The Introduction of the Fourth Estate into Malaysian Jurisprudence and its Impact on Political Libel: A Prefatory View

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Abstract

The paper considers the impact of the Court of Appeal decision in *Utusan Melayu (Malaysia) Berhad v Dato' Sri DiRaja Haji Adnan bin Haji Yaakob* on the role of the media as the Fourth Estate. It focuses on the determination by the court that a political libel suit against a newspaper will result in inhibiting free speech that is in the public interest such as a critique against democratically elected bodies or individuals. This paper argues that firstly, by the court taking the position as laid down in the House of Lords' decision of *Derbyshire CC v Times Newspapers Ltd*, the court introduces the role of the media acting as a Fourth Estate into Malaysian jurisprudence, and secondly, building on the said position, prohibiting a political libel suit being taken by an individual against a media entity. It is contended that there is a foundational basis that by prohibiting a political libel action against a media entity, the court has endorsed this role as being vital in the functioning of a democracy. The paper sets out, firstly, an in-depth understanding of the role of the media as the Fourth Estate, the theoretical underpinnings and the underlying legal rationale, in particular the protection of freedom of speech and expression, for the justification of the said role. Secondly, the paper describes the proposition in *Derbyshire* and its extrapolation into Malaysian common law in *Utusan Melayu*. Thirdly, it establishes a nexus between the judgments in *Derbyshire* and *Utusan Melayu* that the media's role to check on government is a dimension of freedom of speech and expression that should not be suppressed or curtailed, particularly by defamation suits against media entities that are viewed as stifling this role. Finally, the author reflects on several post-judgment considerations drawn from both judgments.

Keywords: Freedom of Speech, Fourth Estate, Media Rights, Political Libel.

[Edmund] Burke said there were Three Estates in Parliament; but in the Reporters' Gallery yonder, there sat a Fourth Estate more important far than they all. It is not a figure of speech, or a witty saying; it is a literal fact…Printing…is equivalent

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to Democracy…Whoever can speak, speaking now to the whole nation, becomes a power, a branch of government, with inalienable weight in law-making, in all acts of authority. It matters not what rank he has, what revenues or garnitures: the requisite thing is that he have a tongue which others will listen to; this and nothing more is requisite[**]

I. Introduction

On 1 March 2016, the Malaysian Court of Appeal in arriving at its judgment in *Utusan Melayu (Malaysia) Berhad v Dato' Sri DiRaja Haji Adnan bin Haji Yaakob*[1] referred to the decision by the United Kingdom (UK) House of Lords in *Derbyshire CC v Times Newspapers Ltd*.[2] The implications from this judgment are manifold. One of these is essentially establishing the role of a newspaper as the Fourth Estate. This is a historical milestone in the recognition of the rights of the media as carrying out a public interest function. Lord Keith, delivering the unanimous judgment of the court in *Derbyshire*, concluded that under the common law of England, a local authority does not have the right to maintain an action of damages for defamation on the basis that it is a democratically elected body. His Lordship clarified that it is a matter of great public importance that public criticism should be directed at democratically elected governmental bodies and that the consequence of a civil action for defamation against such criticism will be an impediment to free speech.[3]

His Lordship premised his findings on two United States' (US) authorities and one South African judgment which will be discussed *infra*. *Derbyshire*, it is worth noting, is not short of criticism. However, its critique is beyond the scope of this paper.

In *Utusan Melayu*, the question before the Court of Appeal was whether the respondent had *locus standi* to initiate and maintain an action for defamation.[4] The appellant had published an article criticising the respondent in his capacity as the Chief Minister of the State of Pahang and his administration. The question before the court in the appeal was the extent to which public officials, in a position similar to that of the respondent, may sue for defamation to protect their reputation. The question also presented before the court for consideration the resolution of the debate arising from the conflict between the right to freedom of speech and expression guaranteed under Article 10(1)(a) of the Federal Constitution on one hand, and the protection of individual's reputation on the other.[5]

The foundation of the contention by the appellant that the respondent's action for defamation was prohibited on the basis that the respondent was an elected representative who could be subjected to public criticism, lies in the English common law decision of *Derbyshire*.[6] The appellant contended that to allow such an action to subsist in the context

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** Thomas Carlyle, On Heroes, Hero Worship and the Heroic in History ([1841] 1993) 141.

1 [2016] MLJU 302.

2 [1993] 1 All ER 1011.

3 *Ibid.* at p. 1017, para (j).

4 *Supra* n 1, at para [6].

5 *Supra* n 1, at para [10].

6 *Supra* n 1, at para [12].

of the surrounding circumstances would be damaging the guarantee of free speech under Article 10 and will have the effect of restraining the public, and particularly the press, from being constructively critical of public administration.

The Court of Appeal found that the article published by the appellant-newspaper concerned the respondent in his official capacity as the Chief Minister of the State of Pahang and not in his personal capacity. The court held that the defamation claim by the respondent against the appellant, if allowed, would result in a chilling effect on free speech and "may prevent the publication of matters which it is desirable to make public."[7]

The essence of the decision is that, a publication comprising of a critical commentary of an elected person or body in its administrative function is an extension, or part of, the right to free speech and expression enshrined in the Federal Constitution. A political libel action therefore will only serve to abrogate the protection of this freedom and curtail the role of the press (or media or journalist) in its role as the Fourth Estate – a role where the press acts to inform the citizenry of matters of public interest at one level, and at a more sophisticated level, act as a checking mechanism on the Executive.

The paper will firstly provide an in-depth understanding of the role of the media as the Fourth Estate, the theoretical underpinnings and the underlying legal rationale, in particular the protection of freedom of speech and expression, for the justification of the said role; secondly, the paper describes the proposition in *Derbyshire* and its extrapolation into Malaysian common law in *Utusan Melayu*. Thirdly, it establishes a nexus between the judgments in *Derbyshire* and *Utusan Melayu* that the media's role to check on government is a dimension of freedom of speech and expression that should not be suppressed or curtailed, particularly by defamation suits against media entities that are viewed as stifling this role. Finally, the author reflects on several post-judgment considerations drawn from both judgments.

II. A Historical Perspective of the Evolution of the Role of Media as the Fourth Estate

In order to appreciate the role of the media as the Fourth Estate, tracing its historical perspective from its inception and acceptance in the UK and the US will set the basis for the acceptance of this role within the higher ideals and principles of a democratic state. This role is enhanced by principles of law established either by the courts in common law or by legislative initiatives founded on constitutional traditions. Media writers and journalists have provided considerable contribution to the appreciation of this role.

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7 *Supra* n 2, at p. 1018, para (g). A phrase quoted by the Court of Appeal from Lord Keith's judgment in *Derbyshire*.

8 Brian McNair, *Journalism and Democracy: An Evaluation of the Political Public Sphere*, Routledge, 2000, p. 62.

9 Thomas Carlyle, *On Heroes, Hero Worship and the Heroic in History* ([1841] 1993), p. 141.

10 Denis McQuail, Media Accountability and Freedom of Publication, Oxford University Press, p. 52.

11 *Ibid*. at p. 52.

12 Quoted in Boyce; D George Boyce, 'The Fourth Estate: The Reappraisal of a Concept' in George Boyce, James Curran and Pauline Wingate (eds), *Newspaper History: From the 17th Century to the Present Day*, Constable, London, 1978.

From the role of the media as a disseminator of information and reportage, the media has embraced the function of being advocates of change, a mouth-piece for engaging debate and even dissent. Political journalism or the role of the media as the Fourth Estate saw its passionate beginnings, its failings, its critics and continued transformation. From the late 17th century in Europe, newspapers, apart from reporting events, advocated social and political change. McNair refers to this element as being essential, from then to the present, to the role of journalists in a liberal democracy.[8]

The origin of the phrase "Fourth Estate" is unclear. The first reference was made by historian Thomas Macaulay when referring to the Press gallery in Parliament in an essay in 1828 and later by Thomas Carlyle.[9] In 1840, Carlyle made reference to the press as the Fourth Estate in his infamous statement quoted at the beginning of this article.

The role of the press as the Fourth Estate is as an "informative press" which is crucial in its role as the "democratic press". This importance was seen particularly in the US from the 1870s which saw the rise of the "informative press", free from political influence, to act as a check on government and political decision-making as a whole, disclosing political activities and engaging debates. In 19th century Britain, McQuail adds that the said "expression and idea" was adopted by "serious newspaper press, increasingly conscious of its influence."[10] He adds the essential elements of this role comprising of the following: "autonomy from government and politicians; having a duty to speak the truth, whatever the consequences; and having primary obligations to the public and to readers."[11]

Several of the writers and editors of newspapers that subscribed to the role of the press as the Fourth Estate expounded on this role as a standard to aspire to. In England, *The Times* saw itself as the Fourth Estate from the 1830s to the 1850s. *The Times* writer Henry Reeve referred to journalism as "an estate of the realm; more powerful than any of the other estates".[12] John Thaddeus Delane, the editor of the *Times* in 1860 defined this role following the abolition of the paper duties as the business of disclosure when he made the following comment – "The first duty of the Press is to obtain the earliest and most correct intelligence of the events of the time, and instantly by disclosing them, to make them the common property of the nation".

