Chapter Ten

Constitutional Facts

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"Constitutional" facts are part of a category of fact called "legislative facts". Legislative facts are to be distinguished from adjudicative facts.

Adjudicative facts are facts which, being in issue or relevant to a fact in issue at a trial, are determined by the jury, or, if there is no jury, by the judge. The search for them is a search for answers to questions like: "Was the factory floor slippery? What did the parties say in conversations which one claims created a contract?"

In finding adjudicative facts the courts act on material received in compliance with the law of evidence. But they are not limited to it. They rely, also, on their knowledge of the English language as it is used in innumerable contexts, and of elementary mathematical principles, for without this knowledge they could not understand the evidence presented. And they rely on matters supposedly derived from the ordinary experience of human life shared by almost all adults. Those matters are often not controversial but they may be controversial either in their formulation or their application. These matters include simple physical and scientific facts about human and other behaviour; common experience of the ordinary world of cars, trains, aircraft, ships, telephones, computers, machinery, roads and physical objects; matters going to human motivation and credibility; and various types of informal reasoning derived from those sources and applied to the factual material received in conformity with the rules of evidence.

"Legislative facts" are sometimes called "premise facts" or "lawmaking facts". Legislative facts are resorted to in order to determine what a law should be, or how it is to be applied. Legislative fact analysis can be employed in four categories of inquiry to be numbered two to five – category one being adjudicative facts. Category two concerns finding the facts relevant to the constitutional validity of enactments or executive acts. Category three concerns the facts relevant to the construction of statutes. Category four concerns the facts relevant to the construction of constitutions. Category five concerns the facts relevant to the development of the common law.

A given fact may be employed in more than one category. An example is *Brown v Board of Education of Topeka*.[1] From 1896 until that case, the received doctrine was that segregated educational facilities were constitutionally valid if they were "separate but equal". The court examined material showing that segregated schools were separate, but not equal, because of the harm they did to black children. That illustrates use of the material in a category two way. The material showed that even on the received doctrine there was constitutional invalidity.

But another question in the case was whether the received doctrine was sound. That was a category four question: what did the Constitution mean? The material led the Court to depart from the received doctrine because the material showed that even if the schools were separate and equal, the harm they were causing to black pupils suggested that the received doctrine was wrong.

Another example is afforded by *Thomas v Mowbray*.[2] Thomas attended a camp run by Al Qa'ida. One question was – would an interim control order against Thomas assist in preventing a terrorist act? That was an inquiry involving the use of adjudicative facts within category one. Another question concerned the constitutional validity of the relevant statute. The attendance at the camp by Thomas was a category two fact, because the likelihood of the legislation being supported by the defence

power was increased if Al Qa'ida was running camps: this was material to the existence of a threat to Australia.

The expression "constitutional facts" is sometimes used to refer only to those in category two. Sometimes it is used to refer to those in category four as well.[3]

The thesis of this paper is twofold. On the one hand, it is virtually inevitable in constitutional law that the courts must rely on constitutional facts. On the other hand, there are dangers in the ways in which they do so. These dangers arise largely because constitutional facts in categories two and four (like the legislative facts in categories three and five) are often not proved by recourse to the conventional rules of evidence used in category one. Why does that create dangers?

For these reasons. One of the key points Dr Kelly made in her perceptive paper concerned the immense range of protections which the law gives quite independently of a bill of rights, and more effectively. One good example is the rules of evidence used in relation to category one. They require the proof of facts to take place through witnesses who are subject to cross-examination, or through documents, or through physical things produced to the court. They are restrictive rules which prevent some types of relevant evidence being received – because the evidence is hearsay, because it is prejudicial, because of how it was obtained. They have been worked out for 300 years or more by skilful judges and thoughtful legislatures responding to the teachings of an immense body of forensic experience. They may not operate perfectly but they do have advantages. They ensure that all factual material which the jurors (or the judge if there is no jury) are to consider will be methodically tendered in an orderly manner so that everyone understands what is going on; any objection will be ruled on immediately; any questionable testimony can be tested in cross-examination; debates about the significance of the material will take place in the presence of all parties and in public. The rules of evidence ensure that the parties who may lose will have been in a position to understand, call evidence about, and challenge the grounds on which they may lose. They thus reduce the chance of ill-informed and uncontrolled judicial frolics.

