BRIEFING NOTE[1]

SOUTH AFRICAN NATIONAL EDITORS' FORUM

THE *SUB JUDICE* RULE

1 Introduction

1.1 The ***sub judice*** rule prohibits the publication of material that may prejudice the administration of justice in relation to pending proceedings. This rule is a species of the common law crime of contempt of court. In other words, a breach of the ***sub judice*** rule may result in a successful prosecution for contempt of court.

1.2 The ***sub judice*** rule is currently the subject of much debate. Some argue that the crime has no place in a judicial system like ours in which cases are decided by judicial officers, rather than juries consisting of lay persons, and in which the right to freedom of expression is constitutionally protected. While there are numerous recent instances of the media breaching the ***sub judice*** rule, prosecutions have not ensued.

1.3 As with other areas of contempt of court, the ***sub judice*** rule raises difficult questions as to the appropriate balance to be struck between the right to freedom of expression, including freedom of the press and other media, and the interest in the proper administration of justice.

1.4 I have been asked to furnish the South African National Editors' Forum with a briefing note explaining the ***sub judice*** rule and its effect on the media. I have also been asked to include some practical advice to guide media entities in deciding when to publish and when not to publish in relation to pending court proceedings.

1.5 The structure of this note is as follows:

1.5.1 It begins with a brief analysis of the constitutional right to freedom of expression;

1.5.2 I then examine the ***sub judice*** rule as it existed prior to the Constitution;

1.5.3 this is followed by the analysis of the impact of the Constitution on the ***sub judice*** rule; and

1.5.4 I conclude with some suggestions as to the manner in which the ***sub judice*** rule should now be applied, including areas in which the risk to the media is, in my view, greatest.

[1] Document recaptured electronically by the SANEF Office Administrator on 23 January 2006 for www.sanef.org.za

2 The constitutional right to freedom of expression

2.1 Section 16(1) of the Constitution of the Republic of South Africa, 1996 **("the Constitution")** provides as follows:

"Everyone has the right to freedom of expression, which includes-

(a) freedom of the press and other media;
(b) freedom to receive or impact information or ideas;
(c) freedom of artistic creativity; and
(d) academic freedom and freedom of scientific research."

2.2 The right to freedom of expression is fundamental to a constitutional democracy. the importance of this right has been recognized in a number of decisions of our Constitutional Court (see, for example, *South African National Defence Union v Minister of Defence and Another* 1999 (4) SA 468 (CC) at para 7; *Khumalo and Others v Holomisa* 2002 (5) SA 401(CC)). Freedom of the press and other media is specifically protected in section 16(1)(a) of the Constitution. This is a recognition of the specially important role that the media play in furthering the interest of freedom of expression. As O'Regan J stated in *Khumalo v Holomisa* at paras 22-4:

"The print, broadcast and electronic media have a particular role in the protection of freedom of expression in our society. Every citizen has the right to freedom of the press and the media and the right to receive information and ideas. The media are key agents in ensuring that these aspects of the right to freedom of information are respected. the ability of each citizen to be a responsible and effective member of our society depends upon the manner in which the media carry out their constitutional mandate. As Deane J stated in the High Court of Australia,

'…the freedom of the citizen to engage in significant political communication and discussion is largely dependent upon the freedom of the media.'

The media thus rely on freedom of expression and must foster it. In this sense, they are both bearers of rights and bearers of constitutional obligations in relation to freedom of expression.

Furthermore, the media are important agents in ensuring that government is open, responsive and accountable to the people as the founding values of our Constitution require. As Joffe J said in **Government of the Republic of South Africa v 'Sunday Times' Newspaper and Another 1995 (2) SA 221 1-228 A:**

'It is the function of the press to ferret out corruption, dishonestly and graft wherever it may occur and to expose the perpetrators. The press must reveal dishonest mal- and inept administration….It must advance communication between the governed and those who govern.'

In a democratic society, then, the mass media play a role of undeniable importance. They bear an obligation to provide citizens both with information and with a platform for the exchange of ideas which is crucial to the development of a democratic culture. As primary agents of the dissemination of information and ideas, they are, inevitably, extremely powerful institutions in a democracy and they have a constitutional duty to act with vigour, courage, integrity and responsibility. The manner in which the media carry out their constitutional mandate will have a significant impact on the development of our democratic society. If the media are scrupulous and reliable in the performance of their constitutional obligations, they will invigorate and strengthen our fledgling democracy. If they

vacillate in their performance of their duties, the constitutional goals will be imperiled. The Constitution thus assists and protects the media in the performance of their obligations to the broader society, principally through the provisions of s 16."

