



HUMAN RIGHTS AND CONSTITUTIONAL ACCOUNTABILITY

**CONFERENCE TO MARK THE 30TH ANNIVERSARY OF
CONSTITUTIONAL DEMOCRACY IN SOUTH AFRICA**

28 – 29 NOVEMBER 2024

LAW FACULTY, STELLENBOSCH UNIVERSITY

CONFERENCE CONCEPT NOTE AND CALL FOR PAPERS

Introduction

As we mark the significant anniversary of 30 years of constitutional democracy in South Africa, the time is ripe for scholarly reflection on how the value and institutional architecture of accountability under our Constitution can be re-envisioned and revitalised to advance the full and equal enjoyment of human rights for all. Accordingly, Professor Sandra Liebenberg, H.F. Oppenheimer Chair in Human Rights Law and Professor Bradley Slade, Head of the Department of Public Law at the Faculty of Law, Stellenbosch University will be hosting a conference focusing on the aforementioned theme on 28 – 29 November 2024.

Background

The Bill of Rights is described in the Constitution as “a cornerstone of democracy in South Africa.” It “enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.”¹ It further imposes an overarching obligation on the state to “respect, protect, promote and fulfil the rights in

¹ Constitution of the Republic of South Africa, 1996 (Constitution).

the Bill of Rights.” However, 30 years into constitutional democracy there are many obstacles to the full and equal realisation of the fundamental rights enshrined in South Africa’s holistic and integrated Bill of Rights. These include poverty and a lack of access to socio-economic rights; multiple, intersecting inequalities; the impacts of climate change and other forms of environmental degradation; shrinking civil society space;² a loss of faith, particularly amongst the youth, in traditional forms of democratic politics;³ and governance challenges, including weak state capacity, corruption and maladministration. Cumulatively, these conditions generate deep patterns of human rights violations. The complex and structural root causes of these human rights violations pose unique challenges for designing effective systems of constitutional accountability for their redress.⁴

Accountability is a key constitutional value that pervades several sections of the Constitution.⁵ It is also implicit in the system of checks and balances established by the Constitution, the Chapter 9 institutions with their overarching mandate to support constitutional democracy,⁶ and the role of an independent judiciary in interpreting constitutional rights and designing effective remedies for violations.⁷ Well-designed, effective and accessible systems of accountability are critical to bridging the chasm

² See, for example, the criticisms of the introduction of the General Intelligence Laws Amendment Bill (B40-2023) in Parliament: P De Vos ‘New Intelligence Bill is Anti-Democratic, and a Unique Mix of Malice and Stupidity’ (7 September 2023), available at <https://www.dailymaverick.co.za/article/2023-09-07-new-intelligence-bill-is-a-unique-mix-of-malice-and-stupidity/>.

³ Human Sciences Research Council ‘Findings of Survey into Voters’ Perceptions and Intentions: Dr. Ben Roberts’ (7 December 2023), available at <https://hsrc.ac.za/news/latest-news/2024-elections-findings-of-survey-into-voters-perceptions-and-intentions-dr-ben-roberts/>. For related media articles see N Njillo ‘SA Youth “Not Apathetic” but Irked by Poor Delivery, Coalitions, Independent Candidates – Report’ (7 December 2023), available at <https://www.dailymaverick.co.za/article/2023-12-07-sa-youth-not-apathetic-but-irked-by-poor-delivery-coalitions-independent-candidates-report/>; S Smillie and S Payne ‘Dismal Voter Turnout to South Africa’s Municipal Polls a Blow to Democracy’ (2 November 2021), available at <https://www.dailymaverick.co.za/article/2021-11-02-dismal-voter-turnout-at-south-africas-municipal-polls-a-blow-to-democracy/>.

⁴ See S Liebenberg ‘The Art of the (Im)possible? Justice Froneman’s Contribution to Designing Remedies for Structural Human Rights Violations’ (2022) 12 *Constitutional Court Review* 137–170.

⁵ Constitution, ss 1(d), s 41(1)(c), 55, 92(2), 133, 152(a), 195(f), 215(1).