So far as material not complying with these rules of evidence, which have such beneficial effects in relation to category one, is employed in the other four categories, and in particular the two categories of constitutional fact, there are dangers. The dangers are unfairness to the parties, and excessive judicial power.

Before going to the dangers, it may be asked why constitutional facts are acted on without conventionally proved evidence. Why have the courts abandoned for categories two and four the advantages and protections which the rules of evidence bring for category one?

Dixon CJ said: "matters of fact upon which . . . the constitutional validity of some general law may depend" do not form issues between the parties to be tried like adjudicative facts. "They simply involve information which the Court should have" in order to decide on the constitutional validity of a statute or of an executive act under a statute.[4] He said that, "[h]ighly inconvenient as it may be", constitutional facts "must be ascertained by the Court as best it can".[5]

Sometimes the high inconvenience can be sidestepped. The parties may rely on a case stated, or on some other document agreeing on all relevant facts.[6] The parties may rely on admissions in the pleadings, or formal admissions. These "facts" cannot bind the court, but the court may accept them. The defendant may demur to the plaintiff's statement of claim, and the validity of the demurrer may then be decided as a preliminary question on the assumption that the facts alleged by the plaintiff are correct. But sometimes these procedures for agreeing or assuming facts are not or cannot be used, or matters of fact later arise which are outside them. The question then arises: is material receivable only if it complies with the rules of evidence?

The High Court has answered that question in the negative. It adopts a less restrictive approach for constitutional facts than it does for facts in issue. Thus Brennan J said, speaking about the construction of a non-constitutional statute but extending his remarks to constitutional facts:

> When a court, in ascertaining the validity or scope of a law, considers matters of fact, it is not bound to reach its decision in the same way as it does when it tries an issue of fact between the parties. The validity and scope of a law cannot be made to depend upon the course of private litigation. The legislative will is not surrendered into the hands of litigants.[7]

Why is this so? The courts do not strike down legislation of their own motion, without one party taking the initiative. Statutes and subordinate legislation are presumed to be valid. But "to the extent that validity depends on some matter of fact, there is no onus on a challenging party which, being undischarged, will necessarily result in a declaration of validity."[8]

Why is the task of factual proof not left in the hands of the party alleging invalidity? Why, if the party which alleges invalidity fails to prove the facts on which invalidity depends, does the court not simply treat the statute as valid and reserve the question of its potential invalidity to a battle to be conducted at another time, in a different field, and by a better-prepared litigant? While most private litigation is of great importance to the parties, it is not important to the public. Constitutional litigation has a different kind of importance, and to a much wider range of persons. Why is it that conventional private litigation is regulated by the strictness of the rules of evidence, while in constitutional litigation fact-finding is subject to a much more liberal regime?

One answer advanced in Canada proceeds in three steps. First, "the proper role of the court is to allow considerable leeway to the legislature to make the findings of fact upon which its constitutional power depends". Secondly:

> While a court must reach a definite conclusion on the adjudicative facts which are relevant to the disposition of litigation, the court need not be so definite in respect of legislative facts in constitutional cases.

Thirdly, it is said that if:

> there is significant support among the professionals for the legislative facts which would justify the legislation, then it is plain that the legislators had a rational basis for [their] action [in enacting the impugned legislation, and it must be held valid].[9]

Whether or not parts of United States or Canadian constitutional law permit the reasoning just outlined, Australian constitutional law does not. The trouble with that reasoning is that it confuses two questions. One is whether courts should invalidate legislation merely because they strongly deny the wisdom of enacting it, or consider that some other method of achieving the goal desired could more appropriately have been employed. The answer to that question is in the negative, for the court cannot override a legislature acting within power.

The other question is whether legislation is within power merely because there is significant support for the view that the relevant constitutional fact exists, as opposed to the court experiencing an actual persuasion that the fact exists. The answer is in the negative. Section 51 of the Australian Constitution gives to the Commonwealth Parliament power to legislate with respect to, for example, lighthouses, aliens and corporations, not with respect to things which there is significant support for thinking are lighthouses, aliens and corporations, although they are not in fact so.

