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The Problem of Applying Foreign Law under Section 44(i) of the *Constitution*

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Abstract

Dual citizens are ineligible to sit in the Federal Parliament by virtue of section 44(i) of the Australian Constitution. In 2017 in Re Canavan, the High Court took a strict interpretation of that section, meaning that dual citizens are ineligible regardless of whether they have any knowledge of their foreign citizenship. The status of foreign citizenship, and therefore the status of eligibility under the Constitution, falls to a question of foreign law. This gives foreign law a peculiar significance in determining who may and may not participate in our democratic system of government. Most commentary on the dual citizenship crisis has centred on the constitutional implications, and the normative question of whether section 44(i) ought to exist. Instead, this article focuses on the internal problems of section 44(i) as it stands, according to its recent interpretations by the High Court. Specifically, this paper is concerned with the exceptions to the application of foreign law under section 44(i). It asks, when will the Court defy the word of foreign law? And on what principled basis?

I Introduction

In July 2017, Greens Senators Scott Ludlam and Larissa Waters resigned from their places in the Federal Parliament after they revealed that they held a foreign citizenship. They were, therefore, ineligible to have been elected by operation of section 44(i) of the *Australian Constitution*. It soon followed that others, including Government ministers, might have been ineligible for election. The Parliament resolved to refer five other members, in addition to Ludlam and Waters, to the Court of Disputed Returns[1] for the determination of their eligibilities under section 44(i).

Section 44(i) of the *Constitution* soon became the focus of a political and constitutional crisis.

In *Re Canavan*, the High Court, sitting as the Court of Disputed Returns, held that five of those referred were ineligible at the time they nominated

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1 *Commonwealth Electoral Act 1918* (Cth) s 379.

for election.[2] Their seats were vacated. Only senators Canavan and Xenophon were allowed to retain their places in the Senate.[3]

The case of *Re Canavan*[4] presents opportunity for an interesting discussion of the values expressed in the *Constitution* and whether they are suited to contemporary Australia. But the objection against s 44(i) which that question anticipates is ultimately a political one. That is not the scope of this article, which is instead concerned with the internal logic of the *Constitution*, that is whether or not s 44(i) is a good and effective law on its own terms. Is it really possible to obey it? This question is concerned with way that section 44(i) extends the rule of foreign law into our public life. Questions of foreign law frequently arise in *private* international law. But section 44(i) of the *Constitution* gives foreign law a curious *public* significance, in allowing it to determine who is eligible to participate in our democracy.

This article analyses the judgment in *Re Canavan*[5] in its broader legal context. In Part II, I rationalise the bases on which the Court suggested it would defy the word of foreign law. I explore how this decision builds on earlier cases which deal with section 44(i). In Part III, I investigate the normative bases to those exceptions. This includes a discussion of the jurisdiction of nationality, and decisions of the House of Lords dealing with the legal legacy of Nazi Germany in questions of private international law. Finally, in Part IV, I look at two sections of the judgment in *Re Canavan*,[6] which dealt with the references of Senators Canavan and Xenophon. Here the Court gave greater scrutiny to foreign law than it did in respect of the other referees. In that part, I analyse the Court's interpretations of Italian and British law with regard to the normative principles discussed in Parts II and III.

II Foreign Law under Section 44(i)

Section 44(i) of the *Australian Constitution* proscribes from election three classes of person:

1. Those who are 'under any acknowledgment of *allegiance, obedience, or adherence* to a foreign power';
2. Those who are '*subject[s]* or *citizen[s]*' of a foreign power;
3. Those who '*entitled to the rights or privileges* of a subject or a citizen of a foreign power'.

The broad purpose of the section is clear. It seeks to ensure that Federal elected representatives have no other allegiance than to Australia.[7]

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2 *Re Canavan, Re Ludlam, Re Waters, Re Roberts (No 2), Re Joyce, Re Nash, Re Xenophon* (2017) 349 ALR 534, 563–4 [136]–[139] ('*Re Canavan*').

3 Ibid 554 [87], 563 [135].

4 *Re Canavan* (n 2).

5 Ibid.

6 Ibid.

7 *Sykes v Cleary* (1992) 176 CLR 77, 107 ('*Sykes*'); *Re Day (No 2)* (2017) 343 ALR 181, 193 [49] (Kiefel CJ, Bell and Edelman JJ), citing *R v Boston* (1923) 33 CLR 386, 400 (Isaacs and Rich JJ).

Allegiance is a state of mind. It is a conscious preference for the interests of a particular cause. But it is possible and common for someone to be a citizen of a country and also to be opposed to its interests. So might national allegiance be more accurately described as a conscious debt of obligation to a state, willing or not, but necessarily knowing. The problem arises when that obligation is owed—for the state considers this to be true—by a person who does not know it. Thus it seems that section 44(i) is not concerned with *actual* allegiance, but with the *status* of foreign citizenship.[8]

The problem of knowledge and allegiance was made plain by the cases of the respondents in *Re Canavan*.[9] With the exception of Roberts, the Court accepted that none of the respondents actually knew that they were a foreign citizen at the time they nominated for election.

Various submissions made to the Court sought to imply into the words of section 44(i) a mental element.[10] Adopting that implication, the section would only operate to disqualify people who knew of their status as a foreign citizen or—depending on the threshold for knowledge—ought to have known.

But the Court took a strict interpretation of the section. Its construction was clear. It was concerned with *status*, and not *knowledge* of that status.[11] To the Attorney-General, who had made submissions in favour of a mental element,[12] this was 'almost brutal literalism'.[13]

The Court's interpretation meant that a person's citizenship status under foreign law would be determinative of eligibility under section 44(i).[14] But the Court accepted that it would not apply foreign law in some cases. The following sections discuss the exceptions which the Court sought to define.

A *The Constitutional Imperative and the 'Reasonable Steps' Test*

The Court in *Re Canavan* recognised that compliance with section 44(i) must be exempted where a person would be irremediably disqualified because the person could never be able to extinguish their foreign citizenship.[15] This might be the consequence of an extreme foreign citizenship law, or particularly onerous requirements for renunciation. To apply such a law would violate the person's right to participate in the

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8 *Re Canavan* (n 2) 541 [26], citing *Sykes* (n 7) 109–10 (Brennan J).

