Altered Snaps

JUDICIAL ACCOUNTABILITY
AN ERA FOR CONSCIOUSNESS

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The heightened fear of a compromised judiciary has catalysed recent dialogue concerning judicial accountability. A considerarion of these discussions on judicial accountability across the board, within the legal fraternity, and society at large, reveals emphasis on the necessity for judges to place paramount their compliance with the obligations ordained in the Constitution.[1]

Judicial accountability has been defined as "a set of mechanisms aimed at making judges and courts personally and institutionally accountable for their behaviours and decisions contrary to constitutional or legal standards".[2] This is so because judges wield tremendous powers and judges, being human, are not infallible. Judges are judicially accountable through the appeal process of their judgments.

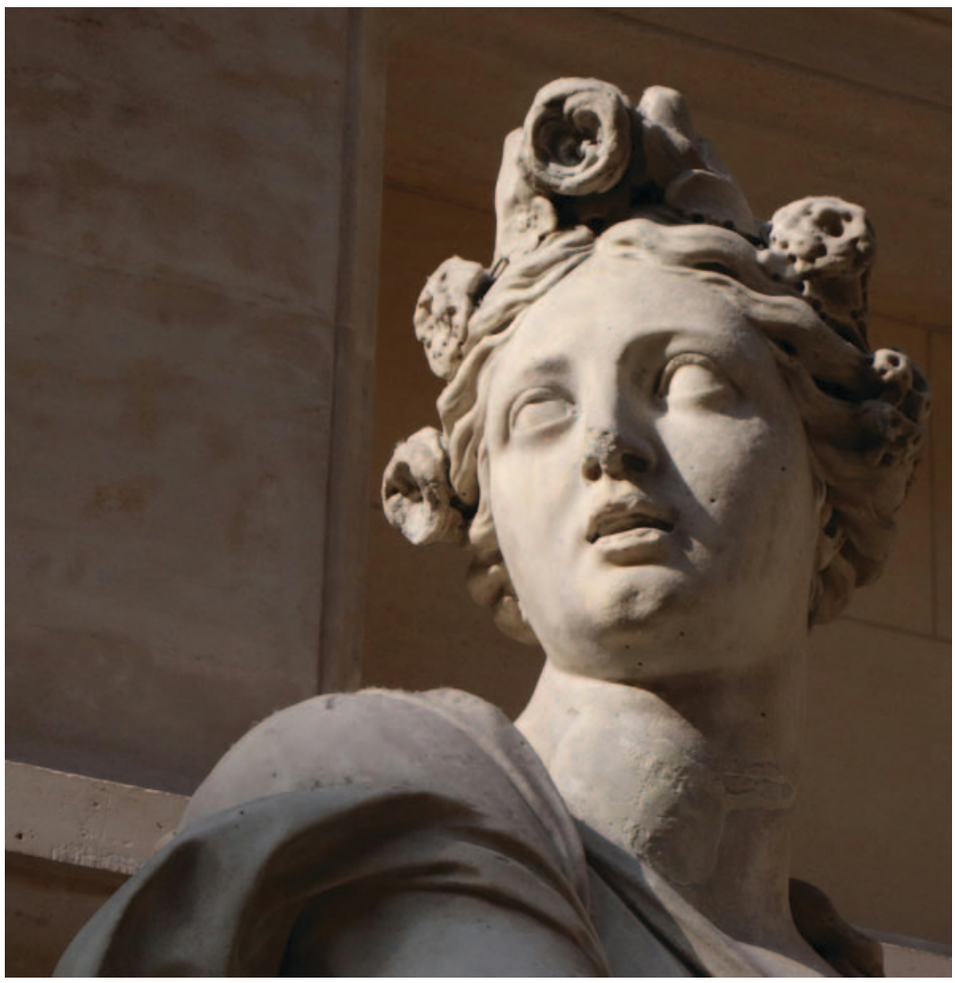
There is just reason to fear when any judiciary faces the risk of being compromised. It is instinctive to recognise that a compromised judiciary will not be accountable. It will be characterised by the failure to alleviate the challenges affecting access to justice; it will allow unfettered and unwarranted interference in the functioning of the courts; and turn a blind eye to improper judicial conduct. This should not be the fate of our judiciary, as it bears the highest responsibility of protecting and promoting the rule of law which is the foundation of constitutional democracy.

