



## Private rights and public wrongs: Limits of press freedom

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IKE any other right, the press right is not without limit or corresponding duty. It may be easier to understand this if one draws a line between the journalist's conduct and the content of his publication; the first refers to his actions while the second pertains to the message or viewpoint. While courts have generally been solicitous of the constitutional guarantee that protects viewpoint or content, the same is not true of media's conduct.

The repression or punishment of any form of action or conduct that amounts to a crime, or which results in injury or harm to others, or which creates risk of greater social injury is widely recognised as a valid public goal. The press is not exempt from the general set of laws and rules that governs the public in their dealings with the state, the society and other persons. The press right "has never been construed to accord newsmen immunity from torts and

viating where media abuses its rights or commits illegality. The right to information is a public right and is intended to enable the governed to participate in governance, not so that media can publish. It is not an adjunct of the press right and media may claim the right only as an agent of the public, not because of a right to publish. Just recently, the Philippine Supreme Court refused to broaden the right to information by upholding a presidential order that disallows executive officials from testifying in congressional investigations. Clearly, what experience has taught us is that there are lines not to be crossed, not even by media.

## Private rights and the duties of media

The private individual has three basic rights—the right to life, the right to liberty and the right to property. Media may infringe on any of these rights in varying degrees. Common violations of private rights may be

Whereas before the media restricted itself to reporting only matters in plain or public view, the pressure of the exclusive, the real-time, and the ratings have emboldened media to make news instead of waiting for the news to break. In such cases, the courts have looked at media professionals as complicit co-actors in the event and not mere reporters and thus held them responsible for their conduct. The same responsibility is imposed on media who misrepresent, mislead, lie or use some other subterfuge to gain access or information from private sources.

The concept of privacy may be strange to Asians. If you have been to the Philippines, you can see 20 people with criss-crossed knees and elbows seated in a jeepney that sits only 16, or ten very adult men passing the same glass the whole night in a drinking ritual, or a shanty half the size of a standard hotel room where an entire eats, sleeps and procreates in the same space. This notwithstanding, judicial decisions of late have been expanding private space from the traditional privacy of domiciles and communications to a broader zone of privacy that covers a person's personality, dignity, integrity and physical body. The right of privacy, or otherwise the right to be let alone, is now defined more broadly in terms of a reasonable personal expectation of privacy and not just physical space. Whether privacy claim may validly be made depends on two tests: i) whether by his conduct the individual has exhibited an expectation of privacy, and ii) whether this expectation is one that society recognises as reasonable."

Privacy infringement may be committed by i) prying into the privacy of another's residence, ii) access to confidential communications or correspondence, iii) disturbing the private life or the family relations of another, iv) intrigue or innuendo that results in alienation from or embarrassment among friends or community, and v) publication of private facts that result in vexation, humiliation, contempt or dishonour due to a person's religious beliefs, lowly station in life, physical defect, circumstance of birth or origin or other personal condition. The privacy or confidentiality of certain information has resulted in legislation that penalises unauthorised disclosure where the dignity of persons and the integrity of official processes demand secrecy. In recent years, the Philippines has removed from the public sphere much information in cases involving children and youthful offenders and witnesses, victims of sexual crimes regardless of age, family members in disputes over domestic affairs and public and quasi-public officials involved in disciplinary or pending investigative proceedings.

In the law on privacy, there still however remains the ambiguous dichotomy between the public figure and the private figure. You may still recall the 1986 People Power Revolt in the Philippines. When an Australian movie outfit tried to film a documentary of those events, ex-Defense Secretary Enrile and Col. Gregorio Honasan who both played indispensable roles in these events sued to prevent any

reference to them in the film. In ruling against them, Philippine courts denied injunction since the 1986 events were genuinely a matter of public interest and concern, but only as long as a "fairly truthful and historical presentation of events is presented... no presentation of an unwilling party... certainly no revelation of intimate or embarrassing personal facts." ... The same court defined a public figure as: "... a person who, by his accomplishments, fame, or mode of living, or by adopting a profession or calling which gives the public a legitimate interest in his doings, his affairs, and his character has become a public personage. He is in other words, a celebrity."

The courts have recognised that what is a matter of legitimate public concern is to be determined on a case to case basis and there is no rigid test that provides an easy answer. In 1991, "private was defined as 'belonging to or concerning an individual person, company or interest' while public means pertaining to or belonging to or affecting a nation, state or community." Much later, a broader interpretation of the public sphere was defined to "embrace subjects which the public may want to know, either because these directly affect their lives, or simply because such matters naturally arouse the interest of an ordinary citizen". The discussion is far from resolved. You may have read that the President's husband has gone on a rampage and charged at least 45 journalists in different libel cases, principally on his claim that other than being the president's husband, he is a private person. Arroyo claims that he does not occupy any public office or perform any official duty for his wife's government, thus the media should just leave him alone. Some of these journalists have sued back.

