wrought by focused and competent drafters, are all dispensable as long as the results come out approximately okay. On that point, I am with Stu Woolman. And I can join him, too, in wishing the Constitutional Court not to be too 'thin' in its own accountings of its constructions not just of the clauses on application but of the Constitution's text in general.

With all that said, a difference (whose origins Stu describes in the opening of his 'kibitz') still remains between us two on the application terrain. That difference consists in my persisting doubt about how great an exegetical advantage, if any, Stu's proposed parsing of the texts on application holds over that of the Constitutional Court.[19]

19 Michelman (n 1 above) 35 - 42 (briefly explaining my doubt); S Woolman 'Application' in Woolman *et al* (eds) *Constitutional law of South Africa* (2005) (2nd ed) ch 31-47 – 31-48 (on a 'good faith reconstruction' of the Constitutional Court's approach).

CHAPTER 19

JUDICIOUS TRANSPARENCY

*Jonathan Klaaren**

1 Introduction

This paper reflects on two instances of contested openness occurring in the course of the recent saga involving Hlophe JP and the judges of the Constitutional Court.. While both gripping and significant, that broad and significant story itself is not the focus here.[1] Instead, this work will examine two specific events within that larger narrative. The first is the publication by the Constitutional Court of the fact that the judges of that Court were laying a complaint against Hlophe JP with the Judicial Services Commission (JSC) and the upholding of that decision in the courts. The second is the pair of decisions by the JSC to hold closed hearings on the Hlophe matter and the reversal of both of those decisions in court. In respect of the first event, the Constitutional Court judges' publication and media statement was itself the subject of two judicial decisions, one in the South Gauteng High Court and one in the Supreme Court of Appeal (SCA).[2] In respect of the second event, whether the JSC hearings would be open or closed was the subject of a public submission process initiated and conducted by the JSC as well as two judicial decisions, both going in favour of openness and against the JSC. This paper will cover the expressed reasoning in these events as well as –

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1 For one telling, see J Klaaren 'Hlophe JP and the three dimensions of current judicial politics in South Africa' paper delivered at the University of the Witwatersrand, 5 October 2009 (citing other versions). In his assessment of the wisdom of the action of the judges of the Constitutional Court, Roux gives a close critical reading of the media statement. T Roux 'The South African Constitutional Court and the Hlophe controversy' unpublished paper, 27 November 2009 http://cccs.law.unimelb.edu.au/index.cfm?objectid=43FA1016-E35C-7A6A-398B2D1F6BD650CC (accessed 3 February 2010) 1-3.

2 An appeal to the Constitutional Court was noted by Hlophe JP but later withdrawn. 'Hlophe to withdraw Constitutional Court appeal' *Mail & Guardian Online* 5 October 2009.

confining itself to the version of the facts that is publicly available – the underlying situation.[3]

This topic is a worthwhile and appropriate one for a colloquium such as the current one. The openness aspects of the Hlophe JP saga were clearly important, but have not yet been examined at depth. For instance, the decisions over whether or not to close the JSC were keenly anticipated in the media, but were framed largely as a for or against decision regarding Hlophe JP.[4] The issue became the person. Thus, it was the outcome that was reported on by the media and discussed by the commentators rather than the matter of principle. Likewise, the decision to issue the media statement by the Constitutional Court judges as well as Hlophe JP's decisions to counter-complain before the JSC and to sue in the courts have largely been examined as particular fights within a larger battle rather than on their own. This paper aims to begin to redress that inattention.

As an initial argument, I will argue that the final resting points of the law in both instances – that the JSC hearings be open and the determination that the media statement did not violate Hlophe JP's rights – were correct and, further, that both resolutions may best be understood in terms of a concept of judicious transparency. This concept differs significantly from two other types of transparency that were also often deployed and invoked in the Hlophe JP saga, types of transparency which one could term media transparency and public transparency.[5]

3 It is beyond the scope of this paper to consider the transparency aspects of the judicial discipline procedure to be put into place with the Judicial Service Commission Amendment Act 20 of 2008. See D Milo 'Presume openness not secrecy' *Mail and Guardian* 4 September 2009.

4 See eg, 'Letter to the editor' by Calamity Jane, *Without Prejudice* April 2008 4: 'The only person who might stand to benefit from a secretive hearing of the evidence is that champion of the implausible denial, the Judge-President in question.'

