

# idasa



22 July 2008

The Honourable Mr Justice CT Howie  
Acting Chair  
Judicial Service Commission

Per email: [masangwana@concourt.org.za](mailto:masangwana@concourt.org.za)  
Per fax: 086 649 1338/2425

Dear Judge

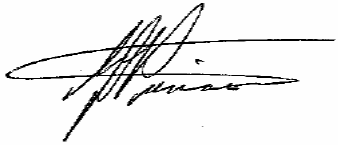
**SUBMISSION REGARDING PUBLIC AND MEDIA ACCESS TO THE ENQUIRY  
BY THE JUDICIAL SERVICE COMMISSION CONCERNING JUDGE  
PRESIDENT MJ HLOPHE AND THE CONSTITUTIONAL COURT**

On 14 July 2008, the Judicial Service Commission invited written submissions from interested parties as to 'whether the pending hearing into the complaints by the Constitutional Court and Judge President Hlophe should be public or not and, if public, what media coverage should be permitted'. Submissions should be made by 15:00 on 23 July 2008.

The joint submission by the Political Information and Monitoring Service ('PIMS') of the Institute for Democracy in South Africa ('Idasa'), and the Democratic Governance and Rights Unit of the Faculty of Law of the University of Cape Town is attached herewith for your attention and consideration.

We are grateful for the opportunity to make this submission.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Gary Pienaar', with a large, sweeping horizontal stroke above the name.

Gary Pienaar

Email: [gpienaar@idasa.org.za](mailto:gpienaar@idasa.org.za)

Tel: (021) 467-7600

Cell: 082 541 4221

Political Information and Monitoring Service  
IDASA Cape Town  
6 Spin Street  
Church Square  
PO Box 1739  
CAPE TOWN  
8000

**Encl.**



**SUBMISSION TO THE  
JUDICIAL SERVICE COMMISSION**

**With regard to the Pending Hearing into the Complaints  
by the Constitutional Court and Judge President Hlophe**

**BY THE POLITICAL INFORMATION & MONITORING SERVICE AT IDASA &  
THE DEMOCRATIC GOVERNANCE & RIGHTS UNIT AT UCT**

**BACKGROUND**

1. On 14 July 2008, Judge CT Howie, Acting Chair of the Judicial Services Commission ('the JSC') invited written submissions to the Commission as to whether or not the pending hearing into the complaints by the Constitutional Court and Judge President Hlophe should be public and, if public, what media coverage should be permitted.

## **IDASA and UCT**

2. The Institute for Democracy in South Africa ('Idasa') is an independent public interest organisation. Idasa is committed to promoting a sustainable democracy in South Africa and Africa by building democratic institutions, educating citizens and advocating social justice. Idasa was established in 1987 and since its inception has pursued a wide range of projects designed to support the consolidation of democratic processes and attitudes within South African and African societies.
3. The Democratic Rights and Governance Unit ('DGRU') is a new unit within the Department of Public Law of the Faculty of Law at the University of Cape Town, and which is established now to focus on issues of the rule of law and public ethics.
4. This submission is made jointly by The Political Information and Monitoring Service (PIMS) at IDASA and the DGRU: UCT. We take this opportunity to make submissions in regard to (a) whether, in principle, the proceedings should be open to the public and the media; and (b) the nature and extent of that openness.

## **OUR GENERAL APPROACH**

5. Generally speaking, our reasons for seeking a ruling that the JSC's proceedings should be open to the public and to the media, including that the proceedings should be broadcast (at least by radio), are as follows:

6. Idasa and the DGRU are involved in projects aimed specifically at promoting the constitutional principles of transparency and accountability as safeguards against abuse of power. As part of its work to promote open and accountable government, Idasa has conducted research into corruption, understood in its wider sense of the 'abuse of public power for private or sectional gain'. Abuse of entrusted public power for private advantage undermines people's trust in the institutions of democracy.
  
