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.

—Justice Renato S. Puno

This Article seeks to understand how prejudicial publicity affects “trials of national notoriety.” It explores the interplay between the freedom of expression, the rights

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

of an accused, and the public’s interest in crimes involving “prominent persons, sex[,] and mystery.” 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 Hard Copy demonstrate the public’s insatiable curiosity” for information regarding these crimes. The Article also investigates how the Internet, particularly social media, has altered the dissemination of prejudicial publicity.

Media can “distort public opinion” by directing people’s attention to certain issues and influencing the criteria by which audiences judge governmental actions. 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 assess the effectivity of these remedies against abuses communicated through the Internet. It also studies how the peculiar characteristics of the Internet, particularly anonymity and the ability to transcend national borders, 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. 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-à-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

4. Hardaway & Tumminello, supra note 2, at 41.
7. Id. at 442.
proven guilty and to be accorded a fair and impartial trial whenever he or she faces a hostile public.\textsuperscript{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),\textsuperscript{12} International Covenant on Civil and Political Rights (ICCPR),\textsuperscript{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.\textsuperscript{14} Specific recommendations shall be made with respect to the press and journalists, and remedial or procedural measures available to the court.

\section*{II. Media and the Courts}

The freedom of opinion\textsuperscript{15} and freedom of expression\textsuperscript{16} are “core rights”\textsuperscript{17} which are both civil and political in nature.\textsuperscript{18} Not only do these rights protect an individual

\begin{itemize}
  \item \textsuperscript{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).
  \item \textsuperscript{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].
  \item \textsuperscript{15} ICCPR, supra note 13, art. 19 (1). The Article provides that “[e]veryone shall have the right to hold opinions without interference.” \textit{Id.}
  \item \textsuperscript{16} \textit{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
\end{itemize}
against the state’s undue interference, but they also guarantee every individual’s participation in political life. Thus, freedom of opinion and free expression are regarded as the foundations of a free and democratic society. Only by ensuring their free exercise would transparency and accountability, which are values crucial for the promotion and protection of human rights, be realized.

The right to hold an opinion, on one hand, must be unfettered and states have the obligation to protect all forms thereof. 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” through a preferred medium. Unlike the freedom to hold an opinion, free expression may be limited whenever circumstances require. Article 19 (3) of the ICCPR 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. 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.

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


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.

Customary international law recognizes free media as a “cornerstone of democracy.”\textsuperscript{29} Free media is one wherein the press is allowed “to comment on public issues or without censorship or restraint to inform public opinion.”\textsuperscript{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.\textsuperscript{31} Nonetheless, governments are advised to be wary of media’s ability to influence public opinion,\textsuperscript{32} and are encouraged to foster competition in the industry to prevent the monopolization of ideas.\textsuperscript{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.\textsuperscript{34} On one hand, the “phone hacking scandal”\textsuperscript{35} in the U.K., which involved illegally accessing the mobile phone of a murdered student,\textsuperscript{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 benefitted or prejudiced the public.\textsuperscript{37} On the other hand, perceived bias against the administration of former Philippine President Gloria Macapagal-Arroyo during the 2003 coup d’état was extensively discussed by the Southeast Asian Press Alliance in its 2004 publication.\textsuperscript{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\textsuperscript{39} and to explain

\textsuperscript{30} GC 34, supra note 20, ¶ 13.
\textsuperscript{31} Id. ¶ 7.
\textsuperscript{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.
\textsuperscript{33} GC 34, supra note 20, ¶ 36.
\textsuperscript{34} Beale, supra note 6, at 442-43.
\textsuperscript{35} BRIAN LEVESON, AN INQUIRY INTO THE CULTURE, PRACTICE AND ETHICS OF THE PRESS: EXECUTIVE SUMMARY 3 (2012).
\textsuperscript{36} Id. at 3.
\textsuperscript{37} Id. at 4-5.
\textsuperscript{39} LEVESON, supra note 35, at 4.
to the public how the justice system works. In the process, the inquiry uncovered serious breaches of the Editor’s Code of Practice — “to respect the truth, to obey the law[,] and to uphold the rights and liberties of individuals.” It criticizes investigative journalism as it discusses how the press has treated or described persons undergoing criminal investigation. The Leveson inquiry confirmed the presence of ethical lapses of media in the performance of its duty, especially the effect of personal relationships between members of the press and public officials.

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.

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

40. Id.
41. Id.
43. Id.
44. Id. at 8.
45. LEVESON, supra note 35, at 8.
46. Id. at 9–11.
47. Id. at 23–29.
50. Id.
52. Id.
53. Id.
One of these seven coups d’etat against Aquino provided the backdrop for the case of Soliven v. Makasia. Then President Cory Aquino sued Philippine Star publishers Maximo Soliven, Antonio Roces, Frederick Agcaoli, and journalist Luis Beltran for libel. The broadsheet published an article written by Beltran revealing that Aquino “hid under her bed” during a coup d’etat. The Court dismissed the petition questioning the finding of probable cause against Soliven and others and ordered the parties to proceed with the trial. Soliven and his co-accused were subsequently acquitted on appeal. 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 was tainted by the private television (TV) stations’ bias in favor of the renegade soldiers. TV stations continuously aired recorded video statements of mutineers and their live press conference while government begged them for airtime and to stop the live coverage of the coup d’etat. Worse, members of the media integrated personal opinions into news reports and “negotiated” with the rebels by asking them for their demands from government.

