

Advancing Citizenship: The Legal Armory and Its Limits

*Kim Rubenstein**

This Article considers the use of litigation as one mechanism to make citizenship more inclusive. It examines three Australian High Court decisions on citizenship in which the author was also counsel. While addressing the promotion of inclusive approaches to citizenship as a legal status, the Article argues that advocates must consider a range of avenues for advancing their clients' claims. In doing so, the Article also presents a normative critique of citizenship legislation as not paying enough attention to the individual's affiliation with Australia. The cases highlight rules that overlook certain individuals without giving sufficient consideration to their special circumstances, demonstrating that a person's identity is not always reflected in law.

I acknowledge the power of the plaintiff's arguments. I also confess to sympathy for the plaintiff's plight as a young girl who was born in Australia and who has been educated here and has known no other country. If I were a legislator, I would not favour a law depriving her of Australian nationality and providing for her involuntary removal. However, my function is to give meaning to constitutional concepts. I must do so in a way that is consistent with my notion of how the Constitution must be interpreted when it refers to a word such as "aliens". For me, that word, like every other word in the Constitution, is not frozen in whatever meaning it may have had in 1901.

* Professor and Director, Centre for International and Public Law, ANU College of Law, Australian National University. I am grateful for the opportunity of participating in this workshop and the ideas it generated in writing this piece. I thank the two reviewers who made helpful suggestions in revising the piece for publication, and Garry Sturgess for his editing and wise suggestions in finalizing the piece.

Thus, for me, this case is primarily about the proper approach to constitutional construction.

Justice Kirby in *Singh v. Commonwealth of Australia***

INTRODUCTION

This extract from Justice Kirby's judgment in *Singh*, one of the three citizenship cases I examine below, raises issues central to this Article. When thinking about promoting inclusive approaches to citizenship as a legal status, advocates must consider a range of avenues for advancing their clients' claims. This Article considers the use of litigation as one mechanism to make citizenship more inclusive. The place of litigation as a social and political tool is a continuing preoccupation for many lawyers. In their book *Pressure Through Law*,¹ Carol Harlow and Richard Rawlings explain with regard to the use of law for political and social purposes how they were "easily able to trace the phenomenon" back to the eighteenth century,² and their work focuses in particular on pressure group litigation.

Between 2002 and 2005, I was involved in three citizenship cases argued before the High Court of Australia. Two of the three individuals, Susan Walsh and Amos Ame,³ had been stripped of their Australian citizenship (obtained at birth) and another, Tania Singh (who was born in Australia), was denied recognition as a citizen. While these individuals were certainly motivated to achieve immediate results for themselves, their actions also proved important test cases wherein the issues underpinning citizenship policy were closely examined. As such, the cases are part of a continuing discussion about the use of litigation as a mechanism to effect broader policy changes, whether by pressure groups or by individuals, as in these instances.

My own involvement in the cases gave me two vantages, one as representing individual applicants, another as acting for the respondent State. I was counsel for Susan Walsh in her special leave application to the High Court, I was junior counsel to the Solicitor General for the Government in Tania Singh's matter, and I was counsel for Amos Ame in his application against the Government. These experiences assist my consideration of the

** (2004) 222 C.L.R. 322, 399.

1 CAROL HARLOW & RICHARD RAWLINGS, *PRESSURE THROUGH LAW* (1992).

2 *Id.* at 291.

3 Pronounced Ah-may. Given that identity is part of what drives individuals to make their claims, recognition of how people pronounce their names is an affirmation of who they are.

way litigation in citizenship matters highlights tensions that arise in juggling one's desire to promote a client's case to the best of one's ability while situating that case in the often restrictive framework of law.

Each of the cases was a constitutional matter; the applicants had made claims about the legal status of citizenship within the framework of the Australian constitution. In examining these three High Court cases, this Article presents a normative critique of citizenship legislation, which does not pay enough attention to the individual's affiliation with Australia. The cases also highlight rules that overlook certain individuals without giving sufficient consideration to their special circumstances. Primarily it considers how to best address problem areas and promote progressive change. It is here that the question of litigation versus lobbying is significant. There are undoubted limitations to the pursuit of litigation yet, if pursued within a broader framework, it can play an important part in the broader agenda, the goal of which is to effect progressive change.

Finally, my perspective as an academic and "actor" in these High Court cases is unusual in Australia, which seems reluctant to pluck either its advocates or judges from the ranks of academia. Thus I was presented with a firsthand opportunity to view the challenges and tensions posed by litigation up close, and to ponder the advantages and disadvantages of pressing suit rather than other forms of advocacy. Litigation, it must be remembered, is expensive, time-consuming, demanding on clients, and can also stand both litigant and those similarly placed farther away from the objective than when they started the process. If the goal is inclusion, one must weigh the possibility of a result that only further entrenches exclusion.⁴

I. LEGAL CITIZENSHIP COMPARED TO NORMATIVE CITIZENSHIP

This Article focuses upon citizenship as a legal status; that is, the formal legal understanding of the term. In the context of this theoretical inquiry, however, it is also concerned with the relationship between legal status and the normative appreciation of citizenship as a progressive project. In using the term "progressive" I am describing policy that errs on the side of inclusion rather than exclusion, and law that is better able to accommodate the nuanced specifics of cases that arise under it.⁵ In discussing law as an instrument for

4 For recent scholarship addressing some of the limits of law in bringing about social change, see also Orly Lobel, *The Paradox of Extra-Legal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937 (2007).

5 A central theme to KIM RUBENSTEIN, AUSTRALIAN CITIZENSHIP LAW IN CONTEXT

the attainment of progressive ends, I am concerned with both the way law determines the acquisition of citizenship (and the corresponding resistance to the loss of citizenship) and also the legal consequences of citizenship, including residence, political participation and identity.

Different discussions often take place when citizenship is thought of as a formal legal notion,⁶ in comparison to citizenship as a normative concept.⁷ The formal legal notion is primarily concerned with the legal status of individuals within a community. In Australia, for instance, citizens are contrasted to permanent residents, temporary residents and unlawful non-citizens.⁸

The normative notion of citizenship is not as concerned with these legal questions. Rather, it sees membership as "becoming increasingly comprehensive and open ended."⁹ In the non-legal, normative frameworks citizenship is discussed in a variety of ways; primarily in terms that look to the material circumstances of life within the polity, notably concerning questions of social membership and substantive equality.¹⁰ In this way the normative notion is much broader than the legal notion. It goes beyond legal citizenship to deal with the panoply of relations described by a body politic within it and the way people should act and be treated as members of a community.

When discussing legal status and legal claims of citizenship, there is the

(2002) is the way law errs on the side of exclusion rather than inclusion when defining membership of the community.