⁶ The so-called Chapter 9 institutions established in terms of ss 181–194 of the Constitution are: The Public Protector; The South African Human Rights Commission; The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities; The Commission for Gender Equality; The Auditor-General; The Electoral Commission. For a recent reflection on the role of the SA Human Rights Commission in addressing human rights violations arising from poverty and economic inequality, see S Liebenberg and BV Slade ‘Applying a Human Rights Lens to Poverty and Economic Inequality: The Experience of the South African Human Rights Commission’ (2023) 51(3) *Federal Law Review* 296–314. On the powers of the SA Human Rights Commission, see BV Slade ‘Clarifying the Power of the SA Human Rights Commission to take Steps to Redress the Violation of Human Rights: A Discussion of: *South African Human Rights Commission v Agro Data CC* [2022] ZAMPMBHC 58’ (2023) 44(2) *Obiter* 459–470.

⁷ Constitution s 38 read with s 172.

between rights on paper and their practical realisation and vindication. Despite the elaborate architecture of constitutional accountability established by the Constitution, the effective prevention and redress of structural human rights violations remains elusive.

This raises several questions concerning both the normative content of constitutional accountability, and the institutions, processes, and practices through which it is operationalised.⁸ What, for example, should the fundamental purposes of constitutional accountability be? How should the effectiveness of accountability mechanisms and processes be evaluated in the context of different constitutional rights?⁹ How do key elements of accountability such as a process of “justification”¹⁰ or “answerability”,¹¹ and ensuring that the relevant accountability forum enjoys appropriate sanctioning powers help foster greater constitutional accountability? Is there scope for envisioning alternative more preventive mechanisms and processes of constitutional accountability? How does the concept of constitutional accountability relate to other constitutional values, doctrines, and principles such as transparency, responsiveness,¹² participatory democracy, and *Ubuntu*¹³?

⁸ A selection of international and South African literature on the concepts of public accountability in general and constitutional accountability in particular includes M Bovens ‘Analysing and Assessing Accountability: A Conceptual Framework’ (2007) 13 *European Law Journal* 447–468; A Schedler ‘Conceptualizing Accountability’ in A Schedler, L Diamond and MF Plattner (eds) *The Self-Restraining State: Power and Accountability in New Democracies* (1999) 13–27; J Waldron ‘Accountability: Fundamental to Democracy’ NYU School of Law, Public Law Research Paper (2014); E Cameron ‘Judicial Accountability in South Africa’ (1990) 6 *South African Journal on Human Rights* 251; A Price ‘State Liability and Accountability’ (2015) 1 *Acta Juridica* 313–335; C Okpaluba ‘The Constitutional Principle of Accountability: A Study of Contemporary South African Case Law’ (2018) 33(1) *Southern African Public Law* 1–39; DM Chirwa and L Nijzink (eds) *Accountable Government in Africa: Perspectives from Public Law and Political Studies* (2012).

⁹ Bovens, for example, identifies three perspectives for assessing accountability relations: the democratic perspective aimed at deepening popular control of government action; the constitutional perspective aimed at safeguarding against the concentration and abuse of power; and the learning perspective aimed at stimulating improved the effectiveness and efficiency of government. See Bovens (note 8 above) at 462–466.

¹⁰ See, for example, Bovens’s definition of accountability (note 8 above) at 450. The requirement to justify the exercise of power by those holding governmental power resonates with Etienne Mureinik’s famous characterisation of the 1993 South African Constitution as one aimed at instituting “a culture of justification”. E Mureinik ‘A Bridge to Where? Introducing the Interim Bill of Rights’ (1994) 10 *South African Journal on Human Rights* 31, 32.

¹¹ Schedler (note 8 above) at 14.

¹² Chirwa and Nijzink view responsiveness as one of the constituent elements of accountability: see DM Chirwa and L Nijzink ‘Accountable Government in Africa: Introduction’ in Chirwa and Nijzink (eds) (note 8 above) at 5.

¹³ D Cornell and N Muvangua *uBuntu and the Law: African Ideals and Postapartheid Jurisprudence* (2012).

In the context of constitutional rights, the courts are important guarantors of accountability when a right has been infringed or threatened.¹⁴ They are mandated to declare any law or conduct inconsistent with the Constitution invalid and to give “appropriate” and effective remedies to vindicate rights.¹⁵ Since the inception of constitutional democracy in South Africa, the courts have experimented with a range of remedies for human rights violations,¹⁶ including supervisory orders and structural interdicts,¹⁷ meaningful engagement orders,¹⁸ constitutional damages,¹⁹ punitive costs orders,²⁰ and recruiting intermediaries such as specialist oversight and audit committees²¹ or Special Masters.²²

These remedial innovations have arguably had limited success in achieving effective accountability for human rights violations. In certain cases, there has been

¹⁴ Constitution s 38 read with s 172.