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

55. Id. at 397.
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.
68. LEVESON, supra note 35, at 4.
motivate or encourage change in industry practice.\textsuperscript{69} These proposals are consistent with the Dakar Declaration\textsuperscript{70} on Article 19 of the UDHR\textsuperscript{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”\textsuperscript{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.”\textsuperscript{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,\textsuperscript{74} the “[j]udiciary and media are partners, not adversaries in building a democratic society.”\textsuperscript{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.\textsuperscript{76} Media shapes the judiciary’s image,\textsuperscript{77} and determines whether the public should repose trust and confidence in the courts.\textsuperscript{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”\textsuperscript{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.”\textsuperscript{80}

\textsuperscript{69} Id. at 5.
\textsuperscript{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.
\textsuperscript{72} Dakar Declaration, supra note 70.
\textsuperscript{73} Id.
\textsuperscript{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].
\textsuperscript{75} Id. intro, ¶ D.4.
\textsuperscript{76} Id. ch. I, ¶ C.i.
\textsuperscript{77} Id. ¶ C.2.
\textsuperscript{78} Id. ¶ C.3 & Beale, supra note 6, at 404.
\textsuperscript{79} Id. ch. III, ¶ B.2.
\textsuperscript{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

81. Id. ¶ A.1.
82. Id.
83. Beale, supra note 6, at 442.
85. Id. ¶ C.1.
87. Id. at 692 (citing Martelino v. Alejandro, 32 SCRA 106, 115-16 (1970)).
90. Id. at 2.
the concurrence of the Lord Chief Justice,"91 to issue an order exempting a case due
to special circumstances92 provided in Section 41 of the Criminal Justice Act of
192593 and Section 9 of the Contempt of Court Act of 1981.94 Media can now
record and broadcast court proceedings95 pursuant to guidelines issued by the court.

The Maputo Declaration96 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. Cox101 involved a

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
(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
events/prizes-and-celebrations/celebrations/international-days/world-press-
freedom-day/previous-celebrations/worldpressfreedomday20090601/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
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
Doc. A/HRC/17/27 (May 16, 2011) (by Frank La Rue) [hereinafter First La
Rue Report].
blog entry by Cox insinuating that Obsidian Finance and Summit conspired to commit tax fraud.\textsuperscript{102} Summit and its court-appointed trustee, Obsidian Finance,\textsuperscript{103} sued Cox for defamation and won.\textsuperscript{104} Cox appealed and requested for the application of the negligence standard for private defamatory actions.\textsuperscript{105} The appellate court denied the appeal because the First Amendment rules apply to both institutional and individual speakers.\textsuperscript{106} Media are not entitled to special protection.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{110} While news articles accurately reported what transpired during trial, headlines suggested a particular opinion or stand towards the article.\textsuperscript{111} Individuals — private and public personas alike — voiced out their opinions in

\textsuperscript{102} Id. at 1287.
\textsuperscript{103} Id.
\textsuperscript{104} Id.
\textsuperscript{105} Id. at 1287–88.
\textsuperscript{106} Id. at 1291.
\textsuperscript{107} Obsidian Finance Group, 740 F.3d at 1291.
\textsuperscript{108} GC 34, supra note 20, at ¶ 3.
\textsuperscript{110} Id.
\textsuperscript{111} Id.
social media\textsuperscript{112} which clearly intended to influence the tribunal. There are online surveys asking the public whether they believed Corona was guilty.\textsuperscript{113} This clearly violated international human rights laws because an accused facing impeachment still enjoys the guarantees of presumption of innocence and fair trial.\textsuperscript{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.\textsuperscript{115} Due process has three components: equality


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

\textsuperscript{115} ICCPR, supra note 13, art.14 (1). The article provides that —

[all persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent[,] and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (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.\textsuperscript{116}

Of particular interest to this section is the concept of “fair and public hearing.”\textsuperscript{117} A fair proceeding is devoid of “any direct or indirect influence, pressure or intimidation[,] or intrusion in the proceedings”\textsuperscript{118} exerted by any party for whatever reason.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{121}

A person accused of a crime has the right to be presumed innocent until his guilt is proven in accordance with law.\textsuperscript{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.\textsuperscript{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.\textsuperscript{124} Media capitalizes on the public’s curiosity by continuously running features on their latest development, and

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\textsuperscript{116} UNHRC, \textit{General Comment No.13 on Article 14 of the ICCPR: Right to Equality Before Courts and Tribunal 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.

\textsuperscript{117} \textit{Compare} GC 13, \textit{supra} note 116, ¶ 1 with ICCPR, \textit{supra} note 13, art. 14 (1).

\textsuperscript{118} GC 32, \textit{supra} note 114, ¶ 25.

\textsuperscript{119} Id.

\textsuperscript{120} Id.

\textsuperscript{121} Id. at ¶ 29.

