The legocentric citizen

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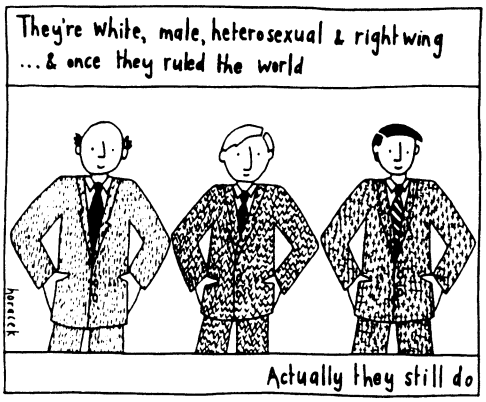
Exploring notions of citizenship in multicultural Australia.



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> *Multiculturalism* is the ultimate soundbite. It embodies not only a claim of inclusion. It is also metaphor for the opposition to institutional rules that reframe in meritocratic terms the historical exclusion of people of color and women. It is metaphor for the demand for a reconceptualization of the 'public' as heterogeneous, not homogenous and assimilated. It is also metaphor for an idea of inclusion that transcends formal equality and narrow conceptions of legal remediation.[1]

By and large, law or, more accurately, liberal legalism, has had remarkably little to say about citizenship, other than in regard to the existential question of 'in' or 'not in'. The primary role assigned to law has been to police the metaphysical boundaries in order to maintain the exclusivity of the in-group within the international community. The preponderance of reported cases in Australia deal with disputes relating to entry permits and deportations. A superficial reading of key Australian legal texts could induce one to believe that the substantive meaning of citizenship was inconsequential. However, a closer inspection reveals that liberal legalism is constantly engaged in a subtle constitution and reconstitution of the citizen.

Like many terms favoured by liberal legalism, citizenship poses as a universal, of the kind that is familiar within the public realm, the realm of generality. However, the post-modern imperative demands that cognisance be taken of the subcutaneous meanings lurking beneath claimed universals. Law, as the pre-eminent discourse of modernity, continues to be resistant to the critiques of feminists, critical race scholars and others, who argue that the universal is a convenient carapace designed to occlude the identity of its typical beneficiary, who is white, Anglo-Celtic, male, heterosexual, able-bodied, and veers to the right of centre in political and social issues, a creature whom I have dubbed 'benchmark man', since he is the standard against which normativity is invariably measured.

The deconstructive project of post-modernism has coincided with an historical high point in Australia — the simultaneous celebration and soul-searching emanating from the temporal lacuna between the Bicentenary of 1988 and the impending centenary of Federation. Sloughing off the last of the imperial ties is high on the agenda, as is the desire for an Aboriginal reconciliation in the aftermath of *Mabo*. The sequential dissonance has caused us to be more reflexive about notions of Australian nationalism and identity, demanding interrogation of 'the citizen'. In this brief comment, I suggest that the universality and ostensible neutrality of citizenship has served a significant ideological purpose by occluding the play of partiality and power beneath its carapace.

Texts

The Constitution

The Australian Constitution, a key text, one would have thought, for determining the relationship between citizen and state, alludes to 'citizens' only incidentally, although there are scattered references to

'subjects', 'residents', 'people' and 'persons' — hardly the same thing at all. The framers of the Constitution rejected a focus on 'the citizen' because of what were perceived to be its republican origins; subjecthood was deemed more appropriate within a monarchy.[2] People are important in the Constitution only in so far as they constitute States, for the Constitution is primarily concerned with the allocation of powers between the Commonwealth and the States, the mode of governance of the Commonwealth and the separation of powers. There is no express reference to individual rights of the kind found in the American Constitution, such as freedom of speech and equality before the law.[3] Westminster governance and British subjecthood were considered adequate protection by our Constitutional framers:

> 'I am a British subject,' is equal in practical and Imperial significance to the proud boast of the Roman *'civis Romanus sum.'*[4]

However, this boast did not extend to inclusion of an equality clause, for the benchmark men of Federation undoubtedly had an interest in retaining discriminatory legislation. After all, neither women nor Aboriginal people possessed the status of legal subjects at the time of the Constitutional conventions, even if enfranchised, and discriminatory legislation involving 'aliens', such as the Chinese, was a feature of the times, and was to crystallise in the infamous White Australia policy (*Immigration Restriction Act 1901* (Cth)).

