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**Political Blogs and Freedom of Expression:  
A Comparative Study of Malaysia and the  
United Kingdom**

**Nazli Ismail Nawang**

# Table of Contents

Table of Contents	i
Abstract	v
Declaration	vi
Acknowledgement	vii
Abbreviation	viii
1.1 Overview and Rationale of the Study	1
1.2 Research Objectives	4
1.3 Methodology and Sources	6
1.4 The Structure of Study	12
2.1 Introduction	15
2.2 Brief History of Blogs	17
2.3 Definition of Weblogs or Blogs	22
2.4 Nature and Importance of Blogs	27
2.5 Political Blogs & Democratisation in Malaysia	33
2.6 Conclusion	37
3.1 Introduction	39
3.2 Origin of Freedom of Expression	40
3.3 The Meaning of Freedom of Expression	45
3.4 The Scope of Freedom of Expression	53
3.5 Political Expression	55
3.6 Restrictions on Freedom of Expression	60
3.6.1 Permitted Grounds of Restrictions	62
3.7 Legality of Restrictive Laws on Freedom of Expression	66

3.7.1	<i>The Phrases ‘Necessary or Expedient’</i>	69
3.7.2	<i>Constitutional Interpretation</i>	71
3.7.3	<i>Reasonableness of Restrictions on Freedom of Expression</i>	78
3.7.4	<i>The Test of Reasonableness</i>	80
<b>3.8</b>	<b>Application of Freedom of Expression to Political Blogs</b>	<b>88</b>
<b>3.9</b>	<b>Conclusion</b>	<b>91</b>
<b>4.1</b>	<b>Introduction</b>	<b>93</b>
<b>4.2</b>	<b>The Position of Freedom of Expression in the United Kingdom</b>	<b>94</b>
4.2.1	<i>Pre the Human Rights Act 1998 (HRA)</i>	96
4.2.2	<i>Post HRA</i>	101
<b>4.3</b>	<b>The Meaning and Scope of Freedom of Expression</b>	<b>112</b>
<b>4.4</b>	<b>Political Expression</b>	<b>118</b>
<b>4.5</b>	<b>Restrictions on Freedom of Expression</b>	<b>120</b>
4.5.1	<i>Prescribed by Law</i>	122
4.5.2	<i>Legitimate Aim</i>	125
4.5.3	<i>Necessary in a Democratic Society</i>	125
<b>4.6</b>	<b>Application of Freedom of Expression to Political Blogs</b>	<b>129</b>
<b>4.7</b>	<b>Conclusion</b>	<b>140</b>
<b>5.1</b>	<b>Introduction</b>	<b>142</b>
<b>5.2</b>	<b>Overview of Statutory Controls of the Media in Malaysia</b>	<b>143</b>
<b>5.3</b>	<b>Print Industry</b>	<b>147</b>
5.3.1	<i>Historical Background of the Regulatory System of the Press</i>	147
5.3.2	<i>The Printing Presses and Publications Act 1984</i>	148
5.3.2.1	<i>The Licensing System of the Press</i>	148
5.3.2.2	<i>Content Regulation</i>	157
5.3.3	<i>Application of the Press Regulatory System to Political Blogs</i>	160
<b>5.4</b>	<b>Broadcasting Industry</b>	<b>161</b>
5.4.1	<i>Historical Background of the Broadcast Media in Malaysia</i>	161
5.4.2	<i>Legislative Framework of the Broadcast Media</i>	163

5.4.3	<i>The Communications and Multimedia Act 1998</i>	164
5.4.3.1	Malaysian Communications and Multimedia Commission	165
5.4.3.2	The Licensing System of the Broadcast Media	167
5.4.4	<i>Application of the Broadcast Regulatory System to Political Blogs</i>	170
<b>5.5</b>	<b>Internet Industry</b>	<b>172</b>
5.5.1	<i>Overview of the Internet Industry in Malaysia</i>	172
5.5.2	<i>The Internet Governance in Malaysia</i>	174
5.5.2.1	The Licensing of the Internet Service Providers (ISPs)	174
5.5.2.2	No Censorship of the Internet Policy	175
5.5.2.3	Regulation of the Online Content	178
5.5.3	<i>Application of the Internet Regulatory Regime to Political Blogs</i>	181
<b>5.6</b>	<b>Conclusion</b>	<b>184</b>
<b>6.1</b>	<b>Introduction</b>	<b>186</b>
<b>6.2</b>	<b>Print Industry</b>	<b>187</b>
6.2.1	<i>Overview of the Regulatory System of the Print Industry</i>	187
6.2.2	<i>Independent Press Standards Organisation (IPSO)</i>	189
6.2.2.1	IPSO's Remit	189
6.2.2.2	The Editor's Code of Practice (the Code)	190
6.2.2.3	IPSO's Sanctions	192
6.2.3	<i>Application of the Press Regulatory Regime to Blogs</i>	194
<b>6.3</b>	<b>Broadcasting Industry</b>	<b>195</b>
6.3.1	<i>Overview and Rationales for Strict Statutory Regulations</i>	195
6.3.2	<i>Regulatory System of the UK Broadcast Media</i>	197
6.3.2.1	The Office of Communications (Ofcom)	197
6.3.2.2	The British Broadcasting Corporation (BBC)	198
6.3.2.3	Licensing of the Broadcast Media	200
6.3.2.4	The Broadcasting Code	201
6.3.3	<i>Application of the Broadcasting Regulatory System to Blogs</i>	203
<b>6.4</b>	<b>On Demand Industry</b>	<b>204</b>
6.4.1	<i>Overview of Video on Demand (VOD) Services</i>	204

6.4.2 <i>Regulatory System of the VOD</i>	205
6.4.2.1 Self-regulation by the Old ATVOD	205
6.4.2.2 Co-regulation by the New ATVOD and Ofcom	206
6.4.3 <i>Application of the ODPS Co-regulatory System to Blogs</i>	208
<b>6.5 Internet Industry</b>	<b>212</b>
6.5.1 <i>Overview of the UK Internet Governance</i>	212
6.5.2 <i>Industrial and Legal Control of the Internet in the UK</i>	212
6.5.2.1 ISPs Liability & the E-Commerce Regulations 2002	212
6.5.2.2 Internet Watch Foundation (IWF)	218
6.5.2.3 Cleanfeed System	224
6.5.3 <i>Application of the Internet Regulatory Regime to Blogs</i>	227
<b>6.6 Conclusion</b>	<b>228</b>
<b>7.1 Introduction</b>	<b>231</b>
<b>7.2 Overview of Defamatory Statement</b>	<b>233</b>
<b>7.3 Libel or Slander</b>	<b>237</b>
<b>7.4 Multiple and Single Publication Rule</b>	<b>246</b>
<b>7.5 Online Intermediary Liability</b>	<b>250</b>
7.5.1 <i>Liability for Third Party Content</i>	250
7.5.2 <i>Liability for Linking</i>	258
<b>7.6 Defences</b>	<b>264</b>
7.6.1 <i>Truth &amp; Justification</i>	265
7.6.2 <i>Honest Opinion &amp; Fair Comment</i>	269
7.6.3 <i>Publication on Matter of Public Interest &amp; the Reynolds Defence</i>	277
7.6.4 <i>Defence to Operators of Websites</i>	285
7.6.5 <i>Innocent Dissemination</i>	287
7.6.6 <i>Electronic Commerce (EC Directive) Regulations 2002</i>	293
7.6.7 <i>Innocent Carrier</i>	301
<b>7.7 Conclusion</b>	<b>303</b>
<b>8.1 Conclusion</b>	<b>305</b>
<b>Bibliography</b>	<b>317</b>

## **Abstract**

The study is undertaken on the premise that the technological advancement of blogs has not only accorded a novel platform for communication, but has also democratised the right to exercise political expression in Malaysia. Blogs have on numerous occasions outpaced restrictive laws that were enacted to curtail the exercise of this fundamental right and have caused great challenges in applying the existing specific media laws to online content in the blogosphere. The main purpose of the study is to resolve the legal uncertainties faced by bloggers in disseminating political speech under the existing laws of the country and to analyse the legal position in the United Kingdom as a comparative model or reference to the issue. In so doing, the study examines the general principles and restrictive laws to freedom of expression and the application of these rules to political blogs, scrutinises the statutory rules and regulations that are currently being employed to govern the traditional media and the Internet as well as other relevant general legislation, in particular the law of defamation, that has been commonly employed to regulate blog entries and comments by readers in both countries. The study concludes that although offline and online content should not be treated differently and certain regulatory controls are undoubtedly necessary to prevent misuse of political blogs by unscrupulous persons, any legal measures to be adopted by the Malaysian government to govern political blogs should take into account the rapid development of various forms of Internet based communications and be proportionate in light of current needs and the local circumstances of the society.

## **Declaration**

I, Nazli Ismail Nawang, hereby declare that this thesis, which is approximately 99,955 words in length, has been composed by me, that it is a record of work carried out by me, and that no part of it has been submitted in any previous application for a higher degree.

Signature.

24<sup>th</sup> October 2013.



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## Abbreviation

AC	Law Reports Appeal Cases
AIR	All India Reporter
All ER	All England Law Reports
All ER (EC)	All England Law Reports European Cases
AMLECON	American Law & Economics Association Annual Meetings
Admin L Rev	Administrative Law Review
Am J Comp L	American Journal of Comparative Law
Annals Pb & Coop Econ	Annals of Public and Cooperative Economics
Asian J Polit Sci	Asian Journal of Political Science
Asian Yrbk Int L	Asian Yearbook of International Law
BCL Rev	Boston College Law Review
BLR	Business Law Review
BU J Sci & Tech L	Boston University Journal of Science & Technology Law
BU Pub Int LJ	Boston University Public Interest Law Journal
BILETA	British and Irish Law Education and Technology Association
Ch	Law Reports, Chancery Division (3 <sup>rd</sup> Series)
CLJ	Cambridge Law Journal

CLJ	Current Law Journal (Malaysia)
CLJ (Rep)	Current Law Journal (Reprint) [Malaysia]
CLSR	Computer Law & Security Report
CLS Rev	Computer Law & Security Review
CTLR	Computer and Telecommunications Law Review
CMLR	Common Market Law Reports
Cal W L Rev	California Western Law Review
Comms L	Communications Law
Comp Fr & Sec	Computer Fraud & Security
Comps & Law	Computers & Law
Colum JL & Soc Probs	Columbia Journal of Law and Social Problems
Cov LJ	Coventry Law Journal
Cult & Relig	Culture and Religion: An Interdisciplinary Journal
Dev Dialogue	Development Dialogue
E.D. Pa	Eastern District of Pennsylvania
ECHR	European Court of Human Rights
EHRR	European Human Rights Reports
EIPR	European Intellectual Property Review
EMLR	Entertainment and Media Law Reports
Ent LR	Entertainment Law Review

EWCA Civ	Court of Appeal (Civil Division) [Neutral Citation]
EWCA Crim	Court of Appeal (Criminal Division) [Neutral Citation]
EWHC (Admin)	England & Wales High Court (Administrative Court) [Neutral Citation]
EWHC (QB)	England & Wales High Court (Queen's Bench Division) [Neutral Citation]
Ethics & Info Tech	Ethics and Information Technology
F. Supp	Federal Supplement
Foreign Pol'y	Foreign Policy
Harv L Rev	Harvard Law Review
Hastings LJ	Hastings Law Journal
Howard LJ	Howard Law Journal
IACS	Inter-Asia Cultural Studies
ICLQ	International & Comparative Law Quarterly
IJEF	International Journal of Economics and Finance
IJPP	International Journal of Press/Politics
IRLCT	International Review of Law, Computers & Technology
IJL & IT	International Journal of Law And IT
Index Censorship	Index on Censorship
Info & Comm Tech Law	Information & Communications Technology Law

JCA	Journal of Contemporary Asia
JCL	Journal of Civil Liberties
JDTV	International Journal of Digital Television
JILT	Journal of Information, Law & Technology
JIS	Journal of Information Science
JISC	Joint Information Systems Committee
JITP	Journal of Information Technology & Politics
JMCL	Journal of Malaysian and Comparative Law
JML	Journal of Media Law
JOD	Journal of Democracy
Javnost-The Public	Journal of the European Institute for Communication and Culture
J Imp & Commonw Hist	Journal of Imperial and Commonwealth History
J Int'l Comm	Journal of International Communication
J Marshall J Computer & Info L	John Marshall Journal of Computer & Information Law
J Pol Mar	Journal of Political Marketing
Kasarinlan	Kasarinlan: Philippine Journal of Third World Studies
LNS	Legal Network Series
LQR	Law Quarterly Review
LS	Legal Studies
LS Gaz	Law Society Gazette

MCS	Media, Culture & Society
MLJ	Malayan Law Journal
MLJU	Malayan Law Journal Unreported
MLR	Modern Law Review
Malaya L Rev	Malaya Law Review
Masons CLR	Masons Computer Law Reports
Mich L Rev	Michigan Law Review
NLJ	New Law Journal
PC	Public Choice
PL	Public Law
Pac Aff	Pacific Affairs
Parliam Aff	Parliamentary Affairs
QB	Law Reports Queen's Bench
QBD	Law Reports Queen's Bench Division
QLR	Quinnipiac Law Review
Round Table	The Round Table: The Commonwealth Journal of International Affairs
SC	Session Cases, Scotland
SCC	Supreme Court Cases, India
SCL Rev	South Carolina Law Review
SCR	Supreme Court Reports, India
SLT	Scots Law Times
Santa Clara Computer & High Tech LJ	Santa Clara Computer and High Technology Law Journal

Sing J Int'l & Comp L	Singapore Journal of International & Comparative Law
Sing J Legal Stud	Singapore Journal of Legal Studies
Sing L Rev	Singapore Law Review
TWQ	Third World Quarterly
UKHL	United Kingdom House of Lords [Neutral Citation]
UKSC	United Kingdom Supreme Court [Neutral Citation]
Vand J Transnat'l L	Vanderbilt Journal of Transnational Law
WL	Westlaw Transcripts
WLR	Weekly Law Reports
Wm & Mary L Rev	William and Mary Law Review
Wash U L Rev	Washington University Law Review
Yale Hum Rts & Dev LJ	Yale Human Rights & Development Law Journal

## 1.1 Overview and Rationale of the Study

Malaysia is a democratic country with a written constitution that guarantees the fundamental rights of its citizens including freedom of speech and expression. The existence of the right is central to the democratic process in Malaysia as it enables the people to acquire a reasonable understanding of political issues and to make informed judgments in elections. Nonetheless, the exercise of the right has been severely constrained by a long list of restrictive laws passed by the Parliament. To intensify the issue, the traditional print and broadcast media have been strictly controlled by the government via the imposition of prior restraints in the form of licences and permits, and the adoption of ownership mechanisms.<sup>1</sup> As a result, news and information disseminated by the mainstream media are often biased and partial towards the ruling party. This has indirectly affected the democratic status of the country and as a result, various labels have been given including ‘democratic state’ but also an ‘electoral autocracy’,<sup>2</sup> ‘semi-democracy’<sup>3</sup> and ‘flawed democracy’.<sup>4</sup>

The evolution of the World Wide Web (the Web),<sup>5</sup> from its first form Web 1.0 (the read only web) into the new version of Web 2.0 (the read – write web),<sup>6</sup> appears to offer a novel platform for freedom of

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<sup>1</sup> Wang Lay Kim, ‘Malaysia: Ownership as Control’ (1998) 2 Dev Dialogue 61, 65 – 74.

<sup>2</sup> Larry Diamond, ‘Thinking about Hybrid Regimes’ (2002) 13(2) JOD 21, 33.

<sup>3</sup> William Case, ‘Semi-Democracy in Malaysia: Pressures and Prospects for Change’ (1993) 66(2) Pac Aff 183, 183.

<sup>4</sup> Economist Intelligence Unit, ‘The Democracy Index 2012: Democracy at a Standstill’, 2012 at <[www.eiu.com/Handlers/WhitepaperHandler.ashx?fi=Democracy-Index-2012.pdf&mode=wp&campaignid=DemocracyIndex12](http://www.eiu.com/Handlers/WhitepaperHandler.ashx?fi=Democracy-Index-2012.pdf&mode=wp&campaignid=DemocracyIndex12)> [accessed 7 May 2013].

<sup>5</sup> The Web is to be distinguished from the Internet. See Przemysław Paul Polański, *Customary Law of the Internet: In the Search for a Supranational Cyberspace Law* (T.M.C. Asser Press 2007) 17.

<sup>6</sup> The term ‘Web 2.0’ was initially coined by Darcy DiNucci in 1999 but it was closely associated with O’Reilly Media Inc and was popularly used by Dale Dougherty in 2004. See Paul Anderson, ‘What is Web 2.0? Ideas, Technologies and



A Comparative Study of Malaysia and the United Kingdom expression. The development of Web 2.0 has enabled Internet users not only to read critical views of the government, but also to contribute and provide information<sup>7</sup> through various applications that are largely based on user-generated content (UGC)<sup>8</sup> like blogs, wikis, social networking sites and other user generated media sites.<sup>9</sup> Out of these platforms, it was argued that blogs with a political slant or political blogs have not only revitalised the people's right to exercise freedom of expression, but they have also reshaped and redefined the landscape of the media in Malaysia.<sup>10</sup>

Political blogs in Malaysia were reported to have garnered the highest interest and attention of the blogosphere among seven Asian countries.<sup>11</sup> This is arguably due to the widespread perception that Internet based publications are free of government controls.<sup>12</sup> Consequently, political blogs have been resorted to publish and express personal opinions and dissenting views against the government's policies and decisions.<sup>13</sup> Political blogs also play a significant role as 'watchdog to watchdog' (mainstream media)<sup>14</sup> or

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Implications for Education', 2007, JISC  
<<http://www.jisc.ac.uk/media/documents/techwatch/tsw0701b.pdf>> [accessed 14 February 2011].

<sup>7</sup> Peggy Valcke and Marieke Lenaerts, 'Who's Author, Editor and Publisher in User-generated Content? Applying Traditional Media Concepts to UGC - Providers' (2010) 24(1) IRLCT, 120.

<sup>8</sup> There is no specific definition of UGC but it is generally understood to cover all content that is put online by users, regardless of whether it is created by them or not.

<sup>9</sup> P. A. Bernal, 'Web 2.5: The Symbiotic Web' (2010) 24 (1) IRLCT 25, 26 – 28.

<sup>10</sup> Tang Hang Wu, 'Let a Hundred Flowers Bloom: A Malaysian Case Study on Blogging towards a Democratic Culture' (presented at the 20th BILETA Conference BILETA 23 June 2005).

<sup>11</sup> PR Newswire, 'Blogging Phenomenon Sweeps Asia' 28 November 2006) <<http://prnwire.com/cgi-bin/stories.pl?ACCT=104&STORY=/www/story/11-28-2006/0004480819&EDATE=>> [accessed 2 August 2010].

<sup>12</sup> Stuart Biegel, *Beyond Our Control? Confronting the Limits of Our Legal System in the Age of Cyberspace* (MIT Press 2001) 53.

<sup>13</sup> Brian Ulicny, 'Modeling Malaysian Public Opinion by Mining the Malaysian Blogosphere' in Huan Liu and others (eds), *Social Computing, Behavioral Modeling, and Prediction* (Springer US 2008) 211.

<sup>14</sup> Laura McKenna and Antoinette Pole, 'What Do Bloggers Do: An Average Day on an Average Political Blog' (2008) 134(1) PC 97, 102.

