The Sub Judice Rule in the Philippines as an Interference in the Right to the Freedom of Expression: Determining Tensions and Defining Legal Standards to Address Conflicting Interests

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Recent political controversies in the Philippines have pitted the right to the freedom of expression against the sub judice rule—a judicial sanction against public comments and disclosures of cases under litigation.[1] These invocations of the rule have improperly reduced its meaning and disregarded its historical nuance. Recent implementations of the sub judice rule have also improvidently broadened the rule's scope and effects to the detriment of constitutionally protected liberties. This article aims to revisit the contemporary application of the sub judice rule and its enforcement under Section 3(d) of Rule 71 of the Rules of Court on indirect contempt.[2]

The article will argue that the current application of the sub judice rule has improperly disregarded its original conception as a protection of the right to the presumption of innocence of the accused in criminal cases.[3] Instead, Philippine jurisprudence has deviated to focus on the interests of the judicial process, irrespective of whether there is a reasonable threat or interference to judicial integrity. This treatment has conflated the rights and interests that the rule implicates and effected a blanket censure that fails to consider the value of public discussion and democratic debate. The sub judice rule, as presently understood, must be revisited and reformed.

I. INTRODUCTION

> Sige ka diyan, daldal nang daldal, sige, upakan kita. I will help any investigator, talagang upakan kita. I am putting you on notice na I am now your enemy and you have to be out of the Supreme Court. I will see to it then after that I will request the Congress, go into the impeachment right away. [4]

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[1] *See* discussion *infra* Part I.

[2] RULES OF COURT, Rule 71, § 3(d).

[3] *See* discussion *infra* Section III.C.

[4] Allan Nawal & Nestor Corrales, *Duterte Declares War vs Sereno,* PHIL. DAILY INQUIRER (Apr. 9, 2018, 2:08 PM), https://newsinfo.inquirer.net/981101/duterte-sereno-supreme-court-impeachment-oust-congress ("You've kept on yakking, now I will hit back. I will help any investigator, I will really hit back. I am putting you on notice that I am now your enemy and you have to be out of the Supreme Court. I will see to it then after that I will request the Congress, go into impeachment right away." (Translated by author)).

This was President Rodrigo Roa Duterte's response to then Philippine Supreme Court Chief Justice Maria Lourdes Sereno's question as to why the top Philippine government lawyer—Solicitor General Jose Calida—seemed overly interested in ensuring Maria Loudres Sereno would be removed from her position.[5]

Months preceding this statement, members of the House of Representatives instituted at least two impeachment proceedings against former Chief Justice Sereno.[6] Several weeks after, Solicitor General Calida filed a petition for *quo warranto*[7] with the Philippine Supreme Court.[8]

To prepare for the upcoming Senate trials, former Chief Justice Sereno was forced to take a "wellness leave" earlier than initially scheduled.[9] Former Chief Justice Sereno then spent couple of months on a nationwide campaign—conducting speeches, accepting interviews, and discussing the merits of the pending case.[10] In response, the Philippine Supreme Court, through an administrative matter following *Republic v. Sereno* (2018), found that former Chief Justice Sereno's public pronouncements violated the *sub judice* rule under the Code of Professional Responsibility.[11]

Former Chief Justice Sereno had been critical on what she believed were unconstitutional practices by the Executive branch since the election

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[5] Pia Ranada, *Sereno to Duterte: Explain Calida's Unconstitutional Petition*, RAPPLER (Apr. 19, 2018, 2:05 PM), https://www.rappler.com/nation/chief-justice-sereno-duterte-explain-calida-quo-warranto-petition.

[6] Press Release, House of Representatives, Republic of the Philippines, House Panel Oks Impeachment vs. Sereno, (Mar. 19, 2018), http://www.congress.gov.ph/press/details.php?pressid=10581.

[7] *Quo warranto*: Medieval Latin for "by what warrant" is a special form of legal action used to resolve a dispute over whether a specific person has the legal right to hold the public office that he or she occupies. *Quo warranto*, BLACK'S LAW DICTIONARY (9th ed. 2009).

[8] Dane Angelo Enerio, *Solicitor General Files Quo Warranto Petition Against Sereno*, BUSINESSWORLD (Mar. 5, 2018, 3:44 PM), https://www.bworldonline.com/solicitor-general-files-quo-warranto-petition-sereno [hereinafter *Enerio*, Solicitor General].

[9] Eimor P. Santos, *Chief Justice Sereno to go on Leave as Camp Expects Senate Impeachment Trial*, CNN PHIL. (Feb. 27, 2018, 10:37 PM), https://cnnphilippines.com/news/2018/02/27/Chief-Justice-Sereno-wellness-leave-impeachment-case.html.

[10] *SC Orders Sereno to Explain Attacks on Colleagues*, ABS-CBN NEWS (May 11, 2018, 11:21 PM), https://news.abs-cbn.com/news/05/11/18/sc-orders-sereno-to-explain-attacks-on-colleagues.

[11] [11] Republic v. Sereno, G.R. No. 237428, 863 S.C.R.A. 690 (June 19, 2018) (Phil.); CODE OF PROFESSIONAL RESPONSIBILITY, Rule 13.02. This paper will only discuss the sub judice rule as contemplated in the Rules of Court and not in the context of the Code of Professional Responsibility.

of President Duterte in 2016.[12] For instance, former Chief Justice Sereno invoked judicial independence in publicly questioning the inclusion of judges' names on President Duterte's drug list.[13] Former Chief Justice Sereno also dissented against the Duterte-backed burial of former Dictator Ferdinand Marcos in the case of *Ocampo v. Enriquez* (2016).[14] Lastly, former Chief Justice Sereno warned against the abuses of martial law three days after President Duterte placed Mindanao under martial law due to the Marawi Siege.[15]

Like former Chief Justice Sereno, other prominent public figures who criticized the current administration—particularly on its unrelenting war on drugs—have experienced the full force of government backlash.[16] This is not surprising, especially because President Duterte regards public criticism as an injury to his personhood, requiring less of a rational defense as an irrational torrent of abuse meant to reduce his critics to silence or death.[17]

For instance, Senator Leila de Lima, the most vocal critic of President Duterte at the beginning of his term, was immediately imprisoned under questionable charges of violating the Dangerous Drugs Act.[18] Senator Antonio Trillanes IV, who was given amnesty for his involvement in a failed

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[12] *Philippine Chief Justice Sereno, Duterte's Critic, Removed*, AL JAZEERA (May 11, 2018), https://www.aljazeera.com/news/2018/5/11/philippine-chief-justice-sereno-dutertes-critic-removed.

[13] *Sereno Expresses Concern over Duterte Drugs List*, RAPPLER (Aug. 8, 2016, 11:00 AM), https://www.rappler.com/nation/142295-chief-justice-maria-lourdes-sereno-president-rodrigo-duterte-drugs-list-judges.

[14] Ocampo vs. Enriquez, 807 S.C.R.A. 223, 325–424, Nov. 8, 2016. (Phil.) (C.J. Sereno, dissenting). Former Chief Justice Sereno wrote that the order of the President is tantamount to a "declaration that Marcos is a worthy of a grave at a cemetery reserved for war heroes, despite the objections of countless victims of human rights violations during the Martial Law regime"—which, she argued, was not bereft of any significance because of the nature of the position of the President that allows him to "influence public discourse." *Id.*

[15] Pia Ranada, *Duterte Declares Martial Law in Mindanao*, RAPPLER (May 23, 2017, 11:28 PM), https://www.rappler.com/nation/170745-philippines-duterte-declares-martial-law-mindanao.Mindanao is the second largest island in the Philippines. The Marawai Siege was a five-month-long armed conflict in Marawi, Lanao del Sur, Philippines, that started on May 23, 2017, between Philippine government security forces and militants affiliated with the Islamic State of Iraq and the Levant ("ISIL"). At the time of publication, this has been the longest urban battle in modern Philippine history. *See id.*

[16] *See Senator Leila de Lima Arrested in the Philippines*, AL JAZEERA (Feb. 25, 2007), https://www.aljazeera.com/news/2017/02/leila-de-lima-arrested-philippines-170224003808389.html [hereinafter *Senator de Lima Arrest*].

[17] Dante B. Gatmaytan, *Constitutional Desecration: Enforcing an Imposed Constitution in Duterte's Philippines*, 62 ATENEO L.J. 311, 319 (2017).

[18] *Senator de Lima Arrest*, *supra* note 16.

coup d'état in 2003 by former President Beningo Aquino III had his amnesty revoked by President Duterte.[19] President Duterte then ordered the Department of Justice "to pursue all criminal and administrative cases" filed against former President Aquino in relation to the aforementioned mutiny.[20]

There emerges a pattern in everything happening against staunch government critics.[21] In both cases of Senators de Lima[22] and Trillanes,[23] as with the case of former Chief Justice Sereno, the full force of the government was employed and threats of violation of the *sub judice* rule were raised.[24] The *sub judice* rule, meant to protect the "administration of justice," is ironically being used to commit injustice.[25] Thus, there is an urgent need to re-examine the rule on *sub judice* as its invocation is prone to abuse by those in power who seek to silence and oppress any opposition.[26]

An equally important reason for the *sub judice* rule to be re-examined is its potential ability to stifle the most cherished constitutional right of freedom of expression.[27] The *sub judice* rule is, in essence, a restraint on free speech imposed by the judiciary because it prohibits any party from commenting on, or discussing, the merits of any case pending before any tribunal.[28] Whether or not the *sub judice* rule falls under the

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[19] Camille Elemia, *Duterte Revokes Trillanes' Amnesty 'Effective Immediately'*, RAPPLER (Sept. 4, 2018, 10:18 AM) https://www.rappler.com/nation/211079-duterte-revokes-amnesty-granted-antonio-trillanes.

[20] *Id.*

[21] *See, e.g.*, Rey E. Requejo & Macon Ramos-Araneta, *Gag Leila, Court Urged*, MANILA STANDARD (Mar. 4, 2017, 12:01 AM) http://manilastandard.net/news/top-stories/230838/gag-leila-court-urged.html ("The Justice Department has asked the Muntinlupa City regional trial court to issue a gag order to prevent all parties from discussing the cases filed against Senator Leila de Lima in public because doing so would be sub judice."); Leila B. Salaverria, *Palac Backs Gag Order on De Lima*, PHIL. DAILY INQUIRER (Mar. 5, 2017, 3 :00 AM), https://newsinfo.inquirer.net/877526/palace-backs-gag-order-on-de-lima; Gabriel Pabico Lalu, *Stop Commenting on Trillanes Case or Face SC Contempt—Guevarra*, PHIL. DAILY INQUIRER (Sept. 7, 2018, 1:32 PM) https://newsinfo.inquirer.net/1029509/guevarra-asks-public-to-refrain-from-commenting-on-trillanes-case; Joel San Juan, *DOJ Chief Reminds Trillanes's Camp to Observe Sub Judice Rule*, BUSINESSMIRROR (Oct. 16, 2018), https://businessmirror.com.ph/2018/10/16/doj-chief-reminds-trillaness-camp-to-observe-sub-judice-rule.

[22] Requejo & Ramos-Araneta, *supra* note 21; Salaverria, *supra* note 21.

[23] Lalu, *supra* note 21; San Juan, *supra* note 21.

[24] Lalu, *supra* note 21; San Juan, *supra* note 21.

[25] Lalu, *supra* note 21; San Juan, *supra* note 21.

[26] *See* Lalu, *supra* note 21; San Juan, *supra* note 21.

[27] *See* discussion *infra* Part IV.

[28] Judicial Right to Know Act, S. No. 1357 (Sept. 11, 2007) (Phil.),

exceptions to free speech should be examined in light of the rule's historical nuances, the Philippines' prevailing jurisprudence, the experience of other countries, and international laws.[29]

Lastly, given the lack of local jurisprudence on the *sub judice* rule, there has been considerable public uncertainty over its application in the Philippines.[30] This article seeks to correct the misconceptions regarding the rule on *sub judice*. In doing so, it lays down standards collected from the Philippine Constitution, international and domestic laws, American jurisprudence, Philippine jurisprudence, and other jurisdictions, and sets guidelines that better reflect what the *sub judice* rule really means.[31]

In Part II, the article expounds on the concept of contempt of court in the general sense, and *sub judice* as its specific type. [32]

Part III discusses the contemporary interpretation of the *sub judice* rule in the Philippine jurisdiction.[33] There, the article traces the history of the rule and narrates its development from the moment it was first applied by the Philippine Supreme Court through its initial abandonment in *Cabansag v. Fernnandez* (1957)[34] to the re-transplantation of the doctrine in Philippine Jurisprudence through the arguably deviant *Nestle* case.[35]

Part IV discusses the constitutional right to freedom of expression, the rights of the accused, and their appreciation in Philippine jurisprudence.[36] It is argued that these two rights should be balanced in the discussion of the *sub judice* rule—contrary to what Philippine jurisprudence provides.[37]

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http://legacy.senate.gov.ph/lis/bill_res.aspx?congress=14&q=SBN-1357.

[29] *See* discussion *infra* Parts IV–VI.

[30] Palma Pelagio Jr., *Should We Keep Our Mouth Shut? Supreme Court Should Clarify Sub Judice,* RAPPLER (May 19, 2008, 4:00 PM), https://www.rappler.com/thought-leaders/202849-supreme-court-clarify-sub-judice-rule-sereno-quo-warranto; Dean Andy Bautista, *Sub Judice*, PHIL. STAR (Jan. 15, 2011, 12:00 AM), https://www.philstar.com/opinion/2011/01/15/647890/sub-judice.

[31] *See* discussion *infra* Parts IV–VI.

[32] *See* discussion *infra* Part II.

[33] *See* discussion *infra* Part III.

[34] Cabansag v. Fernandez, G.R. No. L-8974, 102 PHIL. REP. 152, 161–63 (S.C., Oct. 18, 1957) (Phil.).

[35] Nestle Phil. v. Sanchez, G.R. No. 75209, 154 S.C.R.A. 542, 546 (Sep. 30, 1987) (Phil.).

[36] *See* discussion *infra* Part IV.

[37] *See* discussion *infra* Part V.

Part V compares the treatment of the right of the accused in American jurisprudence and how the right was reconciled in Philippine jurisprudence.[38]

Part VI looks into international legal standards from the lens of conventional obligations and compares the Philippine practice with how other jurisdictions balance the conflicting interests of contempt and freedom of expression laws, as well as their underlying justifications for doing so.[39]

Part VII reconciles the entire discussion and attempts to balance the conflicting interests in the Philippine jurisdiction.[40]

Finally, Part VIII proposes changes to the Philippine legal framework for a clearer application of the *sub judice* rule.[41]

II. ORIGINS AND ANTECEDENT CONSTRUCTION

Before proceeding to any discussion of the *sub judice* rule, we must first understand the concept of contempt as the punishment for the violation of the *sub judice* rule.[42] In discussing contempt, we will look into its historic application in both foreign jurisdiction and in the Philippines.[43] From there, the article will discuss how the concept of the rule first emerged and how it got to where it is today to understand its proper application.[44]

A. *Contempt of Court*

The offense of contempt traces its origin to twelfth century England[45] when all courts in the realm were but divisions of the *Curia Regia*, the supreme court of the monarch, and to scandalize a court was an affront to the sovereign.[46] The Supreme Court first defined "contempt of court" in the Philippines as:

> Some act or conduct which tends to interfere with the business of the court, by a refusal to obey some lawful order of the court, or some act of disrespect to the dignity of the

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[38] *See* discussion *infra* Part V.

[39] *See* discussion *infra* Part VI.

[40] *See* discussion *infra* Part VII.

[41] *See* discussion *infra* Part VIII.

[42] *See, e.g.*, *In re* A.K. Jones, G.R. No. L-3895, 9 PHIL. REP. 349, 355, (S.C. Dec. 14, 1907) (Phil.); Lim Lua v. Lua, G.R. Nos. 175279-80, 697 S.C.R.A. 237, 262, (June 15, 2013) (Phil.).

[43] *See* discussion *infra* Section III.A.

[44] *See* discussion *infra* Part VIII.

[45] *See* Arthur L. Goodhart, *Newspaper and Contempt of Court in English Law*, 48 HARV. L. REV. 885, 885 (1935).

[46] Español v. Formoso, G.R. No. 150949, 525 S.C.R.A. 216, 224, (June 21, 2007) (Phil.).

> court which in some way tends to interfere with or hamper the orderly proceedings of the court and thus lessens the general efficiency of the same.[47]

More recently, "contempt of court" was defined as "disobedience to the court by acting in opposition to its authority, justice, and dignity."[48] It signifies a willful disregard or disobedience of the court's order, conduct that tends to bring the court's authority and the administration of law into disrepute, or conduct which in some manner impedes the due administration of justice.[49]

As early as the case of *In Re Kelly* (1916),[50] the Philippine Supreme Court recognized that courts have the inherent power to punish contempt on the ground that respect for the courts guarantees the stability of the judicial institution.[51] The *Kelly* Court reasoned that a court's inherent power to punish contempt is "essential" to the "observance of order in judicial proceedings and the enforcement of judgments, orders, and mandates of the courts, and, consequently, to the very administration of justice."[52]

The Philippine Rules of Court, promulgated by the Philippine Supreme Court under its constitutional mandate, provides for two types of contempt of court: (i) direct contempt and (ii) indirect contempt.[53]

Direct contempt consists of "misbehavior in the presence of or so near a court as to obstruct or interrupt the proceedings before [it]."[54] It includes: (i) disrespect to the court; (ii) offensive behavior against others; and (iii) refusal, despite being lawfully required, to be sworn in or to answer as a witness, or to subscribe an affidavit or deposition.[55] Direct contempt can be punished summarily without a hearing.[56]

On the other hand, indirect contempt is committed through any of the acts enumerated under Rule 71, Section 3 of the Rules of Court:

> (a) Misbehavior of an officer of a court in the performance

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[47] *In re A.K. Jones*, 9 PHIL. REP. at 355.

[48] *Lim Lua*, 697 S.C.R.A. at 262.

[49] *Id.*

[50] *In re* Kelly, G.R. No. 11715, 35 PHIL. REP. 944, 950 (Dec. 21, 1916) (Phil.).

[51] *Id.*

[52] *Id.*

[53] Lorenzo Shipping Corp. v. Distrib. Mgmt. Ass'n., G.R. No. 155849, 656 S.C.R.A. 331, 344 (Aug. 31, 2011) (Phil.).

[54] RULES OF COURT, Rule 71 § 1.

[55] *Id.*

[56] *Id.*

> of his [or her] official duties or in his [or her] official transactions;
>
> (b) Disobedience of or resistance to a lawful writ, process, order, or judgment of a court, including the act of a person who, after being dispossessed or ejected from any real property by the judgment or process of any court of competent jurisdiction, enters or attempts or induces another to enter into or upon such real property, for the purpose of executing acts of ownership or possession, or in any manner disturbs the possession given to the person adjudged to be entitled thereto;
>
> (c) Any abuse of or any unlawful interference with the processes or proceedings of a court not constituting direct contempt under Section 1 of this Rule;
>
> (d) Any improper conduct tending, directly or indirectly, to impede, obstruct, or degrade the administration of justice;
>
> (e) Assuming to be an attorney or an officer of a court, and acting as such without authority;
>
> (f) Failure to obey a subpoena duly served;
>
> (g) The rescue, or attempted rescue, of a person or property in the custody of an officer by virtue of an order or process of a court held by him [or her].[57]

The punishment for contempt is classified into two types: civil contempt and criminal contempt.[58] Civil contempt is committed when a party fails to comply with an order of a court or judge "for the benefit of the other party."[59] Criminal contempt is committed when a party acts against the court's authority and dignity or commits a forbidden act tending to disrespect the court or judge.[60] The basis for the classification is the two-fold aspect of contempt which seeks: (i) to punish the party for disrespecting the court or its orders; and (ii) to compel the party to do an act or duty which it refuses to perform.[61]

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[57] *Id.* § 3.