South Africa's judicial authority is vested in the courts. The courts are independent and are only subject to the Constitution and the law. Courts are required to apply and interpret laws impartially and without fear, favour or prejudice.[3] Judicial independence underpins judicial accountability. An independent judiciary is judicially accountable. Such accountability is essential in a democratic society thus ensuring the legitimacy of the courts which serve the people of our nation.

Section 174 of the Constitution provides for the appointment of judges whilst section 177 provides for the removal of a judge from office. The process of appointing judges involves the

participation of the Judicial Service Commission (JSC). There is a degree to which this process of appointment by the JSC ensures independence and impartiality. The disciplinary apparatus of the JSC is provided for in the Judicial Service Commission Act 9 of 1994, which regulates oversight over judicial conduct and accountability of judicial officers, as well as the process and procedures for lodging of complaints against judges and for investigation of these complaints.[4]

The chief justice, as a chair of the JSC, receives all complaints on behalf of the JSC and assesses the extent to which the complaint is serious and how it should be dealt with. If need be, the chief justice will refer the complaint to the Judicial Conduct Committee (the JCC) to determine if it should result in an inquiry or a tribunal. The complaints received by the chief justice can be categorised as '"lesser complaints or less serious complaints' which include those that are related to the merits of a judgment; frivolous or hypothetical complaints; or those that do not relate to incapacity or misconduct by a judge; and 'serious complaints for inquiry' – those that are considered serious but not so serious as to require that a judge be removed from office should they be found guilty, and once received the JCC can designate the CJ or any other member to hold a fact-finding inquiry into the validity of the complaint".[5]



Emeline Mansion

It is inarguable that our judiciary is structured according to the highest standards of constitutional principles and law aiming to make judges accountable. These principles also seek to ensure that they are not vulnerable to political influence and benefit from the security of tenure. The latter contends with the complaints lodged against judges, and the difficulties they grapple with when administering justice. These include remuneration and working conditions that impede their ability to thrive. These conditions include the lack of gender representation on the bench, a high volume of unfilled vacancies, the need for substantial changes to improve the performance of courts, improved technology and minimal resources.

This is not an exhaustive list, and these problems have been publicised and are known.[6] An independent and accountable judiciary is one that is competent and equipped to be efficient in the execution of its duties. This emphasises the need for organs of state unconditionally to invoke the law and other measures, to assist and protect the judiciary to foster the ideal of independence in enforcing constitutional supremacy.[7]

By no means do I invoke these challenges as a justification for judicial impropriety or judicial misconduct, but they do affect the psychology of the judiciary and its ability to facilitate justice. This in turn affects judicial accountability. More needs to be done to ease these burdens.

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REFLECTIONS

Before the era of democracy, the South African judiciary operated under apartheid rule, which was central in deepening the divisions within South African society, and ensuring that the applicability of law and the functioning of the courts did not serve our people fairly and equitably. The transition from a traumatic apartheid state saw a judiciary that shifted from a normative mode of judging to substantive reasoning which required transformative adjudication.[8]

In 1994 about 85% of the legal practitioners in South Africa were white. The judiciary as a whole had only four black judges and two white female judges. The judges who served under apartheid were retained to ease the transition.[9]

According to Judges Matter "What Does South Africa's Judiciary Look Like" in the year 2016, the total seats within the judiciary were 255[10] of which 29 were vacant. The racial composition of the seats was as follows: 101 judges identified African (44%); 78 White (34%); 24 Indian (11%); and 24

Coloured (11%). In contrast, in the year 2020 the total seats were 268 of which 39 were vacant. The racial composition included 104 African judges (45,5%); 73 White (31,9%); 28 Coloured (12,2%); and 24 Indian (10,5%). Gender versus race reflected as: African male 59 (25,7%), African female 45 (19,65%); Indian male 14 (6,1%), Indian female 10 (4,36%); Coloured male 16 (6,98%), Coloured female 12 (5,24%) and White male 45 (19,65%), White female 28 (12,2%). Presently, we have witnessed the rationalisation process of the structure, composition, functioning and jurisdiction of all courts to establish a judicial system suited to the requirements of the Constitution through the Moseneke Committee. This will also lead to a scientific analysis of the judicial establishment to determine how many more posts are needed on the bench.[11]