9 *Re Canavan* (n 2).

10 Ibid 539–40 [13]–[19].

11 Ibid 540 [19].

12 Ibid 539 [14]–[15]; Attorney-General (Cth), 'Annotated Submissions of the Attorney-General of the Commonwealth', Submission in *Re Canavan, Re Ludlam, Re Waters, Re Roberts (No 2), Re Joyce, Re Nash, Re Xenophon*, Nos C11, C12, C13, C14, C15, C17, C18/2017, 26 September 2018, 13 [32], 20–22 [52]–[59].

13 Paul Karp, '"Brutal literalism": Brandis critiques high court and contradicts PM on reform', *Guardian Australia* (online, 29 October 2017) <https://www.theguardian.com/australia-news/2017/oct/29/brutal-literalism-brandis-critiques-high-court-and-contradicts-pm-on-reform>.

14 *Re Canavan* (n 2) 544 [37].

15 Ibid 545 [44].

democratic process that is established as the system of government by the *Constitution*.[16]

The Court accepted the label given to this exception in oral argument: 'the constitutional imperative'.[17] This built on authority in *Sykes v Cleary*, in which the plurality warned against giving 'unqualified effect' to foreign law where that would

> result in the disqualification of Australian citizens on whom there was imposed involuntarily … a continuing foreign nationality, notwithstanding that they had taken *reasonable steps* to renounce that foreign nationality.[18]

Brennan J concurred with the plurality in *Sykes v Cleary*. His Honour considered that it anticipated 'extreme examples of foreign … citizenship being foisted upon persons against their will'.[19] His Honour gave one such example:

> if a foreign power were mischievously to confer its nationality on members of the Parliament so as to disqualify them all, it would be absurd to recognise the foreign law conferring foreign nationality.[20]

This example is fanciful. The operation of section 44(i) to disqualify a member of Parliament is likelier to fall to individual questions, each dealing with different foreign laws and different facts, as in *Re Canavan*.[21] But even if an 'extreme' law of the breadth suggested by Brennan J is unlikely, there are certainly others which are not fanciful, as I will discuss in Part III.

B *Extreme Laws*

A distinction may be drawn between two types of 'extreme' law (to adopt the language in *Sykes v Cleary*). In the first, the law is extreme by its own nature. The reason for it being disregarded by the domestic court, therefore, is inherent to the law itself. This kind of 'extremity' will be discussed in Part III.

In the second kind of extremity, it is the law *as applied* which creates an extreme or absurd result—not wholly because of the nature of the law, but also because of the circumstances of the person to whom the law applies. The problem which these circumstances present for section 44(i) is that they create difficulty for the person seeking to renounce their foreign citizenship. The person cannot make that renunciation by normal procedure—either at all, or without adverse consequences. The personal circumstances which may give rise to such obstacles may be infinite in number. They will be discussed below. It is the 'reasonable steps' test which deals with this kind of situation.

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16 Ibid 545 [39].
17 Ibid 545 [43].
18 *Sykes* (n 7) 107 (Mason CJ, Toohey and McHugh JJ) (emphasis added).
19 Ibid 131.
20 Ibid 113 (Brennan J).
21 *Re Canavan* (n 2).

C *The 'Reasonable Steps' Test*

The test asks whether the foreign law is unreasonably burdensome in its requirements for a person to renounce their foreign citizenship. If the requirements are 'reasonable', then a person must comply with them.[22] It is not only an interrogation of the reasonableness of the law itself, but also of the 'circumstances of the particular case'.[23]

In *Sykes v Cleary,* it was held that the status of ineligibility under section 44(i) will depend on whether the person has 'taken all reasonable steps to divest himself or herself of any conflicting allegiance'.[24] The Court in *Re Canavan* rejected a submission by the Attorney-General which would mean that, if a person did not know that they were a foreign citizen, then '[t]aking *no steps* [would be] reasonable'.[25] Ignorance would not reduce the burden of renunciation if there was a reasonable way for that to be done.

The Court gave one example of a case in which it would accept that a person had undertaken all the reasonable steps availed to them, even if those steps did not fully amount to a renunciation under foreign law:

> for example, … a requirement of a foreign law that the citizens of the foreign country may renounce their citizenship only by acts of renunciation carried out in the territory of the foreign power. Such a requirement could be ignored by an Australian citizen if his or her presence within that territory could involve risks to person or property.[26]

The Court's example brings to mind the hypothetical cases of members of persecuted minorities, and the domestic enemies of authoritarian regimes. Neither of these types of people would be afforded the necessary bureaucratic assistance by the oppressive foreign power for them to renounce their foreign citizenship.

This class of situations may be contrasted to another in which the 'reasonable steps' test might intervene: where the foreign bureaucracy is 'unwilling or unable' to assist with the renunciation.[27] This could include states during times of crisis or civil war, and inept or inefficient bureaucracies.

The purpose of the 'reasonable steps' test, therefore, is to allow an Australian dual citizen to nominate for election where they would otherwise be disqualified by the law of an oppressive or inept foreign legal regime. Even if that person has not fully renounced their foreign citizenship, they would not be treated as a foreign citizen for the purposes of section 44(i) provided they had taken whatever reasonable steps were availed to them.

One question remains: what needs to be done to satisfy the test? This was the issue in *Sykes v Cleary.*[28] The facts concerned two naturalised

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22 *Sykes* (n 7) 108 (Mason CJ, Toohey and McHugh JJ), 114 (Brennan J), 132 (Dawson J).
23 Ibid 108 (Mason CJ, Toohey and McHugh JJ), 128–130 (Deane J), 131 (Dawson J).
24 Ibid 107.
25 Attorney-General (Cth) (n 12) 1–2 [6] (emphasis added); *Re Canavan* (n 2) 549 [61].
26 *Re Canavan* (n 2) 551 [69].
27 Ibid 550 [67].
28 *Sykes* (n 7).

Australian citizens, one born in Greece and one in Switzerland, who had renounced any foreign allegiances when they acquired Australian citizenship.[29] But the Court did not accept that this was enough.[30] They were still citizens to the law of Greece and Switzerland, respectively. Both Greece[31] and Switzerland[32] allow for a person to renounce their citizenship upon application to the proper authority. Neither respondent made any such application.

