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THEORIES AND NON-THEORIES OF CONSTITUTIONAL INTERPRETATION

A clear illustration may be found in s 80 of the Constitution, with its prescription of trial by jury in the case of specified federal offences.[1](23) At the time of Federation, when the constitution had been written, a "jury" incontestably comprised male nationals only; and then a more than a cohort of such persons who satisfied the requisite property qualifications. However, the Court did not impose on the word "jury" an "originalist" interpretation, despite the fact that it was a well-known expression enjoying long established prerequisites. Instead, the High Court adapted the word to extend its meaning to suit later social circumstances: the expanding role of women which had in a feature of the economic necessities of the Second World War and the more egalitarian and universal view about qualifications for jury service.[2] The High Court came to this conclusion facially by interpretation of the constitutional text. However, in undertaking that task, it would not but be influenced by the *context* of social and political facts and the view it took of the *purpose* that the jury, provided for in s 80, was intended to serve. It was, in its essence, a tribunal chosen so as to represent a microcosm of the community, called upon to represent it in determining serious criminal charges where liberty

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and reputation were at stake. Strict *literalism* and rigid *originalism* have not, generally, been the approach of the High Court to its central role as the authoritative interpreter of the Australian Constitution.

There are many more decisions of the court that illustrate these approaches to interpretation. The *Communist Party Case*, in which Justice Kitto participated is an instance where the members of the majority acknowledged candidly how, in confining the otherwise substantial ambit of the defence power, they were influenced by lessons which they derived from "history, and not only ancient history".[3] It was the majority's awareness in that case that "democratic institutions have been unconstitutionally superseded… not seldom by those holding the executive power".[4] A clearer illustration of the impact upon textual interpretation of non-textual practice and basic notions of the fundamental ideas expressed in the constitution, would be difficult to imagine. There are other more recent illustrations of the interplay of textual analysis and emerging social realities can be seen in the effective rejection by the High Court in 2013 of originalist notions, held at the time of Australia's Federation, concerning the meaning of the word "marriage" in s 51 of the Australian Constitution.[5] This also was a technical legal word, even more clearly so than was the word "jury". It described a particular legal relationship, having features that had been expressed authoritatively in judicial decisions.[6] The opponents of same-sex marriage in Australia argued that it was competent under its constitutional power for the Federal Parliament to prohibit same-sex marriage, based upon a notion they

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advanced concerning the ambit of the power.[7] The High Court, in a decision that upheld the challenge to a law of the Australian Capital Territory enacted to permit same-sex marriage in that Territory, contested "the utility of adopting or applying a single all-embracing theory of constitutional interpretation".[8] However, to the extent that the court adopts different approaches to interpreting the single text of the constitution, especially where apparently different approaches are adopted, it inevitably lays itself open to the criticism of selecting an approach that favours an outcome that it prefers for undisclosed reasons.

In the same-sex marriage case, whilst invalidating the Territory law, the High Court unanimously affirmed the constitutional power enjoyed by the Federal Parliament to enact a law that expanded a notion of "marriage" significantly beyond that enjoyed in 1901. The explanation given was that marriage law was "not a matter of precise demarcation" but instead "a recognised topic of juristic classification".[9] One might suggest that, in the nature of its function as a national constitution, intended to operate for an indefinite time, in rapidly changing circumstances, most of the words used might be labelled as "topics of juristic classification". It is then for the Court to explain and justify how far the "classification" extends the new label does not yield much guidance on how the "classification" is to be performed, specifically where its boundaries are to be drawn and by reference to what practice. The one clear *dictum* in the same-sex marriage case about discerning such boundaries was Windeyer J's portion that that the scope of the powers which the constitution gives is "not to be ascertained by merely analytical and a priori reasoning from the

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abstract meaning of words"[10] The foregoing features of constitutional interpretation in Australia appear to bring those charged with the responsibility of interpretation back to the prefundamental guideposts for discharging the task. It is not entirely at large. It does not authorise the decision-maker to yield to every personal preference or to personal notions of social desirability, convenience, utility or concepts of justice. I remain of a view that I expressed, with a nod to the Bible,[11] suggesting that the guideposts for interpretation were "text, context and purpose. These three. But the greatest of these is Text".[12]