- 6 Another legal term used for citizenship is nationality. Nationality is often referred to when discussing formal membership in the international context, whereas citizenship is the term used for formal legal membership in the national, domestic context. For further discussions about the distinction, see Kim Rubenstein & Daniel Adler, *International Citizenship: The Future of Nationality in a Globalised World*, 7 *IND. J. GLOBAL LEGAL STUD.* 519, 521 (2000).
- 7 This divide has been highlighted by Linda Bosniak, *Universal Citizenship and the Problem of Alienage*, 94 *NW. U. L. REV.* 963 (2000) and Karen Slawner, *Uncivil Society: Liberalism, Hermeneutics, and Good Citizenship*, in *CITIZENSHIP AFTER LIBERALISM* 81 (Karen Slawner & Mark E. Denham eds., 1998). One piece that Bosniak highlights in particular is Will Kymlicka & Wayne Norman, *Return of the Citizen: A Survey of Recent Work on Citizenship Theory*, 104 *ETHICS* 352 (1994), in which the authors review the growing literature by theorists on citizenship and its value as a normative project, in particular "citizenship as desirable activity" and "citizenship as identity." See Bosniak, *supra*, at 963.
- 8 This legal distinction is determined through the existence of the Australian Citizenship Act, 1948, and the Migration Act, 1958, in which each status is defined. The consequences of the status are set out more clearly in the material below on the legislative consequences of citizenship.
- 9 BRYAN TURNER, *CITIZENSHIP AND CAPITALISM: THE DEBATE OVER REFORMISM* 135 (1986).
- 10 This has been discussed also in Rubenstein & Adler, *supra* note 6, at 521-22.

foundational question of who the law recognizes as a citizen of the state. It involves asking: who can legally acquire citizenship and who can lose it, renounce it, or have it stripped from them? In reality, many citizenship regimes or legislative frameworks (such as the Australian Citizenship Act, 1948) deal with these foundational questions *only* in the primary citizenship legislation. The three cases examined in this Article dealt with these primary legal questions.

While distinguishing legal from normative citizenship, I am keen to acknowledge and affirm that the distinction between formal legal citizens and fellow-person citizens says something fundamental about the nature of membership in any community. As Linda Bosniak argues, "questions concerning citizenship's thresh-hold and its substantive character are, in fact, deeply interwoven."¹¹ That is, the legal questions impact fundamentally upon the normative evaluation of citizenship. Moreover, the citizenship-based distinctions that exist within a political community reach "deep into the heart of the national political community, and profoundly affect the nature of relations among those residing within."¹²

Therefore, when individuals make legal claims to citizenship and there is a dispute in interpreting the law, the individuals pursue their causes because of strong motivating forces. The consequences flowing from the legal status are important enough to drive them to make claims to that status. They include, but are not limited to, residence rights, voting rights, rights to government assistance, rights to certain government work, rights to engage in certain professions, obligations to pay taxes, rights and obligations to serve in the military, and immigration rights.¹³ These are all legal rights in that law and legislation determines their parameters.

Looking at the three cases, and having been involved as counsel, I am also interested in the issue of identity. The way individuals view themselves in relation to others can be significantly influenced by legal status. But a person's identity cannot be wholly determined by law. The impact of legal status on political participation and on rights to residence has a far

¹¹ Bosniak, *supra* note 7, at 965.

¹² *Id.* at 966. Peter Spiro categorizes the tensions between citizenship as exclusion and citizenship as inclusion as the "citizenship dilemma." See Peter Spiro, *The Citizenship Dilemma*, 51 STAN. L. REV. 597 (1999).

¹³ In RUBENSTEIN, *supra* note 5, chapter 5 is devoted to listing and analyzing hundreds of statutes that discriminate according to legal status or membership level, which in essence represent the consequences of citizenship.

more concrete and definite lineage. One has to satisfy relevant legislation¹⁴ in order to vote and in order to reside permanently without any restriction.¹⁵ These rights impact upon how people regard themselves and their place in any community.¹⁶

Yet law as a determinant of identity has its limits. One can identify as an Australian in a personal sense without formally being an Australian citizen, as affirmed by a Federal Court judge's description of a person as "an Australian in all but law."¹⁷ Picking up on this type of distinction, Tania Singh's counsel promoted her as an "Aussie" in the media during the lead-up to her case.¹⁸ Both Susan Walsh and Amos Ame identified as Australians and wanted the High Court to affirm their identity as Australians.

The three cases raise significant issues about the relationship between legal status and a person's sense of identity. They affirm Bosniak's claim that law profoundly affects "the nature of relations among those residing within."¹⁹ They also highlight the limitations of litigation in achieving the goals of the individual applicants in the cases before the Court, as all of them were unsuccessful, as will be examined below.

II. THE AUSTRALIAN HISTORICAL AND LEGAL CONTEXT

It is important to provide a short background to citizenship law in Australia as a reminder of the way law constructs and restricts citizenship. The legal status of citizenship in Australia has a short history. The formal term only came into being in 1949.²⁰ Before that time, Australians were formally British subjects and the rights that flowed were linked to British

14 In Australia, to vote one has to be eligible under the Commonwealth Electoral Act, 1918.

15 In Australia, the Migration Act, 1958.

16 I discuss this also in Kim Rubenstein, *The Lottery of Citizenship: The Changing Significance of Birthplace, Territory and Residence to the Australian Membership Prize*, 22 L. CONTEXT 45 (2005).

17 See *Minister for Immigr., Local Gov't & Ethnic Affairs v. Roberts* (1993) 41 F.C.R. 82, 86 (Einfeld, J.).

18 See *Lawyers Challenge Citizenship Law* (ABC Radio National radio broadcast Sept. 2, 2003), available at <http://www.abc.net.au/worldtoday/content/2003/s937376.htm>.

19 Bosniak, *supra* note 7, at 966.

20 With the introduction of the Australian Citizenship Act, 1948, on January 26, 1949.

subject status.²¹ The Australian Constitution was formulated and introduced forty-eight years earlier without any mention of Australian citizenship.²²

In 1901 when Australia became a Federation, full members of the Australian community were British subjects. Membership at that time was of the Commonwealth — and kinship through links to a common Monarch. In this sense, membership in Australia began as a "supranational" status.²³

While the concept was broader than the nation-state, crucial to each of the cases examined in this Article is the only terminology used in the Constitution with a bearing on citizenship, which is that of "alienage."²⁴ The failure to include a statement about membership of the Australian community in a positive sense, setting out who is a full member of the Australian community, has complicated the way law regulates citizenship.²⁵

The Constitution sets out the powers of the federal parliament. As a federal system, the Constitution regulates the areas in which the central government is responsible as apart from the six state governments. There is no specific power vested in the federal parliament to make laws about citizenship²⁶ — rather, the power is to make laws about "naturalization and aliens." In other words, the power is to make laws about outsiders and those outsiders who want to become insiders.

