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THE SUB JUDICE RULE IN SOUTH AFRICA: A TOOL FOR JUSTICE OR A SHIELD FOR THE POWERFUL?

By

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Submitted in partial fulfilment of the requirements for the degree of

Master of Laws by Coursework and Research Report

at the University of the Witwatersrand, Johannesburg

Supervised by Professor Cathi Albertyn

Date: 13 / 10 / 2023

DECLARATION

I, 1579315, declare that this Research Report is my own unaided work. It is submitted in partial fulfillment of the requirements for the degree of Master of Laws (by Coursework and Research Report) at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

I have submitted my final Research Report through TurnItIn and have attached the report to my submission.

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DEDICATION

I am deeply grateful for the unwavering love, support and prayers of my dear mother, Ms Seipati Khumalo, who has been the foundation of my academic journey. I also wish to acknowledge my father Bob Phahle, and brothers Bright and Morena Phahle. I would like to express my sincere appreciation for the guidance and mentorship provided by my supervisor, Professor Cathi Albertyn, during this period, which helped me navigate and achieve this important milestone in my life. It was indeed a privilege and an honour to have embarked on this journey with her. To all those whom I had meaningful discussions with about my research, particularly Thabo Mhlanga, I thank you.

Lastly, I want to thank the Almighty God for His boundless grace, mercy, and favour, which sustained me during the cause of this journey.

ABSTRACT

This research report delves into the sub judice rule in the South African context and its impacts on the constitutional right of freedom of expression. The report analyses how elected officials wield the sub judice rule as a protective barrier to responding to questions that relate to matters before a competent court involving them, which tends to happen in cases where there is no actual risk of prejudicing the proper administration of justice by providing answers to the questions posed. This report argues that the misapplication of the sub judice rule undermines the fundamental principles of accountability, transparency, and openness, which are the cornerstones of our democracy, and also infringes the mandate of the media to communicate information to the public and the public's right to access and consume such information. It further contends that the continued abuse and misuse of the rule calls for its reform through legislative measures. Such legislation must delineate circumstances in which the rule may be rightfully summoned, maintain the integrity of the rule and ward off its misuse to conceal information without a valid cause.

Table of Content

DECLARATION....ii

ABSTRACT....iv

I. INTRODUCTION....1

II. UNDERSTANDING THE SUB JUDICE RULE....2

III. THE SUB JUDICE RULE IN THE SOUTH AFRICAN CONTEXT....4

IV. PRINCIPLES UNDERPINNING THE SUB JUDICE RULE AND ITS FUTURE DIRECTION....8

V. MISUSE OF THE SUB JUDICE RULE: A SHIELD FOR THE POWERFUL....14

(a) *Rules of the National Assembly*....14

(b) *Minister of Communication – Portfolio Committee on Communications and Digital Technologies*....16

(c) *President Omar Hassan Ahmad Al Bashir Escape.*....17

(d) *Signal Jamming in the National Assembly*....19

VI. REFORMING THE SUB JUDICE RULE: STRIKING A BETTER BALANCE....21

VII. CONCLUSION....26

BIBLIOGRAPHY....27

I. INTRODUCTION

During the State of the Nation Address (SONA) in 2015, when former President Jacob Zuma delivered the address, a constitutionally unsettling act unfolded during the joint sitting of Parliament. A signal jamming device was discreetly switched on by the State Security Agency, catching everyone in the Parliamentary precinct off guard, and effectively blocking all incoming and outgoing communications, and preventing journalists and others in the building from reporting the unfolding events to the public.[1] Soon after SONA, Mr Cyril Ramaphosa, then Deputy President, faced questions from Members of Parliament during a National Assembly sitting about the unlawful use of the jamming device. Ramaphosa avoided addressing these questions by claiming that the matter was sub judice, despite there being no active court case at that point.[2] This striking example serves as an indicator of how public servants wrongfully use and exploit the sub judice rule [hereinafter referred to as the rule] to escape accountability, obstruct the flow of information and hinder transparency.

A longstanding rule, the sub judice rule has been the subject of much controversy and debate. In short, the rule means when a particular issue is presently being heard by a court, it cannot be discussed publicly in a manner that could potentially influence the final decision. Breaching this rule may result in being criminally charged for contempt, sanctioned by either a fine or imprisonment.[3] Regrettably, the rule has left the media in limbo as they navigate their constitutional mandate which requires them to inform the public about important issues and events as they happen in our country, and this includes shedding light on ongoing legal proceedings.[4] The rule's primary objective is to preserve the integrity of active cases and spare them from any interference, but it is disconcerting to observe public servants exploit it to evade difficult questions and public accountability. Contrarily, those public servants are quick to opine, and even make pronouncements, about cases concerning them before a court when they believe their opponent's case is weak or deems it politically motivated. The blatant selectivity in the rule's application is self-evident, and its far-reaching consequences cannot be overlooked.

It is my submission that the rule was not created to curtail discussions and publications on matters pending in court. Instead, it was conceptualised to, *inter alia*, prevent statements on cases pending in court that would influence the outcome. One must distinguish between two

[1] Parliament of the Republic of South Africa 'National Assembly, Questions For Oral Reply, Hansard' (2015).

[2] Ibid at 9 – 14.

[3] *S v Van Niekerk* 1972 (3) SA 711 (A) at 714F & 726.

[4] *Khumalo and others v Holomisa* 2002 (5) SA 401 (CC) paras 22 & 24.

distinct scenarios. First, when Parliament or a journalist directs a question at an elected official about a legal case they are involved as a plaintiff or an accused, and secondly when the concerned public official or the media make statements that aim to or could potentially influence the outcome of a court judgment. In the latter scenario, the sub judice rule comes into effect, whereas in the former, the rule does not prevent the official from engaging with the line of questions fully, which may involve discussing the merits of the ongoing case. In the former context, open dialogue is not only acceptable but encouraged. These two circumstances should not be conflated as one.

This research aims to shine a spotlight on the alarming trend of the exploitation of this rule to avoid accountability by public officials and shows the urgent need for a more sophisticated approach to the use and monitoring of this rule—one that effectively harmonises the rights of the accused to a fair trial with the public's right to stay informed on issues of public importance. It ends by making proposals for reform of the rule to curb its continued abuse. Although cases of breaching the sub judice rule hardly reach our courts for adjudication, establishing a clear legal framework for its application is necessary to recognise instances where it is erroneously invoked for expediency.

II. UNDERSTANDING THE SUB JUDICE RULE

Contempt by publication, a facet of criminal contempt of court, encompasses two distinct branches, namely the ‘sub judice rule′ and ‘scandalising the court’.[5] The first branch, sub judice, refers to discussions and 'publications tending to prejudice legal proceedings' or putting pressure on involved parties to settle out of court.[6] The second branch, scandalising the court, involves publications ‘attacking the judiciary’, thereby undermining its authority and credibility.[7] Contempt by publication emerged as a response to the burgeoning ‘mass media’, particularly newspapers, which hold immense power to sway public opinion and discourse, and appreciating that such influence could potentially prejudice active legal proceedings or subject the judiciary to unwarranted attacks.[8] Its origins can be traced back to 1742 when Lord Chief Justice Hardwicke identified ‘three types of contempt of court’, including both 'scandalising'

[5] Galia Schneebaum & Shai Lavi ‘The Riddle of Sub-judice and the Modern Law of Contempt’ (2015) 2 *Critical Analysis of Law* at 179.