In the US, the vision of the publisher James Gordon Bennett of the New York *Herald* which started its publication in 1835 was "to make the newspaper press the great organ and pivot of government, society, commerce, finance, religion, and all human civilization."[13] In playing this role, taking a balanced approach became essential. *The New York Times,* first published in 1851, became one of the earlier professors of this approach in separating news from views. Henry Raymond, its founder stated; "We do not believe that everything in society is either exactly right or exactly wrong; what is good we desire to preserve and improve; what is evil to exterminate and reform."[14] This led to the American press breaking alliances with political parties in order to play not only a balanced role but a

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13 Quoted in Asa Briggs and Peter Burke, *A Social History of the Media: From Gutenberg to the Internet*, 2nd ed., Polity, Cambridge, 2005, p 155.

14 Asa Briggs and Peter Burke, *supra* n 13, at p. 155.

more objective one. This role was not always favoured as journalists were already being regarded as hacks but were now being seen as "intruding busybodies".[15]

From the 19th century and into the present time, this view of the press is embedded in liberal theory where democracy and a check on the State are vital.[16] Curran and Seaton added to the liberal theory perspective of the press that whilst press freedom is the right of the publisher to be utilized on behalf of society, its role has to be consistent with the public interest as their actions are regulated by the free market.[17] This freedom of the press, premised on Holmes' marketplace theory discussed *infra,* forwards the position that "the best test of the truth is the power of the thought to get itself accepted in the competition of the market". This position was endorsed by the UK Royal Commission on the Press.[18]

The role of the media as the Fourth Estate is often assumed in recent discussions. McNair comments:

> That the actions of government and the state, and the efforts of competing parties and interests to exercise political power, should be underpinned and legitimized by critical scrutiny and informed debate facilitated by the institutions of the media is a normative assumption uniting the political spectrum from left to right.[19]

The sentiments to reinforce the utility of journalism in a functioning democracy continued to be made by publishers of newspapers. The publisher of the Philadelphia *Public Ledger*, George W. Ochs in a powerful essay in 1906 succinctly observed the importance of the evolution of the role of journalism:

> Journalism has become a very potential, if not a chief, factor in the world's affairs. The advance of civilization may be measured by the dissemination of learning; it received its chief impulse from the art of printing-hence it may be affirmed truthfully that civilization entered upon its latest phase only when printing had attained its latest development, an important manifestation of which is the growth of journalism. The press within a half century has become the chief medium of enlightenment; it has awakened the masses to full perception of their powers, and has established the fact that an alert and aroused public opinion is irresistible, the mightiest force evolved by modern civilization.[20]

Political journalism, the journalism of the Fourth Estate, has in recent times transformed into political commentary which McNair calls the "interpretative moment".[21] He describes

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15 Comment made by Anthony Trollope; quoted in Asa Briggs and Peter Burke, *supra* n 13, at p. 163.

16 The theoretical underpinnings of this view is discussed in Heading (III) Sub-heading (A).

17 James Curran and Jean Seaton, *Power Without Responsibility: Broadcasting and the Press in Britain*, 6th ed., Routledge, London, 2003, pp. 346-347.

18 Royal Commission on the Press, *Final Report*, HMSO, 1977, p. 109.

19 Brian McNair, *Journalism and Democracy: An Evolution of the Political Public Sphere*, Routledge, London, 2000, p. 1.

20 George W Ochs, "Journalism", *The Annals of the American Academy of Political and Social Science*, 1906 (July), Vol. 28, p. 38.

21 Brian McNair, *supra* n 19, at p. 61.

this as "spaces in the public sphere where evaluation of, and opinion about the substance, the style, the policy content or the process of political affairs replaces the straight reportage of new information."[22]

III. Theorising the Role of the Fourth Estate

Essential to the understanding of the role of the media as the Fourth Estate is to place the appreciation of this role in the context of relevant theoretical underpinnings. Several theories are integral in developing a comprehensive and cohesive premise in establishing the validity of common law principles or legislative initiatives that support the role of the media as the Fourth Estate.

Media theory as a subject, according to Inglis, is a version of political theory which is a matter of trying to work out how the world works and how it ought to work.[23] Inglis commented that, "at its heart, in other words, are the connections between theory and practice, thought and action, knowledge and virtue."[24] The link between politics and media is made when the media acts as the mediator by acting as the public communications system between relations that are central to politics. Politics, which has its preoccupation with power in the study of the public realm and our relations to one another in public, relies on the media for its sustenance. It is in the public realm this interplay between politics and the media takes place.

The theories that support the role of the media as the Fourth Estate, *inter alia*, are the liberal theory of press freedom which will encompass a discussion on Mill and the "marketplace of ideas theory" as propounded by Holmes in his dissent in *Abrams v US*.[25]

A. The Liberal Theory of Press Freedom

Much of the importance of the role of journalism in the Fourth Estate rests on its role in promoting freedom of speech. The jurisprudence on the importance of freedom of speech is drawn from the need to have channels of free speech. The press is seen as one of these channels and it was only natural for the scholars of media theory to take the writings of Milton,[26] Locke[27] and Mill,[28] and categorise them as the liberal theory of press freedom. The theory is one of the strongest cornerstones for press freedom and has been extrapolated by the US Supreme Court in articulating its marketplace of ideas theory, discussed *infra*.[29] John Milton published his famous unlicensed pamphlet, *Areopagitica,*[30] seen as "the first statement of the liberal view that in a free market of ideas, the good will

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22 *Ibid*.
23 Fred Inglis, *Media Theory: An Introduction*, Basil Blackwell, Oxford, 1990, p 18.
24 *Ibid.*
25 (1919) 250 US 616.
26 John Milton, *Areopagitica: A Speech for the Liberty of Unlicensed Printing*, 1644.
27 John Locke, *Second Treatise of Government*, 1689; *A Letter about Toleration*, 1689.
28 John Stuart Mill, *Of Liberty of Thought and Discussion* (1859).
29 *Supra* n 25, as per Holmes J; *Whitney v California* (1927) 274 US 357, as per Brandeis J; *Kovacs v Cooper* (1949) 336 US 77, as per Frankfurter J.
30 *Supra* n 26.

supplant the bad and that all intelligent people need is access to the fullest expression of ideas for they themselves to distinguish the former from the latter."[31] Milton opposed State restrictions of freedom of expression as it removed the choice of individuals to make their own judgements of what they read. The importance of open discussion to the discovery of truth is one of four of the arguments proffered by Barendt[32] for a free speech principle. This thought is particularly associated with John Stuart Mill.[33] The value of intellectual discussion and the need for all individuals to be able to debate public affairs vigorously is part of the essence of the Millian principle. Mill promoted the values of the free press in his book *On Liberty*. In the opening line of the second chapter of his book titled *Of the Liberty of Thought and Discussion*, Mill sets out the role of the press or media in keeping a check on the State – "the time, it is hoped, is gone by when any defence would be necessary of the 'liberty of the press' as one of the securities against corrupt or tyrannical government."

Mill advocates that the opinion of each person is valuable and this opinion can be valued by other individuals and society to be either true or untrue. If it is untrue, it provides an opportunity for the truth to emerge. Mill, in Chapter 2 of *On Liberty*, comments as follows - "if the opinion is right, they are deprived of the opportunity of exchanging error for truth; if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth produced by its collision with error…"

Curran[34] summarised the theory as one that holds that "the freedom of the press is rooted in the freedom to publish in the free market" and adds that the press therefore serves democracy in three ways – in informing the electorate, the watchdog role of overseeing and checking on the government, and articulating public opinion.

The emergence of the truth being regarded as the most overarching importance of free speech may not always be justified. Barendt assists on this point when he comments that perhaps certain statements need to be suppressed when they do not promote other equally important values such as racist and hate speech.[35] He further adds that Mill's proposition may have "overvalued intellectual discussion" assuming that all individuals are capable of debating public affairs.[36] Several people may find the assumption by Barendt as disagreeable as all individuals should have the opportunity to debate public affairs whether or not they possess the "capability".