\textsuperscript{122} ICCPR, \textit{supra} note 13, art. 14 (2). The article provides that “[e]veryone charged with a criminal offence[s] shall have the right to be presumed innocent until proved guilty according to law.” Id.

\textsuperscript{123} GC 34, \textit{supra} note 20, ¶ 36 & Beale, \textit{supra} note 6, at 442-43.

\textsuperscript{124} Hardaway & Tumminello, \textit{supra} note 2, at 45.
even conducting their own investigations of the crime, 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*. This involved the automatic review 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. The case, dubbed by the media as the Vizconde massacre, attracted substantial attention because the accused belonged to prominent families. The December 14, 2010 decision of the Supreme Court (SC) contained an observation regarding the extensive media coverage of the case. 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.” In the trial, however, the prosecution’s lone witness admitted that she had smoked *shabu* and sniffed cocaine prior to the incident. It was also shown that she was an asset of the National Bureau of Investigation (NBI). These facts led the Court to conclude that her testimony was not credible. 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. Consequently, the conviction of Lejano and others was reversed due to reasonable doubt.

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

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


127. *Id.* at 124.

128. *Id.* at 124–29.


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.

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\textsuperscript{137} by the state or other persons,\textsuperscript{138} as well as one’s right against unlawful attacks on his honor and reputation.\textsuperscript{139} For this reason, suggesting that one is guilty of a crime is, in itself, “both a crime and a tort”\textsuperscript{140} in many continental jurisdictions. Public figures, however, are legitimately subject to criticisms and public opposition.\textsuperscript{141}

The case of \textit{Von Hannover v. Germany}\textsuperscript{142} involved the question of whether the life of a member of a reigning (or royal) family\textsuperscript{143} is a matter of general interest.\textsuperscript{144} Princess Caroline of Monaco complained that she was being constantly accosted by paparazzi.\textsuperscript{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.\textsuperscript{146} According to Princess Caroline, her agreement with the French press allowed her to choose which of her photos could be published.\textsuperscript{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.\textsuperscript{148} The ECtHR thus concluded that the complainant’s right to privacy was violated.\textsuperscript{149}

\textsuperscript{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.

\textsuperscript{138} UNHRC, General Comment No.16 on Article 17 [of the ICCPR]: The Right to Respect Privacy, Family, Home and Correspondence, and Protection of Honor and Reputation, ¶ 1, U.N. Doc. HRI/GEN/1/Rev.9 (Apr. 8, 1988) [hereinafter GC 16].

\textsuperscript{139} ICCPR, supra note 13, art.17.


\textsuperscript{141} GC 34, supra note 20, ¶ 38.


\textsuperscript{143} Id. at ¶ 8.

\textsuperscript{144} Id. at ¶¶ 9–10.

\textsuperscript{145} Id.

\textsuperscript{146} Id. at ¶ 44.

\textsuperscript{147} Id.


\textsuperscript{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.\textsuperscript{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.”\textsuperscript{151} Second, whether the person involved is a public figure (such as a politician) or a private individual.\textsuperscript{152} The Strasbourg court did not define what general interest is but gave examples of situations constituting public interest.\textsuperscript{153} Moreover, it held that the right of the public to be informed of the private affairs of public figures depends on attendant circumstances.\textsuperscript{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”\textsuperscript{155} are of public interest if they contribute to political debate.\textsuperscript{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.\textsuperscript{157}

In \textit{Campbell v. Mirror Group},\textsuperscript{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.\textsuperscript{159} While the members of the court agreed that public figures are entitled to privacy\textsuperscript{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.\textsuperscript{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.”\textsuperscript{162}

\textsuperscript{150} Id. at ¶ 58.
\textsuperscript{151} Id. at ¶ 60.
\textsuperscript{152} Id. at ¶¶ 62–63.
\textsuperscript{153} Id.
\textsuperscript{154} WACKS, \textit{supra} note 5, at 147–48.
\textsuperscript{155} \textit{Von Hannover}, App. No. 59320/00, ¶ 63.
\textsuperscript{156} Id.
\textsuperscript{157} WACKS, \textit{supra} note 5, 105 (citing In Re S (A Child) (Identification: Restrictions on Publication), 1 A.C. 593, 596 (2003) (U.K.)).
\textsuperscript{158} Campbell v. Mirror Group, UKHL 22 (2004).
\textsuperscript{159} Id. at ¶ 2.
\textsuperscript{160} Id. at ¶ 36.
\textsuperscript{161} Id. \textit{Compare} ¶¶ 61–62 with ¶¶ 147–59 & ¶¶ 169–71.
\textsuperscript{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. \textit{Campbell}, ¶¶ 59–60.
Douglas v. Hello! Ltd.\textsuperscript{163} involved the publication of the wedding pictures of celebrity pair Michael Douglas and Catherine Zeta Jones.\textsuperscript{164} The Douglas couple entered an exclusive agreement to publish the said photos with \textit{OK!} Magazine.\textsuperscript{165} However, Hello! obtained copies of the photographs and published them.\textsuperscript{166} The court permitted the publication because a wedding reception is a spectacle, or a public affair.\textsuperscript{167} Moreover, since the complainants entered into an exclusive agreement to publish the photos, the matter had become a commercial transaction.\textsuperscript{168}

Lastly, Mosley v. News Group Newspapers Ltd.\textsuperscript{169} involved a video uploaded on the Internet showing the complainant engaging in sordid sexual practices with prostitutes wearing Nazi costumes.\textsuperscript{170} The court concluded that nothing in the video constituted public interest.\textsuperscript{171} There was no proof that the sexual roleplay was an enactment of Nazi behavior or adoption of its attitudes.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{174} However, the 2014 decision of the Court of Justice of the European Union in Google Spain and others v. González\textsuperscript{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.\textsuperscript{176} However, the case did not involve a crime; instead, it involved social security debt.\textsuperscript{177} Thus, its applicability to one who was accused of a crime is still debatable.

