Balancing the Freedom of Expression and the Right of the Accused to the Presumption of Innocence and Fair Trial: Is Social Media a Game Changer?

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I. INTRODUCTION

> *In democratic settings, media coverage of trials of sensational cases cannot be avoided and oftentimes, its excessiveness can be aggravated by kinetic developments in the telecommunications industry.*
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> —Justice Renato S. Puno[1]

This Article seeks to understand how prejudicial publicity affects "trials of national notoriety."[2] It explores the interplay between the freedom of expression, the rights

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Cite as 60 ATENEO L.J. 397 (2015).

1. Webb v. De Leon, 247 SCRA 652, 690 (1995).

of an accused, and the public's interest in crimes involving "prominent persons, sex[,] and mystery."[3] As Robert Hardaway and Douglas B. Tumminello pointed out, "[t]he popularity of CNN, the intense interest in the OJ Simpson trial[,] and demand for shows such as *Court TV* and *Hardcopy* demonstrate the public's insatiable curiosity"[4] for information regarding these crimes.[5] The Article also investigates how the Internet, particularly social media, has altered the dissemination of prejudicial publicity.

Media can "distort public opinion"[6] by directing people's attention to certain issues and influencing the criteria by which audiences judge governmental actions.[7] This Article examines the general policy of courts towards media and prejudicial publicity. It also evaluates remedies available to the courts and the accused to protect their respective interests, and assesses the effectivity of these remedies against abuses communicated through the Internet. It also studies how the peculiar characteristics of the Internet, particularly anonymity[8] and the ability to transcend national borders,[9] have changed the news industry. For this reason, it refers to traditional (print and broadcast) media as the starting point for its survey and discusses the changes catalyzed by the Internet.

The freedom of expression and the rights of the accused to the presumption of innocence and a fair trial are of equal value. States must therefore balance these competing rights.[10] This Article is concerned with how prejudicial publicity, as an abuse of the freedom of expression, could distort the administration of justice and endanger, or even disregard, the rights of the accused. It focuses on determining how an individual's sphere of privacy is diminished by an accusation of a crime, and defines the bounds of public (or general) interest vis-á-vis the public's rights to information and the right to hold and express an opinion. Ultimately, it shall establish that customary international law allows the restriction of the freedom of expression in order to protect the rights of an accused to be presumed innocent until

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2. Robert Hardaway & Douglas B. Tumminello, *Pretrial Publicity in Criminal Cases of National Notoriety: Constructing a Remedy for a the Remediless Wrong*, 46 AM. U. L. REV. 39, 41 (1996).
3. Giorgio Resta, *Trying Cases in the Media: A Comparative Overview*, 71 L. & CONTEMP. PROBS. 31, 33 (2008).
4. Hardaway & Tumminello, *supra* note 2, at 41.
5. RAYMOND WACKS, PRIVACY & MEDIA FREEDOM 170 (2013).
6. Sara Sun Beale, *The News Media's Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 48 WILLIAM & MARY L. REV. 397, 404 (2006).
7. *Id.* at 442.
8. Anna Vamialis, *Online defamation: conflict anonymity*, 21 INT'L J. OF L. & INFO. TECH. 31, 32 & 42 (2012).
9. MATTHEW COLLINS, THE LAW OF DEFAMATION AND THE INTERNET 31 (2001).
10. Von Hannover v. Germany, App. No. 59320/00, ¶ 60 (2004) (Eur. Ct. H.R.).

proven guilty and to be accorded a fair and impartial trial whenever he or she faces a hostile public.[11]

This Article studies the common law framework of the United Kingdom (U.K.) and the hybrid legal system of the Philippines, which has been influenced by continental European and Anglo-American traditions. Laws and jurisprudence on the freedom of expression in this jurisdiction, the rights of an accused, and court administration will be examined. Reference to the laws of the United States (U.S.) and Canada shall also be made for their persuasive weight. Standards prescribed by customary international law will be used as benchmark in evaluating the sufficiency of safeguards employed by the foregoing frameworks. The Universal Declaration of Human Rights (UDHR),[12] International Covenant on Civil and Political Rights (ICCPR),[13] and pertinent general comments and special reports on the right to free expression and relevant rights of the accused are also referred to. Reference to the United Nations Human Rights Commission (UNHCR) and the European Court of Human Rights (ECtHR) are made when appropriate.

This Article discusses other proceedings but is primarily concerned with the effects of prejudicial publicity on criminal proceedings. Reference to other proceedings shall only be for illustrative purposes.

The Article concludes with a proposal for a multi-stakeholder system of co-regulation observing United Nations' (U.N.) Special Representative John Ruggie's Protect, Respect, and Remedy Framework.[14] Specific recommendations shall be made with respect to the press and journalists, and remedial or procedural measures available to the court.

II. MEDIA AND THE COURTS

The freedom of opinion[15] and freedom of expression[16] are "core rights"[17] which are both civil and political in nature.[18] Not only do these rights protect an individual

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11. International Committee of the Red Cross, Rule 100. Fair Trial Guarantees, *available at* https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule100 (last accessed Feb. 2, 2016).

12. Universal Declaration of Human Rights, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (Dec. 10, 1948) [hereinafter UDHR].

13. International Covenant on Civil and Political Rights, *opened for signature* Dec.16, 1966, 999 U.N.T.S. 1771 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

14. Special Rapporteur on Human Rights, Transnational Corporations & Other Business Enterprises, *Protect, Respect and Remedy: a Framework for Business and Human Rights*, U.N. Human Rights Council, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008) (by John Ruggie).

15. ICCPR, *supra* note 13, art. 19 (1). The Article provides that "[e]veryone shall have the right to hold opinions without interference." *Id.*

16. *Id.* art. 19 (2). The Article provides that "[e]veryone 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

against the state's undue interference, but they also guarantee every individual's participation in political life.[19] Thus, freedom of opinion and free expression are regarded as the foundations of a free and democratic society.[20] Only by ensuring their free exercise would transparency and accountability, which are values crucial for the promotion and protection of human rights,[21] be realized.

The right to hold an opinion, on one hand, must be unfettered[22] and states have the obligation to protect all forms thereof.[23] The right to free expression, on the other hand, pertains to the "right to seek, receive[,] and impart ideas in relation to particular subject matters"[24] through a preferred medium.[25] Unlike the freedom to hold an opinion, free expression may be limited whenever circumstances require. Article 19 (3) of the ICCPR[26] restricts the right of free expression when its exercise would violate the rights and reputation of others or prejudice national security, *ordre public* or public health or morals.[27] Otherwise stated, government may interfere with the expression of an opinion only if such statement violates the rights and reputation of others or when it constitutes a direct threat to society.[28]

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writing or in print, in the form of art, or through any other media of his choice." *Id.*

17. Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, *Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment*, ¶ 14, U.N. Econ. & Soc. Council, U.N. Doc. E/CN.4/1995/32, (Dec. 14, 1994) (by Abid Hussain) [hereinafter 1994 Special Report].
18. *Id.*
19. *Id.*
20. UNHRC, *General Comment No. 34 on Article 19 [of the ICCPR]: Freedoms of Opinion and Expression*, ¶ 3, U.N. Doc. CCPR/C/GC/34 (Sep. 12, 2011) [hereinafter GC 34].
21. *Id.*
22. *Id.* ¶ 9.
23. *Id.*
24. *Compare* ICCPR, *supra* note 13, art.19 (2) *with* GC 34, *supra* note 20, ¶ 11.
25. *Id.*
26. ICCPR, *supra* note 13, art. 19 (3). 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 or reputations of others; (b) For the protection of national security, or of public order, or of public health or morals. *Id.*
27. *Compare* ICCPR, *supra* note 13, art.19 (3) *with* GC 34, *supra* note 20, ¶ 21.
28. *Compare* 1994 Special Report, *supra* note 17, ¶ 19 *with* ICCPR, *supra* note 13, art.19 (3).

Customary international law recognizes free media as a "cornerstone of democracy."[29] Free media is one wherein the press is allowed "to comment on public issues or without censorship or restraint to inform public opinion."[30] States ought to respect the freedoms of opinion and expression as a whole and to protect them against impairment by private persons and entities.[31] Nonetheless, governments are advised to be wary of media's ability to influence public opinion,[32] and are encouraged to foster competition in the industry to prevent the monopolization of ideas.[33]

In recent years, media have been embroiled in scandals involving breaches of generally accepted ethical principles and perceived bias for (or against) certain personalities.[34] On one hand, the "phone hacking scandal"[35] in the U.K., which involved illegally accessing the mobile phone of a murdered student,[36] gave rise to an inquiry into the Culture, Practices and Ethics of the Press (the Leveson inquiry) in 2012. The Leveson inquiry examined the relationship of the press with government and investigated how such relationship benefited or prejudiced the public.[37] On the other hand, perceived bias against the administration of former Philippine President Gloria Macapagal-Arroyo during the 2003 *coup d'etat* was extensively discussed by the Southeast Asian Press Alliance in its 2004 publication.[38]

The Leveson inquiry studied the functions of the U.K. press in the state's justice system and recognized its ability to assist in criminal investigations[39] and to explain

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29. UNESCO, Freedom of expression: A fundamental human right underpinning all civil liberties, *available at* http://en.unesco.org/70years/freedom_of_expression (last accessed Feb. 2, 2016).

30. GC 34, *supra* note 20, ¶ 13.

31. *Id.* ¶ 7.

32. Beale, *supra* note 6, at 442-43. Beale argues that media can direct the public's attention to the certain issue and can influence the criteria by which an audience judges government action. She refers to the first phenomenon as "priming" and the second as "agenda setting." Beale based this argument on the cognitive accessibility theory which essentially posits that individuals judge issues using "the most accessible information" and "commonly accepted stories." *See* Beale, *supra* note 6, at 442-43 & GC 34, *supra* note 20, ¶ 36.

33. GC 34, *supra* note 20, ¶ 36.

34. Beale, *supra* note 6, at 442-43.

35. BRIAN LEVESON, AN INQUIRY INTO THE CULTURE, PRACTICE AND ETHICS OF THE PRESS: EXECUTIVE SUMMARY 3 (2012).

36. *Id.* at 3.

37. *Id.* at 4-5.

38. *See* Luz Rimban, *A Crisis in Live Coverage*, *in* BETWEEN THE TIGER AND THE CROCODILE: BROADCAST MEDIA SELF REGULATION IN SOUTHEAST ASIA 20-27 (Cecile C.A. Balgos ed., 2004).

39. LEVESON, *supra* note 35, at 4.

to the public how the justice system works.[40] In the process, the inquiry uncovered serious breaches[41] of the Editor's Code of Practice[42] — "to respect the truth, to obey the law[,] and to uphold the rights and liberties of individuals."[43] It criticizes investigative journalism[44] as it discusses how the press has treated or described persons undergoing criminal investigation.[45] The Leveson inquiry confirmed the presence of ethical lapses of media in the performance of its duty,[46] especially the effect of personal relationships between members of the press and public officials.[47]

Luz Rimban's critique of Philippine media echoed the observations of the Leveson inquiry but was more specific. It discussed and compared how the media covered the uprisings against the administrations of the former Philippine presidents Corazon "Cory" C. Aquino and Gloria Macapagal-Arroyo.[48]

Rimban brought to light the 1990 Final Report of the Fact Finding Commission: The Environment of the Philippine Military[49] (Davide commission) on the culture in the military and the motivations behind the seven attempted *coup d'etat* against the Aquino administration.[50] The Davide commission observed how Philippine "mass media quickly blossomed"[51] following the restoration of democracy in 1986 but noted a decline in the quality of journalism.[52] The emergent media concentrated on dramatic political tidbits and criticisms undermining the government,[53] instead of delivering neutral information to the public.

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40. *Id.*

41. *Id.*

42. *Id.* (citing Press Complaints Commission, Editors' Code of Practice, *available at* http://www.pcc.org.uk/assets/696/Code_of_Practice_2012_A4.pdf (last accessed Feb. 2, 2016)).

43. *Id.*

44. *Id.* at 8.

45. LEVESON, *supra* note 35, at 8.

46. *Id.* at 9-11.

47. *Id.* at 23-29.

48. Rimban, *supra* note 38, at 26-27.

49. Hilario G. Davide, Jr., Final Report of the Fact Finding Commission: The Environment of the Philippine Military (A Report Submitted Pursuant to Republic Act No. 6832), *available at* http://www.gov.ph/1990/10/03/the-final-report-of-the-fact-finding-commission-iii-the-environment-of-the-philippine-military/(last accessed Feb. 2, 2016).

50. *Id.*

51. Melinda Q. de Jesus, *Philippines: The Problem with Freedom*, 2 J. OF THE DAG HAMMARSK OCTOBER 104 & 115-16 (1998).

52. *Id.*

53. *Id.*

One of these seven coups d'etat against Aquino provided the backdrop for the case of *Soliven v.Makasiar*.[54] Then President Cory Aquino sued Philippine Star publishers Maximo Soliven, Antonio Roces, Frederick Agcaoli, and journalist Luis Beltran for libel.[55] The broadsheet published an article written by Beltran revealing that Aquino "hid under her bed"[56] during a *coup d'etat*.[57] The Court dismissed the petition questioning the finding of probable cause against Soliven and others and ordered the parties to proceed with the trial.[58] Soliven and his co-accused were subsequently acquitted on appeal.[59] However, this appears to have been a mistake as it emboldened Philippine media to neglect its obligations to deliver accurate news to the public.

Philippine media lacks professionalism and is characterized by widespread unethical practices. The coverage of the 2003 *coup d'etat* against the Arroyo government[60] was tainted by the private television (TV) stations' bias in favor of the renegade soldiers. TV stations continuously aired[61] recorded video statements of mutineers and their live press conference[62] while government begged them for airtime and to stop the live coverage of the *coup d'etat*.[63] Worse, members of the media integrated personal opinions into news reports,[64] and "negotiated"[65] with the rebels by asking them for their demands from government.[66]

Nonetheless, the Leveson inquiry and the Davide commission similarly proposed a system of self-regulation and self-discipline.[67] They opined that these transgressions were not reason enough for government to regulate the press,[68] but to

54. Soliven v. Makasiar, 167 SCRA 393 (1988).

55. *Id.* at 397.