The single reference to citizenship in the Constitution is that contained in s.44(1), which refers to 'a citizen of a foreign power', the implication being that it is only nations other than Australia that have citizens. In one sense, the allusion is unsurprising, since the creation of the Australian nation did not formally confer Australian citizenship on eligible Australians, who retained the status of British subjects until the end of World War II. The Australian Constitution is, after all, an Act of the British Parliament (63 and 64 Victoria, Ch 12).

The formalistic approach to citizenship was long sustained by the High Court's favoured adjudicative mode of 'strict legalism', most notably associated with former Chief Justice, Sir Owen Dixon. Nevertheless, despite the striking shifts in constitutional adjudication that have occurred since the 1980s, a deference to form has by no means been jettisoned, a proposition I shall illustrate by reference to the case of *Sykes v Cleary and Others* (1992) 109 ALR 577. The primary question was whether the first respondent, who was on leave from the Victorian Education Department, held an 'office of profit under the Crown' contrary to s.44(iv) of the Constitution. This question was answered in the affirmative (per Mason CJ, Brennan, Dawson, Toohey, Gaudron and McHugh JJ; Deane J dissenting).

The citizenship issue in *Sykes* related to whether two of the candidates in a House of Representatives by-election should have been disqualified by virtue of s.44(i) of the Constitution if either was a person who:

> [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.

Both Mr Delacretaz and Mr Kardamitsis were naturalised Australian citizens who were found not to have taken 'reasonable steps' to have divested themselves of their Swiss and Greek citizenship respectively, despite long periods of residence in Australia. Mr Delacretaz had lived in Australia for 40 years and had been naturalised for 30 years. At the time, he had renounced all allegiance to any sovereign state and sworn an oath of allegiance to the Queen. He had also sworn to 'observe the laws of Australia and fulfil [his] duties as an Australian Citizen' (at 588). However, he had not applied to the Swiss Government to terminate his citizenship. Mr Kardamitsis had lived in Australia for more than 20 years and had been naturalised for 17 years. He was married to a naturalised Australian citizen and had three children who were Australian citizens. Mr Kardamitsis had sworn a similar oath of allegiance to that of Mr Delacretaz and had surrendered his Greek passport. Mr Kardamitsis had also taken oaths of allegiance as a requirement for serving on his local council and becoming a Justice of the Peace. He was unaware that there was a procedure by which he could have his nationality discharged by applying to the appropriate Greek minister. Both men held Australian passports, the familiar indicium of citizenship within the international community. The ubiquitous and slippery test of 'reasonableness', a favourite hermeneutic device for masking dominant ideologies, was held to depend on the 'circumstances of the particular case' (at 591), which may include 'the situation of the individual, the requirement of the foreign law and the extent of the connection between the individual and the foreign state of which he or she is alleged to be a subject or citizen' (at 594).

Section 44(i) of the Constitution was designed primarily to circumvent treasonable behaviour on the part of Members of the Australian Parliament,[5] the likelihood of which not a scintilla of evidence was adduced in regard to the candidates. *Sykes v Cleary* highlights the distorting effect of focusing on form with scant regard for substance.[6] The evidence before the court revealed that both men had done all that could reasonably be expected to extinguish their original citizenship, which included a formal renunciation of prior allegiances and a long period of residence in Australia. As Gaudron J (dissenting) pointed out, the Parliament could not have intended that the oath and affirmation, involving the formal renunciation, should be 'entirely devoid of legal effect' (at 614). Turning the test around, she suggested that it did not seem reasonable to expect Mr Delacretaz 'to seek release when it necessarily involved acknowledgement of citizenship that has already been formally renounced' (at 617). Why was it not possible for a person to be a Swiss or Greek citizen by birth and an Australian citizen by naturalisation? While the *Australian Citizenship Act 1973* (Cth) suggests that a grant of citizenship places a person in the same position as one who was born in Australia, a majority of the High Court does not agree.

According to Aristotle, and subsequent theorists,[7] the good citizen is one who serves [his] community by actively participating in the life of the polis, that is, by holding office. A mere passive belonging does not suffice. Despite having gone through a ceremony of conferral of citizenship and receipt of the certificate attesting to the grant, Messrs Delacretaz and Kardamitsis were adjudged not fit to hold office and represent their fellow citizens in Federal Parliament, although good enough to be chosen to enter the country and to be granted citizenship. Their ineligibility to stand for Parliament denied them the capacity to be good Australian citizens. Dual citizenship had the effect of downgrading them from citizens to denizens.

Sykes v Cleary illustrates the residual resistance to diversity in the constitution of citizenship, albeit that Australia is an immigrant society, which boasts of its racial heterogeneity

and beneficent multicultural policies. It takes no more than a small scratch to reveal the latent xenophobia beneath the bland surface of universalism that legal formalism endeavours to occlude.