\textsuperscript{164} Id. at ¶ 108.
\textsuperscript{165} Id.
\textsuperscript{166} Id. at ¶ 109.
\textsuperscript{167} Id. at ¶ 253 & 300.
\textsuperscript{168} Id. at ¶ 299-300.
\textsuperscript{170} Id. at 685.
\textsuperscript{171} See Mosley, EMLR 679, at 710-24.
\textsuperscript{172} Id. at 723-24.
\textsuperscript{173} WACKS, supra note 5, at 139.
\textsuperscript{174} Id.
\textsuperscript{175} Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos, Mario Costeja González, Grand Chamber (Eur. C.J. May 13, 2014).
\textsuperscript{176} Id. at ¶ 99.
\textsuperscript{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 therein190 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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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.*
191. *Ayer Productions*, 160 SCRA at 874.
192. *WACKS*, supra note 5, at 129.
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.”\textsuperscript{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.\textsuperscript{195}

U.S. law distinguishes between general purpose public figures and limited purpose ones.\textsuperscript{196} Limited purpose public figures are persons who “voluntarily injected themselves or have been drawn into a particular public controversy.”\textsuperscript{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.\textsuperscript{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\textsuperscript{199} in a particular case within their social circle.\textsuperscript{200} It also


\textsuperscript{195} WACKS, \textit{supra} note 5, at 149-60.

\textsuperscript{196} Id. at 165.

\textsuperscript{197} Id.


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

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

\textbf{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 ICCPR\textsuperscript{202} and Article 11 (2) of the UDHR\textsuperscript{203} guarantee that an accused shall be presumed innocent until he or she is proven guilty beyond reasonable doubt.\textsuperscript{204} Public authorities are therefore prohibited from prejudging a case, and making public statements affirming the guilt of the accused.\textsuperscript{205} Media is also directed to avoid news coverage undermining the presumption of innocence.\textsuperscript{206} Customary international law clearly prohibits prejudicial publicity.

The case of \textit{Gridin v. Russian Federation}\textsuperscript{207} illustrates the foregoing precept. Gridin was accused and convicted of attempted rape and murder by the Russian courts.\textsuperscript{208} He alleged that his right to be presumed innocent was violated by prejudicial publicity.\textsuperscript{209} The media referred to him as the “lifetyle murderer”\textsuperscript{210} who had raped several girls and murdered them 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”\textsuperscript{211} to litigate the case. The UNHCR found merit in complainant’s assertion that the Russian Supreme Court failed to deal


\textsuperscript{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.” \textit{Id.}

\textsuperscript{203} GC 32, \textit{supra} note 114, ¶ 30.

\textsuperscript{204} \textit{Id.}

\textsuperscript{205} \textit{Id.}


\textsuperscript{207} \textit{Gridin}, \textit{supra} note 206, ¶ 2.

\textsuperscript{208} \textit{Id.} at ¶ 3.5.

\textsuperscript{209} \textit{Id.}

\textsuperscript{210} \textit{Id.}

\textsuperscript{211} \textit{Id.}
with the issue of prejudicial publicity.\textsuperscript{212} It reiterated that public authorities must refrain from prejudging the outcome of a trial.\textsuperscript{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.\textsuperscript{214} Customary international law thus permits the exclusion of the public or part thereof, including media, from court premises if necessary.\textsuperscript{215}

Nonetheless, customary international law recognizes the role of media and the press in imparting information,\textsuperscript{216} arguing that all other freedoms are “bereft of effectiveness”\textsuperscript{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.\textsuperscript{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.\textsuperscript{219}

Article 19 (3) of the ICCPR provides that the right of free expression has corresponding duties and responsibilities\textsuperscript{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.\textsuperscript{221} However, any restriction of the foregoing

\textsuperscript{212} Id. at ¶ 8.3.

\textsuperscript{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 \textit{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 accessed Feb. 2, 2016).

\textsuperscript{214} GC 34, supra note 20, ¶ 25.

\textsuperscript{215} Id. at ¶ 29.

\textsuperscript{216} 1994 Special Report, supra note 17, ¶ 34.

\textsuperscript{217} Id. at ¶ 35.


\textsuperscript{219} Id. at ¶ 19.

\textsuperscript{220} ICCPR, supra note 13, art. 19 (3).

