Multiple Nationality and Parliamentary Eligibility in Japanese and Australian Law

Yasuhiro Okuda[*] */ Trevor Ryan*[**]

INTRODUCTION

Multiple nationality arises often from cross-cultural marriage of parents under the jus sanguinis rule found in Japanese law on the one hand, and from the birth of children to foreign residents in national territory under the jus soli rule found in Australian law on the other hand. Interestingly, despite such different nationality laws, the parliamentary eligibility of multiple nationals has become topical in both countries in recent times.

For a long time, foreign residents in Japan numbered fewer than one million, and most of these were Koreans and Taiwanese who came as Japanese nationals before World War II, when Korea and Taiwan were a part of Japanese territory, as well as their descendants.[1] They are generally called 'old comers'.[2] However, since the late 1980s foreign residents have rapidly in-

* Prof. Dr. Yasuhiro Okuda, Chūō University, Law School, Japan.
** Ass. Prof. Dr. Trevor Ryan, School of Law & Justice, University of Canberra, Australia.

1 According to the *Nihon Tōkei Nenkan* [Japan Statistical Yearbook], 664,536 Koreans and 52,896 Chinese (most of them Taiwanese) made up 91.6 percent of 782,910 foreign residents in 1980.

creased to over two million.[3] This is because foreign residents from various countries who have married Japanese nationals, and foreign residents of Japanese ethnic origin mainly from South America have increased.[4] They are generally called 'new comers'.[5] As the Japanese Nationality Act was amended in 1985 from a paternal jus sanguinis rule to one in which nationality passes through both parents,[6] children born to Japanese nationals and foreign residents are now natural-born Japanese nationals under current law.

In September 2016, Renho Murata (known simply as 'Renho'), who was born to an 'old comer' Taiwanese national and his Japanese wife, was elected as the first female leader of Japan's Democratic Party (*Minshin-tō*).[7] Just before the election it was reported that Renho may have possessed dual nationality so should be ineligible as a parliamentary member, leader of the

2 Such old comers are eligible for visa as 'Special Permanent Resident' under *Nihon-koku to no heiwa jōyaku ni motozuki nihon no kokuseki o ridatsu shita mono-tō no shutsu-nyūkoku kanri ni kansuru tokurei-hō* [Act on an Exception of Immigration Control to Persons who lost Japanese Nationality by the Peace Treaty with Japan, and Similar Persons], Law No. 71/1991, last amended by Law No. 42/2014.

3 According to *Nihon Tōkei Nenkan* (note 1), foreign residents in Japan numbered 2,382,822 in 2016. The statistics with English tables of contents since 2011 are available at *http://www.stat.go.jp/english/data/nenkan/index.htm.*

4 Foreigners married with Japanese are eligible for visa as 'Spouse or Child of Japanese National', and foreigners of Japanese origin for visa as 'Long-Term Resident'. See Appended Table II *Shutsu-nyūkoku kanri oyobi nanmin nintei-hō* [Immigration Control and Refugee Recognition Act], Cabinet Order No. 319/1951, last amended by Law No. 88/2018; Sec. 3, 4 Announcement of Ministry of Justice No. 132/1990, last amended by Announcement No. 357/2017.

5 Foreign nationals with a visa as 'Spouse or Child of Japanese National' or 'Long-Term Resident' may apply for a change of visa to 'Permanent Resident' easier than other foreigners. See Guideline for Permanent Resident, last amended on 26 April 2017, available at *http://www.moj.go.jp/nyuukokukanri/kouhou/nyukan_nyukan50.html* (only in Japanese). Thus, most permanent residents in Japan are presumably foreigners married with Japanese and foreign nationals of Japanese origin.

6 *Kokuseki-hō* [Nationality Act], Law No. 147/1950, last amended by Law No. 70/2014. An English translation is available at *http://www.moj.go.jp/ENGLISH/information/tnl-01.html*. For the amendment of 1985, see K. HOSOKAWA, Amendment of the Nationality Law, The Japanese Annual of International Law 28 (1985) 11; D. WANG, *A propos de la nouvelle loi japonaise sur la nationalité* [Concerning the new Japanese Law on Nationality], Clunet 119 (1992) 45; M. DOGAUCHI, *Loi sur la nationalité* [Law on Nationality], Revue critique de droit international privé 75 (1986) 579.

7 She was called Sha Renho by birth in 1967 as she inherited her father's firstfamily name. After acquisition of Japanese nationality in 1985, Saito Renho was registered in her mother's family book (*koseki*), and after marriage in 1993, Murata Renho is registered in her spouse's family register as she took her spouse's family name. However, her professional name is simply 'Renho'.

Opposition party, and as a future Prime Minister of Japan. This negative campaigning continued until Renho resigned her leadership of the party in late July 2017.[8] Such scandals are certain to arise again in the future as children born from mixed marriages are now active in various fields of Japanese society including Parliament.

The first section of this article will analyze Japanese law. After the end of World War II, Japan recognized first the Republic of China in Taiwan and then, in 1972, the People's Republic of China as the sole legal government of China. Thus, the question arises which nationality law is applicable to Renho's case to decide whether she has only Japanese nationality (single nationality) or also Chinese nationality (dual nationality). If Renho has dual nationality, she is obliged to choose one nationality under the Japanese Nationality Act. However, it is not clear what results upon defaulting in making this choice. Above all the question arises whether multiple nationals are, or should be, eligible to public office under current Japanese law.

Australia is a multi-cultural liberal democracy in which, as of June 2016, 28.5% of the population were born overseas[9] and many others have a parent or grandparent who was a migrant. Like all nation states, Australia is grappling with the challenges of globalization, including managing perceived or actual conflicts of allegiance. This has political ramifications such as the resurgence of the nationalist One Nation Party, moves to curb foreign donations to political parties[10] and other forms of influence,[11] and the resignation of a prominent opposition senator after revelations that he provided counter-surveillance

8 See English reports of the Japan Times, though legally not always exact: S. MURAI, Renho nationality accusations spur debate on dual citizenship, 8 September 2016; T. OSAKI, Renho acknowledges that she has yet to renounce her Taiwanese citizenship, 14 September 2016; T. OSAKI, Renho elected first female leader of main opposition force, 15 September 2016; S. MURAI, Justice Ministry says Taiwanese in Japan not subject to Chinese law on citizenship issues, 16 September 2016; T. OSAKI, Nippon Ishin submits bill to bar people with dual nationality from running for Diet, 27 September 2016; T. OSAKI, Abe admits dual citizenship for ministers, officials 'problematic', 6 October 2016; T. OSAKI, Abe urges Renho to prove her status under the law with release of family registry, 14 October 2016; T. OSAKI, Renho admits she started process to get Japanese nationality only this month, 17 October 2016; T. OSAKI, Renho to disclose family registry in bid to quell furor over dual nationality, 14 July 2017; T. OSAKI, Renho discloses family registry as critics call move setback for minorities, 19 July 2017; R. YOSHIDA, Main opposition chief Renho resigns Democratic Party leadership, 28 July 2017.

9 Australian Bureau of Statistics website: *http://www.abs.gov.au/AUSSTATS/abs@.nsf/mf/3412.0*.

10 M. KOZIOL, Coalition, Labor and Greens Agree to Ban Foreign Donations to Political Parties, The Sydney Morning Herald (Sydney), 11 March 2017.

advice to a foreign political donor.[12] It has also galvanized changes to the legal system such as laws allowing the executive (with judicial review) to strip Australian citizenship from alleged terrorists who are dual nationals[13] and proposed reforms imposing stricter residency and language requirements for naturalization.[14] Dual nationality has become more prevalent since 2002, when Australian law was amended to permit Australian citizens to retain this status upon naturalization overseas.[15] Other forms of dual nationality predate this reform: Australian citizens who acquired foreign nationality at birth and those who naturalized as Australians without losing their foreign nationality according to foreign law. In the second half of 2017, the issue of dual nationality and public office came to dominate Australian politics.

The second section describes the Australian law of nationality and public office, arguing that reform is needed to relax the current restrictions on dual nationality for political candidates. It begins with the process and criteria for disqualification. Then it describes other features of the law that result from Australia's position as a former British colony, a federation, and a state without a bill of rights. It concludes by describing the historical movement to reform this area of law and contending that the current system is arbitrary, uncertain, and politically driven and should be dismantled or replaced with a regime better aligned to the purpose of preventing conflicts of allegiance on the part of Australian politicians.

Finally, we conclude with some brief observations that emerge from the juxtaposition of these two seemingly disparate jurisdictions.

