A NOT SO QUIET REVOLUTION[1]

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1 Introduction

The inspiration for this paper stems from the unprecedented media coverage surrounding the legal process in relation to *Oscar Pistorius*. Overnight South Africa's criminal justice system became a world-spectacle, highlighting the realities of an era engulfed by modern communication and its plethora of mediums. Evidence was made public, live-feed flowed from the court, the news was saturated, the public was encapsulated, and the presiding officer issued warnings to the media. Despite this, the assertion that the media has no impact on presiding officers is strongly asserted. Deliberately ignoring the potential influence and failing to scrutinise the relationship between the media and the legal process, means we will never understand the impact the media may have on the criminal trial and on our presiding officers.

The above prompted a reconsideration of the ruling in *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)* ("Midi").[2] This paper is only concerned with the judicial evaluation of one right in relation to contempt law in South Africa.[3] The rule under consideration is the *sub judice* rule,[4] and the right at issue is freedom of expression.[5] Whenever "pre-eminence" is used in this paper, it is in the above context that the word is used. This paper does not advocate a blanket

[1] The title of this paper is borrowed and adapted from D Milo & P Stein "The Quiet Revolution for Freedom of the Press" (28-05-2007) *Legal Brief* <http://www.legalbrief.co.za/article.php?story=20070528163021109> (accessed 10-06-2013).
[2] *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)* 2007 2 SACR 493 (SCA).
[3] Judicial as opposed to Executive or Legislative views on the matter, which may at times be contrasted to the former, see: Film and Publication Amendment Bill B27-2006 in *GG* 29169 of 31-8-2006; the Protection of Information Bill B28-2008 in *GG* 30885 of 18-3-2008; Protection of Personal Information Bill B9-2009 in *GG* 32495 of 14-9-2009.
[4] A specific rule within the broader contempt law, concerning contempt's *ex facie curiae* with reference to pending judicial proceedings and potentially prejudicial publications.
[5] S 16(1) of the Constitution of the Republic of South Africa, 1996 (the "Constitution"), states that: "Everyone has the right to freedom of expression, which includes: (a) freedom of the press and other media; (b) freedom to receive or impart information or ideas; (c) freedom of artistic creativity; and (d) academic freedom and freedom of scientific research". S 16 is a qualified right and contains an internal modifier in s 16(2): "The right in subsection (1) does not extend to (a) propaganda for war; (b) incitement of imminent violence; or (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm".

ban on freedom of expression, nor does it argue that restrictions are pre-requisites for justice. A more nuanced and pragmatic understanding of the issue is needed, instead of the standard view of the need for unhindered free speech and censorship law being malevolent.

Democratic governments are built on the fundamental premise and assumption that more, rather than less, information is necessary to achieve democratic values and goals. This paper aims to highlight a trend, or "quiet revolution," within contempt law toward judicial favouritism of freedom of expression at the expense of other equally important rights.[6] Despite the assertion that all rights are equal and no right is absolute,[7] freedom of expression is becoming a pre-eminent right. This revolution or favouritism can be attributed to historical reasons, judicial behaviour, the legal methodology used by our courts and a complete disregard to scrutinise the media's potential impact on the judiciary.

Not long before *Midi* was decided, the weight of opinion stated that the public interest in a fair and impartial trial must prevail over the public interest to comment on matters of topical importance, concluding that the *sub judice* rule is not unconstitutional even as it stood in its most unrefined form.[8] A critical analysis of *Midi* will illustrate how the *sub judice* rule has been obliterated[9] as a result of the above tendencies and contributing factors.

Therefore this paper argues, in the field of contempt law, freedom of expression is becoming a pre-eminent right trumping others without adequate and reflective justification. This has been made possible through a historical interpretation or conception of the right and a cumulative effect of inadequate balancing as a method to deal with conflicts involving freedom of expression. This is best seen in *Midi*. As a result, a rule aimed at protecting another equally valuable right has been trumped by the pre-eminence of freedom of expression, a rule prior to *Midi, Oscar Pistorius* may have relied on. To begin assessing the validity of these propositions, a nuanced understanding of the right to freedom of expression is needed.

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[6] I Currie & J de Waal *The Bill of Rights Handbook* 5 ed (2005) 737-797.

[7] *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)* 2007 2 SACR 493 (SCA) para 9, 11: rights cannot be reconciled by purporting to weigh the value of one right against the value of the other and then preferring the right that is considered to be more valued, and jettisoning the other, because all protected rights have equal value.

[8] J Burchell & J Milton *Principles of Criminal Law* 3 ed (2005) 946 951.

[9] P De Vos "Don't Hide Behind (Non-Existent) Sub Judice Rule" (18-07-2011) *Constitutionally Speaking* <http://constitutionallyspeaking.co.za/dont-hide-behind-non-existent-sub-judice-rule/> (accessed 2-06-2013) where he states that the 'SCA in effect gutted the sub judice rule", it is "non-existent" and "effectively abolished".

2 Freedom of expression and its pre-eminence

Why is freedom of expression so important? It is often stated that freedom of expression plays an important role in the functioning of any democratic society,[10] that it is one of humanity's most cherished freedoms[11] and it is a hard won and precious asset.[12] The Constitution "represents an emphatic break with a past characterized by denial of human dignity, and commits South Africa to a transition to a new society characterised by a commitment to recognising the value of human beings",[13] and in this context, the right to freedom of expression has been described as an integral part within this transition.[14]

South Africa has emerged from a time where expression was subjected to severe restrictions,[15] thus underlining the need, or want, to protect freedom of expression in our new democracy all the more.[16] The importance of this right has been recognised in a number of decisions of our Constitutional Court (CC).[17]

Considering the impact of apartheid in relation to how freedom of expression is conceived as a right, it is evident then that there is a tendency to equate totalitarian, autocratic, dictatorial regimes and draconian censorship laws with a lack of freedom of expression.[18] It seems natural then that our judiciary would place emphasis on freedom of expression to perform this task: to encourage and solidify democracy. As a result, the conception of freedom of expression as a right is instinctively over-

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[10] D Eady & ATH Smith *Arlidge, Eady & Smith on Contempt* 2 ed (1999) 2-49.