The ruling in *Sykes v Cleary* made plain that unilateral declarations of renunciation are a last resort.[33]A unilateral renunciation is not a convenient way to avoid compliance with foreign legal requirements where they are not manifestly unreasonable. (I return to what 'unreasonable' may mean in Part III.)

In *Re Canavan*, the 'reasonable steps' test did not intervene to save any of the respondents:

> 'in none of the references with which the Court is concerned were candidates confronted by … obstacles to freeing themselves of their foreign ties.'[34]

In respect of one respondent, Senator Malcolm Roberts, the Court adopted the same scepticism towards unilateral declarations of renunciation that had been expressed in *Sykes v Cleary*. Roberts was found ineligible because he had not extinguished the British citizenship that he was born with.[35] A British citizen may renounce their citizenship by making a declaration to the Home Office, provided that the declaration conforms to certain requirements.[36] Roberts had made a declaration of renunciation, but he sent it to the wrong authority,[37] and he did not pay the required fee.[38]

That Roberts made some efforts to renounce his citizenship did not matter. The Court cautioned that

> [s]ection 44(i) does not disqualify only those who have not made reasonable efforts to conform to its requirements. Section 44(i) is cast in peremptory terms.[39]

The British requirements of renunciation were not unreasonable, and Roberts did not comply with them. His efforts meant nothing under British law, so they meant nothing under the *Australian Constitution*.

Just as it had done in its rejection of a mental element, the Court adopted a strict approach to when it would let the 'reasonable steps' test intervene.

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29 Ibid 103.
30 Ibid 108 (Mason CJ, Toohey and McHugh JJ), 114 (Brennan J), 132 (Dawson J).
31 Ibid 103.
32 Ibid 104.
33 Ibid 108 (Mason CJ, Toohey and McHugh JJ), 114 (Brennan J), 132 (Dawson J).
34 *Re Canavan* (n 2) 551 [69].
35 Ibid 556–7 [101]–[103].
36 *Re Roberts* (2017) 347 ALR 600, [77]–[80].
37 Ibid [91].
38 Ibid [99]–[102].
39 *Re Canavan* (n 2) 549 [61].

III Extreme Laws and Unreasonable Requirements

In the previous section, I have tried to rationalise the approach taken by the Court in *Sykes v Cleary*, and later in *Re Canavan*, with respect to when foreign law will not be applied under section 44(i). The language of the Court described the laws and situations in which this may occur as both 'extreme'[40] and 'absurd'.[41] To make sense of those two judgments, I have supposed that there are two broad bases for extremity and absurdity: first, where the foreign law is by its very nature extreme; second, where the foreign law operates in a particular case to impose an extreme obligation on an Australian dual citizen, or otherwise to create an absurd result if it is observed.

But this distinction is imperfect. An extreme law of the first category should, by definition, create an absurd result under the second category. The Court's judgments are not so explicit. The examples are few; the 'extreme example' given by Brennan J,[42] mentioned above, was fictitious. But what is the theoretical basis to these exceptions? What is 'extreme'? What is 'absurd'? What is 'unreasonable'?

In this section, I analyse the theoretical basis to the exceptions suggested in *Sykes v Cleary* and *Re Canavan*.

A *Foreign Law in an Australian Court*

In private international law, a question of foreign law is treated by a domestic court as a 'question of fact of a peculiar kind'.[43] Proof of foreign law, therefore, requires expert evidence, not merely the interpretation of a foreign statute in translation.[44] This was the approach adopted by the Court in *Sykes v Cleary*[45] and *Re Canavan*.[46]

A problem arises when the policy of foreign law is irreconcilable with the policy of the domestic forum or a principle of domestic law. This is the essential problem under section 44(i) where the application of a foreign citizenship law undermines the independent operation of the constitutional system of government. The exception devised in private international law to avoid the application of such laws is the 'public policy doctrine'.[47] Perhaps the starkest contrast between the public policies of two states exists in times of war, when changes made by an enemy state to its law may be disregarded by a domestic court.[48] This may even 'operate to deny

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40 *Sykes* (n 7) 113, 126, 131. See also *Re Gallagher* (2018) 355 ALR 1 at [54]–[55].
41 *Sykes* (n 7) 91, 113, 124.
42 Ibid 113 (Brennan J).
43 *Parkasho v Singh* [1968] P 233, 250.
44 Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins on the Conflict of Laws* (Sweet & Maxwell, 14th ed, 2006) [9-013].
45 *Sykes* (n 7).
46 *Re Canavan* (n 2).
47 See, eg, *Kuwait Airways Corp v Iraqi Airways Co* [2001] 1 Lloyd's Rep 161; *Oppenheimer v Cattermole* [1975] 1 All ER 538 ('*Oppenheimer*').
48 *Oppenheimer* (n 47) 554 (Lord Hailsham of St Marylebone).

recognition to changes effected by legislation of a wholly unobjectionable character'.[49]

In the following subsections, I outline the exceptions which are associated with that doctrine in respect of the law of nationality.

B *Jurisdiction for Nationality*

In international law, each state has jurisdiction to determine the form and scope of its laws of nationality.[50] This suggests that if a law exceeds the state's jurisdiction to legislate on nationality, then the law may be considered an invalid or ineffective attempt to bestow citizenship upon those persons to whom it applies. This depends on the limits of that jurisdiction. The question of the scope of the nationality jurisdiction was addressed in *Sykes v Cleary*.[51] In his opinion, Brennan J quoted Lord Cross of Chelsea in *Oppenheimer v Cattermole*:

> If a foreign country purported to confer the benefit of its protection on and exact a duty of allegiance from *persons who had no connection or only a very slender connection* with it our courts would be entitled to pay no regard to such legislation on the ground that the country in question was *acting beyond the bounds of any jurisdiction* in matters of nationality which international law would recognise.[52]

This was the inspiration for his Honour's example of a foreign power legislating to disqualify the whole Australian parliament by conferring on them its nationality.[53]

The legal status of nationality or citizenship, therefore, must respond to some fact of connection between the state and its subject. According to a judgment of the International Court of Justice,

> nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred … is in fact more closely connected with the population of the State conferring nationality than with that of any other State.[54]

In Gaudron J's dissenting judgment in *Sykes v Cleary*, her Honour recognised the Court may disregard a foreign law 'which does not conform with established international norms'.[55] A law of the kind in Brennan J's example could be ignored, therefore, because it does not conform to the internationally-recognised jurisdiction to legislate on nationality.