56. Luis V. Teodoro, Decriminalising libel: Towards true self-regulation, *available at* http://www.cmfr-phil.org/inmediasres/decriminalizing-libel-towards-a-true-self-regulatory-regime/(last accessed Feb. 2, 2016).

57. *Id.*

58. *Soliven*, 167 SCRA at 399-400.

59. de Jesus, *supra* note 51, at 115.

60. Rimban, *supra* note 38, at 21.

61. *Id.* at 20.

62. *Id.* at 23.

63. *Id.* at 21.

64. *Id.* at 22.

65. *Id.*

66. Rimban, *supra* note 38, at 21.

67. LEVESON, *supra* note 35, at 13, 16, & 17 & Davide Commission, Recommendations of the Final Report of the Fact Finding Commission, *available at* http://pcij.org/HotSeat/davidereport.html (last accessed Feb. 2, 2016).

68. LEVESON, *supra* note 35, at 4.

motivate or encourage change in industry practice.[69] These proposals are consistent with the Dakar Declaration[70] on Article 19 of the UDHR[71] which encourages states to recognize the role of media in "promoting good governance, increasing both transparency and accountability in decision-making processes[,] and communicating the principles of good governance to the citizenry"[72] while simultaneously reminding media "to commit themselves to fair and professional reporting as well as to put in place mechanisms to promote professional journalism."[73]

Pursuant to the customary norms of international law, and notwithstanding breaches of ethical standards by the press, both the U.K. and Philippine governments chose to cooperate with (rather than alienate themselves from) media.

According to the Manual Guide for the [Philippine] Judiciary in Dealing with the Media,[74] the "[j]udiciary and media are partners, not adversaries in building a democratic society."[75] The public's trust and confidence in the judicial institution depends largely on the accuracy and neutrality of information regarding the court's operations and decisions.[76] Media shapes the judiciary's image,[77] and determines whether the public should repose trust and confidence in the courts.[78] The Manual therefore recognizes the power and influence of media. It recommends a policy of openness and transparency towards the press in order to assure the truthfulness and accuracy of reports on the institution.

In connection with the foregoing, the Manual defines "prejudicial publicity"[79] as "publicity that may adversely affect a person's right to fair trial by inducing a prejudgment of an issue upon which admissible evidence has not been adduced."[80]

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69. *Id.* at 5.

70. UNESCO, Dakar Declaration: A Media and Governance Conference for World Press Freedom Day (May 1-3, 2005) *available at* http://www.unesco.org/new/en/unesco/events/prizes-and celebrations/ celebrations/international-days/world-press-freedom-day/previous-celebrations /worldpressfreedomday200900000/dakar-declaration/ (last accessed Feb. 2, 2016) [hereinafter Dakar Declaration].

71. UDHR, art.19. The article provides that "[e]veryone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive[,] and impart information and ideas through any media and regardless of frontiers." *Id.*

72. Dakar Declaration, *supra* note 70.

73. *Id.*

74. Manual for the Judiciary in Dealing with the Media, A.M. No. 11-2-18-SC, Nov. 15, 2011 [hereinafter Manual for the Judiciary].

75. *Id.* intro, ¶ D.4.

76. *Id.* ch. I, ¶ C.1.

77. *Id.* ¶ C.2.

78. *Id.* ¶ C.3 & Beale, *supra* note 6, at 404.

79. *Id.* ch. III, ¶ B.2.

80. Manual for the Judiciary, *supra* note 74, ch. III, ¶ B.2.

It points out the necessity of balancing media's right to free expression, the litigants' fundamental right to due process, and the court's duty to ensure a fair and impartial trial.[81]

"Sensationalized news reporting, slanted television reporting[,] and radio commentaries [focusing] on the victim"[82] vilify the accused in the eyes of the public. Repeatedly showing stories on a particular case leads the public to conclude on the integrity of the proceedings or the guilt of the accused.[83] Consequently, "[t]elevision and radio coverage of a court proceeding may be regulated, restricted[,] and even prohibited,"[84] but such coverage is generally discouraged to avoid the miscarriage of justice.[85]

The guidelines contained in the Manual are consistent with leading Philippine jurisprudence, to be discussed in detail later, on prejudicial publicity and the rules on television and radio coverage. Courts recognized that pervasive and prejudicial publicity could violate the right of the accused to be presumed innocent, as well as his or her right to a fair and impartial trial.[86] However, the party asserting that fact must present evidence showing how the tone and content of publicity fatally affected the fairness and impartiality of the judge to the court.[87]

Similarly, U.K. courts have held that prejudicial publicity does not affect the fairness of the trial.[88] Because most criminal cases in the U.K. may be tried before a jury, the effects of prejudicial publicity may be sufficiently addressed by the judge through the issuance of instructions to the jury before evidence is given and prior to the deliberations.[89] Nevertheless, the judiciary acknowledges that judges themselves could be swayed by prejudicial publicity and that instructions given to the jury are only effective to the extent each juror relies upon them.[90]

Furthermore, the courts of England and Wales have opted to cooperate with media and now allows, subject to the discretion of the judge, live coverage of trials. Section 32 of the Crimes and Court Act of 2013 allows the "Lord Chancellor, with

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81. *Id.* ¶ A.1.

82. *Id.*

83. Beale, *supra* note 6, at 442.

84. Manual for the Judiciary, *supra* note 74, ch. III, ¶ C.2.

85. *Id.* ¶ C.1.

86. *Webb*, 247 SCRA at 691 & Larranaga v. Court of Appeals, 287 SCRA 581, 595 (1998).

87. *Id.* at 692 (citing Martelino v. Alejandro, 32 SCRA 106, 115-16 (1970)).

88. R. v. Abu Hamza, EWCA Crim 2918 (2006) [hereinafter *Abu Hamza*].

89. Norman MacFayden, Pretrial publicity: some U.K. examples (A Paper Presented at the 20th International Conference International Society for The Reform Of Criminal Law held in Brisbane, Australia on July 2-6, 2006) 10, *available at* http://www.isrcl.org/Papers/2006/McFadyen.pdf (last accessed Feb. 2, 2016).

90. *Id.* at 2.

the concurrence of the Lord Chief Justice,"[91] to issue an order exempting a case due to special circumstances[92] provided in Section 41 of the Criminal Justice Act of 1925[93] and Section 9 of the Contempt of Court Act of 1981.[94] Media can now record and broadcast court proceedings[95] pursuant to guidelines issued by the court.

The Maputo Declaration[96] on Article 19 of the UDHR likewise recognizes how contemporary technology has paved the way for "increased and more pluralistic information flows within and across borders."[97] Media is no longer limited to television, radio, and printed publications. Journalists now include bloggers and self-publishing authors on the Internet,[98] and traditional media have turned to social media to widen their reach.[99] Not only has this development facilitated access to information but also allowed individuals to become "active publishers of information."[100]

This development in international law has already been recognized in domestic jurisdictions such as in the U.S. The case of *Obsidian Finance v. Cox*[101] involved a

91. Crimes and Courts Act of 2013, ch.22, § 32 (1) (U.K.).

92. *Id.*

93. Criminal Justice Act of 1925, ch. 86, § 41 (U.K.). This section prohibited the taking of photographs and the drawing of sketches (if meant for publication) in court proceedings.

94. Contempt of Court Act of 1981, ch. 49, § 9(1) (U.K.). This section punished as contempt of court the use of tape recorders and the publication of any recordings of court proceedings.

95. U.K. Ministry of Justice, One step closer to court broadcasting, *available at* https://www.gov.uk/government/news/one-step-closer-to-court-broadcasting (last accessed Feb. 2, 2016).

96. UNESCO, Maputo Declaration: A Media and Governance Conference on Freedom of Expression, Access to Information and Empowerment of People (May 8, 2008) *avaialble at* http://www.unesco.org/new/en/unesco/events/prizes-and-celebrations/celebrations/international-days/world-press-freedom-day/previous-celebrations/worldpressfreedomday2009001/maputo-declaration/ (last accessed Feb. 2, 2016).

97. *Id.*

98. GC 34, *supra* note 20, ¶ 44.

99. Jennifer Alejandro, Journalism in the Age of Social Media, (A Paper Submitted to the Reuters Institute for the Study of Journalism in the University of Oxford) 3, *available at* https://reutersinstitute.politics.ox.ac.uk/sites/default/files/Journalism%20in%20the%20Age%20of%20Social%20Media.pdf (last accessed Feb. 2, 2016).

100. Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, *Report on the Promotion and the Protection of the Right to Freedom of Opinion and Expression*, ¶ 19, U.N. Human Rights Council, U.N. Doc. A/HRC/17/27 (May 16, 2011) (by Frank La Rue) [hereinafter First La Rue Report].

101. Obsidian Finance Group v. Cox, 740 F.3d 1284 (9th Ct. App., 2014) (U.S.).

blog entry by Cox insinuating that Obsidian Finance and Summit conspired to commit tax fraud.[102] Summit and its court-appointed trustee, Obsidian Finance,[103] sued Cox for defamation and won.[104] Cox appealed and requested for the application of the negligence standard for private defamatory actions.[105] The appellate court denied the appeal because the First Amendment rules apply to both institutional and individual speakers.[106] Media are not entitled to special protection.[107] This ruling recognized bloggers as journalist and adopted the expanded definition of journalists in international law into domestic law.

Customary international law recognizes the indispensable role of a strong, vibrant, and free press in promoting and protecting human rights and fostering democracy.[108] Access to information is an integral part of the right to free expression, and media remain to be the public's leading source of information. What is unfortunate is the proclivity of some members of the press towards abusing the right to free expression.

Courts acknowledge the problem of prejudicial publicity in criminal proceedings and have addressed it by maintaining a policy of transparency. U.K. and Philippine courts require individual judges to decide whether to allow the recording and live broadcast of proceedings depending on attendant circumstances. The policy of openness and transparency, however, neither ensures the accurate and faithful reporting of court proceedings nor does it guarantee the exclusion of the press' opinions. The impeachment trial of Philippine Chief Justice Renato C. Corona illustrates this.

The Senate of the Philippines, acting as an impeachment court, allowed the live coverage of the proceedings against Corona.[109] The daily report, however, was not limited to what transpired during trial. Media solicited the comments and analysis of law professors at the end of each day; thus, confusing the public with hifalutin and conflicting claims.[110] While news articles accurately reported what transpired during trial, headlines suggested a particular opinion or stand towards the article.[111] Individuals — private and public personas alike — voiced out their opinions in

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102. *Id.* at 1287.

103. *Id.*

104. *Id.*

105. *Id.* at 1287-88.

106. *Id.* at 1291.

107. *Obsidian Finance Group*, 740 F.3d at 1291.

108. GC 34, *supra* note 20, at ¶ 3.

109. Kathryn Roja G. Raymundo, Covering Corona: Media in aid of accountability, *available at* http://www.cmfr-phil.org/2012/03/02/covering-coronamedia-in-aid-of-accountability/ (last accessed Feb. 2, 2016).

110. *Id.*

111. *Id.*

social media[112] which clearly intended to influence the tribunal. There are online surveys asking the public whether they believed Corona was guilty.[113] This clearly violated international human rights laws because an accused facing impeachment still enjoys the guarantees of presumption of innocence and fair trial.[114]

The media circus surrounding Corona's impeachment trial raised issues on the sphere of privacy of an accused, particularly one facing criminal prosecution, and which aspects of his or her life should remain private in connection with his or her right to the presumption of innocence and a fair trial. These matters will be discussed in the succeeding section.

III. SAFEGUARDING DUE PROCESS AND BALANCING THE RIGHTS OF THE ACCUSED WITH THE RIGHTS OF THE PUBLIC

Due process requires that all persons are treated equally before the courts and tribunals and are given a fair and public hearing by a competent, independent, and impartial tribunal established by law.[115] Due process has three components: equality

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112. There are various examples of Corona impeachment related pages on social media. *See, e.g.,* Facebook, Acquit CJ Corona, *available at* https://www.facebook.com/pages/Acquit-CJ-Corona/356843644370592 (last accessed Feb. 2, 2016); Facebook, Impeach CJ Corona, *available at* https://www.facebook.com/pages/Impeach-CJ-Corona/217018755042846 (last accessed Feb. 2, 2016); & Faceook, Impeach Corona, *available at* https://www.facebook.com/Impeach.CJCORONA (last accessed Feb. 2, 2016).

113. According to the Social Weather Station survey, 73% of Filipino believed Corona should be impeached. *See* Rigoberto D. Tiglao, *Draft Supreme Court decision leaked to SWS head*, MANILA TIMES, June 22, 2014, *available at* http://www.manilatimes.net/draft-supreme-court-decision-leaked-to-sws-head/106047/ (last accessed Feb. 2, 2016). *See also* Kate Evangelista, *Most Filipinos believe Senate will convict Corona, online survey shows*, PHIL. DAILY INQ., May 28, 2012, *available at* http://newsinfo.inquirer.net/202193/most-filipinos-believe-senate-will-convict-corona-online-survey (last accessed Feb. 2, 2016).

114. *Compare* ICCPR, *supra* note 13, art.14 *with* UNHRC, General Comment No. 32 on Article 14 [of the ICCPR]: Right to Equality Befrore Courts and Tribual and to a Fair Trial, ¶ 3, U.N. Doc. CCPR/C/GC/32 (Aug. 23, 2007) [hereinafter GC 32].