[11] D Milo, G Penfold & A Stein "Freedom of Expression" in S Woolman, T Roux, M Bishop (eds) *Constitutional Law of South Africa* (2008) 42-14, referring to *Mandela v Falati* 1995 1 SA 251, 259 (W): "In a free society all freedoms are important, but they are not equally important. Political philosophers are agreed about the primacy of the freedom of speech. It is the freedom upon which all the other freedoms depend; it is the freedom without which the others would not long endure".

[12] B Van Niekerk *The Cloistered Virtue: Freedom of Speech and the Administration of Justice in the Western World* (1987) 149.

[13] S Hoctor "The Right to Freedom of Expression and the Criminal Law - The Journey Thus Far" (2005) 3 *Obiter* 461.

[14] 461.

[15] *Islamic Unity Convention v Independent Broadcasting Authority and Others* 2002 4 SA 294 (CC) para 25: "The restrictions that were placed on expression were not only a denial of democracy itself, but also exacerbated the impact of the systemic violations of other fundamental human rights in South Africa".

[16] *South African National Defence Union v Minister of Defence* 1999 6 BCLR 615 (CC) para 7: "It is valuable for many reasons, including its instrumental function as a guarantor of democracy".

[17] Aside from the above, see: *Khumalo and Others v Holomisa* 2002 5 SA 401 (CC); *Laugh It Off Promotions CC v SAB International (Finance) BV t/a SabMark International (Freedom of Expression Institute as Amicus Curiae)* 2006 1 SA 144 (CC); *Philips v Director of Public Prosecutions (Witwatersrand Local Division)* 2004 1 SA 345 (CC).

[18] Van Niekerk *The Cloistered Virtue* 7.

valued.[19] Granting freedom of expression special protection prevents interference with it in ways that would otherwise be considered reasonable.[20] This tendency is evident in the way the South African judiciary conceives of this right and their approach in dealing with it as a right.

Freedom of expression then is evidently a jealously protected right.[21] In supporting these claims, freedom of expression's pre-eminence has been justified in a number of other ways.[22] The search for truth, the functioning of a democracy, self-fulfillment, autonomy and liberty,[23] the furtherance of tolerance are some of the justifications or rationales given in support of its pre-eminence.[24] These justifications can be seen in the CC case of the *South African National Defence Union v Minister of Defence & Another* 1999 (4) SA 469 (CC).[25]

However the right to freedom of speech is justified, the essential point remains, that we grant

> "special protection to communicative activity which we do not grant to other activities, accepting the inevitable attendant harm to the public, because we believe that giving freedom of speech priority over the public interest serves certain fundamental values or goals".[26]

Despite the numerous justifications, it is not a given that the freedom of expression furthers these justifications.[27] Why then is expression given greater protection from interference than other forms of conduct?[28] Certain academics were unequivocally of the view, shortly before *Midi* was decided, that the *sub judice* rule, is not unconstitutional, and the limitation pursuant to it was justifiable: "the public interest in a fair and impartial trial must prevail over the public interest in comment on

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[19] 7.
[20] D Meyerson "Does the Constitutional Court of South Africa Take Rights Seriously - The Case of the S v Jordan" (2004) 138 *Acta Juridica* 141.
[21] Hoctor (2005) 3 *Obiter* 473: "thus it follows that the right to freedom of expression should be all the more zealously guarded by all who cherish freedom".
[22] Currie & De Waal (2005) 360-361: these purposes can be reduced to two justificatory grounds for the constitutional protection of freedom of expression: (i) the instrumental argument that the quality of government is improved when criticism is free and unfettered; and (ii) the constitutive argument that sees free speech as valuable because expression is an important part of what it means to be human.
[23] Hoctor (2005) 3 *Obiter* 462.
[24] Meyerson (2004) *Acta Juridica* 138 140.
[25] *South African National Defence Union v Minister of Defence & Another* 1999 4 SA 469 (CC) para 7; as well as *Phillips & Another v Director of Public Prosecutions, Witwatersrand Local Division & Others* 2003 3 SA 345 (CC) para 23.
[26] Meyerson (2004) *Acta Juridica* 138 140.
[27] Milo, Penfold & Stein "Freedom of Expression" in *CLOSA* 42-14.
[28] 42-14.

matters of topical importance".[29] The answer to the question posed in this section therefore lies in a combination of historical scepticism in relation to under-protecting the right, and a devotion to it as a reason for over-protecting the right in light of its various justifications.

Having considered the "why" question, it is now possible to move to the next question: "how". The next section deals with the fact that many constitutions protect freedom of expression, as well as the right to a fair trial and the administration of justice. This therefore warrants an enquiry into "how" these rights are to be dealt with when in conflict.[30]

In Nugent J's application to the Judicial Service Commission (JSC) for a position on the Constitutional Court, his judgement in *Midi* is described as:

> "a vital contribution to the balance between the right of freedom of speech and the right to a fair trial. It is an important judgment in demonstrating that no right is absolute and that all rights must be balanced against competing rights".[31]

Is this accurate? A better understanding of the balancing process is needed in order to test the accuracy of the above statement and provide an answer as to "how" freedom of expression has gained its pre-eminence.

3 Balancing and judicial favouritism as contributing factors to freedom of expression's pre-eminence

Is it better to be candid about the process and rank rights against each other?[32] Is it even possible to treat conflicting constitutional rights equally, or is a hierarchy of rights, formal or informal, an inevitable result?[33] Does the balancing of rights by way

[29] Hoctor (2005) 3 *Obiter* 467.
[30] Eady & Smith *Arlidge, Eady & Smith on Contempt* 49.
[31] Nugent JA "Judge Robert Nugent: The Joburg Bar Council's Assessment" (13-06-2012) *Politics Web* <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71619?oid=305581&sn=Detail&pid=71619> (accessed 15-08-2013).
[32] F Du Bois "Rights Trumped - Balancing in Constitutional Adjudication" (2004) 155 *Acta Juridica* 180.
[33] TL Banks "Balancing Competing Individual Constitutional Rights: Raising Some Questions" in PE Andrews & S Bazilli (eds) *Law and Rights: Global Perspectives on Constitutionalism and Governance* (2008) 28: "the German Constitutional Court in reconciling conflicting constitutional rights refers to the structural unity of its constitution applying the principle of practical concordance by which conflicting constitutional rights are harmonised and balanced so that each is preserved in creative tension with

of a proportionality test take the character of constitutional rights, as rights, seriously?[34] Is the unswerving commitment of our courts to balancing appropriate? Are our courts giving the correct weighting? Are we over-protecting freedom of expression at the expense of other rights? These are many questions linked to the same problem, the answers to which contribute to illuminating the pre-eminence of the right to freedom of expression. There are ways of testing the approach taken by a court in a specific instance of balancing but before testing if the method is worth its salt one must assess whether it is the desirable method to begin with. This section aims to show that balancing as a judicial tool to resolve conflicts of this nature may not be the best approach as it has the potential to give undue weight to certain rights and at the same time contribute to over-valuing certain rights. This is particularly worrying considering the expanded nature of the judiciary in our transitional democratic and constitutional state which increasingly falls back on such a method. The below will emphasise the contributing nature that a balancing enquiry has on the undervaluation of rights.[35]

