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A Battle and a Gamble: The Spectre Of An Adverse Costs Order In Constitutional Litigation

Patrick Keyzer
Bond University, Patrick_Keyzer@bond.edu.au

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Abstract
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the High Court has almost invariably applied theindemnity rule, which is that the winner receives their costs of the litigation from the loser.This rule applies to the 'substantive' issues raised in a case and also to 'procedural' arguments over such things as standing. Constitutional cases aretreated no differently from other cases. No special privilege applies to constitutional cases in light of the significant function they have in securing the rule of law through judicial review. In other words, you may need to pay the government to ensure that its acts are constitutional.

Keywords
Access to Constitutional Justice, Costs, Constitutional Litigants, Indemnity Rule, Critique of Indemnity Rationale

A BATTLE AND A GAMBLE: THE SPECTRE OF AN ADVERSE COSTS ORDER IN CONSTITUTIONAL LITIGATION

PATRICK KEYZER*

With the notable exception that an Attorney-General intervening is not liable to pay or entitled to receive costs,[1] the High Court has almost invariably applied the indemnity rule, which is that the winner receives their costs of the litigation from the loser.[2] This rule applies to the 'substantive' issues raised in a case and also to 'procedural' arguments over such things as standing.[3] Constitutional cases are treated no differently from other cases.[4] No special privilege applies to constitutional

* Professor of Law and Director of the Centre for Law, Governance and Public Policy, Bond University.

1 *Attorney-General of Queensland v Holland* (1912) 15 CLR 46.

2 'If you lose, you will be responsible not merely for your own legal costs but you must pay the other side's too': Neil Andrews, *Principles of Civil Procedure* (Sweet and Maxwell, 1994), 393. For accounts of the historical development of the rules see Neil Gold, 'Controlling Procedural Abuses: The Role of Costs and Inherent Judicial Authority' (1977) 9 *Ottawa Law Review* 44, 51-3; Arthur Goodhart, 'Costs' (1929) 38 *Yale Law Journal* 849, 851-5; RW Quick, 'Costs: the historical perspective' (1984) 13(4) *Queensland Law Society Journal* 169 and (1984) 14(4) *Queensland Law Society Journal* 127; *Robert Pilford's case* [1613] 10 Co Rep 116A; *Tyte v Globe* [1797] 7 TR 267; *Harold v Smith* [1860] 5 H & N 381 (157 ER 1231); *Gundry v Sainsbury* [1910] 1 KB 645; *Ritter v Godfrey* [1920] 2 KB 47; *Donald Campbell & Co v Pollak* [1927] AC 732; *Hughes v Western Australian Cricket Association (Inc) & Ors* (1986) 8 ATPR 40-676; *Trade Practice Commission v Nicholas Pty Ltd & Ors* (1979) 28 ALR 201. For further discussion of the contrasting approaches see John F Vargo, 'The American Rule On Attorney Fee Allocation: The Injured Persons' Access To Justice' (1993) 42 *American University Law Review* 1567, 1571; and Chris Tollefson, 'When The 'Public Interest' Loses: The Liability of Public Interest Litigants for Adverse Costs Awards' (1995) 29 *University of British Columbia Law Review* 303, 304.

3 See, eg, *Australian Conservation Foundation v Commonwealth (No 1)* (1980) 146 CLR 493, 512, 546. A failed application for standing can be particularly costly if a judge exercises his or her discretion to conduct a hearing on the merits of the case and then decides that the applicant has no standing.

4 This is apparent from a review of all the constitutional decisions of the High Court that refer to both 'constitutional law' and 'costs' in the catchwords: *Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission* (2001) 203 CLR 645; *De L v Director-General, NSW Department of Community Services (No 2)* (1997) 190 CLR 207; *Re McJannet; Ex parte Australian Workers Union of Employees (Queensland) (No 2)* (1997) 189 CLR

cases in light of the significant function they have in securing the rule of law through judicial review. In other words, you may need to pay the government to ensure that its acts are constitutional.