5 In their response, Calland & Oxtoby have expressed frustration that I do not in this piece clearly articulate a general theory of transparency and the place where the concept of judicious transparency fits into such a general theory. They note that it may be 'somewhat unfair to do so' but ask whether my 'approach to 'judicious transparency' does contribute to a theory of transparency'. Their view is apparently that I might be but they are not sure. They do think that I am breaking 'new ground' and have presented a 'novel' notion. Unclear as to the meaning of judicious transparency, they also see my piece falling short in that I do not clearly articulate the notion of judicious transparency. As regards the first, in this colloquium presentation I did not set out to provide a general theory of transparency. Instead, I took the opportunity of the colloquium to reflect on the uses of transparency in the Hlophe JP and Constitutional Court saga. As Calland & Oxtoby note, this is 'welcome'. I took a topic that was at the same time broader and narrower than the one that Calland & Oxtoby seem to wish me to address. It is broader in that it draws not only upon the right of access to information and the global spread of transparency initiatives, but also on the right of freedom of expression and the right of access to court. As noted in Klaaren *SALJ*, these rights have been fashioned by the Constitutional Court into a concept of open justice. In my view, open justice is the appropriate constitutional background against which to evaluate the instances I chose rather than the global spread of access to information initiatives. It is narrower as a reflection on two instances of openness in the context of a particular political, legal and ethical story, the contest between Hlophe JP and the Constitutional Court, a story which may be told and analysed in various ways and, indeed, which may not yet be finalised at the time of writing. Fundamentally, I set out on a particularistic and situation-based enquiry – were the actions and their judgments correct in law and what transparency rationale best explains them – not a theory building exercise. This was appropriate for the purposes and format of the colloquium. Calland & Oxtoby's response was not surfaced at the colloquium. But if my observations help in the construction of a general theory of transparency, I would be delighted. Still, as shown by my second failing identified by Calland & Oxtoby, a lack of clarity in articulating the notion of judicious transparency, it seems unlikely that my observations will be so helpful. As they put it: 'One senses that Klaaren is onto something, but, tantalisingly, the reader is left to his or her own devices in making sense of the gaps in the line of argument (which may not be an entirely bad thing).' It certainly appears true that my writing was not clear in their reading. I agree with Calland & Oxtoby that a theory of judicial transparency in South Africa would provide much intellectual stimulation and, more significantly, is critically needed. Still, such a theory lies somewhere between the general theory of transparency that Calland & Oxtoby wished I had undertaken in this piece and the more particular enquiry into the dimensions of openness and their uses and justificatory potential in two instances of openness in the Hlophe JP Constitutional Court saga.

2 The media statement and its judgment

The following six paragraphs taken from the SCA judgment give the relevant sequence of events prior to the issuing of the media statement by the Constitutional Court as well as the context of its issuing:

> [10] During March 2008, the CC heard the Thint/Zuma appeals from [the SCA]. They were of public interest and importance since they concerned the prosecution of a high-ranking politician, Mr Jacob Zuma, on a number of counts. One of the issues related to legal privilege. The CC reserved judgment. It was ultimately delivered after the events that feature in this judgment [...].
>
> [11] Towards the end of that month [Hlophe JP] visited Jafta AJ who concluded that the respondent had attempted to influence him to find in favour of Mr Zuma. Knowing that the respondent intended to visit Nkabinde J, he warned her of the possibility that the respondent might repeat his attempt.
>
> [12] The anticipated visit to Nkabinde J took place on 25 April, and she, too, concluded that the respondent had sought to influence her. At the beginning of May and soon after the court term began Nkabinde J made a report to another appellant and through her the matter was taken up with other members of the court. They met in the absence of two appellants, discussed the subject, and eventually agreed to lodge a complaint of judicial misconduct against the respondent with the JSC based on the information provided by the two Justices. This was done on 30 May.
>
> [13] The gravamen of the complaint was in these terms:
>
> 'A complaint 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 this Court's pending judgment in one or more cases is hereby submitted by the judges of this Court to the Judicial Service Commission, as the constitutionally appointed body to deal with complaints of judicial misconduct.'
>
> The document identified the case involved and stressed that there was no suggestion that any litigant was aware of or had instigated the respondent's

> action. It contained further statements about the seriousness of the conduct; the democratic values contained in section 1 of the Constitution; the independence of the judiciary and the prohibition in section 165 of interference with courts; the judicial oath; that attempts to influence a court violates the Constitution and threatens the administration of justice; and that the CC and other courts would not yield to or tolerate attempts to undermine their independence.
>
> [14] A media release in virtually identical terms soon followed, which was sent automatically and electronically to all subscribers to the CC's information system.
>
> [15] It should be noted at this early stage that (a) the respondent was not apprised of the allegations or their source; (b) he was not asked for his version or comments; (c) he received no effective prior notice of the intention to lodge the complaint; and (d) he was not told of the intention to issue a media statement. The public, too, was not given any detail and was left with nothing more than the knowledge that a complaint with serious implications had been lodged.