The dynamic nature of constitutional democracy makes the management of competing values such as freedom of expression and fair trial rights difficult to prescribe. Conventional wisdom for the determination of priorities may change from place to place and time to time. It is quite possible that the choices that underlie today's conventional wisdom for determining compromises may themselves be overtaken by different circumstances.[36] The bias in favour of one constitutional value may often change in favour of another competing value as a result of re-appraisal and re-evaluation as and when the doctrines are put into practice.[37]

This paper argues that in South Africa's instance, it has not been a natural or gradual progression. Rather it has been an intentional favouring and ranking of freedom of expression over other rights. Our judiciary, in assessing the relationship

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one another. Thus there are no absolute rights. And the German Court in harmonising and balancing conflicting constitutional rights has created a de facto hierarchy of rights".

[34] Meyerson (2004) *Acta Juridica* 154: "if one compares the pragmatic approach in *Jordan's* case to the approach of the court in *S v Makwanyane* it is difficult to avoid the impression that the Bill of Rights is being applied selectively. In *Makwanyane* a principled approach was taken to the death penalty and the state was held to the highest standards of justification. In *Jordan*, by contrast, the state carries virtually no burden at all. The justices in *Jordan* take a legislative or political approach rather than a constitutional approach. I suggest that this amounts to a failure to take the Bill of Rights seriously".

[35] D Bilchitz "Does Balancing Adequately Capture the Nature of Rights?" (2010) 25 *Southern African Public Law* 442.

[36] M Addo "Freedom of Expression and the Criticism of Judges: A Comparative Study of European Legal Standards" (2000) 4-5.

[37] 4-5.

between conflicting liberal values, has time and again confirmed the privileged nature of freedom of expression.[38]

More than a decade into our democracy, it is accepted as a trite doctrine of Constitutional law that fundamental rights are capable of limitation. The limitation of rights and the way they are conceived has significant effects on what it means to have a right. Generally the method used in limiting a right is the "balancing approach".[39] The court places the purpose, effects and importance of infringing the right on the one side of the scale and the effect of the infringement on the other.[40] Not all infringements of rights are unconstitutional; if it can be justified in accordance with s36[41] of the Constitution it will be constitutionally valid. A limitation must therefore be justifiable, in that it must serve a purpose,[42] and linked to that there must be good reason for thinking that the restriction will achieve the purpose it is designed to achieve, as well as there being no other realistically available way in which the purpose can be achieved.[43]

The limitation clause does not translate into a standard limitation test, and the application and test itself depends on the circumstances, and on a case-by-case analysis.[44] Therefore the relevant factors[45] are not an exhaustive catalogue of what must be considered in the limitation enquiry, nor are they checklist of requirements. They are simply indicators as to the justifiability of the limitation. Once the court has examined each of the factors (none of which were properly considered in *Midi*) it must then weigh up what the factors have revealed about the purpose, effects and importance of the infringement on the one hand and the nature and effect of the infringement caused on the other.[46]

A court must therefore assess the importance of a particular right in the overall constitutional scheme. A right that is important to the constitution's ambition will carry

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[38] 10.
[39] Bilchitz (2010) *Southern African Public Law* 423.
[40] Currie & De Waal (2005) 177.
[41] S 36(1) "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". "(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights".
[42] Currie & De Waal (2005) 180-181: some important purposes which the CC has considered as legitimate in the context of a limitation analysis, is protecting the administration of justice at its broadest *S v Singo* 2002 4 SA 858 (CC); the prevention, detection, investigation and prosecution of crime generally *S v Mbatha*; *S v Prinsloo* 1996 2 SA 464 (CC) and *S v Manamela* 2000 3 SA 1 (CC).
[43] Currie & De Waal (2005) 164.
[44] 177.
[45] S 36(1): (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.
[46] Currie & De Waal (2005) 178.

a great deal of weight.[47] Here it becomes evident, in light of the discussion above in the first section, that this is where freedom of expression curries favour. The court is also obliged to assess the way in which the limitation affects the right concerned in that it must assess whether the limitation is a serious or minor infringement of the right. In essence, the law should not use a ‘sledgehammer to crack a nut”.[48] Therefore, how does the public’s right to view a documentary intrinsically triumph over the right to a fair trial and administration of justice? Was the rejection, and stretch to alter a common law rule, of the Director of Public Prosecutions (DPP) request to view the tape a sledgehammer in relation to a less restrictive compromise of prior viewing (perhaps by an impartial body)?

In their chapter on “Limitations” Stu Woolman & Henk Botha, in Woolman, Roux, Klaaren, Stein, Chaskalson and Bishop 2 ed *Constitutional law of South Africa* (2006) ch 34,[49] criticise not only the form of the balancing enquiry undertaken in the South African limitations analysis but also the foundational idea that rights can and should be balanced.[50] Even if the balancing enquiry does not give rights priority over competing principles, as is argued, it is capable of giving them unwarranted additional weight.[51] There are institutional difficulties involved in accurate balancing. In certain circumstances, judges might be subjectively predisposed to underestimate the strength of certain rights and find ways to justifiably over-protect other rights.[52]

In a transformative legal system like ours, there are new types of rules which do not simply aim to prescribe individual behaviour; they pursue much more ambitious goals, seeking to shape collective conduct and direct individuals and groups toward

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[47] 178.

[48] *S v Manamela* 2000 3 SA 1 (CC) para 34.

