TOWARDS PROTECTING THE RIGHT TO INFORMATION

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I. INTRODUCTION

In preserving the people's right to a free press, the framers of the present Constitution may not have anticipated its eventual conflict with the guarantee of a fair trial to one accused of a crime. Perhaps, even if they did, it would not have made a difference. This is because both the Free Press and the Fair Trial guarantees are inherent in a truly free and democratic society, one which the framers have envisioned. They must be equally protected for both have been provided for with equal force.

Current developments in media coverage of judicial proceedings, however, have challenged the possibility of protecting the public's right to know and at the same time the accused's right to an impartial trial. Television news programs now broadcast the testimonies of witnesses, arguments of counsel, and even the rendering of judgment, turning ordinary litigations into sensationalized cases. The entry of media into the courtroom has developed out of sheer technological development which "beefs up" the Free Press guaranty without any corresponding technological change in the manner by which an accused is judged. This has raised serious constitutional questions. A *prima facie* observation of this recent development always yields the disturbing sentiment that perhaps media coverage of judicial proceedings obstructs the administration of justice by depriving an accused of an impartial trial.

It has always been a practice of the courts that when two constitutional guarantees collide with each other, the conflict is resolved by limiting the scope of one and allowing the other to operate freely. In labor law, for example, it has long been established that the constitutional guarantee of freedom of contract must surrender to the police power of the State to promote the general welfare.[1] Thus, labor standards legislation interferes with the liberty to contract by restricting the latter's scope amidst the free operation of the plenary

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[1] *See* West Coast Hotel v. Parrish, 300 U.S. 379 (1937), where the U.S. Supreme Court held that ordinary workers must be protected from entering involuntarily into oppressive employment contracts with opportunistic employers.

police power of the State.[2]

Imposing limitations on media coverage therefore seems to be an easy solution to the problem. Justice Holmes himself once said that "the right to free speech strong though it be is not absolute; when the right to speak conflicts with the right to an impartial judicial proceeding, an accommodation must be made to preserve the essence of both."[3] Holmes, however, does not seem to seek the restriction of one guarantee in favor of the other, but rather, seeks a possible compromise between the two. The depolarization of these two conflicting interests may be conveniently brought about by imposing guidelines for media coverage like the Reardon or Katzenbach rules in the United States,[4] but it still remains the subject of debate as to where those limits must lie, and consequently, to what extent the fair trial provision shall be protected.

The objective of this paper is to explore the different possibilities of reconciling the two conflicting guarantees, as well as determine the wisdom in such explorations. A proper resolution of this issue may have to be based on purely hypothetical and academic presumptions,[5] but nevertheless, a well-structured framework of analysis must be constructed as early as possible in order to thwart the possibility of getting caught in a sticky constitutional web. This framework must provide a necessary and proper approach which shall help resolve the issue at its onset, avoiding the situation where the courts must struggle to untangle itself from the sticky situation which may overcome it, as forewarned by current developments.

The framework to be constructed for the Philippine setting shall include considerations from American decisions and statutes. It is always necessary to take advantage of the nascent status of our legal system by studying the history of more mature systems, learning what errors must be avoided and what virtues must be followed. By carefully considering the constitutional issues involved, the mistakes committed in the past, and the existing proposed solutions, it is sincerely hoped

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[2]The police power of the State is embodied in the 1987 Constitution under Art. II, sec. 5: "The maintenance of peace and order, the protection of life, liberty, and property, and the promotion of the general welfare are essential for the enjoyment by all the people of the blessings of democracy."

[3]Patterson v. Colorado, 205 U.S. 454 (1907), at 463.

[4]GILMOR AND BARRON, MASS COMMUNICATION LAW 415 (1974).

[5]Justice Stewart in his dissent in the case of Estes v. Texas stated that "we deal here with matters subject to continuous and unforeseeable change -- the techniques of public communication. In an area where all the variables may be modified tomorrow, I cannot at this time rest my determination on hypothetical possibilities not present in the record of this case," referring to the hypothetical effects of media coverage on the fairness of judicial proceedings.

that the objective of this paper will be satisfactorily met.