7. The Constitution provides a strong institutional framework within which civil, political and socio-economic rights may be realised. The development of an accountable, representative democratic culture premised on good government is crucial to overcoming past injustice and realising the vision of an inclusive society as articulated in the South African Constitution. The concept of good governance incorporates a number of key principles, among them: participation, the rule of law, transparency, responsiveness, equity, efficiency, effectiveness, and accountability. Corruption or abuse of power manifests itself in a myriad ways: the absence of public ethics, accountability, transparency, good and efficient management systems and the erosion of ethics are all drivers of corruption. Institutionalising public ethics and accountability, and entrenching transparency, while at the same time promoting good and efficient governance, is a complex but necessary task.
  
8. In the present matter, the judges of the Constitutional Court have lodged a complaint with the JSC alleging that the Judge President of the Cape High Court, Judge John Hlophe, 'has approached some of the judges of the Constitutional Court in an improper attempt to influence [the] Court's pending judgment in one or more cases' involving, among others, African National

Congress President Jacob Zuma. The Court's complaint thus includes an alleged abuse of authority in order to interfere with the impartial functioning of the administration of justice.

9. Plainly, these are serious matters which could serve to undermine public confidence in the judiciary and the rule of law. Moreover, the allegations by the Constitutional Court and by Judge Hlophe have prompted a vigorous, but divisive debate within the legal profession and beyond. In this highly charged atmosphere, South Africans from all communities are understandably anxious about the implications of these events. It is not inappropriate to suggest that South African democracy faces, in this enquiry, one of its greatest challenges. This could prove to be a moment that either strengthens our national commitment to democratic values, or causes us to question them fundamentally. At this delicate moment, then, we believe it is vital that the JSC makes every effort to ensure that its proceedings are regarded as legitimate and credible. Allowing the South African public to follow the proceedings, via the appropriate media coverage, is, we submit, fundamental to this.
  
10. We make this submission for purposes of protecting and advancing the freedom of the public to receive information and ideas generally and, in particular, in respect of evidence given to the JSC. This would, of necessity, require the press and other media to exercise their right of freedom of expression, including the right to impart information, in terms of Section 16 (1) (a) of the Constitution, 1996.
  
11. Although the right to freedom of expression may be limited to the extent that is reasonable and justifiable in an open and democratic society, the courts have

recognised that a general prohibition on the presence of radio recording devices and television cameras, even if subject to exceptions in individual cases, is too restrictive. The better approach, from a constitutional perspective, is to allow the maximum degree of openness reasonably possible in the given context.

12. In addition, the JSC, as a constitutional body, is bound by Section 7(2) of the Constitution to respect, protect and promote inter alia the freedom of expression, including the freedom to impart and receive information; the principle of transparency permeates provisions of the constitution. Thus, the Constitution establishes an open society (Section 1(d)), and requires organs of state to foster transparency by providing the public with timely, accessible and accurate information (Section 195(1)(g) and (2)(b)). Section 41(1)(c) provides that all organs of State must provide 'effective, transparent, accountable and coherent government for the Republic as a whole'.
13. We submit that the transparency principle results in a general presumption that the proceedings of public bodies should be open to the public unless there are exceptional reasons to justify a departure from the general rule - for example, in *Moldenhauer v Du Plessis and others* 2002 (5) SA 781 (T) at 791-3 rejecting the argument that misconduct proceedings of the Magistrate's Commission should be held *in camera*.
14. This transparency principle is supported by the 'open justice' principle. Therefore, the most important decision that we submit the JSC should take is to order that the hearings be conducted in open session, so that interested members of the public and from civil society organizations can attend the hearings.

15. The more complex and demanding question is whether the media should be permitted to both cover and broadcast the hearings. There is a respectable argument that the media is best placed to assist the JSC in meeting its constitutional requirements: broadcasting of the JSC's proceedings will contribute to its openness as an institution and, in particular, promote public understanding of its procedure and modus operandi. The JSC is dealing with a matter of great public importance and intense public interest. Media coverage of its proceedings will help ensure that there is public confidence that the complaints are being thoroughly and carefully considered.
16. However, we recognize that there are counter-arguments, in relation to the broadcast media in particular, which ought to be carefully weighed in the balance. Our view is that the case for radio coverage is overwhelming, whereas the case for television broadcasting is far less straight-forward given legitimate concerns about the negative impact that such coverage may have on the hearing and its probative integrity. There is, for example, a case to be made for the televising of legal argument, in addition to the opening and closing of the hearing, but not the leading and cross-examination of evidence from witnesses.
17. Idasa and DGRU support conditions aimed at ensuring that radio recording devices and television cameras are used as unobtrusively as possible, as this is essential for the orderly functioning of the JSC's enquiry and befitting of the dignity of the judiciary. The precise detail of these conditions is a matter best discussed between the JSC and the broadcasters. However, we offer the following ideas for consideration:

- 17.1 Courtrooms have long featured devices, primarily for the purpose of recording and transcribing evidence; all participants in court proceedings are aware of the usefulness and role of microphones. Consequently, the presence of additional voice recording devices, particularly if discreetly located in fixed positions and not adorned by company branding, and not accompanied by journalists within the immediate proximity of witnesses, need not be at all intrusive or intimidating. This option, at least, suggests itself as the simplest and easiest communications medium to seamlessly integrate into the proceedings.
- 17.2 Similarly, the presence of discreetly located, and fixed-position, as opposed to roving, television cameras need not detract from the dignity of the JSC's proceedings. It is submitted that it should be possible to determine particular locations within the chosen venue where a limited number of television cameras may be allowed to record proceedings without interfering with the conduct of the business of the hearings.
18. Similar media coverage of, for example, the hearings of the Truth and Reconciliation Commission and, to a lesser degree, the King Commission of Enquiry into cricket match-fixing, allowed South Africans, regardless of geographic location, level of education and socio-economic status, to follow those processes.
19. As will be argued below, the witnesses are public figures who are used to public scrutiny. In addition, the JSC is not a confessional; it is not solely dependent on the testimony that witnesses are comfortable to give. Evidence will be elicited by the process of cross-examination and by the process of questioning by the

JSC's own presiding officers. The presence of radio recording devices or television cameras may arguably even have a positive effect on the task of the Commission; the knowledge that their evidence will be the subject of wider media coverage may encourage witnesses to testify fully and accurately.

20. On the other hand, it is imperative that given the gravity of the hearing and the constitutional issues involved, any danger that the proceedings be undermined by an intrusive broadcast media presence must be avoided. Television broadcasting contains the inherent danger that individual witnesses and/or counsel may 'play to the cameras' and that 'grandstanding' could distract from the real issues and the integrity and dignity of the proceedings. This, in turn, may serve not to inform the public but rather to shed heat and not light on the serious matters at stake.

21. Radio coverage, on the other hand, is far less intrusive. As noted above, microphones can be discreetly located; they tend not to attract the same level of attention as TV cameras and, therefore, are far less likely to distract witnesses or counsel from their responsibilities to the hearing, while at the same time providing the public with a potentially unadulterated version of the evidence.

## **THE JSC's AUTHORITY TO DECIDE**

22. Section 178(6) of the Constitution provides that the JSC may determine its own procedures. The JSC last issued updates to its 'Rules Governing Complaints and Enquiries in terms of Section 177(1)(a)' in 2006. These Rules are applicable when the JSC deals with any complaint that 'may result in an adverse finding' pertaining to the removal of a judge in terms of Section 177(1)(a).

23. JSC Rule 5.6 provides that the Commission ‘shall be entitled to permit the media and public, subject to such restrictions as may be considered appropriate, to attend any enquiry unless good cause is shown for their exclusion’. Rule 5.6 affords the JSC and/or, by extension, any sub-committee (‘the JSC’) conducting a preliminary enquiry in terms of these Rules, the discretion to ‘permit the media and the public, subject to such restrictions as may be considered appropriate, to attend any enquiry unless good cause is shown for their exclusion’.

24. Consequently, the decision by the JSC to consider opening its preliminary enquiry to the public and/or the media is clearly a decision that it is entitled to take in the circumstances, as is the decision regarding openness itself. The provisions of this Rule establish clearly that the JSC should allow the proceedings of a either a preliminary or a formal enquiry envisaged in the Rules to be open to the public and the media unless there are good reasons to exclude them. The JSC has, to our knowledge, not made publicly known any reasons suggesting that it should decide that the current proceedings should not be open to the public and the media. In the circumstances, it is submitted that good cause must be shown before the JSC may decide that the public and the media must be excluded.