[58] Halili v. Ct. of Indus. Rel., G.R. No. L-24864, 136 S.C.R.A. 112, 135 (Apr. 30, 1985) (Phil.).

[59] *Id.*

[60] *Id.*

[61] *Id.*

B. *The Sub Judice Rule Defined*

Sub judice is a Latin term that refers to matters under or before a court or judge for determination.[62] The *sub judice* rule pertains to the rule restricting comments and disclosures pertaining to pending judicial proceedings.[63]

The *sub judice* rule can be traced back to *Roach v. Garvan,* a 1742 case decided in England and known as the *St. James's Evening Post* case.[64] *Roach* is a civil lawsuit involving the widow of John Roach, a late major of the garrison of Fort St. George in the East Indies, filed against the executors of his estate.[65] During the trial, the news outlets *Champion* and the *St. James's Evening Post* published articles imputing the executors and the other witnesses with perjury.[66]

In the same case, Lord Chancellor Hardwicke explained that there are three kinds of contempt.[67] The first is contempt by scandalizing the court itself.[68] The second is contempt in abusing parties who are concerned in the causes therein.[69] Finally, the third is contempt in "prejudicing mankind" against persons before the cause is heard.[70] Further elaborating on the third category, now known as the *sub judice* rule, Lord Chancellor Hardwicke wrote: "nor is there anything of more pernicious consequence than to prejudice the minds of the public against persons concerned as parties in causes, before the cause is finally heard."[71] The Judge of *Roach*, Lord Chancellor Hardwicke, held that *Champion's* and the *St. James's Evening*

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[62] BLACK'S LAW DICTIONARY 4471 (8th ed. 2004).

[63] *Id.*

[64] Roach v. Garvan (1742) 26 Eng. Rep. 683, 683; 2 Atk. 469, 469; Solomon Rukundo, *The Subject of Sub Judice: An Analysis of the Sub Judice Rule in Uganda*, 45 COMMONWEALTH L. BULL. 660, 663 (2020)*; see also* Arthur Goodhart, *Newspapers and Contempt of Court in English Law*, 48 HARV. L. REV. 885, 887 (1935) (calling the case of Roach v. Garvan as the "locus classicus" of contempt cases); Richard C. Donnelly, *Contempt by Publication in the United States*, 24 MOD. L. REV 239, 293 (1961) (identifying Roach v. Garvan as the source of the power of English and American courts to punish summarily for constructive contempt).

[65] Galia Schneebaum & Shai Lavi, *The Riddle of Sub-judice and the Modern Law of Contempt*, 2 CRITICAL ANALYSIS L. 173, 186 (2015).

[66] *Id.*

[67] Goodhart, *supra* note 64, at 887.

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *Id.*

Post's publications suggesting the executors and other witnesses in *Roach* committed perjury was contempt.[72]

The words "prejudicing mankind" or "prejudicing the public" are different from "prejudicing the court and jury" in relation to obstruction of justice.[73] Lord Chancellor Hardwicke was more concerned with how the public at large might be influenced than how the publication could adversely affect the administration of justice by influencing the jury or the judge.[74]

"Prejudicing mankind" means leading the public to form an opinion independently of the legal process.[75] Lord Chancellor Hardwicke and other jurists of his time were increasingly concerned with how the public at large may be influenced than how the publication would likely affect the administration of justice by influencing the jury or the judge.[76]

In the case of *King v. Clement* (1821), the court considered the publication of evidence previously used to convict the accused.[77] Finding the publisher guilty, the court reframed Hardwicke's ruling by fusing "prejudicing the public" with "prejudicing the jury" and concluded: "This was therefore a contempt from its tendency to prejudice the minds of the public and the jurors who were to try the other cases; and it comes directly within the law laid down by Lord [Chancellor] Hardwicke."[78] Ultimately, over the years, Lord Chancellor Hardwicke's opinion was masked by courts that emphasized the danger of influencing the minds of the jury and obstructing justice.[79]

Because of the modern conception, it is understandable that over the centuries the *sub judice* rule became more popular in jurisdictions employing laymen in the jury system, as they are theorized to be more susceptible to undue influence from external sources.[80] In fact, in *In Re Lozano and Quevedo,* a 1930 case[81] involving a contempt proceeding against an editor and reporter of a newspaper for publishing inaccurate accounts of a closed door and confidential administrative proceeding, Justice Malcolm said: "Here, in contrast to other jurisdictions, we need not

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[72] Schneebaum & Lavi, *supra* note 65, at 186.

[73] *Id.*

[74] *Id.*

[75] *Id.* at 187.

[76] *Id.* at 188.

[77] *Id.* at 192 (citing King v. Clement, (1821) 4 Barn. & Ald. 218, 106 Eng. Rep. 918, 919).

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] *In re* Lozano, 54 PHIL. REP. 801, 807 (July 24, 1930).

be overly sensitive because of the sting of newspaper articles, for there are no juries to be kept free from outside influence."[82]

In 2010, the late Senator Miriam Defensor-Santiago sought the "elimination of the *sub judice* rule" when she filed Senate Bill No. 1357,[83] also known as the *Judicial Right to Know Act*, in reaction to the case of *Nestle Philippines v. Sanchez* (1987).[84] In the explanatory note, Senator Santiago used the *Nestle* case as a starting point to discuss the *sub judice* rule.[85] According to Senator Santiago, the *sub judice* rule is a foreign legal concept that originated from and is applicable to countries that have adopted a trial by jury system, such as the United States.[86] She emphasized the difference between a jury system and the Philippine court system, implying the inapplicability of the concept in Philippine jurisdiction and calling the rule a "restriction on the constitutional guarantees of free press and of the people's right to petition and information on matters of public concern."[87]

III. THE "SUB JUDICE RULE" IN THE PHILIPPINE LEGAL SYSTEM

While the Philippine legal system has long recognized the court's inherent power to punish contempt,[88] the specific concept of the *sub judice* rule was introduced relatively recently.[89] In order to understand how the *sub judice* rule is or should be applied in our jurisdiction, it is imperative to first look at how this rule made its way into our jurisdiction, and then the subsequent interpretation of this rule by the Philippine courts.

A. *Contemporary Treatment and Construction*

Philippine jurisprudence is wanting in cases with significant analysis of the concept of the rule on *sub judice*.[90] While the words "*sub judice* rule" have been mentioned in cases[91] as early as 1997, the Philippine

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[82] *Id.*

[83] Judicial Right to Know Act, S. No. 1357 (Sept. 11, 2007) (Phil.), http://legacy.senate.gov.ph/lis/bill_res.aspx?congress=14&q=SBN-1357.

[84] Nestle Phil. v. Sanchez, G.R. No. 75209, 154 S.C.R.A. 542, 546 (Sept. 30, 1987) (Phil.). This situation will be explained in depth later.

[85] Judicial Right to Know Act, S. No. 1357.

[86] *Id.*

[87] *Id.*

[88] *See In re* Kelly, G.R. No. 11715, 35 Phil. 944 (Dec. 21, 1916).

[89] *See* discussion *infra* Section III.B.

[90] *See infra* Section III.A.

[91] *See, e.g.*, Viva Prod., Inc. v. C.A., G.R. No. 123881, 269 S.C.R.A. 664, 670–74 (Mar. 3, 1997) (Phil.) (finding that the case was only decided upon the jurisdiction of the lower courts, but the facts indicate that a movie on the life story of the star witness of a criminal case was assailed for violating the sub judice rule and a petition for contempt was subsequently filed); *In re* Request for Live Radio-TV Coverage of the Trial in the

Supreme Court first discussed the concept in 2009.[92] In the few cases where the words "*sub judice*" was mentioned, the issues mostly involved criminal proceedings.[93] Hence, most discussion about the *sub judice* rule is limited to the reasons as to why the *sub judice* rule should be applied to criminal cases.[94]

For example, the Court found Atty. Leonard de Vera guilty of indirect contempt under Rule 71, Sec. 3(d.) for publishing statements[95] based on "rumors" in the Philippine Daily Inquirer, which questioned the impartiality of the Philippine Supreme Court in a pending case involving the constitutionality of the plunder law[96] in *In re De Vera.*[97] There, the court held that attacks on the dignity of the courts cannot be guised as free speech because the said right "cannot be used to impair the independence and efficiency of courts or public respect therefor and confidence therein."[98]

Sandiganbayan of the Plunder Cases Against Former President Joseph E. Estrada, A.M. No. 01-4-03-SC, 360 S.C.R.A. 248, 271 (Sept. 13, 2001) (Phil.) (noting that live commentaries of criminal proceedings might subvert the sub judice rule that media should refrain from publishing or airing comments regarding a pending case); Provident Int'l Res. Corp. v. Venus, G.R. No. 167041, 554 S.C.R.A. 540, 544 (June 17, 2008) (Phil.) (noting that petitioners argued that the recall and cancellation of a previous stock and transfer book did not conflict with the proceedings in another civil case as to violate the sub judice rule).

[92] *See* Lejano v. People, G.R. No. 176389, 638 S.C.R.A. 104 (Dec. 14, 2010) (Phil.).

[93] *See, e.g.*, *Viva Prod., Inc*, 269 S.C.R.A. at 670–74; *In re Request for Live Radio-TV Coverage of the Trial in the Sandiganbayan of the Plunder Cases Against Former President Joseph E. Estrada*, 360 S.C.R.A. at 271; *Lejano*, 638 S.C.R.A. at 158.

[94] *See, e.g.*, *Viva Prod., Inc*, 269 S.C.R.A. at 670–74; *In re Request for Live Radio-TV Coverage of the Trial in the Sandiganbayan of the Plunder Cases Against Former President Joseph E. Estrada*, 360 SCRA at 271; *Lejano*, 638 S.C.R.A. at 158.

[95] *In re Published Alleged Threats Against Members of the Court in the Plunder Case Hurled by Atty. De Vera*, 385 S.C.R.A. 285, at 287-88 (citing *Erap Camp Blamed for Oust-Badoy Maneuvers*, PHIL. DAILY INQUIRER (Nov. 6, 2001)). "We are afraid that the Estrada camp's effort to coerce, bribe, or influence the justices—considering that it has a P500 million slush fund from the aborted power grab that May-will most likely result in pro-Estrada decision declaring the Plunder Law either unconstitutional or vague." *Id.* "People are getting dangerously passionate…emotionally charged…People wouldn't just swallow any Supreme Court decision that is basically wrong. Sovereignty must prevail." *Id.* (citing *SC Under Pressure From Erap Pals, Foes*, PHIL. DAILY INQUIRER (Nov. 19, 2001)).

[96] An Act Defining and Penalizing the Crime of Plunder, Rep. Act. No. 7080, (July 12, 1991) (Phil.), https://www.officialgazette.gov.ph/1991/07/12/republic-act-no-7080/.

[97] *In re Published Alleged Threats Against Members of the Court in the Plunder Case Hurled by Atty. De Vera*, 385 S.C.R.A. 285, at 291.

[98] *Id.* at 231 (citing Nestle v. Sanchez, G.R. No. 75209, 154 S.C.R.A. 542, 547 (Sept. 30, 1987)).

While *In Re de Vera* was not labelled as a violation of the *sub judice* rule, it falls squarely within the direct definition of it.[99] However, what is notable in this case is that the penalty for violation of the *sub judice* rule was only applied against De Vera, and not the newspaper that published his statements.[100]

In *Romero II v. Estrada* (2019),[101] Reghis Romero II sought a temporary restraining order from the Philippine Supreme Court against a Senate Committee's invitations made in relation to the investment of Overseas Workers Welfare Administration funds in the Smokey Mountain Project.[102] Romero argued that the investigations would discuss issues pending before the Philippine Supreme Court in *Chavez v. National Housing Authority* (2007).[103] The Philippine Supreme Court rejected the argument as it had already denied Chavez's motion for reconsideration *en banc*.[104] The most important part of *Romero II,* however, is the Court's brief discussion regarding the application of the *sub judice* rule:

> The *sub judice* rule restricts comments and disclosures pertaining to judicial proceedings to avoid prejudging the issue, influencing the court, or obstructing the administration of justice. A violation of the sub judice rule may render one liable for indirect contempt under Sec. 3(d), Rule 71 of the Rules of Court.[105]

Lejano v. People (2010)[106] was a case involving a charge for multiple homicide, dubbed by the media as the *Vizconde Massacre* case.[107]

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[99] *Id.*

[100] *Id.* at 292.

[101] Romero v. Estrada, G.R. No. 209180, 583 S.C.R.A. 397, 398–99 (Sept. 11, 2019) (Phil.).

[102] *Id.*

[103] *Id.* at 401; *see* Chavez v. Nat'l Hous. Auth., G.R. No. 164527, 530 S.C.R.A. 235 (Aug. 15, 2007) (Phil.).

[104] *Romero*, 583 S.C.R.A. at 403–04.

[105] *Id*. at 403.

[106] Lejano v. People, G.R. No. 176389, 638 S.C.R.A. 104, 158 (Dec. 14, 2010) (Phil.).

[107] *See, e.g.*, *Vizconde Massacre Timeline*, PHILSTAR (Dec. 15, 2010), https://www.philstar.com/headlines/2010/12/15/639027/vizconde-massacre-timeline; Maan Macapagal, *Hubert Webb was in PH during Vizconde Massacre*, ABS CBN NEWS (June 28, 2011, 10:14 PM), https://news.abs-cbn.com/nation/06/28/11/hubert-webb-was-ph-during-vizconde-massacre; Business Mirror Editorial, *Vizconde Massacre: Justice Not Served*, BUSINESSMIRROR (Feb. 16, 2016), https://businessmirror.com.ph/2016/02/16/the-vizconde-massacre-justice-not-served.

Due to the heinousness of the crime and the personality of one of the accused, Hubert Webb—son of then Congressman Freddie Webb—the entire trial garnered a lot of pre-trial publicity, becoming one of the most sensational criminal cases in the history of the Philippines.[108] Justice Brion in his separate opinion, and "independently of the merits of the case," pointed out the "growing disregard" of the *sub judice* rule in our country, to the detriment of the "rights of the accused," the "integrity of the courts," and, ultimately, the "administration of justice."[109]

Justice Brion explained that in essence, "the *sub judice* rule restricts comments and disclosures pertaining to judicial proceedings" and that "the restriction applies not only to participants in the pending case . . . but also to the public in general, which necessarily includes the media."[110] The principal purpose of the *sub judice* rule, according to Justice Brion, is to "preserve the impartiality of the judicial system by protecting it from undue influence."[111] However, Justice Brion also qualified the application of the rule, to wit: "Let me clarify that the *sub judice* rule is not imposed on all forms of speech. In so far as criminal proceedings are concerned, two classes of publicized speech made during the pendency of the proceedings can be *considered as contemptuous*."[112]

Justice Brion wrote that the danger posed by the first class of contemptuous speech is the undue influence it may *directly* exert on the court in the resolution of the criminal case, or *indirectly*, through the public opinion generated against the accused and the adverse impact this public opinion may have during the trial.[113] Accordingly, the significance of the *sub judice* rule is highlighted in criminal cases because undue influence prejudices the accused's right to a fair trial.[114] As to the application of the rule in a non-jury jurisdiction such as in the Philippines, Justice Brion said:

> As may be observed from the cited material, the *sub judice* rule is used by foreign courts to insulate members of the jury from being influenced by prejudicial publicity. *But the fact that the jury system is not adopted in this jurisdiction is not an argument against our observance of the sub judice rule; justices and judges are no different from members of the jury,*

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[108] *See generally Vizconde Massacre Timeline*, *supra* note 107.

[109] *Lejano*, 638 S.C.R.A. at 192 (Brion, J., supplemental opinion).

[110] *Id.* at 193.

[111] *Id.* at 195 (citing New South Wales Law Reform Commission, *Discussion Paper 43: Contempt by Publication,* NSW L. REFORM COMMM'N (2000) [hereinafter Discussion Paper 43]).

[112] *Id.* at 194 (emphasis added).

[113] *Id.* at 195.

[114] *Id.* at 195–96.

> *they are not immune from the pervasive effects of media.* 'It might be farcical to build around them an impregnable armor against the influence of the most powerful media of public opinion.' As I said in another case, in a slightly different context, even those who are determined, in their conscious minds, to avoid bias may be affected.[115]

For the second class, Justice Brion explained that contempt is constituted of actions which tend to undermine the confidence of the people in the honesty and integrity of the court and its members and lowers or degrades the administration of justice.[116]

However, this second class of contemptuous speech pertains to another type of contempt: "contempt of scandalizing the court"—a type distinct and separate from, but often confused with, the *sub judice* rule.[117] In discussing the *sub judice* rule, Justice Brion cited Discussion Paper 43[118] by the Law Reform Commission of the New South Wales, which distinguished between the *sub judice* rule and the contempt of scandalizing the court.[119]

According to the Law Reform Commission, "contempt by publication" means:

> The law may prohibit publications if they fall into any one or more of the following five categories:
>
> > [T]hey have a tendency to influence the conduct of particular pending legal proceedings, or prejudge the issues at stake in particular pending proceedings—*those which breach the sub judice rule*;
> >
> > [T]hey denigrate judges or courts so as to undermine public confidence in the administration of justice—*those which "scandalise the court"*;

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[115] *Id.* at 196–97 (emphasis added); *but see*, People v. Teehankee, G.R. Nos. 111206-208, 249 S.C.R.A. 54, 105 (Oct. 6, 1995) (Phil.) ("Our judges are learned in the law and trained to disregard off-court evidence and on-camera performance of parties to a litigation. Their mere exposure to publications and publicity stunts does not per se fatally infect their impartiality.").

[116] *Lejano*, 638 S.C.R.A. at 198.

[117] *See* Discussion Paper 43, *supra* note 111, at § 1.10.

[118] *Lejano*, 638 S.C.R.A. at 194. Justice Brion cited the Law Reform Commission as justification for the possible curtailment by the sub judice rule of the right to free speech, calling it "necessary" to ensure proper administration of justice and right of an accused to a fair trial. *Id.*

[119] *Id.*

> [T]hey reveal the deliberations of juries;
>
> [T]hey include reports of court proceedings in breach of a restriction on reporting; or they disclose information that has been restricted by an injunction and the person making the disclosure, though not bound by the injunction, knows the terms of the injunction and that the publication will frustrate its purpose.[120]

For his discussion on the first class of contemptuous speech, Justice Brion consistently cited the Discussion Paper and referred to the type of speech as the basis of the rule on *sub judice*.[121] However, in the entire paragraph explaining the second class, Justice Brion never referred to the second class as the "*sub judice* rule" and, in fact, distinguished the "*sub judice* rule" from "the contempt power" by saying that without the two, courts would be "powerless to protect their integrity and independence that are essential in the orderly and effective dispensation and administration of justice."[122] Notwithstanding the clear distinction between the "two classes of contemptuous speech," it is implied in the opinion that Justice Brion considered both as speeches punishable by the *sub judice* rule.[123] Thus, any reference to *Lejano* must be careful with the distinction.[124]

In sum, *Lejano* suggests that contemptuous comments on the merits of the case or the *sub judice* rule is only applicable in the context of criminal proceedings.[125] While Justice Brion's supplemental opinion is not doctrinal for being *just* a supplemental opinion, his discussion on the *sub judice* rule was cited and adopted in succeeding cases by the Philippine Supreme Court.[126]

Marantan v. Diokno (2014) marked the first time the freedom of speech principles were employed in the context of the *sub judice* rule in our jurisdiction.[127] Marantan filed a petition to cite respondents in contempt in

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[120] Discussion Paper 43, *supra* note 111, at Section 1.10 (emphasis added)*; see also* New South Wales Reform Commission, *Report 100: Contempt by Publication*, NSW L. REFORM COMMM'N (2003) [hereinafter *NSW Report 100*].

[121] *Lejano*, 638 S.C.R.A. at 194–95.

[122] *Id.* at 198.

[123] *See id.* at 194–200.