Here endeth this excerpt of the SCA's judgment. The media statement issued by the judges of the Constitutional Court is given in full in Appendix A of this paper. In outline, the media statement noted that Hlophe had 'approached some of the judges of the Constitutional Court in an improper attempt to influence this Court's pending judgment' and that the Court had referred a complaint to the JSC. The statement further noted that the judges of the Court 'view conduct of this nature in a very serious light'. The Court's final paragraph passed at least implicit judgment by stating: 'This court ... will not yield to or tolerate unconstitutional, illegal and inappropriate attempts to undermine their independence or impartiality.'

The first court to judicially consider this sequence of events was the South Gauteng High Court, acting upon a complaint laid by Hlophe JP against the conduct of the judges of the Constitutional Court.[6] In a somewhat convoluted judgment, that court decided in favour of Hlophe JP and against the judges of the Constitutional Court.[7] The Court was, however, divided by three judges to two, with the two minority judges writing separate dissents. As the Supreme Court of Appeal noted, the High Court panel was 'unusually though permissibly constituted as a full bench with five judges ...'[8] Further, while it is arguably not relevant, as several

6 *Hlophe v Constitutional Court of South Africa* (08/22932) [2008] ZAGPHC 289, [2009] 2 All SA 72 (W).

7 The response of Calland & Oxtoby pushes me to engage further with the rationales of these High Court judgments. For a brief instance of such, see J Klaaren & G Penfold 'Just administrative action' in S Woolman *et al Constitutional law of South Africa* (2002) 63-14 fn 4. The point made here is that the SCA did what the High Court did not; it separated out and focused on the precise question of publication of the statement. In so doing, the SCA considered the matter within the context of openness and public justification rather than within the context of procedural fairness understood as fairness to Hlophe JP.

8 *Langa v Hlophe* (697/08) [2009] ZASCA 36; 2009 4 SA 382 (SCA) (31 March 2009) para 1. This was per authority of Supreme Court Act 59 of 1959 sec 13(1)(a).

commentators did point out, the three majority judges were African; the two dissenters white.[9] The majority reasoned that fairness in the circumstances dictated that an accused judge should be heard when a senior person without personal knowledge of an incident considers laying a complaint regarding a breach of judicial conduct.[10]

Taking the appeal from the South Gauteng High Court, the SCA dismissed the majority reasoning regarding the fairness of Hlophe JP's treatment by noting that there is no principle for an accused to be heard by complainants before a complaint is laid and by characterising the special treatment due to an accused judge by his or her judicial colleagues as a matter of ethics rather than of law enforceable in courts.[11] The SCA then considered in paragraphs 48 to 55 of its judgment the question of whether the media statement was unlawful by publishing the fact that the complaint had been made to the JSC. In the view of the SCA, this question was separate and distinct from the issue of whether Hlophe JP should have been heard before the complaint was made. Further, the SCA recognised that this precise question of publication had not been considered by the High Court, since it viewed the laying of the complaint and the issuing of the media statement as intertwined.[12] The SCA thus distinguished the aspect of openness from that of procedural fairness, reframing the case. Nonetheless, the SCA's consideration of the lawfulness of the publication clearly linked the resolution of that question with the question of the lawfulness of the laying of the complaint. The SCA stated:

> Once having found the appellants did not act unlawfully in laying the complaint we can see no basis for finding that they were obliged to keep that secret for the reasons dealt with more fully below. On the contrary there is much to be said for the contrary proposition (bearing in mind the circumstances in which it occurred) that the constitutional imperatives of transparency obliged them to make the fact known.[13]

The SCA then proceeded to quote [presumably] and with apparent approval from the submissions of the Constitutional Court judges as follows:

> In the circumstances where the independence of the Constitutional Court had been threatened and the integrity of the administration of justice in South Africa generally, it was considered imperative and appropriate that this be publicly disclosed. Should the facts have emerged at a later stage there would have been a serious risk that the litigants involved in the relevant cases and the

9 The majority consisted of Mojapelo DJP with Moshidi and Mathopo JJ concurring; separate dissenting judgments were written by Marais J and Gildenhuys J who would have dismissed the application.

10 *Hlophe v Constitutional Court of South Africa* (n 7 above) para 76.

11 *Langa v Hlophe* (n 9 above) paras 40 & 44. (See also para 43, sourcing such duties in the protection of the public rather than of the personal interests of a judge.)

12 *Langa v Hlophe* (n 9 above) para 48.

13 *Langa v Hlophe* (n 9 above) para 50.

> general public would have entertained misgivings about the outcome and the manner in which the decisions were reached. It was especially important that the litigants and the general public were informed of the attempt and that the Constitutional Court had not succumbed to it.