A better explanation is that sometimes not dealing with a constitutional question will create worse evils than dealing with it even though the factual foundation laid by the parties may be feeble. For a court to convict and punish an accused person for breach of a statutory provision alleged to be constitutionally invalid without deciding that allegation is a repugnant outcome. It is more repugnant than an inquiry into validity based on a factual examination conducted by the court

without effective assistance from the parties and unconstrained by the rules applying to facts in issue. This will not, however, explain every application of the doctrine, for often no question of criminal punishment is involved.

The other explanation commonly given is that the court has an overriding duty to enforce the Constitution for all citizens and other persons within its protection which it must fulfil even if the limited class of citizens or other persons who comprise the parties before it will not adequately assist it to do so. From the earliest times the High Court has seen itself as having, in general, a duty to determine the validity, one way or the other, of legislation alleged to be unconstitutional.[10] Putting on one side the political consequences of a legislature embarking on the enactment of unconstitutional legislation, there is no body other than the judiciary capable of preventing an abuse of legislative power using the available mechanisms (for example, section 75 of the Constitution). These are factors seen as outweighing the difficulty of finding the facts relevant to validity.

Since final constitutional courts have ultimate responsibility for the enforcement of the Constitution, they have ultimate responsibility for the resolution of challenges to the constitutional validity of legislation, one way or the other, and cannot allow the validity of challenged statutes to remain in limbo. And they have ultimate responsibility for the determination of issues about constitutional facts which are crucial to validity. This approach has also been said to justify the view that non-compliance with either statutory or common law rules of evidence cannot prevent the court from full inquiry into the existence or non-existence of constitutional facts. A simpler justification for that view is that questions in relation to constitutional facts "cannot and do not form issues between parties to be tried like" ordinary facts in issue.[11] That is, for centuries, common law and statutory rules have grown up to regulate the proof of facts in issue; there are no equivalent rules for constitutional facts and it is wrong to import them from their proper sphere into a different one, to operate there as exhaustive mechanisms.

Thus Brennan J was correct to say, in relation to constitutional facts, that the "validity and scope of the law cannot be made to depend on the course of private litigation."[12] Similarly, Williams J said: "[I] t is the duty of the Court in every constitutional case to be satisfied of every fact the existence of which is necessary in law to provide a constitutional basis for the [challenged] legislation."[13] And Frankfurter J said that when "constitutional issues turn on facts, it is a strange procedure indeed not to permit the facts to be established."[14] In short, the approach of the courts to constitutional facts is wider than its approach to facts in issue because of a principle of necessity: adoption of that approach is necessary if the court is to fulfil its duty to conduct judicial review of the constitutional validity of legislation. That consideration explains not only the court's involvement in constitutional fact finding of its own motion; it also accounts for the width of the principles pursuant to which it finds constitutional facts.

Sometimes constitutional facts are agreed. Sometimes they are proved by material complying with the rules of evidence other than the doctrine of judicial notice. Sometimes they are received through the doctrine of judicial notice, either because they are notorious, or because they can be incontrovertibly established by inquiry from works of authority.

Thus in the *Australian Communist Party* Case, Dixon J instanced certain "notorious international events" as matters of fact relevant to the existence of constitutional facts through being judicially noticed without inquiry:

> The communist seizure of Czecho-Slovakia, the Brussels Pact of Western Union, the blockade of Berlin and the airlift, the Atlantic Pact, the passing of China into communist control, the events in reference to the problem of Formosa, the entry of the North Korean forces into South Korea and the consequent course of action adopted by the United Nations, and the sustained diplomatic conflict between communist powers and the Anglo-American countries and other western powers at meetings of the Security Council and the General Assembly . . .[15]

All those matters were notorious then. Some are not notorious now. There are other matters perhaps well known now but not then known at all – namely that the Russian menace was greater in 1951 than the High Court thought.[16]

Dixon J took judicial notice after inquiry in summarising the "accepted tenets or doctrines of communism . . . ascertained . . . from serious studies":