There is nothing in the Constitution about the federal government's responsibility over its existing insiders nor is there a statement like that found in the United States constitution about the status of those born in the country.²⁷ This limitation in the federal legislative framework has influenced the Australian government's thinking about its control over citizenship, and has also restricted the extent to which the courts can look beyond the strict rules and listen to personal stories when hearing claims to citizenship. This,

21 This has also meant that there are non-citizen British subjects who are still entitled to vote in Australia.

22 RUBENSTEIN, *supra* note 5, ch. 2.

23 See in particular *Re Patterson* (2001) 207 C.L.R. 391, 480-81 (Kirby, J.).

24 The Federal Parliament has power to make laws in relation to "naturalization and aliens." AUSTL. CONST. § 51(xix).

25 I have addressed this issue directly in several articles. See, e.g., Kim Rubenstein, *Citizenship and the Centenary: Inclusion and Exclusion in 20th Century Australia*, 24 MELB. U. L. REV. 576 (2000).

26 For an analysis of the reasons for this, see Kim Rubenstein, *Citizenship in the Constitutional Convention Debates: A Mere Legal Inference?*, 25 FED. L. REV. 295 (1997).

27 U.S. CONST. amend. XIV, § 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

then, is also relevant to strategic decisions about whether to lobby or litigate to achieve a desired outcome, a subject which will be developed further below.

III. SUSAN WALSH, AMOS AME AND TANIA SINGH

These three individuals made legal claims upon the state in a foundational sense — that is, they wanted access to the legal status of citizenship itself. Why did they want to be recognized as Australians and how did their cases get into the court?

For each of them, it was about being able to *live* in their country of citizenship and have the freedom to come and go as they pleased. My involvement as counsel and my experience in meeting Susan Walsh and Amos Ame confirmed that their desire to litigate was initially motivated by a desire to live in Australia. That is, the claims were about the legal consequences of citizenship: residence in the country of citizenship. But this was not their sole motivation. In addition, it was about their identities as Australians and their desire that the court should affirm their sense of self as Australian citizens. Tania Singh's counsel in her High Court litigation, with whom I met during the course of the matter, sought, both in publicizing her case in the media and in argument before the Court, to rely on Tania's identity as an Aussie. Susan Walsh wanted recognition of her Australian identity as a result of her father and his family's long history in Australia. Amos Ame was given moral support by a group of people in Papua committed to being recognized as Australians.

In each of their situations, Parliament (as lawmaker) and the Executive (as the law's executor) did not recognize any of them as Australian citizens. For Susan Walsh and Amos Ame, both born in Papua, legislation had purportedly stripped them of their citizenship by birth²⁸ and, for Tania Singh, legislation had excluded her from recognition of citizenship by birth in Australian territory.²⁹ Their only way to make a direct claim to Australian citizenship was to go to the courts to undermine the validity of that legislation — to make unlawful that which was law; to invalidate their legal exclusion.

28 The Papua New Guinea Independence Act, 1975, had authorized regulations that effected their loss of citizenship, explained further *infra* note 37.

29 Section 10 of the Australian Citizenship Act, 1948.

A. Susan Walsh³⁰

Susan Walsh was born in Papua before PNG became an independent sovereign nation in 1975. Not only was Susan Walsh born in Papua, but her father was an Australian citizen by birth in mainland Australia.³¹ He had lived in Papua and married Susan's indigenous Papuan mother.

In 1975 Papua and New Guinea (which had been administered jointly) became independent from Australia under a newly enacted PNG Constitution. The relevant background to the territory was discussed by Justice French in *Thompson v. Minister for Immigr. & Multicultural and Indigenous Affairs*.³² Importantly, Justice French acknowledged that:

Up to independence Papua and New Guinea had retained their distinct characters as Crown possession and Trust Territory respectively. So, up to 9 September 1975 when the Independence Act came into operation, New Guinea was not part of Australia for the purposes of the Australian Citizenship Act 1948.³³

Papua remained part of Australia for the purposes of the Australian Citizenship Act from 1948 until September 16, 1975.

Having been born after January 26, 1949 and before August 20, 1986, Susan Walsh was born an Australian citizen by virtue of section 10 of the Australian Citizenship Act, 1948. This was because Australia was defined from January 8, 1954 until December 31, 1973 as including "the Territories of the Commonwealth that are not trust territories,"³⁴ and birth in Australian territory led to Australian citizenship.³⁵

If Papua had *not* been an Australian territory at that time, Ms. Walsh could have been an Australian citizen by descent given that one of her parents, her father, was an Australian citizen, and as long as her birth had been registered at an Australian consulate within five years.³⁶ Yet, she was

30 Some of the material in this Section on Susan Walsh appears also in Rubenstein, *supra* note 16.

31 He was born in New South Wales and died in 1982.

32 (2004) F.C.A. 139, para. 32.

33 *Id.* para. 33.

34 See RUBENSTEIN, *supra* note 5, at 90 n.139.

35 Section 10 provided at that time that birth in Australian territory was sufficient to become an Australian citizen, provided their parent was not a diplomat or an enemy alien when the birth occurred. See also RUBENSTEIN, *supra* note 5, at 90.

36 Further details about citizenship by descent are set out in RUBENSTEIN, *supra* note 5, at 94 *passim*.

born in Australian territory and a citizen by birth, so the question of descent was not an issue to her at that time. When Papua ceased to be Australian territory on September 16, 1975 through section 4 of the Papua New Guinea Independence Act, 1975, unbeknown to Ms. Walsh, the PNG Independence (Australian Citizenship) Regulations 1975 were introduced.³⁷ Regulation 4 purported to strip Ms. Walsh and most Papuans of their Australian citizenship.

When this legal reality came to Susan Walsh's attention, she turned her mind to recognition of her citizenship by descent. While section 10B of the Australian Citizenship Act provided for citizenship by descent, if the birth was registered at an Australian consulate within eighteen years of the birth,³⁸ from January 15, 1992, new provisions³⁹ were inserted to allow for citizenship by descent for people *over* the age of eighteen who were born after January 26, 1949 and who were eighteen or over at the time of the new provisions. Thus, they had to have been born on or after January 26, 1949 and before January 15, 1974.

Susan Walsh fell within that timeframe and applied to the Minister for Immigration and Multicultural Affairs for registration of her Australian citizenship by descent under section 10C of the Act on February 14, 2000.⁴⁰ The delegate of the Minister refused the application as Susan Walsh "was not born outside Australia" and, therefore, "did not meet the requirements of section 10C (4)(c)(i) of the Act." This provision, like all provisions regarding citizenship by descent, refers to people who are "born outside of Australia." Those words are there because, *normally*, a person born inside Australia is and remains an Australian citizen by birth and does not need to think about an entitlement to citizenship by descent. Ms. Walsh, according to the delegate, was not born outside Australia because, at the time of her birth, she was born in Australia. As a consequence of this, Susan Walsh was not entitled to her citizenship by birth, because that Territory had changed, nor was she entitled to her citizenship by descent, because she was born within Australian territory.