[124] *See id.*

[125] *See id.*

[126] *See, e.g.*, Romero v. Guerzon, G.R. No. 211816 1 (Mar. 18, 2015) (Phil.); In re Sereno, A.M. No. 18-06-01-SC, 872 S.C.R.A. 1, 17 (July 17, 2018).

[127] Marantan v. Diokno, G.R. No. 205956, 716 S.C.R.A. 164, 172–73 (Feb. 12,

relation to a televised/radio broadcasted press conference wherein respondents allegedly commented maliciously about the conduct of the court and the merits of the criminal cases before the Regional Trial Court.[128] The case was dismissed by the Philippine Supreme Court for failing to pass the "clear and present danger" test[129]—marking the first time the freedom of speech principles were employed in the context of the *sub judice* rule in our jurisdiction.[130]

The Court said that the "specific rationale" for the *sub judice* rule is that: (1) courts should be immune from every extraneous influence when deciding issues of fact and law; (2) facts should be decided upon evidence produced in court; and (3) the determination of such facts should be uninfluenced by bias, prejudice or sympathies.[131]

The Court also reiterated that a public utterance or publication which concerns a pending judicial proceeding is still constitutionally protected form of speech and press. [132] The exception is if the public utterance of publication tends to obstruct the orderly and fair administration of justice.[133] Interestingly, the Court said that the freedom of public comment should weigh heavily against a possible tendency to influence pending cases.[134]

The Court reiterated Justice Brion's supplemental opinion in *Lejano* in *Romero v. Guerzon* (2015).[135] There, Romero filed a "Petition to Cite in Indirect Contempt" against respondent Guerzon for allegedly violating the *sub judice* rule.[136] Guerzon, in a rejoinder in a deportation case filed against him by Romero, indicated therein that Romero had a "sullied reputation as a lawyer" evidenced by a disbarment case filed against him by his own brother.[137] Through a resolution, the Court rejected the petition, holding that:

> . . . no undue influence, let alone a threat to the Court's impartiality, can be ascribed to respondent's language and utterances. By no stretch of the imagination could

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2014).

[128] *Id.*

[129] *Id.* at 172.

[130] *Id.*

[131] *Id*. (citing Romero v. Estrada, G.R. 174105, 583 S.C.R.A. 396 (Apr. 2, 2009)).

[132] *Id.* at 173.

[133] *Id.* at 173.

[134] *Id.*

[135] *See generally* Romero v. Guerzon, G.R. No. 211816 (Mar. 18, 2015) (Phil.).

[136] *Id.* at 1.

[137] *Id.*

> respondent's statement pose a serious and imminent threat to the administration of justice. Likewise, no intent to impede, obstruct, or degrade the administration of justice can be inferred from respondent's comments.[138]

This discussion is notable because in the previously cited cases, the Court always looked at the effect of utterances, comments, and publications on the "administration of justice."[139] This case seems to have also considered the intent of the speaker or the publisher as another element for the violation of the *sub judice* rule, regardless of the effect of the publication and utterances.[140]

In the cases preceding *Republic v. Sereno,*[141] the *sub judice* rule was almost always in the context of criminal contempt under the Rules of Court.[142] However, in *In Re: Show Cause Order in the Decision Dated May 11, 2018 in G.R. No. 237428* (2018),[143] the Philippine Supreme Court, citing *Republic v. Sereno,* held that there are two ways to deal with violations of the *sub judice* rule—either administratively or criminally.[144] In finding that Former Chief Justice Sereno was liable for violating the *sub judice* rule, the Philippine Supreme Court held that while Sereno was correct, there must exist a "clear and present danger" to be punished under the rules of contempt and the instant case is "not a contempt proceeding" but an administrative matter where the Court is "discharging its Constitutionally-mandated duty to discipline members of the Bar and judicial officers."[145] What applied was not the Rules of Court, but rather the Code of Professional Responsibility and the New Code of Judicial Conduct for the Philippine Judiciary, which both mandate the strict observance of the *sub judice* rule.[146]

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[138] *Id.* at 5 (referring to the notice of the resolution dated March 18, 2015 by the Third Division of the Supreme Court.).

[139] *See supra* discussion Section III.A.

[140] *See Romero*, G.R. No. 211816 at 5.

[141] Republic v. Sereno, G.R. No. 237428, 863 S.C.R.A. 690 (June 19, 2018) (Phil.). Republic v. Sereno was the first case to hold that the *sub judice* rule may also be imposed administratively because it "finds a more austere application to members of the Bar and of the Bench as the strict observance thereof is mandated by the Code of Professional Responsibility and the Code of Judicial Conduct." *Id.*

[142] *See, e.g.*, Lejano v. People, G.R. No. 176389, 638 S.C.R.A. 104, 193 (Dec. 14, 2010) (Phil.); Marantan v. Diokno, G.R. No. 205956, 716 S.C.R.A. 164, 171 (Feb. 12, 2014); *Romero*, G.R. No. 211816.

[143] Republic v. Sereno, A.M. No. 18-06-01-SC, 872 S.C.R.A. 1, 302 (July 17, 2018).

[144] *Id.* at 20.

[145] *Id.* at 9 (referring to the promulgated decision).

[146] *Id.* (referring to the promulgated decision).

The aforementioned line of cases where the Philippine Supreme Court ruled on the basis of the *sub judice* rule would show that there has not been any consistency in the application of the rule in our jurisdiction.[147] This inconsistency was inevitable, especially because even the supplemental opinion of Justice Brion in *Lejano*, seemingly the controlling jurisprudential authority on the *sub judice* rule, committed an error in its discussion of the rule.[148]

B. *The Development of the Application and Interpretation of Contempt Laws in the Philippine Jurisdiction*

While the term "*sub judice* rule" has only recently surfaced in the Philippines, the concept has existed in the country's jurisprudence since the last century.[149] As discussed earlier, not all contemptuous statements are encompassed by the *sub judice* rule.[150] To reiterate, the *sub judice* rule only pertains to those comments or statements which have the tendency to influence the conduct[151] or prejudge the issues at stake in a proceeding.[152]

The Philippine Supreme Court has held that courts have the inherent power to punish for contempt for the observance of order in judicial proceedings and for the due administration of justice. In the 1916 case of *In Re Kelly*[153] Amzi Kelly published an article questioning his conviction of criminal contempt and attacking the jurisdiction of the Court to punish him for contempt.[154] In the article, he wrote, "as soon as the Supreme Court of the United States sees this case, they will reverse it; and the Senate sees it . . . they will remove the judges responsible for it."[155] The article was published while Kelly's motion for reconsideration on his conviction for criminal contempt was still pending before the Supreme Court of the Philippines.[156] The Philippine Supreme Court, speaking through Justice Johnson, held that courts have the inherent power to punish for contempt for the observance of order in judicial proceedings and for the due administration of justice.[157]

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[147] *See Lejano*, 638 S.C.R.A. at 192 (Brion, J., supplemental opinion).

[148] *Id*. (citing Romero v. Estrada, G.R. No. 174105, 583 S.C.R.A. 396 (Apr. 2, 2009)).

[149] *See* discussion *supra* Section III.A.

[150] *See* discussion *supra* Section III.A.

[151] *Lejano*, 638 S.C.R.A. at 192 (Brion, J., supplemental opinion) (citing *Romero*, 583 S.C.R.A. 396).

[152] Discussion Paper 43, *supra* note 111, at 7–8.

[153] *In re* Kelly, G.R. No. 11715, 35 PHIL. REP. 944, 946–48 (Dec. 21, 1916).

[154] *Id.*

[155] *Id.* at 948.

[156] *Id.* at 946.

[157] *Id.* at 950.

Furthermore, and more relevant to the *sub judice* rule, the Court cited American jurisprudence including the case of *Cooper v. People* (1889),[158] in holding that a publication, pending a suit, reflecting upon the Court, the jury, or the parties is punishable for contempt for obstructing the administration of justice.[159] Hence, the Court convicted Kelly for another instance of contempt.[160]

In the 1930 case of *In Re: Severino Lozano and Anastasio Quevedo*,[161] the *El Puebo*, a newspaper based in Iloilo, printed an article containing an inaccurate account of the investigation of a Judge of First Instance, which was conducted behind closed doors, despite a resolution by the Philippine Supreme Court making such proceedings confidential.[162] The Court, through Justice Malcolm, held that it is an established rule that newspaper publications tending to impede, obstruct, embarrass, or influence the courts in administering justice in a pending suit or proceeding constitutes criminal contempt punishable by the Court.[163] Justice Malcolm also recognized the guarantee by the Organic Act of the Freedom of Speech and Press.[164] However, he emphasized that the maintenance of the judiciary is equally important and that respect for the Judiciary cannot be obtained if persons are privileged to scorn a resolution by the Court and are permitted to diffuse inaccurate accounts of confidential proceedings to the embarrassment of the parties and the Court.[165]

What is also notable in the *In Re: Severino Lozano and Anastasio Quevedo* case is the comparison made by Justice Malcolm between the approach by the English courts and the American courts regarding publication of proceedings.[166] After comparing how judges from England, California, Texas, and Wisconsin ruled on instances when documents in cases pending before the courts were published, Justice Malcolm noted that the English courts are more stringent than American Courts. [167] Notwithstanding the disclaimer by Justice Malcolm that there should be a different criterion in our jurisdiction, the Court adopted the American, or the less stringent approach, of striking a balance between the competing

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[158] Cooper v. People, 22 P. 790, 791 (Colo. 1889).

[159] *In re Kelly*, 35 PHIL. REP. at 950–51.

[160] *Id.* at 952.

[161] *In re* Lozano, 54 PHIL. REP. 801, 803–04 (July 24, 1930).

[162] *Id.*

[163] *Id.* at 805.

[164] *Id.* at 807.

[165] *Id.*

[166] *Id.* at 806–07.

[167] *Id*. at 806.

rights, saying that in this jurisdiction, "we need not be overly sensitive because of the sting of newspaper articles, for there are no juries to be kept free from outside influence."[168]

The two aforementioned cases cited American jurisprudence as a basis for the application of the *sub judice* rule in the Philippine jurisdiction.[169] However, it is important to note that shortly after the *In Re Severino Lozano and Anastasio Quevedo* case was decided in 1930, there had been a drastic change in the application of contempt of court within American jurisprudence.[170]

In *Bridges v. California* (1941),[171] the petitioners were adjudged guilty and fined for contempt of court by the Superior Court of Los Angeles County for their comments in relation to a labor case pending in the said court.[172] The petitioners argued before the United States Supreme Court that the contempt was a violation of their freedom of speech guaranteed by the Constitution.[173] The Court held that the "clear and present danger" test is applicable in this case and found the lower court decision to be "a curtailment of expression that cannot be dismissed as insignificant."[174] More importantly, the court through Justice Black, wrote this important discussion:

> We may appropriately begin our discussion of the judgments below by considering how much, as a practical matter, they would affect liberty of expression. It must be recognized that public interest is much more likely to be kindled by a controversial event of the day than by a generalization, however penetrating, of the historian or scientist. Since they punish utterances made during the pendency of a case, the judgments below therefore produce their restrictive results at the precise time when public interest in the matters discussed would naturally be at its height. Moreover, the ban is likely to fall not only at a crucial time, but upon the most important topics of discussion. Here, for example, labor controversies were the topics of some of the publications. Experience shows that, the more acute labor controversies are, the more

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[168] *Id.* at 807.

[169] *In re* Kelly, G.R. No. 11715, 35 PHIL. REP. 944, 946–48 (Dec. 21, 1916); *In re Lozano*, 54 PHIL. REP. at 803–04.

[170] *See, e.g.*, Bridges v. California, 314 U.S. 252, 252 (1941); Pennekamp v. Florida, 328 U.S. 331, 333 (1946); Craig v. Harney, 331 U.S. 367, 369 (1947).

[171] *Bridges*, 314 U.S. at 252.

[172] *Id.* at 258.

[173] *Id.* at 258–59.

[174] *Id.* at 270.

> likely it is that, in some aspect, they will get into court. *It is therefore the controversies that command most interest that the decisions below would remove from the arena of public discussion*.[175]

In *Pennekamp v. Florida* (1946),[176] the petitioners were the publisher and the associate editor of a newspaper responsible for the publication of two editorials and a cartoon criticizing actions taken by a Florida trial court in certain non-jury proceedings as being too favorable to criminals and gambling establishments.[177] The petitioners were cited for contempt for impugning the integrity of the court and obstructing the fair and impartial administration of justice in pending cases.[178] The U.S. Supreme Court reversed the decision of the Florida Supreme Court and held that the danger in the present case "has not the clearness and immediacy necessary to close the door on permissible public comment," and that the freedom of expression under the Constitution was violated.[179]

More important in this case and more relevant in our jurisdiction, was Justice Reed's discussion of what constitutes "clear and present danger":

> What is meant by clear and present danger to a fair administration of justice? No definition could give an answer. Certainly, this criticism of the judges' inclinations or actions in these pending non-jury proceedings could not directly affect such administration. This criticism of their actions could not affect their ability to decide the issues. Here, there is only criticism of judicial action already taken, although the cases were still pending on other points, or might be revived by rehearings. For such injuries, when the statements amount to defamation, a judge has such remedy in damages for libel as do other public servants.
>
> It is suggested, however, that, even though his intellectual processes cannot be affected by reflections on his purposes, a judge may be influenced by a desire to placate the accusing newspaper to retain public esteem and secure reelection, presumably at the cost of unfair rulings against an accused. In this case, too many fine-drawn assumptions against the

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[175] *Id.* at 268–69 (emphasis added).

[176] Pennekamp v. Florida, 328 U.S. 331, 333 (1946).

[177] *Id.*

[178] *Id.*

[179] *Id.* at 349–50.

> independence of judicial action must be made to call such a possibility a clear and present danger to justice. For this to follow, there must be a judge of less than ordinary fortitude without friends or support or a powerful and vindictive newspaper bent upon a rule or ruin policy, and a public unconcerned with or uninterested in the truth or the protection of their judicial institutions.[180]

Justice Reed suggests that in non-jury cases, the only thing that can impede the "fair administration of justice" is the judge himself.[181] He surmised that for there to be a "clear and present danger," the following assumption must first be made: that either the judges have "less than ordinary fortitude," or that the newspapers are "powerful and vindictive" that are "bent upon a rule or ruin policy," and that the public are "unconcerned with or uninterested in the truth or the protection of their judicial institutions."[182]

In *Craig v. Harney* (1947),[183] the petitioners were a publisher, an editorial writer, and a news reporter of newspapers published in Christi Texas.[184] The action for contempt was in reaction to articles they had published in relation to a forcible detainer case pending in the county court.[185] In this forcible detainer case, the jury made a verdict twice, both of which were rejected by the judge.[186] The articles called the ruling an "arbitrary action" and a "travesty on justice."[187] Because of these articles, the petitioners were adjudged guilty of criminal contempt by the County Court of Nueces County, Texas and sentenced to jail for three days.[188] Justice Douglas, in dismissing the argument that strong words were used against the judge said:

> The vehemence of the language used is not alone the measure of the power to punish for contempt. The fires which it kindles must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately

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[180] *Id.* at 348–49 (emphasis added).

[181] *Id.* at 349.

[182] *Id.*

[183] Craig v. Harney, 331 U.S. 367, 369 (1947).

[184] *Id.*

[185] *Id.*

[186] *Id.*

[187] *Id.*

[188] *Id.* at 368.

imperil.[189]

The Court then clarified that the doctrine in *Bridges* should not be limited only to pending cases that generates a public concern.[190] While the nature of the case helps determine whether or not the "clear and present danger" test is satisfied, the doctrine is applicable to all litigation, not merely select types of cases.[191]

This line of American cases has been adopted by our Philippine legal system when the cases were, eventually, cited in Philippine cases.[192]

In *Cabansag v. Fernandez* (1957),[193] the petitioner in an ejectment case wrote a letter to a new office created by then President Ramon Magsaysay called the "Presidential Complaints and Actions Commission ("PCAC")."[194] In his letter, the petitioner asked the PCAC for help with the fast resolution of his case, saying that he was "long deprived of his land thru the careful maneuvers of a tactical lawyer," pertaining to the defendant's counsel.[195] The defendant's counsel then filed a motion to declare the petitioner in contempt.[196] This was dismissed by the trial court, but the petitioner was ordered by the judge to show cause why he should not be held liable for contempt for degrading the court in the eyes of the president and the people.[197] The trial court thereafter held the petitioner in contempt "to protect its judicial independence."[198]

The Court, in deciding the case, recognized that it was confronted with a clash between two fundamental rights—the independence of the judiciary and the right to petition the government for redress and grievance.[199] In deciding the case, the Court employed both the "clear and present danger" test and the "dangerous tendency" rule.[200] The "clear and

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[189] *Id*. at 376.

[190] *Id.* at 378.

[191] *Id.*

[192] Cabansag v. Fernandez, G.R. No. L-8974, 102 PHIL. REP. 152, 161–63 (Oct. 18, 1957).

[193] *Id*. at 156.

[194] *Id.*

[195] *Id.*

[196] *Id.* at 157.

[197] *Id.* at 158.

[198] *Id.* at 160.

[199] *Id.* at 172 ("As important as the maintenance of freedom of speech, is the maintenance of the independence of the Judiciary. The "clear and present danger" rule may serve as an aid in determining the proper constitutional boundary between these two rights.").

[200] *Id.* at 161.

present danger" test provides the criterion as to which words can be published and the Court cited *Bridges, Pennekamp*, and *Craig* in applying the test.[201] On the other hand, the Court said that the "dangerous tendency" rule has been adopted in cases where extreme difficulty is confronted in determining where the freedom of expression ends and the right of courts to protect their independence begins.[202] The Court eventually held that there was no "serious imminent threat" to the administration of justice and that the assailed act did not have a "dangerous tendency" to undermine the court and the administration of justice.[203]

The problem with *Cabansag* is that it is clearly one of contempt by scandalizing the courts, and not the *sub judice* rule of contempt.[204] Thus, instead of clarifying the proper application of the *sub judice* rule, it only left a lot of questions about the meaning of "administration of justice."[205] In that case, the Court stated that the administration of justice is "bound to falter or fail" if the courts do not possess the power to "preserve their integrity and maintain their dignity."[206] Shortly afterwards, it also said that the administration of justice will be obstructed if the Court were to have its impartiality impaired. [207] Thus, in *Cabansag*, the Court interpreted "administration of justice" as protecting both the integrity and impartiality of the courts.[208] This is a different interpretation of the "administration of justice" in *Bridges, Pennekamp*, and *Craig*, which is prejudicing the rights of the accused to an impartial trial—compliant with the definition of the *sub judice* rule.[209]

In *Bridges,* the U.S. Supreme Court held that to regard the assailed editorials as a substantial influence upon the course of justice would be to impute to judges a lack of firmness, wisdom, or honor—which it cannot accept as a major premise.[210]

In *Pennekamp,* the U.S. Supreme Court held that the specific freedom of public comment should weigh heavily against a possible

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[201] *Id.* at 162.

[202] *Id.* at 163.

[203] *Id.* at 165.

[204] *Id.*at 159.

[205] *Id.*

[206] *Id.* (noting that the reason for the power of contempt is that respect for courts guarantees the stability of their institution, without which, said institution would be resting on a very shaky foundation).

[207] *Id.*

[208] *Id.*

[209] *See, e.g.*, Bridges v. California, 314 U.S. 252, 273 (1941); Pennekamp v. Florida, 328 U.S. 331, 347 (1946); Craig v. Harney, 331 U.S. 367, 391 (1947).