## **LEGAL CONSIDERATIONS FOR AND AGAINST OPENNESS OF THE PROCEEDINGS**

25. It is submitted that, despite the important concerns regarding the constitutionally enshrined values of individual dignity and privacy (Sections 10 and 14,

respectively), there are several good reasons why the proceedings of the JSC's enquiry should be open to the public and to the media, both print and electronic. It is submitted that these reasons, taken together, outweigh considerations favouring their exclusion. Thus, the Constitutional Court noted, per O'Regan J, in *South Africa National Defence Union v Minister of Defence* 1999 (4) SA 469 (CC) at 477 (para 7):

'Freedom of expression lies at the heart of a democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals and society generally.'

Hefer JA in *National Media Limited and others v Bogoshi* 1998 (4) SA 1196 (SCA) at 1207 – 1208, said:

'The freedom of expression ... has been referred to as the matrix, in indispensable condition of nearly every other form of freedom' (*Palko v State of Connecticut* 302 US 319 (1937) at 327); and in the majority judgment of the European Court of Human Rights in *Handyside v United Kingdom* (1976) 1 EHRR 737 at 754 it was said that freedom of expression constitutes one of the essential foundations of a democratic society and is one of the basic conditions for its progress and the development of man....'

#### The ordinary position in courts of law

26. Ordinarily, proceedings in both criminal and civil matters in a court of law must be conducted in accordance with the principles of the right to a fair trial recognised in Section 34 of the Constitution, 1996. They are, therefore, conducted in a manner permitting access by both the public and the print media, subject to certain restrictions, such as on the taking of photographs.
27. Similarly, although Section 35(3)(c) of the Constitution recognises that the right to a fair trial ordinarily includes that it be conducted in open court, radio and television broadcasts of the proceedings are not permitted because, as noted in *South African Broadcasting Corporation Ltd v National Director of Public Prosecutions 2007 (2) BCLR 167 (CC)*, it would place a 'stress' on witnesses, counsel and judges, inhibiting interaction and creating a material risk that justice would be impaired. In addition, the accused's or others' right to privacy and dignity may be unduly impaired.
28. Thus, in accordance with the inherent jurisdiction of the courts to regulate their own proceedings, recognised in Section 173 of the Constitution, the right of freedom of expression, that is, including the right to impart and receive information, recognised in Section 16 of the Constitution, is normally limited by the courts, in accordance with the provisions of Section 36 (the 'limitations clause').
29. The rationale underlying the right of public access to judicial proceedings is a matter of settled law, hence the recognition in our Constitution of the 'open justice' principle. It is nevertheless helpful to understand it, as accepted by Justice Ackermann in *S v Lephele 1986(3) SALR 661 (W)*, where he referred

extensively to the leading decision of the United States Supreme Court in *Richmond Newspapers v Virginia* where Chief Justice Burger said as follows:

‘A result untoward may undermine public confidence and where the trial has been concealed from public view an unexpected outcome can cause a reaction that the system at best has failed, and at worst, has been corrupted. To work effectively it is important that society’s criminal processes satisfy the appearance of justice. The appearance of justice can best be provided by allowing people to observe it...People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing. When a criminal trial is conducted in the open, there is at least an opportunity both for understanding the system in general and its workings in a particular case...Instead of acquiring information about trials by first hand observation, or by word of mouth from those who attend it, people now acquire it chiefly through the print and electronic media. In a sense this validates the media’s claim of functioning as surrogates of the public...This contributes to public understanding of the rule of law, and to comprehension of the functioning of the entire criminal justice system...Public access is essential therefore if trial adjudication is to achieve the objective of maintaining public confidence in the administration of justice.’

30. In like vein, the underlying rationale for the principle was articulated in the influential House of Lords decision in *Scott v Scott* [1913] AC 417 at 447 (approving Jeremy Bentham): ‘Publicity is the very soul of justice. It is the

keenest spur to exertion and the surety of all guards against improbity. It keeps the judge himself, while judging, under trial.’