115. ICCPR, *supra* note 13, art.14 (1).The article provides that —

> [a]ll 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 ([*ordre 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

before courts and tribunals, a fair and public hearing, and access to a competent, independent, and impartial tribunal.[116]

Of particular interest to this section is the concept of "fair and public hearing."[117] A fair proceeding is devoid of "any direct or indirect influence, pressure or intimidation[,] or intrusion in the proceedings"[118] exerted by any party for whatever reason.[119] A hearing is not fair if the defendant in a criminal proceeding is faced with the public's hostile attitude or support for the prosecution, or is exposed to other manifestations of hostility.[120] This is especially true when such sentiments are merely tolerated by the court. In order to protect the fairness of proceedings, courts may "exclude all or part of the public to the extent strictly necessary when publicity would be prejudicial to the interests of justice."[121]

A person accused of a crime has the right to be presumed innocent until his guilt is proven in accordance with law.[122] As explained in the previous section, prejudicial publicity could facilitate the formation of opinions regarding the guilt or innocence of a defendant without the proper presentation of facts and evidence which ought to be the basis of an informed opinion on the matter.[123] Statements regarding the conduct of the proceedings, particularly on the impartiality of judges, are extremely dangerous if made by influential personalities. They could undermine the authority of the court by questioning its ability to conduct a fair trial and to judge the case based on the evidence presented. At its worst, prejudicial publicity leads the misinformed public to question the propriety of a court's decision and insist on the correctness of the popular opinion.

Prejudicial publicity is often prevalent in cases involving sordid facts, heinous crimes, or where the victim or defendant is a celebrity.[124] Media capitalizes on the public's curiosity by continuously running features on their latest development, and

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> 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.

Id.

116. UNHRC, *General Comment No.13 on Article 14 [of the ICCPR]: Right to Equality Before Courts and Tribual and to a Fair Trial* (Apr. 13, 1984) U.N. Doc HRI/GEN/1/Rev.1 at 14, ¶ 1 [hereinafter GC 13]. It must be noted that GC 13 has since been replaced by GC 32.

117. *Compare* GC 13, *supra* note 116, ¶ 1 *with* ICCPR, *supra* note 13, art. 14 (1).

118. GC 32, *supra* note 114, ¶ 25.

119. *Id.*

120. *Id.*

121. *Id.* at ¶ 29.

122. ICCPR, *supra* note 13, art. 14 (2). The article provides that "[e]veryone charged with a criminal offen[s]e shall have the right to be presumed innocent until proved guilty according to law." *Id.*

123. GC 34, *supra* note 20, ¶ 36 & Beale, *supra* note 6, at 442-43.

124. Hardaway & Tumminello, *supra* note 2, at 45.

even conducting their own investigations of the crime,[125] thereby sensationalizing these crimes.

An interesting example of how prejudicial publicity can affect the fairness of trial is illustrated by the Philippine case of *Lejano v. People*.[126] This involved the automatic review[127] of the decisions of the trial and appellate courts finding Lejano and others guilty of murdering a middle-aged woman and her two daughters, and raping the elder of the children.[128] The case, dubbed by the media as the Vizconde massacre, attracted substantial attention because the accused belonged to prominent families.[129] The 14 December 2010 decision of the Supreme Court (SC) contained an observation regarding the extensive media coverage of the case.[130] As Justice Conchita Carpio-Morales pointed out in her concurring opinion, "the crimes have already been played out in media, both print and broadcast[,] in every gory detail. It was a raging topic that drew intense discussion in both talk shows and informal gatherings, and all sorts of speculation about it were rife."[131] In the trial, however, the prosecution's lone witness admitted that she had smoked *shabu* and sniffed cocaine prior to the incident.[132] It was also shown that she was an asset of the National Bureau of Investigation (NBI).[133] These facts led the Court to conclude that her testimony was not credible.[134] The Court also observed that the public's familiarity with the Vizconde massacre made it easier for the prosecution witness and the NBI to fabricate the entire testimony.[135] Consequently, the conviction of Lejano and others was reversed due to reasonable doubt.[136]

Prejudicial publicity gives rise to issues involving the balancing of the rights of the accused to privacy, as well as his or her right to be presumed innocent and to be tried fairly in a court of law. It also brings to light issues involving the right of the public in general to free expression, particularly the right to hold and express an opinion and to access information. The case of *Lejano* shows how prejudicial publicity (alongside other factors) can compromise the integrity of a proceeding.

A. Privacy versus Public Interest

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125. *Id. See also* WACKS, *supra* note 5, 137-38.

126. Lejano v. People, 638 SCRA 104 (2010).

127. *Id.* at 124.

128. *Id.* at 124-29.

129. Rogelio Karagdag, Jr., The Hubert Webb Acquittal, *available at* http://asianjournalusa.com/the-hubert-webb-acquital-p9860-154.htm (last accessed Feb. 2, 2016).

130. *Lejano*, 638 SCRA at 135.

131. *Id.* at 176-77 (J. Carpio-Morales, concurring opinion).

132. *Id.* at 164.

133. *Id.* at 137.

134. *Id.* at 138-40.

135. *Id.* at 149.

136. *Lejano*, 638 SCRA at 155.

When a person is accused of a crime, which aspects of his life remain private, and which become part of public interest?

Article 17 of the ICCPR guarantees the right of a person against unlawful or arbitrary interference[137] by the state or other persons,[138] as well as one's right against unlawful attacks on his honor and reputation.[139] For this reason, suggesting that one is guilty of a crime is, in itself, "both a crime and a tort"[140] in many continental jurisdictions. Public figures, however, are legitimately subject to criticisms and public opposition.[141]

The case of *Von Hannover v. Germany*[142] involved the question of whether the life of a member of a reigning (or royal) family[143] is a matter of general interest.[144] Princess Caroline of Monaco complained that she was being constantly accosted by paparazzi.[145] She argued that the term "secluded place" was narrowly defined in German law and that the German definition circumvented her agreement with the French press.[146] According to Princess Caroline, her agreement with the French press allowed her to choose which of her photos could be published.[147]The court ruled in her favor, confirming that the photographs in question were not matters of general interest because they only appealed to a particular readership and did not contribute to democratic dialogue.[148] The ECtHR thus concluded that the complainant's right to privacy was violated.[149]

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137. ICCPR, *supra* note 13, art. 17. The Article provides: "1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks." *Id.*
138. UNHRC, *General Comment No.16 on Article 17 [of the ICCPR]: The Right to Respect Privacy, Family, Home and Correspodence, and Protection of Honor and Reputation*, ¶ 1, U.N. Doc. HRI/GEN/1/Rev.9 (Apr. 8, 1988) [hereinafter GC 16].
139. ICCPR, *supra* note 13, art.17.
140. Resta, *supra* note 3, at 58. A person may file a claim for damages in relation to libellous statements against him in a Philippine court. Villanueva v. Philippine Daily Inquirer, Inc., 588 SCRA 1, 2 (2009).
141. GC 34, *supra* note 20, ¶ 38.
142. Von Hannover v. Germany, 40 Eur. H.R. Rep. 1 (2004).
143. *Id.* at ¶ 8.
144. *Id.* at ¶¶ 9-10.
145. *Id.*
146. *Id.* at ¶ 44.
147. *Id.*
148. *Von Hannover*, 40 Eur. H.R. Rep. ¶¶ 59-60.
149. *Id.*

The ECtHR discussed the equal value of the rights to privacy and freedom of expression and recommended how domestic courts may balance these rights.[150] The court laid out two questions that must be answered: first, whether the information, depending on attendant circumstances, gives rise to a "debate of general interest."[151] Second, whether the person involved is a public figure (such as a politician) or a private individual.[152] The Strasbourg court did not define what general interest is but gave examples of situations constituting public interest.[153] Moreover, it held that the right of the public to be informed of the private affairs of public figures depends on attendant circumstances.[154] "[F]acts — even controversial ones — capable of contributing to debate in a democratic society, relating to politicians in the exercise of their official functions for example, and reporting details of the private life of an individual who ... does not exercise such functions"[155] are of public interest if they contribute to political debate.[156]

The U.K. follows the subjective criteria given by the ECtHR and likewise observes the guidelines above. It also holds that the rights of privacy and free expression are of equal value.[157]

In *Campbell v. Mirror Group*,[158] the court faced the question of whether the complainant's right to privacy was violated by the publication of an article disclosing her drug addiction with pictures of her arriving at and attending a Narcotics Anonymous meeting.[159] While the members of the court agreed that public figures are entitled to privacy[160] and that disclosing complainant's addiction did not violate her privacy, they disagreed on whether the publication of the complainant's photos was justified.[161] With a vote of three-to-two, the court held that the publication of the photos caused "substantial offen[s]e to [a person] ... of ordinary sensibilities."[162]

150. *Id.* at ¶ 58.

151. *Id.* at ¶ 60.

152. *Id.* at ¶¶ 62-63.

153. *Id.*

154. WACKS, *supra* note 5, at 147-48.

155. *Von Hannover*, App. No. 59320/00, ¶ 63.

156. *Id.*

157. WACKS, *supra* note 5, 105 (citing In Re S (A Child) (Identification: Restrictions on Publication), 1 A.C.593,596 (2005) (U.K.)).

158. Campbell v. Mirror Group, UKHL 22 (2004).

159. *Id.* at ¶ 2.

160. *Id.* at ¶ 36.

161. *Id. Compare* ¶¶ 61-62 with ¶¶ 147-59 & ¶¶ 169-71.

162. *Id.* at ¶ 92. The minority, meanwhile, held the opinion that since complainant's drug addiction was a matter of public interest, the publication of her photos should have been a matter of journalistic discretion. *Campbell*, ¶¶ 59-60.

Douglas v. Hello! Ltd.[163] involved the publication of the wedding pictures of celebrity pair Michael Douglas and Catherine Zeta Jones.[164] The Douglas couple entered an exclusive agreement to publish the said photos with *OK! Magazine*.[165] However, *Hello!* obtained copies of the photographs and published them.[166] The court permitted the publication because a wedding reception is a spectacle, or a public affair.[167] Moreover, since the complainants entered into an exclusive agreement to publish the photos, the matter had become a commercial transaction.[168]

Lastly, *Mosley v. News Group Newspapers Ltd.*[169] involved a video uploaded on the Internet showing the complainant engaging in sordid sexual practices with prostitutes wearing Nazi costumes.[170] The court concluded that nothing in the video constituted public interest.[171] There was no proof that the sexual roleplay was an enactment of Nazi behavior or adoption of its attitudes.[172]

Curiously, U.K. case law does not define what constitutes public interest. Wacks proposes that public interest should be determined by "the value of the information to the public."[173] Nevertheless, just as the Strasbourg court explained the concept of the public interest, Wacks' suggestion appears to lead back to the examination of attendant circumstances.[174] However, the 2014 decision of the Court of Justice of the European Union in *Google Spain and others v. Gonzáles*[175] must be duly noted. The court in that case ordered the removal of the respondent's personal data published on the Internet, recognizing that his right to privacy overrides public interest, regardless of the nature of the information.[176] However, the case did not involve a crime; instead, it involved social security debt.[177] Thus, its applicability to one who was accused of a crime is still debatable.

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163. Douglas v. Hello! Ltd., UKHL 21 (2007) (U.K.).

164. *Id.* at ¶ 108.

165. *Id.*

166. *Id.* at ¶ 109.

167. *Id.* at ¶¶ 253 & 300.

168. *Id.* at ¶¶ 299-300.

169. Mosley v. News Group Newspapers Ltd., EMLR 679 (Q.B. 2008) (U.K.).

170. *Id.* at 685.

171. *See Mosley*, EMLR 679, at 710-24.

172. *Id.* at 723-24.

173. WACKS, *supra* note 5, at 139.

174. *Id.*

175. Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos, Mario Costeja González, Grand Chamber (Eur. C.J. May 13, 2014).

176. *Id.* at ¶ 99.

177. *Id.* at ¶ 14.

The Philippine case of *Ayer Productions v. Capulong*[178] explained the concept of privacy. It involved the mini-series "The Four Day Revolution,"[179] which dramatized the 1986 People Power Revolution.[180] On one hand, Juan Ponce Enrile, one of the leaders of the 1986 revolution, applied for an injunction seeking to prevent production of the series because it would unlawfully intrude on his privacy.[181] Petitioners, on the other hand, asserted their right to free expression.[182] They pointed out that the mini-series was a portrayal of the historic event.[183] The Court, in weighing the totality of the circumstances, concluded that the mini-series did not constitute an unlawful intrusion of Enrile's privacy.[184] The production was limited to Enrile's participation in the revolution and did not delve into his private life.[185] Thus, balancing the constitutional freedoms of speech and expression and the right of privacy in this case required the fair and truthful presentation of the historical event.[186] "There must, in other words, be no knowing or reckless disregard of truth in depicting the participation of [Enrile] in the EDSA Revolution. There must, further, be no presentation of the private life of [Enrile] and certainly no revelation of intimate or embarrassing personal facts."[187]

Under Philippine law, a member of the Senate,[188] a candidate for public office,[189] and the counsel of an accused in a high profile criminal case by virtue of his involvement and participation therein[190] are considered public figures — one "who, by his accomplishments, fame or mode of living, or by adopting a profession or calling which give the public a legitimate interest in his doings, his affairs, and his character has become a 'public personage.'"[191] Determining which areas of these individuals' lives remain private is dictated by public interest.[192] Their sphere of privacy may be diminished if an otherwise private piece of information is of public interest or pertains to a matter of which the public has right to be informed.[193]

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178. Ayer Productions v. Capulong, 160 SCRA 861 (1988).

179. *Id.* at 865.

180. *Id.*

181. *Id.* at 867.

182. *Id.*

183. *Id.*

184. *Ayer Productions*, 160 SCRA at 878.

185. *Id.* at 870.

186. *Id.*

187. *Id.* at 876.

188. *Id.*

189. *Villanueva*, 588 SCRA at 13.

190. Fortun v. Quinsayas, 690 SCRA 623, 642 (2013).

191. *Ayer Productions*, 160 SCRA at 874.

192. WACKS, *supra* note 5, at 129.

193. *Villanueva*, 588 SCRA at 13.