[49] I Currie “Balancing and the Limitation of Rights in the South African Constitution” (2010) 2 *South African Public Law* 25 412-141: balancing has principal defects and the continued deployment in limitation analysis of this “bad metaphor” leads limitation jurisprudence seriously astray: (a) *Incommensurability* - the metaphor of “balancing” and its partner “weighing up” suggest that rights and the public interest in their limitation are commensurable, measurable by the same metric (b) *Subjectivity and Arbitrariness* - the absence of an objective, external metric for the comparison and ordering of competing values creates the danger of subjectivism, that judges will use their own personal metric when balancing.

[50] 412.

[51] *Laugh It Off Promotions CC v SAB International (Finance) BV t/a SabMark International (Freedom of Expression Institute as Amicus Curiae)* 2006 1 SA 144 (CC) para 48: the protection of trademarks must be curtailed to the least intrusive means necessary to achieve its purposes and must be restricted to the scope least destructive of and most compatible with free expression. This is not mere balancing. The least-destructive means test is meant to put a thumb on the scales on the side of free expression.

[52] Bilchitz (2010) *Southern African Public Law* 442 431.

social and economic objectives such as affirmative action policies or increasing the value of freedom of expression in a society previously devoid of the luxury.[53]

What emerges is an instrumental and promotional function of the law, which is conceived as fostering social change and implementing public policies.[54] This is evident in the historical references made in instances of bestowing freedom of expression a higher status, as shown above. Because judges are often educated under formalistic[55] legal doctrines, they may not be well equipped to perform the new tasks required as a result of the expansion of their functions.[56] When courts cannot see a connection with the legal issue to apartheid they are comfortable with the traditional vision of the common law, but when they are able to see a connection (as in this freedom of expression instance) they invoke new methods which are untested.[57] This is the case, as this paper argues, in Nugent's attempt at balancing in the *Midi* case, where "reconciling" is the method used.

There are however other ways in which clashing rights may be reconciled.[58] All the same, if it is accepted that rights may clash, are not absolute and may be limited, the question then becomes how do the courts ensure that the choices that are made when rights clash with each other are the correct choices?[59] As has been shown the balancing process involves a selection among, rather than a balancing of, norms and the process judges employ entail a moral reading of the constitution that inevitably engages their own moral views.[60] Balancing is not inherently superior to other legal methods. In terms of balancing and judicial behavior, it becomes evident that a lot depends on how the tool of balancing is deployed.[61]

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[53] G Carlo & P Pederzoli *From Democracy to Juristocracy? The Power of Judges: A Comparative Study of Courts and Democracy* (2002) 7.
[54] 7.
[55] D Davis & K Klare "Transformative Constitutionalism and the Common and Customary Law" (2010) 3 *SAJHR* 26 407: "occurs when a lawyer believes that a particular authoritative legal norm, concept, rule or principle entails a specific legal result or conclusion, when in fact a qualified legal practitioner utilising accepted tools and cannons of legal reasoning can generate one or more alternative results or conclusions that are also compatible with the norm".
[56] Carlo & Pederzoli *From Democracy to Juristocracy?* 1-7: "there is an increasing trend of judicial involvement in a wide range of social, political and economic issues. The social and political significance of the judiciary has become a common trait of contemporary democracies. This has become known as the "judicialization of politics".
[57] Davis & Klare (2010) *SAJHR* 468: There is no literature or case law on the "reconciling" approach advocated and used by Nugent JA.
[58] Banks "Balancing Competing Individual Constitutional Rights: Raising Some Questions" in *Law and Rights: Global Perspectives on Constitutionalism and Governance* (2008) 28: one other example is by way of ranking rights in order to resolve conflicts. This approach is adopted by the United States Supreme Court, which creates a formal hierarchy of constitutional rights privileging some constitutional rights over others, with the First Amendment being an example.
[59] Du Bois (2004) *Acta Juridica* 156.
[60] 181.
[61] Davis & Klare (2010) *SAJHR* 497.

As Dennis Davis and Karl Klare accurately put it:

> "Balancing suggests the nature of the exercise required, but tells us almost nothing about how to conduct it. Merely concluding that a balancing test is appropriate with respect to a legal problem leaves us in the dark regarding how to identify, weigh, and prioritise the conflicting considerations. For balancing techniques to evolve, let alone for them to contribute positively to legal transformation, jurists must begin to establish and disclose the scale of values informing their work… To put it simply, they must explain what they are doing when they balance and why, and they must begin to discipline the exercise so that some consistency in use of the technique may be sought from one case to the next. To date, the courts" balancing jurisprudence has been ad hoc, loosely explained, and inconsistent. Unless it becomes more disciplined and more deeply rooted in a transformative theory of the Constitution, contextual legal reasoning and balancing can easily become a new species of formalism".[62]

Therefore, the above process has the potential to devalue certain rights when consistently inadequate weighing is given to one right over another.[63] This leads to the situation where rights are overridden where they should not be, as they are not accorded the weight they deserve.[64] Contrary to the traditional view, the results of balancing entail an evident "choice" to prioritise one principle over another,[65] and given the consistent application by our courts in terms of the justifications for freedom of expression, this choice is likely to occur time and time again. Despite the terminology or metaphors used to describe the process being used the actual result is that, in line with this paper's thesis, freedom of expression is being ranked pre-eminently in the context of contempt law.

