences in a code jurisdiction have their source in statute law not the common law

93 *Barlow* (1997) 188 CLR 1, 31 (Kirby J); *DPP (NT) v WJI* (2004) 219 CLR 43, 66 (Kirby J).

94 (1997) 188 CLR 1, 31.

95 (1986) 161 CLR 10, 30.

because the criminal law ‘is codified’.⁹⁶ In reality, insofar as criminal offences do have their source in statute law alone, it is because specific legislative provisions determine this. In Western Australia, for example, all offences have their source in statute law except one — the common law offence of contempt of court — because ss 4 and 7 of the *Criminal Code Act 1913* (WA) expressly determine this. It is sometimes assumed that principles of criminal responsibility set out in a code apply also to offences created in other Acts of the same legislature because they are ‘codified’ when in reality they apply to other Acts because the terms of the code provide expressly for this.⁹⁷ *There is no force of law that a code has other than its force as a statute.*

3. There is an absence of judicial and academic discussion aimed at determining the parliamentary purpose of any *particular codification* — ie the purpose in designating an Act a ‘code’ (whatever the subject matter of the Act). There is an assumption that each Parliament that so designates an Act had the *same* purpose, suggesting there are fundamental characteristics that arise because of the designation itself. Yet, there are a number of motivations that can result in a codification and some, as discussed in Part II, have no automatic relevance to the exercise of judicial power. It is true that codifications offer a ‘quasi-constitutional conception of ... law reform’⁹⁸ or may serve to unify jurisdictions for example. But these are very broad political, administrative or constitutional aims that have no automatic relevance to the exercise of judicial power in interpreting the subject matter of each Act. The point here is that insofar as *codification projects* very often have a constitutional nature it appears to be accepted without note or justification that *each code, as a statute*, has a quasi-constitutional nature affecting the way its content should be construed.
4. References to codes as a different form of enactment and statements of the rules of interpretation said to apply are made *before* the statutory interpretation exercise for the particular case begins. There is a suggestion in this analytical order that the characterisation of an Act as a ‘code’ is fundamental; that it is the very nature of the statute that is different, not that there is a difference of a lower order, concerning the content or structure of the specific enactment under scrutiny which may become relevant once the general exercise of statutory interpretation is begun.
5. Apart from express statements by judges and commentators that codes are a special kind of legislation, the insistence, itself, that different ‘paramount’ rules of interpretation are applicable according to the kind of legislation in question is to *presuppose a different constitutional status* for that kind of legislation. Indeed, such different rules of interpretation would *themselves*

96 See, eg, Ian Leader-Elliott, ‘Elements of Liability in the *Commonwealth Criminal Code*’ (2002) 26 *Criminal Law Journal* 28, 31–2.

97 See, eg, *Western Australian Criminal Code* s 36; *Queensland Criminal Code* s 36; *Commonwealth Criminal Code* pt 2.1.

98 Wright, ‘Self-Governing Codifications’, above n 16, 41.

create a different constitutional status for the legislation in question because they would constitute a different relationship between the judiciary and the legislature. Within a Westminster system of government, the legislature creates and the judiciary interprets laws.⁹⁹ In other words, as a matter of Australian constitutional law, the legislature and judiciary stand in the same relationship with regard to any statute, code or otherwise. The primary rules of statutory interpretation are the expression of that relationship.¹⁰⁰ Once the legislature has created a statute the rules of interpretation define the way in which the judiciary must deal with the enactment. There are different theories about how best to achieve a proper construction; there are particular presumptions relating to the *content* of legislation (such as presumptions relating to criminal statutes) or the relationship *between enactments* (such as the relationship between human rights Acts and other statutes). But, as a matter of constitutional principle, there cannot be different paramount principles of statutory interpretation for different pieces of legislation; there is only one form of legislation.

Thus, although it is clear that codes are not a unique form of legislation, the discourse surrounding them within cases and in commentary suggests that they are — that in some unexplained way, they have a different constitutional nature.