A Comparative Study of Malaysia and the United Kingdom the 'fifth estate'<sup>15</sup> to the traditional media by providing information from many sources, revealing media bias and influencing opinion on a wide scale vision called 'participatory media'.<sup>16</sup> Sometimes, they disseminate first-hand reports and details that the mainstream media ignore or have too little preference or time to investigate.<sup>17</sup> Thus, they posed serious challenges to the traditional media and have resulted in the public being less dependent on the latter. Their most celebrated impact in Malaysia can be best illustrated with the outcome of the country's 12<sup>th</sup> general election.<sup>18</sup> It was the first time in history that the ruling coalition (the National Front) suffered heavy losses and failed to secure a two-thirds majority of the seats in Parliament.<sup>19</sup> It has been claimed by some analysts that political blogs are the driving force for the success of the opposition parties (People's Alliance) as they appeared to have accorded 'greater' opportunity to the people to exercise freedom of speech and expression in the electronic environment.<sup>20</sup>

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<sup>15</sup> The four estates consist of the political nobility (government), the knowledge clergy (academia and research institutes), the popular citizenry and the press. See M. Cornfield, J. Carson, and A. Kalis, 'Buzz, Blogs and Beyond: the Internet and the National Discourse in the Fall of 2004' (Pew Internet & American Life Project and BuzzMetrics 2005) 16.

<sup>16</sup> Rebecca Blood, 'Hammer, Nail: How Blogging Software Reshaped the Online Community', December 2004 <[http://www.rebeccablood.net/essays/blog\\_software.html](http://www.rebeccablood.net/essays/blog_software.html)> [accessed 14 March 2010].

<sup>17</sup> Eric Barendt, 'Bad News for Bloggers' (2009) 1(2) JML 141, 145

<sup>18</sup> The country's 12<sup>th</sup> general election was held on 8 March 2008.

<sup>19</sup> Rachel Gong, 'Internet Politics and State Media Control: Candidate Weblogs in Malaysia', in *SSRN eLibrary* (presented at the 4th Communication Policy Research: South Conference, Negombo, Sri Lanka: SSRN, 2009), pp. 3 - 4 ..

<sup>20</sup> Susan Leong, 'The Hindraf Saga: Media and Citizenship in Malaysia' (Australia and New Zealand Communication Association Conference 2009, Brisbane, July 2009) <[http://www.academia.edu/192821/The\\_Hindraf\\_Saga\\_Media\\_and\\_Citizenship\\_in\\_Malaysia](http://www.academia.edu/192821/The_Hindraf_Saga_Media_and_Citizenship_in_Malaysia)> [accessed 12 September 2010].

Nonetheless, political blogs or other web-based publications have neither been left unregulated nor treated as a legal vacuum.<sup>21</sup> Bloggers and their readers have never been accorded absolute or uninhibited freedom in the blogosphere, and they are expected to be bound by the same rules and regulations as the mainstream media and the general public.<sup>22</sup> Preventive efforts and legal actions, including the blocking of access to certain blogs<sup>23</sup> and the filing of defamation suits against bloggers,<sup>24</sup> have been employed by the authority to curb unwelcome critiques of the government's programmes and policies.<sup>25</sup> Unfortunately, political blogs managed to evade most of these autocratic measures. This posed a great challenge to the existing laws and resulted in uncertainties as to the legal position of bloggers in expressing political speech in the online world.

## 1.2 Research Objectives

Prior to the development of blogs and other online publications, ordinary citizens in Malaysia in general had difficulties to advance or publish their views and thoughts to the public. Political blogs then appear to offer a novel platform for communication and seem to have democratised freedom of expression as they have enabled the people to directly share and publish their opinions and ideas to the outside world without the need to pass any traditional media outlets. Nonetheless, uncertainty arises as to whether political blogs are bound

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<sup>21</sup> Section 3.5 of the Malaysian Content Code explicitly provides that 'The online environment is not a legal vacuum. In general, if something is illegal off-line, it will also be illegal on-line'. See also Sonia Ramachandran, 'Cyber Crimes: The Net is Not in a Legal Vacuum' *New Sunday Times* (Kuala Lumpur, 31 August 2008).

<sup>22</sup> Anis Ibrahim, 'Bloggers Subject to Same Rules' *New Straits Times* (25 January 2007).

<sup>23</sup> Nurbaiti Hamdan and Cheok Li Peng, 'ISPs Ordered to Cut Access to Malaysia Today Website' *The Star* (28 August 2008).

<sup>24</sup> Ahiruddin Attan, 'Bloggers Sued in Malaysia', 18 January 2007 <<http://rockybru.com.my/2007/01/injunction.html>> [accessed 14 March 2010].

<sup>25</sup> Sabrina Mohamed Hashim, 'Blogging - Are You Exposing Yourself to Legal Liabilities?' (2007) 2 CLJ i, 1 - 4.

by existing rules and regulations that predated their existence. Further, the no censorship promise on the Internet by the government seems to suggest that the new media are beyond legal rules and controls. Thus, the main objective of the study is to analyse and possibly suggest potential solutions to the uncertainties faced by bloggers in expressing political expression under the existing laws. An in-depth analysis of all types of Internet communications such as social networking services, online news portals, twitter and many others is not possible within the limited period of the PhD programme and I have therefore focussed on this key issue of political communication and blogs. Further, the use of political blogs has been admitted to have had a great impact on the liberalisation of freedom of speech and democracy in Malaysia.<sup>26</sup>

In order to fully comprehend this critical predicament, the research will:

1. Highlight the importance and role played by political blogs in democratising the media freedom in Malaysia;
2. Examine the general principles relating to and restrictions on the exercise of the right to freedom of expression, as well as the special position of political speech (if any) in Malaysia and the UK;
3. Analyse specific media laws and regulations that could potentially be extended and applied to political blogs in Malaysia and the UK;

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<sup>26</sup> Koh Lay Chin, 'Was This Election Made on the Internet?' *New Straits Times* (Kuala Lumpur, 12 March 2008), 25; 'Internet Served a Painful Lesson' *New Straits Times* (Kuala Lumpur, 26 March 2008), 2.

4. Scrutinise the efficacy of general laws, in particular the law of defamation which has been widely used to restrict political blogs; and
5. Recommend potential solutions to the uncertainties faced by authors of political blogs or other user-generated content media in Malaysia.

### 1.3 Methodology and Sources

The study is largely based on doctrinal research as it is primarily concerned with the review of the existing rules and regulations that are likely to be applicable to political blogs in Malaysia and the UK, and the formulation of possible solutions to address the uncertainties posed by political blogs. As such, the study will conduct critical analyses of the primary sources of law that are to be found in statutes and cases, as well as the secondary sources including text books, scholarly articles from refereed journals and seminar papers presented at relevant conferences. Further, reference will also be made to newspaper articles, periodicals and information gathered from reliable websites that reflect the latest development on the subject matter.

The study has also adopted a comparative analysis with the position in the UK. This method is preferred because it can be a useful tool in exploring a range of alternative approaches that can be used as a basis for law reform in the country.<sup>27</sup> Moreover, a comparative analysis can help to avoid ‘mistakes’ as the experience and approaches in other jurisdictions can be useful in determining how best to protect freedom of expression in the online environment.<sup>28</sup> It is thus submitted that a

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<sup>27</sup> O. Kahn-Freund, ‘On Uses and Misuses of Comparative Law’ (1974) 37(1) MLR 1, 1 – 2.

<sup>28</sup> Morris Manning, *Rights, Freedoms and the Courts: A Practical Analysis of the Constitution Act, 1982* (Emond-Montgomery 1983) 12.

A Comparative Study of Malaysia and the United Kingdom

comparative method is appropriate as it allows knowledge of other legal systems to be built up and then used to inform development of the law.<sup>29</sup> In particular, it should facilitate the development of principles consistent with recognised international standards. It is submitted that for a comparative study, the author needs to ‘first lay out the essentials of the relevant foreign law and then uses this material as a basis for critical comparison, ending up with a conclusion about the proper policy for the law to adopt, which may involve a reinterpretation of his own system’.<sup>30</sup>

A comparative analysis will be made with the position in the UK, since Malaysia is a Commonwealth nation whose laws are based to a large extent on English legislation and precedent.<sup>31</sup> Further, the English common law also has a special position in the country’s legal system. By virtue of Article 160(2) of the Malaysian Federal Constitution, the word ‘law’ is defined to include ‘written law, the common law in so far as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law in the Federation or any part thereof’. Thus, the English common law has been regarded as one of Malaysia’s unwritten sources.<sup>32</sup>

Apart from that, the reception and application of the English law has been clearly enunciated in the Civil Law Act 1956. Section 3(1) states that:

Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the Court shall –

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<sup>29</sup> Rodolfo Sacco, ‘Legal Formants: A Dynamic Approach to Comparative Law’ (1991) 39 Am J Comp L 1, 5.

<sup>30</sup> Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law* (2nd rev. ed. Clarendon Press 1987) 6

<sup>31</sup> Cirami Drahaman, ‘Computers and Internet’ (2006) 27 BLR 2, 11.

<sup>32</sup> Tan Sri Ahmad Ibrahim and Ahilemah Joned, *The Malaysian Legal System* (2nd ed. Dewan Bahasa dan Pustaka 1995) 12 – 15; Min Aun Wu, *The Malaysian Legal System* (2nd ed. Longman 2004) 20 – 21.

A Comparative Study of Malaysia and the United Kingdom

(a) in West Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on the 7th day of April 1956;

(b) in Sabah, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on the 1st day of December 1951;

(c) in Sarawak, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on the 12th day of December 1949, subject however to subsection (3)(ii):

Provided always that the said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary.

The significance of the provision is that the English law as of the aforesaid cut-off dates shall continue to apply in the country provided that local circumstances permit and no overriding provisions have been made by any statutes. With regard to the application of the English law after the cut-off dates, it is within the discretionary power of the courts on the basis of persuasive authority. Comparison with subsequent English law will clearly be of interest with the coming into operation of the Human Rights Act 1998 and recent cases on blogs and other Internet-based communications.

With regard to the application of international law in Malaysia, historically prior to the country's independence in 1957, local courts had adopted a similar approach to that practised by the UK; namely the doctrine of transformation for treaties and the doctrine of incorporation with certain limitations for customary international law.<sup>33</sup> The situation changed after the independence as the operation of any law (municipal or international) will be subjected to the express

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<sup>33</sup> Abdul Ghafur Hamid, 'Judicial Application of International Law in Malaysia: A Critical Analysis' (2005) 1 *Asian Yrbk Int L* 196, 197.

A Comparative Study of Malaysia and the United Kingdom provisions of the Malaysian Federal Constitution. Unfortunately, there are no specific provisions in the constitution on the operation of international law into the country. Hence, reference must be made to general provisions and decided cases that may lend some assistance on this matter.

Article 39 of the Malaysian Federal Constitution provides that ‘The executive authority of the Federation shall be vested in the *Yang di-Pertuan Agong*<sup>34</sup> and exercisable ... by him or by the Cabinet or any Minister authorized by the Cabinet’. Further, Article 80(1) states that ‘the executive authority of the Federation extends to all matters with respect to which Parliament may make laws’. The power of the Parliament to enact laws is stated in Article 74(1) whereby it explicitly provides that ‘Parliament may make laws with respect to any of the matters enumerated in the Federal List<sup>35</sup> or the Concurrent List’.<sup>36</sup> The Federal List among others covers ‘external affairs, including (a) treaties, agreements and conventions with other countries and all matters which bring the Federation into relations with other countries; (b) implementation of treaties, agreements and conventions with other countries’. Thus, the aforesaid provisions prove that the Executive or the Cabinet is vested with the exclusive power to enter into treaties, agreement and conventions with other countries whilst the Parliament is empowered to enact municipal laws in order to implement the treaties, agreements and conventions so that they can be enforced in the domestic courts.

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<sup>34</sup> The *Yang di-Pertuan Agong* can be literally interpreted as the King and His Majesty is to be appointed among the Royal Rulers or Head of each state in the country. Article 32 of the Malaysian Federal Constitution stipulates that the *Yang di-Pertuan Agong* shall be considered as the supreme head of Malaysia.

<sup>35</sup> Article 160(2) of the Malaysian Federal Constitution defines Federal List as to mean the First List of the Ninth Schedule.

<sup>36</sup> Article 160(2) of the Malaysian Federal Constitution refers Concurrent List as the Third List of the Ninth Schedule.



The position is further reiterated by the judgment of Thomson CJ in *The Government of the State of Kelantan v The Government of the Federation Malaya and Tunku Abdul Rahman Putra Al-Haj*.<sup>37</sup> In this case, Kelantan (one of the states in the Federation of Malaya) commenced proceedings against the Federal Government and Tunku Abdul Rahman (the first Prime Minister). It was argued that the Malaysia Agreement, an international treaty which was signed on 9<sup>th</sup> July 1965 by the Federation of Malaya, the UK, Singapore, Sarawak and North Borneo (now known as Sabah) was null and void on the ground that the consent of individual states in the Federation of Malaya had not been obtained prior to the conclusion of the agreement. It was held that by virtue of Articles 39 and 80(1) of the Malaysian Federal Constitution, the Malaysia Agreement was not a nullity as the power to conclude the agreement was lawfully exercised by the body that was conferred express authority by all of the states in the Federation. It was observed by Thomson CJ that:

The Malaysia Agreement is signed ‘for the Federation of Malaya’ by the Prime Minister, the Deputy Prime Minister and four other members of the Cabinet. There is nothing whatsoever in the Constitution requiring consultation with any State Government or the Ruler of any State.<sup>38</sup>

The decision espoused an important principle that the treaty-making capacity is exclusively entrusted by the Malaysian Federal Constitution to the Executive or the Cabinet.<sup>39</sup> Nonetheless, for the treaties to be implemented domestically, Parliament must pass necessary laws to give effect to these treaties. A good illustration would be the Malaysia Act 1963 that was passed by the Parliament subsequent to the signing of the Malaysia Agreement. However, there are treaties that can be implemented without the necessity of enacting

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<sup>37</sup> [1963] 1 MLJ 355.

<sup>38</sup> *ibid* 359.

<sup>39</sup> Abdul Ghafur Hamid, ‘Treaty-Making Power in Federal States with Special Reference to the Malaysian Position’ (2003) 30 JMCL 65, 80 – 82.

A Comparative Study of Malaysia and the United Kingdom  
any legislation<sup>40</sup> such as the Treaty of Friendship between the Federation of Malaysia and the Republic of Indonesia that was signed on 10 April 1959 and has resulted in several cultural exchanges being implemented between the neighbouring countries without specific legislation.<sup>41</sup>

Pertaining to international treaties on human rights, currently Malaysia has only ratified two conventions namely the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child (CRC).<sup>42</sup> Both of these treaties were acceded to in 1995 with certain reservations on the basis of religious and national or cultural relativism.<sup>43</sup> The country has also signed, but not ratified,<sup>44</sup> the Convention on the Rights of Persons with Disabilities (CRPD).<sup>45</sup> Unfortunately, Malaysia still has not signed the International Covenant on Civil and Political Rights (ICCPR) that safeguards fundamental human rights including the right to freedom of expression. The government has been urged by the Human Rights Commission of Malaysia (SUHAKAM)<sup>46</sup> to ratify certain core treaties including the ICCPR, but so far the situation remains the same. It is submitted that perhaps special protection accorded to the

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<sup>40</sup> Heliliah Haji Yusof, 'Internal Application of International Law in Malaysia and Singapore' (1969) 1 Sing L Rev 62, 65.

<sup>41</sup> *ibid.*

<sup>42</sup> CRC was acceded on 17<sup>th</sup> February 1995 whilst CEDAW was on 5<sup>th</sup> July 1995. See Malaysia's status at <<http://www.unhchr.ch/tbs/doc.nsf/Statusfrset?OpenFrameSet>> [accessed 16 March 2010].

<sup>43</sup> Jaclyn Ling-Chien Neo, 'Malaysia's First Report to the CEDAW Committee: A Landmark Event for Women's Rights in Malaysia' (2007) 13 Asian Yrbk Int L 303.

<sup>44</sup> CRPD was signed on 8<sup>th</sup> April 2008.

<sup>45</sup> Elizabeth Looi and Shanon Shah, 'Human Rights: What's Stopping Malaysia?', 10 December 2008 < <http://www.thenutgraph.com/print/1226>> [accessed 17 March 2010].

<sup>46</sup> SUHAKAM is the only independent national human rights institution in Malaysia which was established by the Malaysian government under the Human Rights Commission of Malaysia Act 1999. For details see <<http://www.suhakam.org.my>> [accessed 23 March 2010].

Political Blogs and Freedom of Expression:  
A Comparative Study of Malaysia and the United Kingdom  
*Bumiputera*<sup>47</sup> as well as the persistent use of several legislative provisions which contravene fundamental liberties are among the key factors for such resistance.<sup>48</sup>

## 1.4 The Structure of Study

The study is organised into eight chapters as follows:

### Chapter 1 – The Framework of Study

The chapter offers a general background to the thesis, its research objectives, methodology and sources of the study.

### Chapter 2 – Overview of Blogs

This chapter provides a brief history of blogs, analysis of various interpretations of the word ‘blogs’, their nature and the important role played by political blogs in democratising freedom of speech and expression in Malaysia.

### Chapter 3 – Freedom of Expression in Malaysia

This chapter analyses the right to freedom of expression under the Malaysian Federal Constitution, statutory limitations on such a right, the legality of the restrictive laws that have been passed by the Parliament and the possibility of applying the principles to political blogs in the country.

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<sup>47</sup> The word ‘*Bumiputera*’ means the son of the soil and it refers to the Malays and natives of Sabah and Sarawak.

<sup>48</sup> Looi and Shah, ‘Human Rights: What’s Stopping Malaysia?’ (n 45).

Political Blogs and Freedom of Expression:  
A Comparative Study of Malaysia and the United Kingdom

Chapter 4 – Freedom of Expression in the UK

This part of the study examines the right to freedom of expression in the UK under the common law and the Human Rights Act 1998, the status of political speech in the offline and online environment, permitted restrictions to the right and the potential application of these principles to political blogs.

Chapter 5 – Specific Regulation of the Media in Malaysia

This chapter examines in detail the statutory rules and regulations that are currently being used to govern the traditional print and broadcast media as well as the Internet industry in Malaysia, and to evaluate the possibility of applying any of these legal regimes to the blogosphere.

Chapter 6 – Specific Regulation of the Media in the UK

This chapter analyses specific media laws and the regulatory bodies which govern the traditional print and broadcast media as well as the new on-demand and the Internet industries in the UK, and to evaluate the possibility of applying these legal regimes to political blogs.

Chapter 7 – Blogs and Online Defamation in Malaysia and the UK

The chapter discusses a brief overview of defamatory statement and the status of defamatory posts by bloggers and comments by readers, the application of single publication rule to Internet publication under the Defamation Act 2013, liability of blogs for third party content and hyperlinks, and available defences in Malaysia and the UK.

Chapter 8 – Conclusion

The chapter concludes the issues that have been discussed in the previous chapters.

## 2.1 Introduction

The Internet has had an enormous impact on our daily lives. It has empowered any persons to share and publish their views or thoughts, either one-to-one, one-to-many or many-to-many, without restrictions or limitations. This is in stark contrast with the traditional print and broadcasting media that are only one-to-many media. For that reason, it has been claimed that the Internet has completed the transformation of communication by enabling the emergence of various types of online channels such as e-mail, instant messaging, chat group, newsgroup, blog, forum, wiki, social networking site and many others.<sup>1</sup> Out of these platforms, blogs have been regarded as a global phenomenon that brings about a ‘blogging revolution’<sup>2</sup> and is currently changing journalism, politics, business, academia and other aspects of everyday life.<sup>3</sup>

Since the first website which coined the word ‘weblog’ went online more than twelve years ago,<sup>4</sup> blogs have surpassed other types of Internet communications previously used by the digital communities including bulletin board system (BBS), Usenet and e-mail listings.<sup>5</sup> Blogs continue to have a steady increase in numbers and influence though they faced strong competition from social networking sites like Facebook and Twitter. By the end of 2011, NM Incite (a

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<sup>1</sup> Dan Gillmor, *We the Media: Grassroots Journalism by the People, for the People* (O’Reilly 2006) 13.