31. The danger to constitutional democracy inherent in closed judicial proceedings was again recognised by the Constitutional Court in *Shinga v The State* 2007 (5) BCLR 474 (CC) (at para 25):

‘Closed court proceedings carry within them the seeds for serious potential damage to every pillar on which every constitutional democracy is based ....Seeing justice done in court enhances public confidence in the criminal justice process and assists victims, the accused and the broader community to accept the legitimacy of that process. Open courtrooms foster judicial excellence, thus rendering courts accountable and legitimate. Were criminal [matters] to be dealt with behind closed doors, faith in the criminal justice system may be lost. No democratic society can risk losing that faith. It is for this reason that the principle of open justice is an important principle in a democracy.’

32. The Shinga Court affirmed the adoption of the open justice principle in *South African Broadcasting Corporation Limited v National Director of Public Prosecutions and Others* 2007 (1) SA 523 (CC) (at paras 31 and 32):

‘ ... open justice is observed in the ordinary course in that the public are able to attend all hearings. The press are also entitled to be there, and are able to report as extensively as they wish and they do so...Courts should in principle welcome public exposure of their work in the courtroom, subject of course to their obligation to ensure that proceedings are fair.

The foundational constitutional values of accountability, responsiveness and openness apply to the functioning of the judiciary as much as to other branches of government. The values underpin both the right to a fair trial and the right to a public hearing (i.e. the principle of open courtrooms). The public is entitled to know exactly how the judiciary works and to be reassured that it always functions within the terms of the law and according to the time-honoured standards of independence, integrity, impartiality and fairness.’

33. In *Edmonton Journal v Attorney General for Alberta, Attorney General of Canada and Attorney General of Ontario* [1989] 2 SCR 1326, 64 DLR (4<sup>th</sup>) 577, the Canadian Supreme Court identified out a further rationale for the open justice principle (at para 21):

‘It is also worth noting that there is an important educational aspect to an open court process. It provides an opportunity for the members of the community to acquire an understanding of how the courts work and how what goes on there affects them.’

34. The Supreme Court of Canada recently emphasised the open justice principle in the following terms in *Named Person v Vancouver Sun* 2007 SCC 43 (at para 1):

‘Information is at the heart of any legal system .... In any truly democratic society, courts are expected to be open and information is expected to be available to the public.’

35. It is submitted that the circumstances surrounding the present matter before the JSC, described in the preceding section and below, are strongly suggestive of the value and benefit of an even greater degree of openness than ordinarily characterises proceedings before a court of law.

The position relating to commissions of enquiry

36. However, it is possible to distinguish the decision in the *SABC* case and its rationale on two grounds. Firstly, as accepted by a full bench of the Cape High Court in *Dotcom Trading 121 (Pty) Ltd v The Honourable Mr Justice King NO and Others* [2000] 4 All SA 128 (C) (concerning the ‘King Commission’ of enquiry in cricket match-fixing), proceedings before a Commission of Enquiry conducted in terms of the Commissions Act, 1947, are distinguishable from those in a court of law (at 141). Proceedings before a commission of enquiry are not aimed at reaching a finding of guilt or innocence, but simply at fact-finding. One of the clear implications of this difference, it is submitted, is that the pressure on witnesses, legal representatives and presiding officers is not the same as in a court of law.

37. It is submitted that the proceedings envisaged by the JSC in the present matter are clearly analogous to those of a commission of enquiry.

38. Secondly, the witnesses before the JSC’s enquiry will not be ordinary witnesses, they will be judges. By virtue of the nature of their position alone, it may be argued that, at least, they ought not to be susceptible to the same kind of pressures as an ordinary witness or counsel, in a court of law or even before a commission of enquiry. As is recognised in the current Code of Conduct, or

Guidelines for Ethical Conduct (of 2000), applicable to all South African judges, they are expected to be able to exercise independence of mind. (Rule 1 of the Guidelines thus enjoins judges to ‘maintain an independence of mind in the performance of judicial duties’.)