\textsuperscript{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 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

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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.\textsuperscript{236} Accordingly, the Court refused a live coverage of the trial of former president Estrada.\textsuperscript{237}

The foregoing decision considered the events following the live coverage of Estrada’s impeachment trial in 2001.\textsuperscript{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.\textsuperscript{239} The walk-out of some senator-judges triggered calls for a “second people power revolution,”\textsuperscript{240} which were disseminated through SMS.\textsuperscript{241} This mass action forced Estrada to abandon the presidency,\textsuperscript{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.”\textsuperscript{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.\textsuperscript{244} (“Re: Ampatuan”), media sought the “lifting of the absolute ban on live television and radio coverage of court proceedings”\textsuperscript{245} which allegedly prejudiced their constitutional rights.\textsuperscript{246} On 14 June 2011, the SC issued a pro hac vice decision allowing live coverage,\textsuperscript{247} as the Aquino\textsuperscript{248} and Estrada\textsuperscript{249} decisions were not based

\begin{itemize}
\item\textsuperscript{236} Id.
\item\textsuperscript{237} Id. at 269.
\item\textsuperscript{238} Id. at 259 & 264-65.
\item\textsuperscript{239} Sheila S. Coronel, The Media, the Market and Democracy: The Case of the Philippines, 8 THE PUBLIC 109, 110 (2001).
\item\textsuperscript{241} Id.
\item\textsuperscript{242} Estrada v. Desierto, 353 SCRA 452, 536 (2001) [hereinafter Desierto].
\item\textsuperscript{243} Re: Estrada, 360 SCRA at 264-65.
\item\textsuperscript{244} Re: Petition for the Radio and Television Coverage of the Multiple Murder Cases Against Maguindanao Governor Zaldy Ampatuan, et al., 652 SCRA 1(2011) [hereinafter Re: Ampatuan].
\item\textsuperscript{245} Id. at 7.
\item\textsuperscript{246} Id.
\item\textsuperscript{247} Id. at 8.
\item\textsuperscript{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)).
\item\textsuperscript{249} Re: Ampatuan, 652 SCRA at 10-11 (citing Re: Estrada, 360 SCRA 248, 265).
\end{itemize}
on empirical evidence.\textsuperscript{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.\textsuperscript{251}

On 23 October 2012, however, the SC reversed its earlier position in \textit{Re: Ampatuan} and disallowed the live media broadcast of the trial.\textsuperscript{252} Since “the case ... has achieved a notoriety and sensational status, a greater degree of care is required to safeguard the constitutional rights of the accused.”\textsuperscript{253} The SC also noted that “a judge is not immune from the pervasive effects of media”\textsuperscript{254} and it would be best to ensure that he or she is not affected by any outside force or influence.\textsuperscript{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,”\textsuperscript{256} which persists despite the acquittal of an accused.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{259} It is absolute and covers all forms of opinion\textsuperscript{260} or “political and secular beliefs.”\textsuperscript{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.”\textsuperscript{262} Free expression protects all forms of

\textsuperscript{250} Id. at 12.
\textsuperscript{251} Id. (citing People v. Teehankee, Jr., 249 SCRA 54 (1995) & \textit{Re: Estrada}, 353 SCRA at 452).
\textsuperscript{253} Id.
\textsuperscript{254} Id.
\textsuperscript{255} Id.
\textsuperscript{256} Ruesta, supra note 3, at 53.
\textsuperscript{257} Id.
\textsuperscript{258} Id.
\textsuperscript{259} GC 34, supra note 20, ¶ 9.
\textsuperscript{260} Id.
\textsuperscript{261} 1994 Special Report, supra note 17, ¶ 25.
\textsuperscript{262} GC 34, supra note 20, ¶ 11.
expression, including opinions that have been expressed or communicated, and their means of dissemination.\textsuperscript{263}

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

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

With the free flow of information\textsuperscript{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.\textsuperscript{275} Conversely, it may be used to campaign for the conviction of an accused.

\textsuperscript{263} Id. at ¶ 12.
\textsuperscript{264} Id. at ¶ 44.
\textsuperscript{266} GC 32, ¶ 13.
\textsuperscript{267} Second La Rue Report, supra note 265, ¶ 10.
\textsuperscript{268} Id. at ¶ 13.
\textsuperscript{269} Andreas M. Kaplan & Michael Haenlein, Users of the world, unite! The challenges and opportunities of Social Media, 53 BUSINESS HORIZONS 59, 61 (2010).
\textsuperscript{270} Jennifer Alejandro, supra note 99, at 21.
\textsuperscript{271} Id. at 9.
\textsuperscript{272} Second La Rue Report, supra note 265, at ¶ 10.
\textsuperscript{273} See Raymundo, supra note 109.
\textsuperscript{274} Second La Rue Report, supra note 265, at ¶ 110.
\textsuperscript{275} See, e.g., Adam Hochberg, George Zimmerman’s lawyers hope to win trial by social media in Trayvon 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.\textsuperscript{276} Abu Hamza was accused and convicted of various offenses for public speeches inciting racial hatred.\textsuperscript{277} On appeal, he questioned the excessive period of delay from the alleged commission of the offenses until their prosecution.\textsuperscript{278} Abu Hamza asserted that the delay “subjected [him] to a sustained campaign of adverse publicity,”\textsuperscript{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.\textsuperscript{280} Members of the jury do have personal prejudices and could ignore the directions from judges.\textsuperscript{281} There are mechanisms, such as the law on contempt, which reduce the risk or prevent media from interfering with due process.\textsuperscript{282}