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[49] Ibid 565 (Lord Cross of Chelsea).

[50] *Convention on Certain Questions Relating to the Conflict of Nationality Law*, signed 12 April 1930, 179 LNTS 89 (entered into force 1 July 1937) arts 1–2; *Sykes* (n 7), 111, 131; *Re Canavan* (n 2) 544 [37].

[51] *Sykes* (n 7).

[52] *Oppenheimer* (n 47) 566 (emphasis added); *Sykes* (n 7) 112.

[53] *Sykes* (n 7) 113 (Brennan J).

[54] *Liechtenstein v Guatemala* [1955] ICJ Rep 4, 23 ('*Liechtenstein*').

[55] *Sykes* (n 7) 135.

C *Unjust laws*

The fact that a foreign law is within jurisdiction, however, does not mean that it cannot be extreme for some other reason. In *The Origins of Totalitarianism*, Hannah Arendt observed that

> [o]ne is almost tempted to measure the degree of totalitarian infection by the extent to which the concerned governments use their sovereign right of denationalization.[56]

In the case of section 44(i), the problem is the opposite: a person who wishes to nominate for election seeks to *renounce* their foreign citizenship, not to maintain it. I will return to this problem later. But the principle is the same: a domestic court must decide whether to apply a foreign law which might be called 'inequitable, oppressive or objectionable'.[57]

Several such situations arose in the United Kingdom in the middle of the last century with respect to Jews whose German nationality was extinguished under the rule of the National Socialists. In one such case, *Oppenheimer v Cattermole*, the Court had to decide whether to apply a Nazi law of 1941 in determining the taxation status of a naturalised British citizen who was born a German Jew.[58] The 1941 decree had stripped expatriate German Jews of their German nationality, leaving many stateless.

As that case showed, the legal legacy of the Nazis created a dilemma not only for the new German state, but also for foreign jurisdictions. Since the case of the Nazis was an extreme one—perhaps the most extreme—it raised the basic question, what makes a law valid, or invalid?[59]

This question was a fundamental problem of legal theory, and its response would determine the scope of any exception to the application of objectionable foreign laws:

> Are there certain natural law standards, whether derived a priori or from the legal system itself … which can be used as limitation on accepting the validity of certain inacceptable laws?[60]

To Lord Hailsham, the answer was 'no':

> foreign municipal law is not a question of law but of fact, and the only way known to English law of disregarding an unpleasant fact is to create the legal fiction that it does not exist. I do not think that such fictions always serve a useful purpose.[61]

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[56] Hannah Arendt, *The Origins of Totalitarianism* (World Publishing, 1958) 278.

[57] *Oppenheimer v Cattermole; Nothman v Cooper* [1972] 3 All ER 1106, 1113 (Buckley LJ).

[58] *Oppenheimer* (n 47).

[59] The seminal work on this question in respect of nationality laws is: F A Mann, 'The Present Validity of Nazi Nationality Laws' (1973) 89 *Law Quarterly Review* 194. Mann's work was discussed by the House of Lords in *Oppenheimer* (n 47) 555 (Lord Hailsham), 559 (Lord Cross). See also Rajeev Dhavan, 'Nazi Decrees and Their Validity – An English Decision' (1978) 7 *Anglo-American Law Review* 3.

[60] Dhavan (n 59) 4.

[61] *Oppenheimer* (n 47) 555.

The reason for not applying the 1941 Nazi decree was, according to Lord Hailsham, because it had been declared '"unrecht" and not law' by the new German Constitutional Court itself,[62] not because it was invalid for being unjust. This was an expression of relativism based in legal positivism, which had divorced morality from law.[63]

In German jurisprudence, however, 'this relativism … was soon to break down in the face of [the] Nazi[s]'.[64] The courts of the new Federal Republic were eager to erase the mark of Nazism, declaring the regime's laws invalid for their offence to shared morality.[65] It was on this basis that the German Constitutional Court had declared the 1941 decree 'unrecht' in 1968:

> [the decree] violated fundamental principles. It is to so intolerable a degree irreconcilable with justice that it must be considered to have been null and void ex tunc.[66]

This shift in principle—from an acceptance of the validity of Nazi law, to seeing it as no law at all—was reflected in the opinion of Lord Cross, when he rejected the following opinion of Buckley LJ:

> whether or not [a] person is a national or citizen of the country must be answered in the light of the law of that country *however inequitable, oppressive or objectionable it may be.*[67]

Lord Cross disagreed. A court could 'pay no regard' to a foreign law where it exceeded the proper jurisdiction 'in matters of nationality',[68] as discussed above. But it could also refuse to apply a foreign law that was so unjust that it could not be treated as law by a domestic court.[69]

The judgment of the House of Lords was discussed by the High Court in *Sykes v Cleary.*[70] In her dissent, Gaudron J cited Lord Cross' opinion approvingly, with the conclusion that that a court must disregard a foreign law where it 'involves gross violation of human rights'.[71]

Law today uses a language of rights, not the language of natural law used by the post-war German courts. It is likelier that a court, faced with an 'unjust' foreign law, would appeal to the authority of a document like the Universal Declaration of Human Rights,[72] than to the notion of natural law. This was reflected in Gaudron J's opinion. It was also human rights

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62 Ibid.

63 See, eg, H L A Hart 'Positivism and the Separation of Law and Morals' (1958) 71 *Harvard Law Review* 593.

64 Dhavan (n 59) 5.

65 Ibid 8–9.

66 F A Mann (n 59) 199–200, citing, in translation, Bundesverfassungsgericht [German Constitutional Court], 2 BvR 557/62, 14 February 1968 reported in (1968) 23 BVerfGE 98.

67 *Oppenheimer* (n 47) 566 (Lord Cross of Chelsea) citing *Oppenheimer v Cattermole; Nothman v Cooper* [1972] 3 All ER 1106, 1113 (Buckley LJ) (emphasis added).

68 *Oppenheimer* (n 47) 566 (Lord Cross of Chelsea).