[6] Ibid.

[7] Schneebaum & Lavi loc cit note 5.

[8] Ibid at 185.

and 'sub judice', along with contempt directed at abusing parties involved in the matter before the court.[9] In his ruling, Hardwicke LCJ explained the term sub judice as actions that could 'prejudice mankind' by manipulating public opinion against the parties involved in the impugned case before a final judgment is handed down.[10]

In their discussion of the sub judice rule, Schneebaum and Lavi found it perplexing that its modern interpretation has strayed from its original formulation by Hardwicke LCJ and is now portrayed as a punitive rule that targets those who obstruct 'justice through prejudicing the court'.[11] They hold that the original rule established by Hardwicke LCJ centred on 'prejudicing the minds of the public' rather than influencing the court or jury negatively.[12] To support their claim, Schneebaum and Lavi put forth three reasons why Hardwicke's rationale of sub judice cannot be interpreted as endorsing 'obstruction of justice': (1) sub judice cannot be construed to prejudice the jury because in the matter Hardwicke LCJ conceptualised it there was no jury present; (2) Hardwicke LCJ's use of the words 'prejudicing mankind' implies that the harm he sought to curtail was the impact of the impugned publication on people outside the court, rather than those inside, such as the presiding officer, the jury, and the litigants themselves; and (3) the primary motive for the formulation of the rule was to protect the 'dignity of the court' and 'the reputations of the parties to the trial', rather than solely as a response to obstructive actions that undermine the pursuit of justice.[13]

Over the course of its existence, the rule has traversed a labyrinth of interpretations and adapted to the changing legal landscape. Delving into this intriguing evolution, a thought-provoking article penned by Sossin and Crystal reveals how, back in 1896, the sub judice rule was broadened to include a publication which 'intended or at least is calculated to prejudice a trial which is pending'.[14] Subsequently, the rule was further expanded to cover publications that obstructed justice or disrupted the smooth functioning of the courts.[15] Its journey reached its pinnacle in the 1970s when the House of Lords set out the so-called 'prejudgment

[9] Ibid at 186.

[10] Ibid.

[11] Ibid.

[12] Ibid.

[13] Ibid at 187.

[14] Lorne Sossin & Valerie Crystal 'A Comment on "No Comment": The Sub Judice Rule and the Accountability of Public Officials in the 21st Century' (2013) 36 *Dalhousie Law Journal* at 541.

[15] Ibid.

test/principle', which regarded publications that preconceive or prejudge issues in ongoing cases to be unacceptable if such statements pose 'a real risk of prejudice to the administration of justice'.[16]

Despite scholarly concerns regarding the prejudgment test's vagueness and rationale, there is a general consensus that the test does not primarily seek to restrain publications that directly affect the participants in the legal proceedings, but instead proscribes publications that could potentially influence public opinion and prejudice the outcome of the particular case.[17] It is trite that the rule is now understood to focus on penalising actions that obstruct justice by prejudicing the court and serves as a means to prosecute authors of publications that could potentially influence the minds of the jury and judicial officers.[18]

This development has resulted in the sub judice being viewed from two angles: the diachronic and the synchronic. From the diachronic perspective, the rule was initially employed to safeguard the reputation of the court, but its focus has now shifted to emphasise the promotion of fair judicial processes and the prevention of acts that obstruct justice or undermine the proper administration of justice.[19] From the synchronic perspective, it is argued that the rule is presently confronted with the challenge of balancing competing interests –the right to freedom of expression and the accused's right to a fair trial.[20] According to Craig Cleaver, this tension between rights seems to tip disproportionately in favour of protecting the right to a fair trial at the expense of the right to freedom of expression.[21]

III. THE SUB JUDICE RULE IN THE SOUTH AFRICAN CONTEXT

Before the establishment of a constitutional democracy, the sub judice rule was enforced rigorously, which when coupled with statutes like the Internal Security Act 74 of 1982, resulted in the abuse of power and a notable curtailment of freedom of expression. A case that exemplified the complexities before democracy is *S v Van Niekerk*, where a Professor from the (then) University of Natal appealed a contempt of court conviction to the Appellate Division

[16] Ibid at 542.

[17] Schneebaum & Lavi op cit note 5 at 183.

[18] Ibid at 192.

[19] Ibid at 184.

[20] Ibid.

[21] Craig Cleaver 'Ruling without reasons: contempt of court and the sub judice rule' (1993) 110 *SALJ* at 539.

(AD)[22]. Professor van Niekerk had penned a letter strongly criticising legal practitioners and the judiciary for not disavowing specific provisions in the Terrorism Act 83 of 1967, in particular, the provision of 'detention for interrogation without trial and in solitary confinement and the circumstances that various people had died while detained under the Act'.[23] At the time, there was an ongoing trial regarding the Terrorism Act and he called upon the judge to disregard any evidence obtained through torture.

In the interests of upholding the integrity of ongoing legal proceedings, the AD established the so-called tendency test to determine contempt, which provides that any 'statement or document' will be contemptuous if it 'tends to prejudice or interfere with the administration of justice in a pending proceeding'.[24] It is important to highlight that this test was adopted and applied in the context where South Africa had done away with the jury system under the Abolition of Juries Act 34 of 1969. The AD duly recognised the dichotomy between jury and non-jury court proceedings and noted that the English Courts would apply a less stringent test towards contempt cases in non-jury settings. However, the AD did not provide any direction on how to interpret and apply the test in South Africa.[25]

The dawn of democracy in South Africa triggered a significant overhaul of its legal system, marking a definitive departure from the apartheid era to a democratic order built upon the values of 'human dignity, the achievement of equality and the advancement of human rights and freedoms'.[26] An important obligation encapsulated in the Constitution is the mandate on the 'State to respect, protect, promote and fulfil the rights in the Bill of Rights'.[27] Section 7 places a positive duty on the State to protect all rights and take necessary steps to ensure their realisation, all the while refraining from unduly interfering with these rights. Where interference occurs, the State must justify its actions by strictly adhering to section 36 of the Constitution. In instances where two or more fundamental rights are in conflict – freedom of expression (section 16) and its corollary rights, vis-à-vis fair trial rights (sections 34 and 35(3)) – a process of striking a balance between the rights in question must be undertaken.[28] In this

[22] *Van Niekerk* supra note 3.

[23] Ibid at 714H & 719E-G.

[24] Ibid at 724H.

[25] Ibid at 723H.

[26] Section 1(a) of the Constitution of the Republic of South Africa, 1996 [hereinafter the Constitution].

[27] Section 7(2) and 8(1) of the Constitution.

[28] *S v Makwanyane* 1995 (3) SA 391 (CC) para 104.

process, the principle of proportionality acts as the central catalyst for achieving a balanced and harmonious reconciliation of competing rights.[29] These substantial changes to our legal system apply to 'all law' (section 8(1)) and also require the common law sub judice rule to be reviewed and potentially modified in terms of section 39(2) to align it with the Constitution, given that its historical application seems to clash with the ethos of the new legal framework.