## Right to personal honour and the duty of restraint

The media has a duty of restraint when a man's honour or reputation is at risk by public disclosure. It is this duty that the law on libel imposes. Libel is primarily trespass on a person's honour, more than on his privacy. By definition, libel is committed by publicly and maliciously imputing a crime, a vice or defect or any act, omission, condition, status or circumstance tending to cause dishonour, discredit or contempt of another. Criminal libel punishes the public disorder that the defamation or dishonour caused, independently of any relief for violation of personal rights. In this sense, criminal libel is not purely a private wrong, and state resources and machinery are expended to prosecute and punish the defamer in order to preserve public peace.

The essence of libel is a defamatory imputation made publicly and with malice. Of these elements, malice is the most problematic. By definition, malice is evil intent, a motive to do harm, or to commit wrong on another. In some cases, malice is proved by evidence of a reckless disregard for truth, or when publication is made regardless of whether the matter being published is true or not. The judicial difficulty is who among us can discern the evil that lies in a man's heart? Let me discuss some rules that have emerged with respect to the rule on malice:

1) If the published matter is defamatory, malice is presumed.

2) If the published matter is defamatory but privileged, malice is not presumed and must be proved as fact.

3) If the published matter is defamatory but true, there must still be good or justifiable motive to publish.

4) If the defamatory matter refers to a public official in connection with his official duties, malice is not presumed and actual malice must be proved.

The concept of privilege as a defence is not easily understood and sometimes induces media into false confidence in a supposedly water-tight defence. There are indeed matters which by law are absolutely privileged and thus may not be the basis of a libel charge. However, privilege may only be qualified or conditional and thus may still result in liability if actual malice or malice in fact can be proved by the victim. 16 If a matter is conditionally privileged, publication of such matter must in all cases be motivated by a good and justifiable reason. There is positive news. Following US rulings, Philippine courts have made it more difficult for a public official to sustain a libel charge, whether criminal or civil, by requiring proof of actual malice or malice in fact as a condition of liability. To sustain a libel charge, the public official plaintiff must prove that i) the published matter is untrue and that the publisher knew the matter to be untrue or had no regard whether such matter was true or not and ii) the publisher was motivated by an evil intent or a desire to cause harm by making the publication. If this rule is observed, any publication about a public official in connection with his official duties cannot result in liability if the published matter is true, or there is reasonable belief in its truth, or even if untrue, the error is a result of an honest mistake and ii) there is good or compelling reason to publish the matter.

## Rights of the accused and the duty of fairness

Murder, rape, kidnapping and even prostitution and petty theft have always been good copy. A man charged with a crime, especially when committed under scandalous or shocking circumstances or those involving well-known personalities, is always news. However, to the accused and the courts that will render judgment, the newsworthiness of these events is secondary. This has resulted in problematic relations between media and the courts in the matter of closed courtrooms, confidentiality rules, unfair publicity or trial by media, access to litigants and parties, and post-litigation comments.

In 2001, some media networks petitioned to allow the live video coverage of the trial of former President Estrada for the capital offence of plunder. Previously, the televised impeachment proceedings that led to his overthrow did not serve Estrada well, and the Supreme Court agreed with Estrada this time, denied live coverage and ruled that "... 'the rights of the accused and the power of the court to control its own proceedings are superior to the press right and the public right to information'. This is not to deny that the



right of the public and the press to attend trials is an implicit constitutional right. Open and public trials are essential to maintain public confidence in the administration of justice and is an indispensable aid to fact-finding. This right is however subject to reasonable limitations to ensure the efficient operation of courts, the preservation of respect, decorum and dignity of the judicial system, the rehabilitation of offenders, privacy of victims and other trial participants, and the effectiveness of law enforcement. Consequently, the courts are given wide latitude to take measures to i) prevent carnival atmosphere in court and court premises, ii) insulate witnesses and important trial participants, iii) control the release of information, leads and gossip, iv) forbid media statements and extra judicial statements by lawyers, parties or trial participants. 18

Finally, I wish to comment on what has become a very common but disturbing occurrence in Philippine media—the media confession and the media as witness. It is not unusual to see the spectacle of media thrusting a microphone into the face of a suspect on prime time newscasts, inducing the latter under the full glare of media lights to admit to a crime for which he has just been arrested or to explain why he had done or what he felt while committing such a heinous crime. In this case, media is not just reporting but is taking the initiative to extract a confession without regard for the suspect's rights. Evidently, there is nothing better for the ratings that for the public to see and hear a suspect squeal his guilt on nationwide news. Not surprisingly, it is always the indigent suspect, ignorant of his rights and denied benefit of counsel or legal advice, who is inveigled to admit his guilt on videotape. Such actions do not speak well

of the media's duty to ensure that the rights of the accused whose life or liberty is in jeopardy are not weakened or made ineffective in any manner.