39. In its judgment, the court in *Dotcom* observed (at 140) that it could see ‘no reason in logic’ why the right to freedom of expression should include only the freedom of the press, noting that both television and radio have their advantages over the print media.
  
40. The court in the same decision, recorded in *Dotcom Trading 121 (Pty) Ltd v The Honourable Mr Justice King NO and Others* [2000] JOL 7361 (C), after observing that the provisions of Section 36(1) of the Constitution (the limitations clause) must be weighed up with reference to the facts of any particular case found, on the facts, that, ‘having regard to the worthy consideration of a witness-friendly atmosphere which does not inhibit witnesses from testifying’, there was insufficient evidence to warrant a blanket exclusion on radio broadcasting.
  
41. The court took note (p 28) of undisputed evidence that, in South Africa, ‘radio constitutes the only access to information for many South Africans’. The court also accepted that, in the circumstances characterising the King Commission of Enquiry, ‘counsel for the objectors [to the presence of electronic media] ‘did not distinguish between’ radio and television coverage of the proceedings.

42. As is common knowledge, Judge King subsequently allowed both forms of electronic media to be present, subject to practical arrangements limiting their potential for intrusiveness.

#### Proceedings involving judges

43. However, this factor – that the witnesses and the accused are judges – requires further attention for, while judges are, by reason of the skills and personal attributes ordinarily associated with and expected of members of their profession, arguably better able, on a personal level, to withstand the pressures of public scrutiny, as judges they are also representatives of a constitutional institution that is deserving of particular respect. Consequently, considerations of dignity associated with the office they hold cannot be blithely ignored or dismissed.

44. On the other hand, there is a substantial body of opinion espousing the view that, while the judiciary as an institution and judges as members of that institution are deserving of respect, this undeniably special status does not render them immune from criticism or scrutiny, even public scrutiny. More public debate around the courts can be very healthy. The right to criticism should, however, not be confused with the right to interfere with judicial decision-making. Any criticism of the judiciary should be clearly motivated and not based on unsubstantiated inferences. The International Bar Association Human Rights Institute's Report (July 2008) (at p 43 para 3.135) therefore concludes that:

‘Public faith and trust in the judicial system – its independence, integrity and fairness – are important elements in building a state based upon the rule of law. The work of the courts is therefore of significant public interest and the transparency of court activities is important to the maintenance of this trust. The public has a legitimate interest in court decisions, which should not be immune from public debate or criticism.’

45. The protracted debate over the past few years concerning the clutch of judicial transformation Bills currently making their way through Parliament is indicative of the complexity surrounding the debate on the meaning role of the judiciary in our democracy. The trajectory of that public discussion has thrown into sharp relief the differences concerning the appropriate balance between transparency, accountability and independence of the judiciary in a democratic society. It is in this context that the JSC is now called upon to apply its existing rules in a manner best suited to this evolving context.

46. It is, therefore, important to note that the principle of public scrutiny of judges’ conduct has an appropriate place in disciplinary hearings conducted by the JSC has found recognition in the new JSC Amendment Bill [B 50B – 2007] approved by Parliament on 26 June 2008 and currently awaiting the President’s assent. The Amendment Bill, in Section 29(3), provides that the presiding officer of a disciplinary Tribunal may, in consultation with the Chief Justice, and ‘if it is in the public interest and for the purposes of transparency, determine that all or any part of a hearing of a Tribunal must be held in public’. Although Tribunal hearings in terms of the Amendment Bill are more akin to the formal proceedings envisaged in the present JSC Rule 5, the value of the principle of openness and transparency in the Amendment Bill has received Parliament’s

stamp of approval. Indeed, this principle has found recognition in the new JSC Bill currently before Parliament. The Bill, which awaits its final reading debate in Parliament, accepts the need for a binding and legally enforceable code of conduct for judges, although the provisions of such a code have yet to be determined. Importantly for present purposes, it also provides that the JSC to exercise a discretion concerning the extent of openness that should characterise any particular disciplinary proceedings (for example, before the proposed Tribunal). Although the Bill has not received Parliament's stamp of approval, these provisions should be of persuasive value for the decision in the present matter.