<sup>2</sup> Andrew Sullivan, ‘The Blogging Revolution. Weblogs Are to Words What Napster was to Music’ (*WIRED*, May 2002) <<http://www.wired.com/wired/archive/10.05/mustread.html?pg=2>> [accessed 13 February 2010].

<sup>3</sup> Anthony Ciolli, ‘Bloggers as Public Figures’ (2006) 16 BU Pub Int LJ 255, 255.

<sup>4</sup> Jenna Wortham, ‘After 10 Years of Blogs, the Future’s Brighter Than Ever’ (*WIRED*, 17 December 2007) <[http://www.wired.com/entertainment/theweb/news/2007/12/blog\\_anniversary](http://www.wired.com/entertainment/theweb/news/2007/12/blog_anniversary)> [accessed 13 February 2010].

<sup>5</sup> Sunny Woan, ‘The Blogosphere: Past, Present, and Future - Preserving the Unfettered Development of Alternative Journalism, The’ (2007) 44 Cal W L Rev 477, 481.

Nielsen/McKinsey company) tracked 173 million blogs around the world,<sup>6</sup> up from 133 million in August 2009 as per reported by Econsultancy,<sup>7</sup> which quoted a statistic from Technorati.<sup>8</sup> The growing number of blogs proves the earlier perception that the rise of Facebook and Twitter will bring the demise of blogs was unjustifiable. Indeed, social media networking platforms have saved blogging from extinction or stagnation as it was shown that bloggers used them to promote their blogs.<sup>9</sup>

Blogs have been praised by the mainstream media analysts for providing a new channel for online self-expression.<sup>10</sup> They are primarily used by hobbyists as a source to speak their mind and share experience and expertise with others.<sup>11</sup> On the contrary, corporate and entrepreneur bloggers use blogs to attract new clients to their businesses, whilst professional bloggers earn income from blogging.<sup>12</sup> As to the blogosphere's composition, it was observed that majority of bloggers are young (25 – 44 years old), well educated with a minimum of either college or graduate degrees and more affluent than

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<sup>6</sup> NM Incite, 'State of the Media: U.S. Digital Consumer Report' (NM Incite 2011) 10.

<sup>7</sup> Jake Hird, '20+ More Mind-Blowing Social Media Statistics' (Econsultancy 17 August 2009) <<http://econsultancy.com/blog/4402-20+-more-mind-blowing-social-media-statistics>> [accessed 3 November 2009].

<sup>8</sup> Technorati is the leading blog search engine and directory. For details, see <<http://technorati.com>> [accessed 6 June 2013].

<sup>9</sup> Technorati 'State of the Blogosphere 2011 – Social Media' (4 November 2011) <<http://technorati.com/social-media/article/state-of-the-blogosphere-2011-part2/page-2/#social>> [accessed 5 June 2013].

<sup>10</sup> Bob Tedeschi, 'E-Commerce Report; Internet Experts Wonder If Weblog Technology Is a Powerful New Media Species, or Just Another Fad.' *The New York Times* (25 February 2002) <<http://www.nytimes.com/2002/02/25/business/e-commerce-report-internet-experts-wonder-if-weblog-technology-powerful-new.html>> [accessed 13 February 2010].

<sup>11</sup> Technorati 'State of the Blogosphere 2011 – Introduction and Methodology' (4 November 2011) <<http://technorati.com/social-media/article/state-of-the-blogosphere-2011-introduction>> [accessed 5 June 2013].

<sup>12</sup> *ibid.*

the general population.<sup>13</sup> Further, it was found that bloggers are more likely to have broadband access and to be urban dwellers.<sup>14</sup> Thus, blogs have a great ability to shape the judgment and opinion of the people especially the young generation and the educated group as well as those who live in the urban area. As such, this chapter examines brief history of blogs, analyses various interpretation of the term ‘blog’, explains the nature and importance of blogs and highlights the important role played by political blogs in Malaysia.

## 2.2 Brief History of Blogs

The origin of blogs can be traced back to the year 1989 when an English physicist at *Conseil Européen pour la Recherche Nucléaire* (CERN)<sup>15</sup> in Switzerland, Tim-Berners Lee wrote a proposal for information management showing how information could be transferred easily over the Internet by using hypertext.<sup>16</sup> Later, Tim-Berners Lee together with Robert Cailliau, a Belgian computer scientist, developed a Hypertext project called the World Wide Web (the Web) and built the very first website at the address of <http://info.cern.ch> in 1990.<sup>17</sup> At this point, it is worthwhile to highlight that the Internet and the Web are two different things although these terms are frequently being used interchangeably. The Internet refers to a network of networks whilst the Web is an abstract space of

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<sup>13</sup> Technorati ‘State of the Blogosphere 2011 – Who Are the Bloggers?’ (4 November 2011) <<http://technorati.com/social-media/article/state-of-the-blogosphere-2011-part1>> [accessed 5 June 2013].

<sup>14</sup> David C Wyld, ‘The Blogging Revolution: Government in the Age of Web 2.0’ <<http://www.businessofgovernment.org/pdfs/WyldReportBlog.pdf>> [accessed 26 August 2009].

<sup>15</sup> CERN originally refers to European Council for Nuclear Research, but it was later changed to European Organization for Nuclear Research.

<sup>16</sup> Tim Berners-Lee, ‘Information Management: A Proposal’ (CERN March 1989, May 1990) <<http://www.w3.org/History/1989/proposal.html>> [accessed 4 November 2009].

<sup>17</sup> Tim Berners-Lee and Robert Cailliau, ‘WorldWideWeb: Proposal for a HyperText Project’ (WorldWideWeb 12 November 1990) <<http://www.w3.org/Proposal.html>> [accessed 4 November 2009].



Political Blogs and Freedom of Expression:  
A Comparative Study of Malaysia and the United Kingdom  
information that would link together the vast collection of resources  
and information scattered all over the Internet.<sup>18</sup>

At the early stage, only a handful of pioneering programmers made use of the Web.<sup>19</sup> Later, Marc Andersen and a few students at the National Centre for Supercomputing Applications, University of Illinois wrote Mosaic (Netscape Navigator), a graphical browser that let users browse web pages containing both text and images.<sup>20</sup> The creation of the Web (previously named as 'Mesh') coupled with the invention of the Mosaic has greatly facilitated the transformation of the Internet from a world of largely text-based, hard to find resources to an inviting multimedia tapestry of full-colour information.<sup>21</sup> Over the years, the Web has evolved from a non-interactive web (Web 1.0) that merely displays static content into Web 2.0, a truly participatory medium that allows users to interact with each other. Web 2.0 (known as user generated media) enables users to easily create web content by simply typing words and clicking without having to know anything about computer programming.<sup>22</sup>

The evolution of the Web and the explosion of its popularity in the 1990s<sup>23</sup> have facilitated Internet users to express their opinion via personal websites. This is possibly the starting point of blogs, when

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<sup>18</sup> Richard T. Griffiths, 'From ARPANET to the World Wide Web' (Leiden University 11 October 2002) <<http://www.let.leidenuniv.nl/history/ivh/chap2.htm>> [accessed 2 November 2009].

<sup>19</sup> Scott Rosenberg, *Say Everything: How Blogging Began, What It's Becoming, and Why It Matters* (Crown 2009) 10.

<sup>20</sup> *ibid.*

<sup>21</sup> Ohio University Multimedia Group, 'A Brief History of the Internet' (Ohio University Multimedia Group 1997) <<http://oak.cats.ohiou.edu/~tk347090/history.html>> [accessed 4 November 2009].

<sup>22</sup> Further details on Web 2.0, see Nick Holmes and Delia Venables, 'Law 2.0 Is Not Just a Name' (2007) 1 LS Gaz; Paul Anderson, 'What Is Web 2.0? Ideas, Technologies and Implications for Education' (2007) <[www.jisc.ac.uk/media/documents/techwatch/tsw0701b.pdf](http://www.jisc.ac.uk/media/documents/techwatch/tsw0701b.pdf)> [accessed 20 January 2011].

<sup>23</sup> Przemysław Paul Polański, *Customary Law of the Internet: In the Search for a Supranational Cyberspace Law* (TMC Asser Press 2007) 17.

A Comparative Study of Malaysia and the United Kingdom

Justin Hall, a student at Swarthmore College, created Links.net<sup>24</sup> and started to record chronicles of his life on his personal homepage from January 1994.<sup>25</sup> Though the word ‘blog’ was still unknown at that time, Links.net is generally recognised as one of the earliest blogs ever created in the history and Justin Hall himself has been labelled as ‘the founding father of personal blogging’ by the New York Times Magazine in 2003.<sup>26</sup> Some may argue that the first website created by Tim Berners-Lee in 1990 at <http://info.cern.ch> deserved to be recognised as the first blog,<sup>27</sup> but such argument appears to be baseless since blogs were not invented but evolved over a period of time.<sup>28</sup>

The word ‘weblog’ only came into the picture on 17 December 1997 when Jorn Barger described the list of links on his Robot Wisdom website that ‘logged’ his Internet wanderings.<sup>29</sup> Later, the short form ‘blog’ was coined by Peter Merholz<sup>30</sup> when he playfully pronounced the word ‘weblog’ into ‘wee blog’ or ‘blog’ in his blog Peterme.com.<sup>31</sup> Though Merholz was unsure as to the exact date he coined the word, Brad L. Graham has confirmed in his blog (the

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<sup>24</sup> Justin Hall’s blog of the Links.net <<http://links.net>> [accessed 5 November 2009].

<sup>25</sup> Clive Thompson, ‘The Early Years’ *New York Magazine* (New York 12 February 2006) <<http://nymag.com/news/media/15971>> [accessed 5 November 2009].

<sup>26</sup> Reyhan Harmanaci, ‘Time to Get A Life – Pioneer Blogger Justin Hall Bows Out at 31’ *San Francisco Chronicle* (San Francisco 20 February 2005) <<http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2005/02/20/MNGBKBEJO01.DTL>> [accessed 5 November 2009].

<sup>27</sup> Dave Winer, ‘The History of Weblogs’ (Weblogs.Com News 17 May 2002) <<http://oldweblogscomblog.scripting.com/historyOfWeblogs>> [accessed 5 November 2009].

<sup>28</sup> Rosenberg, *Say Everything* (n 19) 81.

<sup>29</sup> Wortham, ‘After 10 Years of Blogs, the Future’s Brighter Than Ever’ (n 4).

<sup>30</sup> ‘It’s the Links, Stupid’ *The Economist*, 20 April 2006, <[http://www.economist.com/surveys/displaystory.cfm?story\\_id=6794172](http://www.economist.com/surveys/displaystory.cfm?story_id=6794172)> [accessed 5 November 2009].

<sup>31</sup> Peter Merholz, ‘Play with Your Words’ (Peterme.com 17 May 2002) <<http://www.peterme.com/archives/00000205.html>> [accessed 5 November 2009].

A Comparative Study of Malaysia and the United Kingdom  
BranLands) that Merholz did so on 23 May 1999.<sup>32</sup> The coinage did not exactly spread like wildfire but the circle of veteran bloggers picked up Merholz's joke and repeated it to one another in the blogosphere.<sup>33</sup> As a result, the word 'blog' then grew in acceptance as a shorter form of the noun 'weblog' and the weblog editor is known as a 'blogger'.

At the beginning of 1999, it was reported that there were only 23 blogs known to be in existence.<sup>34</sup> The slow take-up is generally due to the fact that the first-generation blogs required considerable technical knowledge to establish and maintain. For that reason, early bloggers were normally those who were acquainted with computer codes and hypertext mark-up language (HTML) such as computer programmers, web designers or those who already knew how to make a website.<sup>35</sup> Later, when user-friendly software and tools for creating blogs were made available to the public, the numbers rose steeply as more Internet users, including non-technical authors, started to publish their personal thoughts and essays through their own blogs.<sup>36</sup>

Pitas.com was recognised as the first free build-your-own-weblog tool and it was launched by Andrew Smales, a programmer in Toronto in July 1999.<sup>37</sup> One month later, Blogger.com, which was invented by Evan Williams and Meg Hourihan at Pyra Labs in San Francisco, was

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<sup>32</sup> Brad L. Graham, 'PeterMe Decides the Proper Way to Say "weblog" is "wee'-blog"' (The BradLands 23 May 1999) <<http://www.bradlands.com/weblog/1999-05.shtml/P1925>> [accessed 5 November 2009].

<sup>33</sup> Rosenberg, *Say Everything* (n 19) 101.

<sup>34</sup> Rebecca Blood, 'Weblogs: A History and Perspective' (Rebecca's Pocket 7 September 2000) <[http://www.rebeccablood.net/essays/weblog\\_history.html](http://www.rebeccablood.net/essays/weblog_history.html)> [accessed 6 November 2009].

<sup>35</sup> *ibid.*

<sup>36</sup> *ibid.*

<sup>37</sup> Jensen Mallory, 'A Brief History of Weblogs (Emerging Alternatives)' [2003] *Columbia Journalism Review* <<http://www.higbeam.com>> [accessed 22 December 2009].

A Comparative Study of Malaysia and the United Kingdom introduced to the market.<sup>38</sup> Blogger.com has later become the most popular tools among the bloggers as it allows them to have personalised addresses by storing their blogs on their servers rather than on a remote base as offered by other blogging tools.<sup>39</sup> By the end of 1999, a lot of other blogging software such as Diaryland,<sup>40</sup> Edit This Page and Velocinews were launched.<sup>41</sup> The innovation and adoption of free and user-friendly blogging software is arguably the main catalyst for the blogging revolution. These programmes have enabled those who have little or no training and knowledge about computer code or programming language a new opportunity to create blogs easily and almost with no trouble at all.

The occurrence of unfortunate events and natural disasters has also ignited the appetite of the public towards the blogosphere. This could be seen in the catastrophic demolition of the World Trade Centre on 11 September 2001, the tsunami incident that hit Asia on 26 December 2004, the London bombings on 7 July 2005, and many other incidents such as the Japanese tsunami, London riots, nuclear crisis in Japan and Arab Spring.<sup>42</sup> The incidents have caused people across the world to search for alternative news and information from blogs as the mainstream media failed to accommodate the pressing demand for the latest coverage and updates. Over time, the interest towards the blogs and the numbers of the bloggers has intensified significantly and consequently 'the bandwagon-jumping turned into an explosion'.<sup>43</sup>

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<sup>38</sup> Rosenberg, *Say Everything* (n 19) 102.

<sup>39</sup> Mallory, 'A Brief History of Weblogs (Emerging Alternatives)' (n 37).

<sup>40</sup> *ibid.*

<sup>41</sup> Blood, 'Weblogs: A History and Perspective' (n 34).

<sup>42</sup> This is clearly illustrated by the Technorati Report in 2011 which shows that these incidents received the greatest hits in the blogosphere. See <<http://technorati.com/social-media/article/state-of-the-blogosphere-2011-part2/page-2/#topics>> [accessed 5 June 2013].

<sup>43</sup> Blood, 'Weblogs: A History and Perspective' (n 34).

### 2.3 Definition of Weblogs or Blogs

There is little consensus as to the agreed definition of the word 'weblog' or 'blog' even though the term had been used and known since late 1990's.<sup>44</sup> The word is elusive and varied according to the understanding and interpretation of scholars, bloggers, blog readers, Internet users and the public members. There were in fact heated debates among the community of the early bloggers as to what was and what was not a blog.<sup>45</sup> In early 1999, any sites that consisted of dated entries was regarded as a blog and listed in the Eatonweb Portal.<sup>46</sup> Although some bloggers disputed the simple criterion adopted by Brigitte Eaton (the creator of the Eatonweb Portal), the definition did prevail since the portal was the only most complete listing of the weblogs available at that point of time.<sup>47</sup>

In general, some would hold the view that websites that are made with blogging software are blogs. Whilst others would simply say that blogs are akin to online diaries that record their personal chronicles and they are publicly shared online in order to be viewed and read by closed relatives, friends and other interested communities. Nonetheless, it is submitted that the first classification is quite inaccurate since there are a number of commercial blogs published by corporations and commercial entities that are not personal in nature. Further, the use of blogging software is also not a precondition since blogs can be built and maintained even without resorting to any blogging tools. This can be seen in the early generation blogs that

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<sup>44</sup> Garry Thompson, 'Weblogs, Warblogs, the Public Sphere, and Bubbles', (Transformation September 2003) <[http://www.transformationsjournal.org/journal/issue\\_07/article\\_02.shtml](http://www.transformationsjournal.org/journal/issue_07/article_02.shtml)> [accessed 6 June 2013].

<sup>45</sup> Blood, 'Weblogs: A History and Perspective' (n 34).

<sup>46</sup> *ibid.*

<sup>47</sup> *ibid.*

A Comparative Study of Malaysia and the United Kingdom  
were set up from scratch by the blogging pioneers long before the coming into picture of the blogging software.

As to the second description, it appears to be rather simplistic and sketchy because modern blogs are much more than online journals or personal diaries of bloggers. Blogs are distinct in both form and content from web journals that preceded them in the sense that blog entries are short, usually contain links to other sites and appear all together on one long page, whilst web journals appear one entry per page and one page per day as per the paper diary.<sup>48</sup> Further, blogs are currently being used for a variety of purposes, including journalism, activism, politics, businesses, academia and many others. Despite the fact that the majority of bloggers are diarists (hobbyists)<sup>49</sup> who blog about their personal activities and daily minutiae rather than news articles, opinion columns or scholarship, blogs should not be merely portrayed as personal diaries as they are also widely used by professional bloggers as well as corporate and entrepreneur bloggers.<sup>50</sup>

The word 'weblog' or 'blog' has also been given a classic definition as just a web site organized by time. Every website that is updated at least once (this applies to 99.9% of all websites) could be considered a weblog because it contains two entries.<sup>51</sup> It is argued that the application of this interpretation does not lend any assistance in

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<sup>48</sup> Rebecca Blood, 'Hammer, Nail: How Blogging Software Reshaped the Online Community' (Rebecca's Pocket December 2004) <[http://www.rebeccablood.net/essays/blog\\_software.html](http://www.rebeccablood.net/essays/blog_software.html)> [accessed 6 November 2009].

<sup>49</sup> 60% of the total numbers of bloggers tracked by Technorati in 2011 are hobbyists. See Technorati 'State of the Blogosphere 2011 – Introduction and Methodology' (n 11).

<sup>50</sup> For details, see Technorati 'State of the Blogosphere 2011 – Who Are the Bloggers?' (n 13).

<sup>51</sup> Russ Lipton, 'What is a Weblog' (RadioDocs 11 June 2002) <<http://radio.weblogs.com/0107019/stories/2002/02/12/whatIsAWeblog.html>> [accessed 7 December 2009].

conceptualising the notion of blogs since such a description would render all websites synonymous with blogs. It is further submitted that blogs should not be treated like typical websites that are composed of static collections of documents and information-rich but often written by anonymous authors in an impersonal and public relations style.<sup>52</sup>

From a historical point of view, when the term ‘weblog’ was first mentioned in 1997, it was originally intended to refer to a webpage where bloggers ‘log’ all other webpages that they find interesting.<sup>53</sup> Blogs were not only about any updated websites, but they were links to other interesting web pages that mixed with bloggers’ commentaries, personal thoughts and essays.<sup>54</sup> On the same note, it is submitted that weblogs are often updated sites that point to articles elsewhere on the web, often with comments and to on-site articles.<sup>55</sup> Since bloggers played an active role in filtering through vast collections of information on web pages and presented the most interesting and important posts to the readers in their own versions, this type of weblogs is known as ‘filter-style’ weblogs.