An analysis of the High Court's decisions where the indemnity rule has not been applied demonstrates that exceptions are few and unpredictable.[5] So, in most cases, a departure from the indemnity rule was 'justified' because the merits of the matter had not been finalised. A point of law might have been determined by the High Court on appeal and the balance of the matter remitted to an inferior court for reconsideration. In such circumstances the question of costs would be left for the trial judge to decide once the matter was reconsidered.[6] This is a standard approach and merits no further scrutiny.[7] It is, at any rate, not a genuine exception to the indemnity rule, since the Court that finally determines the merits of the matter at trial would almost invariably apply the indemnity rule when ultimately disposing of the matter.

In a second group of cases, the reasons for declining to apply the indemnity rule are so specific to the facts of the particular case that it is impossible to draw any general principle from them.[8]

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654 ('*Re McJannet*'); *Free v Kelly* (1996) 185 CLR 296; *O'Toole v Charles David Pty Ltd* (1990-1991) 171 CLR 232; *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation (No 2)* (1982) 152 CLR 179; *Superannuation Fund Investment Trust v Commissioner of Stamps (SA)* (1978-1979) 145 CLR 330; *Cominos v Cominos* (1972) 127 CLR 588; *Kotsis v Kotsis* (1970) 122 CLR 69; *Commonwealth of Stamp Duties v Rhind* (1966) 119 CLR 584; *Breen v Sneddon* (1961) 106 CLR 406; *Commissioner of Stamp Duties (NSW) v Owens* (1953) 88 CLR 67; *Marcus Clark & Co Ltd v The Commonwealth* (1952) 87 CLR 177; *Parton v Milk Board (Vict)* (1949) 80 CLR 229; *New South Wales v Bardolph* (1933-1934) 52 CLR 455; *Crothers v Sheil* (1933) 49 CLR 399; *The King v Archdall and Roskruge; Ex parte Carrigan and Brown* (1928) 41 CLR 128; *Minister for Home and Territories v Smith* (1924) 35 CLR 120; *McGlew v New South Wales Malting Co Ltd* (1918) 25 CLR 416; *R v Industrial Registrar; Ex parte Sulphide Corporation Ltd* (1918) 25 CLR 9.

5 For this part of the analysis I have also had regard to non-constitutional cases, since the Court has not drawn any distinction between constitutional and non-constitutional cases when it comes to the application of the indemnity rule.

6 See, eg, *Western Australia v Ward* (2002) 213 CLR 1, 399.

7 See, eg, *Porta v Hauser* (1919) 27 CLR 192, 193.

8 See, eg, *Re Minister for Immigration and Multicultural Affairs; Ex parte Goldie* (2004) 217 CLR 264, 272 (concerned the availability of costs to the Australian Government Solicitor acting for the applicant as in-house counsel on the basis that the Australian Government Solicitor is not the 'Commonwealth' for the purposes of the application of the relevant High Court Rule); *Solomons v District Court (NSW)* (2002) 211 CLR 119, 170 (Kirby J dissented in respect of the application of the indemnity rule in this case on the basis that the issue raised matters of 'principle' and the appellant had borne sufficient costs in consequence of other

In a third, potentially more significant category of cases, costs are apportioned.[9] The apportionment of costs can indicate an attempt to modify the harsh impact of the indemnity rule. As Neil Gold has observed:[10]

> A rule providing for partial indemnification of the winner may be a compromise allowing some scope for the litigation of reasonable claims. It is an attempt to balance the principle of compensation with the principle of free access to the legal process.

However the High Court has so far failed to provide adequate explanations for its decisions to apportion costs when it has done so.[11]

A fourth category of cases is those cases in which the Court makes no order as to costs.[12] The result of such an order is that the litigant must rely on his own resources. This is not an ideal arrangement for the impecunious litigant, but is a considerably superior result when compared to the typical indemnity order.[13] However the High Court has failed to explain in these cases why it has made no order as to costs. The practical consequence is that would-be litigants who would argue that an exception to the indemnity rule should operate not only take on a significant financial risk by 'chancing their arm', but have no guidance from the Court as to the type of argument that might warrant a departure from the ordinary rule.