II. TOWARDS A FAIR TRIAL

In the history of Philippine constitutional democracy, the right to a speedy, impartial, and public trial has always been guaranteed in the Constitution.[6] Perhaps there is no attribute of a truly democratic society that is more admired by freedom-loving people than the guarantee of a fair trial in all criminal proceedings. The purpose of such a guarantee is clearly to promote justice. The administration of justice is essential for a free society to work and justice must be based on the truth. Without truth, justice can never be approximated. In the United States, several Supreme Court decisions have demonstrated how the truth in a criminal proceeding is corrupted by the entry of biases, or prejudicial influences brought about by mass media communication.

Forty years ago, in the case of *Shepherd v. Florida*,[7] the issue of whether modern media-generated publicity interferes with the administration of justice was tackled by the United States Supreme Court when it reversed the decision of a trial court convicting four African-Americans ("Negroes" was the term used by the High Court) for the crime of rape. The four accused were acquitted on the ground that their trial was found to be tainted by prejudicial influences resulting in a denial of due process and the constitutional right to a fair trial. Newspapers were quick to enter the scene after the arrests of the four suspects. It was published as a fact- the information being attributed to the local authorities - that they had confessed. The U.S. Supreme Court said that "prejudicial influences outside the courtroom, becoming all too typical of a highly publicized trial, were brought to bear on the jury with such force that the conclusion is inescapable that these accused were prejudged as guilty and the trial was but a legal gesture to register a verdict already dictated by the press and the public opinion which it generated."[8]

But exactly how does prejudicial publicity concerning the guilt of the accused before trial result in a denial of the right to due process and a fair trial? The answer lies in the fact that when prejudicial information obtained through mass media is consciously or unconsciously considered by the judge or jury, several constitutional and statutory

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[6]All three Constitutions of the Philippines have provided for a fair trial guarantee, although the word "impartial" is notably absent in the 1935 Charter (*see* Art. II, sec. 1, par. 17). *See* also 1973 Charter (Art. IV, sec. 19) and 1987 Charter (Art. III, sec. 14, par. 2).

[7]341 U.S. 50 (1951).

[8]*Id.*, at 50.

guarantees are inevitably taken away -- the right to be presumed innocent,[9] the right to confront and to cross-examine the witnesses against him,[10] and the right to have only such evidence that is relevant to the issue and permitted by law considered.[11] In the same case, Justice Jackson stated that "neither counsel nor court can control the admission of evidence if unproven, and probably unprovable, `confessions' are put before the jury by newspapers and radio. Rights of the defendant to be confronted by witnesses against him and to cross-examine them are thereby circumvented. It is hard to imagine a more prejudicial influence than a press release by the officer of the court charged with defendants' custody stating that they had confessed, and here just such a statement, unsworn to, unseen, uncross-examined and uncontradicted, was conveyed by the press to the jury."[12] In the case of *Sheppard v. Maxwell*,[13] the court also noted that much of the evidence considered by media was clearly inadmissible in court. Testimonies were given in media which were not presented in court.

In 1965, in the case of *Estes v. Texas*,[14] the accused, who was convicted of swindling in the lower court was likewise acquitted on appeal to the U.S. Supreme Court upon a finding that initial hearings were carried live in radio and television, with at least twelve cameramen taking motion and still pictures. Cables and wires were "snaked across the room" with three microphones placed on the judge's bench. The testimonies of witnesses were also televised. Generally, there was considerable disruption depriving the accused of the "judicial serenity and calm" to which he was entitled.[15] The Court, through Justice Clark, stated that "the atmosphere essential to the preservation of a fair trial- the most fundamental of all freedoms- must be maintained at all costs."[16] It was in this decision that an attempt to regulate the conduct of media in the courtroom first became apparent. Giving utmost importance to obtaining the proper judicial atmosphere, it was held that the "primary concern of all must be the proper administration of justice; that the life or liberty of any individual in this land should not be put in jeopardy because of actions of any news media; and that the due process requirements ... require a procedure that

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[9]CONST. art. III, sec. 14(2) and Rule 115, sec. 1(a) of the 1985 Rules on Criminal Procedure.