2.3 O' Regan J on to note the following proviso at para 25:

"*However, although freedom of expression is fundamental to our democratic society, it is not a paramount value. It must be constructed in the context of the other values enshrined in our Constitution. In particular, the values of human dignity, freedom and equality."*

(See also *S v Mamabolo (E.TV and others intervening)* 2001 (3) SA 409 (CC) at paras 40-41)).

2.4 The value of investigative journalism is important in a discussion of the ***sub judice*** rule. This value has been recognised by our courts. For example, Holomisa v Argus Newspapers Limited 1996 (2) SA 588 (W) Cameron J remarked as follows at 608-9:

"In a system of democracy dedicated to openness and accountability, as ours is, the especially important role of the media, both publicly and privately owned, must in my view be recognised. The success of our constitutional venture depends upon robust criticism of the exercise of power. This requires alert and critical citizens. But strong and independent newspapers, journals and broadcast media are needed, if those criticisms are to be effectively voiced, and if they are to be informed with the factual content and critical perspectives that investigative journalism may provide…*"*

2.5 It is important to note that none of the rights enshrined in the Constitution are absolute. All rights may be limited, provided that this occurs in a manner which complies with the limitations clause. The limitations clause is section 36(1) of the Constitution, which provides that:

"*The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including-*

(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose;
(e) less restrictive means to achieve the purpose."

2.6 The application of the limitations clauses essentially involves a balancing of the impact on persons' rights against the benefit sought to be achieved by the infringements (*S v Makwanyane and Another* 1995 (3) SA 391 (CC) at para 104; and *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC) at para 34-35).

2.7 Section 39(2) of the Constitution is also important for our purposes. This section provides that when a court (or other tribunal) develops the common law, it must promote the spirit, purpot and objects of the Bill of Rights (Chapter 2 of the Constitution). In other words, a count should ensure that the common law (including the ***sub judice*** rule) is consistent with the fundamental rights set out in the Bill of Rights.

3. The crime of contempt of court and the *sub judice* rule

3.1 The crime of contempt of court consists of a number of prohibitions aimed at protecting the administration of justice. Contempt of court has been defined as follows:

[U]nlawfully and intentionally violating the dignity, repute or authority of a judicial body or interfering in the administration of justice in a matter pending before it."

(Burchell and Milton *Principles of Criminal Law* 2nd at. (1997) at 693. I note, however, that intention is not always a prerequisite for contempt of court (see below at paragraph 4.4 below)).

3.2 The crime of contempt of court can be divided into two broad categories:

3.2.1 contempt *in facie curiae* (in the face of the court), which must take place in the presence of the court while it is sitting (e.g. threatening the judge or being drunk in court); and

3.2.2 contempt *ex facie curiae* (out of court).

3.3 The latter category of contempt of court includes:

3.3.1 publications which violate the dignity, repute or authority of the court (either by criticizing or insulting a particular judicial officer or the judicial system as a whole). This crime is known as scandalizing the court;
and

3.3.2 statements which prejudice the administration of justice in pending proceedings (i.e. the ***sub judice*** rule).

3.4 The ***sub judice*** rule therefore applies to "pending" proceedings. Criminal proceedings are probably pending from the moment they have commenced (e.g. by arrest, summons or a warning to appear). Civil proceedings are pending from the time that summons is issued or an application is launched (Bruchell and Milton at 697) Proceedings remain pending until all appeals have been exhausted or the time period for the lodging of an appeal has expired (*R v Davies*: *Ex Parte Delbert Evans* [1945] 2 All ER 167). Nevertheless, I note that our courts are generally prepared to give greater latitude in relation to statements that are published after the initial matter has been decided by a court but while an appeal is being pursued (see *Kelsey Stuart's Newspaperman's Guide to the Law* 5th ed. (1990) at 107).

3.5 It is important, at the outset, to also note that the ***sub judice*** rule applies to both criminal and civil proceedings.