I. JAPANESE LAW

1. Nationality of Taiwanese

The Great Qing, the last imperial dynasty of China, signed the treaty of 1895 in Shimonoseki with Japan after the end of the war between the two

11 'Foreign agents to be forced to declare international links under new laws', ABC News Online, 14 November 2017, *http://www.abc.net.au/news/2017-11-14/foreign-agents-to-be-forced-to-declare-international-links/9150054*.

12 "Sam Dastyari resigns from Parliament, says he is 'detracting from Labor's mission' amid questions over Chinese links", ABC News Online, 13 December 2017, *http://www.abc.net.au/news/2017-12-12/sam-dastyari-resigns-from-parliament/9247390*.

13 Australian Citizenship Amendment (Allegiance to Australia) Act 2015 (Cth), Schedule 1.

14 'Australian citizenship law changes mean migrants will face tougher tests', ABC News Online, 20 April 2017, *http://www.abc.net.au/news/2017-04-20/migrants-to-face-tougher-tests-for-australian-citizenship/8456392*.

15 Through repeal of s 17 of the Australian Citizenship Act 1948 (Cth).

states and ceded Taiwan to Japan, upon which Taiwanese became Japanese nationals.[16] However, ethnic Japanese and Taiwanese were divided under the family registration law because those who held Japanese nationality originally were registered under the family register of Japan and newly Japanese Taiwanese were registered under the Taiwanese equivalent.[17] In 1951, after the end of World War II, Japan signed the Peace Treaty of San Francisco with the Allied Powers and renounced the territory of Taiwan.[18] Just before the entry into force of the Treaty in 1952,[19] the Japanese Government issued a circular on family registration, according to which all Taiwanese, even those living in Japan, lost Japanese nationality upon the entry into force of the Treaty.[20] This is because the loss of nationality follows from the renouncement of territory of Taiwan by Japan and the latter was clearly provided in Article 2 (b) of the Treaty. The Supreme Court of Japan upheld this administrative circular with the minor caveat that Taiwanese lost Japanese nationality not at the entry into force of the Treaty with the Allied Powers but of the Treaty with the Republic of China.[21] On the Chinese side, the Republic of China promulgated a law in 1946 regulating the disposition of nationality of Taiwanese living abroad, according to which Taiwanese reacquired Chinese nationality unless otherwise declared before the end of that year.[22]

Because Renho's father was surely born before 1952 as a Taiwanese-Japanese, he lost Japanese nationality either at the entry into force of the Treaty with the Allied Powers or of the Treaty with the Republic of China, and reacquired Chinese nationality according to the law of the Republic of China. Renho, born to a Chinese father and a Japanese mother in 1967, was a natural-born Chinese national according to the old Taiwanese Nationality Act,[23] but not a natural-born Japanese national. This is because the Japanese

16 H. EGAWA/R. YAMADA/Y. HAYATA, *Kokuseki-hō* [Nationality Law] (3rd ed., Tōkyō 1997) 194.

17 *Ibid.* 195.

18 *Nihon-koku to no heiwa jōyaku* [Treaty of Peace with Japan], Treaty No. 5/1952. Japan renounced also the territory of Korea etc. The English text is available at *https://en.wikisource.org/wiki/Treaty_of_San_Francisco.*

19 The Peace Treaty came into force at 10:30 pm on 28 April 1952. See Cabinet Notice No. 1/1952.

20 Circular Notice No. 438, 19 April 1952 in Civil Matters, 35 Koseki 37.

21 Supreme Court *en banc*, 5 December 1962, 16 (12) Keishū 1661. The Treaty with the Republic of China came into force on 5 August 1952, a little later than the Treaty with the Allied Powers.

22 H. EGAWA/R. YAMADA/Y. HAYATA (note 16) 230.

23 Art. 1 (i) of the Law of 5 February 1929. The Chinese text is available at *https://zh.wikisource.org/wiki/%E5%9C%8B%E7%B1%8D%E6%B3%95_(%E6%B0%91%E5%9C%8B18%E5%B9%B4).*

Nationality Act at that time adopted the principle of paternal jus sanguinis.[24] However, in 1985 the Japanese Nationality Act was amended, providing that a child acquires Japanese nationality if his or her father or mother is a Japanese national at the time of birth.[25] The amendment was in principle not retroactive but allowed one exception: a child who is younger than 20 years old at the time of entry into force of the amendment law on 1 January 1985 can acquire Japanese nationality by applying to the Minister of Justice within three years of that date, if the mother of the child is a Japanese national and was a Japanese national at the time of the child's birth (Art. 5 Appendix to the Amendment Law).[26]

Renho, who was 17 years old at that time, acquired Japanese nationality by applying to the Minister of Justice. Although in cases of naturalization in Japan, a foreign national must in principle renounce his or her foreign nationality (Art. 5 (1) (v) Nationality Act), the acquisition of Japanese nationality by application does not require as a precondition the effective renunciation of the foreign nationality. Nevertheless, Renho visited the Tōkyō office of the Association of East Asian Relations, the de facto consulate of Taiwan in Japan (and renamed in 1992 the Taipei Economic and Cultural Representative Office in Japan), with her father to apply for permission to renounce Chinese nationality. Although any Japanese national who acquires a foreign nationality after birth by his or her own volition loses Japanese nationality by law (Art. 11 (1) Nationality Act), the nationality law of Taiwan (both at that time and currently) requires permission for renunciation of nationality. Complicating matters, the old Nationality Act of Taiwan did not permit application for renunciation by any Chinese national who was younger than 20 years old.[27] This is in contrast to the current Nationality Act, which does allow for a joint application by any minor together with his or

24 Art. 2 No. 1 of the Law (note 6) before the amendment of 1985. Although Art. 24 *Nihon-koku kenpō* [Constitution of Japan] of 1946 provides for gender equality, the paternal jus sanguinis principle was justified by the prevention of multiple nationality, because most nationality laws of foreign states at that time adopted the same principle. See T. KUROKI/K. HOSOKAWA, *Gaiji-hō kokuseki-hō* [Alien Law and Nationality Law] (Tōkyō 1988) 267.

25 Art. 2 (i) of the Law (note 6) after the amendment of 1985. The Japanese government amended the Nationality Act to ratify the Convention on the Elimination of all Forms of Discrimination against Women because Art. 9 (2) of the Convention expressly provided for gender equality concerning the nationality of the child. See the articles cited above in note 6.

26 According to the *Hōmu nenkan* [Yearbook on Judicial Affairs], 11,271 people in 1985, 7,364 in 1986 and 11,918 in 1987 acquired Japanese nationality by applying to the Minister of Justice.

27 Art. 11 of the Taiwanese old Nationality Act (note 23).

her parent.[28] This did not apply in Renho's case. Nevertheless, Renho, who did not understand the Chinese language at that time, believed that she lost Chinese nationality, as her father was allegedly silent on the details of the Chinese communications at the Association of East Asian Relations.

2. Applicability of Unrecognized Government's Law

Renho was born in 1967 during the time in which the Republic of China was recognized by Japan, but she acquired Japanese nationality in 1985 after the recognition of the People's Republic of China (PRC) by Japan, which occurred due to restoration of diplomatic relations between Japan and the PRC in 1972. This means that Renho never possessed dual nationality, notwithstanding her failed attempt to renounce or even apply for renunciation of Chinese nationality under the old Taiwanese Nationality Act. This is because Article 9 of the PRC's Nationality Act provides that any Chinese national who is settled abroad shall lose his or her Chinese nationality by law if he or she acquires foreign nationality by his or her own volition.[29]

In 1974, two years after the restoration of diplomatic relations, the Japanese Ministry of Justice first declared the PRC's Nationality Act applicable for the purposes of Japanese law.[30] This was stated in relation to the case of a child born to Japanese parents left behind in China in the aftermath of World War II. It was proved that the child was registered in the family book of Japan, but held a certificate of naturalization in the PRC. The Ministry of Justice decided that she lost Japanese nationality at the time of restoration of diplomatic relations as she acquired Chinese nationality by her own volition. Two judgments of the District Court Tōkyō upheld the opinion of the Ministry of Justice by the reason that the effect of naturalization was actualized at the time of restoration of diplomatic relations and this was not the case before as the PRC was not recognized by Japan.[31]

Conversely, the Ministry of Justice decided that a Japanese national who was naturalized in the Republic of China after the restoration of the diplomatic relations between Japan and the PRC did not lose Japanese nationali-

28 Art. 11 (2) of the Law of 9 February 2000, last amended by Law of 27 January 2006. An English translation is available at *http://www.moi.gov.tw/english/english_law/law_detail.aspx?sn=82*.