> . . . a political theory based upon the supposed irreconcilable antagonisms inherent in a capitalistic system, the inevitability of its decomposition, the necessity of a period of revolutionary transformation from a capitalist to a communist society, the struggle between bourgeoisie and proletariat, the dictatorship of the proletariat during a longer or shorter period of further evolution, the progressive extension of the revolutionary process over the earth and the need to assist and expedite its spread not merely that its supposed benefits may be more widely enjoyed but for the protection of existing systems of communism from counter action and the revolutionary process of development from delay and temporary defeat . . .[17]

Many other illustrations of notorious facts and facts judicially noticed after inquiry can be found in Callinan J's judgment in *Thomas v Mowbray*.[18] Facts are often judicially noticed after inquiry in relation to category four – the second type of constitutional fact – facts employed in working out the meaning of the Constitution. Until very recently most High Court judges thought that the meaning of the Constitution now is the meaning it had in 1900, and quite a number still do. For judges of this kind, as for Professor James Allan, the Constitution is not a "living tree". And what mattered was not the intention of the framers, but the meaning of the words they used. That meaning could be ascertained by examining contemporary or near contemporary materials. The mischiefs with which the Court was dealing could be examined by looking at historical works which are regarded as authoritative. The main difficulty which arises concerns the determination of what is authoritative.[19]

However, many constitutional facts are incapable of being judicially noticed. But the doctrine has now developed that apart from agreed facts, facts proved under the rules of evidence and facts judicially noticed, all relevant material may be brought to the court's attention, independently of whether any rules as to admissibility in relation to facts in issue have been satisfied.

Thus, in 1952, McTiernan J said assistance could be obtained from judicial "notice, or facts proved … or … *any rational considerations*"[20] [emphasis added]. In 1959, Dixon CJ said that constitutional facts must be ascertained by the court "*as best it can*"[21] [emphasis added]. In 1975, Jacobs J said that "the normal procedures for the reception of evidence" had shortcomings, that the parties need not be confined to the pleadings or to the agreed facts, and that "*[a]ll material relevant* (in a general, not a technical, sense) *to the matter under consideration* may be brought to the court's attention"[22] [emphasis added]. In 1985, Brennan J said that the court could invite and receive assistance from the parties "but it is *free also to inform itself from other sources*"[23] [emphasis added].

However, where the court considers materials without being restricted by the rules of evidence, "it is obviously desirable that [they] should be previously exchanged between the parties".[24] Underlying the process is perhaps the theory that "the nature and importance of constitutional facts" are such that even if they are not "utterly indisputable", they may "be regarded as presumptively correct unless the other party, through an assured fair process, takes the opportunity to demonstrate that [they] are incorrect, partial or misused."[25]

However that may be, if reliance on controversial assertions is to be permitted, it is clear at least that the party against which they are to be used must have an opportunity properly to consider them before argument has closed. It would be astonishing if there were not a duty on the court to advise the parties of any material not tendered or referred to in open court upon which it proposes to rely.

It is scarcely satisfactory for a party to learn of some supposed fact by reason of which that party lost the litigation only on reading the court's reasons for judgment, without having any opportunity to dispute the accuracy of the fact or the trustworthiness of the sources from which it was taken. Callinan J has said[26] that he did not take Brennan J's remarks quoted above:

> to be a warrant for the reception and use of material that has not been properly introduced, received, and made the subject of submission by the parties. What his Honour said cannot mean that the interests of the litigants before the court can be put aside. They retain their right to an adjudication according to law even if other, conceivably higher or wider, interests may ultimately be affected.[27]

This is entirely correct, save that if the words "introduced" and "received" call for compliance with the rules of evidence applied to facts in issue, they are out of line with other authority.

Apart from reference to historical works, two other particular mechanisms for receiving constitutional facts may be noted.

One concerns "official facts". Although Callinan J, more than any other judge, has been sceptical about the employment of "legislative facts" not proved by evidence or taken into account pursuant to the doctrine of judicial notice, speaking in a case about constitutional facts, he excepted from these restrictions what he called "official facts". He gave the following examples: "[O]fficial published statistics, scrupulously collected and compiled, information contained in parliamentary reports, explanatory memoranda, Second Reading Speeches, reports and findings of Commissions of Inquiry, and, in exceptional circumstances, materials generated by organs of the Executive". But he said that, even so, a "deal of care needs to be taken with respect to 'official facts'."[28]

A second mechanism is the derivation of constitutional facts from standard works of reference or other writings of experts on the physical, medical, social or other sciences.