3.6 The rationales that are generally advanced for the ***sub judice*** rule are as follows:

3.6.1 it protects participants in the legal proceedings from improper communications (Hill '***Sub judice*** in South Africa: Time for a change" (2001) 17 *SAJHR* 565 at 566-8). It is said to protect judicial officers and witnesses from being influenced (or being perceived to be influenced) by statements that appear in the media. In a criminal context, the ***sub judice*** rule protects an accused's right to a fair trial (entrenched in section 35 of the Constitution), while in

a civil context it arguably protects the rights of the parties to a hearing (section 34 of the Constitution); and

3.6.2 it protects the institutional position of the courts as the forum for the adjudication of legal disputes, and guards against "trial by media" (Burchell and Milton 697). The idea is that once a matter is before the courts, it is for the courts to adjudicate thereon. The concern is that the public's confidence in the judicial system may be undermined if a court comes to a different conclusion to that which the media coverage suggests the conclusion should be (see Hill at 568-9).

4. The *sub judice* rule prior to the Constitution

4.1 *The common law test for a breach of the **sub judice** rule is "whether the statement or document in issue tends to prejudice or interfere with the administration of justice in a pending proceeding" (S V Van Niekerk 1972 (3) SA 711 (A) at 724).*

4.2 This test only requires a "tendency" to prejudice the administration of justice. It does not require a more rigorous factual test such as a "real likelihood" or a "substantial risk" of prejudice (in fact, the test in English law of a "real risk" of undermining the administration of justice was expressly rejected by the Appellate Division in *S v Harber and Another* 1998 (3) SA 396 (A) at 421).

4.3 The manner in which the Appellate Division applied the ***sub judice*** rule in *S v Van Niekerk* made the rule even more restrictive. The Court held that it does not matter whether the judicial officer is likely to know of the publication or that it is likely, as a matter of fact, to affect his or her judgement. The test rather operates as follows:

4.3.1 one must assume that the judicial officer becomes aware of the statement at the time of deciding the matter (this effectively removes any argument that a particular publication would not in fact be read by a judicial officer or that a significant amount of time may pass between the publication and the adjudication of the matter);

4.3.2 assume that the judicial officer accepted the publication to be true; and

4.3.3 then ask whether the publication "might" have influenced the matter (*S v Van Niekerk* at 724-5).

4.4 In terms of the common law, the mental element for a breach of the ***sub judice*** rule by an editor or a publisher is negligence. In other words, the media will be liable if it negligently or intentionally publishes a statement which tends to prejudice the administration of justice (*S v Harber).*

5. The impact of the Constitution on the *sub judice* rule

5.1 The common law test for the ***sub judice*** rule laid down by the Appellate Division in Van Niekerk's case and Harber's case would, in my view, not pass muster under the Constitution. It goes too far in protecting potential threats to the administration of justice at the expense of the constitutional right to freedom of expression. It is objectional because it does not require actual harm (or some real risk of harm) to the administration of justice. This is not "a reasonable and justifiable" limit on freedom of expression for purposes of the Constitution's limitations clauses (see above at paragraph 2.5).

5.2 This conclusion is supported by the following considerations:

5.2.1 the formulation of the ***sub judice*** rule in our common law is more restrictive than the prohibitions found in other democratic countries. For example, in the United Kingdom the general test is whether there is "*a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudice"* (section 2(2) of the Contempt of Court Act, 1981); in Canada it is whether there is "*a substantial risk of prejudiced"* (*Dagenais v Canadian Broadcasting Corporation* [1994] 3 SCR 835); and in the United States the question is whether is a "*clear and present danger of serious prejudice"* (*Bridges v California* 314 US 252 (1941));

5.2.2 in the context of the crime of scandalizing the court, the Constitutional Court in *S v Mamabolo* held that the similarly-phrased common law crime of scandalizing the court (namely, the statement "tends" to prejudice the administration of justice) did not reflect a proper balance between freedom of expression and the administration of justice, as required under the Constitution. This case is discussed in more detail below;

5.2.3 the common law test of ***sub judice*** has been criticized by a number of academic writers (Dugard "Judges, academics and unjust law – the *Van Niekerk* contempt case" 1972 (89) SALJ 271; Hill, *op cit;* Cleaver "Ruling without reasons: Contempt of court and the ***sub judice*** rule" (1993) 110 SALJ 530; Marcus and Spitz "Expression" in *Constitutional Law of South Africa* Chaskalson *et al* eds. (1998) at 20-40 to 20-41). As Hill states at 588-9:

[T]he limitations on freedom of expression currently permitted by the ***sub judice*** *doctrine are not 'reasonable and justifiable' for the purposes of s 36 of the Constitution. The limitations are so stringent that it is possible that they in fact undermine rather than promote, the due administration of justice. This is so even in the case of criminal proceedings, where the claims in favour if restricting speech are the highest. Here, as judges determined the facts (sometimes with assessors) the chance that outside comments will prejudice pending proceedings is greatly reduced. Moreover, the nature and extent of these limitations seemed to be contrary to open and accountable government provided for by the Constitution".*

5.3 This constitution is also consistent with the approach of the European Court of Human Rights **("the ECHR")** in *The Sunday Times v United Kingdom* ECHR, Series A, vol.30 (1976). This case arose in the context of an article in the *Sunday Times* which discussed the issues relating to class action litigation between the parents of children born with deformities as a result of the use of the drug Thalidomide, and the manufacturer of the drug. The article examined the evidence, effectively concluded that the drug had caused the deformities and suggested that there was a strong case of negligence on the part of the manufacturer. The House of Lords in *Attorney-General v Times Newspapers Limited* [1974] AC 273, held that any publication which pre-judged the issues in pending proceedings automatically amounted to contempt of court (the so-called pre-judgment rule). The majority of the ECHR (by a majority of 11 judges to 9), however, held that the pre-judgment rule was a disproportionate interference with the right to freedom of expression contained in Article 10(1) of the European Convention on Human Rights, 1950. This was despite the fact that Article 10(2) specifically contemplates restrictions on the right to freedom of expression where necessary for *"maintaining the authority and impartiality of the judiciary".* The ECHR held that the pre-judgment rule violated the Convention because it prohibited a publication expressed in moderate terms, which gave a balance account of the evidences and was on a matter of undisputed public concern.

5.4 Although our courts will probably hold that the common law test does not adequately protect the right to freedom of expression, they are unlikely to abandon the ***sub judice*** rule altogether. Our courts are rather likely to re-formulate the rule in accordance with the provisions of the Constitution. In my view, such an approach is consistent with the requirements of the Constitution. Despite the fact that we do not have a jury system, our courts are likely to hold that a criminal prohibition on publications which prejudice the administration of justice is a reasonable and justifiable limitation on the right to freedom of expression (Burchell and Milton at 698 express the same view). This conclusion is consistent with the fact that all legal jurisdictions of which I am aware contain some form of prohibition on the publication of material which prejudices legal proceedings.

5.5 The crucial question is then what rule of ***sub judice*** our courts will fashion in the light of the Constitution. In considering this question, the approach of the Constitutional Court in *Mamabolo's* case provides guidance.

5.6 In *Mamabolo's* case the Constitutional Court considered whether the retention of the crime of scandalizing the court was consistent with the Constitution and, if so, what form that crime should take. While the Constitutional Court in the case acknowledged the importance in a democratic society of robust criticism of the judiciary, it held that the crime of scandalizing the court amounted to a reasonable and justifiable limitation on the right to freedom of expression. In coming to this conclusion, the court relied on, amongst other things, the need to protect the "moral authority" of the courts, the rule of law and section 165 of the Constitution, which provides that organs of state must assist and protect the courts to ensure their independence, impartiality and dignity. Kriegler J, writing on behalf of the majority of the Constitutional Court, rejected the common law "tendency test" and re-formulated the test for scandalizing the court in the following terms:

Ultimately the test is whether the offending conduct viewed contextually, really was likely to damage the administration of justice." (para 45)

(In his separate, concurring judgment Sachs J said that this form of contempt of court should arise if "*the expression is likely to have an impact of a sufficiently serious and substantial nature as to pose a real and direct threat to the administration of justice*" (para75).)

5.7 In other words, the Constitutional Court, in principle, upheld the crime of scandalizing the court, but developed it in light of the Constitution. The common law test thus changed from whether the statement "tends" to prejudice the administration of justice to whether the statement is "really likely" to have that effect.

5.8 In my opinion, our courts are likely to adopt a similar approach in relation to the ***sub judic****e* rule. While the precise formulation of the test is unclear, it seems to me that the ***sub judice*** rule is only breached if there is a real likelihood that the administration of justice in the relevant proceedings will be seriously undermined. If this approach is adopted, it calls for a consideration of two issues: (a) is there a *real likelihood* of prejudicing the administration of justice? and (b) if the risk materializes, will it result in *serious* prejudice? The Court of Appeal in the UK has described these two components as "the risk limb" and "the seriousness limb", respectively (*Attorney-General v News Group Newspapers Limited* [1987] QB 1 at 15).