Privacy is "the presumption that individuals should have an area of autonomous development, interaction and liberty, a 'private sphere' with or without interaction with others, free from State intervention and from excessive unsolicited intervention by other uninvited individuals."[194]

International law, as well as the laws of the U.K. and the Philippines, recognize that the general or public interest diminishes the private sphere of public figures. Information which may be considered private, could be disclosed because they pertain to matters which the public has the right to know about. Difficulty, however, arises with respect to a person accused of a crime. It is true that public order and safety fall within the ambit of general or public interest. It is also true that the public has the right to be informed of the crime and the identity of the accused, and to be assured that the case would be prosecuted. However, the privacy of an accused may be violated under the guise of public interest, as media have a tendency to sensationalize reports.[195]

U.S. law distinguishes between general purpose public figures and limited purpose ones.[196] Limited purpose public figures are persons who "voluntarily injected themselves or have been drawn into a particular public controversy."[197] An accused may be considered as such since he or she is suspected of perpetrating a crime. Determining which aspect of an accused's life becomes a matter of public interest should perhaps be determined by the nature of the crime he or she committed. In the absence of an overriding political or public interest, any information relevant to a criminal proceeding and disclosed to the public must not prejudice the right of an accused to be presumed innocent and the integrity of the proceeding.[198] These criteria, however, are vague.

With the Internet, just about any information on the accused can be disseminated through social media, and individual users can now share their opinion on the guilt of the accused[199] in a particular case within their social circle.[200] It also

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194. Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, *Report on the Promotion and the Protection of the Right to Freedom of Opinion and Expression*, ¶ 22, U.N.G.A., U.N. Doc. A/HRC/23/40(Apr. 17, 2013) (by Frank La Rue) [hereinafter Third La Rue Report].

195. WACKS, *supra* note 5, at 149-60.

196. *Id.* at 165.

197. *Id.*

198. Dupuis and others v. France, App. No.1914/02, Final Judgment, ¶ 44 (Eur. Ct. H.R. Nov. 12, 2007).

199. Hardaway & Tuminello, *supra* note 2, at 41. Distinguishing between acceptable "but shockingly expressed" and offensive speech is difficult in SNS. Dominic McGoldrick, *The Limits of Freedom of Expression on Facebook and Social Networking Sites: A UK Perspective*, 13 HUM. RTS. L. REV.125, 151 (2013).

200. Jane Johnston, et al., Juries and Social Media (A Report Prepared for the Victorian Department of Justice), *available at* http://www.ncsc.org/~/media/Files/PDF/Information%20and%20Resourcesjuries%20and%20social%20media_Australia_A%20Wallace.ashx (last accessed Feb. 2, 2016).

provides a platform for conducting online surveys asking the public for their opinion on the guilt of an accused.[201] These violate the right of accused to be presumed innocent, and to be accorded fair and impartial trial.

B. The Right of the Accused to be Presumed Innocent vis-à-vis the Right to Hold and Express an Opinion

Article 14 (2) of the ICCPRand Article 11 (2) of the UDHR[202] guarantee that an accused shall be presumed innocent until he or she is proven guilty beyond reasonable doubt.[203] Public authorities are therefore prohibited from prejudging a case, and making public statements affirming the guilt of the accused.[204] Media is also directed to avoid news coverage undermining the presumption of innocence.[205] Customary international law clearly prohibits prejudicial publicity.

The case of *Gridin v. Russian Federation*[206] illustrates the foregoing precept. Gridin was accused and convicted of attempted rape and murder by the Russian courts.[207] He alleged that his right to be presumed innocent was violated by prejudicial publicity.[208] The media referred to him as the "'lift-boy murderer'[209] who had raped several girls and murdered them"[210] before he was tried. The investigator likewise informed the press that he was sure of Gridin's culpability and "called upon the public to send prosecutors"[211] to litigate the case. The UNHCR found merit in complainant's assertion that the Russian Supreme Court failed to deal

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201. During the Corona impeachment trial, several groups asked the public whether they believed that the former Chief Justice was guilty of a culpable violation of the Constitution and must therefore be impeached. *See, e.g.,* 73% prefer Corona conviction, says latest SWS survey, PHIL. DAILY INQ., Mar. 30, 2012, *available at* http://newsinfo.inquirer.net/169-99/73-prefer-corona-conviction-says-latest-sws-survey (last accessed Feb. 2, 2016) & UP Poll on Corona irked Miriam, GMA News, Feb. 21, 2012, *available at* http://www.gmanetwork.com/news/story/249872/news/nation/up-poll-on-corona-irked-miriam (last accessed Feb. 2, 2016).

202. UDHR, art. 19. The article provides that "[e]veryone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive[,] and impart information and ideas through any media[,] regardless of frontiers." *Id.*

203. GC 32, *supra* note 114, ¶ 30.

204. *Id.*

205. *Id.*

206. Gridin v. Russian Federation, U.N. Doc. CCPR/C/69/D/770/1997, UNHRC, 69th Sess. (July 18, 2000) & Third La Rue Report, *supra* note 194.

207. Gridin, *supra* note 206, ¶ 2.

208. *Id.* at ¶ 3.5.

209. *Id.*

210. *Id.*

211. *Id.*

with the issue of prejudicial publicity.[212] It reiterated that public authorities must refrain from prejudging the outcome of a trial.[213]

C. The Right to Fair and Public Trial and the Limits of the Right to be Informed

Article 14 of the ICCPR and Article 10 of the UDHR guarantee the right of every person to a fair and public hearing by a competent, independent, and impartial tribunal.

Excluding the public from trial due to adverse publicity may conflict with the right of the public to access information. A trial is unfair when an accused is confronted by the hostile attitude of the public or a part thereof.[214] Customary international law thus permits the exclusion of the public or part thereof, including media, from court premises if necessary.[215]

Nonetheless, customary international law recognizes the role of media and the press in imparting information,[216] arguing that all other freedoms are "bereft of effectiveness"[217] without free access to information. Human rights standards secure not only the right to impart information but also the right to seek and receive it freely as part of the freedom of expression.[218] This aspect of the right of free expression guarantees the right of the public, including the media, to have access to information of public interest.[219]

Article 19 (3) of the ICCPR provides that the right of free expression has corresponding duties and responsibilities[220] and may be restricted in order to ensure respect for the rights and reputation of others, as well as national security, public order, and public health or morals.[221] However, any restriction of the foregoing

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212. *Id.* at ¶ 8.3.

213. *Id.* (citing GC 13, *supra* note 116, ¶ 7). The speech of Senator Ferdinand R. Marcos, Jr. explaining his vote to acquit Corona pointed out that the release of evidence against the accused to media before they were presented to the court violated the *sub judice* rule. He further opined that "the information was grossly exaggerated with the apparent intention to predispose the public's mind against the Chief Justice." Rappler.com, Marcos: acquit Corona, *available at* http://www.rappler.com/nation/special-coverage/6139-marcos-acquit-corona (last accessedFeb. 2, 2016).

214. GC 34, *supra* note 20, ¶ 25.

215. *Id.* at ¶ 29.

216. 1994 Special Report, *supra* note 17, ¶ 34.

217. *Id.* at ¶ 35.

218. Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, *Report on the Promotion and the Protection of the Right to Freedom of Opinion and Expression*, ¶ 2, U.N.G.A., U.N. Doc. A/68/362 (Sep. 4, 2013) (by Frank La Rue) [hereinafter Fourth La Rue Report].

219. *Id.* at ¶ 19.

220. ICCPR, *supra* note 13, art. 19 (3).

221. *Compare* ICCPR, *supra* note 13, art. 19 (3) *with* GC 34, *supra* note 20, ¶ 21.

must be provided by law and conform with the "strict test of necessity and proportionality."[222] Restriction likewise shall not jeopardize the right itself,[223] must pertain to a ground recognized by the ICCPR, and may only be resorted to in light of a pressing public need.[224] The cited threat must also be specific,[225] and any restriction must be susceptible to judicial review.[226]

In *Re: Request Radio-TV Coverage of the Trial in the Sandiganbayan of the Plunder Cases against Former President Joseph E. Estrada*,[227] media and members of civil society requested the Philippine SC to allow the live broadcast of Estrada's trial for plunder before the Sandiganbayan.[228] They asserted that the trial of the former president was "a matter of public concern and interest"[229] and that its live media coverage "would assure the public of full transparency in the proceedings of an unprecedented case in our history."[230] The Court denied the petition.[231] It discussed the competing rights of the accused and the public which must be balanced to ensure due process, and held that "[w]hen these rights race against one another, jurisprudence tells us that the right of the accused must be preferred to win."[232]

Since the life and liberty of the accused is at stake in a criminal trial, the court must decide the matter in a just and dispassionate matter. The court has the obligation to secure the fair administration of justice to protect the rights of an accused to the presumption of his innocence and fair trial.[233] The right to a public trial may only be asserted by the accused,[234] as only he or she may the raise the question of fairness.[235] The right of the public to be informed of what transpired in a criminal proceeding is limited by the power of the court to maintain absolute

222. GC 34, *supra* note 20, ¶¶ 21-22.

223. Fourth La Rue Report, *supra* note 218, ¶ 51.

224. *Id.* at ¶ 52.

225. *Id.* at ¶ 53.

226. *Id.* at ¶ 54.

227. Re: Request Radio-TV Coverage of the Trial in the Sandiganbayan of the Plunder Cases Against the Former President Joseph E. Estrada, 360 SCRA 248 (2011) [hereinafter *Re: Estrada*].

228. *Id.* at 255-56.

229. *Id.* at 256.

230. *Id.*

231. *Id.*

232. *Id.* at 259 (citing People v. Alarcon,60 Phil.265 (1935); Estes v. Texas, 381 US 532 (1965); & Sheppard v. Maxwell, 384 US 333 (1966)).

233. *Re: Estrada*, 360 SCRA at 261.

234. *Id.*

235. *Id.*

fairness in the judicial process.[236] Accordingly, the Court refused a live coverage of the trial of former president Estrada.[237]

The foregoing decision considered the events following the live coverage of Estrada's impeachment trial in 2001.[238] At that time, the public had already immediately decided that Estrada was guilty of culpable violation of the Constitution based on the prosecution's evidence.[239] The walk-out of some senator-judges triggered calls for a "second people power revolution,"[240] which were disseminated through SMS.[241] This mass action forced Estrada to abandon the presidency,[242] which in turn, paved the way for the violent mass protest against the administration of Estrada's successor Gloria Macapagal-Arroyo, dubbed as "EDSA III."[243] This series of events served as the basis for the Court's decision to limit the trial's coverage.

Similarly, in the case of *Re: Petition for the Radio and Television Coverage of the Multiple Murder Cases Against Maguindanao Governor Zaldy Ampatuan, et al.*[244] ("*Re: Ampatuan*"), media sought the "lifting of the absolute ban on live television and radio coverage of court proceedings"[245] which allegedly prejudiced their constitutional rights.[246] On 14 June 2011, the SC issued a *pro hac vice* decision allowing live coverage,[247] as the Aquino[248] and Estrada[249] decisions were not based

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236. *Id.*

237. *Id.* at 269.

238. *Id.* at 259 & 264-65.

239. Sheila S. Coronel, *The Media, the Market and Democracy: The Case of the Philippines*, 8 THE PUBLIC 109, 110 (2001).

240. Sheila S. Coronel, New Media Played a Role in the Peoples Uprising, *available at* http://www.niemanreports.org/articles/new-media-played-a-role-in-the-peoples-uprising/ (last accessed Feb. 2, 2016).

241. *Id.*

242. Estrada v. Desierto, 353 SCRA 452, 536 (2001) [hereinafter *Desierto*].

243. *Re: Estrada*, 360 SCRA at 264-65.

244. Re: Petition for the Radio and Television Coverage of the Multiple Murder Cases Against Maguindanao Governor Zaldy Ampatua, et al., 652 SCRA 1(2011) [hereinafter *Re: Ampatuan*].

245. *Id.* at 7.

246. *Id.*

247. *Id.* at 8.

248. *Id.* at 9-10. The SC ruled therein that trials are "matter[s] of serious importance to all those concerned and should not be treated as a means of entertainment[, and to] so treat it deprives the court of the dignity which pertains to it and departs from the orderly and serious quest for the truth for which our judicial proceedings are formulated. *Id.* (citing Re: Request for Live TV and Radio Coverage of the Hearing of President Corazon C. Aquino's Libel Case, Oct. 22, 1991)).

249. *Re: Ampatuan*, 652 SCRA at 10-11 (citing *Re: Estrada*, 360 SCRA 248, 265).

on empirical evidence.[250] It furthermore held that the rights of an accused are not incompatible with the freedom of the press, as the adverse effect of prejudicial publicity must be proven.[251]

On 23 October 2012, however, the SC reversed its earlier position in *Re:Ampatuan* and disallowed the live media broadcast of the trial.[252] Since "th[e] case ... has achieved a notoriety and sensational status, a greater degree of care is required to safeguard the constitutional rights of the accused."[253] The SC also noted that "a judge is not immune from the pervasive effects of media"[254] and it would be best to ensure that he or she is not affected by any outside force or influence.[255]

Balancing the rights of an accused with the public's right to free expression is done according to attendant circumstances and with regard to the uniqueness of each case. Courts can conduct a fair and impartial trial notwithstanding the presence of prejudicial publicity; however, the possibility of media overstepping boundaries is not nil. Prejudicial publicity results in the "labeling effect,"[256] which persists despite the acquittal of an accused.[257] "[T]he court of public opinion can impose ancillary reputational sanctions, which are independent from the judicial ascertainment of truth, and which tend to persist long after the conclusion of the proceedings."[258]

The next section discusses legal measures that would allow both the courts and the accused to safeguard the latter's right to privacy, the presumption of innocence, and a fair trial.

The right to hold an opinion may not be interfered with.[259] It is absolute and covers all forms of opinion[260] or "political and secular beliefs."[261] However, once opinions are expressed or communicated, they become ideas protected by the freedom of expression which encompasses "the right to seek, receive, and impart ideas of all kinds, regardless of frontiers."[262] Free expression protects all forms of

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250. *Id.* at 12.

251. *Id.* (citing People v. Teehankee, Jr., 249 SCRA 54 (1995) & *Re: Estrada*, 353 SCRA at 452).

252. Re: Petition for the Radio and Television Coverage of the Multiple Murder Cases Against Maguindanao Governor Zaldy Ampatuan, et al., A.M. No.10-11-5-SC, Oct. 23, 2012.