The rationale for the decision in \textit{R v. Abu Hamza}\textsuperscript{283} was explained in the case of \textit{R v. West}.\textsuperscript{284} On appeal, serial killer Rosemary West\textsuperscript{285} asserted that prejudicial publicity deprived her of a fair trial because her guilt was presumed.\textsuperscript{286} The court disagreed with her.\textsuperscript{287} A court can conduct a fair trial notwithstanding the presence of prejudicial publicity.\textsuperscript{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.”\textsuperscript{289}

\section*{IV. Remedies}

\begin{footnotesize}
\begin{itemize}
\item 277. \textit{Id.} at \textit{¶} 2–3.
\item 278. \textit{Id.} at \textit{¶} 5–6.
\item 279. \textit{Id.} at \textit{¶} 5.
\item 280. \textit{Id.} at \textit{¶} 93.
\item 281. \textit{Id.}
\item 282. \textit{Abu Hamza}, EWCA Crim. 2918, \textit{¶} 93.
\item 283. \textit{Id.}
\item 285. \textit{Id.} at 375.
\item 286. \textit{Id.} at 374.
\item 287. \textit{Id.} at 396.
\item 288. \textit{Id.} at 390.
\item 289. \textit{Id.} at 386.
\end{itemize}
\end{footnotesize}
The two general grounds for restricting the right to freedom of expression are the protection of the rights and reputation of others, and national security and public order.

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. The concept of public order encompasses protecting the integrity of courts. The ECtHR case of *Worm v. Austria* 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, 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. The Austrian courts cited Worm for contempt of court because his article undermined the authority of the court. The ECtHR agreed with these findings. It reasoned that the authority and impartiality of the judiciary is an essential component of the rule of law. 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. The exercise of free expression should not overstep the bounds of proper administration of justice. 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. The ECtHR therefore found that there was no violation of the freedom of expression.

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" as contemptuous. Disruptive

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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.
295. Id. ¶ 6.
296. Id. at ¶ 10 & 13.
297. Id. at ¶ 22.
298. Id. at ¶¶ 53-54.
299. Id. at ¶ 40.
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 contumacious. 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 contumacious and could be banned. 320 It should

305. Anwar, Re: Possible Contempt Of Court, HCJAC 36, ¶ 21 (citing Her Majesty’s Advocate v. Airs, J.C. 64, 69 (1975) (U.K.) [hereinafter Annual].
307. Contempt of Court Act, ch.49, § 2 (1).
308. Id. at (2).
309. Id. at (3).
310. Id. at (2).
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. Not only does information travel faster thereon, but information also lingers in cyberspace. The “viral nature” 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.

Not all criticisms against the court are contemptuous. The case of Re: Mohammed Aamer Anwar involved a lawyer, Anwar, criticizing the conviction of his client in a press release. 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. 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.

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.

The decision in Anwar is an example of a comment which criticizes a decision of a court but is not contemptuous. This case is different from Worm 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.
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 and are susceptible of appeal. 334 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, nor does it provide a mechanism to inform the press of the issuance of such orders. 335 It points out that the courts in Scotland have an online list of cases where similar orders were issued, and proposes that a similar system be adopted for the courts of England and Wales. 336

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 with those recognized by international law and must be content-specific. 337

The courts of England and Wales may also withhold the publication of certain matters whenever necessary. 338 These issuances, commonly referred to as Section 11 orders, are issued against parties who deliberately prejudice or obstruct the administration of justice and may be made permanent whenever necessary. 339

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

333. Id. (2).
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.
344. Id.
345. Contempt of Court Act, ch. 1, § 17 (i).
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 1994358 without legal challenge.

346. Consultation Paper No. 209, supra note 334, at 33 (citing Prosecution Offences Act of 1985, § 10 (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).
Another significant case on prejudicial publicity and contempt of court is the case of *Fortun v. Quinsayas*.

This case involved a complaint for disbarment filed by Quinsayas, private prosecutor in the Maguindanao massacre case, against Fortun, defendant’s counsel. 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. Allegedly, their political rivals, the Ampatuans, ordered the massacre. 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. He allegedly distracted the court away from the merits of the main case, thus, violating the Code of Professional Responsibility.

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. He asserted that the “public circulation of the disbarment complaint against him exposed this Court and its investigators to outside influence and public interference.”

None of the members of the media were sanctioned by the Court. “[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.” 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.

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 Rimban’s claim that the government is wary of media’s ire, 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.*
366. *Id.*
367. *Id.*
368. *Id.* at 642.
369. *Id.* at 645.
media’s influence on Philippine society.\footnote{371} Because journalists were among the victims of the Maguindanao massacre case, “any matter related thereto is considered a matter of public interest.”\footnote{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,\footnote{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.\footnote{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.\footnote{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.\footnote{376} The guidelines


\footnote{372}Fortun, 690 SCRA, at 642.


\footnote{374}Consultation Paper No. 209, supra note 334, at 32-33.