5.9 I note that such a test is similar to that contained in the United Kingdom's Contempt of Court Act. This Act provides for strict liability in relating to active proceedings for a publication which "*creates a substantial risk that the course of justice in the proceedings…will be seriously impeded or prejudiced*" (section 2).

6. The application of the ***sub judice*** rule

6.1 As stated above, in my view and in light of the Constitution, the test for ***sub judice*** now requires some measures of factual enquiry as to whether the publication of the statement is likely to undermine the administration of justice in a serious manner. This will depend on all the circumstances surrounding the publication.

6.2 Our courts should therefore take into account factors such as the extent of the publication and the length of time between the publication and the adjudication of the civil or criminal proceedings, in deciding whether the test is met.

6.3 The English case of *Attorney-General v Independent Television News Limited and Others* [1995] 2 All ER 370 illustrates the point. In this case, two Irishmen were arrested for murder and for the attempted murder of a policeman. The fact of their arrest and the fact that the one arrested man was a convicted IRA terrorist who had escaped from a Belfast jail, were broadcast on ITV News and were published in several newspapers. The jury trial was to take place nine months later. In a prosecution of the media entities for breaching the ***sub judice*** rule, the court took into account the delay prior to the trial and the limited nature of each publication, in holding that it had not been shown that the publications created a substantial risk of prejudice to the administration of justice.

6.4 In addition, in light of the fact that South Africa does not have a jury system, our courts should not easily come to the conclusion that the publication of material is likely to influence the outcome of the proceedings. One reason for this is that judicial officers are required to provide judgments in which they explain their decisions, while juries are not. In addition, the legal training and experience of, for example, a judge makes it less likely that he or she will be influenced by the media reports relating to events taking place outside the court (see Dugard at 271).

6.5 I now turn to consider common areas in which the risk of prosecution (and conviction) for breach of ***sub judice*** is, in my view, highest. In this regard, I must emphasise that this is not a closed list and that it is difficult to lay down general guidelines. Each case will depend on its particular facts.

6.6 admissions and confessions

6.6.1 The Criminal Procedure Act, 1997 sets out detailed requirements for the admissibility of admissions and confessions. If a confession is published and the accused subsequently pleads guilty, there is a risk of the public perceiving that justice has not been done. In addition, the publication of confessions (and often admissions) prejudges the guilt of the accused.

6.6.2 There is thus a real risk that the publication of a confession or admission will amount to contempt of court in breach of the ***sub judice*** rule. In this regard, I am aware of a number of recent incidents where the media has refrained from publishing the fact of a confession after the suspect has been arrested.

6.7 previous convictions

6.7.1 There have been a number of recent instances where the media have published the previous convictions of a suspect at the time of his or her arrest. Such publication will usually fall foul of the ***sub judice*** rule.

6.7.2 One reason for this is that the previous convictions of an accused are inadmissible in assessing the guilt or innocence of an accused. Previous convictions are only admissible after a conviction, for purposes of sentencing.

6.7.3 In light of the fact that, on the approach advocated above, the breach of ***sub judice*** will depend on whether the prosecution has proved that the publication created a substantial risk to the administration of justice, the publication of previous convictions will not always contravene this rule. For example, if a person is arrested whom it is well known has previous convictions (e.g. Eugene Terreblanche), it cannot be said that the publication of the fact that such person has previous convictions undermines the administration of justice.

6.7.4 A recent example of a case where the publication of previous convictions did not sustain a conviction for breach of ***sub judice*** was the Canadian decision of the Court of Appeal of *Alberta v The Edmonton Sun* 2003 ABCA 3. This case related to the publication of the fact that a man had recently been convicted for assaulting his step-son, which publication took place shortly after his arrest for the murder of the same child. The step-son had recently been returned to the care of the man by the social services department. The edition of the newspaper that contained the relevant article was not delivered to homes in the areas where the offence had occurred and where the trial would be held (and from which the jury would be drawn). The court held that, having regard to a list of relevant factors (including the delay prior to the trial-a period of a year – and the limited publication in the area from which a jury was likely to be chosen), the publication did not give rise to a "*a real and substantial risk*" to the course of justice. Nevertheless, McFadyne J emphasized that this conclusion was based on the particular facts of this case. At para 64 she sounded the following note of caution in relation to the publication of previous convictions:

"*There is no doubt that the disclosure of details an accused's past criminal conduct may operate unfairly because of the tendency to assume that a person with a criminal record is more likely to commit a criminal offence… Publication of the criminal record of an accused who is not at large and does not pose a danger to the community may even be a* prima facie *contempt of court… Any such publication may create a real and substantial risk to the course of justice.*"

6.7.5 It is unclear whether our courts will allow as much latitude for the publication of previous convictions as the court in the *Edmonton Sun* case. Nevertheless, this case illustrates that one needs to take all relevant factors into consideration in assessing whether the particular publication is likely to prejudice pending proceedings.

6.8 **prejudgment**

6.8.1 Even under the common law prior to the Constitution, our courts rejected the "prejudgment" rule (i.e. the rule that a publication which prejudges issues that are pending before a court automatically amounts to a breach of ***sub judices***) (*S v Harber* at 421).

6.8.2 Nevertheless, publication which prejudge the guilt or innocence of an accused (or the merits of a civil case) are often likely to fall foul of the ***sub judice*** rule. The media should generally refrain from drawing conclusions as to the merits of a particular matter that is pending before the courts. Once a matter is pending, "trial by media" should thus be avoided. In addition, one should generally avoid publishing eye witness accounts which prejudge guilt (e.g. "I saw Joe Soap stab her in broad daylight").

6.8.3 Nevertheless, the decision of the ECHR in the *Sunday Times* case suggests that the discussion of the merits of a pending matter in moderate terms, which gives a balanced account of the evidence and which is on a matter of public concern, will not contravene the ***sub judic****e* rule.

6.9 **witness statements**

It is often said that the publication of witness statements before the witness gives evidence in court breaches the ***sub judice*** rule. This rule is, however, not generally observed, and the risk of prosecution in relation to such statements is probably somewhat lower than the other areas discussed here.

6.10 **secret tenders, payments into court and settlement offers**

The details of secret tenders made into court, payments into court and offers to settle litigation are generally inadmissible in court (Kelsey Stuart at 105). The publication of this material may well prejudice one or both parties to the proceedings, and should be avoided.

6.11 I note that members of the media occasionally adopt the approach of information the police prior to the publication of material which shows that an offence has been committed (e.g. the *Special Assignment* broadcast of the footage relating to the abuse of illegal aliens by the East Rand Dog Unit). This is often done with the purpose of ensuring that the perpetrators do not abscond following the publication and thereby evade arrest. In such circumstances, the publication of the material often clearly prejudges an issue before the court (e.g. in the case of the East Rand Dog Unit, the accused persons were shown actually committing the offence). There is thus a technical risk of a contravention of the ***sub judice*** rule in such circumstances. Nevertheless, it seems to me that the risk of prosecution in such circumstances is low, since prosecutors would not wish to discourage investigative journalism which leads to the arrest of perpetrators as well as the responsible conduct of the media in approaching the police prior to the publication.

7. **A possible public interest defence**

7.1 The public interest is not ordinarily a defence to a criminal offence in our law. In my view a good argument can, however, be made that the public interest can now be used to justify the publication of material which creates a likelihood of prejudicing the administration of justice in pending proceedings. The recognition of such a defence would be consistent with the constitutional protection of freedom of expression.

7.2 This is, for example, the position under the UK's Contempt of Court Act, which provides that one has a defence if one publishes material that creates a substantial risk of impending the administration of justice if that effect is "*merely incidental*" to a "*discussion in good faith of public affairs or other matters of general public interest*" (section 5). This defence was raised in the case of *Attorney-General v English* [1983]

1 AC 116. This case related to the publication of an editorial in the *Daily Mail* in support of a handicapped, pro-life candidate who was running in a by-election to be held shortly after the publication. The candidate was opposed to what was perceived to be a practice of handicapped babies being left to die if medical staff considered that their lives would be intolerable. The editorial stated that it was a good thing that she had not been born at that time as "*someone would surely have recommended letting her die of starvation, or otherwise disposing of her*". This was published at the same time as a doctor was on trial for allegedly leaving a Down's syndrome baby to die in similar circumstances. The court held that, although the editorial was likely to prejudice the administration of justice in the doctors' trial (and would otherwise amount to contempt of court), the public interest defence applied and the newspaper was thus acquitted.