THE PROBLEM DAWNS

A number of considerations began to present for Australians after the conclusion of the Second World War that required a closer inspection of s 44(1) of the Constitution. These included the enactment, for the first time in 1948, of a federal law providing for the concurrent state of Australian citizenship, alongside the more traditional monarchical nationality principle of allegiance to the King.[13] This provision recognised, and built upon, the emerging status of Australia as a fully self-governing and independent dominion of the Crown within the British Commonwealth of Nations. The demise of the British Empire so far as Australia was concerned was not only a feature of political realities made evident by the existential challenges of the War. It was also recognised in both pre-war[14] and post-war[15] with other political ideas, germinated in the fertile soil of

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the United States,[16] opportunities for political victories that had been denied by the electors, sprang into the fertile minds of political opponents, mostly of the Right.

The dominion of Canada was created by the *British North America Act* 1867 (Imp) (BNA). That Act was subsequently amended on a number of occasions by the United Kingdom Parliament, acting at the request, and at the consent, of the Canadian Parliament. The ultimate amendments were so enacted in 1982 in the form of the *Constitution Act* 1982 (UK) which included the *Canadian Charter of Rights and Freedoms.* As with the *Australia Act* 1986 (Cth) the constitutional force of the war was symbolised by the presence of the Queen signifying her Royal Assent respectively in Ottawa in 1982 and in Canberra in 1986.

Under the BNA, as originally enacted, detailed provisions were provided for the qualifications and disqualifications of members of the Parliament of Canada. So far as the qualifications of Senator in that parliament were concerned, these were provided by s 23 BNA as follows:[17]

> "The Qualifications of a Senator shall be as follows:
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> (1) [Age]
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> (2) He shall be either "a natural born subject of the Queen, or a Subject of the Queen naturalized by an Act of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland or of the Legislature of One of the Provinces of Upper Canada, Lower Canada, Canada, Nova Scotia or New

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Brunswick before the Union or the Parliament of Canada after the Union.

(3) [Property qualification]

(4) [Property qualification]

(5) He shall be resident in the Province for which he is appointed.

(6) In the case of Quebec [a special provision was made].

So far as the disqualification of Senators was concerned, this was provided by s 31 BNA:

(1) [Non-attendance];

(2) If he takes an Oath or makes a Declaration or Acknowledgement of Allegiance, Obedience or Adherence to a Foreign Power or does an Act whereby he becomes a Subject or Citizen or entitled to the Rights or Privileges of a Subject or Citizen of a Foreign Power;

(3) [Bankruptcy];

(4) [Convictions];

(5) [Ceases Property Qualification].

No equivalent provision of the BNA was enacted in relation to the qualifications or disqualifications of members of the Canadian Parliament. In the several provincial parliaments (as in the case of colonial parliaments in Australia) various qualifications were provided. By s 31 BNA it was enacted that the electoral laws thus enforce should continue until the Parliament of Canada "otherwise provides".

There were some common features between the United States Constitution and the Canadian provisions. The "natural-born"

requirement, a feature of many British colonies survived in the Canadian case. So did naturalisation. However, citizenship did not intrude as a qualification, being thought inappropriate to the monarchical form of government in Canada. Its only appearance was in the case of disqualification. However, in that case a positive act is required for disqualification such as taking an Oath; or making a Declaration; or acknowledging allegiance, obedience or adherence to a foreign power or doing an "Act" by which the person becomes a subject or citizen or entitled to rights and privileges as such. Under the Canadian provision it is not competent for the laws of a foreign country to impose an incompatible nationality status that will be disqualifying by their own force. Some initiative would be Senator is obligatory, whether it be an oath, declaration, acknowledgement or the doing of some other act. Slipping into, or retaining past links to a foreign country cannot, in Canada, be easily retained as disqualifications.

This was the background against which relevant provision of the Australian Constitution was adopted in the form in which it appears in s 44(i). That provision states:

> "Any person who –
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> (i) Is under any acknowledgement of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power; or
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> (ii) [Convictions]; or
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> (iii) [Bankruptcy]; or

(iv) Holds any office of profit under the Crown, or any pension payable during the pleasure of the Crown out of any of the revenues of the Commonwealth; or

(v) Has any direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth otherwise than as a member and in common with other members of an incorporated company consisting of more than 20-5 persons;

Shall be incapable of being chosen or of sitting as a Senator or a member of the House of Representatives.