69 Ibid 567.

70 *Sykes* (n 7) 105, 110, 112, 135–6.

71 Ibid 135–6.

72 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd session, 183 plen mtg, UN Doc A/810 (10 December 1948).

which Lord Cross appealed to, when he identified the qualities of the 1941 Nazi law which he refused to apply:

> the 1941 decree did not deprive *all* "emigrés" of their status as German nationals. It only deprived *Jewish* emigrés of their citizenship. Further, … this discriminatory withdrawal of their rights … was used as a peg on which to hang a discriminatory confiscation of their property. … it is part of the public policy of this country that our courts should give effect to clearly established rules of international law … Whether, legislation of a particular type is contrary to international law because it is 'confiscatory' is a question on which there may well be wide differences of opinion between Communist and capitalist countries. But … here is a legislation which takes away without compensation from a section of a citizen body singled out on racial grounds all their property … and, in addition, deprives them of their citizenship. To my mind a law of this sort constitutes so grave an infringement of human rights that the courts of this country ought to refuse to recognise it as a law at all.[73]

As a matter of logic, it is uncertain why a state, which oppresses a class of citizens, would legislate to disallow those citizens from renouncing their citizenship. One such motive may be to neutralise the foreign influence of émigrés: to disqualify them from participation in the legislative process of another state, like Australia, where foreign citizens are ineligible for election.

This example presents a paradox, because a law forbidding a class of persons from renouncing their citizenship is a law which purports to *uphold* those persons' rights to the benefits that citizenship creates. But if those rights cannot be disavowed—alternatively, if the obligations of citizenship cannot be renounced—then the status of citizenship operates to oppress those to whom it applies. This is only compounded if those rights cannot be fully exercised by the group (such as the right to come and go freely) because the regime is oppressive. The rights that such a citizenship supposedly confers would be a fiction.

In fact, the adverse consequences of the assertion of an unwanted citizenship was a concern of the young post-war German state:

> It was anxious on the one hand to restore to the expatriate the nationality which the Nazis had purported to take away, but it was not disposed on the other hand to force such restoration on an unwilling recipient.[74]

These scenarios are not so fanciful as to be foreign to Australia. As concerns about dual citizenship overtook Australian politics in late 2017, Minister Josh Frydenberg met accusations that he was a Hungarian citizen by descent.[75] His mother was born in the Budapest ghetto. Being a Jew, she was born stateless—her citizenship having been stripped of her by Hungary's fascist government. She escaped the Holocaust to come to Australia. When she was naturalised, she still held no other citizenship.

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73 *Oppenheimer* (n 47) 567 (emphasis in original).

74 Ibid 547.

75 Amy Remeikis, 'Turnbull hits out at claim Josh Frydenberg is Hungarian dual citizen', *Guardian Australia* (online 3 November 2017) <https://www.theguardian.com/australia-news/2017/nov/03/turnbull-hits-out-at-claim-josh-frydenberg-is-hungarian-dual-citizen>.

Perhaps because of the sensitivity of his family history, Frydenberg escaped the political pressure for his status to be referred to the High Court. But had he been referred, fascism would have come back to haunt another foreign court, leaving it to decide whether to apply its discriminatory laws.

The opinion of Gaudron J suggests that an Australian court would deal with that kind of case in the language of rights and by appeal to the notion of international norms.[76]

D *Reasonableness*

Not all cases in which a foreign citizenship is difficult—or impossible—to renounce involve foreign citizenship laws which are of the unjust type discussed above. As I suggested above with respect to the 'reasonable steps' test, there remain two broad possibilities by which a person may not be able to renounce their foreign citizenship: first, where the foreign bureaucracy is unwilling or so incapable as to be unable to assist with the renunciation; second, where the process for renunciation is so onerous that it is unreasonable to expect an Australian citizen to have to comply with its requirements.

The first possibility is, by far, the simpler one. The incapability or unwillingness of a foreign bureaucracy to process a renunciation is a question of fact.

The second, however, necessarily demands an interrogation of the 'reasonableness' of the foreign law. The Court in *Sykes v Cleary* did little to clarify what this meant:

> What is reasonable will turn 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.[77]

Despite the fact the 'reasonable steps' test was upheld in *Re Canavan*, the Court gave no further clues to what is reasonable and what is not.[78] Accepting the existence of the 'reasonable steps' test, but dissenting as to its conclusion, Gaudron J suggested that the balance of considerations should be tipped towards 'circumstances of the person concerned', not the 'content of the law of the [foreign] country'.[79]

The clearest cases of unreasonableness may indeed arise where circumstance is the main consideration. This was the case in the Court's example, mentioned above, where renunciation must occur in the territory of the foreign state, at risk to the person.[80] However, even if circumstance is the main consideration, there must still be some scrutiny of the foreign law. It is the circumstances *in the context of* the requirements of the foreign law—two factors together—which create the unreasonable requirement. Would the requirement in that example—to make the renunciation in the

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76 See, eg, *Sykes* (n 7) 135–6.
77 Ibid 108 (Mason CJ, Toohey, McHugh JJ) (emphasis added).
78 *Re Canavan* (n 2) 549–51 [61]–[69].
79 *Sykes* (n 7) 139.
80 *Re Canavan* (n 2) 551 [69].

foreign state itself—be unreasonable if there was no risk involved in travelling to that state? Perhaps not. But neither *Re Canavan*[81] nor *Sykes v Cleary*[82] allow us to be very sure.

Another case, *Re Gallagher*,[83] closely followed the judgment in *Re Canavan*,[84] in finding the ineligibility of another senator. The foreign law in question was British. The process of renunciation established by British law involved certain steps which had to be taken by foreign officials.[85] Counsel had submitted that this 'imposed such an unreasonable obstacle' that the foreign law 'ought not to be given effect.'[86] Rejecting this submission, Edelman J reflected that

> the further one departs from a situation of impossibility, and the broader the operation given to "unreasonable obstacles" to renunciation, the more vague and uncertain becomes the [constitutional imperative] and the more unpredictable becomes its operation.[87]

In *Re Canavan*, the 'reasonable steps' test attracted considerably more of the focus of the Court's judgment than did the notion of an exception for 'extreme' or 'unjust' laws.[88] Nevertheless, there is still little clarity on what is 'unreasonable'. As Edelman J reminds us, '[u]nreasonableness is a relative term.'[89] Of course, relativity does not itself pose an impossible problem for the law. 'Reasonableness' is an established, widespread legal test in the common law. But in respect of section 44(i) there has yet to be any case in which the Court has accepted that the 'reasonable steps' test has been satisfied. The problem is that the 'reasonable steps' test lacks the guide of a strong normative or theoretical basis, in contrast to the other exceptions discussed above—for breach of jurisdiction, and for being 'unjust' or 'extreme'. This means that, beyond one or two examples, it is difficult to know what is 'unreasonable'.