¹⁵ *Fose v Minister of Safety and Security* [1997] ZACC 6, 1997 (7) BCLR 851, 1997 (3) SA 786 para 69.

¹⁶ H Taylor ‘Forcing the Court’s Remedial Hand: Non-Compliance as a Catalyst for Remedial Innovation’ (2019) 9 Constitutional Court Review 247–281; F Veriava and M Harding ‘The *Komape* Litigation: Ensuring Effective Remedies’ (2023) *De Jure Law Journal* 505–524.

¹⁷ For example, *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* [2009] ZACC 16, 2010 (3) SA 454 (CC), 2009 (9) BCLR 847 (CC) (‘*Joe Slovo*’); *Electoral Commission v Mhlope* [2016] ZACC 15, 2016 (5) SA 1 (CC), 2016 (8) BCLR 987 (CC); *Equal Education v Minister of Basic Education* [2020] ZAGPPHC 306, 2021 (1) SA 198 (GP), [2020] 4 All SA 102 (GP) (‘*Equal Education*’).

¹⁸ For example, *Occupiers of 51 Olivia Road, Berea Township & 197 Main Street, Johannesburg v City of Johannesburg* [2008] ZACC 1, 2008 (3) SA 208 (CC), 2008 (5) BCLR 475 (CC) (‘*Olivia Road*’); *Head of Department, Department of Education, Free State Province v Welkom High School*; *Head of Department, Department of Education, Free State Province v Harmony High School* [2013] ZACC 25, 2014 (2) SA 228 (CC), 2013 (9) BCLR 989 (CC) (‘*Welkom High School*’).

¹⁹ For example, *MEC for the Department of Welfare v Kate* [2006] ZASCA 49, 2006 (4) SA 478 (SCA), [2006] 2 All SCA 455 (SCA) (‘*Kate SCA*’); *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* [2005] ZACC 5, 2005 (5) SA 3 (CC), 2005 (8) BCLR 786 (CC) (‘*Modderklip*’). But note the narrowing of the circumstances in which an award of constitutional damages could be ordered in recent Constitutional Court jurisprudence: *Residents of Industry House v Minister of Police* [2021] ZACC 37, 2022 (1) BCLR 46 (CC) (‘*Residents of Industry House*’); *Thubakgale and Others v Ekurhuleni Metropolitan Municipality and Others* [2021] ZACC 45, 2022 (8) BCLR 985 (CC) (‘*Thubakgale*’). For recent academic criticisms, see J Davis ‘Emptying the Remedial Toolbox: Thubakgale, Residents, and Constitutional Damages’ (2023) 13 *Constitutional Court Review* 221–254; SB Nxumalo ‘The Analytical Reasoning Defects in Thubakgale’ (2023) 13 *Constitutional Court Review* 255–289.

²⁰ For example, *Black Sash Trust (Freedom Under Law Intervening) v Minister of Social Development & Others* [2018] ZACC 36, 2018 (12) BCLR 1472 (CC) (‘*Black Sash 3*’); *Ex parte Minister of Home Affairs and Others*; *In re Lawyers for Human Rights v Minister of Home Affairs* [2023] ZACC 34, 2024 (1) BCLR 70 (CC) (‘*Ex parte Minister of Home Affairs*’)

²¹ For example, *Black Sash Trust v Minister of Social Development (Freedom Under Law NPC Intervening)* [2017] ZACC 8, 2017 (3) SA 335 (CC), 2017 (5) BCLR 543 (CC) (‘*Black Sash 1*’); *Madzodzo v Minister of Basic Education* [2014] ZAECHMHC 5, 2014 (3) SA 441 (‘*Madzodzo*’).