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interrelated litigation); *Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission* (2001) 203 CLR 645, 661 (applied *Re McJannet*, *infra*); *Re McJannet; Ex parte Australian Workers Union of Employees (Queensland) (No 2)* (1997) 189 CLR 654, 657 (where s 75(v) constitutional jurisdiction is invoked, the High Court enjoys discretion over costs, and this cannot be excluded by statute); *Free v Kelly* (1986) 185 CLR 296, 306.

9 For recent examples in the High Court see *North Australian Aboriginal Legal Aid Service v Bradley* (2004) 218 CLR 146; *Western Australia v Ward* (2002) 213 CLR 1, 399; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 539. For earlier cases see *Kotsis v Kotsis* (1970) 112 CLR 69, 113. The Full Federal Court has developed reasons though, see *Ruddock v Vadarlis (No 2)* (2001) 115 FCR 229; (2001) 110 FCR 491.

10 Gold, above n 2, 56-7. This certainly seems to have occurred in the (non-constitutional) High Court decisions in *Edgar and Walker v Meade* (1916) 23 CLR 29, 45.

11 For further cases illustrating the typical approach see *Re Minister for Immigration and Ethnic Affairs; Ex parte Qai Lin* (1997) 186 CLR 622, 629 and *Spencer v The Commonwealth* (1907) 5 CLR 418, 444. In *Jenkins v Lanfranchi* (1910) 10 CLR 595, 598 an appeal in a non-constitutional case was dismissed without costs and with no express reasons given for the departure.

12 As in *North Australian Aboriginal Legal Aid Service v Bradley* (2004) 218 CLR 146; see also *Reis v Carling* (1908) 5 CLR 673; *Maiden v Maiden* (1908) 7 CLR 727, 747.

13 Such as in *North Australian Aboriginal Legal Aid Service v Bradley* (2004) 218 CLR 146.

In the final group of cases, those cases in which the Court has explained its reasons for departing from the usual rule, they have only offered reasons in the most general terms: for example, on the basis that it was 'reasonable' or 'appropriate' to do so in the circumstances.[14] Again, this provides scant guidance to the would-be constitutional litigant as to their prospects of avoiding a costs order should they be found to have no standing or should they lose on the merits.

To sum up: the indemnity rules are almost invariably applied, but when they do not the exceptions are seldom and unpredictable, and are narrowly fact-specific. The High Court does have the power to develop a special jurisprudence applicable to costs for constitutional cases as an incident of the exercise of its constitutional jurisdiction.[15] However in light of the preceding account of the case law, a cautious lawyer would advise their client that the High Court will almost invariably apply the indemnity rule, and exceptions to the rule are few and unpredictable.[16]

If the indemnity rule can have such devastating consequences on a constitutional litigant, why is it applied? The 'loser pays' approach has been justified on a number of grounds.[17] The first rationale is compensatory.[18] Costs furnish the victor with funds to cover the expense of bringing the action, and compensate the defendant for their litigation expenses in defending a suit.[19] Second, the loser pays rule is said to deter

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[14] See, eg, *Bodruddazza v MIMA* (2006) 228 CLR 651, 675-7; *Re Minister for Immigration and Ethnic Affairs; Ex parte Qai Lin* (1997) 186 CLR 622, 629 ('reasonable'); *Hudson v Lee* (1993) 177 CLR 627, 634 ('appropriate'); *Dwyer v Vindin* (1906) 4 CLR 216 (reversal of the usual rule may be appropriate if the defendant's opposition to a suit is 'unreasonable'). The best effort to explain why the indemnity rule ought not be applied was in *McLaughlin v Daily Telegraph Newspaper Co Ltd* (1906) 4 CLR 548, 562 when the Court, after analysing the successful claims made by both parties, indicated that each party, having succeeded in part, should be allowed the costs of their respectively successful claims, however 'under the circumstances we think justice will be done by omitting all references to costs from the judgment'.