2 Two Further Problems with the Special Status and Special Rules for Codes

Two further problems arise from the idea that there are rules of interpretation peculiar to codes and from the related idea that in some unexplained way codes are considered to have a quasi-constitutional status. First, the special rules pertaining to codes command attention, while the ordinary, well developed and articulated rules of statutory interpretation are largely ignored. Focus on codes as ‘special’, with their own rules of interpretation, appears to encourage an approach in which these rules are stated and explained and then the code provision in question is interpreted without reference to the detailed, general rules of statutory interpretation. That is to say, the special rules said to pertain to codes appear to exhaust the list of rules which are understood to be applicable, leaving common law method to be engaged to resolve the specific problem.

Paradoxically, *Barlow*, which is the foundational case now relied on for an explanation of the special rules of interpretation, is an example of this. In *Barlow* the accused was convicted of manslaughter of a co-prisoner in a Queensland jail.

99 According to some theories of interpretation, there is a source of law distinct from Parliament and the judiciary. The ‘principle of legality’ or common law Bill of Rights refers to a source of law which exists a priori, in the Westminster system of government: see Spigelman, ‘The Common Law Bill of Rights’, above n 27, 22–4, 34–6. But, even if this theoretical position is taken, there is no contest about the paramourcy of Parliament.

100 Ibid 22–4; Justice James Spigelman, ‘Legitimate and Spurious Interpretation’ in *The McPherson Lectures: Statutory Interpretation and Human Rights* (University of Queensland Press, 2008) 101, 143–5; *Zheng v Cai* (2009) 239 CLR 446, 455–6; *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 264–5.

He was convicted as a party to an offence committed by two other men, who bashed the victim to death.¹⁰¹ The accused's role was to entice the victim to the prison gym, and there was evidence that he watched the assault with approval and acted with bravado afterwards.¹⁰² The two men who bashed the victim were convicted of murder whereas Barlow was convicted of manslaughter, as a party under s 8 of the *Queensland Criminal Code*. The question on appeal to the High Court was the same as that in *Brennan*, discussed above — whether, under s 8, an accused could be convicted of an offence different from that with which the main offender was convicted. Thus, the case turned on the meaning of s 8 of the *Queensland Criminal Code*.

Kirby J begins his analysis with the four paragraphs which have become an important reference for principles of interpretation of the criminal codes.¹⁰³ He sets out general principles of interpretation, the special rules for codes, the desirability of uniformity between code and non-code jurisdictions and a statement that the word 'offence' in s 8 is 'inherently ambiguous'.¹⁰⁴ Having set out a general approach in some detail, Kirby J proceeds to analyse the problem of ambiguity in s 8 primarily by applying common law method. Instead of examining the terms of s 8 and its place in the schemes of the Code, his Honour refers immediately to case law. The vital first step in statutory interpretation method — an examination of the primary authority in the statute, its terms and their statutory context — is absent. His Honour looks first at code-state cases (then 'non-code' cases, followed by 'foreign authority') but the analyses are of the *conclusions of another court*.¹⁰⁵ The directing inquiry is not about what the words in s 8 mean. Rather, it is a survey of judicial opinion from different jurisdictions applying various laws.

In contrast to Kirby J's judgment, the joint judgment of Brennan CJ, Dawson and Toohey JJ does not refer to special rules pertaining to codes but proceeds with the exercise of statutory interpretation of s 8. The analysis begins with the ambiguous term ('offence') and maintains focus on the terms and context of s 8 and its context in the Code.¹⁰⁶ The directing inquiry is: what is the meaning of the statute? Cases are examined after this analysis and their correlation, or otherwise, with the interpretation arrived at is considered.¹⁰⁷ It is noted that the interpretation arrived at accords with Jacobs J's view in *Stuart* and observations in Western Australian and Tasmanian cases.¹⁰⁸ It is also noted that it is 'to the same effect' as the common law in *Markby v The Queen* but that '*Markby* expressed the common law; it did not interpret the Code'.¹⁰⁹

101 *Barlow* (1997) 188 CLR 1, 26–7.