The rationale expressed in this context by the judges of the Constitutional Court and adopted by the Supreme Court of Appeal is significantly circumscribed. Stripped to its bare essentials, the reasoning may be paraphrased is as follows:

> If word of the attempt to influence us got out, and it was not made clear that the attempt had failed, then the public would doubt our judicial decision-making process but, never fear, we are hereby telling the public that the attempt to influence us did fail and our decision-making processes are just fine and intact.

In my view, this is a rationale based on the Court's core judicial function.[14] At base, the SCA is agreeing that the Constitutional Court's ability to judge (indeed, the prime function of the Constitutional Court) was being placed in issue by the fact of the contact/approach. Another relevant implication that one might draw from the statement is to the effect of 'we think that there is a significant possibility that this word might get out. The Constitutional Court thus did not appear to have total confidence in the informational integrity of its own organisational and decision-making processes, as I shall elaborate on further below.

In the view of the SCA, which has had the final judicial word here, the media statement was not unlawful. While the media statement may have been *prima facie* unlawful for carrying the implication that Hlophe JP had attempted to improperly influence other judges, a statement may be justified and that justification 'can be raised validly if the statement was true and for the public benefit'.[15] Indeed, according to the SCA in its elaboration of the law of defamation, '[d]isclosure of an allegation of gross misconduct against a judge may in certain circumstances not be for the public benefit but that could hardly be the case if the allegation is true'.[16] Thus, for the SCA, the possibility that the *prima facie* defamatory allegation in the statement was true thus needed to be considered in deciding whether the publication was unlawful.[17] An assessment of the truth of the allegation had not been done at the High Court level, of course, and the SCA thus overturned the High Court. The appeal succeeded. In this way,

14 It perhaps thus ironic that it was the determination that the judges were not exercising a judicial function in making the complaint that decided the lawfulness of that question. See eg *Langa v Hlophe* (n 9 above) para 47.

15 *Langa v Hlophe* (n 9 above) para 51.

16 *Langa v Hlophe* (n 9 above) para 54.

17 The response of Calland & Oxtoby pushes me to link this decision to previous case law on defamation. It would indeed be interesting and worthwhile to do so, but a full analysis of the decision from the viewpoint of defamation case law and of the place of various rationales of openness within such case law would lie beyond the scope of this paper colloquium presentation.

without itself actually examining or determining the truth of the media statement, the SCA was able to determine the statement not to be unlawful.

3 Opening and closing the JSC hearings

Given the mind-bending and attention-sapping twisty and tortuous path of the JSC consideration of the Constitutional Court judges' complaint (not to mention Hlophe JP), this paper may be forgiven for merely summarising the three decision-making instances regarding the question of opening the JSC's disciplinary proceedings for Hlophe JP. The first instance occurred in July 2008 when the JSC itself, in a commendable display of openness to public participation, decided to and did invite submissions on the question of whether the disciplinary hearings to be conducted in respect of Hlophe JP were to be closed or open to the public and the media (as for instance are the interviews of candidates for judicial office).[18] This was done after Hlophe JP had made his counter-complaint. A number of persons and organisations made submissions, including the Wits Law School.[19] The second instance occurred after the JSC had decided on 28 March 2009 to close the hearings. On the Saturday before the Wednesday scheduled start of the hearing, the JSC announced its decision: that the proceedings would be closed.[20] As Milo describes it:

> This decision prompted an urgent application, the day before the hearing was to start, by most of the major media groups – *Avusa*, *Independent*, *Mail and Guardian*, *Media 24* and *e-TV* – and the Freedom of Expression Institute and the Centre for Applied Legal Studies. The JSC argued that the hearing should be in secret in order to protect the dignity and statute of the office of the chief justice and the deputy chief justice of the Constitutional Court and of the judge-president, all of whom would be required to give evidence at the enquiry.

The JSC also noted that they would give reasons after the hearings.[21] In the High Court, Judge Nigel Willis rejected the JSC's argument 'ruling that the dignity and statute of the judiciary as a whole would be enhanced rather than undermined if the hearings were to be held in the open: The

18 D Milo 'The very soul of justice' (June 2009) *Without Prejudice* 12.

19 See eg 'Submission to the Judicial Service Commission by members of the School of Law of the University of the Witwatersrand, July 2008'. The Wits legal academics argued in part that '[i]n a matter that has attracted enormous public interest, open hearings could have an important educational value in allowing the public to understand the issues at stake and the nature of judicial independence. By contrast, closed hearings will limit public knowledge and information, and limit the public's ability to engage with the issues.'

20 *eTV (Pty) Ltd v Judicial Service Commission* (13712/09,13647/09) [2009] ZAGPJHC 12 (31 March 2009).