[15] *Re McJannet; Ex parte Australian Workers Union of Employees (Queensland) (No 2)* (1997) 189 CLR 654, 657 (where s 75(v) constitutional jurisdiction is invoked, the High Court enjoys discretion over costs, and this cannot be excluded by statute).

[16] *Bateman's Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Ltd* (1988) 194 CLR 247, 263. Gaudron, Gummow and Kirby JJ stated that 'the peril of an adverse costs order' would represent a deterrent to a person bringing an unmeritorious suit to court.

[17] These are developed by the Australian Law Reform Commission in ALRC 75.

[18] ALRC 75, [4.5].

[19] 'Costs as between party and party are given by the law as an indemnity to the person entitled to them; they are not imposed as a punishment on the party who pays them nor given as a bonus to the party who receives them. Therefore if the extent of the

frivolous, vexatious or unmeritorious litigation.[20] A third justification for the loser pays rule is that it allows people without means to litigate if their legal representatives are prepared to work on a no-win no-fee basis (that is, on the basis of their calculation that they are likely to win, and therefore likely to be paid).[21] A fourth justification for the rule is that it deters delay in proceedings and encourages settlement.[22] Finally, the loser pays rule has been justified on the basis of a 'floodgates' argument: 'large scale disregard of the usual order as to costs would

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damnification can be found out, the extent to which costs ought to be allowed is also ascertained': *Harold v Smith*, (1865) H & N 381, 385. See also *Smith v Buller* (1875) LT 19 Eq 473; *London Scottish Benefit Society v Chorley* (1884) 13 QBD 872 at 875; *Ryan v McGregor* [1926] 58 OLR 213; 1 DLR 476.

20 ALRC 75, [4.5]; Comment, 'Limitation or Denial of Costs in Trial Courts in Actions at Law as a Device for the Discouragement of Vexatious Litigation' (1927) 27 *Columbia Law Review* 974; Comment, 'Use of Taxable Costs to Regulate the Conduct of Litigants' (1953) 53 *Columbia Law Review* 78. The courts have specifically eschewed describing this as a punitive rationale for costs, but that is what it amounts to: Gold, above n 2, 32, 53, and references there cited.

21 ALRC 75, [4.5]. Peysner describes the rationales for costs as 'Janus-like', 'they are designed to offer a disincentive to launching litigation but also offer a financing system of a potential source of funds for the victorious party to use to pay his lawyer': John Peysner, 'A Revolution by Degrees: From Costs to Financing and the End of the Indemnity Principle', (2001) 1 *Web Journal of Current Legal Issues* <http://webjcli.ncl.ac.uk/2001/contents1.html> (accessed 11/10/2005), 4. Robert Wyness Millar quotes a speech from Lord Brougham in 1828 in which, defending the rule that the winner of a case should have their costs (subject to taxation), remarks: 'How much nobler will be the Sovereign's boast when he shall have it to say that he found the law dear and left it cheap; found it a sealed book, left it a living letter; found it the patrimony of the rich, left it the inheritance of the poor; found it the two edged sword of craft and oppression; left it the staff of honesty and the shield of innocence': Robert Wyness Millar, *Civil Procedure of the Trial Court in Historical Perspective* (Lawbook Exchange, 2005) 44.

22 ALRC 75, [4.5], [4.15]-[4.17] and Chapter 11 (noting that this effect is not unequivocal). The same rationale is invoked to support contingency fees: Fredrick B MacKinnon, *Contingent Fees For Legal Services* (American Bar Foundation, 1964), Chapter 1: 'The basic objection to the contingent fee is the adverse effect it possibly may have on the performance of the Bar's professional responsibilities both in the case at hand and more importantly in the future. The major arguments against contingent fees are that the gamble on the outcome produces a speculative attitude towards law practice that is inconsistent with the detachment essential to a profession and that because of the contingency there is an emphasis on winning which tends to reduce the lawyers' self restraint in negotiation and trial advocacy thereby engendering the effective operation of the adversary system of judicial administration'.

inevitably lead to an increase in litigation with an increased, and often unnecessary, burden on the scarce resources of the publicly funded system of justice'.[23]

These arguments are unpersuasive, for the following reasons.

