Dual citizenship and Section 44: what role of the court?

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Dual Citizenship and Section 44: What Role of the Court?

The relevance of section 44 of the Australian Constitution has again been questioned. Senator Matt Canavan has resigned as a minister on account that he might be an Italian citizen. It seems anomalous to the naked eye that there was sufficient grounds to resign as minister but insufficient grounds to resign as senator, if he is indeed, a senator. The amorphous test he applied to the ministerial resignation was "the uncertainty raised by this matter". Section 44(i) is concerned with parliamentary seats, not ministerial warrants. Inconsistently, the Hon. Barnaby Joyce has not resigned as Deputy Prime Minister and, ironically, from the portfolios he assumed from Canavan, once it was confirmed on 14 August 2017 that he was a New Zealand citizen by descent on the grounds that, in the troubling words of the Prime Minister, he "is qualified to sit in this House and the High Court will so hold".

Senator Canavan has defended himself broadly on the ground that he "was not born in Italy, [has] never been to Italy, and to [his] knowledge never stepped foot in an Italian consulate or embassy." Further, the Attorney-General stated, albeit preliminarily, "that because the registration [of citizenship] was obtained without Senator Canavan's knowledge or consent, that he is not in breach of section 44 of the Constitution." Joyce is likely to adopt a similar argument: that section 44(i) requires a person to 'accept or acquiesce' to foreign citizenship to be considered disqualified.

Arguments relating to 'knowledge' or 'acknowledgement' are not relevant under section 44(i) in relation to citizenship. There has also been a legally irrelevant fascination with whether Canavan obtained citizenship *by descent* and with the fact that Joyce did and, but for the dubious decision in *Sykes*, whether he was aware of it. Under the deliberate drafting of section 44(i), citizenship is not conditioned on methods of its acquisition nor any states of mind; it is a status obtained or granted by law and either exists or doesn't exist. The relevant issue for Canavan ought to be whether his citizenship was acquired lawfully under Italian law and whether he was a dual citizen on the date of his nomination for the 2013 general election. In the Joyce matter, there are no issues; he has been confirmed as a dual citizenship since birth. He only renounced his New Zealand citizenship on 15 August 2017. These matters are destined for the High Court, sitting as the Court of Disputed Returns ("Court"). The fear is that the Court will continue to improperly and undemocratically develop substantive tests.

The case of *Sykes v Cleary* will undoubtedly be cited by Canavan and Joyce. The majority in *Sykes* opined that it "would be wrong to interpret the constitutional provision in such a way as to disbar an Australian citizen who had taken all reasonable steps to divest himself or herself of any conflicting allegiance." The case qualified section 44(i) by ruling that persons are only disqualified if they have not renounced or attempted to renounce their other citizenship. This is deeply-troubling.

First, citizenship is not conditional on allegiance and particularly there is invariably no acknowledgement of allegiance where citizenship is gained by descent. These types of statements and those of Canavan and others fail to recognise the structure of section 44(i).

Second, there are two independent points of time at which section 44(i) disables a person: at the date of his or her nomination; and after being sworn in as a senator or member of the House. Successfully renouncing citizenship after being elected does not validate the original breach of being incapable of even being chosen as a senator or member. If renunciation is unsuccessful or not possible, a breach of section 44(i) remains and is a continuing breach.

Third, the Court in *Sykes* qualified section 44(i) by judicial activism and injected a wholly substantive and mystical test of renunciation, or worse still, attempted renunciation as it relates to a sitting parliamentarian. This is clearly against the text of section 44(i) relating to citizenship and against the textualist approach. In doing so, seven men effectively amended the Constitution which rendered it, in the words of Thomas Jefferson, "a mere thing of wax in the hands of the judiciary which they may twist and shape into any form they please." Many commentators have retorted that section 44(i) fails to recognise Australian multiculturalism. Notwithstanding that dual citizenship was clearly foreseen by the drafters of the Constitution, if the Constitution no longer meets society's expectations, there is nothing stopping each House of Parliament from changing it through the amendment process. If such process was absent, we could perhaps allow the judiciary limited play. If a referendum is not held or is defeated, a clear signal is sent to future Courts and section 44(i) critics with a message that the Court is not an alternative forum for constitutional amendments of a substantive nature.