[210] *Bridges*, 314 U.S. at 273.

tendency to influence pending cases, and that the freedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice.[211]

In *Craig,* the evil sought to be protected is the possible influence of the editorial on an elected judge.[212] The U.S. Supreme Court held that it failed to see how the editorial could, in any realistic sense, create an imminent and serious threat to the ability of the court to give fair consideration to the motion for rehearing.[213]

Clearly then, in our jurisdiction, "orderly of administration of justice" pertains to the maintenance of both the integrity and impartiality of the judiciary.[214] However, since the case of *Cabansag* is one that involves contempt by scandalizing the courts, the question is whether or not *Cabansag,* which cited *Bridges*, *Pennekamp*, and *Craig*, is also controlling for cases involving contempt by *sub judice* or those comments which have the tendency to influence pending judicial proceedings.[215]

In any case, the Court in *Cabansag* upheld the rule that the "clear and present danger" test must be applied as a formula to determine whether a speech made against the orderly administration of justice is constitutionally protected.[216] In doing so, the Court effectively placed comments and statements, which may influence the court, at the same level as all other speeches being regulated by the government.[217] There is no need to distinguish statements that violated the *sub judice* rule with that of speeches that violated the "clear and present danger" test.[218] Both are prohibited speeches susceptible to government restraint and the rules of court provision becomes the means to restrain the speech.[219] Hence, the *sub judice* rule can be said to have been judicially abandoned in the Philippine jurisdiction as of the promulgation of *Cabansag*.[220]

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[211] *Pennekamp*, 328 U.S. at 347.

[212] *Craig*, 331 U.S. at 391 (identifying the evil as "the purposeful exertion of extraneous influence in having the motion for a new trial granted").

[213] *Id.* at 378.

[214] Cabansag v. Fernandez, G.R. No. L-8974, 102 PHIL. REP. 152, 162 (Oct. 18, 1957).

[215] *See id.*

[216] *Id.* at 165.

[217] *Id.*

[218] *See id.*

[219] *See id.*

[220] *See id.*

C. *The Nestle Deviance*

In the decades following the *Cabansag* ruling, the doctrine with respect to contempt of court as to comments which have the tendency to influence the conduct of a proceeding is clear: there will be no finding of contempt unless the speech passes the "clear and present danger" test.[221] However, in 1987, the Court seemed to have forgotten that there were already standards set, and instead, decided to make a decision from scratch. [222] In doing so, the Court shoved aside well-entrenched jurisprudence without expressly doing so, when it decided the case of *Nestle Philippines v. Sanchez*.[223] In this case, the Court *almost* cited the protesting laborers of Nestle Philippines, Inc. in contempt for picketing outside the premises of the Philippine Supreme Court:

> They set up pickets' quarters on the pavement in front of the Supreme Court building, at times obstructing access to and egress from the Court's premises and offices of justices, officials and employees. They constructed provisional shelters along the sidewalks, set up a kitchen and littered the place with food containers and trash in utter disregard of proper hygiene and sanitation. They waved their red streamers and placards with slogans, and took turns haranguing the court all day long with the use of loud speakers.[224]

The Court threatened "not [to] entertain their petitions for as long as the pickets were maintained" and issued them a show cause order for contempt.[225] In justifying its actions, the Court cited a 1927 American case *In Re Stolen*,[226] decided by the Wisconsin Supreme Court which held that:

> For it is a traditional conviction of civilized society everywhere that courts and juries, in the decision of issues of fact and law should be immune from every extraneous influence; that facts should be decided upon evidence

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[221] *See* Nestle Phil. v. Sanchez, G.R. No. 75209, 154 S.C.R.A. 542, 546 (Sept. 30, 1987) (Phil.).

[222] *Id.*

[223] *Id.*

[224] *Id.* at 544.

[225] *Id.*

[226] *In re* Stolen, 214 N.W. 379, 385 (Wis. 1927).

> produced in court; and that the determination of such facts should be uninfluenced by bias, prejudice or sympathies.[227]

This lifted quote, even without the necessary context, suddenly became the "poster case" for the *sub judice* rule in the Philippines and has been cited in various cases[228] invoking the *sub judice* rule and in various articles attempting to explain the rule.[229] The 1927 case of *In Re Stolen*, or the particular quoted paragraph, it appears, became the new seminal doctrine for the re-emergence of the *sub judice* rule in the country.[230]

Upon closer examination of the factual circumstances of the case, it appears that the case *In Re Stolen* involved a different kind of medium for comment—through a "petition" filed to the Court—from what is usually contemplated by the *sub judice* rule.[231]

The *In Re Stolen* case was about Ole A. Stolen, a Judge of the Superior Court of Dane County who took a loan from a known "bootlegger" with a "long court record."[232] The Wisconsin Supreme Court decided to disbar the respondent Stolen and remove his name from the roll of attorneys for voluntarily placing himself "under obligation to the criminal element of his judicial district," and in so doing shocked the public confidence in his court and brought the general administration of justice into disrepute.[233]

In the same case, and more relevant to the discussion, the Wisconsin Supreme Court acted upon a motion for reconsideration on a "petition" by sixty officers of the Dane County Bar Association, which the Court described to be a "sentimental appeal to the court in favor of Mr. Stolen."[234] The Court considered the petition as "well calculated" to have an influence

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[227] *Sanchez*, 154 S.C.R.A. at 546.

[228] *See, e.g.*, Romero v. Estrada, G.R. No. 209180, 583 S.C.R.A. 397, 403 (Sept. 11, 2019) (Phil.); Marantan v. Diokno, G.R. No. 205956, 716 S.C.R.A. 164, 172 (Feb. 12, 2014) (Phil.)*; see also* Lejano v. People, G.R. No. 176389, 638 S.C.R.A. 104, 192 (Dec. 14, 2010) (Phil.) (Brion, J., supplemental opinion).

[229] *See, e.g.*, Edsel Tupaz, *On Sub Judice and Gag Orders*, RAPPLER (Jan. 26, 2012, 8:23 PM), https://r3.rappler.com/thought-leaders/1130-on-sub-judice-and-gag-orders; Manuel L. Quezon III, *The Burden of Proof Shifts to the Defense*, MLQ3 (Jan. 30, 2012), http://www.quezon.ph/2012/01/30/the-burden-of-proof-shifts-to-the-defense; Robert Bolisay, *Why is Ang Dating Daan Boycotting GMA News and Network*, STANDUPPER (Sept. 7, 2011, 3:06 PM), https://standupper.wordpress.com/2011/09/07/why-ang-dating-daan-add-mcgi-boycotting-gma-news-and-7-network-sub-judic.

[230] In re *Stolen*, 214 N.W. at 385.

[231] *Id.* at 386.

[232] *Id.* at 384.

[233] *Id.* at 385–86.

[234] *Id.* at 127–28 (Owen, J. dissenting).

on the conviction.[235] Since the right of petition is an "inherent right" protected by the State Constitution, the Court held it does not include with it the "right to attempt to influence the decision of a court through the medium of a petition."[236] The Court then elaborated and held that the "right to petition is no more sacred than the right of free speech" and there may be an abuse to the right of petition. [237]

Cabansag has similarities to the case of *In Re Stolen* with respect to involving letters ("petition" in *In re Stolen*) assailing a decision—but was arguably worse because the letter was sent directly to the President of the Republic, and not privately through the same court.[238] The difference, however, is that in the former,[239] the interference was treated as an attack against the integrity of the judiciary, while in the latter, the interference was seen as an attempt to influence the court.[240] Be that as it may, the imposition of the "clear and present danger" test in the *Cabansag* decision was essentially overturned by the later, albeit standardless, ruling in the case of *Nestle*.[241]

In promulgating *Nestle*, the Philippine Supreme Court cited, perhaps inadvertently, old American jurisprudence that has long been overturned by the U.S. Supreme Court.[242] In particular, *Nestle* cited *Cooper v. People*,[243] an 1889 case which tilted the scale against freedom of expression when it ruled against a daily newspaper having a large circulation in Denver and which published certain articles having reference to a pending case involving a petition for writ of habeas corpus.[244] To reiterate, the case of *Bridges* applied the "clear and present danger" test to comments on cases pending before the courts.[245]

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[235] *Id.* at 128.

[236] *Id.* at 129.

[237] *Id.*

[238] Cabansag v. Fernandez, G.R. No. L-8974, 102 PHIL. REP. 152, 156 (Oct. 18, 1957) (Phil.).

[239] *Id.* at 159.

[240] *In re* Stolen, 214 N.W. at 386–87.

[241] Nestle Phil. v. Sanchez, G.R. No. 75209, 154 S.C.R.A. 542, 546 (Sep. 30, 1987) (Phil.).

[242] *Id.*

[243] Cooper v. People, 22 P. 790, 791 (Colo. 1889).

[244] *Id.*

[245] Craig Clever, *Ruling without Reasons: Contempt of Court and the Sub Judice Rule*, 110 S. AFRICA L.J. 530, 541 (1993).

Ironically, the *Bridges* case, which discarded the *sub judice* rule in American jurisprudence,[246] pertains to a labor case similar to the *Nestle* case that transplanted the doctrine in our jurisdiction.[247] Since the *Nestle* case, the *sub judice* rule was invoked in different types of cases—those involving legislative inquiries, constitutional cases, criminal proceedings, and even election cases. [248] Only recently, 2019 vice-presidential candidates Ferdinand Marcos, Jr. and Leni Robredo were both fined P50,000 each by the Presidential Electoral Tribunal for violating the *sub judice* rule in relation to the electoral protest filed by the camp of Marcos.[249]

IV. BALANCING COMPETING RIGHTS: FREEDOM OF EXPRESSION AND RIGHT OF THE ACCUSED

Previous parts of the article discussed how the Philippine Supreme Court has historically made confusing applications of the *sub judice* rule.[250] Next, this part of the article evaluates whether the *sub judice* rule should be restored, and if so, determines the proper way to interpret and apply the rule in the Philippine jurisdiction. In the quest for answers, we must look further into the very essence of the *sub judice* rule. Analysis of various cases citing the rule leads to the realization that the application of the *sub judice* rule is riddled by two conflicting rights—the rights of freedom of expression and of the accused—that are fundamental to our democratic society and that must be weighed together.

This part picks up from *Cabansag* and looks into the case of *Marantan* as the succeeding case which expressly clashed the right to freedom of expression with the maintenance of an independent judiciary.[251] The author submits that in doing so, *Marantan* erred.[252] From there, the discussion will focus on the two different rights protected by the rule and their treatment in the Philippine jurisdiction.

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[246] Schneebaum & Lavi, *supra* note 65, at 49.

[247] *Id.*

[248] *See* discussion *supra* Section III.A.

[249] Dane Angelo M. Enerio, *Robredo, Marcos Face P50,000-Fine Each for Violating PET's Sub Judice Rule*, BUSINESSWORLD (June 16, 2018, 9:41 PM), https://www.bworldonline.com/robredo-marcos-face-p50000-fine-each-for-violating-pets-sub-judice-rule; Kristine Joy Patag, *PET Fines Marcos, Robredo, P50k for Public Remarks on Electoral Case,* PHILSTAR (June 26, 2018, 7:22 PM), https://www.philstar.com/headlines/2018/06/26/1828117/pet-fines-marcos-robredo-p50k-public-remarks-electoral-case.

[250] *See* discussion *supra* Part III.

[251] Marantan v. Diokno, G.R. No. 205956, 716 S.C.R.A. 164, 171–74 (Feb. 12, 2014) (Phil.).

[252] *See id.*

A. *The Marantan Ruling – Corrective or Misapplied?*

The previous part discussed the *Nestle* case, which re-transplanted the *sub judice* rule in our jurisdiction and was based on overturned jurisprudence both in the United States and in our jurisdiction.[253] Prior to *Nestle*, the prevailing doctrine was *Cabansag*, which employed both the "clear and present danger" test and the "dangerous tendency" tests in applying the *sub judice* rule.[254] While *Cabansag* is consistent in its citation of American cases, it was likewise problematic for not choosing a single test, and seemingly advocating a two-tiered approach in the application of the *sub judice* rule.[255]

Moving forward with this discussion, this article looks into the 2014 case of *Marantan*, which again balanced two democratic rights—the right to freedom of speech and the administration of justice[256] In *Marantan*, the Court employed the "clear and present danger" test as the standard in determining the proper constitutional boundary between these two rights.[257] *Marantan* also explained that the evil sought to be protected is the "all-important duty of the court to administer justice in the decision of a pending case."[258] In that case, the Court found that the *sub judice* rule was not violated because the pronouncements in question were mere reiterations of their positions in the petition which cannot influence the court.[259] Thus, in *Marantan*, the issue was about the possible influence of the pronouncements in the decision of a pending case,[260] in contrast with *Cabansag* wherein the issue was about the attack on the integrity of the court.[261]

The Court in *Marantan* reiterated *Cabansag*, citing *Craig* and held that for speech to be considered a violation of the *sub judice* rule, there must exist a "clear and present danger" that the utterance will harm the "administration of justice," to wit:

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[253] *See* discussion *supra* Part III.

[254] Cabansag v. Fernandez, G.R. No. L-8974, 102 PHIL. REP. 152, 156 (Oct. 18, 1957) (Phil.).

[255] The Marantan case referred to both the clear and present danger test and dangerous tendency test. *See* discussion *supra* Section III.B.

[256] Marantan v. Diokno, G.R. No. 205956, 716 S.C.R.A. 164, 171–74 (Feb. 12, 2014) (Phil.).

[257] *Id.* at 172.

[258] *Id.* at 171–72.

[259] *Id.* at 173.

[260] *Id.* at 172 ("[T]he specific rationale for the *sub judice* rule is that courts, in the decision of issues of facts and law should be immune from extraneous influence . . .").

[261] Cabansag v. Fernandez, G.R. No. L-8974, 102 PHIL. REP. 152, 159 (Oct. 18, 1957) (Phil.).

> Freedom of speech should not be impaired through the exercise of the power of contempt of court unless there is no doubt that the utterances in question make a *serious and imminent threat to the administration of justice*. A judge may hold in contempt one who ventures to publish anything that tends to make him unpopular or to belittle him. . . The vehemence of the language used in newspaper publications concerning a judge's decision is not alone the measure of the power to punish for contempt. *The fires which it kindles must constitute an imminent not merely a likely, threat to the administration of justice*.[262]

Marantan, a later ruling to *Nestle*, effectively overturned the prevailing doctrine on the application of the *sub judice* rule yet again.[263] It restored *Cabansag* with a clearer single standard of "clear and present danger," and resolved lingering questions as to the applicability of the "clear and present danger" test to comments which tend to influence the court and pending judicial processes.[264]

While *Marantan* is a welcomed development in terms of creating a more consistent subsequent jurisprudence, it is still problematic because it erred in selecting the right with which the right to freedom of expression is to be balanced.[265] As discussed earlier, the right to the maintenance of an independent judiciary is the subject of a different type of contempt, which is contempt by scandalizing of the courts.[266] Hence, further decisions stemming from these cases would inevitably lead to further confusion and continued overlapping of the different types of contempt.[267]

In order to develop an interpretation truly reflective of the essence of the *sub judice* rule, the right to freedom of expression must be balanced with the right of the accused.[268]

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[262] *Id.* at 172 (emphasis added).

[263] *Marantan*, 716 S.C.R.A. at 171–74.

[264] *Id.* at 172.

[265] *Id.*

[266] *See* discussion *supra* Section III.B.

[267] *See, e.g.,* Cabansag v. Fernandez, G.R. No. L-8974, 102 Phil. 152, 163–66 (Oct. 18, 1957) (Phil.)(suggesting that dangerous tendency test can be used to determine whether a speech or publication is contemptuous), Lejano v. People, G.R. No. 176389, 638 S.C.R.A. 104, 194–95 (Dec. 14, 2010) (Phil.) (Justice Brion suggesting that comments scandalizing the courts are the same as comments *sub judice*); Marantan v. Diokno, G.R. No. 205956, 716 S.C.R.A. 164, 171–74 (Feb. 12, 2014) (Phil.) (holding that the rights to freedom of speech should be balanced with the administration of justice).

[268] Justice Brion said that the significance of the *sub judice* rule is highlighted in criminal cases, as the possibility of undue influence prejudices the accused's right to a fair

B. *The Right to Freedom of Expression*

In the Philippines, freedom of expression is treated with primacy and high esteem.[269] Its elevation to constitutional status[270] as early as the 1935 Constitution is a reflection of our collective belief that freedom of speech is an indispensable condition for nearly every other freedom.[271] As early as the Spanish Colonial Period which lasted from 1521 to 1898, the Filipinos have fought for the right to Free Speech, and the refusal of the Spanish Government to grant this right was a prime cause of the revolution. [272] In fact, the Malolos Constitution, the first Philippine Constitution adopted by the First Philippine Republic in 1899, already provided that no Filipino shall be deprived "of the right to freely express his ideas or opinions, orally or in writing, through the use of the press or other similar means."[273] Hence, as aptly worded by Justice Malcolm, "a reform so sacred to the people of these Islands and won at so dear a cost, should now be protected and carried forward as one would protect and preserve the covenant of liberty itself."[274]

Justice Puno, in *Chavez v. Gonzales*, [275] discussed the practical importance of the freedom of expression:

> It is the chief source of information on current affairs. It is the most pervasive and perhaps most powerful vehicle of opinion on public questions. It is the instrument by which citizens keep their government informed of their needs, their aspirations and their grievances. It is the sharpest weapon in the fight to keep government responsible and efficient. Without a vigilant press, the mistakes of every administration would go uncorrected and its abuses unexposed.[276]

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trial. According to him, the principal purpose of the *sub judice* rule is to preserve the impartiality of the judicial system by protecting it from undue influence. *Lejano*, 638 S.C.R.A. at 194–97; *see* discussion *supra* Part III.

[269] Chavez v. Gonzales, G.R. No. 168338, 545 S.C.R.A. 441, 482 (Feb. 15, 2008) (Phil.).

[270] CONST. (1935), art. III, § 8 (Phil.).

[271] *Chavez*, 545 S.C.R.A. at 482.

[272] JOAQUIN BERNAS, THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 232 (2009); *see* U.S. v. Bustos, G.R. No. L-12592, 37 PHIL. REP. 731, 739 (Mar. 8, 1918).

[273] CONST. (1899), art. 20 (1) (Phil.).

[274] BERNAS, *supra* note 272, at 232 (citing *Bustos*, 37 PHIL. REP. at 739–40).

[275] *Chavez*, 545 S.C.R.A. at 488–89.

[276] *Id.*

Article III, Section 4 of the Constitution which states that "no law shall be passed without abridging the freedom of speech, of expression or of the press. . ." is copied almost verbatim from the First Amendment[277] of the U.S. Bill of Rights.[278] Hence, in discussing the development and application of the Freedom of Expression in our jurisdiction, American jurisprudence has been persuasive.[279] The trend in both Philippine and American decisions is to recognize the broadcast scope and assure the widest latitude to the freedom of expression.[280]

In the often-cited U.S. case *Terminiello v. City of Chicago* (1949),[281] Justice Douglas wrote that the function of free speech is "to invite dispute" and that free speech "best serve[s] its purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."[282] Speech, according to Justice Douglas, is "often provocative and challenging."[283] That is why freedom of speech is protected against censorship or punishment, unless shown that it is likely to produce a "clear and present danger" of a serious substantive evil that rises far above public inconvenience, annoyance or unrest.[284]

Freedom of speech protects every individual from prior restraint.[285] Verily, the elements of freedom of expression are: (1) freedom from previous restraint or censorship, and (2) freedom from subsequent punishment.[286]

In the landmark case of *Chavez v. Gonzales*, the Philippine Supreme Court held that the prevailing test in our jurisdiction to determine the constitutionality of government action imposing prior restraint is the "clear

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[277] U.S. CONST. amend. I. ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

[278] CONST. (1987), art. III, § 4 (Phil.).

[279] BERNAS, *supra* note 272, at 230–324 (2009) (providing commentary on the evolution of freedom of speech provision in the Philippines)*; see also* Re: Letter of Tony Q. Valenciano, Holding of Religious Rituals at the Hall of Justice Building in Quezon City, A.M. No. 10-4-19-SC, 819 S.C.R.A. 313, 425 (Mar. 7, 2017) (Phil.) (Leondardo-De-Castro, J., concurring opinion) ("American jurisprudence has persuasive weight in our jurisdiction.").