[10]CONST. art. III, sec. 14(2) and Rule 115, sec. 1(f) of the 1985 Rules on Criminal Procedure.

[11]Rule 128, sec. 3, 1985 Rules on Criminal Procedure.

[12]*See* note 7, *supra*, at 52.

[13]384 U.S. 333 (1966).

[14]381 U.S. 532 (1965).

[15]*Id.*, at 536.

[16]*Id.*, at 540.

will assure a fair trial."[17] The Court then sought to create and define the limits of a free press in the courtroom, ruling that the free press guarantee does not speak of an "unlimited right of access to the courtroom on the part of the broadcasting media."[18] Thus, we once again witness a constitutional policy evolving - the policy of restricting one constitutional right (freedom of the press) in order to protect another guarantee (fair trial), as earlier mentioned.

The Supreme Court of the Philippines has had little chance to decide on the constitutional issues of a "trial by publicity". One case worth mentioning is that of *Martelino v. Alejandro*[19] which impliedly acknowledges that publicity directed at the guilt of the accused would be prejudicial to his right to a fair and impartial hearing, when it ruled that there is no trial by publicity since the publicity focused not on the guilt of the accused but on the responsibility of the government.[20]

An earlier case, *Cruz v. Salva*,[21] could have set the limitations of media coverage in a judicial proceeding, but the Court in that case chose to focus on censuring the City Fiscal of Pasay for unduly allowing such wide publicity and sensationalism to an investigation. However, despite this seeming lack of controversy regarding a free press versus a fair trial in Philippine jurisprudence, recent experience has proven that this issue is increasingly becoming evident.

Both the Philippine and American cases reveal that there are two possible avenues for media-generated prejudice to occur. Prejudice, as the term is used, does not necessarily mean that an accused has been prejudged to be guilty or has been portrayed by the media as appearing to be guilty. It merely refers to any substantial tendency caused by publicity of a judicial proceeding to impair or lessen the chances of obtaining a fair trial.

First. Prejudice may occur long before trial begins, as shown by the *Shepherd* and *Martelino* cases. This is brought about by publishing or broadcasting certain information which is considered prejudicial. Its effects fall on the general public, including the judge (or the jury), such that even before trial begins, the accused has been morally adjudged and

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[17] *Id.*, at 540.

[18] *Id.*, at 540.

[19] 32 SCRA 106 (1970).

[20] This case involved the famous Jabidah massacre of 1968 where a military man received wide publicity as the suspect in the killings. However, prayers by the defense to dismiss the case based on prejudicial publicity were denied by the Supreme Court on the ground that the publicity centered on the culpability of the Government and not on the guilt of the accused.

[21] 116 Phil. 1151 (1959).

convicted by the public. There are six types of information which when publicized before trial tend to lessen the chances of obtaining an impartial judgment: (1) information regarding the circumstances surrounding the crime tending to establish the guilt of the accused; (2) information regarding the accused's criminal record; (3) confessions or incriminatory statements of the accused; (4) statements of witnesses; (5) information regarding credibility of witnesses;and (6) comments or conclusions regarding the guilt of the accused.[22]

Second. Prejudice may also arise during trial, as shown by the facts of the *Estes* and the *Cruz* cases, when the proceedings are held in the presence of broadcast and print media. This type of prejudice occurs when the atmosphere of "judicial serenity and calm" is lost and is replaced by the ruckus of a theatrical event. The presence of media, however, creates more than just a noisy disturbance, it affects the very purpose of the trial, which is the administration of justice. As stated in *Estes*, media interference may affect a trial in four ways: (1) by distracting the jury or the judge and thus hindering a proper verdict; (2) by affecting the quality of the testimony of witnesses; (3) by imposing additional responsibilities on the judge in regulating court behavior and (4) by creating a form of mental and physical harassment on the accused.[23] This type of prejudice may be avoided by imposing certain guidelines to restrict the conduct of mediamen so that proper court decorum may be observed. This kind of restriction on the media does not impair the free press provision nor the public's right to information for two reasons: (1) the media is still allowed to broadcast and print information regarding the trial, the restriction being only as to the manner by which media shall acquire such information; and (2) the Constitution itself provides that the Supreme Court may promulgate rules concerning the protection and enforcement of constitutional rights and procedure in all courts.[24]