21 Judicial Service Commission 'Media statement, 31 March 2009, Justices of the Constitutional Court and Judge-President Hlophe, Reasons for decision not to hold hearing in public'.

dignity of the entire bench will be done a favour by these proceedings being in public.'[22]

The third instance consists of another court application, occasioned by the JSC's decision on 20 July 2009, despite the then recent High Court decision, to hold a closed preliminary hearing into the complaint against Hlophe JP.[23] In this instance, some of the applicants that went to court on behalf of openness went further than contesting the question of transparency. Some asked for a ruling regarding the substance of the JSC process. Rejecting such a substantive intervention, the Court, *per* Malan J, gave a decision that the openness as decided in the earlier case needed continued respect.[24]

As has been noted, these decisions on transparency were to some degree mere skirmishes in the larger campaign regarding Hlophe JP and, in the view of some, the transformation of the judiciary itself. Nonetheless, these were important points of conflict, both for the campaign within which they were waged as well as for constitutional and open democracy more generally. After the decision not to proceed with the complaint was announced, Andrew Brown, a perceptive and witty Cape advocate, pushed further the question of openness in a comment in the following terms:

> If, as has been suggested, the decision of the JSC has resulted in the undermining of public and professional confidence in the judicial system, then the fault surely must lie squarely at the feet of the members of the JSC, not with any one judge and his alleged indiscretions. That being so, the attentions of the disenchanted should be focused squarely (and I would suggest exclusively) on the weaknesses that are to be found in the JSC's make-up (its constitution, not its domestic façade) and its processes. If, as has also been suggested *sotto voce*, the voting on the JSC on this issue was split along racial lines, then we need to establish alterative procedures that could cure the JSC of an apparent racial malady. Is the procedure for the nomination of persons to serve on the JSC adequate? Should the proceedings of the JSC be open to public scrutiny? If voting were open and public, would members of the JSC be more accountable?[25]

4 Analysis

As I shall argue in this section, the final legal determinations – of the SCA that the media statement did not violate Hlophe JP's rights through publication and of the South Gauteng High Court that the JSC hearings be

22 *eTV (Pty) Ltd v Judicial Service Commission* (n 21 above) 16.
23 D Milo 'JSC's about-face on Hlophe tramples public's rights' *Sunday Times* 20 July 2009.
24 *Mail and Guardian Limited v Judicial Service Commission (Centre for Applied Legal Studies, Amicus Intervening)* (09/30894) [2009] ZAGPJHC 29 (29 July 2009).
25 A Brown *Advocate* (April 2008) 28.

open – were correct as matters of law. It also and significantly seems correct that the July 2009 decision regarding the JSC did not go further than considering the question of openness.

In my view, the correctness of these two final legal determinations may best be understood in terms of a concept of judicious transparency. Judicious transparency is a form of openness ultimately linked to the Constitution's notion of open justice, as articulated in the *Independent Newspapers* case.[26]

In at least two dimensions, judicious transparency may be distinguished from other forms and rationales of transparency. First, judicious transparency is distinct from what might be termed presumptive or media transparency. To paraphrase, the media have almost never met an open hearing or proceeding that they have not liked. Taken for granted is a presumption of openness that is the opposite of considered and nuanced. This is practically a principle of professional qualification in the field. Indeed, media transparency may itself be a version of the second-best argument that Joseph Stiglitz has made on behalf of transparency.[27] His argument with respect to globalisation and the place in that of international public legal institutions begins with a recognition that the first best thing at the moment is to change the governance structures of structures like the International Monetary Fund, the World Bank and the World Trade Organisation. He then makes a clearly-defined 'a half loaf is better than no loaf' argument:

> Short of a fundamental change in their governance, the most important way to ensure that international financial institutions are more responsive to the poor, to the environment, to the broader political and social concerns that I have emphasised is to increase transparency and openness.[28]

In addition to its differences with media transparency, judicious transparency is also distinct from what can be termed public transparency, though it shares with public transparency many of the goals inherent in the support of constitutional democracy.[29] As an instance of public transparency, we can take the quote attributed to Prof Cathi Albertyn in

26 See J Klaaren 'Open justice and beyond: *Independent Newspapers v Minister for Intelligence Services (In re: Masetlha)*' (2009) 126 *SALJ* 24-38.
27 Stiiglitz, Calland and others are engaged in research on the global wave of transparency linked to the right of access to information. See eg C Darch & P Underwood *Freedom of information and the developing world: The citizen, the state and models of openness* (2010). As articulated above (n 6), my topic in this piece has differed from that topic. However, I support Stiglitz *et al* and their pragmatic espousal of transparency practices in general. Such practices most often are an immediate and effective means by which to exert pressure towards change towards social justice.
28 JE Stiglitz *Globalisation and its discontents* (2002) 227.
29 Discussing only the example of Prof Albertyn's appeals in the context of the recent JSC interviews of judicial candidates, the response of Calland & Oxtoby argues that the rationale of public education does not exhaust the notion of public transparency. I would agree. The rationale of the Constitutional Court submission to the SCA noted in