Over times, blogs have evolved beyond the lists of links that characterised the early efforts. The introduction of Blogger.com and other similar blogging software has resulted in the shift from the filter-style blogs to the new breed of journal-style blogs.<sup>56</sup> The main difference between the two is that the former includes a mix of links and commentaries whilst the latter merely consists of a record of bloggers’ thoughts that are often updated several times a day.<sup>57</sup> It is obvious that the traditional blogs perform a valuable filtering service

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<sup>52</sup> Wyld, ‘The Blogging Revolution: Government in the Age of Web 2.0’ (n 14).

<sup>53</sup> Daniel J Solove, ‘A Tale of Two Bloggers: Free Speech and Privacy in the Blogosphere’ (2006) 84 Wash U L Rev 1195, 1196 – 97.

<sup>54</sup> Blood, ‘Weblogs: A History and Perspective’ (n 34).

<sup>55</sup> Winer, ‘The History of Weblogs’ (n 27).

<sup>56</sup> Blood, ‘Weblogs: A History and Perspective’ (n 34).

<sup>57</sup> *ibid.*

and provide tools for more critical evaluation of the information available on the Internet whereas the free-style blogs are nothing less than an outbreak of personal self-expression. Even though both styles still exist, it is observed that modern bloggers preferred to adopt the journal-style blog since they are free to express their personal opinions and ideas on any subjects without the hassle of searching a link and writing some text around it.<sup>58</sup>

The popularity of the word 'blog' has resulted in the inclusion of its definition into the Oxford English Dictionary in 2003.<sup>59</sup> The word is defined as 'a frequently updated web site consisting of personal observations, excerpts from other sources, etc., typically run by a single person, and usually with hyperlinks to other sites; an online journal or diary'.<sup>60</sup> Later, the US dictionary of Merriam-Webster declared that the term 'blog' has been chosen as the top word of 2004 as it was the most looked up word for that particular year.<sup>61</sup> Merriam-Webster Dictionary defines a blog as 'a web site that contains an online personal journal with reflections, comments, and often hyperlinks provided by the writer'.<sup>62</sup>

Apart from the definitional perspectives, a more comprehensive discussion states that 'a blog is a type of website, usually maintained by an individual with regular entries of commentary, descriptions of events, or other material such as graphics or video. Entries are

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<sup>58</sup> *ibid.*

<sup>59</sup> Daniel Lyons, 'Attack of the Blogs' *Forbes* (New York 14 November 2005) <<http://www.forbes.com/forbes/2005/1114/128.html>> [accessed 11 November 2009].

<sup>60</sup> The Online Oxford English Dictionary <<http://dictionary.oed.com>> [accessed 11 November 2009].

<sup>61</sup> BBC News, 'Blog' Picked as Word of the Year' BBC (London 1 December 2004) <<http://news.bbc.co.uk/1/hi/technology/4059291.stm>> [accessed 11 November 2009].

<sup>62</sup> The Merriam-Webster Online Dictionary <<http://www.merriam-webster.com/dictionary/blog>> [accessed 11 November 2009]



A Comparative Study of Malaysia and the United Kingdom commonly displayed in reverse-chronological order'.<sup>63</sup> Likewise, another technical clarification describes a blog as 'a web-based writing space, like an on-line journal, a website an individual uses to write every day, where all the writing and editing, and the whole look and feel of the site, is managed through a web browser from wherever the writer happens to be. A weblog is designed so that, just like a journal, the page can be turned each day, and the website itself keeps track of the date and archiving of all the writing'.<sup>64</sup>

Many scholarly articles attempted to provide some useful input into the meaning of the word. Blogs have been defined as a series of web posts from a single web address with a common author or set of authors, often integrated with commentary on the post itself or on other blogs.<sup>65</sup> Others claimed that the word may be best explained in three definitions; namely chronological definition, diary definition and amateur journalist definition.<sup>66</sup> The chronological definition adopts the view proposed by the classic definition which states that every website that is updated at least once can be considered a weblog because it contains two entries.<sup>67</sup> In the meantime, the diary definition assumes a narrower approach whereby blogs are regarded as online diaries because they are distinct from regular websites in the sense that the personalities or voice of the bloggers are communicated via their posts.<sup>68</sup> As to the amateur journalist definition, blogs are given a

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<sup>63</sup> Wikipedia, 'Blog' (2013) <<http://en.wikipedia.org/wiki/Blog>> [accessed 6 June 2013].

<sup>64</sup> Chris Ashley, 'Weblogging: Another Kind of Website' (A Place to Work, Nothing Fancy 20 July 2001) <[http://interactiveu.berkeley.edu:8000/CA/stories/storyReader\\$192](http://interactiveu.berkeley.edu:8000/CA/stories/storyReader$192)> [accessed 12 November 2009].

<sup>65</sup> Larry E Ribstein, 'From Bricks to Pajamas: The Law and Economics of Amateur Journalism' (2006) 48 Wm & Mary L Rev 185, 187.

<sup>66</sup> Ciolli, 'Bloggers as Public Figures' (n 3) 258.

<sup>67</sup> Lipton, 'What is a Weblog?' (n 51).

<sup>68</sup> Dave Winer, 'What Makes a Weblog a Weblog?' (Weblogs at Harvard Law 23 May 2003) <<http://blogs.law.harvard.edu/whatmakesaweblogaweblog.html>> [accessed 12 September 2009].

A Comparative Study of Malaysia and the United Kingdom significantly narrower meaning and being characterised as a new form of journalism (citizen journalist). Bloggers are referred to as those who are either not employed at all in the media industry, or write as a side-line to some other business.<sup>69</sup>

For the ease of understanding, blogs may be summarised as a kind of website that can be created from scratch or by using blogging software. Blogs provide web-based writing space that is free from editorial control. They can be used for various purposes and their entries may contain personal records of the bloggers without referring to any links or the bloggers' comment on other stories in external websites. Blog posts are usually displayed in reverse chronological order, expressed in an informal style and they reflect the personal voice and personalities of their authors.

## 2.4 Nature and Importance of Blogs

The dawn of the 21<sup>st</sup> century has witnessed the influx of blogs as the newfound technology that is revolutionising the mode of communication and the exchange of information in the new era. The explosion of this phenomenon, which is referred to as the 'blogging revolution',<sup>70</sup> has resulted in enormous popularity of blogs and their widespread acceptance among the online communities. Being a new pedigree to the Internet communications, blogs possess the distinctive features of borderlessness, geographical independence, one-to-many communication, low threshold information distribution, widely used,

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<sup>69</sup> Ribstein, 'From Bricks to Pajamas' (n 65) 189.

<sup>70</sup> Dan Kennedy, 'The Blogging Revolution. Breakthrough, Hype — or Both?' (*Public/Private: Interactions in New Media*, 13 October 2005) <<http://www.lib.neu.edu/newmedia/dankennedyessay.htm>> [accessed 18 February 2010].

portability, lack of reliable geographical identifiers, reactive nature, lack of central control and convergence.<sup>71</sup>

Apart from those common traits, the nature of blogs is however to be distinguished from other online media, in particular web magazines and online news. This is because more often than not those online channels are simply the Internet footprint of traditional media entities like newspapers, radio, and television stations.<sup>72</sup> Blogs on the other hand are highly personal in nature and their postings are often written in an informal style.<sup>73</sup> This is the striking difference between blogs and other online media as the former lets the voice of the bloggers comes through and consequently reflects the interest, view and personality of their authors.<sup>74</sup> Hence, personality or voice of the bloggers is the distinctive persona of a blog even though some blogs may lack other common technical features such as permalinks,<sup>75</sup> calendar, bio page and many others,<sup>76</sup> or even if certain blog entries in a webpage cannot be linked to separately via permalinks rather than just linking to the whole site.<sup>77</sup>

Blogs are also interactive in nature as they are equipped with technical features that enable bloggers to interact with readers through trackback and comment sections. The trackback enables bloggers to keep track of who is linking and referring to their blog posts.<sup>78</sup>

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<sup>71</sup> Dan Jerker B Svantesson, 'The Characteristics Making Internet Communication Challenge Traditional Models of Regulation—What Every International Jurist Should Know about the Internet' (2005) 13 IJL & IT 39, 44 – 61.

<sup>72</sup> Michael Russo, 'Are Bloggers Representatives of the New Media Under the Freedom Information Act?' (2006) 40 Colum JL & Soc Probs 225, 230.

<sup>73</sup> Ciolli, 'Bloggers as Public Figures' (n 3) 255 – 256.

<sup>74</sup> Sylvia Mercado-Kierkegaard, 'Blogs, Lies and the Doocing: The Next Hotbed of Litigation?' (2006) 22(2) CLSR 127, 128.

<sup>75</sup> Permalinks (short for permanent links) allows blog readers to link directly to any individual posts.

<sup>76</sup> Winer, 'The History of Weblogs' (n 27).

<sup>77</sup> Wyld, 'The Blogging Revolution: Government in the Age of Web 2.0' (n 14).

<sup>78</sup> 'Trackback - Wikipedia, The Free Encyclopedia' <<http://en.wikipedia.org/wiki/Trackback>> [accessed 19 February 2010].

Bloggers can then track and respond to others who cite their postings, and readers of the linked blog can refer to the record of the trackbacks under each blog post.<sup>79</sup> In addition, comment feature empowers blog readers to post comments or leave questions to any blog posts. The design of blogs can be easily customised to either turn-on or turn-off the comment feature altogether. Alternatively, bloggers can manage incoming comments by turning away anonymous comments, screening or freezing such comments temporarily or even deleting them to keep the interactions smooth.<sup>80</sup> However, setting the blog into comment-free may lead the blog to be an inferior form of the broadcast media.<sup>81</sup> Thus, these features should be fully utilised so that they do not only become places for self-expression, but also as platforms for dialogue and debate.

From the economics point of view, blogs differ greatly from the mainstream media in the sense that a majority of their authors does not have a profit motive from blogging. This is based on the findings of the Internet survey conducted from 13 September to 4 October 2011 among 4,114 bloggers around the world, which reveal that personal satisfaction and number of unique visitors are the prime motivations of the surveyed bloggers.<sup>82</sup> Unsurprisingly, only 14% of the respondents generated revenue from blogging activities although they

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<sup>79</sup> Ribstein, 'From Bricks to Pajamas' (n 65) 191.

<sup>80</sup> Paul de Laat, 'Online Diaries: Reflections on Trust, Privacy, and Exhibitionism' (2008) 10(1) *Ethics & Info Tech* 57, 59.

<sup>81</sup> Blood, 'Hammer, Nail: How Blogging Software Reshaped the Online Community' (n 48).

<sup>82</sup> Technorati 'State of the Blogosphere 2011 – What's in it for the Bloggers: Motivations and Consequences of Blogging' (4 November 2011) <<http://technorati.com/social-media/article/state-of-the-blogosphere-2011-part2/>> [accessed 5 June 2013].

may earn modest income through advertising, per-post fees and salaries for maintaining blogs for companies.<sup>83</sup>

In terms of capital investment, the setting up and maintaining of blogs require no significant investments in physical equipment, technology, office space, personnel and goodwill.<sup>84</sup> The cost is very minimal as it only necessitates a computer, Internet connection and any cheap or free blogging software. Beside the basic investments, blogs require additional investments in the form of the bloggers' time and credibility necessary to build readership in the blogosphere.<sup>85</sup> The readership, which is a kind of goodwill asset analogous to the audience of the conventional media, can only be built by establishing the credibility and encouraging links by other blogs.<sup>86</sup>

As for the importance of blogs, it was obvious that blogs have been widely used as a novel channel for expression.<sup>87</sup> Blogs have enabled Internet users to express and publish their personal opinions on various topics directly to the public at large. They have empowered their authors to have total control over the content of their blogs as they are not subjected to any control by editors or intermediaries. As such, blogs have democratised publishing<sup>88</sup> and seized the means of production.<sup>89</sup> In relation to this, it is argued that blogs will continue to become one of the preferred media for authentic or uncensored

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<sup>83</sup> Technorati 'State of the Blogosphere 2011 – Monetization / Revenue Generation' (4 November 2011) <<http://technorati.com/social-media/article/state-of-the-blogosphere-2011-part3/page-2/#monetization>> [accessed 5 June 2013].

<sup>84</sup> Ciolli, 'Bloggers as Public Figures' (n 3) 259 – 260.

<sup>85</sup> Larry Ribstein, 'Initial Reflections on the Law and Economics of Blogging' [2005] AMLECON 5. <<http://law.bepress.com/alea/15th/bazaar/art14>> [accessed 22 January 2010].

<sup>86</sup> Ribstein, 'From Bricks to Pajamas' (n 65) 192.

<sup>87</sup> Technorati 'State of the Blogosphere 2011 – What's in it for the Bloggers: Motivations and Consequences of Blogging' (n 82).

<sup>88</sup> Blood, 'Hammer, Nail: How Blogging Software Reshaped the Online Community' (n 48).

<sup>89</sup> Sullivan, 'The Blogging Revolution: Weblogs Are to Words What Napster was to Music' (n 2).

A Comparative Study of Malaysia and the United Kingdom  
expression of Internet users. Since blogs or other online publications do not operate by prescribed standards or codes, they could facilitate the sharing of news or critical comments that are most unlikely to be featured in any mainstream media. This is particularly significant for countries with limited media freedom like Malaysia where almost all of the traditional media are heavily controlled and regulated by the government through licensing and restrictive laws.

Another significant contribution of blogs is in the field of journalism. Blogs enable ordinary Internet users, who were former readers or audience of the mainstream media, to engage in journalistic activities of collecting and circulating news to the public. Further, the interactive feature of blogs allows their authors to engage in online debates or discussion with blog readers on any issues or viewpoints. Thus, blogs appear to possess great potential to change the nature of journalism and democratic function of the traditional media.<sup>90</sup> Although some bloggers, particularly online diarists, do not regard blogging as a form of journalism and are hesitant to be labelled as journalists,<sup>91</sup> blogs have over the last few years become increasingly mainstream.<sup>92</sup> In the first place, many traditional media journalists have established their own blogs as it is believed that their presence in the blogosphere can help to democratise news production processes and bring audiences closer.<sup>93</sup> Further, there is also an ever-increasing overlap between the professional journalists and bloggers since a large number of bloggers are still working with the media establishments or

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<sup>90</sup> Stephen Coleman and Scott Wright, 'Political Blogs and Representative Democracy' (2008) 13(1) *Information Polity* 1, 3.

<sup>91</sup> Stuart Allan, *Online News: Journalism and the Internet* (Open University Press 2006) 43.

<sup>92</sup> Mark Taylor and Diana Chu, 'Weblogs' (2005) 11(7) *CTLR* 228, 228.

<sup>93</sup> Coleman and Wright, 'Political Blogs and Representative Democracy' (n 90) 3.

used to be employed either as a journalist, columnist, reporter, news presenter or even producer.<sup>94</sup>

Secondly, many amateur bloggers attempt to operate as journalists. This can be seen in the occurrence of natural disasters that have turned many passers-by and eye witnesses, who have no journalism background and professional training, into amateur journalists and reporters via their blogs. Blogs offer first-hand reports that are more often than not accompanied with raw pictures and unedited video shoots taken from their digital cameras, camcorders or even mobile phones. This reflects the personal experience of bloggers who happened to be on the scene during the happening of such events. Undoubtedly, blogs have emerged as a citizen-based form of journalism<sup>95</sup> and this is by far more appealing and preferable over the mainstream media, which perform ‘helicopter journalism’, as their news coverage is normally mediated by editors and limited in scope.<sup>96</sup> Further, the ‘bottom up coverage’ in blogs provides in depth reporting and coverage with frequently updated news and interactive features, and they sometimes provide details that the mainstream media ignore or have too little inclination or time to investigate.<sup>97</sup>

Unfortunately, their status as journalists is yet to be resolved<sup>98</sup> although reports suggested that bloggers tend to define their role as an extension of the traditional media and believe that they have an impact

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<sup>94</sup> Technorati ‘State of the Blogosphere 2011 – Bloggers and the Traditional Media’ (4 November 2011) <<http://technorati.com/social-media/article/state-of-the-blogosphere-2011-part1/page-2/#tradmedia>> [accessed 5 June 2013].

<sup>95</sup> Allan, *Online News* (n 91) 45.

<sup>96</sup> *ibid.*

<sup>97</sup> Eric Barendt, ‘Bad News for Bloggers’ (2009) 1(2) JML 141, 145.

<sup>98</sup> Neil Pandey-Jorin, ‘Is Everyone Now a Journalist: How the FEC’s Application of the Media Exemption to Bloggers Weakens FEC Regulation’ (2008) 60 Admin L Rev 409, 410.

A Comparative Study of Malaysia and the United Kingdom on politics and news.<sup>99</sup> Reporters Without Borders claimed that blogging is a form of independent journalism and bloggers are regarded as the real journalists particularly in countries where the traditional media are heavily censored or placed under government pressure.<sup>100</sup> It has been argued that by writing blogs, bloggers are neither qualified nor disqualified from the 'journalist' label, and so long as they perform similar journalistic tasks such as recording and reacting to newsworthy events, they should be considered as journalists.<sup>101</sup> It has been further argued that though many bloggers are keen to concentrate on analysis rather than reporting of facts,<sup>102</sup> they should still be regarded within the general term of journalists and be rightly treated as amateur journalists.<sup>103</sup> In relation thereof, it was alleged that the argument seems to be more sensible than the crude approach of treating bloggers in general as amateur journalist.<sup>104</sup>

## 2.5 Political Blogs & Democratisation in Malaysia

Initially, blogs were primarily used for personal self-expression, sharing expertise<sup>105</sup> and maintaining social networks with family and friends.<sup>106</sup> However, as the influence and size of the blogosphere continues to grow, blogs have started to establish their eminence in

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<sup>99</sup> Michael Tomaszewski, Jennifer M Proffitt and Steven McClung, 'Exploring the Political Blogosphere: Perceptions of Political Bloggers about Their Sphere' (2009) 17(2) *Atlantic Journal of Communication* 72, 83.

<sup>100</sup> J Pain, 'Bloggers, the New Heralds of Free Expression' in Reporters Without Borders (ed), *Handbook for Bloggers and Cyber Dissidents* (2005) 5.

<sup>101</sup> Rosenberg, *Say Everything* (n 19) 273.

<sup>102</sup> JD Lasica, 'Blogging as a Form of Journalism' (*Online Journalism Review*, 24 May 2001) <<http://www.ojr.org/ojr/workplace/1017958873.php>> [accessed 1 September 2010].

<sup>103</sup> Ribstein, 'From Bricks to Pajamas' (n 65) 189.

<sup>104</sup> Ciolli, 'Bloggers as Public Figures' (n 3) 259 – 260.

<sup>105</sup> Technorati 'State of the Blogosphere 2011 – Introduction and Methodology' (n 11).

<sup>106</sup> Kim Hart, 'Portrait of a Blogger: Under 30 and Sociable' *The Washington Post* (20 July 2006) <<http://www.washingtonpost.com/wp-dyn/content/article/2006/07/19/AR2006071901900.html>> [accessed 19 February 2010].



other fields including politics. In parallel to this, a survey by the Pew Internet and American Life Project reveals that political blogs appear to have grown faster than other kinds of blogs including technology, business, music and sports blogs,<sup>107</sup> and consequently they have been hailed as a new force in politics.<sup>108</sup>

Political blogs are generally referred to as blogs that focus on issues, events and policy in a constituency, national, international or party political context.<sup>109</sup> They can be individualised (e.g. personal blogs by MPs, citizens or journalists) or multiple author groups (e.g. Greenpeace).<sup>110</sup> It has been argued that political blogs are primarily used as technological ‘soapboxes’ from which bloggers can convey their ideas, observations, experiences and opinion to the public at large.<sup>111</sup> On the other hand, they have to a lesser extent been utilised as ‘link filters’ or ‘transmission belts’ that provide links to other websites or quote sources with no commentary.<sup>112</sup> Apart from that, political blogs offer information not covered by the traditional media such as party platform, dates of political rallies or events, upcoming votes and the release of data.<sup>113</sup> Political blogs also act as ‘fifth estate’<sup>114</sup> or ‘watchdog’ to the mainstream media<sup>115</sup> by highlighting and writing posts about bias or omissions in the media.