Generally, there is an agreement that the fair trial provision must be protected at all costs, even at the expense of imposing certain limitations on the free press guarantee. It cannot even be argued that the right to a free press is a matter of public interest while that of a fair trial is only for the benefit of the private individual accused of a crime. If we uphold such an argument then the conclusion is inescapable that the public interest must prevail over individual rights. However, the proper view is that in a democracy such as ours, the fair trial guarantee is not a matter of private right, it is a matter of great public interest. As worded in the case of *Magtoto v. Manguera*, "the rights of none are safe

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[22]Davis, The Press and the Law in Texas, 168 (1956).
[23]*See* note 14, *supra*.
[24]CONST. art. VIII, sec. 5(5).

unless the rights of all are protected."[25] U.S. decisions have shown clearly that the participation of media in judicial proceedings, whether before or during trial, must be regulated in order to protect the administration of justice. Indeed, it is not anymore the subject of debate as to whether media, in the enjoyment of their constitutional right, may deprive an accused of his right to a fair trial. It is obvious that media may not. The damage done by prejudicial publicity is irreversible and this is the reason for extreme caution. In *Estes*, it was held that although maximum freedom must be allowed the press, its exercise must necessarily be subject to the maintenance of absolute fairness in the judicial process.[26]

But what if a doubt exists as to whether publicity before or during trial indeed caused prejudice? The tendency has been to resolve the doubt in favor of the accused. Although a rule which regards the presence of media in the courtroom as *per se* unconstitutional, has not been allowed by the courts in the absence of "empricial data sufficient to establish that the mere presence of the broadcast media inherently has an adverse effect,"[27] the presumption in specific cases is still that media has psychological effects adverse to the administration of justice.[28] In the case of *Offutt v. U.S.*,[29] it was held:

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. ... To perform its high function in the best way justice must satisfy the appearance of justice.

Despite this general consensus as to the paramount importance of a fair trial over any right of media and the people's right to information, there is still the problem of determining exactly where the limitations must lie. Should there be a total ban on all information before trial? Should the ban apply to all kinds of cases - criminal, civil, administrative, or labor? May the public be lawfully excluded from attending judicial proceedings? Although at this point it is conceded that the fair trial guarantee is of paramount importance, the right to information must be protected by avoiding an over-restriction of the free press guarantee.

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[25]63 SCRA 4 (1975) at 27.

[26]*See* note 14, *supra.*

[27]Chandler v. Florida, 449 U.S. 560 at 579.

[28]Gardner, *Cameras in the Courtroom: Guidelines for State Criminal Trials*, 84 MICHIGAN L. REV. 3 (1985).

[29]348 U.S. 11(1954) at 13.

III. TOWARDS A FREE PRESS

The Constitution provides that anyone accused of a crime is entitled to a public trial.[30] This guarantee is for the benefit of the accused. The majority itself in *Estes*, through Justice Clark, admits that the purpose of a public trial is to guarantee that the accused would be fairly dealt with and not unjustly condemned. According to them, history has shown that secret tribunals were effective instruments of oppression.[31] According to Mr. Justice Douglas of the U.S. Supreme Court, "the concept of the public trial is not that every member of the community should be able to see or hear it. A public trial means one that is open rather than closed - a trial that people other than officials can attend. The public trial exists because of the aversion which liberty-loving people had toward secret trials and proceedings."[32] On the other hand, it may be added that a public trial exists also for the benefit of the public, who have a right and a duty to safeguard the efficiency and fairness of the criminal justice system that governs them. There is no doubt then that the benefits of a public trial are enjoyed not only by the accused but by the public as well.

It is important at this point to determine the role a free press may have in protecting, if not enhancing, the claimed advantages of a public trial. As phrased by Justice Murphy, "a free press lies at the heart of our democracy and its preservation is essential to the survival of liberty. Any inroad made upon the constitutional protection of a free press tends to undermine the freedom of all men to print and read the truth."[33] The beneficial role of a free press in judicial proceedings has likewise been acknowledged to a considerable extent by the U.S. Supreme Court.