Arguments to defend the role of the press and the media in democratic states often draw their merits from the liberal theory of the press. There are four distinguishable but overlapping arguments expanded on by Keane.[37] The first is the theological defence where

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[31] Martin Conboy, *Journalism: A Critical History,* SAGE, London, 2004, p. 32.

[32] Eric Barendt, *Freedom of Speech*, 2nd ed, Oxford University Press, London, 2005, pp. 6-7.

[33] John Stuart Mill, *On Liberty* (1859), Chapter II 'Of Liberty of Thought and Discussion'.

[34] James Curran, 'The liberal theory of press freedom' in James Curran and Jean Seaton, eds., *Power Without Responsibility: Press, Broadcasting and the Internet in Britain: Press and Broadcasting in Britain*, 5th ed., Routledge, London, 1997, p. 287.

[35] Eric Barendt, *supra* n 32, p 8.

[36] *Ibid.* at p. 9.

[37] John Keane, *The Media and Democracy*, Polity, Cambridge, 1991.

Keane makes particular reference to Milton's *Aeropagitica* where he "pleaded for a free press in order to let the love of God and the 'free and knowing spirit' flourish"[38] and that restrictions on the press were "repugnant because it stifles the exercise of individual's freedom to think, to exercise discretion and to opt for a Christian life".[39] The basis of the second argument is rights of individuals premised on writings of Locke,[40] Tindal[41] and Asgill[42] whereby the right of the individual not only includes the right to decide matters of politics or religion but the right to express views freely including views that may not accord with those of the government.[43] The third argument is based on the utilitarian theory where the control of the press by the government which nullifies public opinion reduces the happiness of people. The sentiments are that a free press is an "ally of happiness" checking on government.[44] Keane's last argument is based on the attainment of truth whereby truth can be attained through unrestricted and free discussion drawing this argument's strength from Mill's *On Liberty*.

Apart from the first argument, Keane's extrapolation is extremely relevant in the context of rationalising the media's role as the Fourth Estate.

B. *Marketplace of Ideas Theory*

The "marketplace of ideas" theory was originally derived from Mill and was given judicial recognition by Justice Brandeis and Justice Holmes in the US Supreme Court.

The "marketplace of ideas" theory of free speech has been enormously influential in American jurisprudence. Developed by Justice Holmes in his dissenting judgment in *Abrams* v *US,*[45] the theory suggests that the truth would emerge from "free trade in ideas" or intellectual competition and that the regulation by government distorts the working of a free market for the exchange of ideas resulting in the courts undertaking great scrutiny as a result of a mistrust of government intervention even when it is meant to foster free speech.

Justice Holmes in *Abrams* held that the truth will emerge from a "free trade in ideas":

> But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.[46]

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38 *Ibid.* at p. 11.
39 *Supra* n 37, at p. 12.
40 John Locke, *A Letter about Toleration*, 1689.
41 Mathew Tindal, *Reasons Against Restraining the Press*, 1704.
42 John Asgill, *An Essay for the Press*, 1712.
43 *Supra* n 37, at p. 13.
44 *Supra* n 37, at p. 16.
45 *Supra* n 25, at pp. 630-31, as per Holmes J.
46 *Supra* n 45.

Justice Brandeis affirmed this in *Whitney,* adding that the "freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth."[47]

In short, if ideas are available and compete with or counter each other, the "good counsels" will prevail.[48] It is essential to note that both Justices Holmes and Brandeis laid out "the clear and present danger" test that may restrict speech in the marketplace whereby speech will not be protected where there is "a clear and present danger that will bring about the substantive evils that Congress has a right to prevent."[49]

Baker sets out the assumptions that need to be appreciated to assess the theory's merits. The first assumption is that the truth must be "objective" or "discoverable".[50] Baker explains that the ability of the truth "to outshine falsity in debate or discussion" is only possible "if truth is there to be seen."[51] The second assumption is that people are rational and that they "possess the capacity correctly to perceive truth or reality."[52] This assumption is based on further assumptions - firstly, that "a person's personal history or position in society must not control the manner in which he or she perceives or understands the world" and secondly, "people's rational faculties must enable them to sort through the form and frequency of message presentation to evaluate the core truth in the messages."[53] The latter is essential as acceptance of the truth in the marketplace of ideas cannot be based on only perspectives that were more attractively and "effectively packaged and promoted."[54] The third assumption comprises several interrelated assumptions. Baker expounds this:

> The discovery of truth must be desirable - for example, because truth provides the best basis for action and, thereby, uniformly promotes human interests. If 'objective' truth provides the best basis of action, then as humanity progressively finds more truth, the diversity of practice as well as of opinion should gradually narrow. Cultural pluralism should progressively diminish. Moreover, truth would provide the basis for resolving value conflicts. For objective truth to be the proper basis of action implies that people's real interests do not conflict. In contrast, if truth is not objective or is not the best basis of action, there could be intractable value conflicts. Then the value of the marketplace of ideas would be unclear. Whether robust debate is useful would depend on whether it advanced or obstructed the interests of the group one favors or the group that 'ought' to prevail.[55]

The media is often perceived as the marketplace but what is available in the marketplace is very much mediated by the powers that own the media or through a process of editorial

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[47] *Whitney v California* 274 US 357 (1927) 375, Brandeis and Holmes JJ dissenting.

[48] David A Strauss, "Persuasion, Autonomy and Freedom of Speech", *Columbia Law Review*, 1991, Vol. 91, p. 348.

[49] *Schenk v United States* 249 US 47 (1919) 52, revisited in *supra* n 47, p 376, as per Brandeis J.

[50] C Edwin Baker, *Human Liberty and freedom of Speech*, Oxford University Press, Oxford, 1989, p. 6.

[51] *Ibid*.

[52] *Supra* n 50, at pp. 6-7.

[53] *Supra* n 50, at p. 7.

[54] C Edwin Baker, *supra* n 53.

[55] *Ibid.*

gatekeeping. Therefore regulation of the media is required in order to ensure that varied views and opinions can be heard in the marketplace. This is perhaps the model adopted in liberal democracies but not always the case in legal systems where the media is state-regulated or where there are legal filters on the type of speech that can be disseminated.

The media as a platform is indeed representative of "the marketplace of ideas". The idea that the citizenry ought to have access to a variety of views made available through the media ties in with the self-realization value that the theory positions itself on. This is where "the individual needs an uninhibited flow of information and opinion to aid him or her in making life-affecting decisions, in governing his or her own life."[56]

IV. The Legal Foundation for the Fourth Estate Role

The legal basis of the Fourth Estate can be traced back to the tradition of protecting and promoting freedom of speech and expression found in international human rights law and at the national level, in constitutional provisions that enshrine this freedom.

A. *International Conventions*

The right to free speech and expression has developed through the centuries and has now been enshrined in conventions and constitutions.

The idea of a right to freedom of expression is derived from the 17th and 18th century European Enlightenment which saw the struggle against the power of monarchist rulers. In the UK, the earliest source of protecting free speech was the Bill of Rights 1688, where Article 9 sets out that freedom of speech is essential to members of Parliament to speak and debate freely in Parliament. The clause reads – "That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament." In the First Amendment of the US Constitution, it is provided that – "Congress shall make no law…abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances".[57]

The international authority for the freedom of speech and expression is Article 19 of the Universal Declaration of Human Rights.[58] Although the Declaration is not an international treaty, nevertheless, Article 19 provides an international reference for media rights to build on. Article 19 of the Declaration reads – "Everyone 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."

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[56] Martin H Redish, "The Value of Free Speech", *University of Pennsylvania Law Review*, 1982, Vol. 130, p. 618.

[57] Bill of Rights 1791.

[58] Adopted 10 December 1948 by the General Assembly of the United Nations. The declaration is not a treaty but it is considered as customary international law.

This right is reiterated but qualified in Article 19 of the International Covenant on Civil and Political Rights[59] with the main addition being the proviso in Clause 3 of the said Article. As the covenant is a binding treaty, the inclusion of permitted limits on the rights is highly relevant. The Article reads:

> 1. Everyone shall have the right to hold opinions without interference.
> 2. *Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*
> 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.*[60] [Emphasis added]

Further, Article 10 of the European Convention of Human Rights[61] adopted by the Council of Europe resembles Article 19 of the United Nations' Universal Declaration of Human Rights 1948, even more so Article 19 of the International Covenant on Civil and Political Rights. The provisions of the Convention were adopted by the UK in the Human Rights Act 1998, which came into force on 2 October 2000, with the various articles contained in Schedule 1 and are treated as constitutional principles.

Article 10(1) reads:

> Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

This Article qualifies itself in Clause 2 which reads:

> The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

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[59] Adopted 16 December 1966 by General Assembly resolution, entered into force 23 March 1976.