7.3 A similar public interest defence to ***sub judice*** was upheld by Berger J, who wrote a separate, concurring judgment in the Canadian case of *Edmonton Sun* (discussed above as paragraph 6.7.4). In light of the fact that the social services department had returned the accused's step-son to his care shortly before the child's murder, there was a public interest in questioning the effectiveness of social services' functioning. At para 112 Berger quoted with approval the following statement of the Australian court in *Ex parte Bread manufacturers Limited; Re Truth and Sportsman Limited* (1937) 37 S.R. (NSW) 242:

"*But the administration of justice, important though it undoubtedly is, is not the only matter in which the public is vitally interested; and if in the course of the ventilation of a question of public concern matter is published which may prejudice a party in the conduct of a law suit, it does not follow that a contempt has been committed. The case may be one in which as between competing matters of public interest the possibility of prejudice to a litigant may be required to yield to other and superior considerations. The discussion of public affairs and the denunciation of public abuses, actual or supposed, cannot be required to be suspended merely because the discussion or the denunciation may, as an incidental but not intended by-product, cause some likelihood of prejudice to a person who happens at the time to be a litigant.*

It is well settled that a person cannot be prevented by process of contempt from continuing to discuss publicly a matter which may fairly be regarded as one of public interest, by reason merely of the fact that the matter in question has become the subject of litigation, or that person whose conduct is being publicly criticized has become a party to litigation either as plaintiff or as defendant, and whether in relation to the matter which is under discussion or with respect to some other matter." (our emphasis)

7.4 Some authority for a public interest defence may also be found in South African law in the decision of the Transvaal Provincial Division in *Dunston NO v Transvaal Chronicle Limited and Sampson* 1913 tpd 557 at 559:

"*A matter may be of such public interest that the newspapers are entitled to discuss it on its merits. It may be of such public interest that the voice of the newspaper cannot be silenced because the matter is the subject of legal proceedings.*"

(See Kelsey Stuart at 104. See also, albeit in a different context, *Romeo v Gauteng Newspapers Limited and Others* 2002 (2) SA 431 (W) at 44).

7.5 If a public interest defence to ***sub judice*** is accepted in our law, it would be arguable, for example, that much of the recent reporting on allegations relating to the conduct of the Deputy President with regards to the Arms Deal, is not in breach of the ***sub judice*** rule, notwithstanding the fact that it may impact on Schabir Shaik's trial. There is a compelling public interest in allegations that the Deputy President may have involved in corruption.

7.6 It should, however, be noted that our courts are likely to adopt a stricter approach to the public interest requirement than that suggested in the *Edmond Sun* case. This is reflected in the recent decision of the Supreme Court of Appeal in *Independent Newspapers Holdings Limited and Others v Suliman* (unreported decision of the SCA handed down on 28 May 2004 under case no. 49/2003). In this case, the majority of the SCA held, in the context of a defamation claim, that there is generally no public interest in identifying a person who has been arrested before he or she is charged and appears in court(para 47). Marais JA, writing on behalf of the majority of the SCA, indicated that exceptions may, however, apply in relation to the arrest of a person who is a danger to the public or a person who occupies a public office the nature of which suggests that he or she should be free of even suspicion (such as a judge) (paras 45-6). The naming of the Members of Parliament arrested in the recent Travelgate saga may well fall into the latter category.

7.7 It should also be noted that the public interest defence would generally not apply where the public interest that is served by the publication is the narrow public interest in exposing the wrongdoing that is the subject of the criminal or civil proceedings. The public interest must be found in some other aspect of the matter. For example, one cannot argue that the public interest in exposing Mr Soap as a murder justifies the publication of evidence of this fact after Mr Soap's arrest for murder. It is this very type of trial by media that the ***sub judice*** rule seeks to prohibit. As Feldman *Civil Liberties and Human Rights in England and Wales* 2nd ed. (2002), discussing the public interest exception law, states at 986:

"*The main [limit on the public interest exception] is that an article or programme which sets out to expose the behaviour of a particular person, who is a party to active proceedings, will constitute…contempt, as the prejudice will…be the direct result of the main thrust of the article, rather than an incidental effect of a discussion of some other matter of general public importance.*"