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<sup>107</sup> Kevin Wallsten, ‘Political Blogs: Transmission Belts, Soapboxes, Mobilizers, or Conversation Starters?’ (2008) 4(3) JITP 19, 20.

<sup>108</sup> M Cornfield, J Carson and A Kalis, ‘Buzz, Blogs and Beyond: The Internet and the National Discourse in the Fall of 2004’ (Pew Internet & American Life Project and BuzzMetrics 2005) 3.

<sup>109</sup> Ross Ferguson and Barry Griffiths, ‘Thin Democracy? Parliamentarians, Citizens and the Influence of Blogging on Political Engagement’ (2006) 59 *Parliam Aff* 366, 366.

<sup>110</sup> Coleman and Wright, ‘Political Blogs and Representative Democracy’ (n 90) 1.

<sup>111</sup> Wallsten, ‘Political Blogs’ (n 107) 32 – 33.

<sup>112</sup> *ibid.*

<sup>113</sup> Laura McKenna and Antoinette Pole, ‘What Do Bloggers Do: An Average Day on an Average Political Blog’ (2008) 134(1) *PC* 97, 101 – 102.

<sup>114</sup> Cornfield, Carson, and Kalis, ‘Buzz, Blogs and Beyond’ (n 108) 16.

<sup>115</sup> Laura McKenna and Antoinette Pole, ‘Do Blogs Matter? Weblogs in American Politics’ (2004)..

A Comparative Study of Malaysia and the United Kingdom

Political blogs have taken off in the US and they have been extensively used for various aspects of political activities.<sup>116</sup> They have started to gain attention and respect from the mainstream media after making several important exposures. The most remarkable success is the highlighting of racist remarks by Senator Trent Lott in 2002, which later on resulted in his resignation as the Senate Majority Leader.<sup>117</sup> Another celebrated incident is the exposure of forged documents used by Dan Rather to publish a story on President Bush's service in the National Guard. Upon the revelation of the truth, Dan Rather resigned from his post as CBS Evening News anchor in 2004.<sup>118</sup> In the US presidential campaign of 2004, political blogs were perceived to have reached almost the status of mainstream media with political consultants, news services and candidates beginning to use blogs as tools for outreach and opinion formation.<sup>119</sup> Similarly in the 2008 US Presidential election campaign, where Barack Obama's ability to fully utilise social networking including blogs is claimed to have given him an advantage over other candidates.<sup>120</sup>

As to the position in the UK, political blogs have only come into the picture in 2003 even though UK-authored blogs have been around from the late 1990s. They have initially been resorted to by individuals and groups on the margins of political institutions,<sup>121</sup> but following a series of incidents including record low turnout at the

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<sup>116</sup> R Ferguson and M Howell, 'Political Blogs, Craze Or Convention?' (Hansard Society 2004) 5.

<sup>117</sup> Tomaszewski, Proffitt, and McClung, 'Exploring the Political Blogosphere' (n 99) 74.

<sup>118</sup> N Vlachos, 'The Federal Election Commission & Political Blogging: A Perfect Balance or Just Not Enough?' (2006) 24 J Marshall J Computer & Info L 611, 635.

<sup>119</sup> David Stevenson, 'A Presumption against Regulation: Why Political Blogs Should Be (Mostly) Left Alone' (2007) 13 BU J Sci & Tech L 74, 82.

<sup>120</sup> Derrick L Cogburn and Fatima K Espinoza-Vasquez, 'From Networked Nominee to Networked Nation: Examining the Impact of Web 2.0 and Social Media on Political Participation and Civic Engagement in the 2008 Obama Campaign' (2011) 10(1-2) J Pol Mar 189, 190.

<sup>121</sup> Ferguson and Howell, 'Political Blogs, Craze Or Convention?' (n 116) 5.

A Comparative Study of Malaysia and the United Kingdom  
2001 General Election and a vigorous debate on military action in Iraq, the UK media began to take notice and political blogs entered the mainstream.<sup>122</sup>

In Malaysia, political blogs were initially not regarded as a threat at all by the government. This is perhaps due to the reason that the overwhelming majority of the Malaysian bloggers (94 per cent) is highly individualistic and apolitical in nature.<sup>123</sup> As such, it is not surprising that early political bloggers have been likened as ‘bad karaoke singers’ by the Information Minister.<sup>124</sup> Nonetheless, the misjudgement of the role of political blogs seemed to be fatal when the ruling party (National Front or *Barisan Nasional*) lost five out of eleven states in the Peninsular Malaysia to the opposition parties, which only formalised their coalition (People’s Alliance) after the general election.<sup>125</sup> The crucial role played by political blogs is also reflected by the fact that six well-followed bloggers won their parliamentary seats on the opposition tickets.<sup>126</sup> Consequently, many political analysts believed that the driving force for the success of the opposition parties was the effective use of political blogs by the candidates and supporters. Indeed, the former Malaysian Prime Minister, Abdullah Ahmad Badawi, admitted that the biggest mistake of the ruling party was ignoring the impact of the online debate that

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<sup>122</sup> *ibid* 8.

<sup>123</sup> Jun-E Tan and Zawawi Ibrahim, *Blogging and Democratization in Malaysia: A New Civil Society in the Making* (SIRD 2008) 87.

<sup>124</sup> ‘Malaysian Minister Likens Bloggers to Bad Karaoke Stars: Report’ <<http://news.theage.com.au/technology/malaysian-minister-likens-bloggers-to-bad-karaoke-stars-report-20070825-v9w.html>> [accessed 1 August 2010].

<sup>125</sup> National Front won at least 83% of the seats in Parliament in the elections in 1974, 1978, 1982 and 1986. Whilst in 1990, 1995, 1999 and 2004, it maintained a two thirds majority in Parliament. For details, see Andreas Ufen, ‘The Transformation of Political Party Opposition in Malaysia and Its Implications for the Electoral Authoritarian Regime’ (2009) 16(3) *Democratization* 604, 607 – 608.

<sup>126</sup> Jacqueline Ann Surin, ‘Occupying the Internet: Responding to the Shifting Power Balance’ (2010) 99(407) *Round Table* 195, 204.

A Comparative Study of Malaysia and the United Kingdom was fully exploited by the opposition.<sup>127</sup> Therefore, it is submitted that the proliferation of political blogs has a great impact on the liberalisation of freedom of expression and democracy in Malaysia.

## 2.6 Conclusion

Until the emergence of the Internet, the traditional media were the only sources of information and news for the people in Malaysia. Realising the powerful influences of the media, the government had imposed permit and license requirements as well as ownership mechanism on the media players.<sup>128</sup> The adoption of such policy that has gravely impaired the media freedom was justified on the ground of unity and nation building, though it was alleged that the ultimate goal was to confine the role of the media as the mouthpiece of the ruling party and to contain political dissent and eliminate open criticisms against the government.<sup>129</sup> As a result, the ruling party managed to control the public sphere, gain enormous political support and eventually hold to its power for more than 50 years since the country's independence in 1957.

The scenario has started to change with the evolution of numerous forms of web-based communications, including blogs in the late 1990s. Despite the fact that blogs are primarily used by Internet users as online diaries that record personal interests and experience, they have more importantly become a novel platform for public dialogue and debate on political issues and matters of public interests. Blogs have given a new hope to the people to access independent and alternative information. They have also empowered the public to

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<sup>127</sup> 'Malaysian Cyber-Paper at Vanguard of Media Revolution' *AFP* (26 January 2009) <<http://www.google.com/hostednews/afp/article/ALeqM5jzFASb-fbqfZ6zs-GrPN55BSLXSA>> [accessed 27 August 2010].

<sup>128</sup> Detailed discussion on the regulatory control of the print and broadcast media in Malaysia, see Parts 3 and 4 of Chapter 5 below.

<sup>129</sup> For further details, see discussion in Part 2 of Chapter 5 below.

## Political Blogs and Freedom of Expression:

### A Comparative Study of Malaysia and the United Kingdom

express authentic and unprejudiced critics against the establishment as blogs or other web-based communications are currently unsusceptible to prior constraints such as printing licence or publication permit. Consequently, blogs have flourished and become an effective platform for bloggers and their readers to share information, circulate news and critically discuss issues and events more broadly.<sup>130</sup> Thus, it is argued that not only blogs have gradually changed the media landscape in Malaysia, they have also been considered as the most ideal platform to democratise public participation and political debates. To sum up, it is submitted that blogs have and will continue to enhance the people's right to exercise freedom of expression as well as the democracy in the country.

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<sup>130</sup> Sandra C Smeltzer, 'Blogging in Malaysia: Hope for a New Democratic Technology?' (2008) 14(1) J Int'l Comm 28, 5.

### 3.1 Introduction

Malaysia is a parliamentary democracy with a constitutional monarch, the *Yang di-Pertuan Agong* (King), as the supreme head of the country<sup>1</sup> and a prime minister as the head of the government. The prime minister is appointed from among the members of the House of Representatives<sup>2</sup> according to which political party wins the most seats in a general election.<sup>3</sup> Since the fate of the country is decided by the votes of the electorate, the right to exercise freedom of speech and expression is crucial to enable the people to participate and make an informed judgment in the political process. Therefore, the people should be allowed to enjoy this right at their will and any interference with its exercise could only be imposed by the government in certain prescribed circumstances for Malaysia to be regarded as a democratic nation in the true sense.

In relation thereof, this part of the thesis attempts to analyse the right to freedom of speech and expression in Malaysia and the application of these principles to political blogs. The study will begin the discussion with historical origin of the right, its meaning, scope and categories of expression, in particular political speech. Thereafter, it will discuss permitted grounds of restrictions under the Malaysian Federal Constitution (Malaysian Constitution), legality of restrictive laws passed by Parliament and reasonableness of such derogation on

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<sup>1</sup> Article 32(1) of the Malaysian Constitution provides ‘There shall be a Supreme Head of the Federation, to be called the *Yang di-Pertuan Agong*...’. The *Yang di-Pertuan Agong* shall be selected among the nine Malay Rulers and elected by the Conference of Rulers for a term of five years.

<sup>2</sup> House of Representatives is one of the three components of the Malaysian Parliament and the members are elected by the people in general election. See Articles 44 and 46 of the Malaysian Constitution.

<sup>3</sup> Article 43(2)(a) of the Malaysian Constitution states ‘... the *Yang di-Pertuan Agong* shall first appoint as *Perdana Menteri* (Prime Minister) to preside over the Cabinet a member of the House of Representatives who in his judgment is likely to command the confidence of the majority of the members of that House; ...’.

A Comparative Study of Malaysia and the United Kingdom  
freedom of expression. Finally, the application of these principles to  
political blogs will be highlighted at the end of this chapter.

### 3.2 Origin of Freedom of Expression

The historical origin of the right to freedom of expression in Malaysia is deep rooted in the Report of the Constitutional Commission of 1957 (Constitutional Commission Report).<sup>4</sup> The Constitutional Commission Report was prepared by a group of independent constitutional experts who were jointly appointed by the British sovereign and the Malay Rulers subsequent to the London Constitutional Conference of 1956<sup>5</sup> and was headed by Lord Reid (Reid Commission).<sup>6</sup> The Reid Commission was composed of eminent jurists<sup>7</sup> from the Commonwealth countries, as it was believed that a commission of locals would not be qualified for the task and ‘it would be desirable, therefore, to invite persons with specialised knowledge of constitutions of federal government’.<sup>8</sup>

The Reid Commission was entrusted ‘to make recommendations for a federal form of constitution for the whole country as a single independent, self-governing unit within the Commonwealth’.<sup>9</sup> The Reid Commission then adopted the Indian model with a written and

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<sup>4</sup> Andrew Harding, *Law, Government and the Constitution in Malaysia* (Kluwer Law International 1996) 28.

<sup>5</sup> The conference was primarily held to discuss the independence of Malaya from the British and was attended by the British government, the Alliance government and representatives of the nine Malay Rulers (Kings).

<sup>6</sup> Since the commission was led by Lord Reid, it was commonly referred to as the Reid Commission.

<sup>7</sup> The Reid Commission was made up of Lord Reid (Scottish lawyer and judicial member of the House of Lords), Sir Ivor Jennings (British constitutional lawyer), Justice B. Malik (chief justice of the Allahabad High Court in India) Justice Abdul Hamid (member of West Pakistan High Court) and Sir William McKell (former governor-general of Australia and cabinet member).

<sup>8</sup> Memorandum by Tunku Abdul Rahman, 1 March 1955, Malayan Chinese Association Files, MCA Headquarters, Kuala Lumpur, PH/A/0084.

<sup>9</sup> Para 3 of the Constitutional Commission Report. For details on the terms of references for the Reid Commission, see Mohd. Hishamudin Mohd. Yunus, ‘An Essay on the Constitutional History of Malaysia (Part 2)’ (1995) 3 CLJ xxxi, 3 – 5.

A Comparative Study of Malaysia and the United Kingdom supreme constitution and a chapter on fundamental rights, but Parliament is conferred with legislative power to restrict the application of those rights.<sup>10</sup> Thus, that the draft constitution was largely based on the Constitution of India of 1949 (Indian Constitution), with a specific chapter on fundamental rights including freedom of expression.<sup>11</sup> Paragraph 161 of the Constitutional Commission Report states:

The rights which we recommend should be defined and guaranteed are all firmly established throughout Malaya and it may seem unnecessary to give them special protection in the Constitution. But we have found in certain quarters vague apprehensions about the future. We believe such apprehensions to be unfounded, but there can be no objection to guaranteeing these rights subject to limited exceptions in conditions of emergency and we recommend that this should be done.

The paragraph points out the Reid Commission's perception that fundamental rights were already recognised in Malaysia and therefore warranted no special attention. As the Reid Commission appeared to be over optimistic about these rights,<sup>12</sup> it was not unexpected that their importance was not sufficiently emphasised. This is evidenced with only two<sup>13</sup> out of 194 paragraphs of the Constitutional Commission Report were devoted to recommending protection for these rights. However, there exist uncertain apprehensions among the minority communities,<sup>14</sup> and since the country was still vulnerable to racial and religious tension, political and economic instability and threat of

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<sup>10</sup> Apart from the Indian model, the drafters of the Malaysian Constitution also did consider the British model of an unwritten constitution with a supreme Parliament vested with unlimited legislative competence and the US model of a written constitution with a limited legislature and an entrenched chapter on fundamental liberties. See Shad Saleem Faruqi, *Document of Destiny: The Constitution of the Federation of Malaysia* (Star Pub Bhd 2008) 62.

<sup>11</sup> Tan Sri Ahmad Ibrahim and Ahilemah Joned, *The Malaysian Legal System* (2nd ed, Dewan Bahasa dan Pustaka 1995) 54 – 55.

<sup>12</sup> Harding, *Law, Government and the Constitution in Malaysia* (n 4) 35 – 36.

<sup>13</sup> Paras 161 – 162 of the Constitutional Commission Report.

<sup>14</sup> A number of non-Malay communities such as the Malayan Tamils Association, Eurasian Union and the Straits Chinese British Association had raised the issue of fundamental rights in their memoranda submitted to the Reid Commission.



communist subversion, the Reid Commission felt that the fundamental rights should be included into the draft constitution.<sup>15</sup> Article 10 of the draft states:

Every citizen shall have the right to freedom of speech and expression, subject to any reasonable restriction imposed by federal law in the interest of the security of the Federation, friendly relations with other countries, public order, or morality or in relation to contempt of court, defamation or incitement to any offence.

It is imperative to note that Article 10 of the draft constitution contained the word 'reasonable' in relation to the power of Parliament in restricting the right to freedom of expression. This setting was similar to Article 19 of the Indian Constitution<sup>16</sup> and was purposely designed to empower the judiciary to review the reasonableness of any restrictive laws passed by Parliament.<sup>17</sup> However, the inclusion of the word 'reasonable' was strongly opposed by Justice Abdul Hamid. In his Note of Dissent, he opined:

If the word reasonable is allowed to stand, every legislation on this subject will be challenged in court on the ground that the restrictions imposed by the legislature are not reasonable. This will in many cases give rise to conflict between the views of the legislature and the views of the court on the reasonableness of the restrictions. To avoid this situation it is better to make the legislature be the judge of the reasonableness of the restrictions... There will always be a fear that the court may hold the restrictions

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<sup>15</sup> Kevin Tan and Li-Ann Thio, *Constitutional Law in Malaysia and Singapore* (3rd ed, LexisNexis 2010) 719.

<sup>16</sup> Article 19(1) of the Constitution of India provides 'All citizens shall have the right to (a) freedom of speech and expression...'. And clause 2 to the same article stipulates that 'Nothing in sub clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes *reasonable* restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence'.

<sup>17</sup> Michael Hor and Collin Seah, 'Selected Issues in the Freedom of Speech and Expression in Singapore' (1991) 12 *Sing L Rev* 296, 299.

imposed by it to be unreasonable. The laws would be lacking in certainty.<sup>18</sup>

It was alleged that Justice Abdul Hamid's insistence on the omission of the word 'reasonable' was based on three grounds namely that it would derogate from the sovereignty of Parliament, create uncertainties as all laws will be exposed to judicial review, and ultimately could lead to tension and conflict between the legislature and the judiciary.<sup>19</sup> Although some contended that the dissent was flawed as Article 19 of the Indian Constitution (in *pari materia* with Article 10 of the draft constitution) had served India very well,<sup>20</sup> it was really surprising that other members of the Reid Commission did not stage any argument to counter the dissent. Even Lord Reid himself felt that the proposed changes to the provision on freedom of expression were not significant and said:

[A] greater part of the changes have been in the direction of giving more freedom to the executive and Parliament of Malaya and correspondingly less extensive guarantees of individual rights that we had recommended. I cannot speak for my colleagues but speaking for myself I am not dismayed at the changes which have been made. The other changes which do not come into this category I have described are mostly of minor importance.<sup>21</sup>

The Constitutional Commission Report together with the draft constitution were reviewed by a Working Party, which was made up of the High Commissioner, four representatives of the Malay Rulers, four Alliance Government representatives, the Chief Secretary and the Attorney-General.<sup>22</sup> Unfortunately, the Working Party, in its White

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<sup>18</sup> Para 11 of Justice Abdul Hamid's Dissent Note.

<sup>19</sup> Khoo Boo Teong, 'Rule of Law in the Merdeka Constitution' (2000) 27 JMCL 59, 71 – 74.

<sup>20</sup> *ibid.*

<sup>21</sup> Quoted at clmn. 3139 of the *Federal Legislative Council Proceedings*, 11 July, 1957.

<sup>22</sup> Jack Tsen-Ta Lee, 'Rediscovering the Constitution' (1995) 16 Sing L Rev 157, 171.

A Comparative Study of Malaysia and the United Kingdom Paper,<sup>23</sup> concurred with Justice Abdul Hamid's argument and insisted for the deletion of the word 'reasonable' from the draft constitution.<sup>24</sup> Based on the recommendations in the White Paper, several amendments were made and later, a final draft was passed by the Federal Legislative Council and came into force with the independence of the nation on 31 August 1957.<sup>25</sup>

Despite the fact that the Reid Commission proposed the right to freedom of expression '... should be guaranteed in the Constitution and the courts should have the power of enforcing the right,'<sup>26</sup> the word 'guaranteed' appeared to be without much substance. This is because the right could be restricted by numerous laws passed by Parliament.<sup>27</sup> For this reason, it was argued that the Reid Commission did not lay down solid foundation for freedom of expression in the draft constitution.<sup>28</sup>

Nonetheless, it would be erroneous to hold the Reid Commission responsible in entirety for the lack of an effective constitutional safeguard. Although the Malaysian Constitution was alleged to be less indigenous<sup>29</sup> for it was a product of constitutional advisers from the Commonwealth,<sup>30</sup> the final draft was indeed debated and reviewed by

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<sup>23</sup>The White Paper prepared by the Working Party entitled 'Constitutional Proposals for the Federation of Malaya' sets out the changes made to the Constitutional Commission Report and the draft constitution.