LegalBrief in October 2009.[30] This was on the occasion of the JSC's decision, as is its constitutional duty, to nominate seven candidates for posts as judges of the Constitutional Court from the 22 short-listed names it had previously decided upon. Albertyn is paraphrased as saying the way the JSC currently operated was not transparent and quoted as its operation resulted in 'us not ending up with the best constitutional lawyers because we are too busy looking at other things'. Upon closer examination, Albertyn's call resolves into two separate appeals. One is that the criteria for judicial selection be better articulated.[31] This call has been echoed elsewhere, for instance, in a well-crafted editorial by former Constitutional Court researcher Susannah Cowen.[32] The second appeal relates to the type of questioning engaged in by the JSC commissioners. Albertyn perceived, as indeed many members of the public at large do, that some candidates in the JSC got an easy run and some got a hard run. In Albertyn's view, there should have been both greater consistency and, in particular, greater attention to constitutional conversations. The interviews were like job interviews but should have been conducted at a higher level. In this view, the primary value of the potential openness of the hearings would be their public educational potential.

Distinguishable from both of the above forms of transparency, the concept of judicious transparency is rooted in the constitutional concept of open justice. This concept is itself derived from the rights of freedom of expression, the right of access to information, and the right of access to court. It is further constituted by the direct implementation by judges of the constitutional principle of openness.[33] A practice of judges related to demands for openness, judicious transparency is a particular form of transparency.[34] I would argue that it is not concerned, at least in the first instance, with the individual dignity of any particular judge. Instead, it is its manner of implementation that makes it particularly judicious. As for its substantive value, the substance of that value is indicated by the three rights from which the concept of open justice has been constructed.

the text would constitute another example as would Willis J's statement regarding the JSC hearings and Andrew Brown's comment. More generally, the concept of public transparency would seem to be completely included in the concept of open justice.

30 *Legal Brief* 6 October 2009.

31 The JSC did attempt to meet a request for disclosure of the criteria. See 'Re: Request for Access to Record of Public Body in terms of Section 18(1) of Promotion of Access to Information Act 2 of 2000' V Masangwana to M Desai (3 April 2009)(listing in a paragraph the 'wide variety of factors which are taken into account').

32 S Cowen 'What exactly are we looking for in the ideal SA judge?' *Business Day* 17 September 2009. See also S Cowen 'Judicial selection' (cited in Response by Calland & Oxtoby n 17).

33 See *Open justice and beyond* (discussing the appropriate test for limiting open justice).

34 The response of Calland & Oxtoby spends much of its time arguing that the meaning of the concept of judicious transparency is unclear. They ask: 'But is it the fact it is courts or other such bodies acting which is important, or the nature of actions?' It is both. As I noted later in the conclusion: 'There was no intermediary between the judges and the action that needs to be judged; it was not some official that took the action, the judges themselves did the deed.'

The argument here is not that the lodging of the complaint was either politically wise or ethically necessary (or even correct). Those questions of politics and of ethics are ones that are distinct from the admittedly narrow conception of legal correctness and its rationale in a concept of judicious transparency that I am exploring here. The question of whether the judges of the Constitutional Court were wise to lodge the complaint has been explored in some depth by Roux from a law and politics perspective.[35] Roux concludes that the decision to do so was 'truly disastrous' from the perspective of 'the long-term project of subordinating political power to the rule of law' and thus that the action of the judges was 'regrettable'.[36] Roux argues that, while the alleged conduct was serious enough to constitute gross misconduct, the judges should have considered the likelihood that the allegations could be prosecuted to a successful conclusion and the negative implications for the lodging of the complaint 'for public confidence in the Constitutional Court and the administration of justice in South Africa generally'.[37] Apart from the political wisdom, while there has been extensive discussion by commentators in the media, a comprehensive analysis of the ethics of the action of the judges of the Constitutional Court remains to be undertaken.[38] The judges of the Supreme Court of Appeal did seem to indicate that, as an ethical as opposed to a legal matter, the Constitutional Court judges' action might well be judged differently and negatively.[39] The judicial ethics argument providing the foundation to the

35 Roux notes that he is assessing the action against 'prudential criteria'. Roux (n 2 above) 9. In constitutional law and politics, prudential doctrines are ones crafted by courts to husband their institutional legitimacy and/or other resources. They thus guide the decision of whether or not to exercise legal judicial power and assume that legal power may be exercised. In other words, as Roux puts it, they are concerned really with the wisdom rather than the correctness of the decision. Roux (n 2 above) 8 (not discussing in any depth the SCA decision).

