

Citizen Peters and Aristotle

The right to park in a loading zone

Rebecca Peters

This exceptionally didactic piece demonstrates how irrelevant and sterile is the debate about designer flags and electing a local president.

In his work *Politics* Aristotle observed 'as soon as a man becomes entitled to participate in authority, deliberative or judicial, we deem him to be a citizen'.

When you apply to become a citizen of Australia, they offer you a choice of a ceremony in your local council area or at the Immigration Department. I chose my local council, envisaging myself in the Victorian wedding-cake town hall, being sworn in by a dignitary with a florid complexion and a tricolour sash extending across his official girth. But no! A check of my postcode revealed I live in a municipality which does not 'do' citizenship ceremonies. So it had to be the Immigration Department building, follow the signs to the third floor, and get your name ticked off the list: oath or affirmation? Oaths to the right, affirmations to the left.

Through the labyrinth

The application form was long and demanded my vital statistics, my convictions (other than traffic offences), the details of every time I'd entered or left Australia. It also spelled out the obligations imposed by Australian citizenship: voting is compulsory; you must be prepared to serve on a jury; you must be willing to defend Australia should the need arise. You can't just mail in your application, but must take it to a personal interview with a departmental officer. Fair enough, I thought — it's an important step to take, after all; it makes sense for me and my new country to mutually suss each other out, to be sure of what we're letting ourselves in for.

So I take the morning off work and front for the interview. The departmental officer checks that all the slots on my

application are filled, then looks me in the eye and lays it on me: 'Now, do you understand what it means to be an Australian citizen?'

Barely am I gathering breath for a patriotic soliloquy *What This Great Nation Means to Me* than she obliges with the answer: 'Voting is compulsory, you must be prepared to serve on a jury, you must be willing to defend Australia should the need arise'. That's it, thanks very much, off you go. Next!

Why am I disappointed? I guess I thought the meaning of citizenship might be more than that. It seems pedestrian, mundane, bureaucratic — like applying for a parking sticker, or queuing at the post office in Bulgaria. Even when I applied for sickness benefits it was more personal: the DSS seemed genuinely interested in me and my relationships with my fellow Australians, especially any that I might sleep with.

So what did I expect? A requirement of respect for something — the dignity of the individual? the natural environment? the rule of law? tolerance/freedom/peace/multiculturalism? Some mention of the clever country or an exhortation to do the right thing? A mini-manifesto about the basic entitlement of everyone to health and shelter and education? (Admittedly there are limits to the myths a departmental officer can be required to propagate in the course of duty.) Perhaps some reference to the rights of others, for example a rule that citizens refrain from roaring motorcycles in residential streets.

And what of the rights I had expected to acquire alongside these three essential obligations of citizenship? The right to park in a loading zone would be the most precious, but I would settle for equal pay for work of equal value; a decent standard of service in a bank, any bank; or the right to turn left on red; or the right to revenge on perpetrators of sexual harassment.

I think my problem is that I am confusing citizenship with some concept of 'good citizen', or with what the Americans call civics, which refers to the practice of cleaning up after your dog on the footpath.

Marriage to Mrs Windsor

When you become a citizen you make the oath (or affirmation) of allegiance to the Queen of Australia, her heirs and successors according to law. It seems a lot to ask . . . though I am a big fan of Princess Anne, who single-handedly brought the word 'equerrey' back into common usage.

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By coincidence the other day I came upon an article about citizenship, and in particular about loyalty oaths.¹ It notes the distinction between relations based on consent and those based on descent. Institutions operating on descent principles, such as biological families, do not ask for overt loyalty oaths or vows of membership because that is presupposed. Consent relations, on the other hand, stress our 'abilities as mature free agents to choose', and typically do require such oaths. Examples of consent relations are marriage and the law, including citizenship.