Section 44(i)-like provisions are not unique to Australia. While New Zealand allows members of parliament to be dual citizens, a member must be a NZ citizen and cannot during membership of Parliament, assume citizenship of any foreign state or power. In 2003, one member of Parliament, Hon. Harry Duynhoven, exercised his right to take up Netherlands citizenship, which he was entitled to through his Dutch-born father. He inadvertently breached the *Electoral Act 1993*. Parliament, however, passed special sunset legislation suspending the operation of the impugned provision which allowed Duynhoven to remain in Parliament. Canada is similar to Australia in its drafting of section 31 of the Constitution Act 1867. In India, to be a member of either House of Parliament, you must have Indian citizenship but Article 102 of the Constitution of India appears to imply that involuntary acquisition of a foreign citizenship may not disqualify a member – verbiage which may have assisted Canavan and Joyce. The requirements for membership of the United Kingdom House of Commons is unique. A candidate must be either a British or Irish citizen or a "qualifying Commonwealth citizen".

Some have responded to the recent stream of section 44(i) casualties with the phrase 'ignorance of the law is no excuse'. It is not even possible for a federal electoral candidate to be unaware of their potential electoral disabilities. The Australian Electoral Commission requires each candidate to complete the:

Candidate statement and declaration

Please read the candidate statement and declaration carefully before signing the nomination form.

Your attention is drawn in particular to **section 44** of the **Constitution of the Commonwealth of Australia**. (*emphasis original)

The entire section 44 is then reproduced. The candidate then declares that he or she is "not, by virtue of section 44 of the Constitution, incapable of being chosen or of sitting as a Senator [or member of the House]" and that he or she "qualified under the Constitution and the laws of the Commonwealth to be elected as a Senator [or member of the House]". The constitutional requirements are further set out in a guide to candidates which state that "you cannot nominate for the Senate or the House of Representatives if you are…disqualified by section 44 of the

Constitution…" and that "[a]s a prospective candidate, you must satisfy yourself about your legal position."

It is therefore not a case of ignorance of the law, rather ignorance of personal affairs that can never amount to an excuse.

Questions remain over what level of knowledge Canavan may have had over his dual citizenship. One media report has stated that Canavan "has been listed on the Registry of [Italian Nationals] Residing Abroad and Italian voting forms were automatically sent to him at his mother's address for the past 10 years" but that "he had never received or even viewed a ballot paper." There are also reports that "Canavan did not want dual Italian citizenship when it was brought up in his family in 2005. And that is where he thought it ended."

The level of knowledge is relevant in determining whether there has also been a breach of federal criminal law. Relevant to a nomination of a senator, where a person makes a false or misleading statement in an application (i.e., a declaration in Form 59 that a candidate is qualified under the Constitution to be elected as a Senator) to a Commonwealth entity (i.e., the Australian Electoral Commission) and does so *knowingly* or *recklessly* that the statement is false and misleading, the person commits an offence for which there is a penalty of imprisonment.

There is another constitutional issue flowing beyond section 44(i). Canavan and Joyce are or have served as ministers. Individual ministers derive their executive power from section 64 of the Constitution. It states that ministers must "sit in Parliament". If Senator Canavan was, in fact, an Italian citizen on the date of his nomination, then under section 44(i), he was incapable of be chosen as a senator. Certainly, Joyce was incapable of being chosen as a senator in 2004 and as a member of the House of Representatives in 2013. The Court would then have little discretion but to declare under section 379 of the *Commonwealth Electoral Act 1918* that Canavan and Joyce were "not capable of being chosen or of sitting as a Senator or a Member of the House of Representatives" respectively. As such, they would not have been permitted to hold offices as ministers and their appointments would have been, through reductionist logic, unlawful. Ultimately, one must question the legality of every ministerial power exercised by them during these periods. Not to do so would not only result in the destruction of the Constitution but would amount to a declaration of war on responsible and accountable government. Although arising in a different context, improperly appointed judges globally have invariably had their judgements voided. In this sense, the legal metaphor 'fruits of the poisonous tree' exemplifies the point: if the election of a candidate (the 'tree') itself is tainted, then anything gained or done from it (the "fruit") is tainted as well.

May the submissions to the Court and the Court's decision rest on constitutional law and not emotion, political science, convenience, cultural diversity or illegitimate constitutional 'amendments' by the Court draped as mere constitutional interpretation. These impermissible considerations do not displace the express words of section 44(i). In the words of the minority in the Duynhoven case, "[i]t would send a particularly bad message to the public if the law were set aside to benefit a member of Parliament."

Despite the Prime Minister's constitutionally inappropriate foretelling of the outcome, the Court's decision is far from predictable. The composition of the Court are relatively recent appointees who have not presided over section 44(i) cases. They will have the opportunity to affirm, overrule or otherwise deviate from past cases of the Court as they have the power to do.

Otherwise, if the magnitude of the consequences of any adverse finding of the Court is politically crippling, it is to cite the accurate words of the Federal Court, "simply the product of the scale of the [constitutional] breaches [by parliamentarians] over a considerable period."