



**4<sup>th</sup> Congress of the World Conference on Constitutional Justice  
Vilnius, Republic of Lithuania, 11-14 September 2017  
“The Rule of Law and Constitutional Justice in the Modern World”**

**Session 4 - “The law and the individual”**

**Response by**

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Your Excellency, Mr Zalimas, the President of the Constitutional Court of the Republic of Lithuania, esteemed judicial Colleagues, distinguished guests, ladies and gentlemen, I greet you.

I wish to congratulate President Zalimas, the Judges of the Constitutional Court of Lithuania and the Government of Lithuania for a well organised 4<sup>th</sup> Congress of the World Conference on Constitutional Justice. I also thank you for the hospitality that the people of Lithuania have extended to us.

The topic “The Law and the Individual” is essentially about how, the law that conceptually exists for the benefit not just of a group or groups but also for an individual, does in reality or practical terms redound to the good of even an individual citizen.

It entails the possibility an individual has to vindicate his or her rights, especially constitutional rights, when threatened or believed to have been infringed. This possibility manifests itself in the form of the entitlement to personally challenge or have someone else challenge on the individual’s behalf a perceived or actual violation of his or her individual rights and the accessibility of courts or justice to all , including the financially under-resourced the vulnerable.

I intend to touch on some of the critical issues so appropriately raised by Justice Christoph Grabenwarter, based largely on the South African experience but with some cursory reflection on the position in some African jurisdictions.

South Africa has, so to speak, codified fundamental human rights in its Bill of Rights. They range from individual liberties, group and political rights to socio-economic rights. They are all justiciable. The Bill of Rights renders it inevitable that individuals be able to enjoy or benefit optimally from rights entrenched in the Constitution and also that they be allowed to personally assume responsibility for their protection and enforcement.

And section 34 of the South African Constitution gives an individual the right of access to justice. This entails the right to have any dispute capable of being resolved through the application of the law adjudicated upon by a court of law or any impartial tribunal or forum. I must hasten to say that some of our ground-breaking judgments relate to the vindication of socio-economic rights in areas like health, housing etc.

Additionally, not only does an individual have the right to challenge any law or conduct perceived to be an actual violation of their right, on grounds that they are inconsistent with the Constitution and are therefore invalid. A person or entity acting on behalf of an individual(s) or in the furtherance of the interests of the public may approach any court including the Constitutional Court to vindicate their or others' constitutional rights.

For, in South Africa all courts from High Court level all the way through the Supreme Court of Appeal up to the Constitutional Court, which is the apex court in all matters, do have the jurisdiction to entertain an individual's challenge to the constitutionality of laws or conduct.

The gross inequality arising from the institutionalised impoverishment of a section of our population during our shameful past, of necessity renders it near-impossible for the vulnerable and indigent individuals to challenge a violation of their rights. This is compounded by the prohibitively high costs of litigation. In recognition of this reality, section 35 of our Constitution makes express provision for the State to ensure that an indigent person is provided with legal representation at State expense in criminal cases. As regards constitutional and other matters of a civil nature, a statutory mechanism has been created for the assistance of an indigent individual. The organised legal profession, universities' law clinics, public interest litigation centers do assist individuals to vindicate their constitutional rights although some do at times represent themselves. Where individuals are unrepresented South African courts, including the Constitutional Court, do facilitate their representation through the Registrar's office if they are deserving and financially under-resourced.

In sum individuals, whether poor or wealthy, enjoy access to justice and legal representation although the rich perceptibly enjoy the monopoly of the best legal brains. This, as you would imagine, tends to generally tilt the prospects of success in favour of those with superior legal representation.

Costs could impede access to justice. Because the South African legal system recognises the awarding of costs against the losing party, a principle has been developed by our Constitutional Court in recognition of the possible chilling effect of awarding costs against individuals or entities that litigate against the State in constitutional matters. As a result, even if a party loses against the State, each party would be ordered to pay its own costs. Cost orders are only made against individuals in constitutional litigation against the State where court process is being abused through vexatious or baseless serial litigation.

But, a litigant is sometimes barred from lodging an appeal unless they have paid costs awarded against them. Again, this would be in cases where a person, for example, brings endless applications or appeals on the same hopeless legal point and facts. That abuse is dealt with that firmly.

In conclusion, an individual may challenge any unconstitutionality on his or her own behalf or in the public interest and in any court in South Africa including the Constitutional Court. A quick look at some of the African jurisdictions has revealed that in Benin, Gabon and the Democratic Republic of Congo an individual does have direct access to the Constitutional Court. But in Gabon and the Democratic Republic of the Congo that direct access is limited to certain matters and only in terms of certain procedures. However, in Algeria, Mali, Senegal and Tunisia an individual cannot apply directly to the Constitutional Court for judicial review.

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