A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny.[34]

In other words, although the possibility of media interference with the proper administration of justice is very real, the courts have still considered that the presence of media in judicial proceedings is generally favorable.

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[30]CONST. art. III, sec. 14(2).
[31]*See* note 14, *supra*.
[32]DOUGLAS, *The Public Trial and the Free Press*, 46 ABA JOURN. 8 (1960).
[33]Craig v. Harney, 331 U.S. 367 (1947), at 383.
[34]384 U.S. 333, at 350.

The free press has been a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences, including court proceedings.[35]

A free press has a role, not irrelevant, for it acts as an agent of the public and ensures its constructive presence in the courtroom so that the settled benefits of a public trial shall always be protected.

Two decisions in the U.S. Supreme Court in the past decade have sought to reaffirm the public nature of a criminal proceeding. In *Richmond Newspapers, Inc. v. Virginia,*[36] the U.S. Supreme Court reversed a lower court's order excluding the public from a trial, saying that the public has a guaranteed right under the U.S. Constitution to attend criminal trials, absent a showing that the public's presence would impair the conduct of a fair trial. In *Chandler v. Florida,*[37] the Court rejected arguments to lay down a *per se* rule that all media coverage would be prejudicial to a judicial proceeding. "An absolute constitutional ban on broadcast coverage of trials cannot be justified simply because there is a danger that, in some cases, prejudicial broadcast accounts of pre-trial and trial events may impair the ability of jurors to decide the issue of guilt or innocence uninfluenced by extraneous matter."[38] In fact, the decision made a distinction between media coverage in *Estes* and that under *Chandler,* pointing out that broadcast technology is different today than it was thirty years ago. No such cumbersome equipment is used anymore by media today as will tend to disrupt the proper judicial atmosphere.

The *Richmond* and *Chandler* cases show that the role of a free press in the administration of justice cannot be overemphasized. Although these two cases also provide for limitations on media coverage, the trend has been towards giving more protection to the public's right to information. In *Richmond,* it was held that the public has a guaranteed right under the First Amendment of the U.S. Constitution[39] to attend criminal trials provided there is no overriding interest, articulated in findings which would justify otherwise. As earlier stated, in *Chandler,* the court abandoned the notion that photographic coverage is *per se* unconstitutional, but only because there is still an absence of "empirical data sufficient to establish that the

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[35]*See* note 14, *supra,* at 539.

[36]448 U.S. 555 (1980).

[37]449 U.S. 560 (1981).

[38]*Id.,* at 574.

[39]The First Amendment of the U.S. Constitution reads: "Congress shall make no law... abridging the freedom of speech, or of the press..."

mere presence of the broadcast media inherently has an adverse effect."[40] Given these decisions, prejudicial publicity now must be adequately proven by the accused and cannot be conveniently invoked and relied upon to warrant a reversal of conviction.

The administration of justice, however, is not served by the "palliative" treatment of reversal of conviction by the reviewing court. Just because there has been prejudicial publicity does not mean that the accused is innocent, although he must be acquitted on the ground that his right to due process has been denied. The solution then must be preventive. That is, prejudice must be avoided before and during trial.

> If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered. But we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception.[41]

As was stated earlier, it would seem easy to dispose of the free press-fair trial issue by subjecting the free press guarantee to certain limitations. However, the problem is much deeper than it appears. Specifically, there is the problem of determining where those limits shall lie to avoid the danger of overrestricting the guaranty of free press which will have the effect of restricting an even greater right -- the right to information. The right to information is an inherent right which involves the public's right to know all facts which are of public interest. This inherent right is best realized and protected by the guarantee of a free press. Any limitations therefore must be strictly scrutinized and alternative approaches towards avoiding its impairment must first be exhausted.

IV. ATTEMPTS AT REGULATION OF PREJUDICIAL PUBLICITY

Prejudicial Publicity Before Trial

Media must be a forum for truth and ideas freely exchanged.[42] It should be a public service "aware of the right and ability of people to think for themselves, conscious of its true obligation as a powerful instrument in the course of justice when called to service."[43] Unfortunately, when television or newspaper reports publicize the facts and circumstances surrounding a criminal case before trial, good faith,

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[40]*See* note 38, *supra*, at 579.