8. The application of the *sub judice* rule where proceedings are not pending

8.1 Certain authors suggest that one can breach the ***sub judice*** rule not only when legal proceedings are "pending" but also when they are "imminent". As Kelsey Stuart explains at 106:

"*In particular circumstances, the mere statement by the police that they are hot on the trail of an offender may not fulfill the requirement that legal proceedings are pending. There can, however, obviously be other circumstances where such a statement by the police should be taken very seriously indeed as an indication that legal proceedings are pending and that the publication of matter relevant to those proceedings would amount to contempt of court.*"

8.2 The position under the English common law is that a breach of the ***sub judice*** rule may arise before proceedings are "imminent". Proceedings are said to be imminent "*when there is a likelihood or a real risk that they will be instituted in the near future and when there is a real risk that the kind of publication as here would interfere with the course of justice*" (*Attorney-General v News Group Newspapers plc* [1989] QB 110 at 132). Nevertheless, the effect of section 6 of the UK Contempt of Court Act is that this common law position will only apply where one *intends* to impede or prejudice the administration of justice.

8.3 In my view, however, our courts will probably not accept an extension of the ***sub judice*** rule beyond the time when proceedings are pending. Such an approach has the potential to undermine freedom of expression to too great a degree. It would, in particular, create difficulties for investigative journalism and may give rise to a "chilling effect" in which publication is avoided due to uncertainty as to

whether proceedings could be said to be imminent. Once one gives up the bright line between when proceedings are pending and when they are not, it becomes difficult to ascertain whether proceedings are imminent. Our courts should therefore adopt the position that the ***sub judice*** rule can only be breached where proceedings are pending.

8.4 A likely exception to this approach is where the publisher deliberately attempts to circumvent the ***sub judice*** rule by ensuring that proceedings only become pending after the publication of the relevant statements. This could be the case where, for example, a newspaper funds litigation (e.g. a private prosecution) and publishes an article dealing with the merits shortly before the proceedings are launched (see, for example, the English case of *Attorney-General v News Group Newspapers)* or where the newspaper agrees with the police that they will only arrest the suspect after the publication. In such a case, a court may hold that the proceedings were, in substance, pending at the time of the publication.

9. Conclusion

9.1 The views expressed in this note may be summarised as follows:

9.1.1 the common law test for a breach of the ***sub judice*** rule that was established by the Appellate Division in the 1970's and 1980's probably does not comply with the right to freedom of expression under the Constitution;

9.1.2 our courts are, however, unlikely to adopt the approach that the offence of ***sub judice*** is, in principle, unconstitutional. They will rather retain the offence but develop it in light of the Constitution;

9.1.3 although the test that our courts will adopt cannot be predicted with any certainty, the ***sub judice*** will, in my view, only be breached if the publication creates a real likelihood that the administration of justice in the proceedings will be seriously prejudiced;

9.1.4 the high risk areas that arise often in practice in relation to the ***sub judice*** rule are the publication of: admissions and confessions; previous convictions; statements which prejudge the matter; and secret payments into court, tenders and settlement offers;

9.1.5 our court will probably accept a public interest defence to the breach of the ***sub judice*** rule. The public interest must be found in something other than the exposure of the wrongdoing that is the subject of criminal or civil proceedings; and

9.1.6 although it is arguable that the ***sub judice*** rule can be breached where proceedings are not yet pending, our courts would probably not adopt such an approach. An exception to this is where the publisher deliberately attempts to circumvent the rule by ensuring that proceedings only become pending after the publication.

9.2 Finally, I reiterate that the law relating to the ***sub judice*** rule is currently very uncertain and that it is difficult to give a reliable indication of the approach that our courts will adopt to this issue under our constitutional dispensation. In addition, the question as to whether the rule is breached in any particular case will depend in large measure on the facts of that case. The examples used in this note are only intended to give some indication as to the manner in which it seems to me that our courts are likely to now approach the issue of ***sub judice***.

9.3 It should be emphasized that if a newspaper or broadcaster is in doubt as to whether a particular publication is contrary to the ***sub judice*** rule, it would be prudent to obtain legal advice on the particular issue.

Please do not hesitate to contact me should you have any queries relating to this note.

Yours sincerely

GLENN PENFOLD

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WEBBER WENTZEL BOWENS