102 *Ibid* 26.

103 *Ibid* 31–3.

104 *Ibid* 32–3.

105 *Ibid* 33–40.

106 *Ibid* 10.

107 *Ibid* 11–14.

108 *Ibid* 11.

109 *Ibid* 12, citing *Markby v The Queen* (1978) 140 CLR 108 ('*Markby*').

Thus, the joint judgment is an exercise in statutory interpretation but does not refer to special rules of interpretation relating to codes whereas Kirby J's judgment sets out in some detail the rules said to be applicable to code interpretation but proceeds largely with common law method.¹¹⁰ It may be that focus on 'special rules' for codes is distracting attention from a proper statutory interpretation process. At the least, a statement of the rules did not assist.

The second more profound problem arising from the special rules of interpretation said to pertain to codes is the dissonance the rules themselves contain. The rules said to be special to codes are, as set out above, are:

- codes replace the common law;
- their language should be construed according to its natural meaning; and
- pre-existing law should only be resorted to, to aid interpretation, where either the code's words are ambiguous or the words had previously acquired a technical meaning.

But these are general rules of statutory interpretation. All statutes replace the common law insofar as they are inconsistent with the pre-existing law. The task underpinning all statutory interpretation is to ascertain the meaning of the statute and in doing so the first reference is the form of words, in their context, taking account of the legislative purpose.

The point here is that the curious persistence in describing what are general principles of statutory interpretation as rules peculiar to codes, itself creates a dissonance: something that is plainly untrue (the rules apply especially to codes) is asserted as a reality. It may be that this uncomfortable tension contributes to the approach described above in which courts pay careful attention to the fact of codification or to the more detailed rules of interpretation but proceed by ignoring the terms of the statute and the more detailed and nuanced rules of general statutory interpretation. That is, the dissonance itself may command an uneasy attention and lead to the statements of these overlapping rules themselves taking the place of the actual work of statutory interpretation.

C Codes as Statutes

A proper approach to the legal interpretation of codes is that they are statutes, pure and simple; there are no general rules of interpretation that apply peculiarly to a 'code' as a reified notion of a special form of law. The value in this approach (apart from its constitutional correctness) is that it directs attention to the fact that *all* the law on statutory interpretation — that in Interpretation Acts, the common law, other statutes and constitutional principles — is available and should be applied when interpreting a code. It is not that judicial discourse denies the relevance to the criminal codes of these general principles of statutory interpretation but that the principles do not appear; they are not the language of code interpretation.

¹¹⁰ *Barlow* (1997) 188 CLR 1, 31–3.

Even principles especially relevant to criminal laws (such as the presumption that penal statutes should be interpreted strictly and the presumption against retroactivity) do not generally feature in code interpretations. This is the law on how the Griffith Codes should be interpreted, yet such principles are rarely applied.

If this approach is taken the numerous criminal law statutes in the ‘common law jurisdictions’ are in the same world, as it were, as the criminal codes. The sources of statutory interpretation law are the same. And, subject to any differences in state Interpretation Acts, the rules themselves are the same. The state, territory and Commonwealth statutory schemes for statutory interpretation reflect the common law approach: ascertaining the meaning of a provision via the text, in context and with reference to the legislative purpose.¹¹¹ The Hon Michael Kirby refers to the three-fold approach to statutory interpretation as a mantra: text, context and purpose and the greatest of these is text.¹¹²