<sup>24</sup> Rais Yatim, *Freedom under Executive Power in Malaysia: A Study of Executive Supremacy* (Endowment Sdn Bhd 1995) 78 – 79.

<sup>25</sup> Harry E Groves, 'Fundamental Liberties in the Constitution of the Federation of Malaya - A Comparative Study' (1959) 5 Howard LJ 190, 199 – 200.

<sup>26</sup> Para 161 of the Constitutional Commission Report.

<sup>27</sup> Yatim, *Freedom under Executive Power in Malaysia: A Study of Executive Supremacy* (n 24).

<sup>28</sup> Abdul Aziz Bari, 'Freedom of Speech and Expression in Malaysia After Forty Years' (1998) 27(3) INSAF 149, 159.

<sup>29</sup> Tun Suffian LP observed that the Malaysian Constitution is less indigenous compared to the Indian Constitution as it was not drawn up by a constituent assembly and was not 'given by the people'. See *Phang Chin Hock v. Public Prosecutor* [1980] 1 MLJ 70 at 73.

<sup>30</sup> Joseph M Fernando, 'Sir Ivor Jennings and the Malayan Constitution' (2006) 34(4) J Imp & Commonw Hist 577, 578.

A Comparative Study of Malaysia and the United Kingdom local leaders from the Alliance party<sup>31</sup> and their response was considered by the Federal Legislative Assembly.<sup>32</sup> This can be seen with the inclusion of provisions on the monarchy institution, the Islamic religion, the Malay language and the Malay special privileges (commonly known as ‘traditional elements’<sup>33</sup> or ‘indigenous elements’),<sup>34</sup> which were incorporated into the final draft on recommendations by local leaders. Since there was sufficient local input inserted into the final draft, it would be more appropriate to regard the Malaysian Constitution as a product born of the local people.<sup>35</sup> Further, the final draft was scrutinised and approved by members of the Alliance party and not the constitutional jurists of the Reid Commission.<sup>36</sup>

### 3.3 The Meaning of Freedom of Expression

Freedom of speech and expression has been grouped together with freedom of assembly and association in Article 10. It is specifically placed in Part II (Articles 5 – 13)<sup>37</sup> of the Malaysian Constitution

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<sup>31</sup> The Alliance (*Perikatan*) party was the ruling government at that time and it was a coalition of the United Malays National Organisation (UMNO), Malayan Chinese Association (MCA) and Malayan Indian Congress (MIC). The Alliance party is now superseded by the National Front (*Barisan Nasional*).

<sup>32</sup> Abdul Aziz Bari, ‘The Indigenous Roots of the Malaysian Constitution: The Provisions and the Implications’ (2008) 6 CLJ xxxiii, 6.

<sup>33</sup> Mohd Salleh Abas, ‘Traditional Elements of the Malaysian Constitution’ in FA Trindade and Hoong Phun Lee (eds), *The Constitution of Malaysia: Further Perspectives and Developments: Essays in Honour of Tun Mohamed Suffian* (Oxford University Press 1986) 1 – 12.

<sup>34</sup> Bari, ‘The Indigenous Roots of the Malaysian Constitution: The Provisions and the Implications’ (n 32) 43 – 50.

<sup>35</sup> Sharon K Chahil, ‘A Critical Evaluation of the Constitutional Protection of Fundamental Liberties: The Basic Structure Doctrine and Constitutional Amendment in Malaysia’ (2002) 3 MLJ xii, 6.

<sup>36</sup> It was claimed that the Malaysian legal system was greatly influenced by a mixture of the British law, the Commonwealth jurisprudence, Shariah law and local customs. See Shamrahayu A. Aziz, ‘The Malaysian Legal System: The Roots, the Influence and the Future’ (2009) 3 MLJ xcii, 92.

<sup>37</sup> Part II of the Malaysian Constitution contains nine provisions on fundamental liberties namely (i) personal liberty, (ii) prohibition from slavery and forced labour, (iii) prohibition on double jeopardy and retrospective criminal laws, (iv) right to equality, (v) freedom of movement, (vi) freedom of expression, assembly and

A Comparative Study of Malaysia and the United Kingdom under the heading of 'Fundamental Liberties',<sup>38</sup> and is distinctively arranged after the supremacy clause.<sup>39</sup> Since the legislative framework of the country is based on the doctrine of constitutional supremacy,<sup>40</sup> this setting gives the impression that the right is very well guarded. In addition, any alteration to the constitutional provisions that house this right requires a two-third majority of the total number of members of Parliament.<sup>41</sup> Unfortunately, such a presumption is simply flawed as the right can be abridged by various restrictive laws so as to render it less significant.<sup>42</sup>

Article 10(1) of the Malaysian Constitution provides that:

Subject to Clauses (2), (3) and (4)<sup>43</sup> –

(a) Every citizen has the right to freedom of speech and expression.

The provision demonstrates express recognition of freedom of expression, but elaboration on its meaning is nowhere provided. Plain reading of the provision indicates that the right is conferred on Malaysian citizens only. The right is also applicable to artificial

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association, (vii) religious freedom, (viii) educational rights and (ix) proprietary rights.

<sup>38</sup> The terms 'fundamental liberties', or 'civil rights' or 'civil liberties' refer to rights that are basic and essential for the development of human personalities and capabilities. They can also be referred to as human rights. See Tunku Sofiah Jewa, *Public International Law: A Malaysian Perspective* (Pacifica Publications 1996) 465.

<sup>39</sup> The supremacy clause refers to Article 4(1) of the Malaysian Constitution that provides 'This Constitution is the supreme law of the Federation and any law passed after *Merdeka* (Independence) Day which is inconsistent with this Constitution, shall, to the extent of the inconsistency, be void'.

<sup>40</sup> Mohamed Suffian, *An Introduction to the Legal System of Malaysia* (2nd ed, Penerbit Fajar Bakti 1989) 12.

<sup>41</sup> Article 159(3) of the Malaysian Constitution provides 'A Bill for making any amendment to the Constitution (other than an amendment excepted from the provisions of this Clause) and a Bill for making any amendment to a law passed under Clause (4) of Article 10 shall not be passed in either House of Parliament unless it has been supported on Second and Third Readings by the votes of not less than two-thirds of the total number of members of that House'.

<sup>42</sup> Bari, 'Freedom of Speech and Expression in Malaysia After Forty Years' (n 28) 150.

<sup>43</sup> Clauses 2 – 4 of the Malaysian Constitution that restrict freedom of expression are discussed below at Part 3.6.

A Comparative Study of Malaysia and the United Kingdom persons such as companies and statutory bodies that are incorporated under Malaysian law, although they are unable to be regarded as citizens since citizenship is only conferred on natural persons.<sup>44</sup>

With regard to foreigners or non-citizens, they are not entitled to claim this right although they are constitutionally guaranteed other fundamental liberties including freedom of religion and right to property.<sup>45</sup> However, this does not render foreigners to be totally unprotected as common law principles can be invoked to protect their interests. This can be seen in the case of *John Peter Berthelsen v Director-General of Immigration, Malaysia & Ors*,<sup>46</sup> when it was ruled that the summary withdrawal of the work permit of an American journalist, who was legally permitted to enter the country, without a prior hearing was declared to be null and void as it violated the principles of natural justice. As to the disqualification of the right to foreigners, this has been expounded in *Dow Jones Publishing v Attorney General*,<sup>47</sup> whereby it was ruled that foreigners and foreign publications lack the constitutional protection of freedom of speech and expression under Article 10 of the Malaysian Constitution.

The lack of statutory interpretation on freedom of expression has nevertheless been remedied in *Public Prosecutor v Ooi Kee Saik & Ors*<sup>48</sup> that 'The right to freedom of speech is simply the right which everyone has to say, write or publish what he pleases so long as he does not commit a breach of the law'.<sup>49</sup> By virtue of this ruling, freedom of expression refers to communication of information and

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<sup>44</sup> Under Part III of the Malaysian Constitution, citizenship can only be conferred on natural person either by birth, descent, registration or naturalisation.

<sup>45</sup> Shad Saleem Faruqi, 'Human Rights and the Constitution' in S. Sothi Rachagan and Ramdas Tikamdas (eds), *Human Rights and the National Commission* (HAKAM 1999) 140.

<sup>46</sup> [1986] CLJ (Rep) 160

<sup>47</sup> [1989] 2 MLJ 385.

<sup>48</sup> [1971] 2 MLJ 108.

<sup>49</sup> *ibid* 112.

ideas that are not prohibited by law and it can be in verbal or written form. Nonetheless, this judicial interpretation still appears to be wanting and incomplete compared to definitions by other institutions. A good illustration would be the European Convention on Human Rights (ECHR), which provides a clear interpretation on the right to freedom of expression. Article 10(1) of the ECHR says:

Everyone has the right to freedom of expression. This right includes the *freedom to hold opinions and to receive and impart information and ideas* without interference by a public authority and regardless of frontiers... (emphasis added).

The right to freedom of expression in the ECHR has been defined to include freedom of information since these two rights are so closely connected or intertwined.<sup>50</sup> The close relationship between freedom of expression and freedom of information has also been recognised in other international instruments including the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR). The UDHR is a non-binding declaration and was adopted by the United Nations in 1948 as part of the International Bill of Human Rights along with the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>51</sup> Whilst the ICCPR is an international legal treaty which was approved by the Third Committee of the General Assembly of the United Nation in December 1966 and came into force in 1976.

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<sup>50</sup> The Hon Sir Anthony Mason, 'The Relationship between Freedom of Expression and Freedom of Information' in J Beatson and Yvonne Cripps (eds), *Freedom of Expression and Freedom of Information: Essays in Honour of Sir David Williams* (Oxford University Press 2000) 225.

<sup>51</sup> Henry J Steiner, *International Human Rights in Context: Law, Politics, Morals: Text and Materials* (3rd ed, Oxford University Press 2008); Arthur Henry Robertson and John Graham Merrills, *Human Rights in the World: An Introduction to the Study of the International Protection of Human Rights* (4th ed, Manchester University Press 1996).

Article 19 of the UDHR provides:

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 (emphasis added).

In a similar vein, Article 19(2) of the ICCPR states:

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 (emphasis added).

These provisions clearly show that though the ECHR slightly differs from the UDHR and ICCPR, in the sense that the former merely guarantees the right ‘to receive and impart’ and not the right ‘to seek’ information and ideas, they all treat freedom of expression to cover freedom of information. The absence of freedom of information from the judicial interpretation of freedom of expression in Malaysia seems to suggest that the scope of the right is deficient compared to the international jurisprudence. Attempts were made to invoke the provisions of UDHR in *Mohamad Ezam bin Mohd Noor v Ketua Polis Negara & Other Appeals*,<sup>52</sup> but it was held that UDHR was not legally binding on the Malaysian courts.<sup>53</sup> The case followed the earlier decision in *Merdeka University Berhad v. Government of Malaysia*<sup>54</sup> that provides:

The Universal Declaration of Human Rights was proclaimed and adopted on December 10, 1948 by the General Assembly of the United Nations. It is not a legally binding instrument as such and some of its provisions depart from existing and generally accepted

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<sup>52</sup> [2002] 4 MLJ 449

<sup>53</sup> *ibid* 453.

<sup>54</sup> [1981] 2 MLJ 356.



rules. It is merely a statement of principles devoid of any obligatory character and is not part of our municipal law.<sup>55</sup>

Since UDHR is not applicable in Malaysia, the government has been urged by the Human Rights Commission of Malaysia (SUHAKAM)<sup>56</sup> to ratify certain core treaties particularly the ICCPR that guarantees the right to freedom of expression. But so far, the situation remains the same and the ICCPR has yet to be signed and ratified by the country.<sup>57</sup> It was claimed that special protection accorded to the *Bumiputera*<sup>58</sup> and the use of certain laws that contravene the fundamental rights are among the key factors for the government's resistance.<sup>59</sup>

The non-accession of the ICCPR is further intensified with the absence of Asian regional human rights regime, comparable to the ECHR in Europe, Pact of San José in America or Banjul Charter in

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<sup>55</sup> *ibid* 366.

<sup>56</sup> The Human Rights Commission of Malaysia (SUHAKAM) was established under the Human Rights Commission of Malaysia Act 1999. See Kevin Kam Soon Aun, 'The Role of Fundamental Liberties in the Evolution of Malaysia as a Democratic Society' (2003) xxxii (2) INSAF 50, 60. For details on SUHAKAM, see <[www.suhakam.org.my/home](http://www.suhakam.org.my/home)> [accessed 1 March 2012].

<sup>57</sup> Malaysia is a dualist state that has currently ratified only two international treaties on human rights; the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child (CRC). These treaties were acceded to in 1995 with certain reservations on the basis of religious and national or cultural relativism. Malaysia has also signed, though not ratified the Convention on the Rights of Persons with Disabilities (CRPD). See Jaclyn Ling-Chien Neo, 'Malaysia's First Report to the CEDAW Committee: A Landmark Event for Women's Rights in Malaysia' (2007) 13 Asian Yrbk Int L 303.

<sup>58</sup> The word 'Bumiputera' or 'Bumiputra' literally means the 'son of soil' and it is used to refer to ethnic Malay and other indigenous ethnic groups such as the aboriginal people (*Orang Asli*) in Peninsular Malaysia and the tribal people in Sabah and Sarawak. See Sharon Siddique and Leo Suryadinata, 'Bumiputra and Pribumi: Economic Nationalism (Indiginism) in Malaysia and Indonesia' (1981) 54(4) Pac Aff 662, 662 – 663; Maran Marimuthu, 'Bumiputera-Controlled Companies: Performance Evaluation Using A Non-Parametric Approach' (2010) 2(2) IJEF 178. <<http://journal.ccsenet.org/index.php/ijef/article/view/5905/4684>> [accessed 29 March 2012].

<sup>59</sup> Elizabeth Looi and Shanon Shah, 'Human Rights: What's Stopping Malaysia?', 10 December 2008 <<http://www.thenutgraph.com/print/1226>> [accessed 17 March 2010].

A Comparative Study of Malaysia and the United Kingdom Africa,<sup>60</sup> which ought to safeguard the fundamental rights of the people in Asia or Asia-Pacific.<sup>61</sup> Fortunately, all leaders of Association for South-East Asian Nations (ASEAN) states have taken a positive step to promote human rights among its members with the adoption of the Charter of ASEAN in 2007.<sup>62</sup> Thereafter, an ASEAN human rights body, the ASEAN Intergovernmental Commission on Human Rights (AICHR), was founded in 2009.<sup>63</sup> Though AICHR is still considered in its infancy stage, it has already been heavily criticised as a toothless council that failed to promote and protect human rights and fundamental freedoms in the region.<sup>64</sup>

Despite those undesirable developments, the ruling in *Sivarasa Rasiah v Badan Peguam Malaysia & Anor*<sup>65</sup> appears to have relieved the lack of interpretation in the Malaysian Constitution. It was ruled by Gopal Sri Ram FCJ:

Article 10 contains certain express and, by interpretive implication, other specific freedoms. For example, the freedom of speech and expression are expressly guaranteed by art. 10(1)(a). The right to be derived from the express protection is the right to receive information, which is equally guaranteed.<sup>66</sup>

By virtue of this judgment, it is a settled law now that the right to freedom of speech and expression in Malaysia should be interpreted to include the right to receive information as well.

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<sup>60</sup> Further discussion on human rights regimes, see Burns H Weston, Robin Ann Lukes and Kelly M Hnatt, 'Regional Human Rights Regimes: A Comparison and Appraisal' (1987) 20 Vand J Transnat'l L 585, 592 – 614.

<sup>61</sup> Ralph Wilde, 'NGO Proposals for an Asia-Pacific Human Rights System' (1998) 1 Yale Hum Rts & Dev LJ 137, 137.

<sup>62</sup> Li-Ann Thio, 'Human Rights and the Charter of ASEAN' (2006) 13 Asian Yrbk Int L 285.

<sup>63</sup> For details on ASEAN Intergovernmental Commission on Human Rights (AICHR), see <[www.aseansec.org/22769.htm](http://www.aseansec.org/22769.htm)> [accessed 9 July 2012].

<sup>64</sup> 'Asean's Toothless Council' *Wall Street Journal* (22 July 2009) <<http://online.wsj.com/article/SB10001424052970203517304574303592053848748.html>> [accessed 9 July 2012].

<sup>65</sup> [2010] 2 MLJ 333.

<sup>66</sup> *ibid* 519.

A Comparative Study of Malaysia and the United Kingdom

Of late, many scholars and legal experts, including His Royal Highness Raja Azlan Shah, the former Lord President of the Supreme Court<sup>67</sup> who was later elected as the *Yang di-Pertuan Agong* (King) of Malaysia,<sup>68</sup> have openly recommended the adoption of the right of access to information. In a public lecture delivered on 19 December 1986, His Royal Highness was reported to have said:

The right to access to information has assumed increasing importance in recent years as one of the steps in achieving the concept of open government. I believe that we need a Freedom of Information, under which members of the public have a right to access specifically requested records, and that these should be made available, as a right, within reasonable time.<sup>69</sup>

It is an undisputed fact that apart from freedom of expression, the right of access to information is also crucial in a democratic country.<sup>70</sup> Unfortunately, the importance of such a right and the public outcry for a law on freedom of information was rejected by the government as it viewed such law as unnecessary at the present time.<sup>71</sup> This position is certainly undesirable as the rejection for the proposals of formulating freedom of information law indirectly indicates the government's intention of holding on to the culture of secrecy in its operations.

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<sup>67</sup> The title of Lord President of the Supreme Court previously referred to the highest position in the Malaysian judicial system. But the judiciary reforms in 1994, which rendered final appeals to the Privy Council in London were abolished in 1985, had resulted in the title to be replaced by that of Chief Justice of the Federal Court (also known as Chief Justice of Malaysia). Accordingly, the Supreme Court was replaced by the Federal Court as the apex court in the country.

<sup>68</sup> Raja Azlan Shah was promoted to the office of Lord President on 12 November 1982, and later was installed as Raja Muda (Crown Prince) by his uncle, Sultan Idris, the King of Perak. When Sultan Idris passed away, he succeeded to the throne of Perak. Later in April 1989, Raja Azlan Shah was appointed as the ninth *Yang di-Pertuan Agong* (King) of Malaysia.

<sup>69</sup> Sultan Azlan Shah, 'The Right to Know' (1986) 1 JMCL 22.

<sup>70</sup> Abu Bakar Munir and Siti Hajar Mohd Yasin, *Information and Communication Technology Law : State, Internet and Information: Legal and Regulatory Challenges* (Sweet & Maxwell Asia 2010) 34 – 37.

<sup>71</sup> Beh Li Yi, 'Minister: No Need for Freedom of Information' (*Malaysiakini.com*, 26 September 2005) <<http://www.malaysiakini.com/news/40903>> [accessed 10 February 2012].