The Citizenship Act

White Australians, either born in Australia, or naturalised, were not formally deemed to be citizens until 1948, when the *Nationality and Citizenship Act* (changed to the *Australian Citizenship Act* in 1973) was passed. Similarly, there was no Australian nationality, as distinct from British nationality, in formal terms until 1948. The formal citizenship status of Aboriginal Australians remained ambiguous after that date, as they were not enfranchised in Queensland and Western Australia until 1962.

The Commonwealth was empowered to enact legislation dealing with citizenship by virtue of s.51(xix) of the Constitution, the head of power pertaining to 'naturalisation and aliens'. The conjunction communicates the absence of a positive image of citizenship, as well as a sense of the prevailing xenophobia of the 1890s. Cognate sections of the Constitution, which also involve policing the boundaries of citizenship, include s.51(xxvii) 'Immigration and Emigration' and s.51(xxix) 'External Affairs'.

Despite its title, the *Australian Citizenship Act 1948* (Cth), like the Constitution, does not attempt to define 'citizen', although 'Australia', 'child' and even 'responsible parent' are defined in the interpretation clause (s.5). The Act nevertheless proceeds to regulate citizenship by birth, adoption and descent. It also authorises citizenship to be granted to a person who is able to satisfy the Minister that he or she has been (*inter alia*) a permanent resident for two years, is over 18 years, is of good character, possesses a basic knowledge of English, and has an adequate knowledge of the responsibilities and privileges of Australian citizenship (s.13(1)). The grant of citizenship or 'naturalisation' purports to confer on the grantee the same status as that which a natural-born Australian acquires by birth. In *Sykes v Cleary*, the majority judges did no more than cursorily advert to the respondents' naturalisation under the *Citizenship Act*. There was no consideration of the *character* of Australian citizenship under that Act, and no acknowledgement by the majority that they were creating both a bifurcation and a hierarchisation of the concept.

Until recently, the *Citizenship Act* was a paradigmatic illustration of the formalistic approach to citizenship — solely concerned with how to get in and out of it — as there was no advertence to obligations, such as voting or defending the country against invasion, although a departmental officer may have informed grantees that assuming such responsibilities was what citizenship meant.[8] However, in 1993, as a result of criticism that the Act contained 'no comprehensive statement of who are citizens, nor of their rights and obligations, and because of the obscure drafting of the Act',[9] amendments were effected to acknowledge ideals of citizenship. A Preamble was included in the Act, which referred to citizenship as a 'common bond, involving reciprocal rights and obligations, uniting all Australians, while respecting their diversity . . .' In addition, a Pledge of Commitment, based on a poem by Les Murray, was added:

> From this time forward [under God],
> I pledge my loyalty to Australia and its people,
> whose democratic beliefs I share,
> whose rights and liberties I respect, and
> whose laws I will uphold and obey.

Despite the inclusion of more stirring and inspirational sentiments, the *Citizenship Act* falls far short of a code of the rights and responsibilities of citizenship. Even the amendments I have adverted to are not found in the body of the text, rendering their effect hortatory rather than mandatory within the canons of interpretation. Although it is apparent that there has been some movement away from the constraining effects of 'strict legalism', Australian citizenship is still generally perceived as being somewhat limited in content, as witnessed by the fact that more than one million Australian permanent residents have declined to apply for 'naturalisation'.[10]

Active citizenship

While a formalistic appraisal of the legocentric citizen identifies the passive or descriptive elements of citizenship, it cannot capture the active elements, including the discrepancies in power between citizens that shape their ability to be good citizens.[11] Civility is invisible to the juridical gaze. Indeed, the universalism of citizenship, underpinned by the liberal myth that the citizenry constitutes a community of equals, is designed to mask differences. Alterity has to be muted or suppressed altogether within a sphere of generality.

Jocelyn Pixley argues compellingly that the opportunity to engage in employment is a basic condition of being a citizen.[12] Indeed, it is apparent that economic worth, property and rationality operate to produce the power capital that conduces to active or 'good' citizenship. Unemployment and dependency may be devastating for those on welfare, particularly for many women, Aboriginal people and people from non-English speaking backgrounds. Lack of power capital denies them a speaking voice. Legal formalism, attuned as it is to the carapace of universalism, chooses to disregard these crucial differences.