253. *Id.*

254. *Id.*

255. *Id.*

256. Resta, *supra* note 3, at 53.

257. *Id.*

258. *Id.*

259. GC 34, *supra* note 20, ¶ 9.

260. *Id.*

261. 1994 Special Report, *supra* note 17, ¶ 25.

262. GC 34, *supra* note 20, ¶ 11.

expression, including opinions that have been expressed or communicated, and their means of dissemination.[263]

Customary international law has recognized the Internet as a medium of communication[264] and applies the rules against the suppression of free expression to online content.[265] Media must therefore be allowed to comment on public issues without censorship.[266]

The "[I]nternet allows individuals to communicate instantaneously and inexpensively[,]"[267] thus, facilitating the free flow of information. Anyone with access to the Internet can disseminate information globally.[268] The Internet, particularly social media, provides a platform allowing individuals to publish information, albeit to a limited audience.[269] That traditional media has turned to social media in order to widen its reach[270] attests to the potency of the Internet as a medium of communication. Bloggers and social media users supplement and complement traditional media.[271] Clearly, "information is no longer an exclusive preserve of professional journalism,"[272] as the public now has an alternative source.[273]

With the free flow of information[274] comes the transmission of various ideas. An opinion expressed by one and liked by another could be viewed by an infinite number of persons. Moreover, since the Internet is largely uncensored, the liberal exchange of ideas compound the problem of prejudicial publicity. In the U.S., for instance, it is not unusual for defense lawyers to turn to social media to campaign for the innocence of an accused.[275] Conversely, it may be used to campaign for the conviction of an accused.

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263. *Id.* at ¶ 12.

264. *Id.* at ¶ 44.

265. Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, *Report on the Promotion and the Protection of the Right to Freedom of Opinion and Expression*, ¶ 15, U.N.G.A., U.N. Doc. A/66/290 (Aug. 10, 2011) (by Frank La Rue) [hereinafter Second La Rue Report].

266. GC 32, ¶ 13.

267. Second La Rue Report, *supra* note 265, ¶ 10.

268. *Id.* at ¶ 13.

269. Andreas M. Kaplan & Michael Haenlain, *Users of the world, unite! The challenges and opportunities of Social Media*, 53 BUSINESS HORIZONS 59, 61 (2010).

270. Jennifer Alejandro, *supra* note 99, at 21.

271. *Id.* at 9.

272. Second La Rue Report,*supra* note 265, at ¶ 10.

273. *See* Raymundo, *supra* note 109.

274. Second La Rue Report, *supra* note 265, at ¶ 110.

275. *See, e.g.,* Adam Hochberg, George Zimmerman's lawyers hope to win trial by social media in Trayvor Martin case, *available at* http://www.poynter.org/latest-news/making-sense-of-news/172840/george-zimmermans-lawyers-hope-to-

The case of Afghan Muslim cleric Abu Hamza al Masri illustrates how courts manage prejudicial publicity.[276] Abu Hamza was accused and convicted of various offenses for public speeches inciting racial hatred.[277] On appeal, he questioned the excessive period of delay from the alleged commission of the offenses until their prosecution.[278] Abu Hamza asserted that the delay "subjected [him] to a sustained campaign of adverse publicity,"[279] which jeopardized the conduct of fair trial. In upholding the legitimacy of the stay in the proceedings, the court held that prejudicial publicity generally does not compromise fair trial.[280] Members of the jury do have personal prejudices and could ignore the directions from judges.[281] There are mechanisms, such as the law on contempt, which reduce the risk or prevent media from interfering with due process.[282]

The rationale for the decision in *R v. Abu Hamza*[283] was explained in the case of *R v. West*.[284] On appeal, serial killer Rosemary West[285] asserted that prejudicial publicity deprived her of a fair trial because her guilt was presumed.[286] The court disagreed with her.[287] A court can conduct a fair trial notwithstanding the presence of prejudicial publicity.[288] "To hold otherwise would mean that if allegations of murder are sufficiently horrendous so as inevitably to shock the nation, the accused cannot be tried."[289]

IV. REMEDIES

win-trial-by-social-media-in-trayvon-martin-case (last accessed Feb. 2, 2016) & Andrew George, Local lawyers sound off on Verdict in Casey Anthony trial, blame pre-trial publicity, *available at* http://www.lehighvalley live.com/breakingnews/index.ssf/2001/07/local_attorneys_sound_off_on_v.ht ml (last accessed Feb. 2, 2016).

276. R v. Abu Hamza, EWCA Crim 2918 (2006).

277. *Id.* at ¶¶ 2-3.

278. *Id.* at ¶¶ 5-6.

279. *Id.* at ¶ 5.

280. *Id.* at ¶ 93.

281. *Id.*at

282. *Abu Hamza*, EWCA Crim. 2918, ¶ 93.

283. *Id.*

284. R. v. West (Rosemary Pauline), 2 Cr. App. R. 374 (1996).

285. *Id.* at 375.

286. *Id.* at 374.

287. *Id.* at 396.

288. *Id.* at 390.

289. *Id.* at 386.

The two general grounds[290] for restricting the right to freedom of expression are the protection of the rights and reputation of others,[291] and national security and public order.[292]

A. The Sub Judice Principle and Contempt of Court

Contempt of court proceedings are valid restrictions on the freedom of expression pursuant to Article 19 (3) (b) of the ICCPR on public order.[293] The concept of public order encompasses protecting the integrity of courts. The ECtHR case of *Worm v. Austria*[294] illustrates this precept by showing how a publication may offend public order by influencing the outcome of a trial. It involved an article written by Worm, an Austrian journalist,[295] analyzing the behavior of the judge, the prosecutor, and the defense counsel during the trial of a former government official facing accusations of tax evasion.[296] The Austrian courts cited Worm for contempt of court because his article undermined the authority of the court.[297] The ECtHR agreed with these findings.[298] It reasoned that the authority and impartiality of the judiciary is an essential component of the rule of law.[299] Free expression may be restricted when the necessity of such restriction has been convincingly established and national authorities have determined the presence of a pressing need.[300] The exercise of free expression should not overstep the bounds of proper administration of justice.[301] Thus, while public figures, such as government officials, are scrutinized by journalists and the public alike, a commentary which intends to influence the outcome of a trial, cannot be allowed.[302] The ECtHR therefore found that there was no violation of the freedom of expression.[303]

The strict liability rule under the Contempt of Court Act of 1981 treats any conduct tending "to interfere with the course of justice in a particular legal proceeding regardless of the intent to do so"[304] as contemptuous. Disruptive

290. GC 34, *supra* note 20, ¶ 21.

291. ICCPR, *supra* note 13, art.19 (3) (a).

292. *Id.* at (b).

293. GC 34, *supra* note 20, ¶ 24 & 31.

294. Worm v. Austria, App.No.83/1996/702/894 (1997) (Eur. Ct. H.R.).

295. *Id.* ¶ 6.

296. *Id.* at ¶ 10 & 13.

297. *Id.* at ¶ 22.

298. *Id.* at ¶¶ 53-54.

299. *Id.* at ¶ 40.

300. *Worm*, App.No.83/1996/702/894, at ¶ 6.

301. *Id.* at ¶ 50.

302. *Id.* at ¶ 44.

303. *Id.* at ¶ 59.

304. Contempt of Court Act, ch. 49, § 1.

conduct inside a courtroom, defiance of a court order, and breach of the prohibitions provided in the foregoing law constitute contempt of court.[305]

The case of *Attorney General v. Associated Newspapers Ltd.*[306] illustrates how a publication[307] may create a "substantial risk"[308] of seriously impeding or prejudicing active[309] proceedings.[310] The case involved the publication of a picture of the defendant in a murder case holding a pistol on the website of Mail Online.[311] A cropped version of the same picture, this time showing only the barrel of the gun, appeared later on the website of Sun Online.[312] The defendant's counsel called the attention of the trial court and requested it to determine whether the foregoing publications were contemptuous.[313] The trial judge opined that since none of the jurors accessed the Internet since the proceeding started, and the photos have not been on the Internet for a long time, the defendant could not have been prejudiced.[314] Thus, there was no *prima facie* case of contempt of court.[315] The High Court disagreed, and found the newspapers guilty of contempt for violating the strict liability rule embodied in Section 1 of the Contempt of Court Act of 1981.[316] "Publishing the photos created a substantial risk seriously impeding or prejudicing the course of justice."[317]It depicted the defendant as a violent person. Thus, the High Court took action against the publisher of the photos to protect "the integrity of a criminal trial."[318]

Photos which indirectly suggest the defendant's guilt can shape public opinion and give rise to a certain expectation that may contradict the findings of the court.[319] For this reason, the publication of statements relating directly or indirectly to the merits of a case are deemed contemptuous and could be banned.[320] It should

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305. Anwar, Re: Possible Contempt Of Court, HCJAC 36, ¶ 21 (citing Her Majesty's Advocate v. Airs, J.C. 64, 69 (1975) (2008) (U.K.) [hereinafter *Anwar*].

306. HM Attorney General v. Associated Newspapers Ltd., EWHC 418 (Q.B. 2011) (U.K.).

307. Contempt of Court Act, ch.49, § 2 (1).

308. *Id.* at (2).

309. *Id.* at (3).

310. *Id.* at (2).

311. *Attorney General*, EWHC 418, ¶ 6.

312. *Id.* at ¶ 12.

313. *Id.* at ¶ 18.

314. *Id.* at ¶ 19.

315. *Id.*

316. *Id.* at ¶ 55.

317. *Attorney General*, EWHC 418.

318. *Id.* at ¶ 54.

319. *Id.* at ¶¶ 47-48.

320. GC 34, *supra* note 20, at ¶ 39 & 44.

also be pointed out that materials placed on the Internet, as opposed to traditional forms of media, pose an even greater threat to the integrity of the courts.[321] Not only does information travel faster thereon, but information also lingers in cyberspace.[322] The "viral nature"[323] of information on the Internet, as well as the difficulty or the impossibility of removing information which has been published thereon, creates a near-permanent repository for such prejudicial information.[324]

Not all criticisms against the court are contemptuous. The case of *Re: Mohammed Aamer Anwar*[325] involved a lawyer, Anwar, criticizing the conviction of his client in a press release.[326] The trial court judge called the attention of Anwar, stating that his actions may constitute contempt of court, and submitted the matter to the High Court.[327] However, the High Court held that a criticism or "an opinion about the verdict of the jury in general terms" could not impede or prejudice court proceedings.[328]

The Contempt of Court Act provides —

> [a] publication made as or as part of a discussion in good faith of public affairs or other matters of general public interest is not to be treated as a contempt of court under the strict liability rule if the risk of impediment or prejudice to particular legal proceedings is merely incidental to the discussion.[329]

The decision in *Anwar*[330] is an example of a comment which criticizes a decision of a court but is not contemptuous. This case is different from *Worm*[331] because Anwar, on one hand, criticized the decision of the court, which meant trial had already been terminated. Worm, on the other hand, questioned the integrity of the proceedings, clearly attempting to condition the public that defendant should be convicted. While Anwar's statement was one that qualifies for a healthy democratic debate, that of Worm was designed to undermine the authority of the court.

The Contempt of Court Act of 1981 provides for three remedial mechanisms to contain prejudicial publicity. As a general rule, the contemporaneous publication of a fair and accurate report of what transpired during legal proceedings is allowed.[332]

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321. *Id.* at ¶15.

322. *Id.*

323. *Id.* at ¶ 54.

324. *Id.*

325. *Anwar*, HCJAC 36.

326. *Id.* at ¶¶ 2-5.

327. *Id.* at ¶ 6.

328. *Id.* at ¶ 41.

329. Contempt of Court Act, ch.49, § 5.

330. *Anwar*, HCJAC 36.

331. *Worm*, App.No.83/1996/702/894.

332. Contempt of Court Act, ch. 29, § 4 (1).

However, whenever there is a substantial risk of prejudice, the court may suspend the publication of reports as long as necessary.[333]

These Section 4 (2) orders are issued after hearing[334] and are susceptible of appeal.[335] The Law Commission criticizes these orders insofar as Contempt of Court Act of 1981 neither specifies if there must be deliberate intent to breach a Section 4 (a) order,[336] nor does it provide a mechanism to inform the press of the issuance of such orders.[337] It points out that the courts in Scotland have an online list of cases where similar orders[338] were issued, and proposes that a similar system be adopted for the courts of England and Wales.[339]

A court issuance specifying which cases should not be subject of any publication would not only clarify the nature and scope of Section 4 (2) orders, but also comply with the requirements of customary international law. Publishing such notice on the Internet serves as constructive notice to the public. Restrictions on the "operation of websites, blogs or Internet-based, electronic[,] or such other information dissemination systems, including systems to support such communications such as Internet Service Providers (ISPs) or search engines[,] must be consistent"[340] with those recognized by international law and must be content-specific.[341]

The courts of England and Wales may also withhold the publication of certain matters whenever necessary.[342]These issuances, commonly referred to as Section 11 orders, are issued against parties who deliberately prejudice or obstruct the administration of justice[343] and may be made permanent whenever necessary.[344]

Lastly, the court is empowered to order the payment of "third party costs"[345] whenever a publication has prejudiced or impeded the proceedings.[346] Third party costs are issued in relation to breaches of Sections 4 (a) and 11 orders.

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333. *Id.* (2).

334. U.K. Law Commission, Law Commission Consultation Paper No.209 (A Consultation Paper on U.K. Contempt of Court Laws) 28-29 *available at* http://www.lawcom.gov.uk/wp-content/uploads/2015/03/cp209_contempt _of_court.pdf (last accessedFeb. 2, 2016) [hereinafter Consultation Paper No. 209].