\footnote{375}Vamialis, supra note 8, at 62-63.

\footnote{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. Bercow381 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 impliedly385 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 Journal391 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.

377. GC 34, supra note 19, at ¶ 47.
378. Id.
379. Id.
382. Id. at ¶ 3.
384. Id. at ¶ 47-56.
385. Id. Compare ¶¶ 91-92 with ¶¶ 47-56.
386. Id. Compare ¶ 90 with ¶ 15.
387. MacAlpine, EWHC 1342, ¶ 92.
389. Id. explan. n., ¶¶ 29 & 35.
390. Id.
392. Id.
and that the journalist honestly and justifiably believed the information was true. The article stated that the complainant, a U.K. entity with diverse business interests, allegedly was unavailable for comment. The court held that the requirements of “responsible journalism” must be met before the Reynolds tests can be applied. Because the complainant therein failed to establish that the journalist concerned did not exercise responsible journalism, the appeal was dismissed.

The Canadian case of Grant v. Torstar involved an article stating that the application for the construction of a golf course on complainant’s Twin Lakes estate was a “done deal,” and insinuating that government would grant all necessary permits due to Grant’s close ties with officials. The trial court found respondent guilty of defamation but the Court of Appeals ordered a new trial. The appellate court recognized “responsible journalism” as a possible defense, expanding the conception of “qualified privilege.” 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. Consequently, “when proper weight is given to the constitutional value of free expression on matters of public interest, the balance tips in favor of broadening the defense available to those who communicate facts [that are] in the public’s interest to know.”

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, and that such belief was reasonable. Nonetheless, these defenses give journalists wider latitude in determining what constitutes public interest.

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.
399. Id. at 642.
400. Id. at 704.
401. Id. at 641.
402. Id. at 655.
403. Id. at 641.
404. Gram, 3 SCRA at 642.
405. Id.
406. Id.
407. Id.
Operators of websites are not liable for defamation if they prove that someone else posted the defamatory statement. Service providers may also not be sued for defamation, as only authors, editors, or publishers can be liable. The case of Tamiz v. Google discussed this issue. Google runs a free service called blogger.com which allows users to create an independent blog. 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” 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.

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

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

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408. Defamation Act of 2013, ch. 26, § 5 (1) & COLLINS, supra note 9, at 61.
409. Id. at § 5 (2).
410. Id. ch. 29, § 10 (1).
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.
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, and consequently was not a publisher. The liability of an ISP depends on whether it has been notified of the alleged defamation and their “illegality or potential illegality.”

Tamiz clarified the decision in Davidson v. Habeeb, 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. Ordinarily, these terms pertain to disseminating information to the public. It is clear that the dissemination of information through the Internet is considered publication. The cases of MacAlpine and Grant similarly opine “that repeating a libel has the same legal consequences as originating it,” and that a person sharing a post or re-tweeting a statement would have the same liability as the person who posted the original.

In the Philippines, libel is penalized under Article 353 of the Revised Penal Code (RPC). 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.

Oral defamation, on the other hand, is referred to as slander. 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

427. Id. at ¶ 40.
428. Id. at ¶ 33 (citing Godfrey v. Demon Internet, EWHC 244 (Q.B.1999) (U.K.)).
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.\textsuperscript{439} In 2012, the Congress of the Philippines enacted the Cybercrime Prevention Act of 2012,\textsuperscript{440} which penalized the publication of a defamatory statement online as a distinct offense from one committed through “writing.”\textsuperscript{441} This provision was assailed in the case of \textit{Disini v. Ochoa},\textsuperscript{442} specifically on the ground that the presumption of malice\textsuperscript{443} unduly restricts freedom of expression.\textsuperscript{444} Petitioners likewise contended that penalizing libel was unconstitutional,\textsuperscript{445} and constituted a derogation of obligations of the Philippines in international law,\textsuperscript{446} particularly the ICCPR and the opinion of the UNHCR in \textit{Adonis v. Philippines},\textsuperscript{447} which both prescribe truth as a defense.\textsuperscript{448}

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

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

\textsuperscript{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).

\textsuperscript{441} \textit{Id.} § 4 (4).

\textsuperscript{442} \textit{Disini v. Ochoa}, 716 SCRA 237 (2014).

\textsuperscript{443} \textit{REVISED PENAL CODE}, art. 355.

\textsuperscript{444} \textit{Disini}, 716 SCRA at 316.

\textsuperscript{445} \textit{Id.} at 317.

\textsuperscript{446} \textit{Id.} at 319.

\textsuperscript{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 \textit{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 an 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. \textit{Id.}

\textsuperscript{448} \textit{Disini}, 716 SCRA at 319.

\textsuperscript{449} \textit{Id.} at 320.

\textsuperscript{450} \textit{REVISED PENAL CODE}, art. 354-55.
exhibition, or any similar means.” Internet libel falls under “similar means.” No new crime was created. Moreover, the Court brushed aside the petitioners’ allegation that government violated its international obligations, and insisted that the present laws are consistent with these recommendations.