The goal of the courts in examining material within these categories is to ensure that their decisions involving constitutional facts rest on more than mere intuition, hope, legend, cliché, guesswork, assumption or prejudice. The courts are not to make up the course of constitutional development as they go along.

It is now necessary to turn to the second thesis of this paper – the dangers in the use of constitutional facts. Enough has been said about the risk that courts which resort to "constitutional facts" may not give the parties a proper hearing. Some others are as follows.

One problem is this. Trial courts are most effective when their activities centre on the conduct of fair trials by finding adjudicative facts and applying to them well-settled law, and appellate courts operate at their most effective when their activities centre on ensuring that litigants received a fair trial. The evaluation of legislative facts causes different problems to intrude: "[J]udicial competence to evaluate . . . [constitutional] facts varies inversely with their distance from the facts concerning the parties."[29] It is a field in which they lack experience.

Secondly, the use of legislative facts in general and constitutional facts in particular is more legitimate in some fields than others. Categories two to five have similarities, but also differences. Use of legislative fact analysis in relation to the common law – category five – is less dangerous than its use in relation to statutory or constitutional interpretation (categories three and four). That is because the common law does legitimately change over time, but the interpretation of statutes, or the Constitution, is not supposed to change over time. The courts are supposed loyally to comply with the legislative or constitutional language. What of constitutional facts in category two? Changes in approach to facts relating to constitutional validity amount to changes in the application of the Constitution, and the application of the Constitution, too, is supposed to be constant. Excessive looseness may, as a practical matter, widen federal legislative power. And to widen federal legislative power is to narrow State legislative power, because of the operation of section 109 of the Constitution.

A third area of difficulty concerns the formal reception of constitutional facts. Two distinct but related questions arise. Should judges engage in private inquiries? Should material, particularly expert material, be given to the courts via testimony, or merely as part of written submissions? It may be argued that while evidence is necessary to prove adjudicative facts, the material used to establish constitutional facts is more like law itself – characterised by general ideas applicable beyond particular instances. Hence, it may be argued, constitutional facts should be treated in the same way as legal precedents, and if the parties fail to supply adequate material, the court should rely on its own researches.

This argument wrongly assumes that courts are entirely free to rely on legal materials not referred to by the parties. Legal points and at least significant authorities not raised in argument should not be relied on without the opportunity for further argument being afforded.[30] The position must be *a fortiori* where expert literature on factual issues is concerned. The argument also jumbles the roles of judge and party. It is normally for "each party to bring forward the evidence and argument to establish his/her case, detaching the judge from the hurly-burly of contestation and so enabling [the judge] to view the rival contentions dispassionately."[31] Judges are umpires or referees, not players. The pursuit by judges of independent lines of inquiry, unaided by the parties, distracts them from their quintessential role. On the other hand, to require oral evidence may be inconvenient.

The fourth problem concerns the fact that to reach a conclusion that a constitutional fact exists can involve speculation, or what Callinan J called the making of an "assumption". The assumption, he said, "may be unsafe because the judge making it is necessarily making an earlier assumption that he or she is sufficiently informed, or exposed to the subject matter in question, to enable an assumption to be made about it."[32]

Fifthly, not only are constitutional facts speculative in that sense: they can be subjective. Adjudicative facts are relatively value-neutral. Legislative facts are not. Adjudicative facts are proved after compliance with fairly rigid rules of evidence and procedure, requiring in criminal cases and some civil cases high standards of proof. Constitutional facts need not be. The relative value-neutrality of adjudicative facts and the rigours of the litigation system tend to ensure that the outcomes of cases resting on adjudicative facts do not depend just on the personality and ideology of the judge.