In fact my citizenship ceremony was like a marriage, requiring me to 'solemnly and sincerely promise and declare that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, Queen of Australia'. There was a youthful Liz up the front in a gorgeous white sleeveless number, radiantly solemn as any bride in a painting can be. There was I promising fidelity, to the amusement of my friends in the audience. Well, there we were all 50 of us converts: more like a mass wedding performed by Rev. Sun Yung Moon, I suppose. The Oaths recited in unison, the Affirmations responded likewise. 'Congratulations,' said Vera, the presiding departmental officer/immigration princess, 'you are citizens of Australia from this moment on.' I looked at my watch: 10.12 a.m., 21 May 1992. Then in alphabetical order we each went up and received a handshake and a beautiful certificate of citizenship (polychrome kangaroo and emu and embossed seal), suitable for framing except you mustn't glue it to anything. Vera warned, as a crucial detail, the citizenship number, is printed on the back.

Unlike many marriage vows, the oath of allegiance does not require the new citizen to forsake all others. (Even in traditional marriages the parties are not expected to give up their descent-based loyalties, e.g. to parents; it is only multiple consent-based loyalties which are unacceptable.) In the old days new Australians did have to 'renounce all other allegiance' to their countries of origin, but that was changed in 1986 to emphasise that citizenship does not imply abandoning one's cultural background. As Vera told us, 'The Government isn't asking you to give up your traditions and customs'.

Of course, for native-born Australians the relationship with the state is based on descent, not consent. They are never required to take an oath

of allegiance, and they can commit with impunity all manner of infidelities to the Queen, her heirs and successors.

Is allegiance owed to the Queen personally, as opposed to her office? It used to be so, at least for people who acquire citizenship (and presumed allegiance) by birth. The leading case on allegiance is *Calvin's case*² from 1608. The question there was: since King James of Scotland had additionally become King James of England, could people born in Scotland thenceforth be considered English citizens, since they owed allegiance to the same sovereign? Answer: yes, allegiance was owed to the natural body of the King. The source of allegiance was the law of nature, and that law could only bind people who had souls, i.e. individual humans.

Two forces affected this perception of allegiance so that by the 18th century it had turned completely around. The rise of contract theory led to allegiance being viewed as a reciprocal relationship of protection and obedience; the American Revolution showed that individuals were able to choose the state to which they would owe allegiance. *Isaacson v Durant*³ (1886) had the opposite facts to *Calvin's case*: King William IV, who had been King of England and Hanover, died and his two kingdoms were given to two different heirs. So were Hanoverians who were born before William's death still subjects of the Crown in England? Answer: no, allegiance is owed to the body politic, not the person.

So there you have it. I've promised myself to the body politic called Queen of Australia, not to Herself herself. This will also make for much less awkwardness, I feel, when we do finally make the break with England and become a grown-up country in our own right. 'It's nothing against you personally', we'll say to the Queen, and she'll know it's true.

The constitutional basis for citizenship

The Constitution makes no reference to Australian citizens, although 'people of the Commonwealth' appears in ss.24 and 25; and 'subject of the Queen' in ss. 34 and 117. Citizens of other countries are mentioned — they cannot be elected to Federal Parliament: s.44(i). Remember Robert Wood who was an NDP Senator for about five minutes before his English subjection brought him down. And parliamentarians who become subject to the 'disability' of foreign citizenship must pack up their offices and go: s.45(i).

There is no specific power in the Constitution to make laws for nationality or citizenship; the power authorising the *Australian Citizenship Act* 1948 appears to be s.51(xix) naturalisation and aliens. Other potentially relevant powers include s.51(xxvii) immigration and emigration, s.51(xxix) external affairs, s.51(xxxviii) the influx of criminals (excluding traffic offences, presumably), and the implied power of Parliament by reason of Australia's existence as a sovereign State.