First, the compensation or 'indemnity' rationale, while relevant to private law disputes where the costs of litigation can be factored in as a business risk, is really quite irrelevant to many, if not all constitutional cases.[24] So long as constitutional arguments advanced by a person are not doomed to failure (and therefore waste the court's time) it is difficult to understand why exposing a government to the discipline of judicial review of its legislation is a matter in respect of which a government should be compensated.[25] If a constitutional case is arguable, then a person should not be expected to pay for their opportunity to ensure that the government behaves lawfully.[26]

A second reason why the compensation rationale is inappropriate in the context of constitutional justice is because the indemnity rule does not affect governments in the

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[23] *Oshlack v Richmond River Council* (1998) 193 CLR 72, 106.

[24] It could be argued that different considerations should apply where a constitutional issue is raised in litigation involving non-governmental parties (see, eg, *O'Sullivan v Noarlunga Meat Ltd* (1954) 92 CLR 565) and/or in commercial or private law cases where the principles of business risk that animate the ordinary approach to costs ought to apply. For the reasons that are set out in the next section of this Chapter, it is not necessary for me to traverse those considerations in detail here. In the next section of this Chapter I argue that principles of equal access to justice should be applied in constitutional cases *whatever* the identity of the constitutional litigant. Accordingly, in those cases where there is a mix of constitutional and extraneous issues, the constitutional issues can and should be disaggregated from the other issues in the litigation, and no costs order should apply in respect of those issues.

[25] There is a skerrick of support for this contention, in a not dissimilar legal context. In *Chanter v Blackwood (No 2)* (1904) 1 CLR 121, 132, Griffith CJ observed, 'I think a claim to set aside a parliamentary election is a matter of as great importance as any that can be raised in any Court. I regard this, therefore, as a matter of importance. It is also a matter of considerable difficulty. But the difficulty has arisen from the manner in which the Act is framed, and from the action of the electoral officers in the arrangement for the election. It would be hard to make the respondent pay for those mistakes, or to pay more because of them. I think, for these reasons, that under the circumstances of this case I ought not to make an order for taxation on the higher scale'. For further support of the proposition put here, see, Elizabeth J Shilton, 'Charter Litigation and the Policy Processes of Government: A Public Interest Perspective' (1992) 30 *Osgoode Hall Law Journal* 653, 655.

[26] In a different context, but to similar effect, Enid Campbell and Matthew Groves, 'Award of Costs in Administrative Proceedings' (2004) 11 *Australian Journal of Administrative Law* 121, 133.

same way that it affects many ordinary litigants.[27] The loser pays rule might be justified in the private law paradigm of (supposedly) 'equal economic actors' but the manifest inequality of resources between many litigants and governments strips the loser pays rule of its persuasive power. *North Australian Aboriginal Legal Aid Service v Bradley*[28] demonstrated how the risk of an adverse costs order[29] can place enormous pressure on people to abandon their constitutional questions even in circumstances where the High Court recognises that those questions are of public importance and must be resolved.[30] Furthermore, as Toohey J has observed in a different context, but in terms no less relevant for that reason only:[31]

> Relaxing the traditional requirements for standing may be of little significance unless other procedural reforms are made. Particularly this is so in the area of funding … litigation and the awarding of costs. There is little point in opening the doors to the courts if litigants cannot afford to come in. The general rule that 'costs follow the event' is not in point. The fear, if unsuccessful, of having to pay the costs of the other side (often a government instrumentality or wealthy corporation), with devastating consequences to the individual or … group bringing the action, must inhibit the taking of cases to court. In any event it will be a factor that looms large in any consideration to initiate litigation.

Governments have much less to lose than litigants like NAALAS. If a government loses millions of dollars in a case the government will still exist the next day, and is very likely to continue to command the resources needed to fund further (expensive)

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27 ALRC 75, [4.9].