47. Furthermore, the US Supreme Court in *Landmark Communications Inc v Virginia* 435 US 829 (1978) at 832 and 842 explained the importance to the administration of justice of the public being entitled to receive information concerning serious complaints against judges:

‘The operation of the Virginia Commission [that, like the JSC, considers misconduct allegations against members of the judiciary], no less than the operation of the judicial system itself, *is a matter of public interest* .... Admittedly, the [government] has an interest in protecting the good repute of its judges, like that of all other public officials. Our prior cases have firmly established, however, *that injury to official reputation is an insufficient reason 'for repressing speech that would otherwise be free'* ... The remaining interest sought to be protected, *the institutional reputation of the court, is entitled to no greater weight in the constitutional scales.*’  
(Emphasis added)

48. Against the background of these considerations, it is submitted that the particular facts of the present matter, discussed below, strongly suggest that the proceedings of the JSC's enquiry should, in principle, be open to the public and to their agents, the print and electronic media.

## **REASONS FAVOURING PUBLIC ACCESS TO THE PRESENT PROCEEDINGS**

### **The Constitutional Court believes the complaint should be dealt with publicly because of its potentially serious implications**

49. The Constitutional Court stated on 30 May 2008, when referring their complaint to the JSC, that:

‘Any attempt to influence this or any other Court outside proper court proceedings therefore not only violates the specific provisions of the Constitution regarding the role and function of courts, but also threatens the administration of justice in our country and indeed the democratic nature of the state. *Public confidence in the integrity of the courts is of crucial importance for our constitutional democracy and may not be jeopardised.*’ (Emphasis added)

50. In this statement, the Court was clearly signalling its view of the gravity of its allegations for public confidence in the administration of justice in the country. Both the nature of the alleged conduct itself and the context within which it allegedly took place, render the subject-matter of the complaint of profound public interest.

## **Second reason – the complaint and response have been made publicly**

50. Despite differing views concerning the Court's action in making public both the fact and, subsequently on 17 June 2008, the content of the complaint against Judge Hlophe lodged with the JSC, the Court was clearly of the opinion that transparency regarding its actions is both necessary and appropriate. The persistence in this course of action by the entire bench of the highest court, and its expressed conviction in its correctness, are not without significance and cannot simply be dismissed or disregarded.
51. In its May statement, the Court was clearly endorsing the applicability and importance in the present circumstances of the democratic principle that justice should not only be done, but it should be seen to be done. In so doing, the Court was thereby self-consciously seeking to reinforce the 'constitutional values of openness and accountability'.
52. Thus, the Constitutional Court maintains that the decision to issue a media statement at the time of referring the complaint to the JSC was necessary because the 'integrity of the adjudication process and the very independence of the Constitutional Court' had been threatened by Judge Hlophe's improper actions (para 5.1).
53. The Court argued (in para 5.7) that, should the complaint have emerged at a later stage, 'there would have been a serious risk that the litigants involved in the relevant cases *and the general public* would have entertained misgivings about the outcome and manner in which decisions were reached'. The Court also stated that the constitutional values of openness and accountability as well

as the independence of its deliberative processes would best be protected by *public disclosure* (para 5.5).

54. While many disagree with the Court's decision to make the complaint public, we submit that this is not the central point at issue in this matter. While it may be important, it is essentially a distraction from the procedural and substantive decisions to be made by the JSC. The more important consideration is that, now that the allegations are in the public domain, it is submitted that it is extremely difficult to make the argument that they should now be withdrawn and dealt with in secret. The principle of transparency having been asserted, it ought now to be respected. The public has a right to know how the allegations will be resolved and to make up its own mind about their accuracy, which is difficult to do when proceedings are revealed second hand.

55. It is submitted, therefore, that continued transparency by the JSC in the investigation of the complaints would be consistent with the Court's view of this matter. The Court having publicly disclosed the fact and the details of the complaint against Judge Hlophe, and the latter having responded to the Court's allegations in a similar manner, any decision by the JSC to conduct its investigation behind closed doors will inevitably entail the danger of negative inferences regarding the impartiality and integrity of the JSC's enquiry. The likelihood of negative inferences may arguably be strengthened by the lingering uncertainty surrounding the JSC's handling of the previous enquiry (during 2007) into separate allegations of misconduct against Judge Hlophe.