An early case that dealt with the dissemination of information concerning pending court proceedings was *Romero v Gauteng Newspapers Ltd*.[30] The High Court had to determine the lawfulness of publishing court documents in a newspaper article concerning a review application before it was formally presented in court and, whether the contents of the impugned article were defamatory.[31] It held that 'the legitimacy of publishing information about pending proceedings must depend on balancing' the following factors: (1) 'the public interest'; (2) 'the nature of the information', whether the published information was relevant and important enough for the public to receive; (3) prejudice on the parties involved in the matter (i.e. the accused); and (4) whether the publication is intended to 'in any way to influence the court… or otherwise interferes with the administration of justice'.[32] If there is evidence of prejudice towards the accused, then the trial cannot be considered fair, but, in the absence of such prejudice, there is a rebuttable presumption of fairness.[33] Therefore, the determining factor of the overall fairness of a trial hinges on the presence or absence of prejudice.[34] Building upon this principle, I argue that the same yardstick should be extended to the sub judice rule. In other words, the publication or discussion of matters before the court should be deemed as breaching the rule only if they will prejudice the case or obstruct justice.

The landmark decision of the Supreme Court of Appeal (SCA) in *Midi Television (Pty) Ltd v Director of Public Prosecutions (Western Cape)* signifies a momentous departure from the traditional 'tendency test', used in the past for contempt, and introduces a newly formed test, known as the 'real risk test'.[35] This represents a greater focus on assessing the actual manifestation of the alleged prejudice, rather than its mere existence. The case involved a

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[29] Ibid.

[30] *Romero v Gauteng Newspapers Ltd* 2002 (2) SA 431 (W).

[31] Ibid at 437.

[32] Ibid at 443.

[33] *S v Soci* 1998 (2) SACR 275 (E) at 278A.

[34] Ibid.

[35] *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)* 2007 (5) SA 540 (SCA) para 16.

dispute over broadcasting a documentary about an ongoing trial. The documentary unveiled, *inter alia*, the events surrounding the tragic murder of Jordan-Leigh Norton (Baby Jordan). Following the arrest of suspects in connection with the murder, the broadcaster decided to share information it had obtained on the killing. Upon learning of the approaching airing of the documentary, the DPP, apprehensive of possible prejudice to the pending trial, requested to view it before it was televised. Midi Television declined the request. An urgent application was promptly lodged in the Western Cape High Court to interdict the broadcast of the documentary. The court granted the interdict and ordered the broadcaster to provide the respondent with a copy of the documentary, allowing the respondent 24 hours to view it and further granted the same period to consider pursuing any legal action if prejudicial elements were discovered.[36] Midi Television took the matter on appeal to the SCA.

Before the SCA, there were two competing fundamental rights, the right to freedom of expression and the accused's right to a fair trial, and how these rights could be reconciled. It is important to emphasise that the ruling of the SCA did not extend to the sub judice rule, nor did it explicitly mention it or make any determination regarding its current application. Despite that, it is my submission that substituting the 'tendency test' for the 'real risk test' is a progressive step towards shaping the future of the rule. Nugent AJ held that 'the constitutional promise of a free press, like other constitutional promises, is not absolute' and, in instances where rights conflict, it is the responsibility of the courts to reconcile the tension 'against the standard set by section 36 of the Constitution'.[37] Reconciling competing rights, Nugent AJ continued, does not involve simply determining their relative importance and choosing the more valuable one while relegating the other to obscurity.[38] Instead, the proper approach is to limit 'one right to the extent that it is necessary… to accommodate the exercise of the other' according to the standard set in section 36.[39] Nugent AJ provided a comprehensive test – the real risk test – that must be satisfied by the individual seeking to prohibit a particular publication from discussing a matter that is before a court.

This new test effectively overturns the *Van Niekerk* tendency test discussed above. The real risk test consists of the following three requirements. The real risk test consists of the following three requirements: (i) there must be a demonstrable relationship between the

[36] *Director of Public Prosecutions (Western Cape) v Midi Television (Pty) Ltd* 2006 (3) SA 92 (C) para 51.

[37] *Midi Television*s supra note 35 para 5.

[38] Ibid para 9.

[39] Ibid.

publication and the prejudice that it might cause to the administration of justice; (ii) substantial prejudice if it occurs ; and (iii) a real risk that the prejudice will occur .[40] The existence of prejudice must be substantiated with concrete evidence, as ‘mere speculation or conjecture’ is insufficient.[41] However, Nugent AJ held that satisfying the requirements of this real risk test does not automatically ban the impugned publication; the party seeking to prohibit the publication must also demonstrate to the court that doing so – 'curtailing the free flow of information' – will result in more detrimental consequence than advantageous ones, and in this assessment, the court will consider both the publisher of the publication in question as well as 'the interests of every person in having access to information'.[42]

It is quite clear from the analysis above that the real risk test places a substantial burden on individuals who wish to ban a publication and thus curtail freedom of expression. I argue in this report that if this test were to be applied as the standard for sub judice rule, it would become exceptionally challenging for politicians to exploit it in order to run away from answering difficult questions. They would have to undertake the difficult task of demonstrating the existence of a real risk of prejudice occurring if they were to respond to the questions asked by the media or public representatives in Parliament on the merits of a matter(s) currently pending in court.

IV. PRINCIPLES UNDERPINNING THE SUB JUDICE RULE AND ITS FUTURE DIRECTION

South Africa’s democracy is a fusion of participatory and representative features; this underscores the importance of active engagement from both individuals and institutions in shaping relevant decisions. Inextricably linked to this idea of democracy are the foundational principles of openness, transparency, and accountability, which are pivotal drivers in fostering active participation of the public in moulding South African democracy. Thus, one compelling reason for aligning the sub judice rule with the tenets of the real risk test established by Nugent AJ is the principle of open justice. Open justice has been an essential feature of the legal system

[40] Ibid para 16.

[41] Ibid para 19.

[42] Ibid. paras 16 & 19.

of South Africa since the early 1800s.[43] The Constitution places an obligation on all arms of the State (judiciary, executive and legislature) to collectively uphold these values. Indeed, failure to do so will result in the State losing the necessary 'legitimacy and independence it requires in order to perform its function'.[44]

The Constitutional Court (CC) has endorsed the benefit of opening up the legal process for the public to witness how the court conducts its business. Openness cultivates trust in the judiciary to the public, which in turn legitimises the legal process and promotes excellence within the broader legal system.[45] I hold that this commitment to transparency and winning public trust ought to apply to the other branches of the State. The SCA has identified at least three compelling reasons for the principle of open justice:

> 'First, it assists in the search for truth and played an important role in informing and educating the public. Secondly, it enhances accountability and deterred misconduct. Third, it had a therapeutic function, offering an assurance that justice had been done'.[46]

The operation of justice in the full view of the public, as prescribed by sections 34 and 35(3)(c) of the Constitution, fosters a belief that justice is indeed being done and instils trust and confidence in the judiciary and the rule of law.[47] Kriegler J contends that conducting legal proceedings in an open and accessible manner serves to keep the public informed about active cases, which in turn, promotes public participation and allows for a robust public critique of judicial conduct.[48] This highlights the importance of the public retaining their autonomy and right to engage in public discourse, rather than outsourcing their active participation in the truth to the courts or investigative bodies.

The principle of open justice and participatory democracy is inextricably linked to the right to freedom of expression. Freedom of expression guarantees the right to free and

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[43] *City of Cape Town v South African National Roads Authority Limited* and others 2015 (3) SA 386 (SCA) para 16.