36 Roux (n 2 above) 11.

37 Roux (n 2 above) 8.

38 The response of Calland & Oxtoby does not take up this invitation, although Calland did pronounce on this question at the colloquium at which this paper was initially delivered. He called for the development of judicial ethics and I agreed. And here is perhaps the sole hard distinction, as far as I can tell, between the response of Calland & Oxtoby and my paper. Calland & Oxtoby call into question 'drawing a distinction between how the complaint is viewed ethically and legally'. In their apparent view, the constitutional basis for argument on both questions means that there is or should be no distinction. There is much to be said for the Calland & Oxtoby position that the resolution of questions of ethics directly and immediately translates into the resolution of questions of law in situations such as the instances of openness I have discussed in this paper. Indeed, judges pride themselves in following ethical conduct and the dangers of positivism. But, as we know in our constitutional order and perhaps know even more deeply following the unrolling of this Hlophe JP Constitutional Court saga, our judges are human. And it would seem too far-reaching a principle to collapse the ethical enquiry into the legal one in these instances. To do so might lose much of the useful room for maneuver, criticism and reconciliation that still exists in the institutions and offices that regulate and guide the conduct of the judiciary.

39 'There is considerable merit in the submission that a judge who is minded to lay a complaint against a colleague has special duties that are not shared by lay complainants, for there is an overarching duty upon judges, in whatever they do, to preserve the dignity of the judicial institution. Indeed, the Constitution itself commands all organs of state, which include the judiciary, to assist and protect the independence, impartiality, dignity, accessibility, and effectiveness of the judiciary.' The duty that is cast upon judges no doubt calls upon them to act with due care and circumspection

SCA's suggestion has not yet been furnished, but might well be furnished by one of the perceptive and informed commentators on the place of the judiciary in the South African constitutional democracy, such as Calland. Interestingly, Roux does note that the most feasible alternative course of action open to the Constitutional Court judges was to have called Hlophe JP to for his account to Langa CJ in his capacity as the Chief Justice and the head of the judiciary.[40] To do so would have been to choose an ethical rather than a legal battleground. Yet, it was a legal battleground that was chosen – by both sides – and that did indeed provide the weapons of conflict in both these incidents.

5 Two legal conclusions

Shorn of the political and ethical dimensions (admittedly a difficult and perhaps dangerously positivistic move), I see a correct legal determination of judicious transparency in the issuing of the media statement by Constitutional Court judges for three reasons. First, the subject matter was on an important and delicate public matter, a fact situation at the intersection of partisan politics, the politics of judicial personnel, and the politics of the judiciary within a constitutional democracy. This was a statement by judges about a judge and about judging. Second, this was an instance of judicious transparency since this transparency had to be put into action by individual judges. Their activity constituted a judicial practice. There was no intermediary between the judges and the action that needs to be judged; it was not some official that took the action, the judges themselves did the deed. Thus, it was the judges that were liable in terms of the applicable law of defamation, the private law arena in which the SCA judgment was ultimately fought out.[41] Third, the judiciousness of the transparency practice needs to be examined within its actual institutional context. In particular, an element of context that is important to take into account and is properly taken into account goes beyond the narrow judicial process reasoning given by the SCA. In my view, the credible evidence here that mentions the potential role of agencies of national intelligence must be taken into account and has, by and large, not been highlighted in

before exposing the judicial institution, and those who hold office in the institution, to loss of public confidence through allegations of misconduct, as submitted by the respondent's counsel. That might indeed in some cases call for an invitation to be extended to the judge concerned to offer an explanation for the alleged misconduct before a complaint is laid. Whether that will be so in a particular case will necessarily be bound up with the particular circumstances in which the decision comes to be made, for there are peculiar complexities that are capable of arising if such an invitation were to be made. But we are not called upon to consider whether that was called for in this case, in which we are not adjudicating ethical questions but questions of law.' *Langa v Hlophe* (n 9 above) para 42. See Roux (n 2 above) 8. Roux also sketches the ethics framework then applicable to the action of Hlophe JP.

40 Roux (n 2 above) 7.

41 The publication of the lodging of the complaint was thus a private law analogue to the direct judicial conduct regulating access to court at issue in the *Independent Newspapers* case.

the discussion of this sequence of events. This possibility goes beyond any leakage of information from the Constitutional Court and entertains rather some interference with court operation. A potential role of the agencies of national intelligence in a matter such as this could effectively constitute a broader attack on judicial independence and the administration of justice and arguably on constitutional democracy.[42] The Court may have been spooked by the spooks. From this angle, the publication was thus an instance of judicious transparency, appropriately not as a judicial function, but rather as a non-judicial decision taken by those entrusted to deciding judicially.