IV Foreign Law in *Re Canavan*

Whereas the discussion in the previous two sections has covered interesting questions of principle, the application of foreign law in *Re Canavan* was straightforward in respect of five of the seven respondents. It was only in respect of the remaining two—Senators Canavan and Xenophon—that the Court cast a more critical eye on foreign law.

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81 *Re Canavan* (n 2).
82 *Sykes* (n 7).
83 *Re Gallagher* (n 40).
84 *Re Canavan* (n 2).
85 *Re Gallagher* (n 40) 16 [61].
86 Ibid.
87 Ibid 17 [64].
88 The 'reasonable steps' test is discussed at *Re Canavan* (n 2) 545 [44]–[46], 549–51 [61]–[69]. The idea of 'extreme' laws did not figure, as it did, eg, in Brennan J's judgment in *Sykes* (n 7) 112–13.
89 *Re Gallagher* (n 40) 16 [60]

A *Senator Matthew Canavan*

Senator Canavan was an Australian citizen from birth.[90] His maternal grandparents were Italian citizens at birth, and later became naturalised Australians. Despite having never visited Italy, nor having ever applied for Italian citizenship,[91] he was surprised by his mother's announcement in mid-2017 that she might have registered him as an Italian citizen as part of the process by which she obtained Italian citizenship for herself in 2006–7.[92] According to expert evidence tendered to the Court, however,

> Senator Canavan's status, if any, as an Italian citizen [did] not arise from any step taken by his mother in 2006 but rather from the circumstance that his maternal grandmother had not renounced her Italian citizenship at the date of his mother's birth.[93]

Under a 1912 law, Italian citizenship by descent could only descend via the male line. But this changed after a decision of the Italian Constitutional Court in 1983. The consequence was that Canavan's mother became a citizen by descent from her mother, who was still an Italian citizen at the time she was born.[94] Canavan himself was born 3 years before that decision. His mother was not then an Italian citizen. The issue was, did the decision apply 'retroactively' to mean that Canavan was himself an Italian citizen by descent?

Canavan had, in fact, been registered as an 'Italian Resident Abroad' at the Municipality of Lozzo di Cadore as a result of steps taken by his mother.[95] This raised a further issue: 'whether registration is merely declaratory of the status of citizen or a condition of the grant of the status in the case of citizenship by descent'.[96]

Accepting evidence that the taking of 'administrative steps' ought to be considered 'prerequisite to the "potential" citizenship right being activated', the Court decided that Canavan should not be considered to have obtained Italian citizenship.[97] Despite the fact that he had been registered in Italy as a foreign resident Italian, the Court refused to accept that this amounted to citizenship.

In making that decision, the Court took notice of the consequences of its alternative:

> Given the potential for Italian citizenship by descent to extend indefinitely—generation after generation—into the public life of an adopted home, one can readily accept that the reasonable view of Italian law is that it requires the taking of positive steps.[98]

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90 *Re Canavan* (n 2) 551 [74].
91 Ibid 552 [76].
92 Ibid 552 [78].
93 Ibid 552 [80].
94 Ibid.
95 Ibid [78].
96 Ibid 553 [83].
97 Ibid 553–4 [85].
98 Ibid 554 [86].

These few lines of opinion raise several problems. The potential—for Italian citizenship to descend parent to child indefinitely—is the very point of the principle of jus sanguinis which is the basis of Italian citizenship law by descent.[99] Some kind of citizenship jure sanguinis is recognised by the law of most European countries.[100] During the age of nationalism in Europe during the nineteenth century, '[t]he codification of nationality became a constitutive act in the construction of nation-states.'[101] The idea that nationality could be passed on *by descent* became central to the creation of the 'nation'.

Nevertheless, during the hearing in *Re Canavan*, the word 'exorbitant' was used to describe a type of foreign citizenship law which the Solicitor-General submitted should be disregarded by the Court.[102] Referring to the Italian law, counsel for Canavan argued that

> indefinite succession automatically imposed …, if it is done retrospectively, is an *exorbitant* law…[103]

Counsel relied on a report by expert statisticians, which concluded that as many as 45.06 per cent of Australians may have some claim to a foreign citizenship.[104] It was suggested that this figure would have been even higher had the report considered persons whose claim to foreign citizenship depended on their descent from foreign ancestors removed by 'more than one generation.'[105]

The meaning of 'exorbitance' was related to the principle developed in *Oppenheimer v Cattermole*, which supposes that effect should not be given to foreign laws which exceed a state's jurisdiction on nationality.[106] As I have discussed above, that jurisdiction was limited in international law by the requirement that a state should bestow citizenship only on persons to whom it is connected by the existence of certain 'social facts'.[107]

The problem created by the Italian law—and, therefore, by the law of any of the many jus sanguinis jurisdictions—is that these social facts of

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99 The law by which Italian citizenship descends by parent to child is: *Legge 5 febbraio 1992 n 91 in materia di Nuove norme sulla cittadinanza* [Law No 91 of 5 February 1992] (Italy) GU, 16 August 1992, art 1.

100 Maarten P Vink and Gerard-René de Groot, *Birthright Citizenship: Trends an Regulations in Europe* (Comparative Report, EUDO Citizenship Observatory, November 2010) 5–6.

101 David Scott FitzGerald, 'The History of Racialised Citizenship' in Ayelet Shachar et al (eds), *The Oxford Handbook of Citizenship* (Oxford University Press, 2015) 135.