[44] Ibid. para 19.

[45] *S v Shinga (Society of Advocates (Pietermaritzburg)) as Amicus Curiae), S v O'Connell* and others 2007 (4) SA 611 (CC) para 26.

[46] *City of Cape Town* supra note 43 para 12. See *S v Mamabolo* (E TV and Others Intervening) 2001 (3) SA 409 (CC) para 29.

[47] Section 34 and 35(3)*(c)* of the Constitution.

[48] *S v Mamabolo* (E TV and Others Intervening) 2001 (3) SA 409 (CC) para 29.

independent media as well as the right for the public to receive information.[49] Former Chief Justice Mogoeng Mogoeng aptly described this right as 'the lifeblood of a genuine constitutional democracy', whose characterisation underscores the importance of maintaining a vibrant democracy.[50] Moreover, the CC in *Qwelane v South African Human Rights Commission* identified four values that shape the very essence of this right. These are: '(a) the pursuit of truth; (b) facilitation of the proper functioning of democracy; (c) the promotion of individual autonomy and self-fulfilment; and (d) the encouragement of tolerance'.[51] As noted previously, freedom of expression must be balanced with other rights, in this case, fair trial rights. The question, however, is how this might relate to fair trial rights.

The SCA decision in *SABC v Downer NO* and *Shaik*, upheld on appeal by the CC in *SABC v NDPP*, is instructive on the interaction between freedom of expression and fair trial rights.[52] In the SCA the matter emanated from the SABC's application to the SCA Registrar to televise Mr Shaik's proceedings and the Registrar permitting only visual recordings without sound. The SABC sought live broadcasting, with both visuals and sounds, to carry out its mandate of keeping the public well-informed.[53] In a unanimous judgment, the SCA noted that there needed to be a balancing between the two competing rights of freedom of expression and fair trial rights, guided by section 173 of the Constitution which allows it to regulate its internal processes.[54] The SCA held that in this balancing exercise, the proper test favours the right to a fair trial over freedom of expression because for the accused the trial 'is the be all and end all as far as maintaining reputation and liberty', thus 'live broadcasting should not be allowed unless the court is satisfied that justice will not be inhibited rather than to adopt the converse test'.[55] The SCA then dismissed the application by the SABC. On appeal, the CC narrowly focused on whether the SCA appropriately exercised the section 173 discretion. In other words, the issue was not the general allowances of cameras in courtrooms, but whether the CC should

[49] Section 16(1) of the Constitution.

[50] *Economic Freedom Fighters and Another v Minister of Justice and Correctional Services* and another (2021 (2) SA 1 (CC) para 1.

[51] *Qwelane v South African Human Rights Commission* and another 2021 (6) SA 579 (CC) para 69.

[52] *South African Broadcasting Corporation Ltd v Downer NO* and *Shaik* [2007] 1 All SA 384 (SCA).

[53] Ibid para 12

[54] Ibid para 15.

[55] Ibid para 20.

intervene and order live audio-visual coverage, in the context of that particular case.[56] The CC held that where a court exercises its section 173 discretion it must undertake a proportionality test to ensure that the limitation on a right corresponds proportionally to the objective the court is pursuing.[57] The CC did not decide on the proportionality test applied by the SCA nor did the CC apply any proportionality test, as this was not the issue on appeal, thus it held that another court could interpret the interests of justice differently and apply the proportionality test differently.[58] What emerges from these decisions is that freedom of expression is intricately linked to open justice; courts balance freedom of expression against fair trial rights. Moreover, the decision made by a court is based on a factual basis; hence it is conceivable that courts might favour freedom of expression in other matters. In the *SABC* case the fact that the matter was unprecedented as all parties opposed live broadcast, and that there was the possibility of further charges emanating from the matter and the same witnesses called in different matters, led to the SCA allowing only visual broadcast.[59] Importantly, the right to freedom of expression was given effect by allowing airing of visuals. Thus, what is in effect required is a case-by-case balancing of these two rights.

Furthermore, courts have recognised that a progressive and robust press can encourage individuals to move from the margins of society to become active contributors to public affairs, and through engaging in public discourse people can fully experience 'the benefits that flow from living in a constitutional democracy'.[60] The Court in *Brummer* recognised the interdependence of the right to access information and the right to freedom of expression.[61] These rights work in tandem to enable media practitioners to gather crucial information 'about how our government is run and this information may very well have a bearing on elections' and proficiently convey it to the public.[62] Similar sentiments were echoed by Mlambo JP in his High Court judgment that ruled on the live broadcast of the now-convicted murderer Oscar

[56] *South African Broadcasting Corp Ltd v National Director of Public Prosecutions* and others 2007 (1) SA 523 (CC) para 34.

[57] Ibid para 42.

[58] Ibid paras 46, 52 & 55.

[59] Ibid. paras 59, 62 & 63.

[60] *SABC* supra note 56 para 28.

[61] *Brümmer v Minister for Social Development* and others 2009 (6) SA 323 (CC) para 68.

[62] Ibid.

Pistorius, on the Multichoice pop-up channel.[63] Mlambo JP acknowledged the massive interest both locally and internationally surrounding the criminal trial of Pistorius, and with deftness, ruled that it is in the public interest, within allowable limits, that the trial be broadcast as it ensures that the majority of society, for example, which cannot physically attend court can follow the trial from wherever they are.[64] Importantly, Mlambo JP stressed the significance of using the proposed medium to address the genuine concerns held by marginalised groups 'who have found it difficult to access the justice system'.[65] These perceptions often paint a picture of a system that tends to favour the affluent and powerful, and offers them preferential treatment 'whilst being harsh on the poor and vulnerable'.[66] According to Mlambo JP, displaying to the public justice unfolding, especially a case involving a globally recognised star, could dispel these widespread negative perceptions of the justice system, while simultaneously informing and enlightening society about the intricacies of court processes.[67] It is very clear, therefore, from the discussion above that applying the *Van Niekerk* tendency test would severely curtail the principle of open justice, and it is my submission that in a society like ours that is governed by the rule of law, such a test is are not only flagrantly unlawful but also go against the very core of our constitutional framework. In South Africa, openness is unequivocally our default position.

As discussed in this report, one of the primary objectives of the rule is to protect the sanctity of the legal proceedings and protect judges and juries from the pernicious influence of public statements and publications that concern an active case and avoid any potential prejudice. My argument is that decisions from the bench are not easily susceptible to the influence of public statements and media, regardless of the profile and complexities of the case. This is because judges make a legal public oath or affirmation to uphold and defend the rule of law upon their appointment in terms of section 174 of the Constitution, and to exercise their duties without bias or preconceived notions.[68] Moreover, judges undergo rigorous legal training before they are even considered for appointment, meaning that by the time a judge takes a seat

[63] *Multichoice (PTY) Ltd* and others *v National Prosecuting Authority* and another: *In Re; S v Pistorius, Media 24 Ltd* and others *v Director of Public Prosecutions, North Gauteng and others* 2014 (1) SACR 589 (GP).

[64] Ibid para 27.

[65] Ibid.

[66] Ibid.

[67] Ibid.