It cannot be denied that democracy in South Africa ushered in a rich jurisprudence of constitutional values and principles laid down by the judiciary, to improve the lives of our people. That being said, 30 years of democratic rule still entails a South African nation and judiciary that is suffering the postpartum effects of apartheid. The irony of this dilemma, as succinctly put by *Kibet* and *Fombad*, is that:

> "In functioning democracies, the ideal situation is that the state and all its instrumentalities ought to commit to, respect and uphold these values. The reality, however, shows that more often than not the state and its agents, indeed, are the violators as these values serve as limits and inconveniences in the course of the exercise of power."[12]

MOVING FORWARD

Reflecting on the past and the present is essential to forecast the future. But, being caught up in rhetoric, even if painfully brutal, is not going to help a judiciary serving our people today, who are suffering now and in need of urgent attention. The stakes are too high. Our judiciary will have to guard fiercely and jealously the gains of our Constitution.

It must adapt and be a vehicle for change, be mindful, timeous, expeditious, resourceful, and competent. It must ensure equity through access to justice, and restore faith in the affirmation of the democratic values of human dignity, equality and freedom. The judiciary will have to embody mental strength and an attitude towards wellness. It must manifest the ability to operate with a culture of judicial consciousness to be judicially accountable. It must be conscious and present in the moment. It needs to be consciously aware, alert, and alive to its role in the scheme of matters and knowing that in performing the skill and art of judging it impacts the lives of others.

I believe that finding solutions to the problems of judicial accountability will begin with an inward and honest evaluation by every single judge in the conduct of their duties. This will be in their understanding of human life and the lens through which they view the pain of injustice, the cries of malnourished hungry children, the scourge of unemployment, the effects of poor education, lack of access to proper healthcare, the lack of efficient service delivery and infrastructure, the desire to protect environmental sustainability and the inheritance of *ubuntu*[13] remembering that *"motho ke motho ka batho ba bangwe"*.

Perhaps it can be argued that these aspirations are akin to the notions of judicial conscience and transformative constitutionalism[14] but this is a new era, a time of revival and awakening of the judiciary such that not only should judges remember the history of where we come from as a nation, but they should also be judicially conscious of the fact that they are shaping the history of the future now. A

Notes

1 See https://hsrc.ac.za/news/latest-news/suspension-of-two-south-african-judges-has-opened-up-debates-about-bad-working-conditions-and-poor-delivery-of-justice/
See also https://www.judgesmatter.co.za/opinions/the-importance-of-hlophe-and-motatas-impeachment-vote-for-judicial-accountability/.
2 See https://oxcon.ouplaw.com/display/10.1093/law-mpeccol/law-mpeccol-e329#:~:text=1%20Judicial%20accountability%20can%20be,to%20constitutional%20or%20legal%20standard.
3 Section 165(1) and (2) of the Constitution of South Africa Act 108 of 1996.
See also *Van Rooyen and Others v the State and others* 2002 (5) SA 246 (CC).
4 *Seriti and Another v Judicial Service Commission and others* (32193/2023) [2023] ZAGPJHC 332; 2023 (5) SA 304 (GJ) (14 April 2023).
5 https://www.judgesmatter.co.za/conduct/#:~:text=Importantly%2C%20a%20failure%20to%20adhere,as%20head%20of%20the%20judiciary.
6 n1 *supra*.
7 Section 165 (4) of the Constitution.
8 Cameron E (2019), "The transition to democracy: Constitutional norms and constitutional reasoning, in legal and judicial practice", *The South African Judicial Education Journal,* Vol. 2, Issue 1, pp1 - 18.
9 Cameron, n8 *supra* at pp 4.
10 The total seats shoud amout to 256 if there were 29 vacancies.
11 See https://www.judgesmatter.co.za/opinions/what-does-south-africas-judiciary-look-like/#:~:text=The%20racial%20composition%20of%20the%20judiciary&text=101%20judges%20identified%20African%20(44,and%2078%20White%20(34%25).
12 Kibet & Fombad (2017), "Transformative constitutionalism and the adjudication of constitutional rights in Africa", African Human Rights Law Journal, 17(2), pp 340 -366.
13 Mokgoro J Y (1998), "Ubuntu and the law in South Africa", Potchestroom Electronic Law Journal, Vol. 1, No. 1, pp 1 - 11.
14 Klare K (1998), "Legal culture and transformative constitutionalism", *South African Journal on Human Rights,* 14, pp 146 - 150.