102 Transcript of Proceedings, *Re Canavan, Re Ludlam, Re Waters, Re Roberts (No 2), Re Joyce, Re Nash, Re Xenophon* [2017] HCATrans 199 (10 October 2017) 1793 (S P Donaghue QC). See particularly the following exchanges about the word 'exorbitant': 2241–65 (Keane J and S P Donaghue QC), 2364–413 (Edelman J and S P Donaghue QC), 2827–76 (Keane J and B W Walker SC).

103 Transcript of Proceedings, *Re Canavan, Re Ludlam, Re Waters, Re Roberts (No 2), Re Joyce, Re Nash, Re Xenophon* [2017] HCATrans 200 (11 October 2017) 4084–5 (D M J Bennett QC) (emphasis added).

104 Ibid 4108–17 (D M J Bennett QC).

105 Ibid 4119–21 (D M J Bennett QC).

106 Transcript of Proceedings, *Re Canavan, Re Ludlam, Re Waters, Re Roberts (No 2), Re Joyce, Re Nash, Re Xenophon* [2017] HCATrans 199 (10 October 2017) 2364–71 (S P Donaghue QC), 2678–83 (B W Walker SC). See *Oppenheimer* (n 47) 566.

107 *Liechtenstein* (n 54) 23.

connection (between a person of Italian descent and the Italian Republic) become more slender with each successive generation. Citizenship by descent, it was suggested, could extend for the full 'biblical seven generations or even longer.'[108]

However, the likelihood of being able to satisfy the requirements of registration would also decrease with each generation, as family histories (and the bureaucratic paper trail to prove them) became more tenuous. This appears to have been acknowledged in oral argument by counsel for Canavan:

> Indeed, for those whose hobby is not genealogy, it could be somewhat less than seven generations. The notion of knowing where each one of your grandparents—even if you halve it and say each one of your great grandparents were born— is, by no means, straightforward.[109]

There is a clear difference between the case of the seventh-generation Italian-Australian and the case of Canavan. The former may be entirely unable to take advantage of their 'birthright' claim to Italian citizenship by descent, likely because there are too many gaps in the chain of ancestry to prove that they have an Italian ancestry. But Canavan had a traceable, documented lineage.

Claims to citizenship by descent would likely become more tenuous and difficult with each generation, as the 'social facts' of connection—and the means of proving them to the foreign bureaucracy—decrease with time. It may very well be the case that the much-feared biblical flood of citizenships by descent is but a myth.

In its judgment, the Court described three issues which served to cast doubt on Canavan's status as an Italian citizen: first, that his inheritance of citizenship required a 'retroactive[]' application of the 1983 Italian Constitutional Court decision;[110] second, that it was unclear whether his registration with the municipal authority actually amounted to a declaration of citizenship without Canavan having taken any further steps;[111] third, that his status was one inherited by descent.

It was the last two bases combined which led to the Court's judgment:

> Given the potential for Italian citizenship by descent to extend indefinitely … one can readily accept that … it requires the taking of … positive steps [to become a citizen]…[112]

As we have seen, it is important to recognise that this was *not* a decision to completely disregard the law of Italy, but a 'particular interpretative choice'.[113] According to Professor Anne Twomey,

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[108] Transcript of Proceedings, *Re Canavan, Re Ludlam, Re Waters, Re Roberts (No 2), Re Joyce, Re Nash, Re Xenophon* [2017] HCATrans 199 (10 October 2017) 2872 (B W Walker SC).

[109] Ibid 2873–6 (B W Walker SC).

[110] *Re Canavan* (n 2) 553 [81].

[111] Ibid [83]–[84].

[112] *Re Canavan* (n 2) 554 [86].

[113] Anne Twomey, 'Section 44 of the Constitution – What Have We Learnt and What Problems Do We Still Face?' (2017) 32 *Australasian Parliamentary Review* 5, 15.

> [w]hile the Court accepted that it is foreign law that determines citizenship, it chose to interpret that foreign law, in the face of conflicting evidence, as requiring the taking of positive steps to activate potential citizenship.[114]

However, it seems that Canavan's status as an Italian citizen might have been simply doubted on the second basis alone. The Court noted that the evidence concluded that the municipal registration 'should not per se be considered a recognition of Italian citizenship'.[115] The Court took a view which suggests that a law which confers citizenship jure sanguinis is beyond a state's jurisdiction to legislate on nationality. As I have tried to show, this was a misjudgement.

B *Senator Nick Xenophon*

Senator Nick Xenophon's reference also gave opportunity for the Court to look more closely at foreign law. Xenophon was born in Australia. He was the child of a Greek mother and a Cypriot father.[116] He had renounced any claim he may have had to either Greek or Cypriot citizenship before he was first elected to the Federal Parliament in 2007.[117] But Cyprus was a British possession at the time that his father was born there.[118] This raised concerns that Xenophon had claim to the status of 'British overseas citizen'.

Xenophon's father had the status of a 'natural-born British subject' from birth.[119] He did not lose his British nationality when Cyprus became an independent Republic in 1960, because he had not been resident in Cyprus for the requisite period until independence.[120] Xenophon was born in 1959. His father remained a British subject; Xenophon, therefore, inherited the status of 'citizen of the United Kingdom and colonies by descent'.[121]

When British nationality laws were later revised, Xenophon's status became 'British overseas citizen'.[122] There was 'no question' that Xenophon held this status in British law.[123]

The Court re-emphasised that section 44(i) of the *Constitution* proscribed the election of a person who was '"a *subject* or a *citizen* of a foreign power" or a person "entitled to the *rights* or *privileges* of a subject or a citizen of a foreign power"'.[124]

The issue, therefore, was whether 'British overseas citizenship' amounted to citizenship of a foreign power, or entitled Xenophon to the rights of such a citizenship, for the purposes of section 44(i).

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[114] Anne Twomey, 'A Tale of Two Cases: *Wilkie v Commonwealth* and *Re Canavan*' (2018) 92 *Australian Law Journal* 17, 21.
[115] *Re Canavan* (n 2) 553 [84].
[116] Ibid 560 [121].
[117] Ibid 560 [122].
[118] Ibid 560 [123].
[119] Ibid 561–2 [127].
[120] Ibid 562 [128].
[121] Ibid 562 [129].
[122] Ibid.
[123] Ibid.
[124] Ibid 561 [124] (emphasis added).