[280] Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949)

[281] *Id.*

[282] *Id.*

[283] *Id.*

[284] *Id.*

[285] CARLO CRUZ, NOTES ON THE CONSTITUTION 638–52 (2019).

[286] *Id*.

and present danger" test.[287] This means that the evil consequence of the comment must be "extremely serious and the degree of imminence extremely high" before an utterance can be punished.[288] Hence, our very Constitution tempers the impact of the *sub judice* rule.[289] The Court also held that while it had used both the dangerous tendency doctrine and the "clear and present danger" test to resolve free speech challenges, it has concluded to generally adhere to the latter.[290] Hence, the "clear and present danger" test also applies to statements and comments that have the tendency to influence the court or the conduct of a particular proceeding, just as with any other speeches regulated by the government.[291]

C. *The Right to Fair Trial*

The main rationale for the *sub judice* rule is the protection of the right of an accused to a fair trial.[292] This is premised on the fact that, in criminal cases in particular, jurors would not be able to remain impartial after being exposed to prejudicial publicity.[293] As discussed earlier, the Philippines does not observe the jury system; hence, in this particular aspect, the rationale would seem to be inapplicable.[294] But before completely dismissing this notion, it would be more prudent to discuss the right to fair trial in our jurisdiction.

Prior to the 1973 Philippine Constitution, the 1935 Philippine Constitution did not expressly include the right to an impartial trial.[295] While it is well within the broad sweep of the term "due process of law," the omission of express inclusion resulted in the "right to a fair and impartial trial" being taken for granted as a mere incident of other constitutional prerogatives.[296] An express right to a "fair and impartial trial" can now be found in Article III of the 1987 Philippine Constitution, particularly Section 14, which states:

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[287] Chavez v. Gonzales, G.R. No. 168338, 545 S.C.R.A. 441, 534 (Feb. 15, 2008) (Phil.).

[288] *Id.* at 488.

[289] *Id.*

[290] *Id.*

[291] *See id.*

[292] Lejano v. People, G.R. No. 176389, 638 S.C.R.A. 104, 194 (Dec. 14, 2010) (Phil.) (Brion J., supplemental opinion) (citing Discussion Paper 43, *supra* note 111, at 32).

[293] Discussion Paper 43, *supra* note 111, at 32.

[294] Judicial Right to Know Act, S. No. 1357 (Sept. 11, 2007) (Phil.), http://legacy.senate.gov.ph/lis/bill_res.aspx?congress=14&q=SBN-1357.

[295] BERNAS, *supra* note 272, at 526*; compare*, CONST. (1935) art. III (Phil.) *with* CONST. (1973), art. IV (Phil).

[296] Conrado Sanchez, *A Fair and Impartial Trial,* 11 ATENO L.J. 1, 2 (1961).

> (1) No person shall be held to answer for a criminal offense without due process of law.
>
> (2) In all criminal prosecutions, the accused shall be presumed innocent until the contrary is proved, and shall enjoy the right to be heard by himself and counsel, to be informed of the nature and cause of the accusation against him, to have a speedy, impartial, and public trial, to meet the witnesses face to face, and to have compulsory process to secure the attendance of witnesses and the production of evidence in his behalf. However, after arraignment, trial may proceed notwithstanding the absence of the accused provided that he has been duly notified and his failure to appear is unjustifiable.[297]

When we talk about the right of the accused in the context of the *sub judice* rule, particular focus must be given to two aspects of the "right of the accused," which are the right against trial by publicity and the right to be tried by an impartial judge.[298] This is consistent with the finding of Justice Brion in *Lejano* that the danger posed by the *sub judice* rule is the "undue influence it may directly exert on the court in the resolution of the criminal case, or indirectly through the public opinion it may generate against the accused and the adverse impact this public opinion may have during the trial."[299]

V. RIGHTS OF THE ACCUSED AND COMPARATIVE TREATMENT WITH AMERICAN JURISPRUDENCE

A. *Right Against Trial by Publicity*

Following *Lejano*, the question now is: when is public opinion prejudicial to a point that it will have an adverse impact on the ongoing trial? In order to address this question, we can refer to the discussion made by the Philippine Supreme Court in the case of *Estrada v. Desierto* (2001)[300] as to the two different approaches to adverse publicity:

> There are two (2) principal legal and philosophical schools of thought on how to deal with the rain of unrestrained publicity during the investigation and trial of high profile

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[297] CONST. (1987) art. XIII, § 14 (Phil.).

[298] BERNAS, *supra* note 272, at 499, 502.

[299] Lejano v. People, G.R. No. 176389, 638 S.C.R.A. 104, 195 (Dec. 14, 2010) (Phil.).

[300] Estrada v. Desierto, G.R. No. 146710, 353 S.C.R.A. 452, 524 (Mar. 1, 2001) (Phil.).

> cases. The British approach the problem with the presumption that publicity will prejudice a jury. Thus, English courts readily stay and stop criminal trials when the right of an accused to fair trial suffers a threat. The American approach is different. US courts assume a skeptical approach about the potential effect of pervasive publicity on the right of an accused to a fair trial. They have developed different strains of tests to resolve this issue, i.e., substantial; probability of irreparable harm, strong likelihood, clear and present danger, etc.[301]

The Court then followed with a review of Philippine decisions indicating adherence to the American approach.[302] Having said this, we will now go through the long line of cases of both American and Philippine jurisprudence.

1. American Jurisprudence

In *Irvin v. Dowd* (1961),[303] a habeas corpus proceeding was instituted questioning the validity of petitioner Leslie Irvin's conviction of murder and sentence of death by the Indiana Supreme Court, on the ground that Irvin was not afforded a fair trial because of prejudicial publicity.[304] According to Irvin, in the months preceding his trial, there was a barrage of newspaper headlines, articles, cartoons, and pictures revealing his background, including crimes committed as a juvenile, and depicting him as a "confessed slayer of six," a parole violator, and fraudulent check artist.[305] The U.S. Supreme Court vacated the decision of the Indiana Supreme Court after looking into the "totality of the surrounding facts," particularly noting that the *voir dire* record (preliminary examination of the jurors) showed that 370 prospective jurors or 90 percent of those examined entertained some opinion as to the guilt, exhibiting a "pattern of deep and bitter prejudice" present in the community as a result of the prejudicial publicity.[306]

In *Rideau v. Louisiana* (1963),[307] Wilbert Rideau was apprehended for robbing a bank, kidnapping three of the bank's employees, and killing

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[301] *Id.* at 524–25.

[302] BERNAS, *supra* note 272, at 503.

[303] Irvin v. Dowd, 366 U.S. 717, 718 (1961).

[304] *Id.*

[305] *Id.* at 726.

[306] *Id.* at 727.

[307] Rideau v. Louisiana, 373 U.S. 723, 723–24 (1963).

one of them.[308] A day after his arrest, a film of his interrogation by the Sheriff where Rideau admitted that he had committed the crime was broadcasted over the local televisions for the next two days.[309] During his arraignment, his lawyers filed a motion for a change of venue arguing that Rideau would be deprived of due process if he were forced to have his trial in the same place where his admission was broadcasted.[310] This was denied by the trial court.[311] Consequently, Rideau was convicted and sentenced to death by the trial court.[312] The U.S. Supreme Court reversed the ruling and held that Rideau was deprived of due process when his request for change of venue was turned down, because any subsequent proceeding in a community pervasively exposed to a televised video of the accused personally confessing in detail to the crimes to which he was later to be charged would be but a "hollow formality."[313]

Thus, the rule set by *Irvin*—whether prejudice resulted based on the totality of the surrounding circumstances, was abandoned in *Rideau* where the Court did not consider the "actual effect" of the practice but struck down the conviction on the ground that "prejudice was inherent in it."[314]

In *Estes v. Texas* (1965),[315] Billie Sol Estes argued before the U.S. Supreme Court that he was deprived of his right to due process by the televising and broadcasting of his trial.[316] The U.S. Supreme Court upheld *Rideau* and held that the televising of the courtroom proceedings of Estes' criminal trial, in which there was widespread public interest, was "inherently invalid" as infringing the fundamental right to fair trial guaranteed by the Due Process clause.[317]

In *Sheppard v. Maxwell* (1966),[318] petitioner Sheppard, who was accused of bludgeoning his pregnant wife to death, filed a habeas corpus petition contending that he did not receive fair trial.[319] The Court found that the state trial judge failed to utilize means[320] to protect Sheppard from

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[308] *Id.*

[309] *Id.* at 724.

[310] *Id.*

[311] *Id.*

[312] *Id.* at 725.

[313] *Id.* at 726.

[314] Este v. Texas, 381 U.S. 532, 534–35 (1965).

[315] *Id.*

[316] *Id.* at 535.

[317] *Id.* at 538.

[318] Sheppard v. Maxwell, 384 U.S. 333, 335 (1966).

[319] *Id.*

[320] According to the U.S. Supreme Court, the judge should have limited the

prejudicial publicity and controlling disruptive influences in the court room and ruled in favor of Sheppard.[321] In the same case, the U.S. Supreme Court noted that:

> From the cases coming here we note that unfair and prejudicial news comment on pending trials has become increasingly prevalent. Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused.[322]

In *Murphy v. Florida* (1975),[323] Murphy contended in a habeas corpus proceeding that he was denied a fair trial because of prejudicial publicity.[324] In deciding the case, the U.S. Supreme Court articulated a two-part test for determining whether there was prejudicial publicity.[325]

The first part states that where there is an apparent and flagrant departure from fundamental due process and decorum, and an intrusion of external influences, prejudice will be presumed.[326] According to *Murphy*, the cases *Rideau*, *Turner*, *Estes*, and *Sheppard* would fall under this case.[327] The second part is referred to as the "totality of the circumstances" test and is derived from *Irvin*.[328]

The U.S. Supreme Court then held that Murphy failed to show that the setting of the trial was inherently prejudicial or that the jury selection process of which he complained permitted an inference of actual

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presence of the press at judicial proceedings, regulated the conduct of newsmen in the courtroom, insulated the witnesses, and made effort to control the release of leads, information and gossip to the press by police officers, witnesses and counsels. *Id.* at 358–59.

[321] *Id.* at 363.

[322] *Id.* at 362.

[323] Murphy v. Florida, 421 U.S. 794, 796 (1975).

[324] *Id*. at 795.

[325] Robert Hardaway & Douglas B. Tumminello, *Pretrial Publicity in Criminal Cases of National Notoriety: Constructing a Remedy for the Remediless Wrong*, 46 AM. U. L. REV. 39, 60 (1996); Oscar Franklin B. Tan, *Justice is Blind but She Listens to the Radio: Procedural Remedies to Safeguard the Rights of the Accused from Prejudicial Media Publicity*, 81 PHIL. L.J. 431, 464 (2017).

[326] Hardaway & Tumminello, *supra* note 325, at 60.

[327] *Id.* at 60–61.

[328] *Murphy*, 421 U.S. 799–800 (citing Irvin v. Dowd, 366 U.S. 717, 721 (1961)).

prejudice.[329] The possibility of prejudice was not great enough for reversal.[330]

The foregoing cases show the transition of the American legal system to a stricter approach in determining what constitutes prejudicial publicity.[331] This is in consonance with the observance of the Court in *Estrada v. Desierto* as it regards the United States' "skeptical approach" towards the possibility of prejudice by publicity.[332] The doctrine of *Murphy* showed that even in the United States where juries—the group originally protected by the *sub judice* rule—are employed in the judicial process, the burden of proving prejudicial publicity is relatively high.[333]

2. Philippine Jurisprudence

On the other hand, in the Philippine jurisdiction where there is no jury, there are various cases that tackled the issue on prejudicial publicity, the most noteworthy being *Martelino v. Alejandro.*[334]

In *Martelino v. Alejandro* (1970),[335] Martelino challenged the court-martial president on the ground that newspaper accounts of the "Jabidah Massacre" might unduly influence the ongoing trial, and in doing so, cited American jurisprudence.[336] In its decision, the Court first explained why the cases cited by Martelino were "disparate" from the instant case.[337] The Court then held that the petitioners failed to show that the court martial failed to protect the accused from prejudicial publicity.[338] Furthermore, the Court said that Martelino did not contend that the respondents have been unduly influenced by the newspaper reports but simply said that they might have been because of the "barrage" of publicity.[339]

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[329] *Id.* at 803.

[330] *Id.*

[331] *See, e.g., id.*; Sheppard v. Maxwell, 384 U.S. 333, 363 (1966); Este v. Texas, 381 U.S. 532, 538 (1965).

[332] Estrada v. Desierto, G.R. No. 146710, 353 S.C.R.A. 452, 525 (Mar. 1, 2001) (Phil.) (comparing the British approach with the American approach on prejudicial publicity).

[333] *Murphy*, 421 U.S. 799–800.

[334] Martelino v. Alejandro, G.R. No. L-30894, 32 S.C.R.A. 106, 106 (Mar. 26, 1970) (Phil.).

[335] *Id.*

[336] *Id.* at 109. The Supreme Court said that the following U.S. cases are "widely disparate" in a "fundamental sense" from the present case of *Martelino*: *Irvin v. Dowd*, 366 U.S. 717 (1961); *Rideau vs. Louisiana*, 373 U.S. 723 (1963); *Estes v. Texas*, 381 U.S. 532 (1965); and *Shepard v. Maxwell*, 384 U.S. 333 (1966). *See* discussion *supra* Section V.A.1.

[337] *Martelino*, 32 S.C.R.A. at 112.

[338] *Id.* at 115.

[339] *Id.* at 117.

While not expressly stated in the opinion, it can be inferred from the text that *Martelino* adopted the test of "actual prejudice."[340] This test was affirmed in subsequent Philippine Supreme Court decisions.[341]

In *People v. Teehankee* (1995),[342] the case involved Claudio Teehankee Jr. ("Teehankee"), the son and namesake of former Chief Justice of the Philippine Supreme Court Claudio Teehankee, Sr., who was convicted of murder.[343] Teehankee appealed his case to the Philippine Supreme Court, arguing that prejudicial publicity impaired his right to an impartial trial because of the pressure being exerted by high-ranking officials.[344] For instance, Vice President Joseph Estrada and Justice Secretary Franklin Drilon attended the hearings, while President Corazon Aquino visited the parents of the victim.[345] Teehankee claimed that because of this "pressure," the judge was prevented from protecting him from prejudicial publicity and disruptive influences that attended the prosecution of his case.[346] The Court, in dismissing the case, cited *Martelino* and said:

> At best, appellant can only conjure possibility of prejudice on the part of the trial judge due to the barrage of publicity that characterized the investigation and trial of the case. In *Martelino, et al. v. Alejandro,* et al., we rejected this standard of possibility of prejudice and adopted the test of actual prejudice as we ruled that to warrant a finding of prejudicial publicity, there must be allegation and proof that the judges have been unduly influenced, not simply that they might be, by the barrage of publicity. In the case at a bar, the records do not show that the trial judge developed actual bias against appellants as a consequence of the extensive media coverage

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[340] Oscar Franklin B. Tan, *Justice is Blind But She Listens to the Radio: Procedural Remedies to Safeguard the Rights of the Accused from Prejudicial Media Publicity*, 81 PHIL. L.J. 431, 437–43 (2017) (discussing *Martelino*); *see* Atty. Lorna Patajo-Kapunan, *Prejudicial Publicity,* BUS. MIRROR (July 8, 2019), https://businessmirror.com.ph/2019/07/08/prejudicial-publicity.

[341] *See, e.g.*, Go v. Court of Appeals, G.R. No. 106087, 221 S.C.R.A. 397, 404 (Apr. 17, 1993) (Phil.); Larranaga v. Court of Appeals, G.R. No. 130644, 287 S.C.R.A. 581, 595 (Mar. 13, 1998) (Phil.); Estrada v. Desierto, G.R. No. 146710, 353 S.C.R.A. 452, 525 (Mar. 2, 2001) (Phil.); People v. Sanchez, G.R. Nos. 121039-45, 367 S.C.R.A. 520, 526–27 (Oct. 18, 2001) (Phil.).

[342] People v. Teehankee, G.R. Nos. 111206-208, 249 S.C.R.A. 54, 59 (Oct. 6, 1995) (Phil.).

[343] *Id.*

[344] *Id.* at 104.

[345] *Id.*

[346] *Id.*

> of the pre-trial and trial of his case. The totality of circumstances of the case does not prove that the trial judge acquired a fixed opinion as a result of prejudicial publicity, which is incapable of change even by evidence presented during the trial. Appellant has the burden to prove this actual bias and he has not discharged the burden.[347]

In the case of *People v. Sanchez* (2001),[348] Mayor Sanchez and several others, who were found guilty by the Court for the crime of homicide and rape of two victims, filed a motion for reconsideration on the basis of prejudicial publicity.[349] In dismissing this argument, the Court in a resolution reiterated the ruling in *Teehankee* and then applied the *Martelino* test:

> *This failure to present proof of actual bias* continues to hound accused-appellant Sanchez, having failed, in his motion for reconsideration, to substantiate his claims of actual bias on the part of the trial judge. Not only that, accused-appellant's case has been exhaustively and painstakingly reviewed by the Court itself. *Accused-appellant Sanchez has not shown by an iota of proof that the Court, in the examination of his appeal, was unduly swayed by publicity in affirming the sentence of conviction imposed by the trial court*. The charge of conviction by publicity leveled by accused-appellant has thus no ground to stand on.[350]

In *Estrada v. Desierto*,[351] President Joseph Estrada argued that the Ombudsman should be stopped from conducting the investigation of the cases filed against him due to the "barrage of prejudicial publicity" on his guilt.[352] The Philippine Supreme Court once again applied the *Martelino* test and held that the petitioner needed more proof that the capacity of the judge to render a bias-free decision was impaired.[353]

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[347] *Id.* at 105–06.

[348] People v. Sanchez, G.R. Nos. 121039-45, 367 S.C.R.A. 520, 526–27, (Oct. 18, 2001) (Phil.).

[349] *Id.* at 525.

[350] *Id*. at 527 (emphasis added).

[351] Estrada v. Desierto, G.R. No. 146710, 353 S.C.R.A. 452, 525 (Mar. 2, 2001) (Phil.).

[352] *Id.* at 524.

[353] *Id.* at 526.

It must be noted that almost forty years after *Martelino* was promulgated, the Philippine Supreme Court has yet to decide a case that passes the standard set by the case to warrant a finding of prejudicial publicity, which is that there must be allegation and proof that the judges have been unduly influenced, not simply that they might be, by the barrage of publicity.[354]

If *Martelino* provides such a high standard as to when publicity becomes prejudicial to the point that the right of the accused to an impartial trial is prejudiced, when can we then consider comments as already prejudicing the "administration of justice" and "right to fair trial" which the *sub judice* rule seeks to protect?[355]

More importantly, the *Martelino* standard is patently inconsistent with the *sub judice* rule.[356] The *Martelino* standard requires that there is proof that the judge was unduly influenced—meaning to say that a case has already been decided.[357] On the other hand, the *sub judice* rule, by its literal meaning, pertains to cases that are still pending in the Courts.[358]

B. *Right to be Tried by an Impartial Judge*

Returning to the discussion of Justice Brion in *Lejano*, we have already discussed how comments on *sub judice* may exert undue influence indirectly through public opinion.[359] But how about undue influence directly exerted on the court in the resolution of the criminal case?

In a long list of cases,[360] the Philippine Supreme Court emphasized that the "cold neutrality of an impartial judge" is the indispensable

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[354] *See* Tan, *supra* note 325, at 437–43 (discussing *Martelino* as the prevailing doctrine).

[355] *Id.* at 443 ("Thus a frustrated defense counsel may well read every reiteration of *Martelino* to mean: Storm the gates of hell with a glass of water.").

[356] People v. Teehankee, G.R. Nos. 111206-208, 249 S.C.R.A. 54, 105–06 (Oct. 6, 1995) (Phil.)

> In *Martelino et al. v. Alejandro, et. al*, we rejected this standard of possibility of prejudice and adopted the test of actual prejudice as we ruled that to warrant a finding of prejudicial publicity, there must be allegation and proof that the judges have been unduly influenced, not simply that they might be, by the barrage of publicity.