That is much less likely to be the case with constitutional facts. Judges are not automatons. They have individual opinions. Their background experiences may differ. Yet the whole legal system has the goal of ensuring that it should not matter for a litigant whether the case is to be determined by one particular judge, with a certain personality, background and outlook, or another particular judge, who differs sharply in these respects. To engage too freely in a search for constitutional facts, particularly a search conducted without assistance or control from the parties, is to make that goal less attainable. There is a risk that a "living tree" approach to the Constitution creates a judicial desire to push the application of the Constitution in one direction and to assemble constitutional facts in fulfilment of it. The court which has long thought a certain approach desirable now perceives that opinion – whether of the public, the legal profession or quite narrow legal elites – has come to favour the change. But, even if the spirit of the age is relevant, as Justice Cardozo said, to see this opinion as the spirit of the age is dangerous. The spirit of the age can be merely "the spirit of the group in which the accidents of birth or education or occupation or fellowship" have placed the judges.[33]

Courts can sometimes search for constitutional facts in order to support a conclusion about how the Constitution should apply. Hence critics of excessive resort to constitutional facts fear that the individual world-view of particular judges will influence not only the selection of relevant fields in which to search for constitutional facts, but also the form in which they will be found. This makes the processes under discussion untrustworthy and unpredictable. "Constitutional facts", then, may sometimes only be window dressing. They may too readily permit the judges to make up constitutional law as they go along. That is why their establishment must be closely watched.

Endnotes

1. 347 US 483 (1954).
2. (2007) 233 CLR 307.
3. For examples of constitutional facts within category two, see *Cross on Evidence*, LexisNexis, 8th Aust ed, 2010, [3156]. For examples of constitutional facts within category four, see the same work at [3158].
4. *Breen v Sneddon* (1961) 106 CLR 406 at 411.
5. *Commonwealth Freighters Pty Ltd v Sneddon* (1959) 102 CLR 280 at 292.
6. *Uebergang v Australian Wheat Board* (1980) 145 CLR 266 at 302 and 306-307.
7. *Gerhardy v Brown* (1985) 159 CLR 70 at 141-142.
8. *South Australia v Tanner* (1989) 166 CLR 161 at 179.
9. P. W. Hogg, "Proof of Facts in Constitutional Cases" (1976) 26 *UTLJ* 386 at 397.
10. *D'Emden v Pedder* (1904) 1 CLR 91 at 117.
11. *Breen v Sneddon* (1961) 106 CLR 406 at 411.
12. *Gerhardy v Brown* (1985) 159 CLR 70 at 142.
13. *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 222.
14. *Zorach v Clauson* 343 US 306 at 322 (1952).
15. *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 197.
16. *Thomas v Mowbray* (2007) 233 CLR 307 at 486-487 [533].
17. *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 196-197.
18. (2007) 233 CLR 307 at 488-492 [538]-[553].
19. *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460 at 511-513 [165]-[166].
20. *Marcus Clark & Co Ltd v Commonwealth* (1952) 87 CLR 177 at 227 [emphasis added].
21. *Commonwealth Freighters Pty Ltd v Sneddon* (1959) 102 CLR 280 at 292 [emphasis added].
22. *North Eastern Dairy Co Ltd v Dairy Industry Authority of New South Wales* (1975) 134 CLR 559 at 622 [emphasis added].
23. *Gerhardy v Brown* (1985) 159 CLR 70 at 142 [emphasis added].
24. *North Eastern Dairy Co Ltd v Dairy Industry Authority of New South Wales* (1975) 134 CLR 559 at 622 per Jacobs J.
25. B. L. Strayer, *The Canadian Constitution and the Courts*, 3rd ed, 1988, 292, quoted in *R v Bonin* (1989) 47 CCC (3d) 230 at 248.
26. *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460 at 511 [164].
27. *Gerhardy v Brown* (1985) 159 CLR 70 at 142.
28. *Thomas v Mowbray* (2007) 233 CLR 307 at 483 [526] (footnote omitted). See also *Shaw Savill and Albion Co Ltd v Commonwealth* (1940) 66 CLR 344 at 364.

29. Kenneth L. Karst, "Legislative Facts in Constitutional Litigation" [1960] *Supreme Court Review* 75 at 100.

30. See *Rahimtoola v Nizam of Hyderabad* [1958] AC 379 at 398; *Friend v Brooker* (2009) 239 CLR 129 at 173-174 [118].

31. *Waugh v British Railways Board* [1980] AC 521 at 535 per Lord Simon of Glaisdale.

32. *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 298 [252].

33. Benjamin N. Cardozo, *The Nature of the Judicial Process*, Yale University Press, 1921, 175.