In *Midi*, the interpretation of the rights involved was scant[66] and Nugent in effect boiled the limitation analysis down to a copy and pasting of an international trend. Nugent seemed to have had his mind made up in favour of freedom of expression from the outset.[67] Yet, the purpose of hearing the case on appeal was to resolve the complex legal issues that were bound to rise again, and which were in need of

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[62] 497.
[63] Bilchitz (2010) *Southern African Public Law* 428.
[64] 428.
[65] Currie (2010) *South African Public Law* 418.
[66] K Iles "Fresh Look at Limitations: Unpacking Section 36" (2007) 23 *SAJHR* 68 70.
[67] Attention was given to the context of freedom of expression in South Africa, but none was given to the context of fair trial rights. What about the abhorrent detention laws and lack of fair trial rights during apartheid, let alone the extremely high levels of crime in South Africa at present?

urgent clarification.[68]

This paper submits, in answering the legal question posed, that the reasoning falls short of achieving that purpose. On a reflective understanding of the balancing process, it becomes evident that consistent preferential treatment of one right over another is possible,[69] and balancing is not inherently superior to other legal methods. Much depends on how the tool of balancing is deployed.[70]

Therefore, the conception of freedom of expression discussed above, the balancing tendency and inadequacies mentioned coupled with judicial favouritism toward freedom of expression answers the "how" question. How a right is perceived inevitably has a bearing on how the right is positioned in the legal landscape.[71] If our judiciary ignores certain aspects of the Constitution and consciously or unconsciously prefers certain aspects to others, then the Bill of Rights has not been taken seriously. Its authority has been ignored and replaced by the judiciaries' own views of what the balance of moral and political reasons requires in a particular case.[72] The point of departure in seeking to define the meaning and scope of this right must be the text of the Constitution itself,[73] not individual or collective judicial preferences and views. In conclusion, it must be emphasized that the right to freedom of expression, for all its significance, should not automatically trump other rights. Freedom of expressions is becoming a pre-eminent right and its pre-eminence may be attributed to historical and methodological reasons as well as judicial favouritism more generally. Now that we understand the nature of "how" and "why" this right is becoming pre-eminent, it is possible to accurately[74] re-evaluate a restriction or limit, in this instance the *sub judice* rule, of freedom of expression.

4 Sub judice

[68] *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)* 2007 2 SACR 493 (SCA)
para 4.

[69] Iles (2007) *SAJHR* 92.

[70] Davis & Klare (2010) *SAJHR* 497.

[71] Banks "Balancing Competing Individual Constitutional Rights: Raising Some Questions" in *Law and Rights: Global Perspectives on Constitutionalism and Governance* (2008) 142.

[72] 144.

[73] P Malan & L Dyer "Freedom of Expression and the Statutory Regulation of Political Advertising in the Broadcast Media" (2009) 126 *SALJ* 213 59.

[74] Taking into account the caution by Kriegler J para 37 in *S v Mamabolo* 2001 3 SA 409 (CC) that "we should be particularly astute to outlaw any form of thought control, however respectively dressed" and the statement by Cameron J in *Khumalo v Holomisa* 2002 5 SA 401 (CC) at 860E "that few would suggest that South African courts should follow the severe curtailment of the courts" contempt jurisdiction in the United States".

A rule that prevents the prejudicing of pending proceedings requires the courts to consider the right of freedom of expression with the right of the litigant to a fair trial. The *Midi* case dealt with such a rule, the *sub judice* rule,[75] which forms part of the broader contempt of court. [76]

Two rationales are advanced with regards to this rule, in that (a) prejudicial publicity may impact on the litigants' case by influencing the judges or the jury and more generally by prejudicing the administration of justice, and (b) the general objection to trial by the media.[77] Therefore the *sub judice* rule prohibits comment upon judicial proceedings that are under way.[78] The effect of this form of contempt is to prohibit the publication in the press or other media of any information or commentary upon a matter that is *sub judice.*[79] Criminal proceedings are "pending" from the moment they have been commenced; that is at arrest, summons or warning to appear. From that time the matter is *sub judice.* It does not matter that the actual trial has not started.[80]

Historical scepticism[81] (as mentioned above) has put the focus of judiciaries' attention solely on the ulterior motives for which such restrictions on freedom of expression have been used.[82] The essential reasoning behind such restrictions is to protect the administration of justice and the dignity of the personalities involved therein.[83] The historical elitist and royal antecedent arguments against the contempt institution have been over-emphasised, and the arguments that are socially and democratically more acceptable in an age that plays allegiance to the dictates of reason and liberty are favoured. [84] This is evident by the democratic and

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[75] A contraction of the Latin phrase *adhuc sub indice lis est,* meaning "the matter is still under consideration".

[76] Contempts of court are classified into three main divisions, two of which are further divided into sub offences: (a) contempt *in facie curiae* and (b) contempt *ex facie curiae* with reference to pending judicial proceedings and contempt's *ex facie curiae* which do not refer to pending proceedings. Each division has its own set varied sub-offences. But as stated, this paper is only concerned with contempt's *ex facie curiae* with reference to pending judicial proceedings and potentially prejudicial publications thereto.

[77] For a contrary view see P De Vos "Trial By Media? No, that's Impossible" (6-06-2013) *Constitutionally Speaking* <http://constitutionallyspeaking.co.za/trail-by-media-no-thats-impossible/> (accessed 1-09-2013).

[78] Burchell & Milton *Principles of Criminal Law* 945.

[79] For a further analysis of the tendency test as it once was, see Burchell & Milton *Principles of Criminal Law* 950.

[80] 950.

[81] Van Niekerk *The Cloistered Virtue* 46: the historical tendency of prosecuting or other decision making authorities to invoke restrictions in discriminatory or intimidating fashions.

[82] 46.

[83] 47.

[84] 48.

fundamental emphasis of the need to entrench and over-value freedom of expression as mentioned earlier.

In conclusion therefore, even if the jury and judge distinction holds true in an argument against this rule,[85] it is readily conceivable that publicity concerning the identity of the accused, where identity is an issue, or details concerning witnesses, who might then be intimidated,[86] may undermine the administration of justice.[87] Therefore this paper submits that there are still relevant circumstances in which the administration of justice and the right to a fair trial could be interfered with, which justifies the retention of the rule.[88] But, as will be shown below, the decision of the SCA has radically altered our contempt of court law, and effectively obliterated the rule. Prior to *Midi*, publishing interviews with witnesses before their testimony in court constituted a classic instance of a breach of the *sub judice* rule.[89] Part of the reason for the discussion above and the discussion of the restriction here, is that it will help with a critical reconsideration of *Midi*. As will become evident given the quiet revolution of freedom of expression, the *sub judice* rule stood no chance when it came up against the right to freedom of expression.