[68] Section 174(8) of the Constitution.

on the bench, they are well-equipped to handle intricate cases and objectively determine the truth 'in a welter of contradictory evidence'.[69] The CC in *South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku* held that there is a rebuttable presumption that judges possess 'intellectual discipline, capable of applying their minds to the multiplicity of cases which will seize them during their term of office, without importing their own views or attempting to achieve ends justified in feebleness by their personal opinions'.[70] This dictum debunks the relevance of the strict *Van Niekerk* sub judice rule in our democratic state. Concerns about undue influence on court proceedings arising from public discussions concerning the merits of a case pending before a court on public platforms like Parliament or on news channels should be allayed because judicial officers in South Africa are firmly bound by the oath they solemnly took upon assuming office, which obliges them to actively 'promote all that will advance the Republic, and oppose all that may harm it'.[71] Thus, the reformed sub judice rule I propose would help protect the integrity of the courts and judicial proceedings, and at the same time advance freedom of expression balanced with fair trial rights. Moreover, the proposed rule would provide legal certainty and prevent politicians from arbitrarily relying on the sub judice rule when the potential prejudice to judicial proceedings is remote.

Therefore, the best way of protecting the aforementioned values is to apply the *Midi* real risk test to the sub judice rule. The *Midi* case test is three-fold: (1) there must be an unequivocal nexus between the impugned discussion/publication and the potential prejudice to the administration of justice; (2) such prejudice, if any, should have a significant and noticeable impact on the pending case; and (3) there must be a real risk of the prejudice actually occurring.[72] 'Mere speculation or conjecture' regarding the alleged prejudice is insufficient.[73] The burden of satisfying this test lies on the individual relying on the rule, who is also required to provide compelling evidence that substantiates that the publication or discussion in question, about an ongoing case, poses a real threat to the proper conduct of justice. Given that the standard of the test is considerably high, it is my submission that this will discourage many

[69] *President of the Republic of South Africa* and others *v South African Rugby Football Union* and others 1999 (4) SA 147 (CC) paras 40 & 41.

[70] *South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku* and another 2022 (4) SA 1 (CC) para 58.

[71] Schedule 2 of the Constitution.

[72] *Midi Television*s supra note 35 para 16.

[73] Ibid. para 19.

politicians who frequently resort to this rule for expediency, as they may struggle to meet its stringent requirements. It is to that end that in the next section, I will look at four examples to evaluate how the real risk test works in the context of the rule. These examples are the rules of the National Assembly, parliamentary questioning in the Portfolio Committee, the escape of President Omar Al Bashir, and signal jamming in the National Assembly. The examples and application for the rule must be understood against the backdrop of the dictum of the CC in *United Democratic Movement v Speaker of the National Assembly* wherein it was emphasised that 'accountability, responsiveness and openness enjoin the President, Deputy President, Ministers, and their Deputies, to report fully and regularly to Parliament on the execution of their obligations'.[74]

V. MISUSE OF THE SUB JUDICE RULE: A SHIELD FOR THE POWERFUL

This section discusses how South African politicians have misused and exploited the sub judice rule to shield themselves from media scrutiny, parliamentary accountability, and negative public attention. Contrary to how it is deployed in these circumstances, it is my submission that the rule does not impose a general ban on discussing or reflecting on the merits of a case that is under active judicial consideration. The misuse of the rule obstructs the media and other key institutions, such as Parliament, from effectively holding public officials accountable and seeking truth and justice. To illustrate the misuse and exploitation of the rule, I highlight specific cases mentioned above. The aim is to make the proposition, which I will argue in the next chapter, that the *Midi* real risk test should be used to determine the proper use and application of the sub judice rule.

(a) *Rules of the National Assembly*

The starting point is the sub judice provision in the Rules of the National Assembly (NA), which is flawed in its construction. I argue that this has created an opportunity for some Members of Parliament, the Speaker of the NA, the National Council of Provinces (NCOP) as well as the President, to misuse the rule as a means to evade accountability and sidestep addressing difficult questions directed at them.

The rule does not impose an absolute ban on discussing the merits of cases under active judicial consideration. However, Rule 89 of the Rules of the NA, titled 'Matters of Sub Judice',

[74] *United Democratic Movement v Speaker of the National Assembly* and others 2017 (5) SA 300 (CC) para 9.

expressly states that 'no member may reflect upon the merits of any matter on which a judicial decision in a court of law is pending', erroneously enforcing a complete ban on debates about issues still to be decided by a court.[75] This contravenes the true spirit of the sub judice rule, hinders open debates in Parliament, and violates the Constitution.[76]

In *Democratic Alliance v Public Protector of South Africa*, the Public Protector sought to rely on rule 89 to obstruct the Section 194 Committee from continuing its enquiry because this would inherently mean the Committee deliberating on 'the merits of her rescission applications in this Court and of her application in the High Court to stop the enquiry and set aside her suspension'.[77] The CC rejected this argument, endorsed the court a quo decision, and held that if the sub judice rule was applicable this would restrict the NA's obligation to hold her accountable.[78] Significantly, if the sub judice rule was used in that way, 'any person subject to the section 194 process would' escape such proceedings by simply launching litigation against the process.[79] The Western Cape High Court's ratio for rejecting the argument by the Public Protector was cemented by the fact that she had not placed any facts or factual basis before the court to show that the Section 194 Committee would reflect on the merits of her application.[80] The High Court has previously held that the 'sub judice rule does not preclude members of the National Assembly from carrying out their oversight functions and the holding of office bearers of Chapter 9 Institutions accountable in terms of section 194'.[81] It is important to note that courts have not focused on the constitutionality of Rule 89 nor its interpretation. Thus, Rule 89 still stands in its current form, and it is my view it restricts Parliament's functioning. Therefore, the most appropriate course of action would be for Rule 89 to be reconciled with Parliament's oversight function to preserve the integrity of the NA and uphold the rule of law, or to bring it in line with the *Midi* test. Although the Constitution grants Parliament the autonomy to decide on its own processes and establish internal regulations to fulfil its constitutional mandate, these processes must exhibit consideration for 'representative

[75] Rules of the National Assembly of Parliament of the Republic of South Africa 9ed (26 May 2016).

[76] Section 16(1) of the Constitution.

[77] *Democratic Alliance* and another *v Public Protector of South Africa* and others 2023 JDR 2534 (CC) para 142.

[78] Ibid para 143.

[79] Ibid.

[80] *Public Protector of South Africa v Speaker of the National Assembly* and others [2022] 4 All SA 417 (WCC) para 82.

[81] Ibid para 84.

and participatory democracy, accountability, transparency and public involvement'.[82] This implies that parliamentary rules must foster open and rigorous debate and demand full accountability, rather than stifle debates.