Thus, two types of citizenship all countries provide for in different ways, *jus soli* (by birth in territory) and *jus sanguinis* (through descent), were

³⁷ On September 10, 1975, under section 6 of the Papua New Guinea Independence Act, 1975.

³⁸ RUBENSTEIN, *supra* note 5, at 96.

³⁹ Section 10C of the Australian Citizenship Act, 1948.

⁴⁰ As stated in the judgment of Justice Dowsett in the Federal Court of Australia. *Walsh v. Minister for Immigr. & Multicultural Affairs* (2001) 67 A.L.J. 81, para. 1.

being denied to Susan Walsh.⁴¹ The executive decision-maker interpreted the law so as to exclude Ms. Walsh from its parameters.

Susan Walsh applied to the Administrative Appeals Tribunal for a review of the delegate's decision.⁴² Deputy President Breen noted the anomalous nature of the case, and the unfairness involved, but was bound by the "narrow legalistics which bind this Tribunal in this case because they constitute the law of the land."⁴³ She appealed the decision in the Federal Court of Australia and while successful in the first instance, the Minister appealed the decision in the Full Court of the Federal Court, which found in favor of the Minister on June 26, 2002, reasoning that:

[T]he problem arises not because of the structure of the legislation, but because the government of the day by regulation . . . stripped persons in the position of Ms Walsh of their Australian citizenship by birth, without amending or modifying the Act so as to provide for the acquisition by such persons of Australian citizenship by descent if born of an Australian parent.⁴⁴

While Susan Walsh knew that there may be other ways to achieve residence status in Australia, she was keen to seek special leave to appeal the decision of the Federal Court in the High Court of Australia. She was insistent that she was an Australian citizen by virtue of her father's citizenship — she had family in Australia that went back generations, and she wanted that affirmed by the Court.

As counsel entering only at this point in her case,⁴⁵ I was conscious that

41 Interestingly, in recent argument before the High Court in the matter *Koroitamana v. Commonwealth of Australia* (2006) H.C.A. 161 (Apr. 5, 2006) the Solicitor General in answering the question "who could not possibly answer the description of alien" stated "a person born in Australia to Australian parents." Ms Walsh satisfies this answer, but the government still strenuously espouses the view that she was not an Australian citizen in Walsh.

42 The Australian Citizenship Act, 1948, § 52, provides for administrative review of certain decisions under the Act to the Commonwealth Administrative Appeals Tribunal.

43 *Walsh and Minister for Immigr. & Multicultural Affairs* (2002) A.A.T.A. 378, paras. 21-23.

44 *Minister for Immigr. & Multicultural & Indigenous Affairs v. Walsh* (2002) F.C.A.F.C. 205, para. 60.

45 I had written about Susan Walsh's case in the AAT and Federal Court in my then recently released book, RUBENSTEIN, *supra* note 5, at 70, 90, 167, 173. In my view, the situation in Papua New Guinea raised fundamental questions about the power of the state to strip individuals of their citizenship. There were important due process issues for individuals unaware of their change of legal status. I had contacted Susan

the illogical outcome of her matter was constricted by the legal issues at stake. These included not only the anomalous situation of children born to Australian mainland parents in Papua, but more fundamental constitutional questions. It also raised issues about the capacity of the state to deny entry to its citizens because Papuan-born Australian citizens had to obtain entry permits to enter mainland Australia, despite being Australian citizens.

In special leave matters before the High Court, counsel are limited in the number of pages they can submit in written argument and are allowed only twenty minutes of oral argument. Susan Walsh's solicitor had submitted the written pleadings and I presented the oral argument. The federal government had its Solicitor General present its oral argument, indicating the seriousness of the government's intention to concede no ground on this matter. The normal practice in special leave matters is for the Court (usually presided over by one or two judges) to inform the parties immediately of their decision. At the end of both counsels' argument, the two judges hearing the application left the courtroom to confer before giving their decision. I was informed that the fact the judges had left the room indicated that my arguments had persuaded them to discuss it further before making a decision. They returned, however, with a negative response for Susan Walsh. In a formal and legalistic manner, the Court declined the application. Justice McHugh stated:

The Court is of the opinion that there are insufficient prospects of success for an appeal on the issues of statutory construction decided by the Full Federal Court to warrant a grant of special leave to appeal.⁴⁶

Susan Walsh's disappointment was clear from the tears in her eyes; she was overwhelmed by the sense of being at the end of the road of her quest for recognition as an Australian citizen. Using this traditional litigation route left Ms. Walsh and all Papuan citizens born in Papua as Australian citizens, who also have Australian citizen parents, without affirmation of their Australian identity.

While this was a failure for Susan Walsh, her case can also be viewed in a different manner. The litigation had not given Susan Walsh the recognition of her identity; however, her opportunities for gaining other rights to political participation and residence were not exhausted. My opposing

Walsh's solicitor to let him know that I had written about the case and in the course of those communications he sought my assistance in the matter.

⁴⁶ Transcript of oral argument, *Walsh v. MIMIA B41/2002* (June 25, 2003), available at <http://www.austlii.edu.au/au/other/hca/transcripts/2002/B41/1.html>.

advocate, Australia's Solicitor General and thus the most senior adviser to the government on litigation issues, immediately informed me that the outcome would not preclude Ms. Walsh from seeking permanent residence under the Migration Act, 1958. He urged her solicitor to contact the department to find out more about which visa might be appropriate. While I was no longer involved in that part of her case, I was informed that Susan Walsh did receive permanent residence on August 12, 2003,⁴⁷ and would have been eligible to apply for Australian citizenship by grant two years later.

Can this achievement, then, be termed a success? Writing to me about the approval of her permanent residence status, Susan's husband said:

The PR (permanent residence) is with us but it feels like a 2nd class victory. Susan's father's legacy, his bloodline, and Susan's line of descendency [sic] in Australia from at least 1855 or before has been broken as she is left to start a new line of descent unrelated to her father's⁴⁸

It is difficult to understand why children of Australian citizen parents born in Papua should be singled out and treated differently to all other territories in the world.⁴⁹ Reading the Australian Citizenship Instructions⁵⁰ regarding PNG, one can see that there was certainly an administrative practice in place that treated Australian citizens born in Papua differently to Australian citizens born on the mainland. This related to a differentiation between those of indigenous and non-indigenous Papuan descent for the purposes of rights of residence. Yet, it does not appear that this was articulated regarding rights of descent from Australian citizen (mainland) parents.

Moreover, if one looks at citizenship laws throughout the world there is a consistent acceptance of citizenship by birth and/or descent.⁵¹ That is, when

47 She was eligible for and obtained a Resident Return Visa (RRV). These are for permanent residents, or former citizens who have lost their citizenship, to return to Australia. Her three children then obtained their permanent residence visas a month or so later.