5 Midi

In *Midi* the respondent, the DPP of the Western Cape, sought an application in the Cape of Good Hope Provincial Division to interdict the appellants (the above broadcaster trading as "e-TV") from broadcasting material on 3rd Degree relating to a high profile case, the *Baby Jordan* murder, still under investigation. State witnessess' interviews were to be broadcast in the television programme. The DPP argued it might prejudice the states case, the investigation, hinder the accused right to fair trial, and hinder or obstruct effective prosecution. e-TV relied on s16 of the

[85] P Swanepoel "Pre-Trial Publicity: Freedom of the Press Versus Fair Trial Rights in South Africa?" (2006) 3 *ECQUID NOVI* 27 19: It is not a given, there is a possibility that judges may be subconsciously influenced by publicity. Even if there is a remote possibility of a judge being consciously or subconsciously influenced by extraneous matter, it is still a possibility not to be ignored. Also, "when it becomes mandatory, countrywide, to introduce lay assessors to the lower courts in terms of s 93(1) of the Magistrates" Courts Act 32 of 1944, we will have a system akin to the jury system and the attendant problems of jury and trial bias. Even if our judicial officers are well-schooled to try a matter simply on the evidence, concerns about assessor/trial bias are inevitable, and so the rule of *sub judice* contempt of court, becomes all the more important".

[86] 10: When witnesses divulge their stories for money, their evidence in court is likely to be compromised. The dangers posed by external influences upon the fairness of a trial are real and must not be minimised.

[87] Milo, Penfold & Stein "Freedom of Expression" in *CLOSA* 42-135.

[88] 42-135.

[89] 42-139.

Constitution stating that it amounted to pre-publication censorship, it had a right to broadcast and the public had a right to see it. The applicants argued a clear right and interference with that right had to be established for the interdict to be successful. The respondent sought an opportunity to view the documentary so they could satisfy themselves that the broadcast would not prejudice the upcoming trial.[90]

The DPP won in the High Court,[91] presided over by Zondi AJ, and e-TV took the decision on appeal to the Supreme Court of Appeal (the SCA).[92]

The documentary had been broadcast by the time the appeal was heard in the SCA and the case was still heard because it raised important questions of law on which there was little authority and would likely come before the courts again.[93]

In dealing with this question of law, Nugent formulates the limitation analysis particular to such an issue.[94] However, he adds, this case is a special one, which seeks to evaluate mutually limiting rights[95] and to this end a court must "reconcile"[96] them to accommodate each other.[97] In this vein he states that they cannot be reconciled by purporting to weigh the value of one right against the value of the other and then preferring the right that is considered to be more valued, and jettisoning the other, because "all protected rights have equal value". Rather the reconciliation should only limit the one right to the extent it is still able to accommodate the other, or by an appropriate limitation of both rights. All of which is to be done according to what is required by the particular circumstances and within the constraints that are imposed by s36.[98]

In deciding what is to be weighed in such an analysis, Nugent points out that it is

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[90] *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)* 2007 2 SACR 493 (SCA) para 1-4.

[91] *Director of Public Prosecutions (Western Cape) v Midi Television (Pty) Ltd t/a E TV* 2006 3 SA 92 (C).

[92] In a judgement given by Nugent JA with Howie P, Cloete and Lewis JJA and Snyders AJA concurring.

[93] *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)* 2007 2 SACR 493 (SCA)
para 4.

[94] Despite him terming it as a "reconciliatory" approach, it is effectively a s36 balancing approach as discussed above. Another troubling aspect of the judgement, as an aside, is that there is no mention of the "development clauses" s 8(3) & s 39(2), in the judgment. The reformulation of the test is evidently a development of the common law. This is not an issue discussed in this paper, but does highlight another troubling aspect of the reasoning and analysis taken by the SCA in *Midi.*

[95] As is evident from above, the extent to which freedom of expression may be abridged in favour of the right to a fair trial.

[96] According to the Oxford Dictionary means: "to restore friendly relations between", "to make or show to be compatible", "to make consistent with another". In respect of the rights at issue, this judgment can hardly be said to have done any of these.

[97] *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)* 2007 2 SACR 493 (SCA) para 9.

[98] Para 9.

the benefit that flows from allowing the intrusion that is to be weighed against the loss that the intrusion will entail. It is only if the particular loss is outweighed by the particular benefit, to an extent that meets the standard that is set by s36, that the law will recognise the validity of the intrusion.[99] Nugent then gives brief accounts of the rights[100] in contention, and the extent and instances where administration of justice prevails over freedom of expression.[101] He states again that neither of the rights is absolute. This is apparently what distinguishes us from the United States.[102]

Despite this, Nugent says the comparative jurisdictions such as Australia, England and Canada (which also don't give pre-dominance to Freedom of Expression) nonetheless require a stricter test in curtailing the freedom, and our old cases that say otherwise[103] are not in keeping with these developments.[104]

Therefore he concludes and states the new reformulated test as:

> "a publication will be unlawful, and thus susceptible to being prohibited, only if the prejudice that the publication might cause to the administration of justice is demonstrable and substantial and there is a real risk that the prejudice will occur if publication takes place. Mere conjecture or speculation that prejudice might occur will not be enough. Even then publication will not be unlawful unless a court is satisfied that the disadvantage of curtailing the free flow of information outweighs its advantage. In making that evaluation it is not only the interests of those who are associated with the publication that need to be brought to account but, more important, the interests of every person in having access to information".[105]

Therefore the new test states, that "without a reasonable apprehension that the

[99] *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)* 2007 2 SACR 493 (SCA) para 11.
[100] Every person to have disputes resolved by a court in a fair hearing: s 34, & by the constitutional protection that is afforded to a fair criminal trial: s 35(3) & s 16: the right to freedom of expression.
[101] *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)* 2007 2 SACR 493 (SCA) para 12-13.
[102] *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)* 2007 2 SACR 493 (SCA) para 14 he states, quoting *S v Mamabolo* 2001 3 SA 409 (CC) para 41 that: "The extensive protection that is afforded to the press in that country is dictated by the text and the historical setting of the First Amendment, which is not consonant with our Constitution. Our Constitution ranks the right to freedom of expression differently [to the First Amendment]. With us it is not a pre-eminent freedom ranking above all others. It is not even an unqualified right. The First Amendment declaims an unequivocal and sweeping commandment; section 16(1), the corresponding provision in our Constitution, is wholly different in style and significantly different in content". However, as shown above, the accuracy of such a statement is contested.
[103] *S v Van Niekerk* 1972 3 SA 711 (A) and S v *Harber* 1988 3 SA 396 (A).
[104] *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)* 2007 2 SACR 493 (SCA) para 15-18.
[105] Para 19.