28 *North Australian Aboriginal Legal Aid Service v Bradley*, (2004) 218 CLR 146; (2002) 122 FCR 204; (2001) 192 ALR 625; [2001] FCA 1080; (2001) 188 ALR 312.

29 A number of commentators have pointed to the problems created by the use of the word 'costs' to mean different things. 'The first step in understanding the costs of litigation is to analyse what is meant by a general concept like the 'costs of litigation'…. They are words needing more precise definition before they can be of practical use': G Pesce, 'Analysing the Structure of Litigation Costs' (2002) 16 *Australian Journal of Family Law* 41, 41. For the purpose of this analysis I am using the word 'costs' to refer to the out-of-pocket expenses that may be borne by a person or association engaged in constitutional litigation: to like effect, Goodhart, above n 2, 849.

30 See, eg, *Forster v Forster* (1893) 1 QB 564 (a person must bear the costs of that portion of their claim that failed); *Cretazzo v Lombardi* (1975) 13 SASR 4 (the costs of a matter may have increased significantly by virtue of one of the issues litigated, in which case the successful party may be deprived of costs, or even orders to bear the costs of the other party); *Donald Campbell & Co v Pollak* [1927] AC 732 (the successful party acted improperly in continuing or commencing litigation); ALRC 75, [4.2].

31 An unpublished address to the National Environmental Law Association in 1989 cited by Stein J in *Oshlack v Richmond River Council* (1994) 82 LGERA 236, 238.

constitutional litigation. If NAALAS had not been indemnified by ATSIC then they would have gone bankrupt. So a typical costs order may not be 'intended' to be punitive but it nevertheless has a chilling effect on the ardour of the would-be constitutional litigant.[32] The enforcement of a costs order – particularly in circumstances in which a person advanced an arguable constitutional point – can be likened to 'hit[ting] a man when he is down. … [T]o give costs against the man who has lost seems … perilously like it'.[33]

The second justification for the loser pays rule, that it deters vexatious proceedings, should only be accepted to the extent that it demonstrably has that effect. In other words, an adverse costs order might be appropriate if a court makes a finding that there has been an advertent abuse of process, but not otherwise. There have been cases in which people invoke the original jurisdiction of the High Court to advance fanciful arguments.[34] But overall there is little evidence of a prevalence of nuisance litigants in Australian constitutional law. The evidence indicates that the circumstances in which it might be necessary to penalise a litigant in a constitutional case with an adverse costs order have proven to be quite rare.[35] This is not surprising since constitutional litigation is a time-consuming, human resource-intensive activity, and for those reasons is unlikely to be done for frivolous purposes.[36]

The third justification for the indemnity rule, that it provides funds for litigation, is also questionable. First, it only funds successful claimants. Second, the funds, if any, only come at the conclusion of a case, though the impecunious litigant, by definition, needs the funds at the start of the case.

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[32] ALRC 75, [4.19]. Justice Toohey, in an address to the National Environmental Law Association cited by Gerry Bates, 'Costs of Litigation in Public Interest Environmental Cases' (1996) 13 *Environment and Planning Law Journal* 335, 338; Goodhart, above n 2,32, 874; Deborah M Weissman, 'Law as Largess: Shifting Paradigms of Law for the Poor' (2002) 44 *William and Mary Law Review* 737, 818; see also David Kairys, 'Some Concerns About Context and Concentration of Power' (1999) 72 *Temple Law Review* 1019, 1021.

[33] Goodhart, above n 2, 877.

[34] Probably the most celebrated ambitious litigant in the history of the High Court has been Len Lindon (aka 'Citizen Limbo'): see ie *Re Limbo* (1989) 64 ALJR 241; *Lindon v Commonwealth* (1995) 70 ALJR 145; *Lindon v Commonwealth* [1996] HCA 14; and also *Limbo v Little* (1989) 98 FLR 421.

[35] Ironically enough, I have only been able to trace one constitutional case where punitive costs were awarded, and that was against the Commonwealth, in *O'Toole v Charles David Pty Ltd* (1990) 171 CLR 232, 311.