The Court decided that it was *not*. In evidence, British overseas citizenship was described as a 'residuary form of nationality that differs from British citizenship in important respects'.[125] The primary difference is that British overseas citizenship confers no right of abode in the United Kingdom. Such a right is a fundamental part of the conception of British citizenship:

> a British subject enjoys a constitutional right to reside in or return to that part of the Queen's dominions of which he is a citizen.[126]

A British overseas citizen is still subject to immigration checks at British borders.[127] Further, acquisition of the status does not require a pledge of allegiance to the United Kingdom.[128]

A nationality or citizenship is a legal status which binds its subject to certain obligations, and confers certain rights.[129] Despite its label, British overseas citizenship demands few obligations and affords few rights. During the course of oral argument, Edelman J cautioned that

> [w]hether someone is a citizen or not under section 44(i) is not or should not be affected by whatever *label* is put on the person or the person's rights by the foreign country. … it is the *content* of the rights that we are concerned with, not the label.[130]

The British overseas citizenship status did not confer on Xenophon the 'irreducible minimum' of rights which were integral to a citizenship.[131]

In Canavan's case, the question was whether Italy had recognised Canavan as its citizen. Here, the problem was whether the status that Britain had recognised was one that amounted to citizenship. A decision contrary to the one taken by the Court would have been wrong; despite his label, Xenophon could not be said to have been treated by Britain as its citizen.

V Conclusion

Section 44(i) of the *Constitution* gives to foreign law significant power to determine who is ineligible to be elected to the Federal Parliament. However, in *Re Canavan*,[132] and in the earlier case of *Sykes v Cleary*,[133]

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125 Ibid 563 [131].

126 Transcript of Proceedings, *Re Canavan, Re Ludlam, Re Waters, Re Roberts (No 2), Re Joyce, Re Nash, Re Xenophon* [2017] HCATrans 200 (11 October 2017) 4543–5 (A L Tokley SC) citing *R (on the application of Bancoult) v Secretary of State for the Foreign and Commonwealth Office* [2000] All ER (D) 1675 at [39] (Lord Bingham of Cornhill). The Court accepted this submission: *Re Canavan* (n 2) 562 [131].

127 *Re Canavan* (n 2) 562 [132].

128 Ibid 563 [133].

129 See, eg, *Sykes* (n 7) 109–10.

130 Transcript of Proceedings, *Re Canavan, Re Ludlam, Re Waters, Re Roberts (No 2), Re Joyce, Re Nash, Re Xenophon* [2017] HCATrans 200 (11 October 2017) 4349–53 (Edelman J) (emphasis added).

131 Transcript of Proceedings, *Re Canavan, Re Ludlam, Re Waters, Re Roberts (No 2), Re Joyce, Re Nash, Re Xenophon* [2017] HCATrans 201 (12 October 2017) 8265 (Edelman J).

132 *Re Canavan* (n 2).

133 *Sykes* (n 7).

the High Court has made clear that it will not apply foreign law uncritically in all cases. This follows the doctrine of public policy in private international law, under which foreign law may be disregarded if it is contrary to the public policy of the domestic court.

In respect of the laws of nationality, there are several possible bases on which an Australian court may disregard a foreign citizenship status which is recognised by a foreign law. In *Re Canavan*,[134] the Court's interpretation of British law in respect of Senator Xenophon showed that it was concerned with the *content* of a foreign legal status, not merely its *label*. This resounded with its decision to narrow the effect it gave to Italian nationality law in respect of Senator Canavan.

The clearest examples of laws that an Australian court will disregard are when a foreign law exceeds a state's jurisdiction to legislate on nationality, or when a law is so 'unjust' that it cannot be applied. However, the case of Senator Canavan suggests that the Court accepted a definition of jurisdiction that conflicts with the law of many other states which confer citizenship jure sanguinis. And an 'unjust' law, like the Nazi decrees that were disregarded by the British courts, has yet to come before the High Court in a section 44(i) reference.

Faced with such a law, it is possible that the Court would disregard it by appeal to the notion of human rights, rather than for being 'unjust'.[135] The offensive laws of the Nazis were struck down in German and British courts by appeal to notions of natural right and justice, but those concepts have been largely displaced in judicial discourse by the popularisation of human rights jurisprudence. Of course, domestic courts frequently uphold the validity of domestic laws that litigants claim to be offensive to human rights. But that may not be the case when a court is faced with an interpretive choice dealing with a *foreign* law that is offensive. That is, at least, anticipated by the opinion of Gaudron J in *Sykes v Cleary*.[136] In this way, it is possible that an Australian court would refuse to interpret s 44(i) to apply a foreign nationality law which violates a principle of human rights.

In this article, I have sought to rationalise from the limited jurisprudence the exceptions to the application of foreign law under s 44(i). Each of these seek to ensure that it is the *Constitution*, and not foreign law, which is king. They seek to balance the strict wording of section 44(i)—which defers a nominee's eligibility to their status under foreign law—with the integrity of the *Constitution* and the system of government which it prescribes.

In his Honour's dissenting opinion in *Sykes v Cleary*, Deane J reflected on the question being asked of one of the respondents that

> [i]t must be stressed that the question whether Mr Delacretaz has taken all reasonable steps to terminate Swiss citizenship and allegiance is not being

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134 *Re Canavan* (n 2).
135 *Sykes* (n 7) 135; *Oppenheimer* (n 47).
136 *Sykes* (n 7) 135–6.

> asked for the purposes of Swiss law. It is being asked for the purposes of the Australian Constitution.[137]

The Court in *Re Canavan* described that principle as the 'constitutional imperative'.[138] Foreign law will not be applied if it is offensive to the operation of the *Constitution*. The laws that a domestic court might refuse to apply have been described as 'extreme', 'exorbitant', and 'unreasonable', and the results they may bring about, 'absurd'. But these words are easy to state, and hard to define. Their meanings fall to difficult questions of the proper scope of a state's laws of nationality, and to the basic theoretical question of what makes a law valid and invalid. The problem is that Australian judges may have different views on these questions than do other jurisdictions. This is a problem the *Constitution* could do without, but one that is likely here to stay.

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137 *Sykes* (n 7) 130.

138 *Re Canavan* (n 2) 539 [13]; 545 [43].