[60] Signed by the US and the UK. Unsigned by Malaysia.

[61] The Convention's formal title is "Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, November 4, 1950".

In relation to Malaysia, Article 10 Clause 1 of the Federal Constitution reads that "every citizen has the right to freedom of speech and expression". The Article is limited to citizens and does not expand on what the freedom includes. In the case of Article 10 of the European Convention where the freedom is extended to all with the use of the words "[e]very one" and the right includes "freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers." There is no explicit extension of the right to the press or the media in general.

Article 10 Clause 1 of the Federal Constitution is subject to certain clauses such as Clause 2 which reads:

> (2) Parliament may by law impose -
> a) on the rights conferred by paragraph (a) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of parliament or of any Legislative Assembly or to provide against contempt of court, defamation, or incitement to any offence;

The restriction is deemed as wide and the omission of any qualification on the restrictions leaves the court with minimal jurisdiction to review the constitutionality of a legislation which acts as the restrictive mechanism.

B. *The Relationship between Freedom of Speech/Expression and Media Rights*

The extent of the adoption of Article 19 of the Declaration or Article 19 of the Covenant differs between States and this is evident when discussing this perspective between the US, the UK and Malaysia. The protection of free speech and speech by media varies amongst States.

Certain States exert control over dissemination of news and information and certain others encourage, within acceptable limits, the same. These are the polar extremes of the level of media and press freedom that exists. The relationship of the State and the press is two-dimensional – on one hand, the use of power to limit or suppress discussion to protect *inter alia* individual interests against untruthful, unjustifiable and intrusive publications and protection of the community and security;[62] and on the other hand, affirmative State initiatives to encourage communication of news and ideas and accessibility of information. Whichever the case, there is no denying the continued determination by states to rise up to the standards of Article 19 of the Universal Declaration of Human Rights 1948 either voluntarily or under the pressure of its increasingly informed, connected and educated citizenry.

Within States, the development of free speech in general and in terms of the press, depends on the importance given to constitutional provisions that provide for the said

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[62] Similar to the proviso in Article 19 of the Covenant.

freedoms and to the importance of the role of the mass media[63] in promoting them. The freedoms which were propounded to guarantee freedom of individuals are extended to the mass media in view of the role played by the media in public discourse. In reference to the extension of this freedom to the media, Barendt [64] comments that in view of the media providing readers, listeners and viewers with information, it facilitates the active participation in political democracy, playing the vital role as the "public watchdog"[65] and the "eyes and ears of the general public".[66]

C. The First Amendment and the Fourth Estate in the US

In the US, the First Amendment to the Bill of Rights protects freedom of speech as the most fundamental of all rights. The First Amendment forbids Congress to make laws "abridging the freedom of speech, or of the press."

The rich heritage that has given the First Amendment its voice in the writings of Locke, Paine, Bentham and Mill has also provided the US press and the media in general, its freedom. Rich summarised this:

> Underlying these First Amendment guarantees is the belief that the key to effective government is an informed citizenry, one that is not told by the government what is right, but instead makes those determinations itself, through its own education. Armed with the knowledge provided to them in a free 'marketplace of ideas', these citizens elect officials who, with the citizens' informed consent, steer the government on its proper course.[67]

The marketplace theory became the soap-box for judges and legal scholars upon which to build democratic participation in effective government. It is precisely this positioning that has given the press a preferred constitutional position in the context of the First Amendment.

Barron[68] when writing on the First Amendment and access to the press commented that "little attention" has been paid to the definition of the purposes the said amendment seeks to achieve. He directs us to the opinion of Justice Brandeis in *Whitney v California*[69] and Justice Murphy in *Thornhill v Alabama*[70]. Barron summarises Brandeis's concurring

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63 Freedom of the press amounts to freedom of 'the media' and the term 'press' and 'media' are used interchangeably. Melville B Nimmer, "Introduction – Is Freedom of the Press A Redundancy: What Does it Add to Freedom of Speech?", *Hastings Law Journal*, 1974-1975, Vol. 26, p 639; See also *Gertz v Robert Welch, Inc.* (1974) 418 US 323; *United States v Paramount Pictures, Inc.* (1948) 334 US 131.

64 Eric Barendt, *Freedom of Speech*, 2nd ed, Oxford University Press, Oxford, 2005, pp. 417-8.

65 Borrowing the phrase from the decision in *Observer and Guardian v UK* (1992) 14 EHRR 153, para [59].

66 Phrase used by Sir John Donaldson MR in *AG v Guardian Newspapers Ltd* (No.2) [1990] 1 AC 109 (CA) 183.

67 R Bruce Rich, 'The United States of America' in Nick Braithwaite (ed), *The International Libel Handbook*, Butterworth-Heinemann, Oxford, 1995, p. 1.

68 Jerome A Barron, "Access to the Press – A New First Amendment Right", *Harvard Law Review*, 1967, Vol. 80 1641, p. 1648.

69 (1927) 274 US 357, 375.

70 (1940) 310 US 88, 102.

opinion as follows – " …that underlying the first amendment guarantee is the assumption that free expression is indispensable to the 'discovery and spread of political truth' and that the 'greatest menace to freedom is an inert people.'…"[71]

In *Thornhill v Alabama*, Justice Murphy emphasised the importance of "the public need for information and education with respect to the significant issues of the times." However, the Supreme Court has held that protection could be restricted where there is "imminent lawless action" or speech that was likely to produce such action,[72] or if the speech presented "a clear and present danger" that will bring about imminent danger and substantive evil to the State.[73]

Barron also highlights the further purpose of the First Amendment in providing protection of the right of access to the mass media – the "public order function"[74] relying on Justice Cardozo in *Palko v Connecticut*[75] and Justice Brandeis in *Whitney v California* who both emphasised the importance of the opportunity to communicate ideas.[76] Justice Cardozo in *Palko* made reference to the freedom of thought and speech as "the matrix, the indispensable condition of nearly every other form of freedom."[77] Justice Brandeis stressed the dangers of suppressing speech:

> …it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies…[78]

Justice Brandeis in his concurring opinion in *Whitney v California*, reaffirmed the justifications for free speech as essential in allowing a citizenry to develop its faculties, that it is an end in itself as it is the secret of happiness, that "public discussion is a political duty" and adds that freedom of speech is the "path to safety" if there is an opportunity to discuss matters freely.[79]

The wording of the First Amendment that speaks of the "freedom of speech" and "freedom of the press" has led to the discussion that there is a possible construction of a constitutional role for the press in addition to the freedom of speech being the right of individuals. In the construct of the First Amendment, freedom of the press could be subsumed under freedom of speech or as a distinct freedom with differing scope. Barendt proposes three perspectives on the relationship between the two freedoms – freedom of speech and freedom of the press.

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[71] Jerome A Barron, *supra* n 68.
[72] *Brandenburg v Ohio* (1969) 395 US 444, 447.
[73] *Schenck v United States* (1919) 249 US 47, 52.
[74] Jerome A Barron, n 68, p 1650.
[75] (1937) 302 US 319, 327.
[76] Jerome A Barron, *supra* n 68, at p. 1650.
[77] *Supra* n 75.
[78] (1927) 274 US 357, p. 375.
[79] *Supra* n 78.

The first perspective is that both the freedoms are equivalent. References are made to Dicey, the UK Court of Appeal decision in *AG v Guardian Newspapers Ltd*[80] and the attitude of the US Supreme Court. Barendt[81] comments that Dicey "treated freedom of speech and liberty of the press as interchangeable terms."[82] Further, in *AG v Guardian Newspapers Ltd*, Sir John Donaldson expounded that the right of the media to know and to publish "is neither more nor less than that of the general public."[83] On the attitude of the US Supreme Court, Barendt forwards the view that the US Supreme Court has not accorded the First Amendment "freedom of the press" limb a distinct coverage over and above the freedom of speech enjoyed by any other individual.[84]

The second perspective that freedom of the press is a distinct freedom from freedom of speech is based on the rationale that the press carries out the function of checking on government. This perspective forwards the role of the media as the Fourth Estate. In support of this stand, Barendt refers to Supreme Court Justice Potter Stewart[85] who contends that the "free press" guarantee is a "structural provision" of the US Constitution.[86] Justice Stewart relies on Supreme Court cases[87] to support his contention such as where the privilege of a journalist to refuse disclosure of confidential sources was lost only on a slim five to four majority in the court,[88] where the court refused to grant a restraining order against the *New York Times* and other newspapers from publishing the Pentagon Papers,[89] where the court declared a Florida statute as unconstitutional as it compelled newspapers to grant a "right of reply" to political candidates who they were critical of,[90] where the court ruled that political groups did not have a right of access to federally regulated media[91] and a series of decisions where the court ruled that a public figure could not sue a publisher for libel unless the claimant could prove that the publication was a malicious damaging untruth.[92] This contention is premised on Justice Stewart's opinion that it would be a constitutional redundancy if the freedom of the press was not treated distinctly from freedom of speech in view of the inclusion of both guarantees in the First Amendment.[93] Justice Stewart comments that the primary purpose of the constitutional guarantee of a free press is "to create a fourth institution outside the Government as an additional check on the three official branches" and that it would be a mistake to limit the role of the press, or which purpose the constitutional guarantee to merely being "a