The Constitutional Conventions did consider including a direct definition of citizenship, but decided against it because 'subject of the Queen' was considered to be universally understood. But there were subjects and there were subjects: subjects in some parts of the Empire had full British nationality, others had only local citizenship in their colonies of origin. And what to do about the Irish? Not to mention married women, who became the cause of Australia's divergence from Britain's nationality legislation.⁴ A British woman who married an 'alien' (from another part of the Empire or outside it altogether) lost her own nationality; in Australia the *Nationality Act* 1936 allowed her to retain her nationality or at least the rights and obligations of a natural-born British subject. At the time there was no such thing as Australian citizenship. It only came into being on 26 January 1949, with the *Australian Citizenship Act*. Amendments have since removed all mention of British subjects from the statutory formulation of citizenship.

So the development of separate Australian citizenship was part of the nation achieving autonomy from Britain. What does that have to do with me? The main functions of citizenship are in international law: from now on, if I'm taken hostage in Lebanon it will be Australia who asks for me back. But I lead a quiet life and may never get the chance to reap this indisputably valuable benefit.

[Not everyone's life is as quiet as mine. Salman Rushdie, for example, says his British citizenship has saved his life. On the other hand citizenship can also be life-threatening, to the extent that it requires you to defend the country should the need arise. In some countries the need arises constantly, in the form of war or at least of compulsory military service. Immigrants from those countries may take Australian citizenship as a defensive tactic. Some nations

perceive native-born citizenship as indelible; so that some naturalised Australians are afraid to visit their homelands lest they be drafted.]

What is citizenship anyway?

Justice Felix Frankfurter, a naturalised citizen and judge of the US Supreme Court (have we ever had a naturalised judge?), treated his fellow judges to a heartfelt sermon on the subject one winter's day in 1942, as they sat around the conference table deciding a case. The case involved a communist whose naturalisation was challenged on the basis that an active Marxist Leninist could not also bear allegiance to the US Constitution. American citizenship, in Justice Frankfurter's view, 'implies entering upon a fellowship which binds people together by devotion to certain feelings and ideas and ideals summarised as a requirement that they be attached to the principles of the Constitution'. Therefore a Communist could not be an American citizen. (The majority disagreed.)⁵

My affirmation did not require allegiance to the Constitution. It was proposed in 1983 to replace the oath and affirmation with a pledge of citizenship, omitting the Queen and committing new converts to 'uphold the Constitution'. Commitment to the principles of the Constitution is part of the American naturalisation oath; no doubt it makes for a grander, more substantial-sounding statement. But the American Constitution contains numerous principles people could actually get excited about committing themselves to: free speech, freedom from arbitrary search and seizure, and from arbitrary detention. Whereas our constitution has very little to say to the average citizen, apart from dictating which government bureaucracy is allowed to hit them with which charges. I love a duty of excise as much as the next person, but I can see why the Constitution was not considered a fitting object of general allegiance.

As Justice Frankfurter observed, attachment to the principles of the Constitution is a *summary* of 'a fellowship which binds people together by devotion to certain feelings and ideas and ideals'. Allowing for an excessive measure of patriotic fervour, I think he had a point. Citizenship might be more meaningful if there were some set of ideals we were expected to take on board.

I'm actually pleased our Constitution does not prescribe what they should be.

I don't have much confidence in the 'feelings and ideas and ideals' that might have emerged from the personal values of white gentlemen lawyers of 100 years ago: viz. s.51(xxvi) preventing Aboriginal people from being given the vote. Male lawyers then as now were much better at thinking about relationships between politics than between people — they knew a lot about federalism and nothing about feminism, to mention just one important source of ideas and ideals for a humane society. And the Constitution is so difficult to change, we could have been stuck with some ghastly 19th century moral prescription for a long time.