Id.

[357] *Id.*

[358] *See* discussion *supra* Part II.

[359] *See* discussion *supra* Part III.

[360] *See, e.g.*, Austria v. Masaquel, G.R. No. L-22536, 20 S.C.R.A. 1247 (Aug. 31, 1967) (Phil.); Luque v. Kayanan, G.R. No. L-26826, 29 S.C.R.A. 16 (Aug. 29, 1969) (Phil.); People v. Angcap, G.R. No. L-28748, 43 S.C.R.A. 437 (Feb. 29, 1972) (Phil.); Aquino Jr. v. Mil. Commm'n No. 2, G.R. No. L37364, 63 S.C.R.A. 546 (May 9, 1975) (Phil.); People v. Ancheta, G.R. No. L-39993, 64 S.C.R.A. 90 (May 19, 1975) (Phil.);

imperative of due process.[361] It is not enough that the judge be impartial; he must also appear to be impartial.[362] Looking at Philippine jurisprudence, it is apparent that there is a strong presumption of regularity found among judges.[363]

For instance, in *Teehankee,*[364] the Court, speaking through Justice Puno, said that "our judges are learned in the law and trained to disregard off-court evidence and on-camera performance of parties to a litigation. Their mere exposure to publications and publicity stunts does not per se fatally infect their impartiality."[365]

In *Pimentel v. Salanga* (1967),[366] the issue brought before the Court was whether the respondent Judge should be allowed to continue presiding over a case in which counsel of one of the parties was his adversary in an administrative case.[367] The Court, in denying the petitioner, held:

> Efforts to attain fair, just and impartial trial and decision, have a natural and alluring appeal. But, we are not licensed to indulge in unjustified assumptions, or make a speculative approval to this Ideal. It ill behooves this Court to tar and feather a judge as biased or prejudiced, simply because counsel for a party litigant happens to complain against him. As applied here, respondent judge has not as yet crossed the line that divides partiality and impartiality. He has not thus far stepped to one side of the fulcrum. No act or conduct of his would show arbitrariness or prejudice. Therefore, we are not to assume what respondent judge, not otherwise legally disqualified, will do in a case before him. We have had occasion to rule in a criminal case that a charge made before trial that a party "will not be given a fair, impartial and just hearing is "premature." Prejudice is not to be presumed. Especially if weighed against a judge's legal obligation under his oath to administer justice without respect to person and do equal right to the poor and the rich." To disqualify or

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Martinez v. Gironella, G.R. No. L-37635, 65 S.C.R.A. 245 (July 22, 1975) (Phil.).

[361] *See* discussion *infra* Section V.B.

[362] *See* discussion *infra* Section V.B.

[363] *See, e.g.,* People v. Teehankee, G.R. Nos. 111206-208, 249 S.C.R.A. 54, 105 (Oct. 6, 1995) (Phil.); Pimentel v. Salanga, G.R. No. L-27394, 21 S.C.R.A. 160, 163 (Sept. 18, 1967) (Phil.).

[364] *Teehankee*, 249 S.C.R.A. at 105.

[365] *Id.*

[366] Pimentel v. Salanga, G.R. No. L-27394, 21 S.C.R.A. 160, 163 (Sept. 18, 1967) (Phil.).

[367] *Id.*

> not to disqualify himself then, as far as respondent judge is concerned, is a matter of conscience.[368]

This is not to say that judges are incapable of being impartial.[369] In fact, there are several cases where the Court found that the judge was impartial, but none of these were in relation to indirect influence from comments made by the parties or the public about a pending case which are the ones relevant for our discussion. [370]

The presumption of impartiality in favor of judges, coupled with the *Marantan* and *Martelino* standards on freedom of speech and prejudicial publicity, respectively, bolsters the idea that the *sub judice* rule—its rationale being the protection of the rights of the accused—is incompatible in Philippine jurisdiction.[371]

VI. INTERNATIONAL LEGAL STANDARDS AS GUIDANCE

Having discussed prejudicial publicity, in relation to the right of the accused to an impartial trial and orderly administration of justice, another important consideration is the enforcement of these rights under the regime of international human rights law.[372]

A. *Conventional Obligations*

> The Philippines is a state party to the international human rights instruments on civil and political rights—the International Covenant on Civil and Political Rights

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[368] *Id.* at 166–67.

[369] *See, e.g.*, Sison-Barias v. Rubia, A.M. No. RTJ-14-2388 (June 10, 2014) (Phil.); Bandoy v. Jacinto, A.M. No. RTJ-14-2399 (Nov. 19, 2014) (Phil.); Angping v. Ros, A.M. No. 12-8-160-RTC (Dec. 10, 2012) (Phil.).

[370] *See, e.g.*, *Sison-Barias*, A.M. No. RTJ-14-2388; *Bandoy*, A.M. No. RTJ-14-2399; *Angping*, A.M. No. 12-8-160-RTC.

[371] *See* discussion *supra* Parts V.A & V.B.

[372] Allan Chester B. Nadate, *Presuming Innocence in a Police State and Articulating the Constitutional Imperative for Critical Carceral Reforms*, 91 PHIL. L.J. 136, 180–81 (2018).

> This is crucial considering two factors. First, the Constitution unequivocally provides that the Philippines adopts the generally accepted principles of international law as part of the law of the land. As a cardinal constitutional postulate, this doctrine of incorporation warrants in no small measure that these principles, as well as international jurisprudence, will 'automatically form part of Philippine law by operation of the Constitution.' And, second, the Supreme Court has, recently, become keener in appreciating international human rights concepts and jurisprudence in its interpretation of the Constitution, especially the Bill of Rights.

Id.

> ("ICCPR").[373] The Freedom of Expression is protected under Article 19 of the ICCPR:
> (1) Everyone shall have the right to hold opinions without interference.
> (2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.[374]

In its *General Comment No. 34*,[375] the Committee said that freedom of opinion and freedom of expression are indispensable conditions for the full development of the person, that such freedoms are essential for any society, and that they constitute the foundation stone for every free and democratic society.[376]

Just like any other law, however, the Freedom of Expression is not absolute.[377] Article 19(3) provides for exceptions to Article 19(2):

> The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
> (a) For respect of the rights and reputations of others;
> (b) For the protection of national security or of public order, or of public health or morals.[378]

The restriction was explained in *Mukong v. Cameroon,*[379] to wit:

> Any restriction of the freedom of expression pursuant to paragraph 3 of article 19 must cumulatively meet the following conditions: it must be provided for by law, it must address one of the aims enumerated in paragraph 3(a) and (b) of article 19, and must be necessary to achieve the

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[373] International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

[374] *Id*. art. 19.

[375] U.N. Hum. Rts. Off. of the High Comm'r, Hum. Rts. Comm., *General Comment No. 34*, (Sept. 12, 2011) [hereinafter *General Comment No. 34*].

[376] *Id*. ¶ 2.

[377] *See* ICCPR, *supra* note 373.

[378] *Id.* art. 19 ¶ 3.

[379] Mukong v. Cameroon, Commmc'n No. 458/1991, Judgment, (U.N. Hum. Rts. Off. of the High Comm'r, Hum. Rts. Comm. Aug. 10, 1994).

> legitimate purpose. . . While the State party has indicated that the restrictions on the author's freedom of expression were provided for by law, it must still be determined whether the measures taken against the author were necessary for the safeguard of national security and/or public order.[380]

The "rights or reputations of others" referred to in Article 19(3)(a) undoubtedly includes rights linked to the administration of justice, such as the right to a fair trial and the presumption of innocence.[381] Hence, the ICCPR does not prohibit *sub judice* contempt per se, as long as the application thereof falls under the conditions of Article 19(3).[382]

One of the conditions is that the restrictions must be provided by law.[383] Law, according to *General Comment No. 34*, may include laws of parliamentary privilege and laws of contempt of court.[384] Since any restriction on freedom of expression constitutes a serious curtailment of human rights, it is not compatible with the Covenant for a restriction to be enshrined in traditional, religious, or other such customary law.[385]

Since the rule on *sub judice* in Philippine jurisdiction is only based on the rules promulgated by the Philippine Supreme Court, jurisprudence, and the "inherent power"[386] of the courts, it cannot be said to be compliant with Article 19(3), which requires that any restriction on the right of Freedom of Expression be "provided by law."[387]

In *Couiner Kerrouche v. Algeria* (2016),[388] Kouider Kerrouche wrote to President Bouteflika about the procedural irregularities observed in the preliminary investigation and the abuses of power committed by Mascara judicial authorities.[389] The Chief Prosecutor charged the author for violating article 144 of the Criminal Code by insulting a public official in

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[380] *Id.*

[381] ICCPR, *supra* note 373, art. 19 ¶ 3.

[382] *See id.*

[383] *Id.*

[384] *General Comment No. 34*, *supra* note 375, at ¶ 24 (citing Dissanayake v. Sri Lanka, Commmc'n No. 1373/2005, Judgment, (U.N. Hum. Rts. Off. of the High Comm'r, Hum. Rts. Comm. July 22, 2008)).

[385] *Id.* (citing U.N. Hum. Rts. Off. of the High Comm'r, Hum. Rts. Comm., *General Comment No. 32*, (Aug. 23, 2007) [hereinafter *General Comment No. 32*]).

[386] *See In re* Kelly, G.R. No. 11715, 35 PHIL. REP. 944, 950 (Dec. 21, 1916) (Phil.).

[387] ICCPR, *supra* note 373, art. 19 ¶¶ 2–3.

[388] Couiner Kerrouche v. Algeria, Commmc'n No. 2182/2012, Judgment, ¶ 8.8. (U.N. Hum. Rts. Off. of the High Comm'r, Hum. Rts. Comm. Dec. 29, 2016).

[389] *Id.*at ¶ 2.9.

connection with the performance of his duties.[390] In finding that Article 19(2) of the Covenant was violated, the Committee held:

> The Committee recalls that article 19(3) of the Covenant allows restrictions to be placed on the freedom of expression, but only such as are provided for by law and are necessary for the respect of the rights or reputations of others. In this case, the Committee notes that the State party has offered no explanation that would show that the author's criminal trial and conviction for defamation were necessary to protect the integrity of the judiciary.[391]

On the other hand, the administration of justice, particularly the right to fair trial and presumption of innocence, is protected under Article 14 of the same Covenant:

> (1) All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, *everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal* established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (order public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.
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> (2) Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.[392]

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[390] *Id.*

[391] *Id.* at ¶ 8.8.

[392] ICCPR, *supra* note 373, art. 14 ¶¶ 1□2 (emphasis added).

In its *General Comment No. 32*,[393] the United Nations Human Rights Council ("UNHRC") discussed the concepts of "impartiality" and "fair trial."[394]

The requirement of *impartiality* of a tribunal under section 14(1) is an absolute right and not subject to exceptions.[395] Accordingly, this requirement has two aspects.[396] First, judges must not allow their judgement to be influenced by personal bias or prejudice, nor harbor preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other.[397] Second, the tribunal must appear to a reasonable observer to be impartial.[398] This is consistent with Philippine jurisprudence which repeatedly teaches that litigants are entitled to nothing less than the cold neutrality of an impartial judge.[399]

As to *fair trial*, the fairness of proceedings entails the absence of any direct or indirect influence, pressure, intimidation, or intrusion from whatever side and for whatever motive.[400] In *Gridin v. Russian Federation* (2000),[401] the Human Rights Committee held that a hearing is not fair and in violation of Article 14(1) if the defendant in the criminal proceeding is placed in a hostile atmosphere by pressure created from the public in the courtroom, and the trial court judge was not able to protect the defendant.[402]

Notably, Article 14(1) itself requires that all hearings must be public.[403] In *General Comment No. 32*, it is emphasized that the publicity of hearings "provides an important safeguard in the interest of the individual

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[393] *General Comment No. 32*, *supra* note 385, at ¶ 19.

[394] *Id.*

[395] *Id.*

[396] *Id.* at ¶ 21.

[397] *Id.*

[398] *Id.*

[399] *See, e.g.*, Austria v. Masaquel, G.R. No. L-22536, 20 S.C.R.A. 1247 (Aug. 31, 1967) (Phil.); Luque v. Kayanan, G.R. No. L-26826, 29 S.C.R.A. 16 (Aug. 29, 1969) (Phil.); People v. Angcap, G.R. No. L-28748, 43 S.C.R.A. 437 (Feb. 29, 1972) (Phil.); Aquino Jr. v. Mil. Commm'n No. 2, G.R. No. L37364, 63 S.C.R.A. 546 (May 9, 1975) (Phil.); People v. Ancheta, G.R. No. L-39993, 64 S.C.R.A. 90 (May 19, 1975) (Phil.); Martinez v. Gironella, G.R. No. L-37635, 65 S.C.R.A. 245 (July 22, 1975) (Phil.).

[400] *General Comment No. 32*, *supra* note 385, at ¶ 25.

[401] Gridin v. Russ. Fed'n, Commmc'n No. 770/1997, Judgment, ¶ 8.2 (U.N. Hum. Rts. Off. of the High Comm'r, Hum. Rts. Comm. July 18, 2000).

[402] *Id.* at ¶ 8.2.

[403] ICCPR, *supra* note 373, art. 14 ¶ 1.

and of society at large" and the only exception against a public hearing are those "exceptional circumstances" provided for in article 14(1).[404]

Another convention we can look to for interpretations on the rights of the accused is the European Convention on Human Rights ("ECHR"), as the convention was used as a basis in the "balancing" of the rights of freedom of expression and the orderly administration of justice.[405] This will be discussed in depth later.[406] Interestingly, the provisions of the ECHR on the rights to fair trial and freedom of expression are very similar to those of the ICCPR.[407] Article 6 of the Convention—Right to a fair trial provides:

> 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
>
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

Article 10 of the Convention – Freedom of Expression provides:

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are

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[404] *General Comment No. 32*, *supra* note 385, ¶¶ 28–29.

[405] European Convention on Human Rights, Nov. 4, 1950, CETS No. 194, art 10. [hereinafter ECHR].

[406] *See* discussion *infra* VI.B.

[407] ECHR, *supra* note 405, art. 10.

> prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, *for the protection of the reputation or rights of others*, for preventing the disclosure of information received in confidence, or *for maintaining the authority and impartiality of the judiciary*.[408]

Just like in the ICCPR, the ECHR provides for an exception to the freedom of expression.[409] The exemption for the maintenance of the authority and impartiality for the judiciary is made expressly in the ECHR.[410] Article 10(2) also requires that the restrictions must be prescribed by law, are "necessary" in a democratic society, and must address one of the aims provided for in the section (i.e. for prevention of health or morals, for protection of the reputation or rights of others)[411]

The requisite of necessity is exemplified in the case of *Du Roy and Malaurie v. France* (2000).[412] Du Roy and Malaurie were found by the local court to have violated Article 2 of the Act of 2 July 1931, which prohibits the publication of any information concerning proceedings instigated by an individual before the Court reaches a verdict.[413] The ECHR noted that the disputed ban was an absolute prohibition and only pertained to criminal proceedings instituted on a complaint accompanied by a civil-party application—not those by the Public Prosecutor or a complaint not accompanied by a civil-party application.[414] The difference of treatment did not have any objective reason, and the ECHR held that there are other mechanisms in the local laws that provide the accused the benefit of the presumption of innocence.[415] Hence, the Court found that the total ban was unnecessary and disproportionate to its legitimate pursuit; therefore, France was found to have violated Article 10.[416]

The foregoing shows that certain international conventions, including the ICCPR to which the Philippines is a state party, highly regards the right of freedom of speech and treats it as a "foundation stone" for every

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[408] *Id.*

[409] *Id.* art. 10(2) (emphasis added).

[410] *Id.*

[411] *Id.*

[412] Du Roy v. France, App. No. 34000/96, ¶ 37 (Oct. 3, 2000), http://hudoc.echr.coe.int/eng?i=001-58829.

[413] *Id.* at ¶ 14.

[414] *Id.* at ¶ 35.

[415] *Id*.

[416] *Id.* at ¶ 37.

free and democratic society.[417] While the right is not absolute, these conventions provide conditions for restrictions to be valid and the country has not observed one of the requirements which is that any restraint on the freedom of speech must be provided by law.[418]

B. *Comparative Review of Balancing of Interest*

Having discussed international conventions containing both the freedom of speech and the rights to fair trial and the orderly administration of justice, and how they are applied together, the article will look into how these international obligations are being interpreted in various jurisdictions that incorporate the *sub judice* rule. In doing so, the article analyzes how these jurisdictions attempt to balance the conflicting rights.

The article will discuss the application of the "balancing of rights" in specific countries: (i) United Kingdom, (ii) Australia, and (iii) Singapore. In a nutshell, these countries were chosen because of the interesting developments of freedom of expression alongside the law on contempt in their respective jurisdictions.

The United Kingdom and Singapore have the protection of freedom of speech in their respective Constitutions, with the express exemption for contempt laws.[419] While the law on contempt of United Kingdom has existed for decades, the contempt law of Singapore has only recently been implemented.[420] On the other hand, Australia has an implied protection to the freedom of expression and is still in the process of creating its own law on contempt.[421] Despite these institutional differences, these States have similar juridical tradition regarding contempt, initially based on common law processes.[422]

1. United Kingdom

In studying foreign application of the rule on contempt, the United Kingdom is the most obvious choice because, as discussed earlier, it is where the *sub judice* rule supposedly originated.[423] United Kingdom law has traditionally taken little or no notice of freedom of speech.[424] There has been no equivalent in the United Kingdom to the First Amendment in the

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[417] *General Comment No. 34*, *supra* note 375, at ¶ 2.

[418] The *sub judice* rule is not enforced by law but by a mere rule promulgated by the Supreme Court. *See* discussion *supra* Parts II and III.

[419] *See* discussion *infra* Sections VI.B.1, VI.B.3.

[420] *See* discussion *infra* Sections VI.B.1, VI.B.3.

[421] *See* discussion *supra* Section VI.B.2.

[422] *See* discussion *supra* Section VI.B.1–VI.B.3.

[423] *See* discussion *supra* Part II.

[424] Eric Barnedt, *Freedom of Expression in the United Kingdom Under the Human Rights Act 1998*, 84 IN. L.J 851, 851 (2009).

United States Constitution,[425] or Section 4, Article III in the Philippine Constitution—both of which prohibit any law that abridges the freedom of speech and of the press.[426]

With regard to freedom of speech and administration of justice, the balance in the United Kingdom appeared to tilt in favor of fair trial over the right to free speech before 1979.[427] The traditional common law approach held that if the rights to a fair trial and freedom of speech were found to conflict, the proper course required the media to refrain from publishing until all possibility of risk passed.[428] According to the common law, this was the "balance."[429] Trial by newspaper was to be avoided at all cost.[430]

To encapsulate the prior statement, in *HM Attorney General v. The Times Newspaper LTD* (1973), Lord Reid said that the law of contempt was not intended to protect the rights of parties to a litigation, but to prevent the interference with the administration of justice.[431] While he conceded that the freedom of speech should not be limited to more than what was necessary, freedom of speech could not be allowed when there would be real prejudice to the administration of justice.[432]

In the same case, the House of Lords granted the imposition of injunction against a newspaper article which discussed a pending action between the parents of victims of the drug thalidomide and its manufacturer, the Distiller Company.[433] The newspaper article was held to be contemptuous because of its "prejudgment" of the case: the article discussed the issues involved in the litigation and suggested that there was a strong case in negligence against the distillers.[434] The House of Lords held that any sort of detailed public discussion or pronouncement on the issues raised in pending proceedings would constitute contempt of court.[435] The test, according to Lord Cross, is the prejudgment test.[436] This test does not take

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[425] *Id.*

[426] CONST. (1987) art. III § 4 (Phil.).

[427] A.T.H. Smith, *Contempt, Free Press and Fair Trial: A Permanent Shift?*, 56 CAM. L.J. 467, 467 (1997).