## Conclusion

Democratic constitutions forbid the passage of laws that will infringe, restrict, abridge or limit the press right and the right of free speech. Speakers, reporters and media organisations must however exist and function within a society ruled by law where actions that affect others have legal consequences. In the performance of media's functions, it may be useful to ask these questions before media exercises its vast powers:

1. Is there a relevant law or rule? Professional advice may be necessary.
2. Am I reporting news or making news?
3. Does the public have a right to know of these facts?
4. Is there a risk of harm or injury to any person?
5. Is the safety, dignity or welfare of children or some other protected class at risk?
6. Is there a more compelling social need that overcomes personal privacy or private rights?
7. Is there a less intrusive way to gather or access the same information?
8. Are any of the rights of the accused weakened or prejudiced?
9. Do I have a good motive?
10. Will my publisher defend me if I am sued?

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crimes committed during the course of newsgathering... [It] is not a license to trespass, steal, or to intrude by electronic means into the precincts of another's home or office". The publisher of a newspaper has no special privilege to invade the rights and liberties of others.

Newsworthiness is not a defence to unlawful behaviour and does not create immunity for felonious conduct. Several years back, a Philippine broadcast journalist registered herself as a voter twice precisely to prove the very point and thus add credibility to her report on election fraud. She made news all right, not because of her article but because she was threatened with criminal prosecution for violation of election laws. Similarly, even if done in the pursuit of a valid media report, the unauthorized removal of evidence from a crime scene, or participation in an illegal business like smuggling of aliens or maintaining a child pornography site, or unlawful entry into a restricted government facility would not excuse the crime committed.

Neither is the right to information exten-

committed by media in the course of its newsgathering activities, in the publication of libel or private facts, and in its post-publication activities. In the course of newsgathering, the media professional may violate laws of general application or commit trespass, harassment, misrepresentation and fraud, or breach privacy and confidentiality. These are narrated below:

## Property rights and the duty to respect privacy and confidentiality

Property rights are violated by trespass and unauthorised entry, or when media's access is without consent of or over the objection of the party with the right. Unlawful access may also be secured through fraud, deceit or misrepresentation. These problems are now prevalent especially in the case of the broadcast media whose staple these days is reality television, undercover investigations with secret cameras and other hidden audio and video technology and ride-alongs.

As standard setting in the field of human rights gained momentum during the 1960s and 1970s, discussions on national institutions became increasingly focused on the ways in which these bodies could assist in the effective implementation of these international standards. In 1978, the Commission on Human Rights holds a seminar in Geneva from 18-29 September on national and international institutions to draft guidelines for the structure and functioning of such bodies. The seminar proposed a series of guidelines, which suggested that the functions of national institutions should be:

(a) To act as a source of human rights information for the Government and people of the country;

(b) To assist in educating public opinion and promoting awareness and respect for human rights;

(c) To consider, deliberate upon, and make recommendations regarding any particular state of affairs that may exist nationally and that the government may wish to refer to them;

(d) To advise on any questions regarding human rights matters

Throughout the 1980s, the United Nations continued to take an active interest in this topic, and a series of reports, prepared by the Secretary General, was presented to the General Assembly. It was during that time that a considerable number of national institutions were established.

In 1990, the Commission on Human Rights called for a workshop to be convened with the

participation of national and regional institutions involved in the protection and promotion of human rights, and requested the Secretary General to submit a detailed report on existing national institutions.

The Paris Principles: The Paris Principles are the principal source of normative standards for national human rights institutions. So far

these principles are considered as the main guiding principles for NHRIs. Both the Commission on Human Rights and the General Assembly later endorsed them. The main elements of Paris Principles are as follows:

The Principles are broad and general. They provide that a national institution should be established in the national Constitution or by a law that clearly sets out its role and powers and that, its mandate should be as broad as possible.

• They state that the national institutions should be pluralist

NHRIs are called on to publicize their decisions and concerns, as well as meet regularly. The principles do not require NHRIs to have a 'quasi-judicial' function—that is to handle complaints or petitions from people whose human rights are alleged to have been violated. However, where NHRIs do have this function, the principles list the following particular obligations:

- To seek an amicable settlement through conciliation, a binding decision or on the basis of confidentiality;
- To inform petitioners of their rights, and available remedies, and promote access to them;
- To hear complaints and transmit them to competent authorities; and
- To make recommendations to competent authorities.

The role of NHRIs is very important in the protection and promotion of human rights as they bridge between the state and its citizens. Thus, NHRIs should be completely independent and at the same time capable to address any human rights issue with adequate effectiveness and competence.

Source: Office of the United Nations High Commissioner for Human Rights (OHCHR) publications

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