29 Art. 9 of the Law of 10 September 1980. An English translation is available at*http://www.chinaembassy.org.nz/eng/lsqz/zgygflgd/t39423.htm.*

30 Reply No. 5623, 11 October 1974, 5th Civil Matter Section, 29 (12) Minji Geppō 99.

31 District Court Tōkyō, 27 May 1992, 48 (11) Minji Geppō 6; District Court Tōkyō, 21 December 1995, 48 (5) Katei Saiban Geppō 84. However, the court decisions confirmed Japanese nationality of the children left behind in China by reason that

ty.[32] This is because the naturalization governed by the unrecognized government's law does not amount to the acquisition of foreign nationality under Article 11 (1) of the Japanese Nationality Act. This is somewhat inconsistent with other areas of law, for example Taiwanese family law, which has been applied by the Japanese Ministry of Justice. In 1976, an application to the Japanese family register of the adoption of a Taiwanese national as a child of a Japanese national was rejected because the Taiwanese Civil Code required that the adoptive parent should be twenty years older than the adopted child.[33]

3. Election of One Nationality Under the Nationality Act

It can be concluded from the practice of the Japanese Ministry of Justice that Renho had only Japanese nationality (single nationality) because she lost Chinese nationality according to the Nationality Act of the PRC when she acquired Japanese nationality by applying to the Minister of Justice in 1985. Nevertheless, after it was incorrectly reported at the end of August 2017 that she was a dual national, Renho applied to the Taiwanese Government for permission to renounce Chinese nationality. Renho, having married a Japanese national, was eligible to apply to the Taiwanese Government under the current Taiwanese Nationality Act.[34] The application was affirmed so that she was permitted to renounce Chinese nationality. Renho then gave notice of the loss of Chinese nationality to the family registration office of Tōkyō in accordance with Article 106 of the Japanese Family Registration Act.[35] The application was rejected in October 2017.

According to the above-mentioned former practice of the Ministry of Justice, the rejection is justified because Renho had lost Chinese nationality automatically by the law of the recognized government (PRC) at the time of acquiring Japanese nationality. In other words, she never had dual nationality. Despite this, the Ministry of Justice also recommended that Renho

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the defendant Japanese government did not sufficiently prove naturalization in the PRC by the children's own volition.

32 Reply No. 6674, 26. December 1974, 5th Civil Matter Section, 34 (4) Minji Geppō 21.

33 Reply No. 4984, 8 September 1976, 2nd Civil Matter Section, 31 (12) Minji Geppō 155. According to *Hōrei* [Act on the Application of Laws], Law No. 10/1898 before the amendment of 1990, adoption is governed for each party by his or her national law. Both Japanese and Taiwanese law allow adoption by applying to the family registration official. However, Japanese law requires only that the adoptive parent is older than the adopted child.

34 Art. 11 (1) (ii) of the current Taiwanese Nationality Act (note 28).

35 *Koseki-hō* [Family Registration Act], Law No. 224/1947, last amended by Law No. 51/2016. An English translation is available at *http://www.japaneselawtranslation.go.jp/law/detail/?id=2161&vm=&re=*.

apply to elect Japanese nationality in accordance with Article 14 (2) of the Nationality Act and Article 104-2 of the Family Registration Act.[36] This recommendation is highly questionable. First, only a Japanese national who has foreign nationality is eligible to file to a family registration official to elect Japanese nationality. Because Renho never had dual nationality, any application to elect Japanese nationality must be rejected. Second, even if Renho did have dual nationality, she would have been required to elect one nationality before attaining 22 years of age (Art. 14 (1) Nationality Act).[37] Where this is not complied with, the stipulated procedure is as follows. The Minister of Justice may require in writing the person in question to elect one nationality and, if the person fails to do so within one month, Japanese nationality is lost (Art. 15 Nationality Act). According to parliamentary records, the Minister of Justice had never since the amendment of the Nationality Act in 1985 required this in writing.[38] It is irregular and unfair that Renho only was unofficially recommended to file the election of Japanese nationality. Nevertheless, she followed the recommendation in October 2016 and, by showing a part of her family register to the media in July 2017, revealed that the application was accepted. The acceptance of the application would be justified only by the application of the Taiwanese Nationality Act, which is not recognized by Japan as the sole legal government of China. Had the Ministry of Justice changed its position and decided to apply the Taiwanese Nationality Act, the notification of the loss of Chinese nationality by the permission of the Taiwanese Government should have been accepted, but this was not the case.

36 The requirement of election of one nationality was introduced by the amendment of 1985. Art. 14 (2) Nationality Act provides that the election of Japanese nationality shall be done either by renunciation of foreign nationality or by declaration of Japanese nationality according to the Family Registration Act. The declaration is made by applying to this effect to a family registration official (Art. 104-2 Family Registration Act). The application of the election of Japanese nationality is an alternative to the renunciation of foreign nationality, because the latter depends on the foreign nationality law, which may not always allow renunciation of nationality.

37 Art. 14 (1) Nationality Act provides that a Japanese national having a foreign nationality shall elect either of the nationalities before attaining 22 years of age if he or she acquired both nationalities before attaining 20 years of age, and otherwise within two years after acquisition of the second nationality.

38 See especially Minutes of the House of Representatives, Committee on Judicial Affairs, 12 May 2009, No. 10, p. 6 and 17 April 2009, No. 6, p. 4; Minutes of the House of Councillors, Committee on Judicial Affairs, 27 November 2008, No. 5, p. 23.

4. Eligibility of Multiple Nationals to Public Office

Such contradictory decisions of the Ministry of Justice might be explained by the political reason that Renho was the leader of the opposition party. The ambiguity allowed criticism to be directed at Renho that her perceived dual nationality and subsequent failure to elect Japanese nationality rendered her ineligible to be leader of the party or even a member of Parliament. However, there is no legal basis for this criticism under current laws. Unlike the Australian Constitution, discussed in the second section, there is no provision disqualifying dual nationals from parliament in Japanese law. The Public Offices Election Act of Japan simply requires Japanese nationality to be elected.[39] This is consistent with the governmental opinion declared in the parliamentary debates of 1984 that dual nationals are not excluded from parliamentary eligibility.[40] Further, the Japan Innovation Party *(Nippon Ishin no Kai)* submitted a bill to the House of Councillors in September 2016 to amend the Public Offices Election Act.[41] According to the bill, any dual national who fails to elect Japanese nationality before the deadline provided in Article 14 (1) of the Nationality Act would be disqualified from being elected as a member of either House of Parliament. However, the bill was discarded because of a failure to finish deliberations during the sitting period of that Parliament. Accordingly, under current Japanese law, neither dual nationality nor failure to elect Japanese nationality are related to parliamentary eligibility. Incidentally, under current law, dual nationals are also eligible to other public offices, except as diplomats.[42]

Normatively, dual nationals should be eligible to be elected as parliamentary members. Indeed, the disqualification of dual nationals may be contrary to the postwar Constitution of Japan, which prohibits discriminatory criteria for qualification as parliamentary members.[43] Under the former

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39 *Kōshoku senkyo-hō* [Public Offices Election Act], Law No. 100/1950, last amended by Law No. 66/2017, Art. 10 (1).

40 Minutes of the House of Councillors, Committee on Judicial Affairs, 2 August 1984, No. 10, p. 18.

41 The Japan Innovation Party submitted another bill to the House of Councillors in October 2016 with equivalent provisions for governmental officials. The bill was discarded together with the bill for the amendment of the Public Offices Election Act.

42 *Gaimu kōmuin-hō* [Foreign Public Service Act], Law No. 41/1952, last amended by Law No. 69/2014, Art. 7. This is because diplomats have privileges such as exemption from jurisdiction in the receiving state. See the commentary in 59 Toki no Hōrei 31.