²² *Mwelase & Others v Director-General for the Department of Rural Development and Land Reform* [2016] ZALCC 23, 2017 (4) SA 422 (LCC) (‘*Mwelase LCC*’); *Mwelase & Others v Director-General for the Department of Rural Development and Land Reform* [2019] ZACC 30, 2019 (6) SA 597 (CC) (‘*Mwelase CC*’).

weak or no compliance with court orders by relevant organs of state.²³ This invites reflection on whether more can be done by the courts and all stakeholders in public interest litigation to re-evaluate and re-design the procedural rules, remedies, and support structures of public interest litigation with a view to achieving more effective accountability for human rights violations. Underlying the latter question is a more fundamental one: to what extent is South Africa's traditionally conservative legal culture constraining the potential of the courts to craft transformative remedies?²⁴

The courts have an important constitutional mandate to hold public and private actors accountable for human rights violations. It is thus crucial to interrogate whether their procedures, doctrines and jurisprudence are fit for purpose and aligned to the transformative ethos of the Constitution. At the same time, it is also important to acknowledge the institutional limitations of courts and litigation in achieving constitutional accountability.²⁵ These limitations are particularly acute in contexts where human rights violations arise from deeply rooted historical patterns of political, economic, social, and cultural inequalities and injustices, as well as governance dysfunctions. This reality should catalyse more scholarly attention and engagement with how other constitutional and legislative institutions and mechanisms can be utilised more effectively or reformed to improve accountability for human rights violations. This includes examining mechanisms and processes within the legislative and executive branches of government, the public administration, and the Chapter 9 institutions.

Another dimension of accountability which requires further study in the South African context is that of social accountability. Carmen Malena, Reiner Forster and Janmejay Singh describe social accountability as:

²³ Exemplified by the recent cases of *Thubakgale* (note 19 above) and *Ex parte Minister of Home Affairs* (note 20 above).

²⁴ The question of legal culture's potentially restraining influence on the Constitution's transformative purposes was the focus of Karl Klare's seminal article, KE Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal on Human Rights* 146. For a recent exploration of this and related themes in the context of the Constitutional Court's judgment in *Social Justice Coalition v Minister of Police* [2022] ZACC 27, 2022 (10) BCLR 1267 (CC), see GB Basson 'Procedural Justice as a Feature of Transformative Substantive Equality: Critical Notes on *Social Justice Coalition v Minister of Police 2022 CC*' (forthcoming 2024) *South African Law Journal*.

²⁵ For a critique of the "court-centric bias" within the discourse of transformative constitutionalism, see S Sibanda 'When Do You Call Time on a Compromise? South Africa's Discourse on Transformation and the Future of Transformative Constitutionalism' (2020) 24 *Law, Democracy & Development* 384, 403.

an approach toward building accountability that relies on civic engagement, i.e., in which it is ordinary citizens and/or civil society organizations that participate directly or indirectly in exacting accountability. In a public sector context, social accountability refers to a broad range of actions and mechanisms that citizens, communities, independent media and civil society organizations can use to hold public officials and public servants accountable. These include, among others, participatory budgeting, public expenditure tracking, monitoring of public service delivery, investigative journalism, public commissions and citizen advisory boards. These citizen-driven accountability measures complement and reinforce conventional mechanisms of accountability such as political checks and balances, accounting and auditing systems, administrative rules and legal procedures.²⁶

South Africa has a rich history of labour, civic and social movement organisation and mobilisation, both in resisting the systemic violations of human rights violations during apartheid, and in pursuing accountability for human rights violations during the era of constitutional democracy.²⁷ It is thus timely to focus on the current landscape of social accountability in South Africa, and the constraints faced by civil society organisations, social movements and the media in achieving social accountability for human rights. What kinds of legislative and policy reforms and innovative processes and practices could be instituted to strengthen social accountability for human rights in South Africa?

Conclusion

The planned conference aims to stimulate research and engagement on the above and related questions of constitutional accountability and human rights. Ultimately, it is hoped that the conference will contribute towards revitalising and strengthening the institutions and processes of accountability for addressing human rights violations in South Africa.

²⁶ R Forster, C Malena, J Singh, *Social Accountability: An Introduction to the Concept and Emerging Practice* Social Development Papers No. 76 World Bank Group (2004), abstract. Available at <http://documents.worldbank.org/curated/en/327691468779445304/Social-accountability-an-introduction-to-the-concept-and-emerging-practice>. See further, A Joshi 'Legal Empowerment and Social Accountability: Complementary Strategies toward Rights-Based Development in Health?' (2017) 99 *World Development* 160–172; JM Ackerman 'Human Rights and Social Accountability' Social Development Papers No.86 (2005).