335. *Id.*

336. *Id.*

337. *Id.*

338. *Id.*

339. *Id.*

340. GC 34, *supra* note 20, at ¶ 43.

341. *Id.*

342. Contempt of Court Act, ch. 29, § 11.

343. Consultation Paper No. 209, *supra* note 334, at 30.

344. *Id.*

345. Contempt of Court Act, ch. 1, § 17 (1).

SC Associate Justice Arturo D. Brion discussed the relationship of prejudicial publicity, the *sub judice* rule, and the rule on contempt of court in his supplemental opinion to *Lejano*.[347]

The *sub judice* principle prohibits parties to a case and the public from discussing or commenting on the merits of a case or the manner by which proceedings are conducted.[348] In the Philippines, such a violation constitutes an "indirect contempt of court,"[349] an offense defined and penalized by Section 3 (d), Rule 71 of the Philippine Rules of Court. Under this provision, "[a]ny improper conduct tending, directly or indirectly, to impede, obstruct, or degrade the administration of justice"[350] constitutes indirect contempt of court.

Persons charged with violation of Section 3 (d), Rule 71 of the Rules of Court usually invoke the right to free speech as their defense.[351] However, this particular restriction on the right to free speech is necessary for the proper administration of justice, especially in criminal proceedings.[352] "The accused must be assured of a fair trial notwithstanding the prejudicial publicity; he has the constitutional right to have his cause tried fairly by an impartial tribunal, uninfluenced by publication or public clamor."[353] Moreover, an opinion undermining the authority and dignity of the court fosters in the public's mind a sense of "general dissatisfaction"[354] with the judicial process and lack of respect of the institution.[355] "If the speech tends to undermine the confidence of the people in the institution and the integrity of the court, then the speech constitutes contempt."[356] The court must be protected against embarrassment or influence while deciding a case.[357]

Surprisingly, no member of the press was sanctioned for indirect contempt of court for violating the *sub judice* rule in relation to the Vizconde massacre cases. Moreover, two movies narrating the facts of the case and depicting Lejano and others as the culprits were shown in 1993 and 1994[358] without legal challenge.

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346. Consultation Paper No. 209, *supra* note 334, at 33 (citing Prosecution Offences Act of 1985, § 19 (b)).

347. *Lejano*, 638 SCRA at 192 (J. Brion, supplemental opinion).

348. *Id.* at 194-95.

349. 1997 RULES OF CIVIL PROCEDURE, rule 71, § 3.

350. *Id.* at (d).

351. *Lejano*, 638 SCRA at 193 (J. Brion, supplemental opinion).

352. *Id.* at 193-94.

353. *Id.* at 196.

354. *Id.* at 198.

355. *Id.*

356. *Id.* at 199.

357. *Lejano*, 638 SCRA at 199 (J. Brion, supplemental opinion).

358. Elyas Isabelo Salanga, Massacre era, *available at* http://www.pep.ph/articles/16650//1/2#focus (last accessed Feb. 2, 2016).

Another significant case on prejudicial publicity and contempt of court is the case of *Fortun v. Quinsayas*.[359] This case involved a complaint for disbarment filed by Quinsayas, private prosecutor in the Maguindanao massacre case, against Fortun, defendant's counsel.[360] The Maguindanao massacre case involved the ambush of female members of the Mangudadatu family and 37 journalists who were on their way to the local office of the Commission on Elections to file the certificate of candidacy of the Mangudadatu patriarch.[361] Allegedly, their political rivals, the Ampatuans, ordered the massacre.[362] Quinsayas filed a disbarment case against Fortun claiming that he abused legal remedies to prolong the proceedings and to divert the court's attention away from the main case.[363] He allegedly distracted the court away from the merits of the main case, thus, violating the Code of Professional Responsibility.[364]

Quinsayas immediately distributed copies of the complaint to the media. Meanwhile, Fortun initiated a contempt proceeding against Quinsayas and members of the media who published the disbarment complaint.[365] He asserted that the "public circulation of the disbarment complaint against him exposed this Court and its investigators to outside influence and public interference."[366]

None of the members of the media were sanctioned by the Court.[367] "[T]he filing of a disbarment complaint against [Fortun] is itself a matter of public concern considering that it arose from the Maguindanao massacre case. The interest of the public is not on [Fortun] but primarily on his involvement and participation as defense counsel in the Maguindanao massacre case."[368] Following this line of reasoning, the Court found Quinsayas guilty of indirect contempt of court, not for engaging in prejudicial publicity, but for violating the rule on confidentiality of disbarment complaints.[369]

While the U.K. does not hesitate to sanction journalists who overstepped the reasonable bounds of public interest and undermined the rights of the accused, Philippine courts are reluctant to do so. The Quinsayas decision strongly supports Rimbam's claim that the government is wary of media's ire,[370] proving the extent of

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359. *Fortun*, 690 SCRA at 630.

360. *Id.* at 628-29.

361. *Id.*

362. *Id.*

363. *Id.*

364. *Id.*

365. *Fortun*, 690 SCRA at 628-29.

366. *Id.*

367. *Id.*

368. *Id.* at 642.

369. *Id.* at 645.

370. Rimban, *supra* note 38, at 24.

media's influence on Philippine society.[371] Because journalists were among the victims of the Maguindanao massacre case, "any matter related [thereto] is considered a matter of public interest."[372] Thus, to the Author's mind, Quinsayas' actuations abused this vulnerability to sway public opinion towards the prosecution. For this reason, she should have been held in contempt not only for violating the rule on the confidentiality of disbarment cases, but also for engaging in prejudicial publicity. Moreover, Quinsayas' allegations against Fortun in the complaint suggested the trial court could be easily misled and manipulated by delaying tactics.

Aside from contempt orders, Philippine courts can issue gag orders,[373] preventing parties from discussing their cases with media whenever necessary.

Consultation Paper No.209 suggested that the court notify the press of cases in which such order was issued.[374] The greater danger is in the Internet, particularly in social media, whose audience, although limited, is just as persuasive. Courts should work with ISPs and social networking sites (SNS) on a mechanism capable of filtering comments made in connection with a case, where a gag order could be issued to warn the user that he or she may be violating an order of the court. Such mechanisms are presently available on SNS when one uploads material which is protected by a copyright and he or she is not authorized to disseminate such file.[375]

B. Defamation or Libel

It is likewise a valid restriction on the freedom of expression to penalize defamatory statements in order to protect the rights and reputation of others.[376] The guidelines

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371. It has been observed that government agencies are afraid of Manila-based newspapers and investigative journalists so they eventually, if not readily, release requested information. Article 19 and Center for Media Freedom and Responsibility, Freedom of Expression and the Media in the Philippines (A Study on Promoting and Protecting Freedom of Expression and Freedom of Information in the Philippines) 50, *available at* https://www.article19.org/data/files/pdfs/publications/philippines-baseline-study.pdf (last accessed Feb. 2, 2016).

372. *Fortun*, 690 SCRA, at 642.

373. *See, e.g.,* Interaksyon.com, Court issues gag order [against] Pacquiao, BIR over boxing icon's tax case, *available at* http://interaksyon.com/article/76279/court-issues-gag-order-vs-pacquiao-bir-over-boxing-icons-tax-case (last accessed Feb. 2, 2016); Tetch Torres-Tupas, SC asked to issue gag orders against Aquino, *Palace execs on DAP*, PHIL. DAILY INQ., Nov. 6, 2013, *available at* http://newsinfo.inquirer.net/521469/sc-asked-to-issue-gag-order-vs-aquino-palace-execs-on-dap (last accessed Feb. 2, 2016); & Jaymee Gamil, *Court gags Kris Aquino, James Yap on custody fight over son*, PHIL. DAILY INQ., Mar.22, 2013, *available at* http://entertainment.inquirer.net/86601/court-gags-kris-aquino-james-yap-on-custody-fight-over-son (last accessed Feb. 2, 2016).

374. Consultation Paper No. 209, *supra* note 334, at 32-33.

375. Vamialis, *supra* note 8, at 62-63.

376. ICCPR, *supra* note 12, art. 19 (3) (a).

in General Comment No. 34, formulated by the UNCHR, require that defamation laws be crafted carefully, observe the parameters prescribed by Article 19 (3) of the ICCPR, and must not unduly stifle freedom of expression.[377] Laws should not penalize unverifiable statements.[378] They should also recognize truth and public interest as defenses.[379]

Under the U.K. Defamation Act of 2013, a statement is deemed defamatory when it causes or is likely to cause "serious harm" to a person's reputation when published.[380] The U.K. case of *MacAlpine v. Bercow*[381] discussed this offense in the context of social media. It involved the statement "Why is Lord MacAlpine trending? *innocent face*,"[382] which was disseminated on the SNS Twitter.

The accused Bercow tweeted the statement on the day the news featured serious allegations of child abuse against a "leading Conservative politician from the Thatcher years."[383] The court found the tweet defamatory because it suggested that the politician alluded to was Lord MacAlpine and that he "was a pedophile who was guilty of abusing boys living in his care."[384] Thus, the tweet expressly and impliedly[385] defamed Lord MacAlpine.[386] Bercow was found guilty of defamation.[387]

Section 4 of the U.K. Defamation Act of 2013 codified the Reynolds defense,[388] which exempts a journalist who publishes a "statement on a matter of public interest,"[389] and adduces evidence establishing that his belief was reasonably founded.[390] The case of *Jameel and Another v. European Wall Street Journal*[391] discussed this defense in connection with an article on Saudi Arabian entities suspected of terrorist financing.[392]

In the foregoing case, the respondent European Wall Street Journal sought the application of the Reynolds defense, arguing that the material was of public interest

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377. GC 34, *supra* note 19, at ¶ 47.

378. *Id.*

379. *Id.*

380. Defamation Act of 2013, ch. 26, § 1 (1) (U.K.).

381. MacAlphine v. Bercrow, EWHC 1342 (Q.B. 2013) (U.K.).

382. *Id.* at ¶ 3.

383. *Id. Compare* ¶ 15 *with* ¶¶ 21-24 & 26-28.

384. *Id.* at ¶ 47-56.

385. *Id. Compare* ¶¶ 91-92 *with* ¶¶ 47-56.

386. *Id. Compare* ¶ 90 *with* ¶ 15.

387. *MacAlphine*, EWHC 1342, ¶ 92.

388. *See* Reynolds v. Times Newspapers, UKHL 45 (1999).

389. *Id.* explan. n., ¶¶ 29 & 35.

390. *Id.*

391. Jameel and Another v. European Wall Street Journal, EWHC 2945 (Q.B.2003).

392. *Id.*

and that the journalist honestly and justifiably believed the information was true.[393] The article stated that the complainant, a U.K. entity with diverse business interests, allegedly was unavailable for comment.[394] The court held that the requirements of "responsible journalism"[395] must be met before the Reynolds tests can be applied.[396] Because the complainant therein failed to establish that the journalist concerned did not exercise responsible journalism, the appeal was dismissed.[397]

The Canadian case of *Grant v. Torstar*[398] involved an article stating that the application for the construction of a golf course on complainant's Twin Lakes estate was a "done deal,"[399] and insinuating that government would grant all necessary permits due to Grant's close ties with officials.[400] The trial court found respondent guilty of defamation but the Court of Appeals ordered a new trial.[401] The appellate court recognized "responsible journalism"[402] as a possible defense, expanding the conception of "qualified privilege."[403] The Canadian SC held that insisting on court-established certainty in reporting on matters of public interest may preclude the disclosure of reliable information relevant to a public debate and inhibit discussion on matters of public concern, which are indispensable to discovering the truth.[404] Consequently, "when proper weight is given to the constitutional value of free expression on matters of public interest, the balance tips in favo[r] of broadening the defen[s]es available to those who communicate facts [that are] in the public's interest to know."[405]

To successfully raise the foregoing defenses, it must be shown that the journalist concerned believed that the information was a matter of public interest at the time of publication,[406] and that such belief was reasonable.[407] Nonetheless, these defenses give journalists wider latitude in determining what constitutes public interest.

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393. *Id.* at ¶ 28.

394. *Id.* at ¶ 9-10.

395. *Id.* at ¶ 25.

396. *Id.* at ¶ 87 & explan. n. ¶ 33.

397. *Id. Compare* ¶ 87 with ¶¶ 90-97.

398. Grant v. Torstar, 3 SCRA 640 (2009) (Can.).

399. *Id.* at 641.

400. *Id.* at 704.

401. *Id.* at 641.

402. *Id.* at 655.

403. *Id.* at 641.

404. *Grant*, 3 SCRA at 642.

405. *Id.*

406. *Id.*

407. *Id.*

Operators of websites are not liable for defamation[408] if they prove that someone else posted the defamatory statement.[409] Service providers may also not be sued for defamation, as only authors, editors, or publishers can be liable.[410] The case of *Tamiz v. Google*[411]discussed this issue. Google runs a free service called blogger.com which allows users to create an independent blog.[412] The use of the facility is subject to the following conditions: (1) bloggers own and should be responsible for materials they post; (2) there is a "report abuse function"[413] that bloggers have to consider; and (3) defamation, libel, and slander are governed by U.S., thus, a court order is necessary before an alleged defamatory post may be taken down.[414]

Tamiz sent a letter to Google requesting that eight specific comments allegedly defaming him be taken down within three days.[415] Google forwarded the letter to the concerned blogger who "voluntarily"[416] removed the comments.[417] Despite this, the complainant filed a complaint against Google.[418] Google was found not liable for defamation although the comments were in fact defamatory.[419]

In addressing the issue of whether Google is a publisher,[420] the appellate court reiterated its decision in *Davison v. Habeeb*[421] that an ISP like Google could not be held liable for defamation.[422] Bloggers are independent publishers,[423] and Google, as a mere conduit for Internet posts,[424] does not exercise editorial control.[425]

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408. Defamation Act of 2013, ch. 26, § 5 (1) & COLLINS, *supra* note 9, at 61.

409. Defamation Act of 2013, ch. 26, § 5 (2).

410. *Id.* ch. 29, § 10 (1).

411. Tamiz v. Google Inc., EWCA Civ.68 (Ct. App. 2013) (U.K.) [hereinafter *Tamiz, Court of Appeals*].

412. *Id.* at ¶ 1.

413. *Id.* at ¶ 13.

414. *Id.*

415. *Id.* at ¶ 2.