43 According to Art. 44 of the Constitution, qualifications of parliamentary members and of their electors shall be fixed by law, but there shall be no discrimination because of race, creed, sex, social status, family origin, education, property or income.

pre-war Nationality Act of Japan, naturalized persons were ineligible to be parliamentary members or other important public officials.[44] At that time naturalized persons *(Kika-jin)* were distinguished from nationals by birth *(Nihon-jin)* and regarded as a danger if admitted to public office.[45] However, the provision was deleted from the current Nationality Act because it was contrary to the equality principle under the postwar Constitution of Japan.[46] That is also the case for dual nationals. The dual nationality of parliamentary members as such poses no danger to Japan.[47]

II. AUSTRALIAN LAW

1. Dual Nationality and Disqualification from Parliament

Australia saw a spate of challenges to members of Parliament on the grounds of disqualification in early 2017, including One Nation Senator Rodney Culleton (for criminal conviction) and Family First Senator Bob Day (for having a pecuniary interest in an agreement with the Commonwealth).[48] Both cases also involved bankruptcy as a criterion for disqualification. A third challenge was mounted against Family First Senator Lucy Gichuhi – Australia's first black African member of Parliament – on the grounds of dual nationality. These cases became a catalyst for multiple challenges on the ground of dual nationality in the second half of 2017, and significant disruption to Australian politics including the disqualification of Deputy Prime Minister Barnaby Joyce, the resignation of Senate President Stephen Parry, and a temporary destabilisation of the balance of power that forced the Government to cancel Parliament until a by-election to avoid losing control of the lower house. Questions were also raised regarding the validity of ministerial decisions made by Joyce and other members of Cabinet.[49]

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44 *Kokuseki-hō* [Nationality Act], Law No. 66/1899, Art. 16.

45 See the explanatory report of the government to the bill in 277 Koseki 19.

46 See *Dai 7-kai kokkai seitei-hō shingi yōroku* [Summary of Debates on Statues in the 7th Sitting of Parliament] 396.

47 While it is theoretically possible for dual nationals who are public officials of a foreign state to stand as candidates, this is extremely unlikely.

48 *Re Culleton [No 2]* [2017] High Court of Australia (hereinafter: HCA) 4; *Re Day [No 2]* [2017] HCA 14. Culleton had declared independence from One Nation by the time the matter was resolved.

49 While this issue is beyond the scope of this article, the matter is discussed here: *https://theconversation.com/if-high-court-decides-against-ministers-with-dual-citizenship-could-their-decisions-in-office-be-challenged-82688*. See also *http://www.abc.net.au/radionational/programs/lawreport/hca-ruling-on-dual-citizenship/9102320#transcript.*

It was no coincidence that the early targets of these proceedings were members of minor parties. Voter disenchantment with mainstream politics in Australia has led to the rise of independents and minor parties, who increasingly hold the balance of power in one or both houses. These members are particularly vulnerable to referral by a majority in the House of Parliament in which they sit to the Court of Disputed Returns, constituted by the Australian High Court.[50] Another avenue for challenges on the basis of disqualification is for another candidate or elector to lodge a petition disputing the validity of the member's election on broader grounds within 40 days of the return of the writs for the election.[51] Beyond that period, an elected official's eligibility to sit may also be challenged by any party as part of a 'common informer' suit, a weaker statutory version of the provisional avenue in s 46 of the Constitution, which imposes a monetary penalty on a disqualified official who sits in the Parliament.[52] In the House of Representatives, the ruling party under the Westminster system has an effective veto on referrals. Unambiguous infractions that go to character such as serious criminal conviction or bankruptcy are likely to result in voluntary resignation. Alternatively, the President of the Senate, who traditionally belongs to the ruling party, may issue a notification of vacancy, though this is of dubious legal effect. The ruling party often does not control the Senate due to its proportional preferential voting system, which differs from the single-seat preferential system of the House of Representatives. Yet a referral of aSenator will only occur if one major party regards it as politically expedient. This, added to the lack of resources and experience to vet candidates' qualifications, means that independent and minor party members are more likely to be subject to strategic challenges, for example by an opposition to destabilize government or a ruling party to shore up its numbers.

The criteria for qualification to stand for election are contained in legislation: an Australian citizen having reached 18 years of age who is actually

50 Commonwealth Electoral Act 1918 (Cth), s 376. There is debate about whether the provisional s 47 of the Constitution, which allows the Houses of Parliament to determine matters of qualification themselves, remains operational in the face of s 376 of the Commonwealth Electoral Act: see *Sue v Hill* (1999) 199 Commonwealth Law Reports (hereinafter: CLR) 462, 480 (Gleeson CJ, Gummow, and Hayne JJ).

51 Commonwealth Electoral Act 1918 (Cth), ss 353, 355(e). The majority of the High Court has found this provision to include challenges under s 44 (the disqualification criteria), so s 353 and s 376 are not mutually exclusive: *Sue v Hill* (1999) CLR 462.

52 Common Informers (Parliamentary Disqualifications) Act 1975 (Cth), s 3. The amount is $200 per sitting day, limited to 12 months. This provision is being tested at the time of writing: *Alley v Gillespie* [2017] HCA Trans 196. One of the issues in question is the matter of standing.

or potentially entitled to vote in the House of Representatives[53] and of 'sound mind'.[54] The grounds for disqualification from 'being chosen or of sitting' as a member of Parliament are contained in s 44 of the Constitution. These are, in broad terms, matters going to character (bankruptcy (s 44 (iii)) or serving a sentence for a serious crime (s 44 (ii)) and conflicts of interests, including serving in the public service (s 44 (iv)), being in receipt of financial advantage from the executive (as benefactor or partner in business) (s 44(v)), and allegiance to a foreign power: 'any person who […] is under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen[55] or entitled to the rights or privileges of a subject or a citizen of a foreign power' (s 44(i)). In contrast, appointment of a dual national or even a non-national to the Australian Public Service is at the discretion of an 'Agency Head'.[56]

Some aspects of the law of disqualification have been codified or settled by case law such as the leading case of *Sykes v Cleary*, for example dictating that a candidate is disqualified under s 44 if the disqualifying criterion exists from the date of nomination until the candidate is sworn in as a member.[57] The remedy is a special recount of the vote where this would not distort the intentions of voters.[58] A recount of preferences will determine this for the Senate under its proportional preferential voting system. In contrast, for the House of Representatives: 'a special count could result in a distortion of the voters' real intentions because the voters' preferences were expressed within the framework of a larger field of candidates.'[59] This was clarified in *Free v Kelly*: 'In other words, if the name of the disqualified Mr Cleary had not appeared on the ballot-paper, the voters' preferences might have been differently expressed.'[60] Mason CJ, Toohey, McHugh JJ also emphasized another discrepancy in outcomes in the Electoral Act 1918 (Cth) between the two

53 Commonwealth Electoral Act 1918 (Cth), s 163.

54 Commonwealth Electoral Act 1918 (Cth), s 93. It is for another elector to demonstrate that a candidate is of 'unsound mind'.

55 The terms 'subject' and 'citizen' are today synonymous in Australia, having roots in a time that distinguished between the status of the individual in republics and monarchies.

56 Public Service Act 1999 (Cth), s 22. It is likely that sole Australian nationality would be required in security-sensitive positions: see Australian Public Service Commission website: *http://www.apsc.gov.au/working-in-the-aps/conditions-of-engagement/citizenship-in-the-australian-public-service*.

57 *Sykes v Cleary* (1992) 176 CLR 77. Deane J, in dissent at 120, held that the declaration of the poll is the relevant starting point.

58 *Sykes v Cleary* (1992) 176 CLR 77, 102 (Mason CJ, Toohey, McHugh JJ).

59 *Ibid.*

60 (1996) 185 CLR 296.

Houses: the death of a Senate candidate results in an adjustment of preferences, whereas the death of a candidate for the House of Representatives voids the election in that seat.[61] The test does, however, allow room for these presumptive remedies to be displaced on the facts. Where the disqualifying criteria arise after a candidate is sworn in (and is therefore a 'senator or member of the House of Representatives'), s 45 states that his or her seat becomes vacant. This leads to a by-election or, in the case of a Senator elected on a party ticket, replacement by a member of the same party.[62]

These different outcomes are key determinants to whether one of the major parties will support a challenge. For example, in the *Day* case, the matter was precipitated by Family First Senator Bob Day's bankruptcy, to which he responded by resigning his seat at a strategically opportune time creating a casual vacancy to be filled by a member of his own party, namely Lucy Gichuhi. The Labor Party's desired outcome was instead for Day to have been invalidly elected for his pecuniary interest in an agreement with the Commonwealth, leading to a recount to oust the conservative Family First Party from the seat with a Labor Senate candidate.[63] Neither party secured their desired outcome as Day was ruled to have been invalidly elected, yet the special recount permitted by the High Court revealed Gichuhi to have won the seat in any case.[64] The High Court denied for procedural reasons the Labor Party's alternative strategy of challenging the candidacy of Gichuhi on the grounds of dual nationality.[65]

While disqualification was until recently a rare event and has thus had received limited judicial consideration, the recent spate of cases has allowed the High Court to refine the doctrine in the area. For example, in the *Day* case, the High Court took a stricter approach to disqualification on the basis of a pecuniary interest in an agreement with the Commonwealth than

61 Electoral Act 1918 (Cth), ss 180 (2), 273 (27).

62 Pursuant to s 15, which was amended by referendum in the wake of Australia's constitutional crisis of 1975, precipitated by a vacancy in the Senate.