[41]*See* note 13, *supra*, at 363.

[42]THE COMMISSION ON FREEDOM OF THE PRESS. A FREE AND RESPONSIBLE Press, 9 (1947).

[43]SULLIVAN, TRIAL BY NEWSPAPER 244 (1961).

truth, and fair comment are not enough to protect the report when prejudicial publicity results. For this reason, several rules and guidelines have been issued in the U.S. to prohibit the publication of specific types of information before trial.

In 1965, U.S. Attorney-General Nicholas Katzenbach promulgated what is known as the Katzenbach Rules, addressed to the American Society of Newspaper Editors.[44] The rules limit the kind of information allowed to be disclosed to the public. Only incontrovertible factual matters may be disclosed, and these should not include subjective observations. Factual matters refer to the name of the accused, his age, residence, employment and civil status; but statements regarding the character of the accused are not allowed. This proposal has been favorably received by important segments of the press and have already been adopted by federal departments and bureaus in the U.S.

Another preventive measure is the Reardon Report,[45] conducted by Paul C. Reardon, an Associate Justice of the Supreme Judicial Court of Massachusetts. Similar to the Katzenbach Rules, the Reardon Report selects the type of information which may be disclosed to the public. Only factual matters may be disclosed, but as regards to what may not be disclosed, the Reardon Report is more specific. There must be no extra-judicial comments by any officer of the court regarding the prior criminal record of the accused, the character of the accused, the existence or the contents of any confession, the refusal to submit to an examination, the results of any examination, the identity or credibility of witnesses, the possibility of a plea of guilty, or any opinion as to the guilt or innocence of the accused.[46]

Legislative remedies have also been proposed by Former Justice Bernard S. Meyer of the New York Supreme Court.[47] Meyer advocated a law which would interdict any publication threatening the parties in a case. According to him, the premature publication of any of the following prejudicial matters should constitute a misdemeanor with appropriate penalties: material which as a matter of law is assumed to present a serious danger such as confessions, criminal records, speculation about the credibility of witnesses or the guilt of the accused, interviews with the family of a crime victim, statements as to how a witness will testify, and other appeals to racial, social, political, and economic biases.[48] It is admitted, however, that such a bill to punish with

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[44] *See* note 4, *supra*.
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.*

contempt of court the act of making available to the public information which might affect the outcome of a pending criminal litigation would be hard to pass because of prior restraint objections.[49]

In the Philippines, the contempt power of the courts is provided for in Rule 71 of the Rules of Court. Section 3, paragraph (d) of this Rule empowers all courts to cite for indirect contempt any person who engages in any improper conduct tending directly or indirectly to impede, obstruct, or degrade the administration of justice.[50] This conveniently includes prejudicial publicity caused by the acts of media. It has been held, however, that the courts should be slow to punish for contempt as this drastic remedy should be exercised upon the preservative and not on the vindictive principle.[51] The contempt power of the courts also is a mere palliative, and not an adequate preventive measure of prejudice before trial.

Prejudice During Trial

Regulations to prevent prejudice during trial often center on controlling the conduct of media personnel within the courtroom. This results in an endless search for the most reasonable time, place, and manner restrictions which would allow the protection of the freedom of speech and at the same time ensure a fair trial by preventing emotional disturbance to the witnesses by preserving order and overcrowding in the courtroom.[52] This search for restrictions signify an increasing demand for greater control by the judge over the conduct of the public in his courtroom. The Court in *Sheppard v. Maxwell* clearly recognized this power of control and even called for its future exercise when the situation so warrants. Thus, "the carnival atmosphere at the trial could easily have been avoided since the courtroom and courthouse premises are subject to the control of the court."[53]

In the U.S. there are proposals which may prevent prejudice during trial. One proposal is for uniform procedural guidelines which would require prior permission from the Court before expanded media coverage during trial would be allowed.[54] The procedure shall involve notice to both parties that permission has been sought for expanded

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[49]*Id.*

[50]The Rule states: "After charge in writing has been filed, and an opportunity given to the accused to be heard by himself or counsel, a person guilty of any of the following acts may be punished for contempt: ...(d) any improper conduct tending, directly or indirectly, to impede, obstruct, or degrade the administration of justice ...".