At the time of the adoption of the Australian Constitution, and for decades thereafter, the overwhelming majority of persons living in the country, who were electors and who contemplated (or did in fact) offer themselves to be chosen and who sat as a member of either House of the Federal Parliament faced no problem of dual nationality. This was so for a combination of reasons rested mainly upon two features of the Australian Commonwealth until well into the second half of its first century. Those features were first the composition of the Australian population (by native-born) subject of the British monarch; and second the 'White Australia Policy' which applied throughout the country from colonial times and which was even applied to exclude British subjects until the legal regime which supported that immigration regime began to change between 1966 and 1975.[18] Effectively, the Commonwealth's immigration laws made it extremely difficult for migrants to enter the country, except from 'white' British dominions (the United Kingdom, Canada, New Zealand and some

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South Africans and Rhodesians) or from ‘white’ countries of Northern Europe; a restriction that changed slowly after 1948.

The initial interpretation that would have been given to s 44 of the Australian Constitution for at least two decades after the Constitution came into force would have been literal and legalistic. At such a time (and indeed, in practice, for decades afterwards) there was no possibility whatever that a person whose nationality status was that of a subject of the King (or Queen) of the United Kingdom would be disqualified by the language of s 44 (i). Far from such a person being treated as disqualified from being chosen or sitting as a Senator or Member of the House of Representatives, it would have been regarded as exactly the qualification required and appropriate to candidates and elected members of the Parliament. The fact that overwhelmingly such ‘British subjects’ happen to be ‘white’ was a coincidence, but one consistent with the then near and unanimous conception of an essential characteristic of the Australian nation.

THE PROBLEM DAWNS

As befits the democratic character of the Australian constitution, with its consequent need to adapt to new and unforeseen circumstances, the text, as interpreted by the High Court of Australia, commonly adapted to new conceptions affecting the people living under its protection. The advent of the Great War was the background against which the ambit of the defence power[19] expanded considerably to meet at once the needs of the new federal nation and the practical incapacity of the United Kingdom, so

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far away, to respond to those needs.[20] There are many instances that illustrate the impact upon the meaning of the constitutional text of changing national and international circumstances.

Other developments that occurred in the succeeding years included the adoption of a substantially bipartisan national policy for the abolition of the 'White Australia' policy; the ratification of the convention on all forms of racial discrimination; the enactment of the *Racial Discrimination Act* 1975 (Cth); the decisions of the High Court upholding the constitutional validity of that Act at least on its interpretation of the external affairs power ,[21] and the decision of the High Court in *Mabo v Queensland [No.2].*[22] That decision upheld the existence of residual native title in Australia reversing more than a century of contrary law. A consideration referred to in the reasons of the court was the universal principle recognised by civilised countries and reflected in international law prohibiting discrimination on the grounds of race.[23] In these decisions, clearly the majority of the high Court were influenced, not only by verbal analysis of the Constitutional but also by developments in Australian society and in the world.[24]

It is against this background that the series of cases involving challenges to the election of members of the federal parliament after 1992 must be considered.[25] That is when the leading decision in *Sykes v Cleary* was delivered.[26] It will be necessary to return to that decision because it disclosed an important division amongst the justices of the High Court

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concerning the meaning and operation of s.44(i) of the Australian Constitution. If I sit for present purposes per say that a majority of the justices in *Sykes* concluded that that growing numbers of Australian citizens who had dual nationality were disqualified from offering to be, or being, elected to the Federal Parliament; whether a person was a citizen or national of a foreign state was to be determined according to the foreign law of that state. The mere fact that such persons had acquired Australian citizenship and severed domestic and social links with their country of birth would not prevent their being disqualified under s 44(i). At least, it would not do so where the person concerned "had taken all reasonable steps to divest himself or herself of any conflicting allegiance."[27]

This exception, acknowledged by the majority in *Sykes v Cleary* did not have a textual foundation in the language of s 41(i) of the Australian Constitution. It was an exception implied into the text by the apparent unacceptability perceived in a purely textual interpretation. What was apparently considered to be so unacceptable was "disqualification of Australian citizen on who there was imposed involuntarily by operation of foreign law a continuing foreign nationality, not withstanding that they had taken reasonable steps to renounce that foreign nationality". In reaching this view, the majority looked outside the text at a report by the Senate Standing Committee on Constitutional and Legal Affairs[28] and extreme instance of unacceptable consequences was the theoretical possibility that a foreign state could otherwise immobilise, upon the literal interpretation of the paragraph the operation of the Federal Parliament by "mischievously conferring its nationality on members of the parliament so

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as to disqualify them all".[29] Here we see the court Here we see the Court struggling with a rather unlikely, but theoretical, risk of an over literal interpretation of the Constitution.