63 The strategy involved arguing that with only one candidate left, Family First could not have a valid party ticket to receive preferences under a countback.

64 *Re Day [No 2]* [2017] HCA 14.

65 Essentially, counsel mounting the challenge did not submit arguments in a timely fashion. Gichuhi went on to leave Family First and become an independent after Family First merged with the Australian Conservatives. The challenge would likely have failed because the law of Kenya at the time of Gichuhi's nomination provided for mere eligibility to take out Kenyan nationality. Evidence submitted to the Court suggested that originally a person who naturalised abroad (such as Gichuhi, who became an Australian citizen in 1999) automatically lost Kenyan nationality, but that since a change in Kenyan law in 2011 (before the election), dual nationality was permitted, though in Gichuhi's situation subject to an application to regain Kenyan nationality: see *Re Day* [2017] HCA Trans 86 (19 April 2017).

previous case law,[66] however scant, had foreshadowed.[67] The doctrine developed in *Culleton* was instructive, though less conclusive, in cases of criminal convictions that were later annulled.[68]

2. Sykes v Cleary

The position in Australian law regarding disqualification on the basis of conflicting allegiances was also clarified in *obiter* in *Sykes*.[69] In this case, the majority of the High Court held that two of the respondents, Mr Kardimitsis and Mr Delacretaz, were disqualified for being at the time of nomination dual nationals of Greece and Switzerland respectively. The doctrinal point settled in *Sykes v Cleary* was that a candidate for election to Parliament must take 'reasonable steps' to divest him or herself of any non-Australian nationality before nomination. What constitutes 'reasonable steps' turns largely on the law of the foreign jurisdiction.[70]

This point is illustrated by the facts of the case. Mr Delacretaz was born in Switzerland in 1923 and was a Swiss citizen from birth. He migrated to Australia in 1951 and naturalised as an Australian citizen in 1960. At the time, this entailed making an oath of allegiance to the Australian sovereign and renouncing allegiance to any other sovereign or state. Under Swiss law as of 1992, it was possible to relinquish Swiss nationality if the person had no residence in Switzerland and acquired another nationality. Not having taken steps to notify Swiss authorities of any such intent, the majority held that Mr Delacretaz had failed to take 'reasonable steps'. Mr Kardimitsis was born a Greek national in Greece in 1952, migrated to Australia in 1969, and became an Australian citizen in 1975. Under Greek law, an additional step of ministerial approval was required to relinquish Greek nationality, which Mr Kardimitsis had not sought and could not therefore, according to the majority, be regarded as having taken 'reasonable steps'.

The balance struck by the majority was between guarding against conflicts of allegiance and avoiding the injustice of leaving candidates at the mercy of foreign law, which may not even permit the relinquishment of

66 *Re Webster* (1975) 132 CLR 270.

67 *Re Day [No 2]* [2017] HCA 14.

68 *Re Culleton [No 2]* [2017] HCA 4.

69 (1992) 176 CLR 77. Mason CJ, Toohey J, McHugh J (102) considered s 44(i) on the basis that the second and third respondents may wish to stand in the by-election entailed by the first respondent's disqualification under s 44(iv). Brennan J (109), Gaudron J (132) and Dawson J (131) addressed the issues simply because it was a question put to the Court. Deane J (126) addressed the issue having dissented on the s 44(iv) ruling.

70 (1992) 176 CLR 77, 108 (Mason CJ, Toohey and McHugh JJ).

nationality. The majority held that the assessment of 'reasonable steps' was a contextual one that turns on 'the situation of the individual, the requirements of the foreign law and the extent of the connexion between the individual and the foreign State of which he or she is alleged to be a subject or citizen.'[71] Yet it is questionable whether this test really informed the conclusions of the majority. Any contextual factors were eclipsed by the foreign rule on renunciation. Neither respondent upon migrating to Australia had significant ties to their birth nation nor sought any benefits of their non-Australian nationalities such as voting or travel documentation. As the majority conceded, the respondents might reasonably have believed that they had severed their ties with their birth nations by participating in an Australian naturalization ceremony, which at the time entailed a statement of renunciation of any foreign allegiance.[72] Other justices followed this reasoning to its conclusion. Deane J (in dissent) and Gaudron J held that the matter should be determined solely by Australian law, namely that the renunciation then required upon naturalizing in Australia should be conclusive of the issue.[73] Gaudron J saw a role for foreign law only where the candidate has not made a statement of renunciation a foreign nationality or where that nationality has been reasserted after renunciation.[74]

Section 44 (i) is not only directed at preventing dual nationality. The phrase 'any person who […] is under any acknowledgment of allegiance, obedience, or adherence to a foreign power' can be regarded as a first limb of the test for disqualification in s 44 (i).[75] This is wider in application than the second limb, which relates more narrowly to nationality, albeit possibly inclusive of permanent residents or refugees, whose rights and privileges may approximate those of a national.[76] Matters that could constitute such an acknowledgement might include applying for or travelling on a foreign passport,[77] military service,[78] making a voluntary oath of allegiance,[79] seek-

71 (1992) 176 CLR 77, 108 (Mason CJ, Toohey and McHugh JJ).
72 (1992) 176 CLR 77, 109 (Mason CJ, Toohey and McHugh JJ).
73 The current text of the pledge is located here: *https://www.border.gov.au/Trav/Citi/pathways-processes/Citi/Australian-citizenship-pledge*.
74 (1992) 176 CLR 77, 139–140 (Gaudron J).
75 See (1992) 176 CLR 77 at 127 (Deane J) and 109–110 (Brennan J).
76 G. CARNEY, Foreign Allegiance: A Vexed Ground of Parliamentary Disqualification, Bond Law Review 11 No. 2 (1999) 245, 245, 247.
77 G. MOENS/J. TRONE, The Constitution of the Commonwealth of Australia Annotated (Chatswood, 8th ed., 2012) 93.
78 *Ibid.*
79 M. PRYLES, Nationality Qualifications for Members of Parliament, Monash University Law Review 8 No. 1 (1982) 163, 163, 177.

ing consular assistance,[80] or claiming to hold foreign nationality in an official document.[81] Matters apparently excluded are participating in protests against foreign policy or a friendly state,[82] accepting foreign honours or appointments as honorary consul,[83] and any allegiance that might be imputed from temporary residence overseas.[84] Indeed, for Deane J (though in dissent), a purposive construction requires that no act beyond the volition of the candidate should be the basis of disqualification under either limb of s 44(i):

> Section 44(i)'s whole purpose is to prevent persons with foreign loyalties or obligations from being members of the Australian Parliament. The first limb of the sub-section […] involves an element of acceptance or at least acquiescence on the part of the relevant person […] In conformity with the purpose of the sub-section, the second limb […] should, in my view, be construed as impliedly containing a similar mental element with the result that it applies only to cases where the relevant status, rights or privileges have been sought, accepted, asserted or acquiesced in by the person concerned.[85]

For Deane J, anticipating the *Canavan* case considered below, this also decides the case in which the parliamentarian is a natural-born Australian national and has not 'established, asserted, accepted, or acquiesced in, the relevant relationship with the foreign power.'[86]

The disqualification provisions in s 44 interact with other idiosyncratic aspects of Australian sovereignty and constitutional law. First, the meaning of 'foreign power' has changed over time. At an undefined point, the United Kingdom became a 'foreign power' for the purposes of s 44 (i).[87] Similarly, the people of Papua New Guinea became citizens of a foreign power upon that nation's independence from Australia.[88] Second, because Australia is a federation, the states have their own set of disqualifications for members of state parliaments.[89] To generalize, the main difference between

80 *Ibid.* 174.
81 *Ibid.* 174.
82 *Nile v Wood* (1988) 167 CLR 133.
83 CARNEY, *supra* note 76, 247.
84 *Ibid.* 247.
85 *Sykes v Cleary* (1992) 176 CLR 77, 127 (Deane J).
86 *Ibid.*
87 *Sue v Hill* (1999) 199 CLR 462. But the voting rights of British subjects on the electoral roll for Australia before January 1984 were grandfathered by s 93(1)(b)(ii) of the Commonwealth Electoral Act 1918 (Cth).
88 And thus, lost their Australian citizenship: see P. M. MCDERMOTT, Australian Citizenship and the Independence of Papua New Guinea, University of New South Wales Law Journal 32 No. 1 (2005) 50, 58.
89 See Constitution Act 1902 (NSW) s 13A(b); Legislative Assembly Act 1867 (Qld) s 7(1); Constitution Act 1934 (SA) ss 17(1)(b)(c), 31(1)(b)(c); Constitution Act 1934 (Tas) s 34(b)(c); Constitution Acts Amendment Act 1899 (WA) s 38(f).