[51]Victorino v. Espiritu, 5 SCRA 653 (1962).

[52]36 ARKANSAS L. REV. 688 (1983).

[53]*See* note 13, *supra*, at 358.

[54]*See* note 28, *supra*.

media coverage and a hearing to determine the appropriateness of such coverage. The judge has the discretion to allow or prohibit media coverage of the trial based on two factors: (1) the reasonable likelihood that expanded media coverage would interfere with the rights of the parties to a fair trial; and (2) the reasonable likelihood that expanded media coverage would unduly detract from the solemnity, decorum and dignity of the court.[55] As can readily be seen, these factors offer the judge a tremendously wide discretion. The Reardon Report, earlier mentioned, also has similar recommendations, where the press would be excluded from judicial proceedings on motion of the accused, unless the presiding officer determines that there would be no interference with a fair trial.[56]

In the Philippines, the Supreme Court has issued an *en banc* resolution prohibiting live radio and television coverage of court proceedings, but allowing video footages of court hearings for news purposes only.[57] This means that the actual conduct of a trial may not be broadcast live *in toto*. It may be noted that the public nature of a trial as required by the Constitution would be diminished because of this resolution, since the constructive presence of the public through media has been abandoned. However, a public trial does not refer to the actual or constructive presence of the public in a court proceeding, but refers to the people's right to be informed of the existence and manner of conduct of judicial proceedings. Therefore, a trial does not cease to be public just because the entire proceedings are not shown on television. It is still public because the people still have a right to be informed as to what goes on at trial, and this right is protected by the actual presence of the public or by its constructive presence by way of media reports.

Laws which seek to punish the publication of material which are deemed prejudicial to the accused would indeed be difficult to pass in the Philippines. First of all, the Constitution prohibits the passage of any law which shall abridge the freedom of the press. Publicity which critics claim may be prejudicial is, in reality, still protected by the free press clause of the Constitution since the public also has an interest in being informed of circumstances surrounding a criminal case. Second, no matter how detailed and precise the regulation is as to what kind of matters may not be published during trial, this will still inevitably be challenged as a prior restraint on media. The difficulty in determining what specific information about a trial may or may not be published will result in no publication at all to avoid any penalty

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[55]*Id.*

[56]*See* note 4, *supra.*

[57]Supreme Court Resolution dated October 23, 1991 re: Live TV and Radio Coverage of the Hearing of President Corazon C. Aquino's Libel Case.

which may be appropriated. As held in *Nebraska v. Stuart*, "the guarantees of freedom of expression are not an absolute prohibition under all circumstances, but the barriers to prior restraint remain high and the presumption against its use continues intact."[58]

This apparent shortage of regulations as compared to those of the U.S. is a good sign. It shows that the Philippines has not yet committed itself to a constitutional policy regarding this issue and therefore it is imperative that the past experiences of the U.S. as well as the Philippine courts be examined to be able to determine a proper approach to the constitutional challenges that may soon face the courts.

V. CONCLUSION

The right to information is impaired when the State seeks to impose a prior restraint on the press. There is prior restraint when the State selectively restricts the type of information which the press may publish or broadcast before a trial. The press must be free to broadcast or publish facts which are of the public interest. The commission of crimes and the circumstances surrounding them are definitely of public interest. On the other hand, the administration of justice must still be the overriding interest and care must always be exercised to ensure that an accused will not be prejudiced by any publicity by mass media. An accused is not necessarily prejudiced when information regarding a pending criminal proceeding is publicized, as long as the information published or broadcast is the truth. When a mere defendant or accused in a criminal case pending before the court is described as the culprit, the criminal, or the murderer then what is broadcast is not the truth. This is the reason why the use of the words like "alleged" or "suspected" are necessary adjectives to emphasize the true state of affairs and guarantee a neutral and fair report by media. In fact, the presence of media serves as an additional safeguard for the accused by helping ensure the efficient administration of justice.