80 [1990] 1 AC 109.
81 Eric Barendt, *supra* n 32, at p. 419.
82 AV Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed., MacMillan, London, 1959, Ch. VI, The Right to Freedom of Discussion, 239.
83 *Supra* n 80, at p. 183.
84 Eric Barendt, *supra* n 32.
85 Potter Stewart, "Or of the Press", *Hastings Law Journal*, (1975, Vol. 26, p. 631.
86 Potter Stewart, *supra* n 85, at p. 632.
87 *Ibid.* at pp. 632-633.
88 *Branzburg v Hayes* (1972) 408 US 665.
89 *New York Times Co v United States* (1971) 403 US 713.
90 *Miami Herald Publishing Co v Tornillo* (1974) 418 US 241.
91 *Columbia Broadcasting System Inc v Democratic National Committee* (1973) 412 US 94.
92 *Rosenbloom Metromedia Inc* 403 US 29 (1971); *Curtis Publishing Co v Butts* (1967) 388 US 130; *New York Times Co v Sullivan* (1964) 376 US 254.
93 Potter Stewart, *supra* n 85, at pp. 633-634.

neutral form for debate, a marketplace of ideas" or "a kind of Hyde Park corner for the community."[94]

The third perspective forwarded by Barendt is where the protection is accorded only to "the degree to which it promotes certain values at the core of our interest in freedom of expression generally."[95] This perspective views freedom of the press as an instrument to promote values of freedom of speech such as pluralism in the sources of information in areas of public interest.[96]

Barendt forwards two attractions for taking this perspective – firstly, it brings in line the role of the media in disseminating ideas and information to the public; and secondly, it does not draw a distinctive line between rights of institutional media and other individuals who may also provide information to the public on matters of public interest. This protection, however, requires some form of recognition either by the courts or the legislature.

The second and third perspective promotes the role of the media as the Fourth Estate highlighting a distinct right role of the media to check on the Executive and to provide information in matters of public interest.

D. English Common Law, Article 10 of the ECHR and the Fourth Estate

The UK signed the European Convention of Human Rights[97] as member of the Council of Europe in 1950[98] and became subject to the jurisdiction of the European Court of Human Rights[99] ("the ECtHR") in 1966 where the right of individual petition was allowed to bring a case to the Strasbourg court. The Strasbourg court's jurisdiction is evoked under Article 34 of the European Convention, where "any person, non-governmental organisation or group of individuals claiming to be a victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto."

Prior to the incorporation of the European Convention of Human Rights by virtue of the Human Rights Act 1998 ("the HRA") into the UK domestic law, the Bill of Rights 1688, Article 9, only speaks of freedom of speech being essential to members of Parliament to speak and debate freely in Parliament. Protection of freedom of expression and speech of the individual or the press was left in the hands of Parliament and the courts – meaning freedom of speech existed where it was not limited or restricted by Parliament and the courts. Common law principles were developed by the courts but were nevertheless limited constitutionally by Parliament. This echoes Sir Robert Megarry's statement, inspired by Dicey, in *Malone v Metropolitan Police Commissioner* stating – "England, it may be said,

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94 *Ibid.* at p. 634.

95 Judith Lichtenberg, 'Foundations and Limits of Freedom of the Press' in Judith Lichtenberg (ed), *Democracy and the Mass Media*, Cambridge University Press, Cambridge, 1990, p. 104.

96 Eric Barendt, *supra* n 32, at p. 422.

97 *Supra* n 61.

98 The UK ratified the Convention on 8 March 1951.

99 The court was constituted in 1959.

is not a country where everything is forbidden except what is expressly permitted: it is a country where everything is permitted except what is expressly forbidden".[100]

The third Royal Commission on the Press reported on the need for and importance of press freedom and defined it as:

> …that degree of freedom from restraint which is essential to enable proprietors, editors and journalists to advance the public interest by publishing the facts and opinions without which a democratic electorate cannot make responsible judgments.[101]

Subsequent to the coming into force of the HRA on 2 October 2000, the Convention became incorporated into the UK domestic law. The HRA makes available a remedy in the UK courts for the breach of the Convention rights without the need to go to the ECtHR. It should be made clear that the UK courts are required to take into account the jurisprudence of the ECtHR in cases concerning rights protected under the Convention and does not permit the courts to override clear statutory language.[102] The HRA adopts in Schedule 1 the Convention rights set out in the European Convention for the Protection of Human Rights and Fundamental Freedoms.[103] The Convention right central to the discussion of the rights of media is Article 10(1) which is qualified by Article 10(2).

In *Handyside v UK*,[104] the ECtHR described freedom of expression as "one of the essential foundations of … a [democratic] society, one of the basic conditions for its progress and for the development of every man." In relating it directly to the importance of the exercise of this expression by the media, the inspiring observation of Lord Bingham in *McCartan Turkington Breen v Times Newspapers Ltd* requires notice:

> In a modern, developed society it is only a small minority of citizens who can participate directly in the discussions and decisions which shape the public life of that society. The majority can participate only indirectly, by exercising their rights as citizens to vote, express their opinions, make representations to the authorities, form pressure groups and so on. But the majority cannot participate in the public life of their society in these ways if they are not alerted to and informed about matters which call or may call for consideration and action. It is very largely through the media, including of course the press, that they will be so alerted and informed. The proper functioning of a modern participatory democracy requires that the media be free, active, professional and enquiring. For this reason, the courts, here and elsewhere, have recognised the cardinal importance of press freedom and the need for any restriction on that freedom to be proportionate and no more than is necessary to promote the legitimate object of the restriction.[105]

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[100] [1979] Ch 344, p. 357.
[101] Royal Commission on the Press (Cmnd 6810, 1977) [2.3].
[102] Section 2 Human Rights Act 1998.
[103] Adopted 4 November 1950, entered into force 3 September 1953.
[104] (1976) EHRR 737, para [49].
[105] *McCartan Turkington Breen v Times Newspapers Ltd* [2001] 2 AC 277, pp. 290-291.

The types of expression that are broadly protected can fall into three categories – political, artistic and commercial expression. In the context of the role of the press as the Fourth Estate, the most relevant type is political expression which covers, in general, matters of general public interest. In *Reynolds v Times Newspapers Ltd*[106], Lord Nicholls commented that political discussion should not be distinguished from "other matters of serious public concern". Greater protection has been accorded to political expression in contrast to the other types of expression although it has been commented that there is no "express theoretical basis" for it.[107]

One of the characteristics of protected speech under Article 10 is speech made in the public interest. The requirement of public interest is essential in a number of areas such as successfully raising the defences of fair comment and qualified privilege against a claim in defamation, in upholding open justice and prior restraint, and generally, the right of the press to obtain and receive information and/or impart information. The standard of public interest in these areas differs where the element of public interest in the defence of fair comment is much less exacting in comparison to the defence of qualified privilege.

In recent years, the judgments of the House of Lords in *Reynolds*[108] and later *Jameel*[109] have provided a basis upon which such rights can be determined. Both cases dealt with the media relying on the defence of qualified privilege. In order for the defence to succeed, the element of public interest must exist in the information published. These decisions also echo the need for the standards of responsible journalism to be met before the law will accord any protection. Both *Reynolds* and *Jameel* have a doctrinal basis in Malaysia and their place in the Malaysian jurisprudence is strong.[110] The discussion of the defences of fair comment and qualified privilege, the relationship of public interest to these defences and the test of responsible journalism is beyond the scope of this article.[111]

E. *Article 10 of the Federal Constitution and the Fourth Estate in Malaysia*

As stated *supra*, the restrictions found in Clause 2 of Article 10 of the Federal Constitution are wide. For instance, in the Indian Constitution, the phrase "reasonable restriction" indicates a clear qualification and more importantly, an avenue for the courts to undertake the balancing exercise, discussed *infra*. Undeniably, the application of the provisions for revocation could be justified but they must be exercised by achieving a "balance between individual liberty and social control"[112] and a degree of proportionality in the powers that

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[106] [2001] 2 AC 127, 204.