### 3.4 The Scope of Freedom of Expression

The Malaysian Constitution also does not elaborate the exact scope of the right to freedom of speech and expression in Article 10(1). In the traditional sense, the right refers to typical forms of expression such as making speeches, writing books, articles or broadcasting.<sup>72</sup> Nonetheless, a well-established principle in constitutional law provides that freedom of expression would cover communication by word of mouth, signs, symbols and gestures and through works of art, music, sculpture, photographs, films, videos, books, magazines and newspapers.<sup>73</sup>

As to freedom of the press, its inter-connection with freedom of expression has been highlighted by Abdul Hamid LP in *The New Straits Times Press (M) Bhd v Airasia Bhd*<sup>74</sup> when it was observed that ‘...freedom of speech which is related to the freedom of the press’.<sup>75</sup> Nonetheless, freedom of the press has not been explicitly mentioned in the Malaysian Constitution. Such absence has prompted remarks from Edgar Joseph Jr SCJ in *Public Prosecutor v Pung Chen Choon*:<sup>76</sup>

[T]he Constitution of Malaysia says nothing about the freedom of the press. The relevant portion of art 19(1) of the Indian Constitution says this: ‘All citizens shall have the right: (a) to freedom of speech and expression; ...’. Nevertheless, a consistent current of judicial opinion in India has established the proposition that art 19(1)(a) includes within its ambit the freedom of the press...With this proposition we agree and indeed before us no attempt had been made by senior federal counsel to argue the contrary.<sup>77</sup>

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<sup>72</sup> Richard Stone, *Textbook on Civil Liberties and Human Rights* (6th ed, Oxford University Press 2006) 167.

<sup>73</sup> Shad Saleem Faruqi, ‘Free Speech and the Constitution’ (1992) 4 CLJ xlv, 36.

<sup>74</sup> [1987] 1 MLJ 36.

<sup>75</sup> *ibid* 38.

<sup>76</sup> [1994] 1 MLJ 566.

<sup>77</sup> *ibid* 572 – 573.

The judgment indicates that since Article 10(1) of the Malaysian Constitution is substantially similar with Article 19(1) of the Indian Constitution, the right to freedom of expression should technically include freedom of the press. The decision was followed in *Mkini Dotcom Sdn Bhd v Ketua Setiausaha Kementerian Dalam Negeri & Ors*<sup>78</sup> whereby it was ruled:

It is beyond doubt that the freedom of speech and expression, in Malaysia has its roots in article 10 of our Federal Constitution and further, to my mind that includes the freedom of press to print and publish. Clearly therefore, it is a right founded upon strong constitutional footing, though it must be noted that it is not an absolute right.<sup>79</sup>

Thus, it is a settled law that freedom of the press has been judicially considered to be within the scope of freedom of speech and expression. Despite the close relation between these two rights, Kamalanathan Ratnam J in *J Heng Consulting Services (M) Sdn Bhd & Anor v The New Straits Times Press (M) Bhd*<sup>80</sup> observed:

A distinction must be drawn between the right to ‘freedom of speech’ and the ‘freedom of the press’. Whilst the courts would endeavour to see that the right to freedom of speech is protected, there is no special privilege accorded to the press.<sup>81</sup>

The position of the press has been further underlined by Edgar Joseph Jr SCJ in *Pung Chen Choon’s*<sup>82</sup> case:

The position of the press under our Constitution is not as free as the position of the press under the Indian Constitution and more so when compared to the position of the press in England or the United States of America.<sup>83</sup>

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<sup>78</sup> *Semakan Kehakiman*: R1-25-455-2010. The case is discussed in details in Part 5.3.2.1 of Chapter 5.

<sup>79</sup> *ibid* para 18.

<sup>80</sup> [2003] 5 MLJ 481.

<sup>81</sup> *ibid* 488.

<sup>82</sup> *Public Prosecutor v Pung Chen Choon* (n 76).

<sup>83</sup> *ibid* 576.

These cases have clearly established that although press freedom has been given due judicial recognition, no special constitutional protection is conferred on such a right. Thus, the press merely enjoys the same right to freedom of expression under Article 10(1) like any other ordinary citizens,<sup>84</sup> even though the press may have a great impact on the public mind, particularly in the area of politics and public interest,<sup>85</sup> and has been subjected to specific legislation by the government.<sup>86</sup>

### 3.5 Political Expression

Freedom of expression together with freedom of assembly and association are commonly regarded as important political rights.<sup>87</sup> Nonetheless, the right to freedom of expression, which is explicitly stipulated in article 10(1) of the Malaysian Constitution, is not limited to political speech per se. Other types of expression, which are non-political such as commercial and artistic, are also protected to certain degree by the laws of the country. Nonetheless, the study will limit its focus on political speech because of its substantial impact on the democracy in the country.

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<sup>84</sup> Ahmad Ibrahim and M.P Jain, 'The Constitution of Malaysia and the American Constitutional Influence' in Lawrence Ward Beer (ed), *Constitutional Systems in Late Twentieth-century Asia* (University of Washington Press 1992) 550 – 552.

<sup>85</sup> There is no distinction as to the position of political speech in Malaysia with its counterpart in India. This is because there is no specific provision in the Indian Constitution favouring political speech over other types of speech. Further, other types of expressions are also constitutionally protected. This can be seen in the Supreme Court case of *Tata Press Ltd v Mahanagar Telephone Nigam Ltd* AIR 1995 SC 2438 whereby it was ruled that "Commercial speech is a part of freedom of speech guaranteed under Art. 19(1)(a). The public at large has a right to receive the commercial speech".

<sup>86</sup> Detailed discussion on the regulatory system of the press, see Part 3.2 of Chapter 5 below.

<sup>87</sup> Bari, 'The Indigenous Roots of the Malaysian Constitution : The Provisions and the Implications' (n 32).

A Comparative Study of Malaysia and the United Kingdom

The term 'political speech' has been generally defined to include 'all speech relevant to the development of public opinion on the whole range of issues which an intelligent citizen should think about', and should not be narrowly confined to 'communications which directly concern the conduct of government or which seek to influence electoral choices'.<sup>88</sup> It has been accorded a privileged legal status in most common law countries including the UK.<sup>89</sup> It is however uncertain whether political speech would enjoy similar status under the Malaysian Constitution.

Article 10(1) provides that freedom of expression is not confined to merely speech concerning public affairs, let alone political matters in a narrow sense. Though it was argued that special protection for political speech might be impliedly established in the said provision, this contention was difficult to sustain because the alleged implied protection for political speech, which should be stronger in its effects than the express provisions, is very hard to prove.<sup>90</sup>

The only case that examines the relationship between political discussion and freedom of expression is *Ooi Kee Saik*.<sup>91</sup> In this case, the first accused (an opposition politician) was charged under section 4(1)(b) of the Sedition Act 1948 for uttering seditious words at a dinner held by his party when he alleged the government of practising partiality in favour of one ethnic group. In his defence, he argued that freedom of expression should be given greatest latitude and that such

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<sup>88</sup> Eric Barendt, *Freedom of Speech* (2nd ed, Oxford University Press 2005) 161 – 162.

<sup>89</sup> Ivan Hare, 'Is the Privileged Position of Political Expression Justified?' in Jack Beatson and Yvonne M Cripps (eds), *Freedom of Expression and Freedom of Information: Essays in Honour of Sir David Williams* (Oxford University Press 2000) 105.

<sup>90</sup> Andrew T Kenyon and Hean Leng, 'Reynolds Privilege, Common Law Defamation and Malaysia' (2010) 2010 Sing J Legal Stud 256, 271.

<sup>91</sup> *Public Prosecutor v Ooi Kee Saik & Ors* (n 48).

a charge against him stroked at the very heart of free political comment. It was ruled:

[A]s a general statement, free and frank political discussion and criticism of government policies cannot be developed in an atmosphere of surveillance and constraint ... The question arises: where is the line to be drawn; when does free political criticism end and sedition begin? In my view, the right to free speech ceases at the point where it comes within the mischief of section 3 of the Seditious Speeches Act. The dividing line between lawful criticism of Government and sedition is this – if upon reading the impugned speech as a whole the court finds that it was intended to be a criticism of Government policy or administration with a view to obtain its change or reform, the speech is safe. But if the court comes to the conclusion that the speech used naturally, clearly and indubitably, has the tendency of stirring up hatred, contempt or disaffection against the Government, then it is caught within the ban of paragraph (a) of section 3(1) of the Act.<sup>92</sup>

The judgment has drawn the line between political criticism and sedition, but the special status of political speech has never been underlined. In the absence of any constitutional provision and express judicial recognition, it is submitted that political speech in Malaysia will not be given a privileged legal status like the position in the UK. Thus, political speech ought to be treated in the same manner like other types of expression such as commercial or artistic and shall be subjected to the same restrictive laws that have been passed by Parliament.

Unfortunately, the position of political speech has been further aggravated with the presence of the Seditious Speeches Act 1948, which has on numerous occasions been used to deter dissent and criticism towards the government. This could be seen in a number of cases including *Ooi Kee Saik*,<sup>93</sup> *Public Prosecutor v Fan Yew Teng*,<sup>94</sup> *Public*

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<sup>92</sup> *ibid* 111 – 112.

<sup>93</sup> *Public Prosecutor v Ooi Kee Saik & Ors* (n 48).

<sup>94</sup> [1975] 1 MLJ 176. The accused was charged for publishing the speech of Ooi Kee Saik which was considered a seditious publication in the December 1970 issue of



A Comparative Study of Malaysia and the United Kingdom  
*Prosecutor v Oh Keng Seng*<sup>95</sup> and *Lim Guan Eng v Public Prosecutor*.<sup>96</sup> The use of such laws in the past has effectively curtailed opposition politicians and civic groups from making critical comments on matters of public interest.<sup>97</sup>

Protection of national stability and racial harmony of the country has relentlessly been invoked to justify limitations on speech that challenges the government.<sup>98</sup> This line of reasoning has been underlined in *Fan Yew Teng v Public Prosecutor*<sup>99</sup> that:

It is important to bear in mind that Malaysia has a plural society. Therefore, it is the primary and fundamental duty of every Government to preserve law and order. It is in connection with this function of the Government that the offence of sedition must be looked at.<sup>100</sup>

Notwithstanding the aforesaid judgment, it was claimed that these reasons have been exploited to contain the influence of the opposition and to control public opinion.<sup>101</sup> The vague definition of the phrases ‘seditious’ and ‘seditious tendency’ in sections 2<sup>102</sup> and 3<sup>103</sup> of the

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the *Rocket*, an official publication of the opposition party of Democratic Action Party under the Sedition Act 1948

<sup>95</sup> [1979] 2 MLJ 174. The accused was charged for uttering seditious statements when his speech was found to have exceeded the bounds of fair criticism of government policies

<sup>96</sup> [2000] 2 MLJ 577. The accused was charged under the Sedition Act 1948 for making a speech that was alleged to have contained seditious words against the government.

<sup>97</sup> Other cases involving opposition politicians include *Public Prosecutor v Lim Kit Siang* [1979] 2 MLJ 37; *Public Prosecutor v Mark Koding* [1983] 1 MLJ 111; *Mohamad Ezam v Ketua Polis Negara* [2002] 4 MLJ 449 and *Public Prosecutor v Dato' Seri Anwar bin Ibrahim* [2010] 2 MLJ 353.

<sup>98</sup> Mohd Azizuddin Mohd Sani, ‘Freedom of Speech and Democracy in Malaysia’ (2008) 16(1) *Asian J Polit Sci* 85, 86.

<sup>99</sup> [1975] 2 MLJ 235.

<sup>100</sup> *ibid* 238.

<sup>101</sup> Mohd Azizuddin Mohd Sani, ‘Free Speech in Malaysia: From Feudal and Colonial Periods to the Present’ (2011) 100 (416) *Round Table* 531, 543 – 544.

<sup>102</sup> Section 2 of the Sedition Act 1948 defines ‘seditious’ as when 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.

<sup>103</sup> Section 3(1) provides a ‘seditious tendency’ is ‘a tendency (a) to bring into hatred or contempt or to excite disaffection against any Ruler or against any Government;

Sedition Act 1948 renders the statute to be very wide in scope and this had empowered the government to prosecute opposition politicians and critics under vague grounds of sedition. As a result, most of the sedition cases in Malaysia are not cases where politicians in the opposition parties call for armed rebellion against the government, but merely speech criticising the government.<sup>104</sup> Thus, it is not surprising when political speech in the country has been unfairly dominated by government leaders and ruling parties, whilst opposition parties and civil right groups have constantly been denied the opportunity to deliver political expression arguably as a means by the authority to control public opinion and hold to power.<sup>105</sup>

To sum up, political speech in Malaysia does not enjoy a privileged legal status like the position in the UK or other common law countries. It is theoretically permitted like commercial and artistic speech under article 10(1) of the Malaysian Constitution. Nonetheless, a close scrutiny of sedition cases reveals that political speech has been severely limited in practice by the government to strengthen its position and political control. Since it was observed that open public dialogue and criticism is hardly permissible,<sup>106</sup> it is submitted that so

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(b) to excite the subjects of any Ruler or the inhabitants of any territory governed by any Government to attempt to procure in the territory of the Ruler or governed by the Government, the alteration, otherwise than by lawful means, of any matter as by law established; (c) to bring into hatred or contempt or to excite disaffection against the administration of justice in Malaysia or in any State; (d) to raise discontent or disaffection amongst the subjects of the Yang di-Pertuan Agong or of the Ruler of any State or amongst the inhabitants of Malaysia or of any State; (e) to promote feelings of ill will and hostility between different races or classes of the population of Malaysia; or (f) to question any matter, right, status, position, privilege, sovereign or prerogative established or protected by the provisions of Part III of the Federal Constitution or Article 152, 153 or 181 of the Federal Constitution?.

<sup>104</sup> Farid Sufian Shuaib, 'Fundamental Liberties under the Federal Constitution : A Critical Analysis', *Human Rights Law: International, Malaysian and Islamic Perspectives* (Sweet & Maxwell Asia 2012) 300.

<sup>105</sup> Syed Husin Ali, *Merdeka Rakyat & Keadilan: Kumpulan Artikel Mengkritik Dasar-Dasar UMNO-BN Dan Mengemukakan Asas-Asas Politik Menuju Malaysia Baru* (Strategic Info Research Development 2004) 10 – 14.

<sup>106</sup> Mohd Azizudin Mohd Sani, *Freedom of Political Speech and Social Responsibility in Malaysia* (UKM Press 2010) 215.

A Comparative Study of Malaysia and the United Kingdom long as the Sedition Act 1948 continues to be in force and employed by the government, it is very much unlikely that political speech will be freely exercised by the people in the country. Thus, it is pertinent to scrutinise permitted grounds for restricting freedom of expression under the Malaysian laws.

### 3.6 Restrictions on Freedom of Expression

The right to freedom of speech and expression as constitutionally guaranteed to all citizens is not absolute or limitless. There is no doubt that freedom of expression is the citizens' fundamental liberty, but it is equally not disputed that the right should be subjected to certain restrictions. Several judicial decisions have clearly established that there is no unrestricted freedom of expression and restrictions are a necessary part of the right.<sup>107</sup> The rationale for imposing such restrictions has been described by Raja Azlan Shah J who quoted with approval a passage from the judgment of the Indian Supreme Court in the case of *AK Gopalan v State of Madras*:<sup>108</sup>

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.<sup>109</sup>

It was further observed by Eusoff Chin CJ in *Ling Wah Press (M) Sdn Bhd & Ors v Tan Sri Dato Vincent Tan Chee Yioun*<sup>110</sup> that:

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<sup>107</sup> Among those cases are *Public Prosecutor v Ooi Kee Saik & Ors* [1971] 2 MLJ 108; *Public Prosecutor v Fan Yew Teng* [1975] 1 MLJ 176; *Madhavan Nair & Anor v Public Prosecutor* [1975] 2 MLJ 264; *Lau Dak Kee v Public Prosecutor* [1976] 2 MLJ 229; *Public Prosecutor v Param Cumaraswamy (No. 2)* [1986] 1 MLJ 518.

<sup>108</sup> AIR 1950 SC 27.

<sup>109</sup> *Public Prosecutor v Ooi Kee Saik & Ors* (n 48) 111.

<sup>110</sup> [2000] 4 MLJ 77.

A Comparative Study of Malaysia and the United Kingdom

Freedom of speech is not an absolute right. Freedom of speech is not a licence to defame people. It is subject to legal restrictions. An absolute or unrestricted right to free speech would result in persons recklessly maligning others with impunity, and the exercise of such right would do the public more harm than good.<sup>111</sup>

It is obvious that there is a grave danger for an unbridled freedom of expression and qualifications on this right are undeniably necessary to secure the broader interest of the public. For this reason, the opening sentence to Article 10(1)<sup>112</sup> that stipulates that ‘Subject to Clauses (2), (3) and (4) – (a) every citizen has the right to freedom of speech and expression’ has from the beginning qualified this freedom to a number of restrictions.<sup>113</sup> Nonetheless, this arrangement has invited an acute criticism that Article 10(1) is ‘remarkable for what it takes away rather than what it gives’<sup>114</sup> as it failed to place real restrictions on the restrictions<sup>115</sup> and has effectively rendered the exercise of the right to be residual in nature.<sup>116</sup> The impact of this provision was discussed in *Lau Dak Kee v Public Prosecutor*<sup>117</sup> that:

Article 10(1) of the Federal Constitution guarantees the rights of every citizen to freedom of speech, assembly and association. These rights are, however, subject to any law passed by Parliament.<sup>118</sup>

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<sup>111</sup> *ibid* 85.

<sup>112</sup> Article 10(1) contains three fundamental rights namely freedom of speech and expression in sub-clause (a), freedom of peaceful assembly in sub-clause (b) and freedom of association in sub-clause (c).

<sup>113</sup> Clause 3 to Article 10 will not be discussed in this study because it is mainly on restrictions to the right to form associations under Article 10(1)(c).

<sup>114</sup> Harding, *Law, Government and the Constitution in Malaysia* (n 4) 169.

<sup>115</sup> Ahmad Masum, ‘Freedom of Speech and the Internet - A Case Study of Malaysia’ (2009) 3 MLJ 4.

<sup>116</sup> Abdul Aziz Bari and Farid Sufian Shuaib, *Constitution of Malaysia: Text and Commentary* (2nd ed, Prentice Hall 2006) 33.

<sup>117</sup> [1976] 2 MLJ 229.

<sup>118</sup> *ibid* 230.

### **3.6.1 Permitted Grounds of Restrictions**

Article 10 can be regarded as the most repressive provision as it contains two clauses that provide the basis for Parliament to pass restrictive laws on freedom of speech. Clause 2 of Article 10 states:

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.

Clause 2 empowers Parliament to enact laws restricting freedom of expression on eight specified grounds. The first ground relates to security of the Federation or any part thereof. It was alleged that the words ‘any part thereof’<sup>119</sup> have increased Parliamentary control over freedom of expression.<sup>120</sup> Several restrictive laws have been passed including the Official Secrets Act 1972, Printing Presses and Publications Act 1984, Protected Areas and Protected Places Act 1959, Public Order (Preservation) Act 1958 and Sedition Act 1948. Secondly, freedom of expression can be limited to preserve friendly relations with other countries. At present, no specific law has been passed for preserving good relations with foreign countries as these matters are specifically dealt with by the government in accordance to its administrative guidelines and foreign policies.<sup>121</sup>

Thirdly, limitation on the right can be justified on the ground of public order. This basis has been invoked to pass the Sedition Act 1948, Police Act 1967 and Printing Presses and Publications Act 1984.

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<sup>119</sup> The words were inserted by subsection 60(3) of the Malaysia Act (Act 26 / 1963).

<sup>120</sup> Harry E Groves, ‘The Constitution of Malaysia’ (1963) 5 Malaya L Rev 245, 273.

<sup>121</sup> Faruqi, ‘Free Speech and the Constitution’ (n 73) 36.

Fourthly, Article 10(2) recognises morality as a justifiable limitation and a number of laws such as Films (Censorship) Act 1952, Indecent Advertisements Act 1953, Lotteries Act 1952, Medicines (Advertisement and Sale) Act 1956, Printing Presses and Publications Act 1984 and *Perbadanan Kemajuan Filem Nasional Malaysia Act 1981* have been passed to this effect.