I also see a correct legal determination of judicious transparency in the judicial re-opening of the hearings after decisions to close them were taken by the JSC.[43] Here, it was two High Court judges that served to remind the JSC of the constitutional value of openness, and of the rights of freedom of expression, access to information, and access to courts. These decisions did not and should not have turned on the right to dignity. While relevant, dignity should not be the framing analysis. Indeed, it may be appropriate to recall in conclusion that the SCA emphasised the equal worth of judges with other citizens. Equal but not more equal.

Appendix A: Statement by judges of the Constitutional Court

1 A complaint 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 this Court's pending judgment in one or more cases has been referred by the judges of this Court to the Judicial Services Commission, as the constitutionally appointed body to deal with complaints of judicial misconduct.

2 The complaint relates to the matters of *Thint (Pty) Ltd v National Director of Public Prosecutions and Others* (OCT 89/07), *JG Zuma and Another v National Director of Public Prosecutions and Others* (CCT 91/07), *Thint Holdings (South Africa) (Pty) Ltd and Another v National Director of Public Prosecutions* (OCT 90/07) and *JG Zuma v National Director of Public Prosecutions* (CCT 92/07). Argument in these matters was heard in March 2008. Judgment was reserved in all four matters. The Court has not yet handed down judgment.

42 Roux agrees that this threat constitutes an attempt to influence the decision of Judge Nkabinde, but apparently would not go so far as to characterise the threat as broader. For an official assessment of the precarious positioning of intelligence in the contemporary South African constitutional democracy, see Ministerial Review Commission on Intelligence 'Intelligence in a constitutional democracy: Final Report to the Minister for Intelligence Services, the Honourable Mr Ronnie Kasrils, MP' (10 September 2008).

43 Of course, the South Gauteng High Court decisions were jurisdictionally clearly legal reviews of the decisions of a public body, the Judicial Services Commission. Thus, they do not precisely fit within my definition of judicious transparency. Nonetheless, those court decisions do bear certain similarities in that they are about judges judging a judicial commission that itself judges judges. Moreover, the substantive issue at stake in the judicial review was that of transparency, a key concept in open justice and open democracy.

3 We stress that there is no suggestion that any of the litigants in the cases referred to in paragraph 1 were aware of or instigated this action.

4 The judges of this Court view conduct of this nature in a very serious light

5 South Africa is a democratic state, founded on certain values. These include constitutional supremacy and the rule of law. This is stated in section 1 of our Constitution. The judicial system is an indispensable component of our constitutional democracy.

6 In terms of section 165 of the Constitution the courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice. No person or organ of state may interfere with the functioning of the courts. Organs of state must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the Courts.

7 Each judge or acting judge is required by item 6 of schedule 2 of the Constitution, on the assumption of office, to swear an oath or solemnly affirm that she or he will uphold and protect the Constitution and will administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law. Other judicial officers or acting judicial officers must swear or affirm in terms of national legislation.

8 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.

9 This Court – and indeed all courts in our country – will not yield to or tolerate unconstitutional, illegal and inappropriate attempts to undermine their independence or impartiality. Judges and other judicial officers will continue – to the very best of their ability – to adjudicate all matters before them in accordance with the oath or solemn affirmation they took, guided only by the Constitution and the law.

30 May 2008

JUDGES OF THE CONSTITUTIONAL COURT

CHAPTER 20 IN SEARCH OF A THEORY OF JUDICIOUS (JUDICIAL) TRANSPARENCY: A RESPONSE TO KLAAREN

Richard Calland* and Chris Oxtoby**

In the last ten years there have been huge advances in the right of access to information (ATI). The idea that 'transparency' is important for meaningful and effective democratic process has been widely recognised.[1] Many new laws have been passed; there are now around 80 countries with ATI laws of some sort or other. There is a new – and fast-growing – body of experience and evidence. There are many human stories and the community of practice has grown enormously. But the scholarship has not kept pace. The search is on for a stronger theoretical basis for advancing the right of access to information and the arguments in favour of transparency.[2] While it may be somewhat unfair to do so, given that he may well not have set out to make any contribution to the theoretical understanding of transparency, one primary question that can be posed is whether his approach to 'judicious transparency' does contribute to a theory of transparency.

Certainly the paper breaks new ground. The notion of 'judicious transparency' is an entirely novel one. Klaaren sets out to examine 'two instances of contested openness' during the Hlophe/Constitutional Court dispute. These are the Court's publication of the fact that it was laying a complaint with the Judicial Service Commission (JSC) regarding Hlophe

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1 JE Stiglitz 'Foreword' in A Florini *The right to know: Transparency for an open world* (2007) vii.

2 One of the writers (Calland) is part of a small group of academics who have agreed to collaborate on a global academic research project on the right of access to information, with the intention of responding to the exponential growth in empirical-based understanding of the practice of transparency law and policy, and to contribute to the development of a theory of transparency and access to information.