[107] John Wadham, Helen Mountfield, Caoilfhionn Gallagher and Elizabeth Prochaska, *Blackstone's Guide to the Human Rights Act 1998*, 5th ed, Oxford University Press, Oxford, 2009, para 7.370, p. 235.

[108] *Reynolds v Times Newspapers Ltd* [1999] 4 All ER 609, [2001] 2 AC 127.

[109] *Jameel v Wall Street Journal Europe SPRL (No 3)* [2006] UKHL 44, [2006] 4 All ER 1279, [2007] 1 AC 359, [2006] 3 WLR 642.

[110] See *Dato' Seri Anwar Bin Ibrahim v Dato'Seri Dr Mahathir Bin Mohamad* [1999] 4 MLJ 58 (HC); *Dato'Seri Anwar Bin Ibrahim v Dato' Seri Dr Mahathir Bin Mohamad* [2001] 1 MLJ 305 (CA); *Dato'Seri Anwar Bin Ibrahim v Dato' Seri Dr Mahathir Bin Mohamad* [2001] 2 MLJ 65 (FC).

[111] Note that the Reynolds "public interest defence" has been abolished in the UK by virtue of section 4(6) of the Defamation Act 2013 and is replaced by a statutory defence of "Publication on a Matter of Public Interest".

[112] *Supra* n 110.

may be exercised under the restrictions. Raja Azlan Shah, FCJ (as he then was), in *Public Prosecutor v Ooi Kee Saik & Ors*[113] commented that the Indian Supreme Court "has conceded that fundamental rights are subject to limitations in order to secure or promote the greater interests of the community" quoting *AK Gopalan v State of Madras*[114] where the court commented that:

> There cannot be any such thing as absolute or uncontrolled liberty wholly free from restraint; for that would lead to anarchy and disorder. The possession and enjoyment of all rights ... are subject to such reasonable conditions as may be deemed to be, to the governing authority of the country, essential to the safety, health, peace and general order and moral of the community ... What the Constitution attempts to do in declaring the rights of the people is to strike a balance between individual liberty and social control.

In the case of Malaysia, there is a plethora of statutes that stipulate restrictions of the freedom of speech and expression. One of the earliest statutes to do this was the Printing Presses Act 1948. It was replaced with the Printing Presses and Publications Act 1984[115] and is the main legislation that regulates the press. There have been some welcomed amendments to the said Act. It was amended by the Printing Presses and Publications (Amendment) Act 2012 on 22 June 2012. The amendments to the older Act are progressive in nature, and include the removal of the absolute discretion of the Minister in granting of the permit to print and publish a newspaper, the licence to publish which required an annual renewal will remain valid for so long as it is not revoked and the right to be heard which was expressly excluded has been explicitly included before a decision to revoke or suspend a licence is made.

Further, there is the Sedition Act 1948.[116] The Act defines that an act is "seditious" when it is applied to or used in respect of any act, speech, words, publication or other thing qualifies the act, speech, words, publication or other thing as one having a seditious tendency; and "publication" includes all written or printed matter and everything whether of a nature similar to written or printed matter or not containing any visible representation or by its form, shape or in any other manner capable of suggesting words or ideas, and every copy and reproduction or substantial reproduction of any publication.[117] Section 3 enumerates what may be tantamount to "seditious tendency"[118] and the provisions within the section are quite general and widely worded. The Prime Minister announced

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[113] *Ibid.*

[114] AIR 1950 SC 27.

[115] Act 301. The long title of the Act read, "An Act to regulate the use of printing presses and the printing, importation, production, reproduction, publishing and distribution of publications and for matters connected therewith."

[116] Act 15. The Act was revised in 1969 with the revision taking effect on 14 April 1970.

[117] Section 2 of the Sedition Act 1948.

[118] Section 3(1) of the Sedition Act 1948.

in June 2012 that the Act would be abolished and replaced with a National Harmony Act. However, it appears that the Act is here to stay in view of the amendments made to the Act in April 2015, suggesting its continued relevance and that its position has strengthened in view of the increased number of prosecutions. Although it is not the purview of this paper to discuss the amendments, however, in order to understand the context for its continued existence and reliance by the State, it is essential to highlight that the amendments have been made to curtail speech disseminated through social media platforms. The amendments include the insertion of the definition of "by electronic means" in the definition section of the Act as well as an introduction of a new section 10A which introduces a special power accorded to a Sessions Court Judge to make an order to prevent access to a seditious publication made by electronic means where the person who published the seditious statement cannot be identified.

Other legislation that has been used or can be utilised in controlling the media includes the criminal defamation provision in the Penal Code.[119]

The position of journalists is not a special or privileged one and journalists are subject to the same law as the ordinary man. The sentiments can be summarised by Justice Ahmad's phrase in *Anwar bin Ibrahim v Abdul Khalid @ Khalid Jafri bin Bakar's* case (W-02-741-2000)(unreported) where he stated that "the freedom of the press ends where the force of the law begins." In *Tun Datuk Patinggi Haji Abdul Rahman Ya'kub v Bre Sdn Bhd*,[120] the High Court commented that "journalists, editors and newspapers do not have any special positions so as to entitle them to rely on the defence of qualified privilege on any matters which they may publish."

It is therefore clear that the media's exercise of the role as the Fourth Estate under Article 10 Clause (1) is restricted by the legislative restrictions enabled by Clause (2). Harding commented that Article 10 of the Federal Constitution "is remarkable for what it takes away rather than for what it gives."[121] He adds:

> The idea that restrictions are sometimes necessary on political rights is common place. Art. 10, however, is unusual in its failure to place any real restrictions on the restrictions. They are so widely drafted that in practice there are likely to be very few possible restriction which could not be said to come within the kinds of restriction permitted by Art.10, especially there is nothing in Art.10 to suggest that the courts have any right to review the necessity of legislation restricting one of these rights. The result is therefore quite different from that achieved in the Indian Constitution, which allows only such restrictions as are reasonable, such reasonableness being a matter for the courts to decide on judicial review.[122]

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[119] Act 574. Section 499 reads; "Whoever, by words either spoken or intended to be read or by signs, or by visible representations, makes or publishes any imputation concerning any person, intending to harm, or knowing or having reason to believe that such imputation will harm the reputation of such person, is said, except in the cases hereinafter excepted, to defame that person."

[120] [1996] 1 MLJ 393 (HC), p. 411.

[121] Andrew Harding, *Law, Government and the Constitution in Malaysia*, (Malaysia: MLJ, 1996), p.189.

[122] Andrew Harding, *supra* n 121, at pp. 189-190.

V. The *Derbyshire* Judgment

The central issue for determination in *Derbyshire* was "whether a local authority is entitled to maintain an action in libel for words which reflect on it in its governmental and administrative functions."[123] The action involved two publications in *The Sunday Times* concerning the administration of the superannuation fund of the Derbyshire County Council and which questioned the propriety of the utilisation of the said fund in investments made by the council.[124] The council contended that it had "been injured in its credit and reputation and has been brought into public scandal, odium and contempt, and has suffered loss and damage."[125]

His Lordship, Lord Keith, setting out the unanimous judgment of the court, considered a number of cases involving libel suits initiated by local authorities, namely, *Bognor Regis UDC v Campion*.[126] Lord Keith overruled the decision in *Bognor Regis* on the basis that Justice Browne in that case did not provide any consideration to the fact that a local authority may not be in a "special position" to take a libel action in contrast with the "special position" of a trade corporation, trade unions and charitable organisations.[127] His Lordship distinguished the position of the local authority with other bodies:

There are, however, features of a local authority which may be regarded as distinguishing it from other types of corporation, whether trading or non-trading. The most important of these features is that it is a governmental body. Further, it is a democratically elected body, the electoral process nowadays being conducted almost exclusively on party political lines.[128]

The judgment presents the position of the English common law "…where a local authority does not have the right to maintain an action of damages for defamation."[129] The basis for this position is three pronged. The first is that any government body can be subjected to "uninhibited public criticism". The second is that a political libel action will have an "inhibiting effect" on free speech. Lord Keith affirmed this when His Lordship commented:

> It is of the highest public importance that a democratically elected governmental body, or indeed any governmental body, should be open to uninhibited public criticism. The threat of a civil action for defamation must inevitably have an inhibiting effect on freedom of speech.[130]

The third prong is the "public interest" argument. The public interest aspect was raised in relation to firstly, the impact a libel civil action may have on a publication which is in the

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123 *Supra* n 2, at p. 1013, para (a).
124 *Supra* n 2, at p. 1013, para (c) – (e).
125 *Supra* n 2, p 1013, para (h).
126 [1972] 2 All ER 61, [1972] 2 QB 169.
127 *Supra* n 2, at p. 1017, para (e)-(h).
128 *Supra* n 2, at p. 1017, para (j).
129 *Supra* n 2, at p. 1020, para (e), as per Lord Keith.
130 *Supra* n 128.