conduct of the trial would indeed be compromised by the broadcast of the documentary, that in itself provided no grounds for prohibiting the broadcast".[106] He states that one cannot speculate what the documentary might or might not contain.[107] Nugent concedes that the DPP "did not know what the documentary contained and so he could not say that the administration of justice would be prejudiced if it was broadcast".[108] How is one to know what something entails without knowing what it entails? Despite this, Nugent is of the view that untrustworthy or inconsistent witnesses would help the States case either way.[109]

In light of the above, this paper agrees with the view expressed by Zondi AJ.[110] Even if what the DPP was seeking was a peek before broadcasting, this paper does not think that a peek has the effect of banning the publication, in the interests of the public at large allowing the DPP to do so would have been the more reasonable. All that the DPP seeks is to have access to the broadcast material in order to satisfy itself that its right to a fair trial is protected. The limitation on e-TV's right to freedom of expression is in the circumstances reasonable.[111]

However, the legal issue as Nugent saw it was whether any law obliged e-TV to furnish a copy of the documentary to the DPP before it was broadcast, and not whether it was reasonable to require e-TV to do so.[112] It is here that Nugent contradicts himself - "I have already pointed out that the law prohibits e-TV from broadcasting material that prejudices the administration of justice". Yet in the next sentence he states that there is no such law to this effect[113] - "in the absence of a valid law that restricts that freedom a court is not entitled to impose a restriction of its own".[114] Was he not dealing with such a law? Council for the DPP exhausted other

[106] Para 24.
[107] Para 21.
[108] Para 22.
[109] Para 22.
[110] *Director of Public Prosecutions (Western Cape) v Midi Television (Pty) Ltd t/a E TV* 2006 3 SA 92 (C) para 46: "The interest of administration of justice and the public, the right to freedom of expression should give way to the right to a fair trial. It is in the interests of the public that the applicant should effectively prosecute cases so that safety and security are ensured…The applicant does not seek to arbitrarily interfere with the respondents editorial independence".
[111] *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)* 2007 2 SACR 493 (SCA) para 23.
[112] Para 25.
[113] Para 25: "there is no general principle of our law, whether in the common law, or in a statute, or to be extracted from the Constitution, that obliged e-TV to furnish its material to the DPP before it was broadcast, and least of all a law that prohibited it from broadcasting the material unless it could first demonstrate that the publication would not be unlawful".
[114] Para 15.

avenues,[115] and asked what it could have done or must do in future to ensure a publication will not prejudice a trial. The answer it seems is that one can only hope that a publication will not impede the administration of justice.[116] The appeal was upheld and the High Court order was set aside.[117]

This is a judgement that does a lot, very briefly and unconvincingly. In assessing the case, it becomes evident that the new test as reformulated is impossible to meet (a clear extension of *S v Mamabolo* 2001 (3) SA 409 (CC)).[118] The threshold is set too high and the *sub judice* rule has effectively been destroyed. This judgement has dramatically widened the scope of the constitutional right to freedom of expression.[119] It not only endorses the presumption against prior restraints, but it also has effectively disbarred the courts from interdicting defamatory publications.[120] "The *sub judice* rule is vital to the proper administration of justice and the fair trial rights of the accused, and helps to ensure that evidence considered by the court is not tainted".[121]

The constitutional validity of the *sub judice* rule in South Africa has narrowly been evaluated on two grounds (a) that it encroaches on freedom of expression, which must receive greater protection than the due administration of justice, and (b) because judges do not need the rule to arrive at objective and impartial decisions.[122]

A result of the case is that the courts should from now adopt the principle of "publish and be damned", rather than order that the article be interdicted. A party cannot rely on speculative harm to justify censoring the press, and further, even if the high threshold has been met the court still has discretion in the matter in that the

[115] Para 25: Submitting that the Promotion of Access to Information Act 2 of 2000 entitles the DPP to have access to the documentary.
[116] Para 27: "I fear that he must do what any person must do in similar circumstances: he must expect that freedom will not be abused until he has adequate grounds for believing the contrary".
[117] Para 28.
[118] As predicted by Swanepoel (2006) *ECQUID NOVI* 20: the reformulation of the test in such a way (in line with the international trend) "gives more effect to the protection of the freedom of the press… A test that requires a real and direct threat to the administration of justice could effectively stifle the sub judice rule. If the test is set too high, the rule will be defeated and the confidence in the courts could diminish". In *S v Mamabolo*, *ex facie curiae* statements in the form of 'scandalising the court" were a constitutional and justifiable limit on freedom of expression. The court therefore stated para 45: "The test is whether the offending conduct viewed contextually, really was likely to damage the administration of justice". The *Midi* test is therefore a clear extension, and is more in line with Sachs J's dissenting statement para 75: "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".
[119] According to Milo & Stein "The Quiet Revolution for Freedom of the Press" (28-05-2007) *Legal Brief*: "it is one of the most significant decisions in favour of press freedom, since the ground breaking *Bogoshi* case, which has the potential to radically transform media law".
[120] W Friedman "Constitutional Application" (2008) 21 *S. Afr. J. Crim. Just* 236.
[121] Swanepoel (2006) *ECQUID NOVI* 14.
[122] However, see the judge, jury, assessor and witness discussion mentioned above - Swanepoel (2006) *ECQUID NOVI* .

ban has to be necessary and proportionate to prevent the prejudice from occurring. Therefore according to Dario Milo & Pamela Stein, "in one polite sentence, the court impliedly, in our view, discards the existing *sub judice* test".[123] This new test is structured so that even interviewing witnesses in a murder trial before they give evidence may not justify a publication ban. 'so although the Midi-TV case has entered our law books under the radar, it has affected a quiet revolution for freedom of the press".[124]

To others, in line with the conception and trend toward revering freedom of expression, the judgement is a "victory for the protection of press and media freedom, which will stem the descent into legal censorship".[125] "It is to be welcomed as a victory for press freedom, the entrenchment of constitutional principles and the promotion of an open and accountable democracy".[126] The case is welcomed as a landmark victory for constitutionalism, the protection of freedom of expression and the subsequent entrenchment of democratic principles.[127] It has been described as "an excellent and redeeming judgement, reflecting jurisprudence that is libertarian *par excellence* in character".[128]

They would argue that the potential for misuse of the rule outweighs the possibility of a risk to administration of justice. This approach however is extreme and one that fails to give value to the right to a fair trial.[129] It is evident that these sentiments flow from historical circumstances and the historical scepticism as stated earlier, linking the rights pre-eminence to the fact that high profile criminal trials under the apartheid regime were often deliberately held in remote areas so that proceedings were practically immune from scrutiny.[130] Evidently times have changed and this could not be further from the truth in *Oscar Pretorius*'s instance.