416. *Id.*

417. *Tamiz, Court of Appeals*, EWCA Civ. 68, ¶ 2.

418. *Id.* at ¶ 3.

419. *Id.* at ¶ 4.

420. *Id.* at ¶ 5.

421. Davison v. Habeeb, EWHC 3031 (Q.B. 2011) (U.K.).

422. *Compare Tamiz, Court of Appeals*, EWCA Civ. 68, ¶¶ 2, 16, & 22 *with* ¶¶ 39, 41, & 43.

423. *Id.* at ¶ 25.

424. *Id. Compare* ¶ 19 *with* ¶¶ 24-26.

425. *Id.* at ¶ 25 & Vamialis, *supra* note 8, at 36-41.

Similarly, the Queen's Bench did not find Google liable for defamation, because it played a passive role as a platform for publication,[426] and consequently was not a publisher.[427] The liability of an ISP depends on whether it has been notified of the alleged defamation and their "illegality or potential illegality."[428]

Tamiz clarified the decision in *Davidson v. Habee,*[429] in which the court discussed the difference between the liabilities of a passive platform provider and one who has been notified of a possible abuse, yet refuses to take down the offensive material.

The U.K. Defamation Act of 2013 construes "publish" and "publication" in their ordinary meanings.[430] Ordinarily, these terms pertain to disseminating information to the public.[431] It is clear that the dissemination of information through the Internet is considered publication. The cases of *MacAlpine*[432] and *Grant*[433] similarly opine "that repeating a libel has the same legal consequences as originating it,"[434] and that a person sharing a post or re-tweeting a statement would have the same liability as the person who posted the original.[435]

In the Philippines, libel is penalized under Article 353 of the Revised Penal Code (RPC).[436] Libel, on one hand, involves

> a written public and malicious imputation of a crime, or of a vice or defect, real or imaginary, or any act, omission, condition, status, or circumstance tending to cause the dishonor, discredit, or contempt of a natural or juridical person, or to blacken the memory of one who is dead.[437]

Oral defamation, on the other hand, is referred to as slander.[438] There is a presumption of malice in every defamatory imputation, whether it is true or not, in the absence of good intention and justifiable motive, except if the statement is made in a private communication, or it involves a fair and true report of acts of the

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426. Tamiz v. Google, EWHC 449, ¶ 39 (Q.B. 2009) (U.K.) [hereinafter *Tamiz, Queen's Bench*].

427. *Id.* at ¶ 40.

428. *Id.* at ¶ 33 (citing Godfrey v. Demon Internet, EWHC 244 (Q.B.1999) (U.K.)).

429. Davidson v. Habeeb, EWHC 3031 (2011).

430. Defamation Act of 2013, ch. 26, § 15.

431. MERRIAM WEBSTER 422 (Home & Office ed. 1998).

432. MacAlpine, EWHC 1342, ¶ 44 & COLLINS, *supra* note 9, at 67-68.

433. Grant, 3 SCRA at 640.

434. *Id.* at 643.

435. MacAlpine, EWHC 1342, ¶ 44 & COLLINS, *supra* note 9, at 67-68.

436. An Act Revising the Penal Code and Other Penal Laws [REVISED PENAL CODE], Act No. 3815 (1932), art. 355.

437. *Id.* art. 355.

438. *Id.* art. 358.

government or public officers.[439] In 2012, the Congress of the Philippines enacted the Cybercrime Prevention Act of 2012,[440] which penalized the publication of a defamatory statement online as a distinct offense from one committed through "writing."[441] This provision was assailed in the case of *Disini v. Ochoa*,[442] specifically on the ground that the presumption of malice[443] unduly restricts freedom of expression.[444] Petitioners likewise contended that penalizing libel was unconstitutional,[445] and constituted a derogation of obligations of the Philippines in international law,[446] particularly the ICCPR and the opinion of the UNHCR in *Adonis v. Philippines*,[447] which both prescribe truth as a defense.[448]

The Court agreed with the Solicitor General[449] that the Cybercrime Prevention Act only affirmed Article 354 in relation to Article 355 of the RPC[450] which provides that "libel [may be] committed by means of writing, printing, lithography, engraving, radio, phonograph, painting, theatrical exhibition, cinematographic

439. *Id.* art. 355 & Filipinas Broadcasting Network Inc. v. Ago Medical and Educational Central-Bicol Christian College of Medicine, 448 SCRA 413, 430 (2005) (citing REVISED PENAL CODE, art. 354).

440. An Act Defining Cybercrime, Providing for the Prevention, Investigation, Suppression and the Imposition of Penalties Therefor and For Other Purposes, [Cybercrime Prevention Act of 2012], Republic Act No. 10175 (2012).

441. *Id.* § 4 (4).

442. Disini v. Ochoa, 716 SCRA 237 (2014).

443. REVISED PENAL CODE, art. 355.

444. *Disini*, 716 SCRA at 316.

445. *Id.* at 317.

446. *Id.* at 319.

447. Alexander Adonis v. Philippines Communication No. 1815/2008, U.N. Doc. CCPR/C/103/D/1815/2008/Rev.1, UNHRC, 102d Sess. (Apr. 26, 2012) [hereinafter *Adonis*]. The case involved a radio broadcaster who made an imputation that a particular member of Congress was having an extramarital affair. The concerned member of Congress sued him for libel. Adonis was convicted by the trial court. Because his counsel failed to appeal his conviction, he filed an application before the UNHRC. The UNHRC found merit in his argument that the Philippine law on libel unduly restricted the freedom of expression. It agreed that the presumption of malice and the imposition of a imprisonment as a penalty curtailed free speech. The committee concluded that Philippine law on libel was neither necessary nor reasonable and recommended that the Philippines comply which GC 34 by recognising truth and public interest as a defense as well as by removing punitive sanctions that have a chilling effect on speech. *Id.*

448. *Disini*, 716 SCRA at 319.

449. *Id.* at 320.

450. REVISED PENAL CODE, art. 354-55.

exhibition, or any similar means."[451] Internet libel falls under "similar means."[452] No new crime was created.[453] Moreover, the Court brushed aside the petitioners' allegation that government violated its international obligations,[454] and insisted that the present laws are consistent with these recommendations.[455]

With regard to the objections to Section 5 of the Cybercrime Prevention Act, the Court agreed with the petitioners that it suffers from overbreadth and produces a chilling effect on speech.[456] The provisions on "aiding, abetting of a cybercrime" and "attempt to commit a cybercrime" were declared void due to vagueness.[457] Although these concepts were well defined in criminal law, they are ambiguous when used in relation to cybercrime,[458] and consequently had a chilling effect on speech.[459]

The Court's construction of the words aiding and abetting was particularly interesting. The terms suggest that a person agreed to cooperate with another to commit a crime and, although he or she did not directly participate in the commission, he or she undertook acts to ensure its impunity.[460] With respect to the Cybercrime Prevention Act, aiding and abetting was construed as commenting, liking, and sharing a post on Facebook, or re-tweeting a tweet on Twitter.[461] It identified bloggers, their friends and followers, and ISPs[462] as persons who may aid or abet the commission of a crime.[463] However, Section 5 of the law does not only

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451. *Id.* art. 355.

452. *Disini*, 716 SCRA at 320.

453. *Id.* at 319-20.

454. *Id.*

455. *Id.* (citing REVISED PENAL CODE, art. 361). The article provides that —

> [i]n every criminal prosecution for libel, the truth may be given in evidence to the court and if it appears that the matter charged as libelous is true, and, moreover, that it was published with good motives and for justifiable ends, the defendants shall be acquitted.
>
> Proof of the truth of an imputation of an act or omission not constituting a crime shall not be admitted, unless the imputation shall have been made against Government employees with respect to facts related to the discharge of their official duties.
>
> In such cases if the defendant proves the truth of the imputation made by him, he shall be acquitted.

456. *Id.* at 330.

457. *Id.* at 325-26 (citing Reno v. Civil Liberties Union, 521 U.S.844 (1997)).

458. *Disini*, 716 SCRA at 322-25.

459. *Id.* at 327.

460. United States v. Reogilon and Dingle, 22 Phil. 127, 129 (1912).

461. *Disini*, 716 SCRA at 324.

462. *Id.* at 326 (citing Communications Decency Act, 47 U.S.C. § 223 (1996)).

463. *Id.* at 322-25.

apply to Internet libel, but to the other crimes defined and penalized under the law (that is, by Section 4 of the Cybercrime Prevention Act). For instance, one who provides workspace for persons engaged in data interference,[464] which pertains "to intentional or reckless alteration, damaging, deletion or deterioration of computer data, electronic document, or electronic data message, without right, including the introduction or transmission of viruses,"[465] may be considered as having abetted or aided a crime as it is ordinarily used in criminal law. Thus, construing the terms aiding and abetting strictly in relation to Section 4 (c) (4) of the Cybercrime Prevention Act and declaring such provision void due to overbreadth was erroneous.

Furthermore, the Philippine rule on the liability of ISPs differs from those of the U.K. and Canada, which imposes the same liability on a person republishing a defamatory statement as the originator thereof.[466] In the Philippines, commenting, liking, and sharing a post on social media were construed as aiding and abetting the commission of a cybercrime. But because Section 5 with respect to Section 4 (c) (4) was declared void in *Disini*,[467] a blogger reiterating the statement of another is not liable for defamation.

With regard to the liability of ISPs, U.K. law does not impose a penalty in the absence[468] or impossibility[469] of editorial control. *Disini*, however, did not address this issue squarely. However, Section 30 of the Electronic Commerce Act of 2000[470]

464. Cybercrime Prevention Act of 2012, § 4 (a) (e) (3).

465. *Id.* The constitutional challenge to this provision was struck down by the Court. *Disini*, 716 SCRA at 303-04.

466. *MacAlphine*, EWHC 1342, ¶ 40 & COLLINS, *supra* note 9, at 67-68.

467. *Disini*, 716 SCRA at 322-25.

468. *See* Wayne Crookes and West Coast Title Search Ltd. v. Jon Newton and Others, 3 RCS 269 (2011) (Can.). Crookes accused West Coast Title Search (WCTS) of defamation asserting that it provided a hyperlink to an article defaming him as part of the smear campaign against the Green Party of Canada. For consideration by the court, the determination was whether providing a hyperlink to another article constitutes defamation. Both the trial and appellate courts did not find the act defamatory. The SC of Canada held that the element of publication in defamation requires the plaintiff to establish that the defendant exercised a positive act conveying the defamatory meaning to a third party and that such party has received it. Under the innocent dissemination rule, subordinate distributors (or those who play a secondary role in distribution) may raise the defence of lack of actual knowledge of the defamatory nature of the publication. Moreover, passive act do not constitute publication. Providing hyperlinks to a defamatory article therefore does not constitute defamation unless the person who provides the hyperlink repeats the contents of the defamatory article. *Id.*

469. *Davison*, EWHC 3031, ¶ 38 (Q.B. 2011) (U.K.).

470. An Act Providing for the Recognition and Use of Electronic Commercial and Non-commercial Transactions and Documents, Penalties for Unlawful Use

provides that "no person or party shall be subject to any civil or criminal liability in respect to the electronic data message or electronic document for which the person or party acting as a service provider," as long as he or she does not have knowledge of the fact the material is unlawful.[471] The foregoing provision is consistent with the U.K. framework.

An issue not addressed by the cases above was when the offender uses a pseudonym in creating an email or social media account.[472] Only ISPs have the capability of identifying an anonymous offender through his IP address.[473] While ISPs can voluntarily disclose the identity of the offender, Vamialis argues that this remains a gray area due to various legal and ethical considerations such as privacy.[474]

The extraterritorial reach of the Internet also poses a challenge insofar as its legal actions are concerned.

V. RECOMMENDATIONS

Regulatory systems must take note of the nuances of traditional media, print and broadcast, and the Internet.[475] Their similarities and differences must be taken into account.[476] Furthermore, the importance of fair and free competition[477] and the necessity of ensuring minimal state control over mass media must also be given due weight.[478]

The 1997 Bonn Declaration[479] recognizes the pivotal role of the private sector in the development of the Internet and the necessity of a self-regulatory mechanism capable of protecting consumer interests and ethical principles.[480] Consistent with this mandate, the Leveson inquiry and Davide Commission recommended that media be allowed to regulate itself.[481] On one hand, the Leveson inquiry qualified this recommendation by asserting that such mechanism must be genuinely

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Thereof and Other Purposes [Electric Commerce Act of 2000], Republic Act No. 8792 (2000).

471. *Id.* § 30 (b) (i) & Rules and Regulations Implementing the Electronic Commerce Act of 2000, Republic Act No.8792, § 44 (b) (2000).

472. Alejandro, *supra* note 99, at 6.

473. *Id.*

474. Vamialis, *supra* note 8, at 44.

475. GC 34, *supra* note 20, ¶ 39.

476. *Id.*

477. *Id.* at ¶ 40-41.

478. *Id.* at ¶ 40.

479. DAMIAN TAMBINI, ET AL., CODIFYING CYBERSPACE: COMMUNICATIONS SELF-REGULATION IN THE AGE OF INTERNET CONVERGENCE 17-18 (2008) (citing European Ministerial Conference, July 6-8, *1997 Bonn Declaratio on Global Information Networks*).

480. *Id.* at ¶¶ 13-19.

481. LEVESON, *supra* note 35, at 13, 16-17 & Davide Commission, *supra* note 67.

independent and effective, and advance the interest of both media and the public.[482] It also suggested the enactment of a law directing media to organize,[483] and for government to provide positive incentives such as a "kite mark"[484] establishing a "recognized brand of journalism,"[485] for complying with such mandate.[486] The proposed organization shall be endowed with powers to settle disputes through arbitration,[487] and to issue uniform guidelines defining public interest for purposes of news reporting.[488] On the other hand, the Davide Commission emphasized the need for education. It recommended a system of "providing training and guidance to apprentices,"[489] and encouraged technical and experiential exchanges with foreign counterparts.[490]

In the U.K., the present Press Complaints Commission is a mere complaints-handling body.[491] Membership therein is voluntary, power is concentrated in the hands of a few,[492] and the body lacks an effective enforcement mechanism.[493] Moreover, the Commission's interests are aligned with media, not the public.[494] In the Philippines, abusive practices by the press are well-known, yet there is no definite initiative to curb such practices. While media is organized with a standards authority which regulates programming, advertising, and trade practices,[495] unethical practices persist.[496] That most entities engaged in mass media have Internet presence

482. LEVESON, *supra* note 35, at 13 & 17.

483. *Id.* at 17.