public's interest to be made public on the basis that it was a critique of the government, its Ministers or the Executive, in particular the impact in the manner of the chilling effect the action may have on free speech;[131] and secondly, that there is no public interest that favours institutions of government to sue for libel and that rather it is contrary to public interest that they should possess such an interest.[132]

His Lordship took inspiration from several decisions of the US courts that lent support to His Lordship's pronouncements namely the case of *City of Chicago v Tribune Co*,[133] a decision of the Illinois Supreme Court, which was confirmed by the US Supreme Court in *New York Times Co v Sullivan*.[134] Although the US decisions were related to First Amendment free speech protection, Lord Keith justified the use of these decisions as they were made on the public interest consideration which His Lordship felt were "no less valid" in the UK.[135] His Lordship cited two paragraphs from the judgment of Chief Justice Thompson in *Chicago*, a decision which was subsequently confirmed by the US Supreme Court in *Sullivan*. His Lordship quoted two paragraphs from the Chicago judgment. The former is related to the first two prongs and the latter is related to the "public interest" prong:[136]

> The fundamental right of freedom of speech is involved in this litigation and not merely the right of liberty of the press. If this action can be maintained against a newspaper it can be maintained against every private citizen who ventures to criticise the ministers who are temporarily conducting the affairs of his government. Where any person by speech or writing seeks to persuade others to violate existing law or to overthrow by force or other unlawful means the existing government he may be punished … but all other utterances or publications against the government must be considered absolutely privileged. While in the early history of the struggle for freedom of speech the restrictions were enforced by criminal prosecutions, it is clear that a civil action is as great, if not a greater, restriction than a criminal prosecution. If the right to criticise the government is a privilege which, with the exceptions above enumerated, cannot be restricted, then all civil as well as criminal actions are forbidden. A despotic or corrupt government can more easily stifle opposition by a series of civil actions than by criminal prosecutions …[137]
>
> It follows, therefore, that every citizen has a right to criticise an inefficient or corrupt government without fear of civil as well as criminal prosecution. This absolute privilege is founded on the principle that it is advantageous for the public interest that the citizen should not be in any way fettered in his statements, and where the public service or due administration of justice is involved he shall have the right to speak his mind freely.[138]

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131 *Supra* n 2, at p. 1018, para (f).
132 *Supra* n 2, at p. 1019, para (d).
133 (192) 307 Ill 595.
134 (1964) 376 US 254, p 277.
135 *Supra* n 2, at p. 1018, para (f).
136 *Supra* n 2, at p, 1018, para (a)-(e)
137 (192) 307 Ill 595, pp. 606-607.
138 *Supra* n 137, at pp. 607-608.

These sentiments are in line with the Privy Council's views in justifying the protection of speech that is critical of government and public administration in *Hector v A-G of Antigua and Barbuda.*[139] In *Hector*, Lord Bridge held that a statutory provision, which made the printing or distribution of any false statement likely to undermine public confidence in the conduct of public affairs a criminal offence, contravened the provisions of the constitution protecting freedom of speech. His Lordship clarified the position taken as follows:

> In a free democratic society it is almost too obvious to need stating that those who hold office in government and who are responsible for public administration must always be open to criticism. Any attempt to stifle or fetter such criticism amounts to political censorship of the most insidious and objectionable kind.[140]

It is essential to note that in *Derbyshire* the common law prohibition against a libel civil action by the local council was qualified. The general principle of the said prohibition is followed by two exceptions – firstly, that a local council could maintain an action in malicious falsehood;[141] and secondly, if the individual reputation of councillors "is wrongly impaired by the publication any of these can himself bring proceedings for defamation."[142]

VI. The *Utusan Melayu* Decision

The appellant-newspaper is the printer and publisher of the Sunday edition newspaper "*Mingguan Malaysia*". The basis of the libel action filed by the respondent is an article published on 9 November 2014 titled "*Hebat Sangatkah Adnan*" where references were made to the respondent who held the positions of an elected representative of his constituency and Chief Minister of the State of Pahang. The respondent claimed that the allegations in the article were, as the learned Court of Appeal put it, "outrageous and unsubstantiated."[143] The appellant-newspaper pleaded the defences of fair comment and qualified privilege. The Court of Appeal reiterated the salient points of Lord Keith's judgment in *Derbyshire* and confirmed its applicability in Malaysian jurisprudence. Delivering the decision of the court, His Lordship Yang Arif Tan Sri Idrus bin Harun, upholding the first and second prong, clarified as follows:

> The decision rendered by the House of Lords is, in our opinion, no less valid in Malaysia and should apply alike under and be part of our defamation law as the principle is related most directly to the protection of the right to freedom of speech and expression under Article 10 Clause (1)(a) of the Federal Constitution and that public interest does not favour the right of the government and those holding public office to sue for libel.[144]

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139 [1990] 2 All ER 103, [1990] 2 AC 312. Decision of the Judicial Committee of the Privy Council.
140 *Supra* n 140, at pp. 106 and 318 respectively.
141 His Lordship made reference to Balcombe LJ at the Court of Appeal in this case. See *Derbyshire County Council v Times Newspapers Ltd and others* [1992] 3 All ER 65.
142 *Supra* n 2, at p. 1020 para (d).
143 *Supra* n 1, at para 2.

> We consider that it is one of the fundamental principles that, in the exercise of the right to such freedom within the ambit of the Federal Constitution and other relevant laws, the public should have the right to discuss their government and public officials conducting public affairs of the government without fear of being called to account in the court for their expression of opinion.[145]

His Lordship further emphasised that the issue was not whether the English common law principle in *Derbyshire* was applicable but more importantly whether there is "the right to discuss or criticise the government and public officials by the citizens in the exercise of their right under Article 10 Clause (1)(a) of the Federal Constitution." The court felt the right to be a fundamental right that has to be accorded "due recognition and protected as one which is guaranteed by the Federal Constitution."

Related to the element of "public interest", the third prong, His Lordship's sentiments were strongly worded – "…as public interest dictates, a democratically elected government and its official should be open to public criticism and that it is advantageous that every responsible citizen should not be in any way fettered in his statements where it concerns the affairs and administration of the government."[146]

The learned appellate tribunal held that political libel civil action in this case was not actionable by the respondent on the basis the reference to the respondent was made in his capacity as Chief Minister, an elected representative who was accountable to the people. The Court of Appeal directed us to the point that this was averred by the respondent's Statement of Claim where it was stated that he was suing in his capacity as Chief Minister. The court's conviction of its stand was supported by its sentiments that to allow such an action "will sadly result in political censorship of the most objectionable kind" and that the claim clearly fell within the perimeters of the *Derbyshire* principles making it "unsustainable".[147]

The appellate tribunal concluded with a statement that in its consideration of the central question on whether a political libel action is sustainable, it did not consider the truth or falsity of the article as it was beyond its consideration.[148] This can be interpreted to mean that the court had not ventured to consider the quality of journalism or in other words the standards of adopting the responsible journalism test in *Reynolds* and *Jameel*.[149]

VII. Drawing A Nexus between *Derbyshire*, *Utusan Melayu* and the Fourth Estate

Where the functioning of a democracy involves a recognised role of media or journalism as the Fourth Estate, discussed in depth *supra*, it is therefore vital for the law to recognise and protect this role. If media entities are not allowed to carry out this role, Malaysia

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[144] *Supra* n 1, at para 18.
[145] *Supra* n 1, para 19.
[146] *Supra* n 1, para 20.
[147] *Supra* n 1, para 36.
[148] *Supra* n 1, para 36.
[149] *Supra* n 108 and 109.

cannot be viewed as a functioning democracy. Essentially, the *Utusan Melayu* decision, by relying on *Derbyshire*, has introduced into Malaysian jurisprudence the recognition of this role. It has gone further by laying down the importance of both democratically elected individuals and institutions to be the subject of public criticism as they are accountable to the citizenry and the media plays an integral part in publishing news, critique or commentary of these individuals and institutions in its Fourth Estate role. The role is premised on the constitutionally protected freedom of speech and expression. Therefore, any action that serves to curtail this role through, for instance in the present case, a political libel suit, will be viewed as having an inhibiting effect on our freedoms. The *Utusan Melayu* decision has served to enhance democratic discourse of a socio-political nature through the medium and the message of the media.