48 Email from Surinder Sidhu to Author (Sept. 14, 2003) (on file with author).

49 See Rubenstein, *supra* note 16.

50 This is material prepared by the Executive branch to guide decision-makers in the application of the law. It is available for purchase from the Department of Immigration and Citizenship. The particular instructions referred to were ACI No. 4, File No. 97/002289 (Mar. 23, 2001) (on file with author).

51 In a project analyzing access to citizenship, these two approaches are recognized as central to access to citizenship, in addition to residence in territory. See T. ALEXANDER ALEINIKOFF & DOUGLAS KLUSEMEYER, *CITIZENSHIP POLICIES FOR AN AGE OF MIGRATION* 7-20 (2002).

considering or reflecting on membership and connection to a community, a person will be deemed in some countries to have a sufficient connection to a community by virtue of their birth in the territory. And for others, it is the familial connection that matters. Both of these connections, which exist in real terms for Ms. Walsh, were denied to her in law.

Finally, Australian law distinguishes no other country regarding the right to citizenship by descent for children of one parent who was an Australian citizen and another who was not. All children who have one Australian citizen parent have been entitled to citizenship by descent.⁵² Whereas the administrative practice regarding Papua did make such a distinction. The best interpretation is that the legal situation was an unintended consequence of the move to PNG independence. While the initial judge at the Federal Court was able to interpret the legislation favorably, the High Court was not prepared to deal with this anomaly — the courts in the end were not able to remedy bad law.

There is, however, a positive note on which to conclude Susan Walsh's story. The Australian Parliament recently passed the Australian Citizenship Bill, 2006,⁵³ restructuring the Australian Citizenship Act, 1948, which includes a provision dealing with the Susan Walsh kind of situation. The new provision provides:

Person born in Papua

(7) A person (the *applicant*) is eligible to become an Australian citizen if the Minister is satisfied that:

- (a) the applicant was born in Papua before 16 September 1975; and
- (b) a parent of the applicant was born in Australia (within the meaning of this Act at the time the applicant made the application); and
- (c) the parent was an Australian citizen at the time of the applicant's birth; and
- (d) the applicant is of good character at the time of the Minister's decision on the application.

This provision remedies this anomalous case. Susan Walsh's line of descent still has been broken so she does not personally benefit, but if she had not run her case using litigation to strip bare the harsh anomaly it presents, this progressive outcome would have been unlikely. While a positive outcome won't always be the case as a result of litigation, there is no doubt

⁵² Subject to procedural requirements set out within the Act.

⁵³ On March 1, 2007. When it comes into force, on July 1, 2007, it will be known as the Australian Citizenship Act, 2007.

that the process of litigation, illuminating the legal issues, can sometimes operate extra-judicially to alchemise a result so absurd that the Executive is convinced of the need to change the outcome by redressing it in another forum.

B. Amos Ame

Amos Ame was also born in Papua when it was Australian territory and was an Australian citizen by birth. In contrast to Susan Walsh's special leave application to the High Court,⁵⁴ his matter was brought before the High Court in its original jurisdiction. This was significant in that it allowed the necessary scope for the case to air directly the broader constitutional issues that I had unsuccessfully sought to get the Court to address in Susan Walsh's special leave application.

I had been approached directly by a duty solicitor at the detention center where Amos Ame was being held. The solicitor had read the transcript of the special leave application for Susan Walsh in the High Court and, sensing there were broader issues not canvassed fully by the Court, contacted me to inquire if I thought the matter was worthy of further review. Because the matter was initiated in the High Court's original jurisdiction, the main part of the case concerning deprivation of citizenship could be argued fully before the Court, even more so because the case did not incorporate the descent issues that had arisen in Susan Walsh's case.

Knowing that the Solicitor General would be representing the federal government, I sought experienced junior counsel to work with me. We acted pro bono. As it turned out, when the case was set down for argument before the Full Court of the High Court, my co-counsel was jammed and unable to appear with me. I approached another academic who has appeared in litigation, Professor George Williams, to join me. Two academics acting as counsel without any full-time members of the Bar as part of the team was unusual for Australia, unlike the United States where law academics often make courtroom appearances. Indeed, it may well have been the only time that two academics acting as co-counsel have appeared before the Court. The Court, therefore, had two experts, one in citizenship law and the other more broadly versed in constitutional law, presenting arguments, perhaps in a different way than would have been the case if it had fallen on members of the established Bar. While everyone was respectful of the Court, there

⁵⁴ This was due to her case beginning in the Administrative Appeals Tribunal and being appealed through the courts.

was none of the clubbishness and pronounced deference sometimes present among practitioners.

From the vantage of the High Court justices, there was perhaps an added attentiveness produced by novelty but perhaps too a tendency to bristle at what may have been perceived as a species of lecture running beside legal argument. These too are factors to be weighed when considering litigation and the choice of counsel for the task. There was one stark exchange, which clearly showed how hackles could be raised between the bench and academic Bar. It occurred in the context of discussing the process of loss of citizenship:

GUMMOW J: But it is a consequence of your submissions, is it not, that a large segment of the population of PNG are not PNG citizens because they did not go through this procedure?

MS RUBENSTEIN: Yes, your Honour, that is indeed correct.

GUMMOW J: That seems an alarming state of affairs.

MS RUBENSTEIN: Your Honour, first of all "large" is proportional in the sense if we look at those issues, Papuan population was smaller than New Guinea but, with respect, your Honour, the Court in making its decision should not be influenced by the —

GLEESON CJ: Why? You mean we should not hesitate to declare most of the people who live in Papua are not citizens of Papua New Guinea? Do we happen to have any information about how many people did make the election that you say was necessary to make within two months?

MS RUBENSTEIN: No, your Honour, we do not have that information. The respondent may have that by virtue of the fact that Papua was part of the Australian Commonwealth and all of the material in relation to Papua —

GUMMOW J: This is just not an intellectual game, you know.

MS RUBENSTEIN: With respect, your Honour, that is right. Mr Ame here is seeking to remain in Australia and we are, as his advocates, seeking to persuade the Court that there is a real consequence for him.

GLEESON CJ: There seem to be a great many other people affected by your argument.

MS RUBENSTEIN: Yes, your Honour, and, with respect, the Court has a responsibility in interpreting the rights of Australian citizens in light of the constitutional parameters that this Court is seeking to administer and interpret. In interpreting the Australian Constitution its

first responsibility is to the Australian people rather than necessarily to the comity between nations.⁵⁵

While Justice Kirby articulated the significance of the matter in his judgment, he too was part of a decision that found for the federal government:

This application for the constitutional writ of prohibition and other relief, concerns Australian nationality and citizenship. It is important for the applicant who is facing removal from the Commonwealth. He raises objections that this Court must determine. However, the chief significance of the case arises from the potential implications that the proceedings may have for the citizenship and nationality of all Australians. In short, could they be stripped of their status and rights as citizens in the same way as federal law has purported to provide in the case of the applicant?