Rights are not absolute;[131] they may be infringed, but only if the infringement is for compelling reasons.[132] Pre-trial publicity is such a reason and it need not be a

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[123] Milo & Stein "The Quiet Revolution for Freedom of the Press" (28-5-2007) *Legal Brief*.
[124] Milo & Stein "The Quiet Revolution for Freedom of the Press" (28-5-2007) *Legal Brief*.
[125] J Stevenson "Reformulation of Sub Judice Rule and Prior Restraint of Publication Resolved: A Victory for Press Freedom-Midi Television (Pty) Ltd v Director of Public Prosecution (Western Cape) 2007 9 BCLR 56 (RSA)" (2007) 28 *Obiter* 614.
[126] 618.
[127] 621.
[128] G Devenish "Prior Judicial Restraint and Media Freedom in South Africa – Some Cause for Concern" (2011) 74 *Journal of Contemporary Roman-Dutch Law* 12 25.
[129] Stevenson (2007) *Obiter* 620.
[130] D Robert & J Foster "The Sins of the Media: The SABC Decision and the Erosion of Free Press Rights" (2006) 4 *SAJHR* 563 575.
[131] R Dworkin *Taking Rights Seriously* (1977) 269.
[132] Currie & De Waal (2005) 185.

monster to be avoided at all costs. The *sub judice* rule can be accepted as a necessary constitutional safeguard and not as a form of state censorship or an erosion of the press.[133] However, given the way freedom of expression has been interpreted and balanced in such instances, the rule under consideration has evidently been viewed in this negative light, and freedom of expression has in effect obliterated the *sub judice* rule.

6 Conclusion

It is possible to justify legitimate free-speech restrictions in the legal domain in cases where popular hysteria and pressure tend to invade the judicial and legal process, as seen in the *Oscar Pistorius* instance.[134] The unrestricted publication of all facts relating to the administration of justice can in certain cases thwart the interests of justice. This cannot be denied and therefore some restrictions should be permissible.[135] There are many important considerations that are given less weight when freedom of expression is put on the scale such as the life of the accused, the safety of the community, the detection of crime and the attempt to safeguard the truthfulness of testimony in court.[136] The protection of witnesses and difficulties in procuring witnesses is an important factor as well. While freedom of expression is an important element of a free society, equal importance should be given to the right to a fair trial and the functioning of an effective justice system for the protection of vital societal interests.[137]

This paper submits that no democratic society can burden its citizens with an unqualified affirmation to privilege freedom of expression unreservedly, even within contempt law.[138] However strong one's adherence to freedom of expression may be, there are vital values of another and not necessarily inferior kind to which ones advocacy for freedom of expression must be tempered.[139] While it may be true that freedom of expression in the past has been short-changed, nonetheless its' belated claim for full recognition cannot be interpreted as an absolute and limitless one.[140]

[133] Swanepoel (2006) *ECQUID NOVI* 24.
[134] Van Niekerk *The Cloistered Virtue* 220.
[135] 222.
[136] 222.
[137] 223.
[138] 223.
[139] 223.
[140] 223.

Both the judiciary and the media should aspire to earning the trust of the public and of one another,[141] instead of playing a game of "cat and mouse".[142] Cooperation between the media and the judicial system will strengthen and, it is hoped, justify the public's confidence in both institutions.[143] The judgement of Zondi AJ shows a pragmatic approach that is to be preferred to such a problem.[144] This dialogic approach was not even considered by the SCA in *Midi* because the bench was bent on affording freedom of expression it's deserved pre-eminence.

Therefore, this paper submits that the time is ripe:

> "For the media, the Prosecuting Authority, Bar associations, the judiciary and other stakeholders to devise South African guidelines in order to sensitise the Bar, Bench, press and the police to the issues involved, and to function in our constitutional state without encroaching on the limits of the other's domain and rights. Pre-trial publicity might then become a friendly monster and the *sub judice* rule would be accepted as a necessary constitutional safeguard and not as a form of state censorship or an erosion of the freedom of the press".[145]

However, for now the tension between the players in the field remains. Despite the often-stated assertions that all rights are equal, this is clearly not the case in the law of contempt. Whatever impact the media may have on the criminal trial in general, and in relation to *Oscar Pistorius*, will remain ignored. Freedom of expression spoke and it is a given that no such adverse influence exists. Media's impact on the law, which will only increase, will remain an anomaly. The scale has been tilted and *Midi* has entered the law books under the radar affecting a not so quiet revolution for freedom of the press.

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[141] K Phelps "Can Oscar Pistorius Get a Fair Trial?" (6-06-2013) *CNN* <http://edition.cnn.com/2013/06/ 06/opinion/opinion-oscar-pistorius-fair-trial> (accessed 1-08-2013): see the stark warning the magistrate, in *Oscars Pistorius*'s postponement hearing, issued to the media and the state to act responsibly and avoid scandalising the sanctity of justice through a trial by media.

[142] *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)* 2007 2 SACR 493 (SCA) para 23: "Turning to the present case the papers reflect a curious game of cat-and-mouse between the DPP and e-TV concerning the contents of the documentary".

[143] Swanepoel (2006) *ECQUID NOVI* 22.

[144] *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)* 2007 2 SACR 493 (SCA) para 24: "In this matter the [DPP] does not seek to arbitrarily interfere with [e-tv's] editorial independence. All that it seeks is to have access to the broadcast material in order to satisfy itself that its right to a fair trial is protected. The limitation to [e-tv's] right to freedom of expression claim is in the circumstances reasonable. It is reasonable in relation to the interest that is sought to be protected and does not go beyond that interest. The restriction is not only rationally connected to a legitimate objective that is sought to be protected and does not go beyond that interest".

[145] Swanepoel (2006) *ECQUID NOVI* 24.