(b) *Minister of Communication – Portfolio Committee on Communications and Digital Technologies*

In 2014 Ms Faith Muthambi, the then Minister of Communications, appeared before the Portfolio Committee on Communications and Digital Technologies to discuss the Public Protector's Report, which contained adverse findings against her predecessor and the national broadcasting channel, along with its executive leadership. The Committee expected the Minister to address it on how her Department planned to implement the binding recommended remedial actions in the Report.[83] The Report was also under review in the Western Cape High Court at the time, which later resulted in adverse costs against the Minister in her capacity as Head of the Department.[84] However, when questioned by Members of the Committee, the Minister simply provided vague and unhelpful information and, when pressed, she invoked the sub judice rule to shield herself against the Committee's questions.[85] Despite objections by Members, the Chairperson of the Committee, who is also a member of the ruling party the Minister belongs to, sided with the Minister without providing reasons and ruled that the subject matter was indeed sub judice and decided to adjourn the proceedings of the Committee until the matter has been settled in court.[86]

Before applying the *Midi* test, it is crucial to emphasise the critical role of the Portfolio Committee, which functions as an extension of the NA based on sections 42(3) and 55(2) of the Constitution. The Committee is not only responsible for holding the Executive and organs of state accountable, but it also oversees 'Executive action'.[87] Furthermore, section 92 of the Constitution subjects all Cabinet Members to account 'collectively and individually' to

[82] Section 57(1) of the Constitution.

[83] Parliamentary Monitoring 'Public Protector's SABC Report: response by Minister of Communications' available at *https://pmg.org.za/committee-meeting/17415/*, accessed on 14 July 2023.

[84] *Democratic Alliance v South African Broadcasting Corporation SOC Ltd (SABC)* [2017] 1 All SA 530 (WCC) para 225.

[85] Ibid.

[86] Ibid.

[87] Section 42(3) and 55(2) of the Constitution.

Parliament on the exercise of their executive powers and performances, and they do this by providing 'Parliament with full and regular reports concerning matters under their control'.[88] These provisions underscore a reciprocal relationship between Parliament and the Executive; where Parliament scrutinises the actions of the Executive, and in response, the Executive must account truthfully and regularly for their actions and decisions. This is a demonstration of the checks and balances system envisaged in the separation of powers principle.

In Minister Muthambi's case, it is undeniable that she did not comply with section 92 by refusing to fully engage with the Portfolio Committee, thereby obstructing its oversight duties. For the Minister to legitimately invoke the sub judice rule, as per the *Midi* test, the following requirements had to be met: (1) demonstrate a link between her answers to the Committee questions and the possible prejudice to the administration of justice that would arise; (2) show that the supposed prejudice will most likely manifest by responding to the questions; and (3) prove that there is a real risk of the alleged prejudice actually materialising.[89] It is my submission that the Minister misapplied and abused the rule, as there was no demonstrable prejudice that would have resulted from her responding to questions in the Committee. Even if there was a potential prejudice that could negatively affect the Minister by engaging in the discussion, her position as a Cabinet Member grants her civil and criminal immunity for her remarks in Parliament under section 58.[90] In light of this, it becomes evident that there was no valid reason(s) justifying the Minister's refusal to engage meaningfully with the Parliamentary Committee.

(c) *President Omar Hassan Ahmad Al Bashir Escape.*

In 2015, the President of Sudan, Al-Bashir, was in South Africa to attend the African Union summit, at a time when there were serious charges against him and the International Criminal Court (ICC) had issued a warrant for his arrest.[91] South Africa was legally obliged to execute the warrant and arrest Al-Bashir 'in terms of section 40(1)(k) of the Criminal Procedure Act',

[88] Sections 92(2) and (3)*(b)* of the Constitution.

[89] *Midi Televisio*n supra note 35 para 16.

[90] Section 58(1)*(b)* of the Constitution.

[91] Aljazeera 'Why South Africa let Bashir get away' available at *https://www.aljazeera.com/opinions/2015/6/15/why-south-africa-let-bashir-get-away*, accessed on 14 July 2023.

as a party to the Rome Statute.[92] The South African government ignored a court order which directed it to prevent Al-Bashir from leaving the country 'pending a formal request for his surrender from the International Criminal Court', but instead facilitated his departure.[93] In a strongly worded judgment commenting on the misconduct of the government, the High Court held that 'a democratic State based on the rule of law cannot exist or function if the government ignores its constitutional obligations and fails to abide by court orders'.[94]

After this debacle, Cyril Ramaphosa, then Deputy President and the leader of government business, appeared before the NCOP to answer oral questions.[95] MP Jacques Julius presented Ramaphosa with two pressing questions: (1) why did the government allow Al-Bashir to leave the country despite the legal obligation to arrest him; and (2) how the government plan to hold those responsible for defying the court order accountable for contempt?[96] Before Ramaphosa responded, the Chairperson of the NCOP, prompted by a point of order from another MP, unilaterally declared that the subject matter of Julius' question was sub judice, and ruled that no further questions concerning this matter would be entertained until investigations, as per the court's order, are concluded.[97]

This is a classic example of the ruling party abusing its influence to shield its members from accountability. This is the situation Mogoeng CJ in *the United Democratic Movement* cautioned against when he emphasised that party affiliation of a presiding officer should never overshadow their responsibilities in the Legislature as it hampers the importance of having independent and impartial presiding officers in Parliament.[98] This indicates that once an MP assumes the role of a Presiding officer, they transcend their party affiliation and become representatives of the NA, a 'state resource'. Mogoeng CJ further stated that 'Parliament's efficacy in its constitutional oversight of the Executive vitally depends on the Speaker's proper exercise of this enormous responsibility' and that a 'Speaker must thus ensure that his or her

[92] *Southern Africa Litigation Centre v Minister of Justice And Constitutional Development* and others 2015 (5) SA 1 (GP) para 2.

[93] Ibid paras 2 – 3.

[94] Ibid para 37.2.

[95] Parliament of the Republic of South Africa 'National Council of Provinces, Oral Questions, Hansard'(2015).

[96] Ibid at 9.

[97] Ibid.

[98] *United Democratic Movement* supra note 74 para 87.

decision strengthens that particular tenet of our democracy and does not undermine it'.[99] This firmly establishes that party loyalty should never take precedence over the values of the Constitution and the interests of the South African public. Despite the case now being *res judicata,* Julius' questions to Ramaphosa remain unanswered.

In terms of the *Midi* test, it is evident that the Chairperson had no legal basis for preventing the Deputy President from fully accounting to Parliament on the Al-Bashir matter. The only way the Chairperson could legitimately use the rule as a reason to preclude Ramaphosa from responding to Julius's questions was to establish a clear and direct link between Ramaphosa's answer and the possibility of prejudice towards the pending case. Such prejudice should be significant and have a noticeable impact on the administration of justice, and there should be a real risk of the established prejudice actually materialising. Unfortunately, the Chairperson failed to establish this causal link and instead based her ruling solely on the matter being before the court, which – on its own - is an unjustifiable reason.

(d) *Signal Jamming in the National Assembly*

This incident stands out as one of the circumstances that set back our young democracy, and at the centre of this is Mr Ramaphosa. In the previous years during the Zuma presidency, there had been disruptions by opposition parties against former President Zuma speaking in the National Assembly during the State of the Nation Address (SONA). During SONA on the 12th of February 2015, delivered by former President Jacob Zuma an episode unfolded. The Economic Freedom Fighters (EFF), as in previous SONA's, voiced their displeasure on Zuma addressing Parliament. What followed can only be described as a suppression and violation of the fundamental right to freedom of expression.[100] Shortly after the business of the joint sitting began, visuals were turned to the face of the Speaker to deliberately avoid showing the scuffle that erupted between EFF MPs and security officials.[101]Adding to the gravity of the situation, the State Security Agency employed a signal jamming device without the authorisation nor knowledge of the Speaker of the NA. This unsanctioned action disrupted the proceeding of

[99] Ibid.