VIII. Reflections of *Derbyshire* vis-à-vis *Utusan Melayu*

It is vital to reflect on *Derbyshire* with reference to three aspects – the first being the consideration by the court of the European Convention of Human Rights and the UK's HRA; the second, its consideration and review in the House of Lords' decision of *Reynolds* that followed at the heels of *Derbyshire*;[150] and finally, the exception laid down in *Derbyshire* as to when a prohibition against a libel civil action may not be applicable.

With reference to the HRA and the Convention, since the court's consideration of the matter was delivered prior to the coming into force of the HRA, reference to Article 10 of the Convention[151] was made as a basis of protecting freedom of expression albeit cursorily.[152] The court concluded on the point with reference to Lord Goff in *AG v Guardian Newspaper*,[153] stating that His Lordship "expressed the opinion that in the field of freedom of speech there was no difference in principle between English law on the subject and Article 10 of the convention."[154] Lord Keith added that the "common law of England is consistent" with the Convention.[155]

Hence, much of the basis of the jurisprudence that can be drawn from *Derbyshire* is premised on English common law principles. In respect of extending a vein from *Derbyshire* to the Malaysian context in respect of protecting speech that is in the public interest, the Court of Appeal in *Utusan Melayu* had an advantage of heavily resting its rationale on Article 10 of the Federal Constitution, the spirit of which is closely reflected in Article 10 of the Convention.

With reference to *Reynolds*, their Lordships' judgment is of vital importance to future consideration of how *Utusan Melayu* will be viewed. In a case involving the reputation of a politician and the rights of a newspaper to publish a story, the judgment has received much attention. Without being excessively extensive, three references are made to the judgment in *Reynolds*.

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150 *Supra* n 108.
151 *Supra* n 61.
152 *Supra* n 2, at p. 1020, para (e).
153 *Supra* n 80, at pp. 283-284.
154 *Supra* n 2, at p. 1020 (f).
155 *Supra* n 151, as per Lord Keith.

Firstly, Lord Bingham had to undertake a review of *Derbyshire*. In an argument submitted to the court with reference to the "chilling effect" ratio in *Derbyshire*, it was submitted that 'the publication of criticism of an individual politician will be chilled in exactly the same manner, and that therefore the corollary of the *Derbyshire* decision must be to accord a defence of qualified privilege in actions by individual politicians or public servants.'[156] Lord Bingham was not in agreement as His Lordship took a cautionary position that "the *Derbyshire* case leaves this question completely open, and we think it dangerous to speculate how their Lordships would have decided the present question had it fallen for decision."[157] The Malaysian court in *Utusan Melayu* was perhaps less cautionary, and more courageous, a view that is discussed *infra*.

Secondly, Lord Nicholls emphasised the importance of the two countervailing interests involved and the problem it presents to the court and the law. Lord Nicholls emphasised that the:

> …freedom to disseminate and receive information on political matters is essential to the proper functioning of the system of parliamentary democracy…To be justified, any curtailment of freedom of expression must be convincingly established by a compelling countervailing consideration, and the means employed must be proportionate to the end sought to be achieved.[158]

His Lordship highlighted the importance of upholding both the rights of the media and the protection of an individual's reputation and addressed the challenges of the balancing exercise that the court must undertake. In assisting this endeavour, His Lordship infamously proposes the 10 indicia-test.[159] In future cases post-*Utusan Melayu*, Malaysian courts when dealing with political libel suit involving the publication of potentially libellous information by the media may have to delve deeper into this test and its further refinement in *Jameel*.

Thirdly, the court perambulated through the jurisprudence of the European Court of Human Rights to clarify the position it is taking on the general duty of the media to inform the public of political matters and the public's right to be so informed.[160] The Malaysian courts may draw greater inspiration from the Strasbourg jurisprudence when making a stronger case for the Fourth Estate based on the Malaysian Article 10 of the Federal Constitution.

A final observation of *Reynolds* is its distinguishing aspect from *Derbyshire*. Whilst there was a degree of reliance in *Derbyshire* to invoke Article 10, however in *Reynolds* the court did not resort to Article 10 but felt that the common law rules needed to be adequately developed to deal with the defence of qualified privilege raised by the media

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156 *Supra* n 108, at p. 171.
157 *Supra* n 156, as per Lord Bingham.
158 *Supra* n 108, p. 200.
159 *Supra* n 108, at p. 205.
160 *Supra* n 108, at pp. 214-215, as per Lord Steyn; pp 203-204, as per Lord Nicholls.

when publishing materials it claims to be in the public interest but which may bring disrepute to an individual. Loveland in his article summarised the position in *Reynolds*:

Rather the court took the view, expanding the principle that it had embraced in *Derbyshire*, that common law rules now needed to reflect a pervasive societal awareness that citizens should be afforded access to critical news stories addressing the behaviour of government bodies and politicians.[161]

Finally, with reference to the non-applicability of the prohibition in *Derbyshire*, Lord Keith had laid down two exceptions to the prohibition, as set out *supra*.[162] The second exception may be more relevant in the context of *Utusan Melayu*'s decision where the exception provides that if the individual reputation of councillors is "wrongly impaired" by the publication then the individual may initiate proceedings for defamation."[163]

It appears at first glance to be a surrendering point suggesting that individual politicians will be allowed to bring actions in libel. However, upon closer reading, it does not open the floodgates. The individual will have to substantiate the action on the basis that the publication "wrongly impaired" the individual's reputation. This will take us deep into the realms of defamation law and its defences, which is outside the scope of this paper but may require consideration by the courts should the exception be invoked.

Turning to the reflection on *Utusan Melayu*, the Malaysian courts have further built on the prohibition laid down in *Derbyshire*. Where the English decision was dealing with the determination of whether a local government authority could sue in defamation, the Malaysian court was dealing with the determination of whether an elected representative could sue in defamation. The inspiration drawn from *Derbyshire* led the Malaysian court to draw an analogous parallel between the two cases whereby whether the defamation suit is brought by an elected body or an elected official, the ramifications of a political libel suit against the media will bear the same consequences as highlighted by Lord Keith in his judgment and by the Malaysian judgment. The outcome of the case in Malaysia pivots on the "combined effect of the interrelation between the constitutional guarantee of the fundamental right in Article 10 Clause (1)(a) of the Federal Constitution and the public interest considerations."[164] The strength of the position taken by the Court of Appeal rests on the bedrock of the Malaysian legal system, its constitutional guarantees.

IX. Concluding Thoughts

The role of the media as the Fourth Estate is not a new one. In a democratic State, the tools for check-and-balance have evolved beyond the traditional organs of State to involve the media, and today, this has evolved into the Fifth Estate, where citizens, with the utility of the Internet and its platforms, may be empowered to play the role of checking on government.

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161 Ian Loveland, "Freedom of political expression: who needs the Human Rights Act?" *Public Law*, 2001, p. 233.
162 *Supra* n 142.
163 *Supra* n 142.
164 *Supra* n 1, para [21].

When dealing with a legal system where the media has established rights, such as the US and the UK, the role of the media as the Fourth Estate is recognised albeit not free from legal challenges. In the case of Malaysia, it is rather challenging for the right of the media to act as the Fourth Estate to be built on any existing right or privilege that is accorded to the media - aside from the right to publish and distribute - there is little more in that regard. It is a case of filling the unfilled legal basin. A bottom-up approach needs to be taken in view of the insufficient development of jurisprudence related to media rights which are built on and derived from constitutional provisions namely freedom of speech and expression. Filling the unfilled legal basin must be constructed from building those rights for both established and recognised media entities as well as citizens.

There needs to be a stronger development of the freedom of speech jurisprudence as seen in the US and the UK in the context of the realities of an increasingly well informed citizenry. In a media model that is increasingly decentralised as a result of social media actors on the Internet playing the role of alternative news providers and conduits for democratic discourse, the government, Parliament and the courts need to re-engage with the social and political importance of the role discharged by the media both traditional and on the Internet. The courts' non-recognition of the importance of speech by media outlets is non-progressive to a citizenry that demands increased public speech and engagement.

Only when the constitutional principles of protection of free speech and expression are strengthened in Article 10(1) of the Federal Constitution through sound development of precedent by the apex court will the constitutionality of Acts of Parliament that erode that protection be called to challenge. A precursor to this is the recognition of the role of the media in a democratic State whereby a liberal and sophisticated media encourages or engages in socio-political dialogue, the exchange of ideas, opinions, recognising the importance of executing this role for the benefit of the citizenry and the society at large. Upon a strong constitutional foundation, a review should be initiated with consideration of some basic rights that ought to be accorded to the media such as, *inter alia*, the limitation of prior restraint, upholding the principle of open justice and the basis for the protection of confidentiality of sources. The *Utusan Melayu* decision is prefatory to the development of this type of progressive jurisprudence.