[428] *Id.*

[429] *Id.*

[430] *Id.*

[431] Sunday Times v. U.K., App. No. 6538/74, 2 EHRR 245, par. 29 (Apr. 26, 1979).

[432] *Id.*

[433] Sui Yi Siong, *Sub Judice Contempt of Court in Singapore and the Way Forward*, 32 SING. L. REV. 121, 129 (2014).

[434] *Id.*

[435] *Id.*

[436] *Sunday Times*, 2 EHRR 245 at 265.

into account whether a real risk of interference with, or prejudice to, the course of justice exists and inhibits innocuous publications dealing incidentally with issues and evidence in pending cases in order to prevent a gradual slide towards trial by newspapers or other mass media.[437]

The *Sunday Times* case elevated the decision of the House of Lords to the European Court of Human Rights.[438] The European Court of Human Rights ("ECtHR") found that the law on strict liability contempt was incompatible with Article 10 of the ECHR.[439]

In light of the adverse ruling of the ECtHR, the Contempt of Court Act 1981 was passed to bring UK law in line with the ECHR.[440] The enactment was supposed to create a "permanent shift in the balance of public interest away from the protection of administration of justice and in favor of free speech."[441]

Under the Contempt of Court Act 1981, the present test can be found in Section 2(2) that requires a "substantial risk" of "serious prejudice."[442] In *Attorney General v. MGN ltd.* (1996),[443] the House of Lords laid down

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[437] *Id.* at 299.

[438] *Id.* at 245.

[439] *Id.* at 304*; see* Law Commission of England & Wales, *Consultation Paper 209-Contempt of Court: A Consultation Paper*, L. COMMM'N ENG. & WALES (2012) [hereinafter *Consultation Paper No. 209*].

[440] Siong, *supra* note 433, at 130.

[441] *Id.*

[442] Contempt of Court Act 1981, c49, § 2(2) (UK) https://www.legislation.gov.uk/ukpga/1981/49.

[443] In re Mirror Group Newspapers [1996] EWHC (QB) 398 (UK).

the ten principles[444] governing Section 2(2).[445] The House of Lords denied the application by the Attorney General to punish various newspapers for

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[444] The ten principles are as follows:

1. Each case must be decided on its own facts

2. The court will look at each publication separately and test matters as at the time of publication; nevertheless, the mere fact that, by reason of earlier publications, there is already some risk of prejudice does not prevent a finding that the latest publication has created a further risk; [It was common ground that there was no room for reading the singular word "publication" in s.2 of the Contempt of Court Act 1981 as the plural in accord with Section 6 of the Interpretation Act of 1978.]

3. The publication in question must create some risk that the course of justice in the proceedings in question will be impeded or prejudiced by that publication;

4. That risk must be substantial;

5. The substantial risk must be that the course of justice in the proceedings in question will not only be impeded or prejudiced but seriously so;

6. The court will not convict of contempt unless it is sure that the publication has created this substantial risk of that serious effect on the course of justice;

7. In making an assessment of whether the publication does create this substantial risk of that serious effect on the course of justice the following amongst other matters arise for consideration:-

(a) The likelihood of the publication coming to the attention of a potential juror;

(b) The likely impact of the publication on an ordinary reader at the time of publication;

(c) The residual impact of the publication on a notional juror at the time of trial.

It is this last matter which is crucial.

One must remember that in this, as in any exercise of risk assessment, a small risk multiplied by a small risk results in an even smaller risk

8. In making an assessment of the likelihood of the publication coming to the attention of a potential juror the court will consider amongst other matters:

(a) whether the publication circulates in the area from which the jurors are likely to be drawn

(b) how many copies circulated

9. In making an assessment of the likely impact of the publication on an ordinary reader at the time of publication the court will consider amongst other matters:

(a) the prominence of the article in the publication

alleged contempt of court committed by the publication of various articles pending the trial of Geoffrey Knights.[446] In denying the application, the House of Lords employed the ten principles and held that the publications did not create a substantial risk that the courts of justice in the proceedings would be seriously impeded or prejudiced.[447]

Thus, the test has two benchmarks: the level of risk must be substantial, and the degree of prejudice or impediment likely to be caused must be serious.[448] However, it is debatable whether this new test provides greater protection for the right to free speech.[449] It has been argued that the test in section 2(2) sets a threshold too high for *sub judice* contempt to be established, resulting in contempt being something of a "dead letter" in the U.K.[450] Freedom of Expression can now be found in Article 10 of the Human Rights Act 1998:

> Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authorities and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interest of

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(b) the novelty of the content of the article in the context of likely readers of that publication

10. In making an assessment of the residual impact of the publication on a notional juror at the time of trial the court will consider amongst other matters:

(a) The length of time between publication and the likely date of trial

(b) The focusing effect of listening over a prolonged period to evidence in a case

(c) The likely effect of the judge's directions to a jury.

Id. (citations omitted).

[445] *Id.*

[446] Smith, *supra* note 427, at 467.

[447] *Id.*

[448] *Consultation Paper No. 209*, *supra* note 439, at 16.

[449] *Id.*

[450] *Id*; *see also* Siong, *supra* note 433, at 140 (citing A.T.H. Smith, *The Future of Contempt of Courtina Bill of Rights Age*, 38 H.K. L.J. 593, 596 (2008)).

> national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or *for maintaining the authority and impartiality of the judiciary*.[451]

As a result of the implementation of the Human Rights Act 1998, the treatment of freedom of expression in the United Kingdom has changed radically.[452] Now the UK recognizes freedom of expression explicitly, whereas before the UK treated freedom of expression merely as a "residual liberty" under common law.[453]

However, it can be said that the Human Rights Act 1998 had not much of an impact on the legal protection of freedom of expression as *Attorney General v. MGN Ltd*., a case decided prior to the Human Right Acts 1998, remains to be the prevailing law[454]

2. Australia

In Australia, there is no express protection in the Constitution or in any statute to the right of freedom of expression.[455] In *Nationwide News Pty Ltd v. Wills* (1992),[456] the Court held that the Commonwealth Constitution of Australia contains an "implied guarantee" of freedom of "political discussion" and that said implied guarantee limits the statutory powers of the Commonwealth.[457] In *Theophanous v. Herald Weekly Times Ltd.* (1994),[458] the High Court upheld the defense relying on this implied protection of freedom of "political discussion."[459]

The basic means for controlling prejudicial publications is the law of contempt, which is based on common law.[460] For contempt to be established, the court must be satisfied that the publication not merely has a

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[451] Human Rights Act 1998, c. 42, art. 10 (UK) https://www.legislation.gov.uk/ukpga/1998/42/contents (emphasis added).

[452] Barnedt, *supra* note 424, at 851.

[453] *Id.*

[454] *Id.* at 12.

[455] *See generally Commonwealth of Australia Constitution Act 1900* (Imp) 63 & 64 Vict, c 12, s 9.

[456] Nationwide News Pty Ltd. v. Wills [1992] 177 CLR 1, ¶ 5 (Austl.).

[457] *Id.*

[458] Theophanous v. Herald & Weekly Times Ltd. [1994] 182 CLR 104, 124 (Austl.).

[459] *Id.*

[460] Justice Lockheart, *Contempt of Court – The Sub Judice Rule*, 10 U.N.S. WALES L.J. 1, 1 (1987).

tendency to prejudice the trial but has a real and substantial tendency to do so.[461] The test, therefore, is whether the mind of the judge (or jury) may be affected by the publication, which would prejudice a fair trial.[462]

However, if the detriment arising from the possible prejudice is outweighed by the public interest served by freedom of discussion, a person may avoid liability for contempt of publication on the ground of the "public interest principle.[463]

The public interest principle was broadened in the case of *Hinch v. Attorney General* (1987).[464] In *Hinch*, the Court held that courts must engage in a "balancing exercise" between the two competing interests to satisfy themselves beyond reasonable doubt that the public interest in freedom of speech outweighs the public interest in the administration of justice.[465] This "balancing exercise," according to Justice Wilson, starts with the scales already tilted in favor of free speech, and the Court will then tilt the scales in favor of protecting the due administration of justice.[466]

However, courts are left with little (if any) guidance on how this "balancing exercise" should be undertaken.[467] The test formulated by the majority of the High Court in *Hinch* to determine if a publication is prejudicial, is that the publication must "have a 'real and definite tendency' as a 'matter of practical reality' to 'preclude or prejudice the fair and effective administration of justice in the relevant trial.'"[468]

The problem with the *Hinch* doctrine is clearly explained by Scholar Felicity Robinson:

> The question that arises from the [five separate] judgments in *Hinch v Attorney General* (Victoria) (1997) is what constitutes a substantial public interest. The problem with the balancing approach is that what it gains in flexibility it loses in subjectivity. The High Court has only provided limited examples of what issues may tilt the scales in favour of the public interest defence, namely a 'major constitutional crisis' or 'imminent threat of nuclear disaster.' Consequently, media organisations are left in a situation of uncertainty

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[461] *Id.* at 1–2.

[462] *Id.* at 2.

[463] Ex parte *Bread Manufacturers Ltd.* [1937] 37 SR(NSW) 242, 247 (Austl.).

[464] NSW Report 100, *supra* note 120,at 186.

[465] *Id.* at 187.

[466] *Id.*

[467] Robin Bowley, *Contempt and Public Interest*, 24 COMMMC'N & MEDIA L. ASS'N. 15, 15 (2006).

[468] *Id.*

> because they are unable to gauge when a court may deem a particular topic to be of sufficient public interest to escape a charge of contempt.[469]

The uncertainty brought by the ruling in *Hinch* is one of the problems Australia is currently trying to address in formulating its laws of contempt.[470] Be that as it may, Australia provides a model of a country with no express constitutional protection of freedom of expression and no statutory laws on contempt.[471]

3. Singapore

A little closer to the Philippines, the Republic of Singapore is worthy of discussion because it also has a free speech provision in its Constitution,[472] and only recently enacted law that includes *sub judice* contempt.[473] Singapore's Constitution expressly includes the freedom of speech as well as allows Parliament to impose restrictions on free speech.[474] Prior to 2017, one of the exceptions is the law of contempt of court reflected in Section 7(1) of the Supreme Court of Judicature Act, which gave the High Court and the Court of Appeal the power to punish for contempt of court.[475] The laws on contempt can now be found in the 2016 Administration of Justice (Protection) Act.[476]

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[469] Bowley, *supra* note 467, at 15–16.

[470] Law Reform Commission of Western Australia, *Project No 93: Report on Review of the Law of Contempt*, LAW REFORM COMMM'N OF W. AUSTL. (2003) [hereinafter *Project No. 93*]; NSW Report 100, *supra* note 120, at 7.

[471] *See generally Project No. 93*, supra 470.

[472] CONST. art 14(1)(a) (Sing.).

[473] Administration of Justice (Protection) Act 2016 (No. 19 of 2016), https://sso.agc.gov.sg/Act/AJPA2016.

[474] *Id.* art. 14.

> (1) Subject to clauses (2) and (3) (a) every citizen of Singapore has the right to freedom of speech and expression; (2) Paraliament may impose – (a) on the rights conferred by (1)(a), such restrictions as it considers necessary or expedient in the interest of security of Singapore or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament to provide against contempt of court, defamation or indictment to any offense.

Id.

[475] Siong, *supra* note 433, at 131.

[476] Administration of Justice (Protection) Act 2016 § 3.

In the 1992 case of *Jeyaretnam Joshua Benjamin v. Lee Kuan Yew*,[477] the Court of Appeal held that "restrictions designed to protect the privileges of Parliament or to provide against contempt of court, defamation or incitement to any offence" did not have to be justified.[478] This interpretation seems to imply that at one point, Singapore courts did not have to balance any rights in applying laws on contempt of courts.[479]

While this jurisdiction is replete of cases involving contempt of court on the ground of scandalizing the judiciary, there has been no case governing the *sub judice* rule that casts doubts as to its application, especially before the Administration of Justice (Protection) Act 2016.[480] In the new law, *sub judice* contempt is expressly included under Section 3(1)(b) of the Act, which provides:

> 3.—(1) Any person who –
>
> (b) intentionally publishes any matter that —
>
> (i) prejudges an issue in a court proceeding that is pending and such prejudgment prejudices, interferes with, or poses a real risk of prejudice to or interference with, the course of any court proceeding that is pending; or
>
> (ii) otherwise prejudices, interferes with, or poses a real risk of prejudice to or interference with, the course of any court proceeding that is pending.[481]

According to the Speech by Minister for Law Mr. K Shanmugam, the clause reflects existing common law and that the test is whether it prejudices or interferes with ongoing court proceedings, or poses a real risk of doing so.[482] Hence, it must be shown that it prejudices, or interferes, or poses a real risk.[483]

While there is no case on *sub judice* contempt, we can look into cases involving scandalizing contempt.[484] The test applied in these cases is an example of how free speech was undervalued and how the primacy of maintaining public confidence in the administration of justice was

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[477] Benjamin v. Yew, [1992] 1 SLR (R) 791, ¶ 56 (Sing.).

[478] *Id.*

[479] Siong, supra note 433, at 132.

[480] *See generally* Administration of Justice (Protection) Act 2016.

[481] *Id.* art. 3(1)(b).

[482] Kasiviswanathan Shanmugam, Minister for Law, Second Reading Speech on the Administration of Justice (Protection) Bill ¶¶ 46–48 (Aug. 15, 2016).

[483] *Id.* at 46.

[484] *See* Siong, supra note 433, at 132.

valorized.[485] These cases also determined the meaning of "real risk" that is applicable on *sub judice* contempt.[486]

The case of *Attorney General v. Ong Wui Teck* (2019)[487] involved an act made prior to the enforcement of the Administration of Justice (Protection) Act 2016.[488] Hence, the Court in this case applied the applicable principles for scandalizing contempt in common law laid down in the case of *Shadrake Alan v. Attorney-General* (2011),[489] to wit:

> The fundamental purpose underlying the law relating to contempt of court in general and scandali[z]ing contempt in particular is to ensure that public confidence in the administration of justice is not undermined. The doctrine of contempt of court is not intended, in any manner or fashion whatsoever, to protect the dignity of the judges as such; its purpose is more objective and is (more importantly) rooted in the public interest.
>
> Scandali[z]ing contempt of court is made out when the statement intentionally published by the contemnor poses a real risk of undermining public confidence in the administration of justice. The only *mens rea* required to establish a scandali[z]ing contempt of court is that the publication is intentional, and it is not necessary to prove an intention to undermine public confidence in the administration of justice. The court must make an objective decision as to whether or not the particular statement would undermine public confidence in the administration of justice, as assessed by the effect of the impugned statement on the average reasonable person. In this regard, the precise facts and context in which the impugned statement is made is crucial. A "real risk" does not include a remote or fanciful possibility.[490]

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[485] *Id.*

[486] *See, e.g.*, Att'y Gen. v. Teck, [2019] SGHC 30, 31 (Sing.), https://www.supremecourt.gov.sg/docs/default-source/module-document/judgement/owt-judgment-13-feb-2019-cleanreleased-pdf.pdf; Alan v. Att'y Gen. [2011] 3 SLR 778, ¶ 22 (Sing.), https://www.supremecourt.gov.sg/docs/default-source/module-document/judgement/2011-sgca-26.pdf; Att'y Gen.v. Jolovan [2018] SGHC 222, ¶¶ 39–40 (Sing.), https://www.supremecourt.gov.sg/docs/default-source/module-document/judgement/os-510-2018-(ag-v-jolovan-wham)-(final)-pdf.pdf.

[487] *Teck*, [2019] SGHC 30 at 31.

[488] *Id.*

[489] *Alan*, [2011] 3 SLR 778 at ¶ 22.

[490] *Teck*, [2019] SGHC 30 at ¶¶ 30–31 (citations omitted).

The *Shadrake Alan* case was hailed as a "welcomed departure" from previous scandalizing contempt cases because it finally considered the competing interests of freedom of speech and the administration of justice, and dropped the "inherent tendency" test in favor of the "real risk" test.[491]

In the more recent case of *Attorney-General v. Wham Kwok Han Jolovan and Another Matter* (2018),[492] the Attorney-General commenced two actions against Wham Kwok Han Jolovan (Wham) and Tan Liang Joo John (Tan), for the offence of contempt by scandalizing the court, for posting on their Facebook walls the following, respectively: "Malaysia's judges are more independent than Singapore's for cases with political implications. Will be interesting to see what happens to this challenge."[493]

By charging Jolovan for scandalizing the judiciary, the ACG only confirms what he said was true. The basis for the action is Article 3(1)(a) of the Administration of Justice (Protection) Act 2016, which provides punishment for:

> (1) Any person who —
>
> (a) scandalises the court by intentionally publishing any matter or doing any act that —
>
> (i) imputes improper motives to or impugns the integrity, propriety or impartiality of any court; and
>
> (ii) poses a risk that public confidence in the administration of justice would be undermined;
>
> (b) intentionally publishes any matter that —
>
> (i) prejudges an issue in a court proceeding that is pending and such prejudgment prejudices, interferes with, or poses a real risk of prejudice to or interference with, the course of any court proceeding that is pending; or
>
> (ii) otherwise prejudices, interferes with, or poses a real risk of prejudice to or interference with, the course of any court proceeding that is pending;
>
> (c) intentionally interferes with (by intimidation or otherwise) or hinders another person's access to or ability to appear in court, knowing that this person is a party, witness, advocate or judge in ongoing court proceedings;

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[491] Siong, supra note 433, at 133.

[492] Att'y Gen.v. Jolovan [2018] SGHC 222 (Sing.), https://www.supremecourt.gov.sg/docs/default-source/module-document/judgement/os-510-2018-(ag-v-jolovan-wham)-(final)-pdf.pdf.

[493] *Id.* at ¶ 3.

> (d) intentionally offers any insult or causes any interruption or obstruction to any judge of any court, while such judge is sitting in any stage of a court proceeding; or
>
> (e) intentionally does any other act that interferes with, obstructs or poses a real risk of interference with or obstruction of the administration of justice in any other manner, if the person knows or ought to have known that the act would interfere with, obstruct or pose a real risk of interference with or obstruction of the administration of justice, commits a contempt of court.[494]

The Court said that prior to the "risk" test found in 3(1)(a)(ii), the common law test on scandalizing contempt was that the contemptuous conduct must pose a "real risk" such that public confidence in the administration of justice would be undermined.[495] The Court simply said that the new "risk" test is an adequate formulation in and of itself and requires no further theoretical elaboration.[496] The Court elaborated that it must be satisfied beyond reasonable doubt of the risk that public confidence in the administration of justice would be undermined and that it is not necessary to establish that the conduct in question has in fact resulted in such public confidence being undermined.[497]

More importantly, the Court noted that the *mens rea*[498] required is an intention to publish the contemptuous matter or do the contemptuous act.[499] A person is guilty of scandalizing contempt even if there was no intention to scandalize the courts.[500]

The emergence of the new law seems to have institutionalized the ruling in *Shadrake Alan* [501] While the *Shadrake Alan* ruling was a "welcomed departure" from the previous rulings, it could still be said that with respect to "balancing of interests," Singapore gives more weight to the

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[494] Administration of Justice (Protection) Act 2016 (No. 19 of 2016), art. 3(1)(a), https://sso.agc.gov.sg/Act/AJPA2016.

[495] *Jolovan* [2018] SGHC 222, at ¶ 15 (citations omitted).

[496] *Id.* at ¶ 61.

[497] *Id.* at ¶ 93.

[498] Defined by Black's Law Dictionary as "the state of mind that the prosecution, to secure a conviction, must prove that a defendant had when committing a crime; criminal intent or recklessness." *Mens Rea*, BLACK'S LAW DICTIONARY (8th Ed. 2004).

[499] *Id.* at ¶ 34.

[500] *Id.*

[501] *See* Siong, supra note 433, at 133.