The power capital of women is significantly affected by the fact that they are expected to undertake socially necessary caring work in order to leave men free to fulfil their civic duties, as well as to participate in work, war and sport. Even if women participate in employment, they are still expected to bear responsibility for the preponderance of caring work. The symbiosis between private and public worlds has shown itself resistant to change, despite the contemporary rhetoric. The power capital of benchmark men is augmented by this symbiosis. Not only does it free them from the responsibilities of childcare and housework, it enables them to enhance their power capital through the fraternal ties of civil society, such as those emanating from sporting and club life.

The facilitation of 'good' citizenship for benchmark men has enabled them to be seen as the indigenous inhabitants of the polity, whereas women have not properly been accepted as citizens, despite the significant gains of second wave feminism.[13] Like Messrs Delacretaz and Kardamitsis, they have not been permitted to be 'good' citizens through participation in public affairs, other than at the local level.[14] Formal admission to the polity through enfranchisement did not guarantee representation. Indeed, it was deemed necessary for most Australian States to enact special legislation to permit women to be political representatives.[15] As recently as 1959, there was a formal (albeit unsuccessful) challenge to the nomination of two women to stand for the South Australian Legislative Council (65 years after enfranchisement).[16] Resistance to the idea of women as representatives of benchmark men continues, compounded by a history of masculinist authority in the public sphere.[17] The complemen-

tarity thesis, which avers that women can realise their good citizen potential by being good mothers in the private sphere has not disappeared, despite formal acceptance of the non-discrimination principle. Vestiges of the juridically unequal treatment of married woman, rendering them less than legal persons in their own right, are still to be found in the toleration of domestic violence, as well as in the affirmation of indivisibility in financial and property transactions. Religious and ethnic minorities, together with gay men and lesbians, have also been located within a 'marginal matrix of citizenship'.[18]

Aboriginal people have been constructed as subordinate by two centuries of violent practices, exclusion and paternalism. Enfranchisement certainly did not guarantee instantaneous admission to the community of Equals. Aboriginal women may have been formally, albeit inadvertently, enfranchised in South Australia in 1894,[19] but enfranchisement has not guaranteed social acceptance or an end to racism.[20] Aboriginal people have been confined to a citizenship shadowland. However, the *Racial Discrimination Act 1975* (Cth), which has recently celebrated its 20th anniversary, together with positive initiatives, such as *Mabo*, prefigure a more active conceptualisation of citizenship.[21] Such developments represent discursive moves in the discriminatory narrative of citizenship that I have outlined.

Conclusion

While citizenship appears to be an empty abstraction within legal texts, the currency of the term within popular discourse manifests attempts to slough off the heritage of colonialism, together with its correlative racism and sexism.[22] The law cannot divorce itself from social change, despite the well-entrenched positivistic myth that it is neutral and autonomous. As substantive ideas of citizenship crystallise within popular discourse, a hazy reflection of this revisioning begins to form within the legal imagination.

Deconstructing the legocentric citizen exposes a number of characteristics not otherwise discernible. First, one can see how the concept has begun to acquire colour and shape, as Australia has gradually acquired more confidence in the wake of post-colonial subjecthood, boosted by the triumph accompanying the celebratory moment. Second, when we take a step backwards from the citizen and examine his or her averredly common national identity, we find a plethora of differences emanating from race, class and sex, which affect his or her ability to participate in the community and be a good citizen. We see that the opacity of citizenship within legal texts has permitted the polis to authorise benchmark men to invest it with a substance that continues to operate to their advantage. Stepping back also enables us to discern the dialogue between the passive and the active dimensions of citizenship that is beginning to occur. It is within the interstices of this dialogue that the possibilities of social change are located. Scrutiny is already causing the legocentric citizen to assume a more varied complexion.