Part of the argument on behalf of Amos Ame was that his rights of residence as an Australian citizen should not have been restricted during the time of his citizenship. This was due to the legislative framework which in 1975 had stripped Amos Ame of his Australian citizenship with the introduction of the Papua New Guinea Constitution. The legislative framework provided that any people with rights of residence in Australia would not be stripped of their Australian citizenship. At that time, only those Papuan Australian citizens who were given permission to enter Australia under the Migration Act, 1958 were entitled in practice to such entry. Another part of the argument for Amos Ame was that while this may have been the case administratively, constitutionally it was not permissible, because citizenship rights included constitutional rights of residence in the country of citizenship.

The High Court did not agree with this argument and accepted the Government's case that Papuan Australian citizenship was without any real value when thinking about residence rights and other rights that normally flow from citizenship. The joint judgment in the majority relied upon the fact that as a practical reality:

Before Independence, most Papua New Guineans had no "real" citizenship. Those born in Papua were technically Australian citizens, but they had no right to enter or remain in Australia, or even to leave their own country. . . . Although in the years immediately prior to

⁵⁵ Transcript of oral argument, *Walsh v. MIMIA* B41/2002 (June 25, 2003), available at <http://www.austlii.edu.au/cgi-bin/disp.pl/au/other/HCATrans/2005/66.html?query=Re%20MIMIA;%20ex%20parte%20Ame>.

Independence permission to enter or to leave the country was readily granted and the Papua New Guineans were issued with Australian passports, the technical barrier remained.

These were individuals whose claim to citizenship status and identity as Australians was devoid of any significant legal consequence, and so Amos Ame's claim was dismissed. The disappointing consequence of this for those seeking to promote a more inclusive citizenship is that the judgment, and consequently the jurisprudence, recognizes that it is possible for Parliament to legislate to create different classes of citizenship.

The danger with this is that the way is then clear for governments to think in less progressive ways. Indeed, during the course of argument on the value of citizenship if the government can deny entry to its citizens, the Solicitor General used the opportunity to advance the idea that the government legislate in the *future* to restrict citizens' rights of reentry into the country. In this exchange during the course of oral argument, we see the government perhaps laying down markers for possible futures, while the Court in its reluctance to enter fully into the spirit of the inquiry is perhaps flagging limits:

MR BENNETT: Yes, your Honour. [Say] Parliament passed a law saying if an Australian citizen lives overseas for more than three years he or she needs an entry permit to return. That would be a valid law. . . .

KIRBY J: We do not really have to resolve it in this case, but I really doubt that you could impose a duty on any Australian citizen to get a visa or something, some permission to get back into Australia because they are just not immigrants. They are not within the immigration power.

MR BENNETT: Your Honour

[T]he ultimate fact to be reached as a test whether a given person is an immigrant or not is whether he is or is not at that time a constituent part of the community known as the Australian people.

Nationality and domicile are not the tests; they are evidentiary facts of more or less weight in the circumstances, but they are not the ultimate or decisive considerations.

GUMMOW J: He is talking in an era of British subjects, is he not, particularly, coloured British subjects.

MR BENNETT: Yes, in the context of that case, yes.

GUMMOW J: You might be able to win this case without enticing us into what seems to me rather dangerous waters. You will be advocating a system of internal passports next.

This does represent dangerous waters and has significant potential in the heightened security and terrorism framework that is now used as a significant policy factor when dealing with these issues.⁵⁶ It also reminds strategists of some of the inherent problems in using individual cases to advance particular policy positions. The cases can then be used by the executive to test more restrictive policy approaches, which, if then accepted by the courts, can be justified as a basis for the legislature to proceed along that course.

While the judgment itself gave no encouragement to the government to follow such a path in the future, if a government did seek to, current indications from the Court are that there is nothing in the Constitution that protects any citizenship rights. If the courts are not likely to be protective of these rights, then there is extra incentive for advocates of inclusion to take the arguments and concerns to politicians to ensure that legislation of this nature is kept far away from the statute books. This too might be a vain course in the face of a determined executive that can sniff popular backing and electoral advantage in exclusion and keeping out the Other.

In the aftermath of the case, still keen to maintain his life in Australia, Amos Ame sought to obtain refugee status on the basis of the argument that "his politicising of the Papuan citizenship issue in Australia through the High Court case may have resulted in some dangerous repercussions in the violent and unstable political culture of the Central Highlands."⁵⁷ The case relied upon a primary witness in PNG by the name of Jonathon Baure who has been keen to assert his and others like Amos Ame's claim to Australian citizenship. Amos Ame's refugee application was unsuccessful and he is now relying upon one last avenue of recourse remaining: to seek the Minister's discretion. The political activity in Papua, however, continues, as those like Amos Ame seek recognition of their identity as Australian citizens. As recently as November 22, 2006, a report in the *Sydney Morning Herald* read:

Police fired warning shots to disperse hundreds of Papuans who protested outside the Australian High Commission in Port Moresby to demand recognition as Australian citizens

Australian Papuan Community coordinator Jonathan Baure said the

⁵⁶ Catherine Dauvergne, *Citizenship with a Vengeance*, 8 THEORETICAL INQUIRIES L. 489 (2007); Alexandra Dobrowolsky, *(In)security and Citizenship: Security, Immigration, and Shrinking Citizenship Regimes*, 8 THEORETICAL INQUIRIES L. 629 (2007).

⁵⁷ Email from Martin Clutterbuck, Solicitor in the Refugee Application, to Author (Oct. 14, 2006) (on file with author).

protesters wanted Australia to recognise that Papuans were not given a choice to remain Australians when PNG became independent in 1975.

The rally was in response to a call from the High Commission for all Australian citizens to register at the commission's offices so they could be readily found in emergencies. . . .

A high commission spokeswoman said two senior officials spoke to protest leaders and explained that a High Court ruling in Australia last year upheld laws that Papuans ceased to be Australian citizens when PNG became independent.⁵⁸

The political matter is not going away anytime soon, but the litigation in this case is unlikely to have the same consequences for Amos Ame as it had for Susan Walsh. The process enabled him to remain in Australia for the period during which the litigation took place, and has been a way of expressing his identity as an Australian citizen, but none of the legal consequences of citizenship are likely to flow his way.

C. Tania Singh

For Tania Singh the relevant historical political context began in 1986 when there was a change to the Australian Citizenship Act, 1948, reflecting a significant policy change regarding birthright citizenship. Until that time, birth in Australia led to automatic citizenship. From that time forward, a person needed both birth in territory and one parent who is an Australian citizen or permanent resident.⁵⁹ It is the type of legislative change that Justice Kirby would not have supported, as he clearly states in the extract quoted at the beginning of this Article.