²⁷ T Madlingozi 'Post-Apartment Social Movements and Legal Mobilisation' in M Langford, B Cousins, J Dugard and T Madlingozi (eds) *Socio-Economic Rights in South Africa: Symbols or Substance?* (2014) Cambridge University Press 92–124; M Heywood 'South Africa's Treatment Action Campaign: Combining Law and Social Mobilization to Realize the Right to Health' (2009) 1 *Journal of Human Rights Practice* 14–36.

Call for papers:

In light of the abovementioned introduction and background to the conference, we invite papers which broadly align with the following five themes:²⁸

1. *The theoretical foundations and institutional dimensions of constitutional accountability*

- Are the descriptions and typologies of constitutional accountability outlined above appropriate to the South African constitutional context and the broader context of the Global South and decolonial constitutionalism in an African context?
- How should the purposes of constitutional accountability be conceptualised, and how can this assist in improving accountability for human rights violations?

2. *The judiciary as an institution of constitutional accountability for structural human rights violations*

- What reforms to the courts' rules of procedure and adjudication processes are required to enable the judiciary to redress structural human rights violations more effectively?
- What kinds of innovation in remedial design would better facilitate the redress of structural human rights violations?
- What kinds of institutional support structures are required for more effective monitoring of the implementation of remedial orders, particularly, structural interdicts?
- What role can innovative monetary awards play in redressing structural human rights violations (for example, the development of delictual remedies; constitutional damages; preventative damages; reparations in kind)?
- What role can specialised courts, commissions and tribunals play in remedying structural human rights violations?

²⁸ The questions under each theme are intended to stimulate reflection for possible papers. They are not meant to be exhaustive or to prevent other angles for papers, provided they are aligned to the overarching theme of the conference.

- What lessons or innovations can be drawn from international and comparative jurisdictions in advancing effective accountability for human rights violations in South Africa?

3. Chapter 9 institutions

- What role can institutions such as the SA Human Rights Commission, the Commission for Gender Equality, the Public Protector and the Auditor-General play in promoting accountability for structural human rights violations?
- What kinds of reforms to the structure, mandate and functioning of these bodies are required to facilitate this role?
- To what extent are the current structures and mandates of the Chapter 9 institutions, as well as the interpretation of their powers by the courts an enabler or obstacle to constitutional accountability?

4. Governance and legislative reforms

- What are the obstacles to effective constitutional accountability for human rights?
- What reforms are needed to achieve greater constitutional accountability in areas such as electoral reform; economic policy and public budgeting; local government service delivery; public administration; or the governance of state-owned enterprises?
- How can we improve legislative oversight and monitoring of policies and draft legislation impacting human rights? Do we, for example, need a specialised human rights portfolio committee in Parliament? What lessons can be learnt from comparative jurisdictions in relation to such parliamentary human rights committees?

5. Social accountability

- What innovative mechanisms of organisation and accountability tools have been used by South African civil society organisations and social movements? These could include, for example: social audits; participatory budgeting; public interest litigation; design and experiences

with meaningful engagement processes; and participation in commissions of inquiry.

- What role does the media play in fostering accountability for human rights violations; what are its shortcomings, and how can its accountability function be strengthened?
- How does legislation, policy and/or jurisprudence facilitate or obstruct the activities of civil society organisations and social movements in seeking to hold state and non-state actors accountable for human rights violations?
- What lessons can be learnt from international and comparative jurisdictions regarding the role and effectiveness of various forms of social accountability for human rights violations?

Date and venue

The Conference will take place in Stellenbosch (venue to be confirmed) on 28 and 29 November.

Submission of abstracts

Those interested in presenting papers at the conference must submit an abstract of 500 words and a short bio of no more than 150 words.

Date of submission: No later than 31 May 2024.

Abstracts and bio submission: In Word format to Dr Anisa Mahmoudi, Post-Doctoral Fellow to the H.F. Oppenheimer Chair in Human Rights Law, Stellenbosch University Law Faculty: Email: anisa@sun.ac.za.

Selection of Papers for Conference and Subsequent Publication

Papers for presentation at the conference will be selected based on their fit and alignment with the abovementioned overarching and specific themes. We particularly encourage papers by young and emerging scholars. Whilst we do not exclude papers by more established scholars, we encourage such colleagues to jointly submit papers with young and emerging scholars.

You will be notified by 18 June 2024 whether your abstract has been selected for presentation at the conference.

We intend to pursue the publication of the papers presented at the conference in an edited book project or special edition of an accredited law journal. The details and timeframes will be communicated in due course.