484. *Id.* at 10.

485. *Id.*

486. *Id.* at 14 & 16.

487. *Id.* at 15-16.

488. LEVESON, *supra* note 35, at 15.

489. Davide Commission, *supra* note 67.

490. *Id.*

491. LEVESON, *supra* note 34, at 12.

492. *Id.*

493. *Id.*

494. *Id.*

495. Article 19 and Center for Media Freedom and Responsibility, *supra* note 371, at 43 & *Filipinas Broadcasting Network Inc.*, 448 SCRA at 435.

496. In February 2014, ABS CBN's late night newscast, Bandila, featured a "mysterious flesh eating disease" which allegedly was the fulfillment of the prophecy of a "prophet" who also predicted the onslaught of typhoon Haiyan in 2013. The feature turned out to be hoax. The patients were inflicted with leprosy and a severe case of psoriasis. *ABS-CBN anchor on flesh-eating disease report: No intention to sow fear*, PHIL. DAILY INQ., Feb. 26, 2014, *available at* http://newsinfo.inquirer.net/580801/abs-cbn-anchor-on-flesh-eating-disease-report-no-intention-to-sow-fear (last accessed Feb. 2, 2016).

increases the danger that poorly researched[497] and sensationalized[498] news articles will lead to panic.

In response to the foregoing, the Leveson inquiry proposes the creation of a new "self-regulatory body under an independent trust board,"[499] empowered not only to handle complaints, but also to investigate "serious or systematic failures."[500]This body would represent the interest of both the press and public.[501] Gibbons posits that "[s]elf-regulation can only be fully effective where the policy objectives which are required in the public interest are aligned with the economic objectives of the industry."[502] The conflict confronted by media is one between ethical journalism and the need to maximize circulation.[503]

A meaningful self-regulatory proposal is the imposition of guidelines in making editorial judgments regarding the contents and manner of presenting news.[504] This in effect would restrict the "considerable deference recogni[z]ed to professional judgment,"[505] accorded by the *Jameel* decision, to the press.[506]

According to Collins, the widespread use of the Internet led to the development of a "network culture."[507] Such culture in turn gave rise to "network governance,"[508] which is a form of self-regulation where participating networks possess homeostatic properties.[509] Collins criticizes the system for its lack of accountability, incompetency, and exclusivity.[510] ISPs who do not share the dominant values are excluded.[511]

The Internet as a medium of communication remains largely untouched by states. In the U.K., for instance, the Communications Act 2003 was framed to exclude the Internet because it was found to be different from print and broadcast

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497. *Id.*

498. Davide Commission, *supra* note 67.

499. LEVESON, *supra* note 35, at 14.

500. *Id.*

501. *Id.*

502. Thomas Gibbons, *Fair Play to All Sides of the Truth: Controlling Media Distortions*, 69 CURRENT LEGAL PROBLEMS 286, 310 (2009).

503. *Id.* at 311.

504. *Id.* at 312.

505. *Id.* at 308.

506. *Id.*

507. Richard Collins, *Networks, Markets and Hierarchies: Government and Regulation of the U.K.Internet*, 59 PARLIAMENTARY AFFAIRS 314, 314 (2006) [hereinafter Collins, *Networks, Markets and Hierarchies*].

508. *Id.*

509. *Id.*

510. *Id.* at 316.

511. *Id.*

media.[512] Today, traditional media and the Internet overlap, as most broadcast and print media entities have web pages and social media accounts to which the public may subscribe in order to receive updates on the latest news, and individual users can repost these updates to their friends.[513] However, there is presently no specific system in place which can provide redress for the abuse of freedom of expression on the Internet, much less provide redress for prejudicial publicity that is contemptuous or defamatory.[514] The public depends solely on the internal policies of the concerned ISP.[515]

The "Protect, Respect, and Remedy"[516] framework of Special Representative of the Secretary General John Ruggie is a good starting point for co-regulation. It advocates for

> the state duty to protect human rights abuses by third parties, including businesses, through appropriate policies, regulation[,] and adjudication; the corporate responsibility to respect human rights, which means to act with due diligence to avoid infringing on the rights of others and to address adverse impacts that occur; and greater access by victims to effective remedy, both judicial and non-judicial.[517]

The foregoing framework proposes a multi-sectoral approach with mechanisms for dispute resolution. It seeks to prevent the abuse of governance loopholes resulting from globalization, which allow for corporate-related human right harms to occur where none may be intended.[518] With regard to the Internet, this governance gap is due to the "anonymity and borderless nature"[519] of cyberspace, which is the

512. *Id.* at 316-17 & TAMBINI ET AL., *supra* note 479, at 110.

513. GC 34, *supra* note 20, ¶ 44.

514. COLLINS, *supra* note 9, at 32.

515. Tamiz, *Court of Appeals*, EWCA Civ. 68 & *Davison*, EWHC 3031.

516. Special Rapporteur on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, *Protect, Respect and Remedy: a Framework for Business and Human Rights*, ¶ 19, U.N. Human Rights Council, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008) (by John Ruggie) [hereinafter Ruggie Framework].

517. United Nations, Protect, Respect and Remedy: Framework for Business and Human Rights (A Summary of the Ruggie Framework), *available at* http://www.reports-and-materials.org/Ruggie-protect-respect-remedy-framework.pdf(last accessed Feb. 2, 2016).

518. *Id.* at ¶ 10.

519. Ministry of Foreign Affairs of the Netherlands, Global Corporate Responsibility for the Internet Freedom *available at* http://www.minbuza.nl/binaries/content/assets/minbuza/en/the_ministry/global-corporate-responsibility---freedom-online.pdf (last accessed Feb. 2, 2016).

reason for its open and free character.[520] These characteristics complicate the restriction of the abusive exercise of the freedom of expression.[521]

What the Leveson inquiry proposal (among others) fails to consider is the impossibility of imposing a standard on ISPs which are largely unorganized.[522] There are multi-sectoral initiatives such as the Global Network Initiative (GNI) and the Internet Rights and Principles Coalition (IRPC), which involve the protection of human rights on the Internet,[523] and require its members to observe such principles. However, because membership is voluntary, there are no barriers preventing persons from leaving the organization.[524]

In response to the foregoing, Tambini and others propose a system of co-regulation for the Internet.[525] Co-regulation implies an inclusive approach in enforcing particular norms, and requires the cooperation between government, industry, and the public.[526] It is a holistic approach which includes the drafting of a code of ethical conduct which addresses the diversity of services and functions as well as environments and applications[527] and the rules and regulation governing the practice of journalism.[528] Moreover, Tambini and others foresee federated ISPs performing the necessary single market and coordinating role in regulating the Internet.[529] It may be noted that GNI[530] and IRPC[531] both have guidelines on protecting rights prone to abuse in the Internet which may serve as starting points for establishing system of co-regulation.

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520. *Id.*

521. ICCPR, *supra* note 13, art.19 (3).

522. Collins, *Networks, Markets and Hierarchies*, *supra* note 507, at 313.

523. Ministry of Foreign Affairs of the Netherlands, *supra* note 519.

524. Collins, *Networks, Markets and Hierarchies*, *supra* note 507, at 316. The Electronic Frontier Foundation resigned from GNI shortly after the various surveillance programs of the NSA were disclosed. Lucian Constantin, NSA surveillance revelations prompt EFF to resign from Global Network Initiative, *available at* http://www.computerworld.com/s/article/9243159/NSA_surveillance_revelations_prompt_EFF_to_resign_from_Global_Network_Initiative (last accessed Feb. 2, 2016).

525. TAMBINI, ET AL., *supra* note 479, at 301.

526. *Id.* at 303.

527. *Id.*

528. *Id.* at 298-99.

529. *Id.* at 302-03.

530. Global Network Initiative, Core Commitments, *available at* http://globalnetworkinitiative.org/corecommitments/index.php (last accessed Feb. 2, 2016).

531. Internet Rights and Principles Dynamic Coalition, 10 Internet Rights and Principles, *available at* http://internetrightsandprinciples.org/site/campaign (last accessed Feb. 2, 2016).

The problem, as Leveson framed it, is how to entice ISPs to organize themselves voluntarily.[532] The fact that ISPs are multinational corporations operating in various jurisdictions makes it more logical for them to organize on an international level, and for states to agree on a uniform set of standards.[533] An industry standard for ethical practices,[534] or in this case, compliance with customary norms on the freedom of expression, would lend more credence to ISPs. Furthermore, by providing a mechanism for dispute resolution (as suggested by Ruggie's framework), an international initiative can provide a feasible solution to jurisdictional problems and anonymity, especially on disclosing the identity of anonymous offenders.

The foregoing proposal, however, does not address the lack of accountability, incompetency, and exclusivity[535] among ISPs.

To address the specific concern of this Article, journalists must be trained to report on criminal proceedings with due regard to the *sub judice* principle and contempt of court, and the necessity of safeguarding the rights of the accused and ill-effects of prejudicial publicity on the administration of justice.[536] Courts must also provide guidelines on how to determine whether a piece of information is of public interest,[537] in accordance with existing jurisprudence and an international or regional standard.

What constitutes contemptible conduct or defamatory publication varies from one jurisdiction to another. Moreover, while there is considerable literature on the matter, adopting the recommendations of international bodies depends largely on the discretion of the local courts and law-making bodies.[538] As pointed out earlier, the ability of the Internet to transcend national borders and the lack of international standards creates a problem for publications made through the Internet, not only with respect to jurisdictional requirements, but also on the substantive aspect.

What may be considered contemptible conduct or defamatory publication may be considered as such in one jurisdiction but not in another. The cases cited here involving Google[539] are not accurate illustrations as they involve one multinational ISP. Possible conflict may arise where the ISP is a local entity publishing an article about a foreign person. It is therefore important to have an international standard, at least with respect to what constitutes responsible journalism and public interest, to prevent the multiplicity of suits and conflicting judgments.

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532. LEVESON, *supra* note 35, at 14.

533. Perhaps something similar to the EU Directive 95/46/EC on the protection of personal data and the US-EU Safe Harbour Principles can be a starting point for an international standard.

534. LEVESON, *supra* note 35, at 10.

535. Collins, *Networks, Markets and Hierarchies*, *supra* note 507, at 316.

536. Raymundo, *supra* note 109.

537. LEVESON, *supra* note 35, at 15.

538. *See generally Adonis*, *supra* note 447.

539. Tamiz*, Court of Appeals*, EWCA Civ. 68 & *Davison*, EWHC 3031.

Equally important is educating the public about decorum on the Internet and the ill effects of prejudicial publicity in criminal proceedings. Proper Internet etiquette must be taught, especially to children.[540] In Japan, for instance, children entering junior high school and their guardians are given materials on the dangers of the Internet in an effort to combat *ijime* or cyber-bullying.[541] The teacher discusses these materials[542] during homeroom by explaining the salient points.[543] Because studies reveal that teaching so-called "netiquette" to children decreases the incidence of cyber bullying,[544] the proposed co-regulatory may adopt this model and recommend that proper use of the Internet be integrated into school curricula. The results may be replicated in relation to prejudicial publicity. If people understood the rights of an accused better, they would perhaps be more considerate of the court's obligation to ensure a fair trial.

VI. CONCLUSION

Customary international law restricts the freedom of expression when circumstances reveal that its free exercise could prejudice the right of an accused to the presumption of innocence and to a fair trial. Issuing contempt orders and penalizing defamation are means by which the law allows courts to ensure the fairness of a proceedings, as well as a way for individuals to seek redress for damaged reputations. However, the peculiar characteristics of the Internet challenge how these remedies may be used. The only issue resolved so far is the liability of ISPs for publishing an offensive materials.[545] Others, such as jurisdiction and anonymity, remain blurry due to the lack of an international standard. For this reason, an international, multi-stakeholder co-regulatory system has been proposed. The greater challenge, however, is reconciling the interests of ISPs and states, and finding the compelling argument to convince them to organize.

With regard to ethical considerations, members of the press covering court proceedings must be given special training in order to acquaint them with international human rights standards pertinent to their profession. The public must

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540. Debby Mayne, Proper Internet Etiquette, *available at* http://etiquette.about.com/od/Smartphones/a/Proper-Internet-Etiquette.html (last accessed Feb. 2, 2016).

541. Hirohiko Yasuda, *A Risk Management System to Oppose Cyber Bullying in High School: Warning System with Leaflets and Emergency Stuff*, 34 INFORMATICA 255 (2010).

542. *Id.* at 257.

543. *Id.*

544. Ayuchi Kumazaki, et al., Effects of Classroom Teachers' Policies on Cyber-bullying and School Bullying in Elementary, Junior High and High Schools in Japan (An Unpublished Paper Presented at the 2012 Asian Conference on Psychology & the Behavioral Sciences in Osaka, Japan) 216, *available at* http://iafor.org/archives/offprints/acp2012-offprints/ACP2012_0183.pdf (last accessed Feb. 2, 2016).

545. Vamialis, *supra* note 8, at 62-63.

also be taught of the proper use of the Internet or netiquette, as well as limitations on the right to free expression.

Media are potent tools for the shaping of public opinions,[546] but the degree of their collective influence on courts vary. In China, for instance, they are able to force courts to decide cases according to popular opinion.[547] More studies on these matters should be undertaken to facilitate the identification of common domestic norms that may lay the foundation for compelling argument for an international, multi-stakeholder, and co-regulatory system.

546. Benjamin Liebman, *Watchdog or Demagogue? The Media in the Chinese Legal System*, 105 COLUM. L. REV. 1 (2005).

547. *Id.* at 69-97.