The links between migration law and citizenship law can be highlighted here in explaining the reason for the change.⁶⁰ The immediate catalyst was the case of *Kioa v. West*⁶¹ where it was argued that the child of the parents who were subject to a deportation order was an Australian citizen and therefore entitled to natural justice. While not adopted by the court, the

58 *Warning Shots Fired to Disperse Protestors*, SYDNEY MORNING HERALD, Nov. 22, 2006, available at <http://www.smh.com.au/news/world/warning-shots-fired-to-disperse-protestors/2006/11/21/1163871405011.html>.

59 Section 10 of the Australian Citizenship Act, 1948.

60 See further information about this change in RUBENSTEIN, *supra* note 5, at 93. For a theoretical examination of the links between migration law and citizenship in Australia and Canada, see CATHERINE DAUNVERNGE, *HUMANITARIANISM, IDENTITY AND NATION* (2005).

61 (1985) 159 C.L.R. 550.

possibility that such an argument might one day be successful was enough to encourage precautionary legislative change.⁶² The first challenge to the consequences of that legislative change didn't come until Tania Singh's case, almost ten years later.

Tania Singh was born in Australia on February 5, 1998 and remained in Australia until the decision in her High Court matter was resolved against her. Her parents are Indian citizens. In April 1997, they arrived in Australia with Ms. Singh's brother. In July 1997, Ms. Singh's father lodged an application for a protection visa. The Minister refused the application. While the Singhs were applying for review of their decision Tania was born.

The Singhs' desire to make this application could be viewed as a step to use Tania's citizenship status (if granted) to assist in the family's applications for permanent residence. In July 2003, Ms. Singh, by her next friend, filed a writ of summons in the High Court seeking, among other relief, a declaration that she had acquired Australian citizenship by birth. The technicality of the statement of claim is reflective of the difficult place of citizenship in the Constitutional structure.

Justice Kirby stated a case for the consideration of the Full Court of the High Court. The two questions relevant in the case were: "Is [Ms Singh] an alien within the meaning of s 51(xix) of the Constitution?" The second question was: "If the answer to 1 is 'No,' is s 198 of the [Migration Act] capable of valid application to [Ms Singh]?"⁶³

As there is no reference to citizenship in the Constitution, the case boiled down to whether the term alien must be fixed by reference to its meaning in 1901 when the Constitution came into force, or whether it was a term that could have different meanings at different times. The Migration Act which sought to restrict her residence was, in Ms. Singh's argument, not relevant to her, because the Migration Act was based on the "Aliens and Naturalization" power. As she was not an alien (by virtue of her birth in the territory) Ms. Singh argued that she could not be governed by the Act.

Or, as Justice Kirby began his judgment: "Is a person, born in Australia to parents, neither of whom is an Australian citizen, an 'alien' within s 51(xix) of the Constitution, or otherwise liable under the Constitution and federal law to be removed from Australia?"

Justice Kirby's judgment sets out the quandary that litigation often presents

⁶² Note also the case *Molisi v. Minister for Immigr. & Multicultural Affairs* (2001) F.C.A. 420, where the citizenship status of the children did not assist the parents in their review of the Minister's decision not to allow them to remain in Australia.

⁶³ *Singh v. Commonwealth of Australia* (2004) 222 C.L.R. 322.

in seeking progressive citizenship outcomes. It also highlights the particular idiosyncrasies that made the case so complex:

It was thus possible, according to the plaintiff, that somewhere between persons who were, and were not, citizens according to statute, lay an intermediate category of non-citizen non-alien. This possibility was inherent in the deliberate omission from the Constitution of a provision to empower the Parliament to make laws on citizenship. It might be hoped that the clarification of the meaning of "alien" (and hence of the status of non-alien) would lead promptly to federal legislation to regularise this intermediate class. But if it did not, it would remain for this Court to defend non-alien from exclusion from the polity of the Commonwealth and from ministerial deportation only because they were, in terms of statute, "non-citizens."⁶⁴

Legislation regarding citizenship and the rights that flow from citizenship are purely statutory and, given there is no mention of this status in the Constitution, the constitutional equivalent for citizen is "non-alien." So, as Justice Kirby explained, the plaintiff's argument was based on a constitutional status separate from the statutory status. Tania Singh accepted she was not a citizen by virtue of the legislation, but she didn't accept she was subject to the Migration Act, 1958. She appealed to a higher constitutional meaning and a constitutional membership to protect her from deportation. Her own personal identity was also deeply Australian despite her formal status.

Her identity, however, and the specifics of the policy were not central to the Court's deliberations. Ultimately, a majority of the Court including Justice Kirby held that it was within the Parliament's power to legislate and deem her an alien for the purposes of the Constitution. This eventually, as Justice Kirby set out, came down to constitutional interpretation rather than an analysis of who should be encompassed within the term "alien." It also came down to some democratic notions — that determining who was a member of the community (with some limits) was at the end of the day appropriate for the Parliament to determine rather than the courts.

It is in this context that reflecting upon the value of lobbying for legislative change is now worthy of attention.

⁶⁴ *Singh v. Commonwealth of Australia*, (2004) 222 C.L.R. 322, 408.

IV. LEGISLATIVE CHANGE

In the extract from his decision at the beginning of this Article, Justice Kirby distinguishes between the roles of legislator and judge; if he had been a member of Parliament, responsible for the policy behind the laws, he would not have been supportive of the legislative changes that Parliament introduced in 1986 making citizenship more exclusive.

Those laws narrowing entitlement to citizenship by birth in Australia to those who have a parent who is an Australian citizen or permanent resident⁶⁵ were reviewed in 1994 by the Joint Standing Committee on Migration in its Report, *Australians All: Enhancing The Meaning Of Australian Citizenship*.⁶⁶ At that time, as an academic in the area, I took the opportunity to advocate a return to the 1986 position; i.e., to allow birth in Australia to be a sufficient condition for recognition of citizenship. The Report acknowledged my submission as the *only* person advocating a return to such a policy.⁶⁷

Having put this view on the public record, what then were my feelings when I was first approached by the Solicitor General to appear as his junior? The approach came within months of my appearance against the Solicitor General in the Susan Walsh special leave application. The *Singh* case was the first significant High Court matter for some time to analyze citizenship in a constitutional sense, and here was an opportunity to be involved in such a case, sharing my expertise and gathering that of others. Knowing that my own policy view was in the public domain, I determined that I felt comfortable acting as junior counsel for the respondent, distinguishing the legal point at stake in the claim from the policy point.