However, it was not necessary to reach for such an absurd possibility when the practical consequences of literalism would be bad enough in themselves. Thus, a result of the foregoing loosening up of the nationality and racial characteristics of the Australian society in the second half of the 20th century already meant, that by 1997, millions of Australians enjoyed dual nationality. Unless some different interpretation of s 44(i) were adopted the astonishing consequence would be that millions would be denied an important attribute of their status as an Australian nationality (citizenship) to offer themselves as candidates for election to the Federal Parliament and, if they achieved the requisite majority, of being elected and taking their seat in that parliament. That possibility, and not hypertheical "mischievous" speculations ought, one would think, to have driving the High Court to an interpretation of s 44(i) delivered by the majority in *Sykes v Cleary*. If it was possible to add the modest disqualification to the unwished for operation of foreign law in elucidating the meaning of the Australian Constitution (taking all reasonable steps to divest… any conflicting allegiance) the question is posed as to whether the constitutional text would support a more substantial exception. Afterall, as the majority acknowledged in *Sykes v Cleary*, "what amounts to taking a reasonable step to renounce foreign nationality must depend upon the circumstances of the particular case. What is reasonable will turn on the situation of the individual, the requirements of the foreign law and the extend of the connection between the individual and the foreign State of

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which he or she is alleged to be a subject or citizen.[30] Once judges allow exceptions, they are well and truly in the realm of individual cases. The text of the constitution is no longer a sufficient guide. Then it is necessary to find solace and solutions in indicia beyond the text. Those indicia include the context (internal and external) and the purpose of the constitutional provision.

Other developments that occurred in the succeeding years included the adoption of a substantially bipartisan national policy for the abolition of the 'White Australia' policy, the ratification of the Convention of the elimination of all forms of Racial Discrimination; the enactment of the *Racial Discrimination Act 1975* (Cth); the decisions of the High Court upholding the constitutional validity of that Act, at least on its interpretation of the external affairs power;[31] and the decision of the high Court in *Mabo v Queensland [No.2]*[32]*.* That decision upheld the existence of residual native title in Australia, reversing more than a century of contrary law. A consideration referred to in the reasons of the Court was the universal principle recognised by civilised countries and reflected in international law prohibiting discrimination on the grounds of race.[33] In these decisions, clearly the majority of the High Court were influenced not only by verbal analysis of the constitution but also by national and international developments in Australian society and in the world.[34]

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It is against the background that the series of cases involving challenges to the election of members of the federal parliament after 1992 must be considered. That is when the leading decision in *Sykes v Cleary* was handed down.[35] It will be necessary to return to that decision because it disclosed an important division amongst the Justices of the High Court concerning the meaning and operation of s. 44(i) of the Australian Constitution. If I sit for present purposes per se that a majority of the Justices in *Sykes* concluded that the growing numbers of Australian citizens who had dual nationality were disqualified from offering to be, or being, elected to the Federal Parliament, whether a person was a citizen or national of a foreign state was to be determined according to the law of that foreign state. The mere fact that such persons had acquired Australian citizenship and severed domestic and social links with their country of birth would not prevent their being disqualified under s.44 (i). At least, it would not do so where the person concerned "had taken all reasonable steps to divest himself or herself of any conflicting allegiance".[36]

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Senate Standing Committee on Constitutional and Legal Affairs[37] an extreme instance of unacceptable consequences was the theoretical possibility that a foreign state could otherwise immobilise, upon literal interpretation of the paragraph. The operation of the Federal Parliament by "mischievously" conferring its nationality on members of the Parliament so as to disqualify them all.[38] Here we see the Court struggling with a rather unlikely, but theoretical, risk of an overliteral interpretation of the constitution.

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