[100] *Economic Freedom Fighters* supra note 50 para 1 & 35.

[101] *Primedia (PTY) Ltd* and others *v Speaker of the National Assembly* and others 2017 (1) SA 572 (SCA) para 5.

Parliament, and the media and everyone inside the precinct, could not communicate the events to the public.[102]

This egregious act violated section 16 and other related rights, preventing the public, who usually tune into SONA, from witnessing the events in real time. In her submission to the SCA, the Speaker of NA, stated that she had no knowledge of any intention to use a jamming device during SONA nor was she aware that such a device was in the Parliamentary building.[103] These revelations are troubling considering that section s 4(1) of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act 4 of 2004 explicitly grants the Speaker exclusive authority to decide on security service actions within the precincts.[104] Needless to say, the SCA found that the unauthorised use of the signal jammer during SONA was indeed unlawful, and there were no justifiable reasons to impede the flow of parliamentary proceedings to the public.[105]

Following SONA, Ramaphosa went before the NA to answer questions on various matters, including the working visit of the government to South Sudan.[106] The then leader of the Democratic Alliance, Mmusi Maimane, directed two questions to Ramaphosa regarding the SONA incident: first, when did Ramaphosa become aware of the intention to use a signal jammer at SONA, and secondly, whether Ramaphosa could assure the nation that Parliament would never again use such extraordinary security measure.[107] Ramaphosa replied that he could not answer Maimane's question because the matter would be heard soon by the High Court.[108] Put differently, Ramaphosa skilfully wielded the sub judice rule to sidestep Maimane's questions – pulling a get-out-of-jail-free card from his sleeve. To Ramaphosa's credit, he did say he would address the queries once the legal proceedings concluded.[109] However, at the time of his response, no court was presiding over the matter, making his justification for not responding questionable. It is indeed trite that ordinarily, litigation commences once summons

[102] Ibid paras 5 & 6.

[103] *Primedia Broadcasting* supra note 101 para 62.

[104] Ibid.

[105] Ibid paras 52 & 65.

[106] Parliament op cit note 1.

[107] Ibid at 9 & 11.

[108] Ibid at 9 & 13-14.

[109] Ibid.

are served, but it is my view that when one considers that the purpose of the sub judice rule is to prevent prejudicing court proceedings, for purposes of the rule litigation must be limited when the matter is actually before a court. For example, in the United Kingdom, a civil case, for contempt of court, is deemed to be active once preparations for the hearing are underway, in the absence of such arrangements, from the time the hearing begins.[110] Even when considering the labyrinthine corridors of the sub judice rule provision in Rule 89 of the Rules of the NA, discussed above, Ramaphosa's reliance on this Rule lacks merits due to the absence of any ongoing court proceedings in that respect. Thus, the Speaker had a duty to compel the Deputy President to address Maimane's questions without reservation, but her actions appeared biased and failed to uphold the values of our Constitution, which include accountability and transparency. In a similar vein, the Minister of State Security David Mahlobo, who was responsible for bringing the signal jamming device into the building faced similar questions about its use during SONA. When asked whether he accepted responsibility, the Minister performed the same disappearing act as the Deputy President by invoking the sub judice rule and claimed that he does not take any 'political responsibility for the operational error involving the use of a signal jamming device'.[111]

Applying the 'real risk' test to this incident, it is evident that the grounds Ramaphosa and Minister Mahlobo, relied on to utilise the sub judice rule to avoid answering questions were inadequate because they failed to demonstrate how their response posed a tangible risk of prejudice to the administration of justice. This highlights a concerning pattern of public officials and the NA Speaker exploiting the rule, thereby transgressing the Constitution. It has been approximately seven years since the SCA handed down its judgment on this issue, and still, he to whom the question was asked remains shrouded in silence.

VI. REFORMING THE SUB JUDICE RULE: STRIKING A BETTER BALANCE

So far, I explored the evolutionary journey of the sub judice rule by tracing it back to its origins, to its contemporary interpretation in politics and to a lesser extent in law, and the principles that might guide its reformulation. Furthermore, I provided examples to illustrate how those in power exploit the rule to avoid answering difficult questions relating to a case pending before

[110] See section 12 of Schedule 1 of the United Kingdom Contempt of Court Act 1981.

[111] Parliament op cit note 1 at 93-4.

a court and thus escaping being held accountable. These empirical instances serve to highlight the pressing need to address the multifarious challenges posed by the rule in contemporary practice.

In seeking pragmatic solutions to the quandary posed by this rule, I consider two potential approaches: the complete abandonment of the rule; or undertaking its deliberate reformulation of the rule to align it with the precepts and values of the Constitution. There is no denying that the current use and form of the sub judice rule restricts the right to freedom of expression, unreasonably suppresses it in favour of protecting fair trial rights and carries real punitive consequences. It also encroaches on the principle of transparency and accountability. This creates an absurd notion that mere discussions on the merits of an ongoing case have the potential to obstruct justice. The worst possible outcome would be a scenario where a public official involved as a litigant in a particular legal matter discusses the matter but, when critics discuss the matter the official resorts to the rule to silence them by either filing a civil contempt lawsuit or lodging a criminal case with the police, potentially resulting in the critics facing charges of criminal contempt. The tension that exists between the right to freedom of expression and the right to a fair trial, caused by the sub judice rule, has sparked debate among 'policymakers and commentators' around the globe, and the crux of this discourse is whether it is justifiable to keep this rule considering its gross violation on the freedom of expression when it is strictly applied. [112]

The United Kingdom stands as an exemplar, having codified the sub judice rule, which I submit should be the approach that South Africa also takes.[113] The Contempt of Court Act 1981 Chapter 49 addresses actions that obstruct the administration of justice, undermine the authority of the courts, or interfere with the effectiveness of the judicial process. Section 1 introduces the 'strict liability rule', which is a legal mechanism that imposes contempt penalties on actions that tend 'to interfere with the course of justice in active legal proceedings regardless of intent to do so'.[114] However, the Act expressly states that 'the strict liability rule applies only' when the impugned comment or publication 'creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced'.[115] A further

[112] Schneebaum & Lavi op cit note 5 at 181.

[113] Contempt of Court Act 1981 Chapter 49.

[114] Section 1 Contempt of Court Act.

[115] Section 2(2) Contempt of Court Act.

caveat provided by section 4(1) of the Contempt of Court Act is that 'a person is not guilty of contempt of court' if the comment is a 'fair and accurate report of legal proceedings held in public, published contemporaneously and in good faith'.[116] The fact that the word 'substantial' was used in the Act indicates that the legislature intended not to include trivial risks created by the alleged publication. This high threshold imposed by the Act offers way more protection for freedom of expression in the UK compared to its common law counterpart in South Africa. Moreover, section 5 of the Contempt of Court Act states that a publication made 'in good faith of public affairs or other matters of general public interest is not to be treated as a contempt of court under strict liability if the risk of impediment or prejudice to particular legal proceedings is merely incidental to the discussion'.[117] What emerges from the provisions of this Act is that it provides a threshold analogous to the *Midi* test, and also seeks to balance freedom of expression against the right to a fair trial. Therefore, the *Midi* real risk test has set the foundation for the development of the rule in South Africa, and thus, codifying the rule, like in the UK, could help strike a proper balance between protecting freedom of expression and upholding the integrity of ongoing legal proceedings.