References

1. Greene, Linda S., 'Multiculturalism as Metaphor', (1992) 41 *De Paul Law Rev* 1173.
2. Quick, John and Garran, Robert Randolph, *The Annotated Constitution of the Australian Commonwealth* (1901 edn), Legal Books, Sydney, 1976, p.957. For discussion, see David A. Wishart 'Allegiance and Citizenship as Concepts in Constitutional Law' (1986) 15 *Melbourne University Law Review* 662.
3. The High Court is only now 'finding' such rights within the Constitution. See, for example, *Nationwide News Pty Ltd v Wills* (1992) ALJR 658; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 66 ALJR 214; *Leeth v Commonwealth* (1992) 107 ALR 672 in which Deane, Toohey & Gaudron JJ (dissenting) were prepared to find a doctrine of legal equality underpinning the Constitution, a notion unknown at common law. For commentary on recent developments, see Rich, William, 'Approaches to Constitutional Interpretation in Australia: An American Perspective' (1993) 12 *University of Tasmania Law Review* 150. Cf. Detmold, M.J., 'The New Constitutional Law' (1994) 16 *Sydney Law Review* 228; Doyle, J., 'Constitutional Law: "At the Eye of the Storm"' (1993) 23 *Western Australia Law Review* 15; Kennett, Geoffrey, 'Individual Rights, the High Court and the Constitution' (1994) 19 *Melbourne University Law Review* 581. For recognition of the interests of citizen children, see *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 128 ALR 353.
4. Quick and Garran, above, p.957.
5. Irving, Helen, 'Citizens and Not-quite Citizens', *Constitutional Centenary*, October 1993, p.9.
6. The substantive test is accepted within the principles of international law. See the *Nottebohm Case* (*Liechtenstein v Guatemala*) ICJ Reports 1955. The majority in *Sykes* held that the wording of the Constitution s.44(i) ('. . . citizen of a foreign power') precluded them from adopting this test.
7. Aristotle, *Politics*, ed. and trans. John Warrington, Everyman's Library, J.M. Dent & Sons, London, 1959, 1275a. For example, Arendt, Hannah, *The Human Condition*, University of Chicago Press, Chicago, 1958; Zwiebach, Burton, *Civility and Disobedience*, Cambridge University Press, Cambridge, 1975; Heater, Derek, *Citizenship: The Civic Ideal in World History, Politics and Education*, Longman, London, 1990, p.201.
8. Peters, Rebecca, 'Citizen Peters and Aristotle: The Right to Park in a Loading Zone' (1992) 17 *Alternative Law J* 106. This is a witty critique of the uninspiring process of acquiring citizenship.
9. Report by the Senate Standing Committee on Legal and Constitutional Affairs, *Australian Citizenship Amendment Bill 1993*, Parliament of the Commonwealth of Australia, Canberra, 1993, p.5.
10. Kaye Healey (ed.) *An Australian Identity: Multiculturalism, Civics, Citizenship, Issues for the Nineties*, 1995, p.16.
11. I have elaborated on the argument in this part in Thornton, Margaret, 'Embodying the Citizen' in Margaret Thornton (ed.), *Public and Private: Feminist Legal Debates*, Oxford University Press, Melbourne, 1995.
12. Pixley, Jocelyn, *Citizenship and Employment: Investigating Post-Industrial Options*, Cambridge University Press, Melbourne, 1993.
13. See, for example, Gatens, Moira, *Feminism and Philosophy: Perspectives on Difference and Equality*, Polity Press, Cambridge, 1991; Jones, Kathleen B., 'Citizenship in a Woman-Friendly Polity' (1990) 15 *Signs: Journal of Women in Culture and Society* 781; Pateman, Carole, *The Sexual Contract*, Polity Press, Cambridge, 1988.
14. Phillips, Anne, *Engendering Democracy*, Polity Press, Cambridge, 1991, pp.60-61.
15. *Women's Legal Status Act 1918* (NSW); *Parliamentary Elections (Women Candidates) Act 1923* (Vic.); *Elections Act 1915* (Qld); *Parliament (Qualifications of Women) Act 1920* (WA); *Constitution Act 1921* (Tas.).
16. *The Queen v Hutchins; ex parte Chapman and Cockington* [1959] SASR 189.
17. Sawer, Marian and Simms, Marian, *A Woman's Place: Women and Politics in Australia*, Allen & Unwin, Sydney, 2nd edn, 1993; Phillips *Engendering Democracy* ch. 3; Jones, Kathleen, *Compassionate Authority: Democracy and the Representation of Women*, Routledge, London, 1993.
18. Evans, David T., *Sexual Citizenship: The Material Construction of Sexualities*, Routledge, London, 1993, p.6.
19. *Constitution Amendment Act 1894* (SA).
20. See, for example, Ferguson, William, 'Cries from the Heart: Aborigines claim Citizen Rights' in Irene Moores (Compiler) *Voices of Aboriginal Australia: Past Present Future*, Butterfly Books, Springwood, NSW, 1995. See also other contributions in this collection.
21. Compare Detmold, above, ref 3, p.237.
22. For example, 'Keating's Good Citizen' was the lead story in the *Age* of 27 April, 1995 and the Joint Standing Committee on Migration has recommended that 1999 be proclaimed the Year of Australian Citizenship. See Joint Standing Committee on Migration, Parliament of the Commonwealth of Australia *Australians All: Enhancing Australian Citizenship*, AGPS, Canberra, 1994, p.xix. See also Civics Expert Group, *Whereas the People . . . Civics and Citizenship Education*, AGPS, Canberra, 1994.