Viewing codes as statutes, pure and simple, does not mean that the fact that a Parliament has designated an Act a ‘code’ may have no place at all in the statutory interpretation exercise. The designation may be of significance as a particular aspect of the exercise but not as a paramount principle. The first primary step in statutory interpretation is to examine the ordinary meaning of a provision. That an Act is designated a code has no relevance for this step because it concerns the text of a particular section. If the ordinary meaning is unclear the second and third primary steps in statutory interpretation become relevant: the statutory context of the section and the parliamentary purpose of its enactment. The fact that an Act is designated a code may or may not be relevant here since, as discussed in Part II, there are numerous motivations for codifying an area of law and any one codification project may involve more than one motivation. For example, insofar as the parliamentary purpose in codifying was to rationalise the *whole administration* of a state’s or nation’s criminal law or, say, to promote the democratic value in parliamentary sovereignty,¹¹³ those purposes have no relevance to interpreting *the meaning of a particular provision*. If, on the other hand, the aim in codifying the law was to restate particular common law principles in an orderly statutory form,¹¹⁴ or to depart from pre-existing law in order to modernise it,¹¹⁵ then common law cases would be relevant either to examine the possibility of a statutory interpretation that conforms with the pre-existing law or for comparison and contrast. A parliamentary purpose of presenting a comprehensive scheme of liability that includes the particular section being

111 See *Acts Interpretation Act 1901* (Cth) ss 15AA, 15AB; *Interpretation Act 1984* (WA) ss 18, 19; *Legislation Act 2001* (ACT) s 139; *Interpretation Act 1987* (NSW) ss 33–4; *Acts Interpretation Act 1954* (Qld) ss 14A, 14B; *Acts Interpretation Act 1915* (SA) s 22; *Acts Interpretation Act 1931* (Tas) ss 8A–B; *Interpretation of Legislation Act 1984* (Vic) s 35.

112 He invokes the biblical injunction to have faith, hope and love in 1 Corinthians 13:13: Michael Kirby, ‘Statutory Interpretation: What on Earth Does It Mean?’ (Speech delivered at Public Lecture, University of Western Australia, 27 February 2012).

113 See Part II(D).

114 See Parts II(A)–(B).

115 See Part II(C).

interpreted would encourage close scrutiny of the interconnectedness of the relevant statutory provisions.¹¹⁶

It may be relevant, therefore, in a particular statutory interpretation exercise that the provision in question is contained in a statute designated a 'code'. But even if this is the case the main arguments made here should be noted again: that beyond being an 'alert' that would support an interpretation different from/in conformity with pre-existing law, or a special focus on the interconnectedness of the provisions, the designation 'code' should have no necessary or 'paramount' influence on the process of arriving at a proper construction of a particular provision. In other words, the designation 'code' is, if it appears in the statute itself, *part of the legislative context*; if it appears in other documents, it is *part of the extrinsic material* that may bear on interpretation of a provision in numerous ways. This approach is simpler in principle than the current approach that treats codes as special. However, in application it would be no simpler. Indeed, it would bring with it the complexities of statutory interpretation which the blunt notions that 'codes replace the common law' and 'codes have special rules of interpretation' at present purport to remove. The advantage would be that it would place (correctly) the criminal codes and the many criminal law statutes in Australia in the same analytical world.

V CONCLUSION

This article has been motivated by the trench that exists between 'code' and 'common law' criminal law jurisdictions in Australia. It has argued that some parts of the trench are built on mythologies or habits of mind that are less than useful. A reified idea of a code is a basis for the simple dichotomy that is assumed to exist: code/common law. There are various political, administrative and social motivations for codification projects, not all of which affect the nature of a 'code' once it is in the judicial sphere. Codes are presumed to be inflexible and mechanistic, and the common law to be flexible and rich. The article has re-examined these ideas with the aim of showing they are not correct in crucial ways and yet they help to maintain the divide. That special rules of interpretation apply to the criminal codes is an orthodoxy taught to all first year law students. The article has challenged that orthodoxy and argued that a much more useful position is that the criminal codes should be interpreted with exactly the same primary principles of interpretation as those applicable to 'common law' states' criminal law statutes. That an Act was designated by a Parliament a 'code' is a circumstance to consider in the process but not a first-order principle of interpretation.

116 Ibid. In this regard it is perhaps ironic that the scheme of criminal responsibility in the Griffith Codes has had such little attention.