The absence of the jury system in the Philippines is another reason why prejudicial publicity is not a threat to the administration of justice. In the words of Justice Felix Makasiar, "the justice system in the Philippines cannot be compared with that of the U.S. which adopts the jury system. Members of the jury are laymen, some of whom with low education, and therefore easily influenced by emotion, sentiments, comments of other people and other human frailties. In the Philippines, justice is administered by judges who are learned in the law of evidence, and are constitutionally mandated to state clearly and distinctly the

[58] 427 U.S. 539 at 570.

facts and the law on which their pronouncements and judgment are based."[59]

The identity of rape victims and other crimes against chastity, however, should generally be treated as exceptions to the right of media to broadcast all true information. No public interest is served by revealing the identity of the victim; rather, the victim has every right and interest in keeping her tragedy away from the public eye. This is already well-acknowledged in Philippine law and jurisprudence. In fact, the Revised Penal Code and the Rules of Court provide that the crimes against chastity may not be prosecuted except upon complaint filed by the offended victim.[60] The underlying principle or reason why such crimes may not be prosecuted *de oficio* is the consideration for the offended woman and her family who may "prefer to suffer the outrage in silence rather than go through the scandal of a public trial."[61]

On the other hand, the right to information is not impaired when the court regulates the conduct of media in the courtroom during trial. While press freedom is thereby regulated, the public is not deprived of information relevant to its interest. In line with the constitutional right of the Supreme Court to promulgate rules regarding the protection and enforcement of constitutional rights,[62] its *en banc* resolution prohibiting live video and radio coverage of judicial proceedings but allowing footages for news and information must be applauded. It sends a signal to media that the only purpose for the presence of media in the courtroom is to inform and this objective must be attained without any obstruction to the administration of justice, and as long as the public's right to information is not impaired, the Supreme Court will not hesitate to regulate the manner by which that objective may be obtained.

Media must also serve as a venue whereby the accused may reveal his side to the public and convincingly erase possible prejudices, if any, raised against him. As held in *Craig v. Harney*,[63] "Comment no matter how ill-informed or irresponsible or misrepresentative, is part of the precious right of the free playof opinion. Whatever violence there may be to truth in such utterances must be left to the correction of truth."

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[59]*See* note 58, *supra*.

[60]Art. 344 of the Revised Penal Code and Rule 110, sec. 5 of the 1985 Rules on Criminal Procedure provide: "The offenses of seduction, abduction, rape or acts of lasciviousness, shall not be prosecuted except upon a complaint filed by the offended party or her parents, grandparents, or guardian, nor, in any case, if the offender has been expressly pardoned by the above-named persons, as the case may be."

[61]Samilin v. CFI of Pangasinan, 57 Phil. 298 (1932).

[62]*See* note 24, *supra*.

[63]331 U.S. 367 at 389.

In *Wood v. Georgia*,[64] it was also held that "Men are entitled to speak as they please on matters vital to them; errors in judgment or unsubstantiated opinions may be exposed, of course, but not through punishment for contempt for the expression. Under our system of government, counter-argument and education are the weapons available to expose these matters, not abridgement of the rights of free speech."

In the absence of a showing that publicity *per se* causes a disruption of the fair and orderly administration of justice, the framework which must now be adopted is one that moves away from the traditional solution of restricting one right in favor of another. Rather, the solution must move towards that area of compromise, envisioned by Justice Holmes, where the intent of both rights may be brought to life fully. As a final note, a quotation from Justice Stewart's dissenting opinion in *Estes*:

> The suggestion that there are limits upon the public's right to know what goes on in the courts causes me deep concern. The idea of imposing upon any medium of communications the burden of justifying its presence is contrary to where I had always thought the presumption must lie in the area of First Amendment freedoms. And the proposition that non participants in a trial might get the wrong impression from unfettered reporting and commentary contains an invitation to censorship which I cannot accept. Where there is no disruption of the essential requirement of the fair and orderly administration of justice, freedom of discussion should be given the widest range.[65]

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[64]370 U.S. 375 at 389.

[65]*See* note 14, *supra*, at 614.