A horror of nationalism is healthy to have, but maybe we could use another source document to provide a philosophical underpinning, some statement of what Australia is about (to use a grammatical construction favoured by politicians). I'd like some mention of protection of people's rights and of the environment; of justice; of the things we really value (Uluru, Phar Lap's heart, Radio National). It doesn't have to be a position carved in stone for all time and for all purposes. A Bill of Rights would be super but I'd be happy with a photocopied hand-out, or an extra paragraph in the instructions to departmental officers headed *Something To Make Them Feel A Little Bit Inspired About Being Australian*. It could be sufficient, or at least a start if somewhere along the line between filling in the application and walking out clutching our certificates we were informed, for example, that Australia has ratified the International Covenant on Civil and Political Rights. Instead of just the eternal triangle, the Big Three.

Why choose that particular trinity to sum up what it means to be Australian? True, voting is compulsory under the *Electoral Act*, but I hear the Liberal Party plans to scrap that when they win government, since voting is a Right and should be optional. Being prepared to serve on the jury — has this anything to do with citizenship of the country? It's my impression that jury service is compulsory under State (not federal) law — as is the wearing of helmets on bicycles. Why isn't that the second duty of a citizen instead? Anyway, in New South Wales jury trials look like becoming an endangered species (those Liberals, such enthusiastic reformers), so this duty could become irrelevant too. As for willingness to defend the country should the need arise: the *Defence Act* 1903 says male persons who are British sub-

jects are liable to be called up in time of war. I don't immediately recognise myself in this description, not just because (like probably 51% of new citizens) I am not male, but also because the Act that made me a citizen makes no mention of British subjects.

So a+b+c adds up to a slightly arbitrary (as well as lacklustre) definition of my new status. Why not stress instead the Rights I acquired as a citizen: the right to apply for a job at SBS, the right to stand for Parliament on the Independent Vegetarian Coalition ticket, the right to own a television station, the right to work in New Zealand, the right to dream of wearing the green and gold in the luge event at the Winter Olympics?

In 1989, the Year of Citizenship, Geoffrey Blainey complained that citizenship was too easy to get.⁶ Basically all you had to do is live here legally for two years, be of good character, have basic English (with some exceptions, e.g. for elderly applicants) and be likely to remain in Australia. It's easier than getting into law school, or getting your bond back when you move out of a rented house. But Aboriginal people, who'd lived here longer than anyone, only got it 25 years ago.

Blainey believed one adverse consequence of our cheap'n'easy citizenship policy was that people whose English is poor or who have no understanding of or interest in our political process get the right to vote. This complaint clashes with the principle that naturalised citizens are entitled to the same rights as natives. Plenty of true blue dinkum Aussies are totally ignorant or apathetic about World Heritage, compulsory unionism and the GST, but that's democracy.

According to Blainey, conferring citizenship on such easy terms also has the effect of devaluing it, which is the same as robbing those who already possess it. This commercial approach, treating citizenship like shares in a company, doesn't sit well with me. I prefer to think it's a thing you welcome people into rather than a thing you keep people out of. But he gained support from the Fitzgerald Committee of Inquiry, which said citizenship was declining in symbolic value and was of very little material value.

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rials about victims' rights, which have been circulated to community organisations, is significant.

South Australia, at present the only State which gives legislative force to the presentation of information about injury, loss or damage suffered by a victim of an offence to a sentencing court (s.7, *Criminal Law (Sentencing) Act 1988* (SA)) has also improved its victim compensation system and given administrative directions to criminal justice agencies to facilitate the giving of better information to and protection of victims. Its victim reform process appears to have been driven by parts of the UN Charter.

Like all Australian governments, the Queensland Government is geared towards low or no-cost reform. This may explain why the initial draft proposal does not require police resources to be used to provide assistance to victims in completing the statement. It may also explain the absence of discussions about a Charter of Victims' Rights package. For there is no doubt that, if the UN Charter is to be given effect in Queensland, significant calls on consoli-

dated revenue would be required for the establishment of advice and support services for victims, adequate victim compensation schemes (including the establishment of a state fund upon which victims could claim), and training to sensitise police, prosecutors and courts to the needs of victims.