### **Third reason – the JSC's procedures are not clearly understood**

56. The JSC's 'Rules Governing Complaints and Enquiries' are not widely known or clearly understood, and there is already some uncertainty among observers regarding the precise nature and implications of the present proceedings to be followed by the JSC. The IBA HRI report referred to above (at pp 43-44 para 3.135-136), it expressed concern about the public criticism of the judiciary even before the present dispute arose, and observed:

'Public faith and trust in the judicial system – its independence, integrity and fairness – are important elements in building a state based upon the rule of law. The work of the courts is therefore of significant public interest and the transparency of court activities is important to the maintenance of this trust. The public has a legitimate interest in court decisions, which should not be immune from public debate or criticism. However, engaging in public criticism or personal attacks upon members of the judiciary undermines public faith in the independence of the judiciary and the rule of law. This is particularly damaging to the judiciary *as individual judges are unable to respond directly to criticism, or engage in public debates, in order that they do not bring the judiciary into further disrepute. They, therefore, rely upon other actors in society [including the JSC] to safeguard and defend their integrity and independence.* Legitimate concerns about judicial conduct should be dealt with through appropriate complaints mechanisms [such as the JSC], in line with promulgated standards of judicial conduct. These mechanisms provide a fairer means for evaluating judicial conduct and respecting standards of due process.'

57. It is clear from these comments that the JSC bears an important responsibility in the circumstances surrounding the present enquiry. What it does and how it does it can make a vital contribution, not only to public understanding of the JSC's

functions, but appreciation for its constitutional role in support of constitutional institutions.

**Fourth reason – intense public interest in the Court’s allegations and Judge-President Hlophe’s counter-allegations**

58. Considerations supporting a decision by the JSC in favour of public access to its enquiry in the present matter include the heated controversy surrounding the complaint against Judge President Hlophe, as well as his counter-complaint. Media coverage continues to be extensive, some of it more accurate than others. As indicators of popular opinion, the coverage suggests intense public interest. Even if these media reports are to some extent inaccurate, subsequent corrections and clarifications are not necessarily themselves accurate reflections of popular opinion.

59. In addition, the extent of public interest in the substance of the complaints is evident to even the casual observer. It is submitted that it would clearly assist public understanding of the various allegations and their implications if they were to be publicly discussed and considered.

60. In these highly contested circumstances, it is submitted that a decision to open the hearings to the public and to the electronic media – as well as to the print media – provides the best opportunity for a fair hearing for all parties, both before the JSC’s enquiry and before the court of public opinion. It is respectfully submitted that it is only in this way that the South African public will be able to make up their own minds about the integrity of the individuals and institutions involved in this matter. It is only in this way that concerns and

allegations about inaccurate or ill-informed media reporting can be allayed, and in which any party's concerns regarding the integrity of the JSC's procedures can be adequately addressed.

**Conclusion: Core Recommendations regarding the openness of the hearing**

61. Giving due consideration to the above, we respectfully submit that the JSC should consider adopting the following approach to the hearing:
62. It should be fully open to the public;
63. The print media should be free to attend and report on the proceedings;
64. A distinction should be drawn between radio and television coverage, as follows:
65. Radio should be permitted to broadcast the proceedings in their entirety; however:
66. Television recording and broadcasts should be limited, at most, to legal argument and should, therefore, exclude the leading of evidence and the cross examination of witnesses.
67. There should be explicit conditions attached to the positioning of any cameras and recording equipment so as to minimise the potentially intrusive character of broadcast media equipment.

68. While recognising that the deliberations of the JSC after the hearing will appropriately take place privately, as full and clear a set of reasons for any ruling on the complaints should be made public as soon as possible.

Judith February

Manager: Political Information & Monitoring Service

IDASA

Professor Hugh Corder

Dean

Faculty of Law, UCT

Associate Professor Richard Calland

Director

Democratic Governance & Rights Unit