the states and the Commonwealth is that the state disqualification rules apply to sitting members only, rather than candidates. Moreover, a voluntary act is required of a sitting member to be disqualified, for example applying for a foreign passport. In Victoria and the self-governing territories,[90] there are no provisions for disqualification on the basis of foreign allegiance. Some commentators see a lower risk of conflict of interest at a state and territory level compared to the national government, which presides over issues of diplomacy and defence.[91] Third, the Australian Constitution contains few express rights that may otherwise have shaped doctrine on the position of dual nationals elected to Parliament and indeed is silent on the very notion of citizenship. A possible exception is that the religious freedoms enshrined in s 116 of the Constitution seem to ensure that 'allegiance' in s 44 refers to secular foreign powers only. In *Crittenden v Anderson*, the High Court rejected the argument that the Papal State was a 'foreign power' because this would equate to imposing a religious test for public office.[92]

Sykes reflected the enduring view of the House of Representatives Standing Committee on Legal and Constitutional Affairs that 'it is essential that members of parliament owe allegiance and loyalty only to the parliament and the people of Australia.'[93] At the same time, the balance struck in *Sykes v Cleary* was foreshadowed by a prior reform movement, discussed below, to ensure that s 44 did not impose unreasonable requirements of candidates and parliamentarians, for example being at the mercy of foreign states.[94] Nevertheless, there were critics of the *Sykes* compromise.[95] The test assumes an awareness of family background and foreign laws before reason-

90 See 'Canberra's parliament is full of dual citizens (but you're looking the wrong way)', The Canberra Times (Canberra), 7 October 2017.

91 CARNEY, *supra* note 76, 257.

92 *Crittenden v Anderson* (Unreported, High Court of Australia, Fullagar J, 23 August 1950), extracted in 'An Unpublished Judgment on s 116 of the Constitution', Australian Law Journal 51 (1977) 171, 171.

93 HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS, Aspects of Section 44 of the Australian Constitution – Subsections 44(i) and (iv), Parl Paper No. 85 (1997) 2.114.

94 See eg SENATE STANDING COMMITTEE ON CONSTITUTIONAL AND LEGAL AFFAIRS, Report on the Constitutional Qualifications of Members of Parliament, Parl Paper 131 (1981) 2.16; COMMONWEALTH, Final Report of the Constitutional Commission, Parl Paper 229 (1988) 4.797. The issue was also considered at the 1983 and 1985 Australian Constitutional Conventions, the House of Representatives Standing Committee on Legal and Constitutional Affairs in 1996, and the Joint Standing Committee on Electoral Matters in 1998.

95 CARNEY, *supra* note 76, 257.

able steps can be taken.[96] In this sense, the test also penalises independents who lack the institutional experience of parties that vet such matters routinely. Second, because of the contextual nature of the test and evidential difficulties in obtaining accurate information about foreign laws, the test lacks the clarity and simplicity of the *Sykes* minority view that nationality for the purposes of the Constitution, if not international law, should be determined unilaterally by Australian law. It is telling that the Australian Electoral Commission has been reluctant to advise candidates on their eligibility, preferring to refer them to constitutional lawyers.[97] Third, there is also uncertainty as to what indicia of foreign allegiance other than nationality will lead to disqualification, for example the receipt of welfare entitlements from a foreign state in an age of increasing global mobility. It seems clear though that any entitlements would not include mere eligibility for such rights, including nationality itself.[98]

3. Re Canavan

The High Court had an opportunity to clarify how the *Sykes* test is to be applied in the *Canavan* case. In light of the attention given to disqualification criteria in the *Culleton* and *Day* cases, the qualifications of other federal politicians came under further scrutiny and, beginning with the resignation of Greens Senator Scott Ludlum on 14 July 2017, six other parliamentarians were referred to the Court of Disputed Returns to determine whether they were disqualified under s 44 (i).[99]

While each of the referred parliamentarians presented a different set of circumstances, the Commonwealth sought to differentiate between naturalized and natural-born citizens to distinguish the circumstances of all but two (Senator Roberts and Senator Ludlum, who naturalized in 1974 and 1989 respectively) from those in *Sykes*. The Commonwealth argued that, contrary to common belief, the *Sykes* test was not a literal one and the ultimate issue was instead the extent of recognition of foreign law.[100] Adopting

96 *Ibid.* 254.

97 C. HULL, Bob Day and Rod Culleton's Parliamentary Eligibility Farce Should Have been Fixed 20 Years Ago, The Sydney Morning Herald (Sydney), 5 November 2016.

98 M. PRYLES, Nationality Qualifications for Members of Parliament, Monash University Law Review 8 No. 1 (1982) 163, 163, 179.

99 *Re Canavan*; *Re Ludlam*; *Re Waters*; *Re Roberts [No 2]*; *Re Joyce*; *Re Nash*; *Re Xenophon* [2017] HCA 45 (27 October 2017). Those referred were Nationals MP and Deputy Prime Minister Barnaby Joyce, Nationals Senators Matthew Canavan and Fiona Nash, Greens Senators Larissa Waters and Scott Ludlum, One Nation Senator Malcolm Roberts and NXT Senator Nick Xenophon.

100 Submission of the Commonwealth: *http://www.hcourt.gov.au/assets/cases/03-Canberra/c11-2017/AG_Submission-joint.pdf*.

as a purposive guide to this query the prevention of split allegiance, the Commonwealth proposed that only a foreign nationality 'voluntarily obtained, or retained' should engage s 44(i). Voluntary retention here includes where one 'becomes aware (i.e. subjectively appreciates) that there is a considerable, serious or sizeable prospect that he or she has that status […] unless reasonable steps to renounce it within a reasonable time of becoming so aware.'[101] Therefore the respondents, who took timely action upon discovering the likelihood of foreign nationality, remained qualified to serve in Parliament.

A significant obstacle to this argument is that the original draft of what was to become s 44 (i) stated: 'does any act whereby he becomes a subject or a citizen […] of a foreign power'. The ultimate adoption of 'is a subject or a citizen […] of a foreign power' could be seen as a repudiation by the drafters of the Constitution of the requirement for the additional element of voluntariness. The Commonwealth accounted for this change with the alternative explanation, evidenced by an 1897 Colonial Office memorandum to NSW Premier Reid, that the change was made to protect a candidate who had, after naturalizing as a foreign subject, regained lost British nationality through naturalization. There was no other indication in the drafting process of an intent to depart from the original meaning, which followed other colonial constitutions. The Commonwealth bolstered this argument with the long-established distinction between, on the one hand, natural-born nationals, including both the jus soli regime adopted by the United Kingdom particularly before 1870 and jus sanguinis regime of civil law jurisdictions and, on the other hand, naturalized subjects. Indeed, this distinction was employed in s 34 of the Constitution (the provisional qualifications for MPs) and dates back at least to the Act of Settlement 1700 (Imp), which excluded naturalized subjects from public office until the passage of the Aliens Act 1844 (Imp). The UK and colonies continued to employ this distinction from 1870, when the fact of dual nationality was acknowledged and permitted unless there was a voluntary act of foreign naturalization. In other words, the law permitted dual nationals who were natural-born British nationals to serve in public office and this was the reference point in drafting the Australian Constitution. Other arguments of the Commonwealth included the context of other provisions in the Constitution and the policy of certainty compared with the vagaries of foreign nationality laws.[102]

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101 Reply of the Commonwealth: *http://www.hcourt.gov.au/assets/cases/03-Canberra/c11-2017/Canavan_AGCth-Reply.pdf*.

102 The Commonwealth also dismissed the contentions that its approach was discriminatory and a departure from the principle that ignorance of the law is no defense (foreign law is routinely treated as fact in domestic courts).