In Australia, similar to South Africa, the sub judice rule is derived from the common law and is legislated. What distinguishes the two jurisdictions is that the jury system is still used in Australia, but not in South Africa.[118] Australia uses the 'tendency test' to determine if a publication complained of has breached the sub judice rule and thus constitutes contempt for it obstructs the fairness and efficient administration of justice.[119] The test does not require the complainant to demonstrate that a juror or potential juror has engaged with the publication in question or has encountered the prejudicial material beforehand, it is sufficient to show that such publication has the potential to influence or obstruct the proper administration of justice in that specific legal proceedings.[120] However, if the likelihood of interference is so remote as to be inconsequential, the publication does not tend to obstruct justice.[121] Thus, similar to the United Kingdom where incidental prejudice or impediment is not contempt, in Australia if the risk of prejudice is considered minimal, the publication will fall short of contempt. Although

[116] Section 4(1) Contempt of Court Act.

[117] Section 5 Contempt of Court Act.

[118] Sossin & Crystal op cit note 14 at 554-5.

[119] *Director of Public Prosecutions v Johnson & Yahoo!7* [2016] VSC 699 para 24(a)-(o).

[120] Ibid.

[121] Ibid.

the test for sub judice in Australia is relatively less strict than its UK counterpart, it is important to highlight that courts in Australia have recognised that the rule cannot be wielded to suppress debates about matters pending before a court, especially when the matter is of public interest. A publication can only be held liable for contempt if it apparently tends to undermine the impartiality of the proceedings.[122]

The situation in the United States of America is quite different from the two previous jurisdictions. This is because in the USA freedom of speech is all-encompassing and carries higher value, staunchly protected by the First Amendment, compared to fair trial rights. Hence in the USA, the sub judice rule prioritises freedom of speech over fair trial rights.[123] Moreover, courts in the USA rely on proactive measures to preserve and protect fair trial rights, such as 'sequestering juries' to shield them from external influences and, in cases where 'pre-trial publicity' has improperly influenced convictions, the courts may even overturn such convictions. Consequently, the sub judice rule is not commonly used to guarantee that an accused has a fair trial or to protect the integrity of ongoing legal proceedings.[124] According to Sossin and Crystal, the test for contempt was established in the landmark case of *Bridges v California*, and a high threshold was set for contempt.[125] The test provides that contempt *ex-facie curiae* will be established when the publication in question poses a 'clear and present danger' of undue influence on the judiciary and prejudice to the administration of justice.[126] In other words, there must be an immediate and serious threat to the integrity of the legal system that the court must perceive to satisfy the test.

Turning to how South Africa should move to decisively address the established deficiencies of the sub judice rule, it is important to highlight that in South Africa the current application of the rule tends to favour fair trial rights, thereby unreasonably limiting freedom of expression and related rights. Our constitutional framework does not have a hierarchical structure of rights that elevates fair trial rights, or any other right, above the right to freedom of expression, but rather requires a balancing of rights.[127] This makes it vital to revise the sub judice rule to ensure that it does not perpetuate a hierarchical approach and remove the

[122] Ibid.

[123] *Mamabolo* supra note 48 para 41.

[124] Sossin & Crystal op cit note 14 at 556.

[125] Ibid

[126] Ibid.

[127] *Islamic Unity Convention v Independent Broadcasting Authority* and others 2002 (4) SA 294 (CC) para 28.

purported superior status that the rule places on fair trial rights. To determine the appropriate standard to prove a breach of the rule, the starting point is the Constitution. Section 39 of the Constitution clearly states the Bill of Rights recognises common law rules and rights provided that they comply with the Constitution.[128] This confirms, in principle, that the rule is recognised within our legal system, but the deficiencies attached to the rule prevent it from complying fully with the Bill of Rights as prescribed by section 39. With this understanding, it is necessary to emphasise that this report does not advocate for an outright abandonment of the sub judice rule, such a radical approach is unnecessary. Instead, a more fitting course of action is to modify or develop the rule to align it with the Constitution. This report, therefore, calls for legislative reform of the sub judice rule, akin to the approach taken in the UK, rather than merely leaving it to be amended or developed by the courts.

Codifying the rule will give it more substance and erect boundaries around it to harmonise it with other fundamental rights that underpin our democracy. The incorporation of a higher standard for invoking the rule in the new legislation will also serve as a deterrent to those in power who continue to misuse and exploit the sub judice rule to evade accountability, as illustrated above. This comprehensive legislation could encompass all facets of contempt of court, both within the courtroom and beyond its walls. The proposed legislation should begin by outlining the scope of the rule by offering a clear definition of the forms of expressions or publications that fall under it. Drawing from India's Criminal Contempt of Courts Act 70 of 1971, a publication should include 'words, spoken or written, or by signs, or by visible representation, or otherwise' used in questions, statements, motions, resolutions and other debates, should be construed as a publication for sub judice.[129] The proposed Act, similar to the UK Contempt Act, would explicitly state that sub judice applies in both civil and criminal proceedings from the time when the matter is set down for arguments, and remains in effect until the case reaches its logical conclusion.

Furthermore, the proposed Act should expressly state that discussing the merits of a pending case does not amount to breaching the rule, it is important to dispel this notion that is apparently attached to the rule for the convenience of those who benefit from its exploitative use. I propose the adoption of a judicious and sophisticated test akin to the one established for contempt by the SCA in *Midi*, which requires an individual claiming a publication to prejudice or interfere with the due course of any judicial proceeding to demonstrate a real and tangible

[128] Section 39(3) of the Constitution.

[129] Section 2 of the Criminal Contempt of Courts Act 70 of 1971.

risk of that prejudice actually materialising if the publication is not curtailed.[130] There must be a causal link between the publication and the prejudice that must be substantiated and supported by reliable evidence before the court. The definition of what is 'real risk' can either be prescribed in the new Act by the legislature or left to the courts to decide from case to case. It is my view that through this shift from common law to legislative intervention the sub judice rule will not only address some of the highlighted deficiencies of the rule but will also properly strike the balance between freedom of expression, particularly the rights of the media and the public to receive and access to information, and the defendant's right to a fair trial and the logical flow of justice.

VII. CONCLUSION

This research report posits that the sub judice rule, in its current form, warrants a review and reform because it stands exposed by those in positions of power, allowing them to sidestep probing inquiries that genuinely require answers. The exploitation of the rule regrettably transgresses the fundamental principles of our Constitution, namely openness, transparency, and accountability. Furthermore, the prevailing rendition of the rule, particularly as formulated in the National Assembly Rules, restricts Parliament from performing its constitutional mandate, which includes oversight of the executive authority. Equally important is how the current application of the rule in our post-apartheid society arbitrarily limits the rights to access information and freedom of expression, as illustrated above.

This position clearly undercuts the constitutional foundational pillars viz. transparency and accountability, which are crucial for the smooth functioning of our legal framework and democratic ethos. Codifying the rule will serve as a shield against its blatant misuse and align it with the Constitution, moreover, adopting the *Midi* standard of the real risk test for contempt of court will proportionally balance the fundamental rights affected by the rule.

[130] *Midi Televisions* supra note 35 para 19.

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