It is the same distinction that Justice Kirby made in his judgement finding against Tania Singh. In undertaking this case, I was reminding myself that constitutional principles can be understood separately from individual policy questions. Constitutional points like the one in this matter often are concerned with broader foundational and structural issues about government, such as the extent of a government's power, rather than the specific policy decision exercised within that power. In this case the policy decision revolved around whether Australia should have an inclusive citizenship policy. The

⁶⁵ There is also the provision to allow those born in Australia who then continuously reside in Australia for ten years to also be recognized as citizens by birth. Section 10 of the Australian Citizenship Act, 1948.

⁶⁶ JOINT STANDING COMM. ON MIGRATION, PARL. OF THE COMMONWEALTH OF AUSTL., *AUSTRALIANS ALL: ENHANCING AUSTRALIAN CITIZENSHIP* 100-01 (1994).

⁶⁷ *Id.*

Court was only concerned to determine whether this decision was within the government's control (although the full extent of that control was not articulated).

I was therefore acting for a government for whom it was acceptable (even if I didn't personally agree with the policy) to determine, as the Australian Parliament's Joint Standing Committee on Migration had stated in its report, "that citizenship law should be drafted so that it is not able to be used by persons seeking to obtain an immigration advantage."⁶⁸ This linking of citizenship to residence and couching it as a right to residence and an immigration advantage, rather than assessing whether birth in territory should inherently give a person a right to residence, shows the meshing of citizenship as status with citizenship as rights. Because citizenship gives a person a right to residence, it is viewed by legislators predominantly through that right, even though citizenship stands for so much more than rights — it is also about identity.

The Australian Citizenship Council's Report, *Australian Citizenship for a New Century*,⁶⁹ reviewed the provisions for acquisition of citizenship by birth and concluded that the current policy and law strike the correct balance. It was not concerned in the same way as individuals can be with their identity as someone born in Australia. The Report stated:

In particular, in an international environment where population movements are increasing exponentially, and where Australia is seen by many as a desirable destination, it would be inappropriate to allow migration laws to be circumvented through the acquisition of Australian Citizenship status by children born in Australia to temporary or illegal entrants. Such an approach would compromise Australia's migration program as well as being inequitable to the many thousands of people who apply to migrate to Australia every year through the proper channels.⁷⁰

The council was also comforted by the "safety net" provisions to prevent

⁶⁸ *Id.* para. 4.68.

⁶⁹ Australian Citizenship Council, *Australian Citizenship for a New Century* (Feb. 18, 2000), available at <http://www.citizenship.gov.au/law-and-policy/legislation/report.htm>.

⁷⁰ *Id.* at 40.

children from reaching the condition of statelessness⁷¹ and the government accepted the council's recommendation.⁷²

Therefore, neither the courts nor Parliament seem to be forums likely to promote inclusive change to this aspect of the legislation. The place of individuals born in Australian territory is dependent upon a transformation of public opinion towards more inclusive understandings of membership. These need to be generated more broadly within the community first, before they can be translated back to the courts and Parliament. If Australia reaches a point where the community is of the view that this law is unfair, it will inevitably place pressure on politicians to change the course. Or, if the government goes too far in its definition of who an "alien" is for the purposes of the Constitution, so that the definition falls outside the "ordinary meaning" of that term, then the courts can again become an appropriate venue to test these issues. The role of the strategist is to keep these options in mind as times and circumstance change.

CONCLUSION

In a persuasive article looking at citizenship issues in Israel, Guy Mundlak reminds progressive lawyers who seek to rely on litigation and the pressuring of policy by law that "litigation strategies must maneuver between broad legal claims and targeted solutions that solve individual problems, between eliciting raw narratives and making theoretically complex moral arguments; between compromising at the initiative of the government . . . and pursuing a principles solution that may help other potential plaintiffs, but may also risk the case altogether."⁷³

Each of the applicants in the litigation discussed in this Article had individual claims to Australian citizenship which had to be situated in the broad constitutional framework under which the legislation had been enacted, effectively denying each of them their identity as Australian citizens. Mundlak's points underpin litigation in all jurisdictions, and remind us all of the difficult decisions that need to be made in each case.

Yet as a person who identifies as a progressive lawyer and academic,

71 Section 23D of the Australian Citizenship Act, 1948.

72 AUSTRALIAN CITIZENSHIP . . . A COMMON BOND: GOVERNMENT RESPONSE TO THE REPORT OF THE AUSTRALIAN CITIZENSHIP COUNCIL 16 (2001).

73 Guy Mundlak, *Litigating Citizenship Beyond the Law of Return*, in TRANSNATIONAL MIGRATION TO ISRAEL IN GLOBAL COMPARATIVE CONTEXT 69, 78 (Sarah Willen ed., forthcoming 2007).

who acknowledges the limitations of law's role in creating an inclusive membership, I am still committed to the strategic use of litigation as a tool for achieving progressive ends when the legal principles raise matters of significance and importance. Sometimes the courts are the only forums left to air such matters of consequence and to advocate different and just pathways through the constitutional and legal issues presented. These pathways are always open, even if the times or the judicial personnel are not always suited to the task.

If citizenship cases arise in the future where the arguments are strong but the climate, judicial or otherwise, is not immediately conducive, then running litigation as a means of pursuing a particular end should, in my view, still be entertained. Even where the case is lost it may nonetheless elicit judgments that reinforce important principles in different ways than the immediate outcome of the case might have. It can also trigger other events that may then lead, eventually, to a more favorable policy outcome — whether it be in the way the executive views the case or the legislature reconsiders the issues.

As regards one of the cases discussed in this Article, that indeed appears to be the result for people who were in the same predicament as Susan Walsh, and they can be thankful her case was run to achieve that end. For in cases such as Susan Walsh's, the tool of law cast as litigation can be remarkably effective. It brings with it an armory of crafted argument, an open public forum, media attention, and the possibility of sympathetic judicial utterances. In addition, government lawyers are pressed to consider facts and departmental officers made to ponder how best to spend their scarce time and resources. All of these attributes fall under Harlow and Rawlings' formulation of *Pressure Through Law*.

These three High Court cases underline, however, that both citizenship law and constitutional law in the context of citizenship do not pay sufficient attention to the individual's affiliation with Australia. Blanket rules about birthplace and territory and parentage do not always reflect an individual's connection with the country they identify as their nationality. The extent of a Parliament's power does not necessarily implicate the policy within that power. Each of the cases highlights laws and frameworks for laws that miss out or exclude groups of individuals who fall through the regulatory cracks with no real prospect of their special circumstances being given sufficient consideration until the regulations and law are changed.

How does my experience assist me in answering these often nearly unanswerable questions on whether to litigate or not? Ultimately, while there are undoubted limitations when litigation is pursued, if pursued within a broader framework, it can play an important part in an overall agenda of

effecting progressive change. The moment and the case, however, require careful consideration and savvy judgement, as breaching the fine line between the legitimate exercise of pressure and vexation can impede the progressive project, turning it back not only on the individual litigant but on those who come after.