[36] See Philip Mause, 'Winner Takes All: A Re-examination of the Indemnity System' (1969-70) 55 *Iowa Law Review* 26, 29.

The fourth rationale for the loser pays rule, the 'floodgates' argument that changing the rule might adversely affect the court's processes, is, for the reasons advanced in the penultimate Chapter of the thesis, a weak objection to opening constitutional courts.

The indemnity rule of costs certainly fits snugly into the private law paradigm of constitutional litigation, in which the High Court conceived its role as being limited to the resolution of traditional, private disputes.[37] As John Peysner explains:[38]

> The flowering of the indemnity principle was completely in sympathy with a nineteenth century liberal economics which contemplated equal economic actors who freely contract and then resolve disputes by deploying lawyers for whom they pay.

In theory, the indemnity rule removed questions about the funding of litigation to an extra-legal, private sphere, enabling the courts to keep at arms length from the dust of battle.[39] However it is perfectly apparent that these justifications for the indemnity rule do not address the moral inadequacy of requiring people to pay for access to constitutional justice, particularly when they (are impecunious and) have genuine constitutional claims to advance.[40]

Together, the rules of standing and costs have excluded some types of people and consequently some types of arguments from being advanced in constitutional courts.

Over the course of the 20th century, it has become less and less tenable for courts to adopt such an inegalitarian approach. The drive to equalise rights and entitlements in society has been a *sine qua non* of democratic thinking,[41] and is a common and persistent theme of contemporary politics.[42] Today, people refuse to be treated as second-class citizens, and engage in political activities, including resort to the courts, to advance their claims for equal recognition. A requirement, whether doctrinal or practical, that people be wealthy to access constitutional justice stands in the way of this equality.

In *Locus Standi*, the most extensive treatment of the theoretical bases of Australian standing principles to date, Leslie Stein suggested that the inequality problem could

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37 See *In re Judiciary and Navigation Acts* (1921) 29 CLR 257, 265 (see the analysis from 265-7).

38 Peysner, above n 21, 4.

39 *Fleischmann Distilling Corp v Maier Brewing Co,* 386 US 719 (1967).

40 Peysner has observed that 'scholarly articles on general cost issues are extraordinarily rare': see above n 21, 11.

41 Kwame Anthony Appiah, *The Ethics of Identity* (Princeton University Press, 2005) 103-4.

42 Charles Taylor, 'The Politics of Recognition' in Amy Gutmann (ed), *Multiculturalism* (Princeton University Press, 1994) 25, 38.

be addressed by applying the theory of distributive justice and the remedy of redress as developed by John Rawls.[43] Specifically, Rawls' principle of 'equal liberty' requires that each 'person is to have an equal right to the most extensive total system of equal basic liberties compatible with a system of liberty for all'.[44] The opportunity of redress to realise equal liberty requires equality of access.[45]

In contemporary democratic thinking, 'we have the modern notion of dignity, now used in a universalist and egalitarian sense, where we talk of the inherent "dignity of human beings", or of citizen dignity. The underlying premise here is that everyone shares in it'.[46] This philosophy stands in stark contrast to the class ordering contemplated by the rules governing standing and costs.

Since there is no express constitutional foundation for the advancement of an equality-based argument for the relaxation of standing rules,[47] arguments that may be available in other countries about the realisation of equality in the standing may not be as readily available in Australia.[48] However there are strong reasons for insisting that equality should be a central theme of access to constitutional justice in Australia. To say this does not finally resolve the question as to how this practical equality can be achieved in the context of constitutional justice, but it settles at least part of the picture of what a solution should look like.

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43 Leslie Stein, 'The Theoretical Bases of Locus Standi' in Leslie Stein (ed), *Locus Standi* (Lawbook, 1979) 3, 21.

44 John Rawls, *A Theory of Justice* (Oxford University Press, 1971) 250; 'Distributive Justice: Some Addenda' (1968) 13 *Natural Law Forum* 51, 62.