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. The provisions on “aiding, abetting of a cybercrime” and “attempt to commit a cybercrime” were declared void due to vagueness. Although these concepts were well defined in criminal law, they are ambiguous when used in relation to cybercrime, and consequently had a chilling effect on speech.

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. 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. It identified bloggers, their friends and followers, and ISPs as persons who may aid or abet the commission of a crime. However, Section 5 of the law does not only

451. Id. art. 355.
452. Disim, 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. Disim, 716 SCRA at 322-25.
459. Id. at 327.
460. United States v. Reogilon and Dingle, 22 Phil. 127, 129 (1912).
461. Disim, 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, 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,” may be considered as having abetted or
aided a crime as it is ordinarily used in criminal law. Thus, construing the terms
abetting 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. 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, 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 or impossibility of editorial control. Disini, however, did not address
this issue squarely. However, Section 30 of the Electronic Commerce Act of

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

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. 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. Only ISPs have the capability of identifying an anonymous offender through his IP address. 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.

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. Their similarities and differences must be taken into account. Furthermore, the importance of fair and free competition and the necessity of ensuring minimal state control over mass media must also be given due weight.

The 1997 Bonn Declaration 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. Consistent with this mandate, the Leveson inquiry and Davide Commission recommended that media be allowed to regulate itself. On one hand, the Leveson inquiry qualified this recommendation by asserting that such mechanism must be genuinely


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


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.


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. It also suggested the enactment of a law directing media to organize, 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, 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, and the body lacks an effective enforcement mechanism. Moreover, the Commission’s interests are aligned with media, not the public. 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, 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.
490. Id.
491. LEVESON, supra note 34, at 12.
492. Id.
493. Id.
494. Id.
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\textsuperscript{497} and sensationalized\textsuperscript{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,”\textsuperscript{499} empowered not only to handle complaints, but also to investigate “serious or systematic failures.”\textsuperscript{500} This body would represent the interest of both the press and public.\textsuperscript{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.”\textsuperscript{502} The conflict confronted by media is one between ethical journalism and the need to maximize circulation.\textsuperscript{503}

A meaningful self-regulatory proposal is the imposition of guidelines in making editorial judgments regarding the contents and manner of presenting news.\textsuperscript{504} This in effect would restrict the “considerable deference recogniz[ed] to professional judgment,”\textsuperscript{505} accorded by the \textit{Jameel} decision, to the press.\textsuperscript{506}

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

\textsuperscript{497} Id.
\textsuperscript{498} Davide Commission, \textit{supra} note 67.
\textsuperscript{499} LEVESON, \textit{supra} note 35, at 14.
\textsuperscript{500} Id.
\textsuperscript{501} Id.
\textsuperscript{502} Thomas Gibbons, \textit{Fair Play to All Sides of the Truth: Controlling Media Distortions}, \textit{69 Current Legal Problems} 286, 310 (2009).
\textsuperscript{503} Id. at 311.
\textsuperscript{504} Id. at 312.
\textsuperscript{505} Id. at 308.
\textsuperscript{506} Id.
\textsuperscript{508} Id.
\textsuperscript{509} Id.
\textsuperscript{510} Id. at 316.
\textsuperscript{511} Id.
media.\textsuperscript{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.\textsuperscript{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.\textsuperscript{514} The public depends solely on the internal policies of the concerned ISP.\textsuperscript{515}

The “Protect, Respect, and Remedy”\textsuperscript{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.\textsuperscript{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.\textsuperscript{518} With regard to the Internet, this governance gap is due to the “anonymity and borderless nature”\textsuperscript{519} of cyberspace, which is the

\textsuperscript{512} Id. at 316-17 & TAMBINI ET AL., supra note 479, at 110.

\textsuperscript{513} GC 34, supra note 20, ¶ 44.

\textsuperscript{514} COLLINS, supra note 9, at 32.

\textsuperscript{515} Tamiz, Court of Appeals, EWCA Civ. 68 & Davison, EWHC 3031.


\textsuperscript{518} Id. at ¶ 10.

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 applications527 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 GNI530 and IRPC531 both have guidelines on protecting rights prone to abuse in the Internet which may serve as starting points for establishing system of co-regulation.

520. Id.
521. ICCPR, supra note 13, art.19 (3).
523. Ministry of Foreign Affairs of the Netherlands, supra note 519.
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.
The problem, as Leveson framed it, is how to entice ISPs to organize themselves voluntarily. 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. An industry standard for ethical practices, 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 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. Courts must also provide guidelines on how to determine whether a piece of information is of public interest, 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. 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 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.

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.
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.\textsuperscript{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.\textsuperscript{541} The teacher discusses these materials\textsuperscript{542} during homeroom by explaining the salient points.\textsuperscript{543} Because studies reveal that teaching so-called “netiquette” to children decreases the incidence of cyber bullying,\textsuperscript{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.

\textbf{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 proceeding, 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.\textsuperscript{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


\textsuperscript{541} Hirohiko Yasuda, A Risk Management System to Oppose Cyber Bullying in High School: Warning System with Leglets and Emergency Staff, 34 INFORMATICA 255 (2010).

\textsuperscript{542} Id. at 257.

\textsuperscript{543} Id.


\textsuperscript{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, 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. 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.

547. Id. at 69–97.