The most substantial submission against the Commonwealth was that of former independent MP Tony Windsor.[103] Windsor's Submission argued that the Commonwealth's argument was an attempt to resurrect Deane J's dissent in *Sykes* and a departure from its 'bright lines' objective test of disqualification. The implied exception in the test is one of necessity or public policy only to prevent the case where a candidate cannot renounce foreign nationality even after taking reasonable steps to do so. An additional policy concern was to impose a duty of enquiry on the part of candidates into any possible foreign allegiance. In rejecting the voluntary act approach of the Commonwealth, Windsor's Submission notes that a subjective test is appropriate only to Brennan J's first limb of s 44 (i), namely 'acknowledgment of allegiance, obedience, or adherence to a foreign power.' Windsor's Submission downplayed the influence of colonial models upon Constitutional drafters, dismissing the Colonial Office memorandum as mere 'notes or observations of individuals involved'. He instead emphasized the differences between the Australian Constitution and the former colonies, which prohibited foreign allegiance on the part of sitting members but not candidates.

The High Court seemed to accept unanimously Windsor's effective invitation to adopt the 'strict and complete legalism' espoused by former Chief Justice Owen Dixon[104] as a defence against political controversy. Employing a well-established formulation of constitutional implication,[105] it held that the only qualification permitted by the text and by precedent was that s 44 (i) will not exclude 'participati[on] in the representative form of government ordained by the Constitution by reason of a foreign law which would render an Australian citizen irremediably incapable of being elected to either house of the Commonwealth Parliament.'[106] Evidently included in this test is the practice of foreign law: a lack of knowledge could be an excuse if 'not only the tenacity but also the inaccessibility of the foreign law was apt practically to prevent an Australian citizen from exercising the choice to participate in the system of representative government established by the Constitution.'[107] Reemphasising that this inaccessibility is of a prac-

103 *http://www.hcourt.gov.au/assets/cases/03-Canberra/c11-2017/Joyce_WindsorSubs.pdf.*

104 O. DIXON, Address upon Taking the Oath of Office in Sydney as Chief Justice of the High Court of Australia on 21 April 1952, in: Woinarski (ed), *Jesting Pilate and Other Papers and Addresses* (Melbourne, 1965) 247.

105 See e.g. *Australian Capital Television v Commonwealth* (1992) 177 CLR 106; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, *Roach v Electoral Commissioner* (2007) 233 CLR 162.

106 *Re Canavan*; *Re Ludlam*; *Re Waters*; *Re Roberts [No 2]*; *Re Joyce*; *Re Nash*; *Re Xenophon* [2017] HCA 45 [44].

107 *Ibid.* [67].

tical rather than theoretical nature, the Court added: 'some foreign states may be unwilling or unable to provide necessary information in relation to the ascertainment and means of renunciation of their citizenship.'[108] The Court found that Senators Canavan and Xenophon had been duly elected at the 2016 federal election, but that Joyce, Nash, Waters, Roberts, and Ludlum were unambiguously unelectable under s 44 (i).

Policy reasons rather than 'non-irremediability' seemed to dictate the outcome for Xenophon, whose father was born in Cyprus when it was a British possession. The Court accepted expert evidence that the class of British nationality held ('British overseas citizen') was of such an inferior status – for example, not including residence rights in the UK or entailing loyalty to the UK – that a holder of this status was not a subject or citizen of the UK for the purposes of s 44 (i). Yet the inaptness of the 'non-irremediability' test is most evident in the case of Senator Canavan. Italian consular officials initially confirmed in July 2017 that Canavan was an Italian citizen, having been registered by his mother without his consent on a so-called Register of Italians Resident Abroad in 2006. Yet expert evidence to the Court advised that any Italian nationality would instead arise from the fact that a 1983 decision of the Italian Constitutional Court held that Italian nationality passes through both male and female lines, including Canavan's maternal grandmother. Ordinarily, an applicant would register for a 'declaration of nationality', which has administrative procedures that differ from the Register of Italians Resident Abroad. The area of uncertainty was whether registration is a precondition of nationality or merely declaratory. If the former, Canavan would only be eligible to obtain nationality, which does not activate s 44 (i), as explained above. The view of the experts was that it is a precondition. The High Court preferred this evidence, citing the fact that otherwise nationality would pass automatically and indefinitely over generations.

This reasoning is not entirely compatible with a 'non-irremediability' test. Indefinite transmission of nationality is itself no practical bar to renunciation or therefore participation in Australian political life, but appears to have prompted a policy decision by the Court to exclude from the remit of s 44 (i) circumstances in which the alleged foreign nationality is controversial or unresolved in foreign law due to either doctrinal or factual uncertainties, including the accessibility of family histories. While it may be argued that the historical record is a matter of practical accessibility, this would not explain the result in Canavan's circumstances, where the record was readily available. If such policy concerns were indeed at play, there is much to recommend the Commonwealth's alternative argument that the status-based

108 *Ibid.*

prohibition in s 44 (i) is an unintended historical accident and better interpreted in line with colonial practice as a prohibition activated by objectively-ascertainable steps indicative of foreign allegiance, such as applying for foreign nationality or travelling on a foreign passport.

In summary, while the High Court's formulated test seems a strict and literal interpretation of s 44 (i), the test in application represents a continuation of the balancing policy implicit in *Sykes* between the purpose of preventing split allegiance and that of avoiding unreasonable requirements on political participation. On the other hand, the precise phrasing of the test matters and it is unfortunate that the Commonwealth was forced to overreach in proposing a subjective test in the defence of those such as Deputy Prime Minister Joyce, whose ignorance of unambiguous foreign nationality was inherently difficult to defend on any objective basis. Had an objective test been pursued, the Court may not have retreated into a formulation that it immediately seemed to discard in application to Senator Canavan. In future cases, the formulation leaves little room to incorporate reasonableness, let alone moral or social values, in the application of s 44(i). One example is that of Josh Frydenberg MP, who, if referred to the High Court, would likely be found to be a Hungarian national by virtue of an attempt by the Hungarian Government to remedy past wrongs by retrospectively granting nationality to persons born in Hungary, such as Frydenberg's mother, who had been rendered stateless through anti-Semitic persecution.[109]

4. Reform Options

The *Canavan* case was seen by some Government figures as an opportunity to both clarify the operation of s 44 (i) and move beyond the political instability and taxpayer resentment that the issue had caused.[110] Yet, no sooner had the High Court delivered its judgment than new doubts emerged over sitting parliamentarians. Notable among these was the President of the Senate, Stephen Parry, Government MP John Alexander, and key Senate crossbenchers such as Jackie Lambie. Some parliamentarians resigned, only to raise new issues of eligibility for their replacements (mainly turning on 'office of profit under the Crown' in s 44 (iv)). Where the Opposition – like the Government – had sought to make political mileage out of its stronger vetting procedures, a key ally of the Opposition leader (David Feeney MP) confessed to probably having dual UK nationality. The year 2017 ended with 'tit for tat' threats by the two major parties of referrals of up to 11

109 SENATE STANDING COMMITTEE ON CONSTITUTIONAL AND LEGAL AFFAIRS, *supra* note 94.

110 F. HUNTER, Revealed: Taxpayers Foot $11.6 Million Bill for Parliament's Citizenship Fiasco, The Sydney Morning Herald (Sydney), 18 December 2017.

suspect members of Parliament. Ultimately, at the time of writing, only two new referrals were made, one of which (Opposition Senator Katy Gallagher) was to test the issue of whether renunciation of a foreign nationality before nomination must also have taken effect. This seems unlikely given that the realist reading of the High Court's designation in *Sykes* of nomination as the key date is precisely to balance the letter and purpose of the rule with fairness and reasonableness. That this question remains unresolved speaks to the questionable coherence of the *Sykes* and *Canavan* tests, but the contextual definition of 'reasonable steps' adopted in those cases makes the case arguable either way: what if, like Justine Keay MP, there was a significant and unjustified delay in initiating renunciation?[111]

Section 44 (i) has long been regarded as problematic, with reform proposals dating back at least to a report of the Senate Standing Committee on Constitutional and Legal Affairs in 1981. One solution proposed in 1997 by the House of Representatives Standing Committee on Legal and Constitutional Affairs is for the Constitution to be amended to grant Parliament the power to adapt the disqualification to the times.[112] The Parliament could then merely require parliamentarians to renounce all foreign allegiances (known or unknown) upon nomination, which would have effect for the purposes of Australian law, if not foreign law.[113] Alternatively, the Parliament could adopt a business model of conflict of interest management, where the goal is transparency through disclosure of known allegiances. There is an argument that this should be the model for all disqualifications, including criminal conviction, to defer to the democratic judgement of electors.[114] These models would be consistent with the complementary measure of disqualification if a parliamentarian subsequently takes active steps to adopt a foreign nationality or lesser form of allegiance, which is suggestive of an 'active rather than a dormant interest in the affairs of a foreign state'.[115] A current loophole could also be remedied by making Australian citizenship a condition for sitting federal parliamentarians.[116]

In the wake of the *Canavan* case, Prime Minister Turnbull announced that the Government would again refer the matter to the Joint Standing Committee on Electoral Matters to consider, among other things, whether

111 S. BUCKINGHAM-JONES, Labor MP Justine Keay Admits Delay in Renouncing British Citizenship, The Australian (Sydney), 10 November 2017.