45 Leslie Stein, reflecting on John Rawls' philosophy, remarks: 'There will always be a hegemony in any society which will foster an ideology which will pervade all aspects of that society including the legal system. There will always be one class that is dominated by another and that will be relatively unrepresented in administrative, executive, corporate or judicial decisions. To some extent *locus standi* rules could be used to adjust this situation': above n 43, 21, also citing Anatol Rapoport, 'Theories of Conflict Resolution and the Law' in Martin L Friedland (ed), *Courts and Trials: A Multidisciplinary Approach* (University of Toronto Press, 1975) 22.

46 Taylor, above n 42, 27.

47 See further Michael J Detmold, 'Australian Constitutional Equality: The Common law Foundation' (1996) 7(1) *Public Law Review* 33; Justice Michael Kirby, 'Law and Justice in Australia: Room For Improvement' (2004) 4(2) *Queensland University of Technology Law and Justice Journal* 289.

48 See in particular Russell Binch 'The Mere Busybody: Autonomy, Equality and Standing' (2002) 40 *Alberta Law Review* 367. Binch argues that the right of equality under Article 15 of the *Canadian Charter of Rights and Freedoms* authorises judges to ensure that standing is accorded to all would-be constitutional litigants.

Our equal stake in constitutional law is grounded in the fact that constitutional law is the law by and under which *all of us* constitute ourselves as a society and realise our identities. For that reason, constitutional law ought to advance opportunities for *all of us* to aspire to a better system of government. I do not overlook the difficulty that attends referring to 'all of us' in this way. There are many grounds upon which people are presently excluded from civic entitlements in Australia.[49] However as Charles Taylor has observed:

> The politics of equal dignity is based on the idea that *all* humans are equally worthy of respect (emphasis added).[50]

That means that recognition should not be bestowed only on the majorities whose rights and interests are protected by the representative branches in statutory law but also the minorities that may be protected *against* statutory law by constitutional principles.

Ideally, law should be the product of *inclusive* conversation: a true conversation recognises that wherever there 'a "constitutive we", there is also an excluded "they"'.[51] Justice William Brennan once remarked:[52]

> only by remaining open to the entreaties of reason and passion, of logic and experience, can a judge come to understand the complex human meaning of a rich term such as 'liberty', and only with such understanding can courts fulfil their constitutional responsibility to protect that value.

To make good the objectives of equal respect and equal dignity it is necessary to develop a space within a constitutional system in which powerless voices may contend with the powerful. For these reasons, people should not be expected to pay the costs of government to ensure that the rule of law is realised.

As the Supreme Court of the United States has observed:

> Since litigation is at best uncertain[,] one should not be penalised for merely defending or prosecuting a law suit, and … unjustly discouraged from instituting actions to vindicate their rights of the penalty for losing included the fees of their opponents' counsel.[53]

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49 See Patrick Keyzer, *Open Constitutional Courts* (Federation Press, 2010) 142-3.

50 Taylor, above n 42, 41.

51 Kim Lane Scheppele, 'Telling Stories' (1989) 87 *Michigan Law Review* 2073, 2078.

52 Lucie White, 'Subordination, Rhetorical Survival Skills and Sunday Shoes' (1990) 38 *Buffalo Law Review* 1, 3.

53 *Fleischmann Distilling Corp v Maier Brewing Co,* 386 US 719 (1967). The purpose of the American rule on costs, which is that each party bears their own costs, is to ensure 'that an individual's basic rights never be diminished. Unfettered access to the courts was deemed

Constitutional questions can only be affirmatively resolved in a constitutional court.[54] As Laurence Tribe has correctly observed:[55]

> [D]ecisionmaking processes made essential by the government must not simultaneously be denied because of the poverty of those who are obliged to rely on such processes.

an essential element in the protection of … rights': Phyllis A Monroe, 'Financial Barriers to Litigation: Attorney Fees and the Problem of Access' (1981) 46 *Albany Law Review* 148, 151.

[54] *Huddart, Parker Pty Ltd v Moorehead* (1909) 8 CLR 330, 357.

[55] Laurence Tribe, *American Constitutional Law* (Foundation Press, 1978) 1008.