Conclusion

The victim impact statement proposal confuses the proper place of victim impact assessment within legal processes. The assessment is appropriate to a claim in tort where a civil court can order one individual who has wronged another to pay appropriate compensation to that other. It is not appropriate to an assessment of the penalty that should be given to a person whose wrong action is also a crime.

This confusion underpins the fatal flaw in the present proposal. The role for victims within legal processes should not be retributive or punitive. Their statements should not be given when the punishment of offenders is being calculated. Criminal proceedings focus on the defendant. By contrast,

civil proceedings focus on victims and their claims. For as long as victims are valued within criminal, rather than civil, proceedings, the importance of providing them with proper support, sensitivity, and compensation is undermined.

Information obtained from the Attorney-General's Department indicates that, following community consultations, the issue of victims of crime, their rights and the issue of compensation are now the subject of serious reconsideration by the Attorney-General. Therefore any final conclusion about a government response designed to give effect to the UN Charter would be premature. If the Queensland Government does not address the problems at present experienced by victims in the criminal justice system in a context wider than victim impact statements, then it will leave itself open to the accusation that it has provided for itself a no-cost political protection against law and order lobbies which lacks any substantive benefit to those victims it is said to assist.

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The value of citizenship

How has it changed my relationship with the state? My affirmation committed me to 'faithfully observe the laws of Australia and fulfil my duties as an Australian citizen'. The duties in question are the Big Three; as for observing the laws, I was under that obligation anyway, as a mere resident or even as a visitor. The Immigration Department says I'm now entitled to the same rights as people born here. (That's shorthand for the same rights as people of my own sex and race born here.) As a permanent resident, I already was entitled to the same services and protections (sickness benefits, trial by jury) as citizens of Australia (as opposed to being in the hands of kidnappers overseas). But there are some jobs open only to citizens in the federal public service, and only citizens can stand for elected office.

One way to make citizenship more valuable could be to attach extra privileges to it that non-citizens are denied. Since we are unlikely to invent any new

rights or privileges to bestow on citizens, we could bump up the value of citizenship by denying more to non-citizens. We could also bring back child labour in mines.

Why shouldn't citizenship be easy to obtain? It's hard enough (and getting harder every year) to qualify to get in here in the first place. Unlike residency, citizenship is not a prize awarded in a competition. Like a law degree: the tough part is squeezing in through the doors of the law school in the first place. I agree with George Papadopoulos from the Victorian Ethnic Affairs Commission, whose reply to Professor Blainey said citizenship is a right in itself, freely offered to people born in Australia and those accepted as settlers here.⁷

What I want to know is, who do I lobby about parking in those loading zones?

References

1. Sanford Levinson, 'Constituting Communities through Words that Bind: Reflections on Loyalty Oaths', (1986) 84 *Michigan Law Review* 1440.

2. (1608) 2 St Trials 559. cited in Wishart, David A., 'Allegiance and Citizenship as Concepts in Constitutional Law', 15 *Melbourne University Law Review* 662.
3. (1886) 17 QBD 54. Cited in Wishart, above, at 697.
4. Wishart, above, at 680.
5. *Schneiderman v United States*, 320 US 118 (1943). Cited in Levinson, above, at 1441.
6. Blainey, Geoffrey, 'Too Few True Blue', *Weekend Australian*, 27-28 May 1989, p.1.
7. Papadopoulos, George, 'Blainey on Citizenship', (1989) *Victorian Ethnic Affairs Commission Newsletter*, July, 3-5, at 5.

OPEN DAY

Family and Friends Centre, Long Bay Prison Complex

New trends in training prison officers and how to deal with the 'old guard' officer is the title of a talk at the Family and Friends Centre, Long Bay Prison Complex, on 19 July, 1992.

The talk by Senior Assistant Superintendent Jules Dinsdale from the Department of Corrective Services Training Academy, will begin at 1.30 p.m.

Jules Dinsdale is a senior lecturer and the talk is part of a series of open days at the centre.

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