"orderly administration of justice" than to its Constitutional right to freedom of speech and expression. [502]

VII. THE BALANCING MYTH

Based on the analysis of various jurisdictions and their attempts to balance the conflicting rights of freedom of expression and the rights of the accused, it is evident that there exists no single scale applicable across all jurisdictions. [503] Each jurisdiction has to consider its own context—its Constitution, statutes, and for the Philippines, the collective memory of the country, in its attempt to strike a "balance" between the conflicting rights of the accused and the right to freedom of expression.[504]

As Justice Richardson of the New Zealand Court of Appeal held in his dissenting opinion in the case of *Gisborne Herald Co. Ltd. v. Solicitor General* (1985):

> The complex process of balancing the values underlying free expression may vary from country to country, even though there is a common and genuine commitment to international human rights norms. The balancing will be influenced by the culture and values of the particular community... The result of the balancing process will necessarily reflect the Court's assessment of society's values.[505]

In the previous sections, it was shown that the threshold for a speech to be considered prejudicial to the rights of the accused is very high.[506] The *Martelino* test has not been overcome, and there is a very strong presumption of impartiality afforded to the judges in the Philippine jurisdiction. [507] Thus, it becomes clear that the balance, at least in the Philippine jurisdiction, tilts in favor of the freedom of speech.[508]

The rationale behind the freedom of speech preference is not difficult to understand. First, unlike in other jurisdictions, the 1987 Constitution does not provide any express limitation on the freedom of speech. [509] Second, Philippine history would show that for centuries, Filipino people were deprived of the right to freedom of speech under the

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[502] *See id*.

[503] *See* discussion *supra* Section VI.B.

[504] *See* discussion *supra* Sections VI.B.

[505] *Gisborne Herald Co. Ltd. v. Solicitor General* 3 NZLR 563, 573 (1985) (N.Z.).

[506] *See* discussion *supra* Section VI.B.

[507] *See* discussion *supra* Section V.A.2.2

[508] *See* discussion *supra* Part V.

[509] CONST. (1987) art. III § 4 (Phil.).

Spanish regime, and, in fact, this was one of the burning issues during the Philippine revolution against Spain.[510] Hence, when the privilege was introduced to the country through then U.S. President McKinley's *Instruction* to the second Philippine Commission, it became a "sacred" reform to the people that was protected and carried forward, as one would protect and preserve the covenant of liberty itself.[511]

However, this right was taken away again for the second time in our recent history.[512] Only a day after the declaration of Martial Law on September 21, 1972, Ferdinand Marcos ordered the closure of media establishments including *inter alia,* the *Manila Times, Daily Mirror, Manila Chronicle, Manila Daily Bulletin, Philippine Daily Express,* and the *Philippine Herald*.[513] This was followed by the arrest and detention of media personalities known to be critical against the Marcos administration.[514] Shortly after, the Department of Public Information issued orders requiring media publications to obtain prior clearance, and prohibiting the same from producing any form of publication without permission from the Department.[515] Then President Marcos issued Presidential Decree 33 that "[penalized] the printing, possession, and distribution of leaflets and other materials … which undermine the integrity of the government" and Presidential Decree 36 that cancelled the franchises and permits of all mass media facilities allegedly trying to topple the government.[516]

During the implementation of Martial Law, there were no rights to freedom of the press, freedom of speech, freedom of assembly, freedom from arbitrary arrest, or guarantee of a fair trial.[517] Thus, when the dictator was finally ousted, the emerging leaders made sure to pass a Constitution

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[510] BERNAS, *supra* note 272, at 231–32.

[511] *Id.*; *see* U.S. v. Bustos, G.R. No. L-12592, 37 PHIL. REP. 731, 740 (Mar. 8, 1918).

[512] U.S. v. Bustos, G.R. No. L-12592, 37 PHIL. REP. 731, 740 (Mar. 8, 1918)

[513] Jodesz Gavilan, *From Marcos to Duterte: How Media was Attacked, Threatened,* RAPPLER (Jan. 17, 2018, 6:24 PM), https://www.rappler.com/newsbreak/iq/threats-attacks-philippines-media-timeline.

[514] Camille Elemia, *Fast Facts: How Marcos Silenced, Controlled the Media During Martial Law,* RAPPLER (Sept. 19, 2020, 5:14 PM), https://www.rappler.com/newsbreak/iq/how-marcos-silenced-media-press-freedom-martial-law [hereinafter *Fast Facts*].

[515] *Id.*

[516] Jose Bimbo F. Santos & Melanie Y. Pinlac, *Back to the Past: A Timeline of Press Freedom*, CTR. FOR MEDIA FREEDOM & RESP. (Sept. 1, 2007, 11:27 AM), https://cmfr-phil.org/media-ethics-responsibility/ethics/back-to-the-past-a-timeline-of-press-freedom.

[517] David A. Rosenberg, *Civil Liberties and the Mass Media under Martial Law in the Philippines*, 47 PAC. AFF. 472, 484 (1974).

that would prevent the happening of another martial law.[518] Hence, we cannot discuss the 1987 Constitution without taking into consideration the struggles during Martial Law.[519]

The 1987 Constitution puts primacy on the freedom of expression, which had been severely curtailed during the martial law era.[520] Quoting Commissioner Nolledo during the constitutional commission deliberations on the Freedom of Expression:

> For many years under the Marcos regime, we had what we called the "silent majority." Many people lost their interest in participating in the affairs of the state, of government, and of society, because . . . their freedoms were curtailed. But because of people power, which reminded us all that we practice what we call vibrant democracy, then democracy will be more meaningful. And I know that was the basic reason we added the expression "participatory democracy" which means vibrant and living democracy. We wanted the Filipino people to know that and to keep on practicing a living democracy rather than a democracy with few people speaking and with the majority remaining in solid silence.[521]

Thus, the author submits that in attempting to balance the rights of the accused and freedom of expression, the collective memory of the Philippines and its high regard of freedom of speech alone should be sufficient to tilt the scales in favor of protecting free speech.[522]

Justice Sandoval-Guttierez's [523] opinion in *Chavez* on the importance of freedom of speech is a good way to close this section:

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[518] Mara Cepeda, *1987 Constitution Protects Freedoms Suppressed Under Martial Law – Robredo*, RAPPLER (Feb. 2, 2018, 10:13 PM), https://www.rappler.com/nation/195121-robredo-constitution-protection-freedoms*; see also* Cecilia Muñoz-Palma, President, Const. Comm'n, Closing Remarks of the President of the Constitutional Commission at the Final Session, Oct. 15, 1986, https://www.officialgazette.gov.ph/1986/10/15/closing-remarks-of-the-president-of-the-constitutional-commission-at-the-final-session-october-15-1986 [hereinafter Closing Remarks of Muñoz-Palma].

[519] *See* Cepeda, *supra* note 518; Closing Remarks of Muñoz-Palma, *supra* note 518.

[520] Jose N. Nolledo, Commm'n, Address to Constitutional Commission, June 10, 1986, https://www.officialgazette.gov.ph/1986/06/10/r-c-c-no-7-tuesday-june-10-1986/ [hereinafter Remarks on Free Speech by Commissioner Nolledo].

[521] *Id.*

[522] *See Gisborne Herald Co. Ltd. v. Solicitor General* 3 NZLR 563, 573 (1985) (N.Z.) (holding that the balancing process is decided based on the society's values)

[523] Chavez v. Gonzales, G.R. No. 168338, 545 S.C.R.A. 441, 456 (Feb. 15, 2008) (Phil.) (Sandoval-Gutteriez, J., concurring opinion).

> In fine let it be said that the struggle for freedom of expression is as ancient as the history of censorship. From the ancient time when Socrates was poisoned for his unorthodox views to the more recent Martial Law Regime in our country, the lesson learned is that censorship is the biggest obstacle to human progress. Let us not repeat our sad history. Let us not be victims again now and in the future.[524]

VIII. RECOMMENDATIONS

A. *Amendment by the Supreme Court of Rule 71, Sec. 1(d) of the Rules of Court*

The Supreme Court was given the power to promulgate rules concerning the protection and enforcement of constitutional rights by the 1987 Constitution.[525] More importantly, the 1987 Constitution took away the power of Congress to repeal, alter, or supplement rules concerning pleading, practice, and procedure.[526] Hence, any amendment to the rules is an exclusive power of the Supreme Court.[527]

As noted earlier, the basis for the *sub judice* rule is Section 3(d) of Rule 71 which provides: "Indirect contempt to be punished after charge and hearing.— . . . a person guilty of any of the following acts may be punished for indirect contempt; Any improper conduct tending, directly or indirectly, to impede, obstruct, or degrade the administration of justice."[528]

With this, the author most respectfully recommends to the Honorable Philippine Supreme Court to rephrase the section in such a way that it is clear that the same pertains to the *sub judice* rule.[529]

The use of the very general term of "administration of justice" has resulted in various misinterpretation of the law.[530] For instance, as noted earlier, the contempt by publication was interpreted to be the same as contempt by *sub judice* in *Lejano*.[531] Furthermore, the term "administration of justice" has been interpreted to include the right to the maintenance of

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[524] *Id.* at 456.

[525] CONST. (1987) art. VIII, § 5(5) (Phil.).

[526] *See* Estipona v. Lobrigo, G.R. No. 226679, 837 S.C.R.A. 10, 117 (Aug. 15, 2017) (Phil.).

[527] *See id.* at 181; CONST. (1987) art. VIII, § 5(5) (Phil.).

[528] RULES OF COURT, Rule 71, § 1.

[529] *See id.*

[530] *See* discussion *supra* Part III.

[531] *See* discussion *supra* Part III.

independence by judiciary.[532] This resulted in an erroneous balancing in the cases of *Cabansag* and *Marantan*.[533] As discussed in the article, the right to free speech should have been balanced with the right to fair trial in keeping with the true essence of the *sub judice* rule, as correctly held by Justice Brion in his supplemental opinion in *Lejano*.[534] However, subsequent cases such as *Marantan* failed to do so, putting into question the propriety of the application of the "clear and present danger" test.[535]

Nevertheless, in order to correct the confusing application by *Marantan*, the *sub judice* rule must continue to exist in criminal proceedings because one constitutional right (i.e., the rights of the accused) cannot be shunned in favor of another (i.e., the right to freedom of expression) without employing any standard.[536] To do so would be to violate the express terms of our Constitution and to discredit the collective experience of our people that is aimed to be protected by such right.[537]

Thus, the *sub judice* rule should not be applied in civil cases and cases with public interest that are not criminal in nature, such as the *Sereno* case and the vice-presidential electoral protest involving Ferdinand Marcos, Jr. and Leni Robredo.[538] The simple reason is that there is no constitutional right to be weighed against or balanced with the constitutional right to freedom of expression.[539] Hence, the right to freedom of expression should always be paramount in these instances.[540]

With the foregoing, it is respectfully recommended that Section 3(d) of Rule 71 be amended into:

> Section 3. Indirect contempt to be punished after charge and hearing. — . . . a person guilty of any of the following acts may be punished for indirect contempt;
>
> (d) Any statement or conduct tending to influence the conduct of a pending proceeding either, directly or indirectly,

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[532] *See* discussion *supra* Section III.

[533] *See* discussion *supra* Sections III and IV.A.

[534] *See* discussion *supra* Section III.A.

[535] *See* discussion *supra* Section III.A.

[536] *See* Marantan v. Diokno, G.R. No. 205956, 716 S.C.R.A. 164, 170 (Feb. 12, 2014) (Phil.).

[537] BERNAS, *supra* note 272, at 232 (citing Justice Malcolm in People v. Bustos calling the freedom of expression "a reform so scared to the people of these islands and won at so dear a cost, should now be protected and carried forward as one would protect and preserve the covenant of liberty itself").

[538] *See* Enerio, *Solicitor General*, *supra* note 8; Patag, *supra* note 249.

[539] *See* Enerio, *Solicitor General*, *supra* note 8; Patag, *supra* note 249.

[540] *See* Enerio, *Solicitor General*, *supra* note 8; Patag, *supra* note 249.

which may prejudice the *rights of the accused*.[541]

The author notes that the above changes would lead to contempt by scandalizing the Courts or attacks made against the integrity or impartiality of courts or judges, losing its legal basis.[542] This type of contempt is already beyond the scope of this paper. However, suppose this other type of contempt should be retained? In that case, its basis must be found in another provision (i.e., another letter in Section 3 of Rule 71) and not clumped together with the *sub judice* rule.[543] The same would only promote confusion and continuous misapplication of the rules.[544] This is the practice currently being done in contempt laws of other jurisdictions.[545]

B. *Enactment of a Law on Contempt by Sub Judice by the Legislature*

As discussed in this paper, other jurisdictions have already provided a law on contempt that incorporates the *sub judice* rule.[546] This can also be applied in the Philippine jurisdiction that employs judicial rules as the basis for judicial contempt power.[547] Institutionalizing the *sub judice* rule by enacting it into law would result in a clearer application by the Courts.[548] It would also expose more of the *sub judice* rule to the public, reducing the chances of comments being made on *sub judice* to the prejudice of other constitutional rights.[549]

Furthermore, the enactment of a law would make us compliant with our conventional obligations with the International Covenant on Civil and Political Rights which requires, among other conditions, that any restriction on the freedom of expression should be provided for by law.[550]

However, doing so might clash directly with the Bill of Rights, particularly Article III, Section 4 thereof which states that "no law shall be passed abridging the freedom of speech, of expression, or of the press . . ."[551]

Nevertheless, the law must consider the previous subheading discussion and, when the *sub judice* rule must be balanced with another

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[541] *See* RULES OF COURT, Rule 71, § 1.

[542] *See id.*

[543] *See id.*

[544] *See generally id.*

[545] *See* discussion *supra* Section VI.B.

[546] *See* discussion *supra* Part IV.

[547] *See* discussion *supra* Part II.

[548] *See* discussion *supra* Part III.

[549] *See* discussion *supra* Part I.

[550] *See* ICCPR, *supra* note 373, art. 19 ¶ 3.

[551] CONST. (1987) art. III § 4 (Phil.).

constitutional right, expressly state that the *sub judice* rule applies only to criminal cases.[552]

C. *Enactment of a Law Prohibiting the Sub judice Rule by the Legislature*

Another recommendation is the enactment of a law similar to the Senate Bill previously initiated by Former Senator Miriam Santiago, which expressly prohibits the *sub judice* rule. [553]

This kind of legislation is consistent with our legal system's preference towards freedom of expression over the rights of the accused,[554] and would put a stop to the trend of using the *sub judice* rule as a threat in order to silence dissenters.[555] While a blanket removal of the *sub judice* rule would seem prejudicial to the accused, as discussed earlier, a blanket removal of the *sub judice* rule would have little effect on an accused's rights as the Philippine jurisprudence has already set such a high standard as to what constitutes prejudicial publicity and established it's high regard for the 'natural impartiality of judges' with respect to outside influences.[556]

IX. CONCLUSION

As this article has shown, the inconsistent and erroneous application and interpretation of the *sub judice* rule in the Philippines has been used to silence dissent against the government—all at the pretext of maintaining judicial stability.[557] The unfortunate consequence of this trend may be the precise opposite: the erosion of the independence of the courts and the integrity of the administration of justice.[558]

Shortly after the *Sereno v. Republic* decision,[559] Attorney Theodore Te, then Chief of the Public Information Office of the Supreme Court,

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[552] See discussion *supra* Part VII.

[553] Judicial Right to Know Act, S. No. 1357 (Sept. 11, 2007) (Phil.), http://legacy.senate.gov.ph/lis/bill_res.aspx?congress=14&q=SBN-1357.

[554] *See* discussion *supra* Part IV.

[555] *See* discussion *supra* Part II.

[556] *See* discussion *supra* Part V.

[557] *See* discussion *supra* Part III.

[558] *See* Imelda Deinla et al., *Philippines: Justice Removed, Justice Denied*, LOWY INST. (May 17, 2018, 3:00 PM), https://www.lowyinstitute.org/the-interpreter/philippines-justice-removed-justice-denied; *Senators on Sereno Ouster: 'Black Day for Justice'*, RAPPLER (May 11, 2018, 12:06 PM), https://www.rappler.com/nation/senators-response-sereno-ousted-supreme-court-quo-warranto-decision ("By giving its nod to an obviously unconstitutional petition, the high tribunal has surrendered its judicial independence and integrity to the whims of President Duterte, and subverted altogether our constitutional process of impeachment . . .").

[559] *See* Jomar Canlas, *UPDATE: SC Rules With Finality: Sereno is Out*, MANILA TIMES (June 19, 2018), https://www.manilatimes.net/2018/06/19/news/latest-stories/sc-

changed his Facebook profile photo to a white on black photo with the words "I dissent" pertaining to the majority opinion penned by Justice Tijam.[560] This started a trend with other "dissenters" following suit with their own "protest" on social media, mostly by changing their display pictures with a black image or with the words "I dissent."[561]

Now, take a step back and recall the earlier cited case of *Attorney-General v. Wham Kwok Han Jolovan and Another Matter* and imagine the same thousands of people being charged separately of contempt for undermining the integrity of the Philippine Supreme Court. [562] The right of Freedom of Expression is so ingrained in our culture, deeply embedded in our Constitution and our jurisprudence, that when the author posted his own social media "protest" on the *Sereno* ruling, he did not even think about the post being punishable in other jurisdictions.[563]

However, with the current exposition of the *sub judice* rule, nothing precludes the Court from having this same finding and acting on its discretion to penalize "dissenters."[564]

As succinctly put by the late Senator Miriam Defensor-Santiago, "the constitutional guarantees of free speech, free press, and right to information occupy lofty positions in the Filipino people's hierarchy of values."[565] Thus, any attempt at "freezing" them, with any form of prior restraint, must be shown to be "necessitated by an interest more substantial than the guarantees themselves."[566]

In one of the discussions on freedom of speech during the Constitutional Commission deliberations, Commissioner Padilla emphasized that there must be a "full protection to this right of free speech and press," [567] before quoting Justice Holmes in *United States v. Schwimmer*:

Freedom of speech and of the press which embraces, at the

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rules-with-finality-sereno-is-out/410059.

[560] *SC Spokesman Te: I dissent*, GMA NEWS ONLINE (May 11, 2008, 5:02 PM), https://www.gmanetwork.com/news/news/nation/653059/sc-spokesman-te-i-dissent/story/.

[561] *See id.*

[562] Att'y Gen. v. Teck, [2019] SGHC 30 (Sing.), https://www.supremecourt.gov.sg/docs/default-source/module-document/judgement/owt-judgment-13-feb-2019-cleanreleased-pdf.pdf.

[563] *See* discussion *supra* Part VII.

[564] *See* Republic v. Sereno, G.R. No. 237428, 863 S.C.R.A. 690 (May 11, 2018) (Phil.).

[565] Judicial Right to Know Act, S. No. 1357 (Sept. 11, 2007) (Phil.), http://legacy.senate.gov.ph/lis/bill_res.aspx?congress=14&q=SBN-1357.

[566] *Id.*

[567] IV Record Const. Comm'n 930 (Sept. 30, 1986).

> very least, the liberty to discuss publicly and truthfully all matters of public concerns without previous restraint and without fear of subsequent punishment, deserves protection not only for the thought that agrees with us but even more so for the thought that we hate.[568]

In these alarming times when the freedom of speech is endangered by another would-be authoritarian regime, we Filipinos—and perhaps the Philippine Supreme Court, especially as the final arbiter of the supreme law—should be reminded of the great words of the respected 1986 Constitutional Commission President and later Philippine Supreme Court Justice, Cecilia Muñoz-Palma:

> [T]he vision [of the Constitution] will remain a mere vision if we the people do not give life to it by our deeds. We must live it and live by it. The final responsibility lies in our hands — shall the new Charter be a mere "rope of sand" that can be washed away by the strong currents of time or shall it be a rock, firm and indestructible, unyielding to forces of greed and power?[569]

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[568] *Id.* (Commissioner citing U.S. v. Schwimmer, 279 US 644, 655 (Holmes, J., Dissenting Opinion)).

[569] Closing Remarks of Muñoz-Palma, *supra* note 518.