112 HOUSE OF REPRESENTATIVES STANDING COMMITTEE, *supra* note 93, 42.

113 *Ibid.* 42.

114 See the reference to the submission of Sawer in SENATE STANDING COMMITTEE ON CONSTITUTIONAL AND LEGAL AFFAIRS, *supra* note 94, 2.18. Hull is also critical of each of the disqualifications as currently applied: HULL, *supra* note 97.

115 CARNEY, *supra* note 76, 255.

116 *Ibid.* 255.

s 44 should be amended.[117] That previous recommendations of this and similar committees had not already been implemented speaks to the high threshold for constitutional amendment under s 128. This is compounded by the perception that any such referendum would be motivated by the self-interest of politicians. Political imperatives for both major parties required a short-term solution and, after much wrangling, the major parties agreed to the extraordinary step of requiring all sitting parliamentarians to demonstrate their compliance with s 44 (i).[118] By 1 December 2017, every parliamentarian was required to declare that or she was not a dual national, place and date of the birth, citizenship at birth, date of naturalization if this occurred, place and date of birth of parents and grandparents, whether the parliamentarian had ever been a citizen of another country, what steps had been taken to ascertain any foreign nationality, and evidence of the date and manner of any renunciation. These declarations to the Committee of Senators' Interests are to be maintained on an ongoing public Citizenship Register. Noncompliance with the resolutions underpinning this regime are to be referred to the Privileges Committee of the respective houses of Parliament to determine whether there has been serious contempt, potentially leading to suspension or other disciplinary action.[119] The fundamental weakness of this regime is that even full compliance does not guarantee that a parliamentarian is not a dual citizen. Nor would other proposals requiring parliamentarians to renounce all foreign allegiances (known or unknown) upon nomination[120] or to receive advice from a political rights and obligations ombudsman.[121]

There are hints of a way forward in the tendency for electors to reward, rather than penalize, parliamentarians forced to a by-election to regain a

117 See *https://www.pm.gov.au/media/media-statement-high-court-decision-and-ministerial-arrangements*.

118 See *https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Senators_Interests/establishment-citizenship-register; https://www.aph.gov.au/Senators_and_Members/Members/Citizenship*.

119 Whether contempt will actually be found is another matter. One libertarian Senator, David Leyonhelm, treated the resolution with contempt of a different kind by declaring that 'I once asked my mother if my father was truly my father, but she was offended so I didn't ask again. I suspect immaculate conception…. I've also done nothing to assure myself that I am not a member of the Communist Party or a pedophile.' *https://www.aph.gov.au/~/media/Committees/Senate/committee/interests_ctte/citizenship%20register/LeyonhjelmD_Cstat_171120.pdf?la=en*.

120 HOUSE OF REPRESENTATIVES STANDING COMMITTEE, *supra* note 93, 42.

121 See *http://www.abc.net.au/radionational/programs/lawreport/hca-ruling-on-dual-citizenship/9102320#transcript*.

seat invalidly held under s 44.[122] This suggests that voters do not necessarily see dual nationality as indicative of dual allegiance. A referendum to remove or liberalize s 44 (i) might have success if promoted with bipartisan support as an opportunity for electors to have a greater range of choice of candidates in a multicultural society[123] and, moreover, to secure their chosen candidates from a form of disqualification that may be regarded as an unduly disruptive and politicised technicality.

CONCLUSION

The recent scandals in Japan and Australia are a lesson on the negative effects of disqualification of parliamentary members with multiple nationality. First, the scandals are often used for political point scoring. Parties arbitrarily attack the credentials of members of other parties on the basis of alleged multiple nationality. Whether they in fact have multiple nationality is not always easy to clarify because the nationality law of foreign countries and even of the home jurisdiction poses challenges for identification and interpretation. Second, it is contrary to the global trend to approve of multiple nationality in general. The disqualification threatens multiple nationality because political candidates must renounce their foreign nationality acquired from cross-cultural marriage of the parents or from birth in a foreign country. Yet even if they win the election, the position is contingent on re-election, and they cannot automatically reacquire their former nationality upon failure or leaving office and may abandon troublesome procedures to do so in their former home country. Third, multiple nationals are working for the state where they are elected as parliamentary members. Normally, they are not at the same time public officials of a foreign country but merely nationals with little or no connection to foreign powers. In this context, the distinction between single nationals and multiple nationals is irrelevant. For those reasons, multiple nationality as such should not be a criterion for the disqualification of parliamentary members.

122 Examples include Barnaby Joyce: 'Barnaby rejoices as New England re-elects its deputy PM in a landslide', The Sydney Morning Herald (Sydney), 3 December 2017 and Jackie Kelly in the Lindsay by-election of 1996. Phil Cleary, disqualified under s 44 (iv) in *Sykes*, also went on to win the seat with an increased majority.

123 See Graeme Orr's comments at: *http://www.abc.net.au/radionational/programs/lawreport/hca-ruling-on-dual-citizenship/9102320#transcrip*.

SUMMARY

Multiple nationality may arise under the simultaneous applicability of the jus sanguinis and jus soli rules. This may pose problems in connection with parliamentary eligibility, as single nationality may be a prerequisite. The authors explore this issue with respect to Japanese and Australian law as representatives of the jus sanguinis and the jus soli rule respectively by analysing several recent political cases of double nationality. The first part of this article treats the development of the Japanese law on nationality, which changed in accordance with alterations in Japanese territory and political transformations. The case of Japan's Democratic Party former leader, Renho Murata, is analysed in light of current law and raises questions as to the requirement of nationality in Japanese political offices.

The second part focuses on Australian law, beginning with an overview of the current legal situation of nationality and political office and describing the underlying reasons stemming from historical and political developments. Subsequently, several cases of Australian parliamentarians and double nationality are analysed. Recent trends in the Australian High Court's rulings indicate that the former position of parliamentarians necessarily having only one nationality is softened by the development of the tests used to assess the issue of possible split allegiance. Seeing as though the tests do not lead to congruent results and the expected future increase in such cases, reform options are suggested. The article concludes with comparative observations regarding the similarities and differences between Japan and Australia.

(The Editors)

ZUSAMMENFASSUNG

Eine gleichzeitige Anwendung der Grundsätze des jus sanguinis und jus soli kann eine mehrfache Staatsangehörigkeit zur Folge haben. Eine solche führt dann zu Problemen hinsichtlich des passiven Wahlrechts, wenn dieses an die exklusive Staatsangehörigkeit des betreffenden Landes geknüpft ist. Dieses Spannungsverhältnis wird anhand einer Analyse aktueller Beispielsfälle für das japanische und das australische Recht untersucht, die für die Tradition des jus sanguinis bzw. des jus soli stehen. Der erste Teil des Beitrages gibt einen Überblick über die Historie des einschlägigen Rechts in Japan, welches sich in Abhängigkeit von territorialen und politischen Veränderungen entwickelt hat. Es folgt eine Diskussion des Falles des früheren Generalsekretärs der Demokratischen Partei Japans, Renho Murata, aus der Sicht des geltenden Rechts. Der Fall wirft Fragen bezüglich der Erforderlichkeit der japanischen Staatsangehörigkeit für politische Ämter auf.

Der zweite Teil befasst sich mit dem australischen Recht und beginnt mit einem Überblick über das aktuelle Verhältnis von Staatsangehörigkeit und politischem Amt und dessen historische Wurzeln in Australien. Im Anschluss werden verschiedene Fälle von doppelten Staatsangehörigkeiten von politischen Akteuren diskutiert. Jüngere Entscheidungen des australischen High Court indizieren, dass das tradierte Erfordernis einer einzigen Staatsangehörigkeit durch die Anwendung eines speziellen Test zur Feststellung des (Nicht)Vorliegens potentieller Loyalitätskonflikte aktuell gelockert wird. Da diese jedoch bislang nicht zu kongruenten Ergebnissen geführt haben und weitere Gerichtsverfahren zu erwartet sind, werden Reformvorschläge unterbreitet. Der Beitrag schließt mit einigen rechtsvergleichenden Beobachtungen im Verhältnis von Japan und Australien.