Further, Parliament may enact laws to safeguard the privileges of its members or Legislative Assembly. In relation to this, the Houses of Parliament (Privileges and Powers) Act 1952 and the standing orders of each House of Parliament have been enacted to enable Members of Parliament and State Legislative Assemblies to perform their duties as effectively as possible. The next constitutional ground is contempt of court and accordingly, two laws have been passed to restrict comment on judges and judicial proceedings namely the Judicial Proceedings (Regulation of Reports) Act 1962 and the Courts of Judicature Act 1964.

Freedom of expression can also be limited on the ground of defamation via the Defamation Act 1957 and the Penal Code.<sup>122</sup> Lastly, the Parliament is also permitted to enact laws on the ground of incitement to commit any offence. Offences like obscenity,<sup>123</sup> or causing disharmony, disunity on grounds of religion<sup>124</sup> and many other Penal Code offences that are restricting the right to freedom of expression are derived from clause 2 of Article 10.

Apart from clause 2, clause 4 of Article 10 also confers Parliament with additional legislative power to restrain the exercise of this fundamental right. The article reads:

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<sup>122</sup> Section 298A of the Penal Code was introduced on 20<sup>th</sup> February 1983 pursuant to Article 10(2)(a) of the Malaysian Constitution to regulate criminal defamation.

<sup>123</sup> Sections 292 – 294 of the Malaysian Penal Code.

<sup>124</sup> Sections 298A of the Malaysian Penal Code.

A Comparative Study of Malaysia and the United Kingdom

In imposing restrictions in the interest of the security of the Federation or any part thereof or public order under Clause (2)(a), Parliament may pass law prohibiting the questioning of any matter, right, status, position, privilege, sovereignty or prerogative established or protected by the provisions of Part III, Article 152, 153 or 181 otherwise than in relation to the implementation thereof as may be specified in such law.

The restrictions in Article 10(4) were introduced subsequent to the Constitution (Amendment) Act 1971.<sup>125</sup> The amendment, which was passed following the racial riots on 13<sup>th</sup> May 1969, prohibits anyone from questioning matters classified as politically sensitive in Malaysia. They are the right to citizenship under Part III<sup>126</sup> of the Malaysian Constitution, the status of the Malay language,<sup>127</sup> the position and privileges of the Malays and the natives of Sabah and Sarawak,<sup>128</sup> and the prerogatives of the Malay Sultans and the Ruling Chiefs of Negeri Sembilan.<sup>129</sup>

Freedom of expression is further constrained by Articles 149 and 150. The former permits Parliament to pass legislative action to fight subversion whilst the latter permits Parliament to enact laws to combat an emergency. Altogether, there are fourteen broad grounds available for Parliament to confine freedom of expression. To date, 35 statutes have been passed including the highly repressive laws namely the Printing Presses and Publications Act 1984, the Sedition Act 1948 and the Official Secrets Act 1972.<sup>130</sup> Surprisingly, these limitations are not exhaustive as there is a distinct possibility of other indirect restrictions derivable from other than these provisions.<sup>131</sup>

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<sup>125</sup> Act A30 that came into force on 10<sup>th</sup> March 1971.

<sup>126</sup> Articles 14 – 31 of the Malaysian Constitution.

<sup>127</sup> Article 152 of the Malaysian Constitution.

<sup>128</sup> Article 153 of the Malaysian Constitution.

<sup>129</sup> Article 181 of the Malaysian Constitution.

<sup>130</sup> Tommy Thomas, 'Human Rights in 21st Century Malaysia' (2001) xxx (2) INSAF 91, 97.

<sup>131</sup> Faruqi, 'Free Speech and the Constitution' (n 73).

The existence of this incredible list of constraints has placed freedom expression at the mercy of Parliament. To make matter worse, these legislative powers are open to manipulation by the government to maintain its political power.<sup>132</sup> This can be illustrated by a number of cases whereby members of opposition parties and non-government organisations were dubiously charged with violating restrictive laws on freedom of expression.<sup>133</sup> Undoubtedly, unduly restrictive exploitation of these statutes will have a dire impact on the democratic status of Malaysia, which has already been labelled alongside a ‘democratic state’, an ‘electoral autocracy’,<sup>134</sup> ‘semi-democracy’<sup>135</sup> or ‘syncretic state’.<sup>136</sup> These terms signify the hybrid character of the country that is situated between democracy and ‘full’ authoritarianism.<sup>137</sup>

The latest democracy index issued by the Economist Intelligence Unit in 2012 also categorised Malaysia as a ‘flawed democracy’ and not ‘full democracy’ at the position of 64<sup>th</sup> out of 167 countries worldwide.<sup>138</sup> This is because protection of basic human rights,

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<sup>132</sup> Abdul Aziz Bari, *Malaysian Constitution: A Critical Introduction* (The Other Press 2003) 153 – 156.

<sup>133</sup> In *Public Prosecutor v Lim Kit Siang* [1979] 2 MLJ 37, the opposition MP was charged under the Official Secrets Act 1972 for receiving and communicating secret official information relating to the purchase of fast strike crafts for the use of the Malaysian Navy. In *Public Prosecutor v Mark Koding* [1983] 1 MLJ 111, an MP was convicted for sedition when he advocated in Parliament the closure of Chinese and Tamil Schools. For details on political freedom in Malaysia, see Faridah Jalil, ‘*Kebebasan Berpolitik Menurut Perlembagaan Persekutuan Malaysia Dan Aplikasinya*’ (2001) 4 MLJ i – xxi.

<sup>134</sup> Larry Diamond, ‘Elections Without Democracy. Thinking About Hybrid Regimes’ (2002) 13(2) JOD 21, 33.

<sup>135</sup> William Case, ‘Semi-Democracy in Malaysia: Withstanding the Pressures for Regime Change’ (1993) 66(2) Pac Aff 183, 1.

<sup>136</sup> James V Jesudason, ‘The Syncretic State and the Structuring of Oppositional Politics in Malaysia’ in Garry Rodan (ed), *Political Oppositions in Industrialising Asia* (Routledge 1996) 128.

<sup>137</sup> Andreas Ufen, ‘The Transformation of Political Party Opposition in Malaysia and Its Implications for the Electoral Authoritarian Regime’ (2009) 16(3) Democratization 604, 605.

<sup>138</sup> Economist Intelligence Unit, ‘The Democracy Index 2012: Democracy at a Standstill’, 2012 at <[www.eiu.com/Handlers/WhitepaperHandler.ashx?fi=Democracy-Index-2012.pdf&mode=wp&campaignid=DemocracyIndex12](http://www.eiu.com/Handlers/WhitepaperHandler.ashx?fi=Democracy-Index-2012.pdf&mode=wp&campaignid=DemocracyIndex12)> [accessed 7 May 2013].



A Comparative Study of Malaysia and the United Kingdom including freedom of expression, is among the essential criteria in evaluating the regime types and the country was given a very low mark in this particular area by the report.<sup>139</sup> Hence, there is a pressing need to evaluate the restrictive laws passed by Parliament as any misuse of the permitted constitutional grounds is most likely to undermine the constitutional right of the people.

### **3.7 Legality of Restrictive Laws on Freedom of Expression**

In theory, the legality of any statutes, which have the effect of restricting constitutional rights including freedom of speech and expression, can be challenged in courts. This is by virtue of the doctrine of constitutional supremacy contained in Article 4(1).<sup>140</sup> The supreme status of the Malaysian Constitution was highlighted by the Federal Court in *Loh Kooi Choon v Government of Malaysia*<sup>141</sup> that:

The Constitution is not a mere collection of pious platitudes. It is the supreme law of the land embodying 3 basic concepts ... The third is that no single man or body shall exercise complete sovereign power, but that it shall be distributed among the Executive, Legislative and Judicial branches of government, compendiously expressed in modern terms that we are a government of laws, not of men.<sup>142</sup>

Thus, courts are empowered to review and invalidate any laws that have violated the Malaysian Constitution. However, constitutional review of legislation that restricts freedom of expression is hardly to be effected as the supremacy of the constitution is made subject to a number of exceptions. For instance, Article 10(2) permits Parliament

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<sup>139</sup> The Economist Intelligence Unit's democracy index is based on five categories; electoral process and pluralism, civil liberties, the functioning of government, political participation and political culture.

<sup>140</sup> Article 4(1) states 'This Constitution is the supreme law of the Federation and any law passed after *Merdeka* Day which is inconsistent with this Constitution, shall, to the extent of the inconsistency, be void'.

<sup>141</sup> [1977] 2 MLJ 187.

<sup>142</sup> *ibid* 188.

to pass any restrictive laws on freedom of expression that it deems 'necessary and expedient' for the specified purposes. In addition, other grounds of derogation are also provided in Articles 10(4), 149 and 150. In relation to this, it was alleged that these constitutional provisions have been so promulgated as to give the ruling government in Parliament virtually unfettered powers in controlling the right to freedom of speech and expression in the country.<sup>143</sup>

This state of affairs is worsened by Article 4(2)(b) that explicitly provides that Parliament's assessment of the necessity or expediency of any of these statutes is not open for challenge. Article 4(2)(b) reads:

The validity of any law shall not be questioned on the ground that ... it imposes such restrictions as are mentioned in Article 10(2) but those restrictions were not deemed necessary or expedient by Parliament for the purposes mentioned in that Article.

This position has been affirmed by Chan J in *Public Prosecutor v Param Cumaraswamy*<sup>144</sup> which provides:

By virtue of Article 4(2)(b) the validity of any law which Parliament under Article 10(2)(a) has deemed necessary to pass to impose restrictions on freedom of speech shall not be questioned.<sup>145</sup>

The decision rendered the questioning of the legality of any law that imposes restrictions pursuant to Article 10(2) is prohibited by Article 4(2). As a result, the possibility of any challenge of such laws has almost disappeared.<sup>146</sup> The article had effectively made Parliament 'supreme in the business of law making' and accordingly, the fundamental liberties (including freedom of expression) appeared secondary importance in the Malaysian Constitution.<sup>147</sup> On the

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<sup>143</sup> Faruqi, 'Free Speech and the Constitution' (n 73) 8.

<sup>144</sup> [1986] 1 MLJ 512.

<sup>145</sup> *ibid* 517.

<sup>146</sup> LA Sheridan, 'Constitutional Problems of Malaysia' (1964) 13(4) ICLQ 1349, 1354.

<sup>147</sup> Yatim, *Freedom under Executive Power in Malaysia: A Study of Executive Supremacy* (n 24) 101.

contrary, it was argued that Article 4(2) only prevents questioning on the ground that Parliament did not deem the restriction necessary and does not anticipate arguments based on the reasonableness.<sup>148</sup> It was also alleged that a law purporting to be passed under Article 10(2) could be challenged on the ground that it is not in any of the interests mentioned in the clause.<sup>149</sup>

Nonetheless, the alternative view on the implication of Article 4(2) on freedom of expression has not been favoured. Consequently, the only possible recourse is through an application to declare that such laws are unconstitutional for falling outside the scope permitted by the Malaysian Constitution. This has been highlighted by Chang Min Tat J in *Madhavan Nair & Anor v Public Prosecutor*<sup>150</sup> that ‘Any condition limiting the exercise of the fundamental right to freedom of speech not falling within the four corners of Article 10 clauses (2), (3) and (4) of the Federal Constitution cannot be valid’.<sup>151</sup> The principle has been followed in *Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh*<sup>152</sup> that ‘...such restrictions as only Parliament may impose and that too on specified grounds, and on no other grounds’.<sup>153</sup>

Unfortunately, after more than 55 years since the Independence Day, out of ten cases challenging the legality of restrictive laws, nine cases were rejected by courts.<sup>154</sup> Only in the landmark case of *Muhammad*

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<sup>148</sup> *ibid* 190.

<sup>149</sup> LA Sheridan and Harry E Groves, *The Constitution of Malaysia* (4th ed, Malayan Law Journal 1987) 73 – 74.

<sup>150</sup> [1975] 2 MLJ 264.

<sup>151</sup> *ibid* 265.

<sup>152</sup> [1992] 1 MLJ 697.

<sup>153</sup> *ibid* 713.

<sup>154</sup> The cases are *City Council of George Town v Government of Penang* [1967] 1 MLJ 169; *Selangor Pilots Association v Government of Malaysia* [1975] 2 MLJ 66; *Public Prosecutor v Datuk Haji Harun bin Idris & Ors* [1977] 1 MLJ 180; *Teh Cheng Poh v Public Prosecutor* [1979] 1 MLJ 50; *Malaysian Bar v Government of Malaysia* [1986] 2 MLJ 225; *Menon v Government of Malaysia* [1987] 2 MLJ 642; *Public Prosecutor v Dato' Yap Peng* [1987] 2 MLJ 311; *Mamat bin Daud v*

A Comparative Study of Malaysia and the United Kingdom  
*Hilman bin Idham & Ors v Kerajaan Malaysia & Ors*<sup>155</sup> which disputed the constitutionality of section 15(5)(a) of the Universities and University College Act 1971 (UUCA) that prohibits involvement of university students in politics has been declared unconstitutional. The provision was held to fall outside the scope of permitted grounds in the Malaysian Constitution and was declared illegal by the Court of Appeal. This decision is very commendable and could be regarded as a positive development for the future of free speech in the country. Later, the Federal Court has on 22 November 2012 affirmed the decision of the Court of Appeal when the appeal by the government was rejected as the dispute no longer existed following the repeal of the impugned section three months after the government was granted the permission to lodge a final appeal.<sup>156</sup>

### **3.7.1 The Phrases ‘Necessary or Expedient’**

Apart from ascertaining whether the impugned provisions come within the scope of permissible exceptions, courts in the past appeared to be unwilling to interfere with the legality of such laws arguably because the phrase ‘necessary or expedient’ in Article 10(2) of the Malaysian Constitution confers superfluous legislative power on Parliament. As a result, there are likely to be very few possible restrictions that would not be covered by the permissible grounds. The effect of the phrase ‘necessary and expedient’ has been underlined in *Madhavan Nair*.<sup>157</sup>

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*Government of Malaysia* [1988] 1 MLJ 119; and *Nordin bin Salleh v Dewan Undangan Negeri Kelantan* [1992] 1 MLJ 343.

<sup>155</sup> [2011] 6 MLJ 507.

<sup>156</sup> ‘Section 15 (5) (a) UUCA: Federal Court Dismisses Appeal’ *New Straits Times* (Kuala Lumpur, 22 November 2012) <<http://www.nst.com.my/nation/general/section-15-5-a-uuca-federal-court-dismisses-appeal-1.175136>> [accessed 9 December 2014].

<sup>157</sup> *Madhavan Nair v Public Prosecutor* (n 150).

A Comparative Study of Malaysia and the United Kingdom

Where such entirely subjective words have been used, it is not within the competency of the courts to question the necessity or expediency of the legislative provision.<sup>158</sup>

The judgment has caused Parliament to become the ultimate decision making body in determining the necessity or expediency of any laws and not the judiciary. It was claimed that so long as the passage of laws limiting freedom of expression by Parliament fulfilled all the procedural requirements, there would be no substantive challenge to these laws even if they were overly harsh or unreasonable.<sup>159</sup> This was highlighted by Raja Azlan Shah FJ in *Loh Kooi Choon*<sup>160</sup> that:

The question whether the impugned Act is ‘harsh and unjust’ is a question of policy to be debated and decided by Parliament, and therefore not meant for judicial determination. To sustain it would cut very deeply into the very being of Parliament.<sup>161</sup>

Consequently, courts were powerless to annul laws and they appeared to be assertive on restrictions laid down by Parliament rather than being inquisitive on the aims and functions of the right.<sup>162</sup> This is partly due to the omission of the word ‘reasonable’ from Article 10(2), which indicates the framers’ intention of holding Parliament (ultimately the Executive) as the sole deciding body on the extent, nature or scope of restrictions.<sup>163</sup> This undesirable setup has effectively exempted Parliament from proving the necessity and expediency of laws it passed and simultaneously precluded courts from inquiring the reasonableness of such statutes.

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<sup>158</sup> *ibid* 266 – 267.

<sup>159</sup> Tan and Thio, *Constitutional Law in Malaysia and Singapore* (n 15) 990.

<sup>160</sup> *Loh Kooi Choon v Government of Malaysia* (n 141).

<sup>161</sup> *ibid* 188.

<sup>162</sup> Raja Aziz Addruse, ‘Fundamental Rights and the Rule of Law: Their Protection by Judges’. Paper presented at 12th Commonwealth Law Conference, Kuala Lumpur, 13 September 1999.

<sup>163</sup> *Halsbury’s Laws of Malaysia*, vol 2 (Malayan Law Journal 1999) 164.

The approach taken by the Malaysia courts was in stark contrast with its counterpart in India. This is due to the express provision in the Indian Constitution that specifically mandates any derogation on freedom of expression to be reasonable. Article 19(2) of the Indian Constitution provides that:

Nothing in sub clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes *reasonable* restrictions on the exercise of the right ... (emphasis added)

In relation to this, any laws purported to restrict the right to freedom of expression in India should be reasonable and the duty of determining the reasonableness of such restrictions is vested in courts.<sup>164</sup> The different judicial approach between courts in Malaysia and India has been discussed in *Pung Chen Choon* that:<sup>165</sup>

In Malaysia, the position of the court when considering an infringement of this Right is different from that of the position of the court in India... the Indian Constitution requires that the restrictions, even if within the limits prescribed, must be 'reasonable' – and so that court would be under a duty to decide on its reasonableness. But, with regard to Malaysia, when infringement of the Right of freedom of speech and expression is alleged, the scope of the court's inquiry is limited to the question whether the impugned law comes within the orbit of the permitted restrictions. So, for example, if the impugned law, in pith and substance, is a law relating to the subjects enumerated under the permitted restrictions found in cl 10(2)(a), the question whether it is reasonable does not arise; the law would be valid.<sup>166</sup>

### **3.7.2 Constitutional Interpretation**

Constitutional interpretation poses enormous challenges to local judges. In general, courts are mandated to adopt the 'four walls' approach that was established in *The Government of the State of*

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<sup>164</sup> M. P. Jain, Samaraditya Pal and Ruma Pal, *Indian Constitutional Law* (6th ed, Lexis Nexis Butterworths Wadhwa Nagpur 2010) 982.

<sup>165</sup> *Public Prosecutor v Pung Chen Choon* (n 76).

<sup>166</sup> *ibid* 575.

*Kelantan v The Government of the Federation of Malaya and Tunku Abdul Rahman Putra Al-Haj*.<sup>167</sup> It was ruled by Thomson CJ that ‘The Constitution is primarily to be interpreted within its own four walls and not in the light of analogies drawn from other countries such as Great Britain, the United States of America or Australia’.<sup>168</sup>

The ‘four walls’ approach towards constitutional interpretation was followed by Raja Azlan Shah FJ in *Loh Kooi Choon*.<sup>169</sup>

Whatever may be said of other Constitutions, they are ultimately of little assistance because our Constitution now stands in its own right and it is in the end the wording of our Constitution itself that is to be interpreted and applied, and this wording ‘can never be overridden by the extraneous principles of other Constitutions’.<sup>170</sup>

These cases indicate that the Malaysian Constitution should be ideally interpreted in the local context. Though there were times when local courts resorted to comparative analysis with foreign countries, particularly the English and Indian cases, they are not binding but merely persuasive. This can be seen in a number of cases including *Karam Singh v Menteri Hal Ehwal Dalam Negeri Malaysia*.<sup>171</sup> In this case, the Federal Court was referred to a long list of English and Indian authorities on constitutional interpretation. In choosing the laws between the two countries, it was observed by Suffian LP that ‘Judgments of the Indian Supreme Court are of great persuasive value here, particularly on the Constitution because to a great extent the Indian Constitution was the model of our own Constitution’.<sup>172</sup>

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<sup>167</sup> [1963] MLJ 335.

<sup>168</sup> *ibid* 358.

<sup>169</sup> *Loh Kooi Choon v Government of Malaysia* (n 141).

<sup>170</sup> *ibid* 188 – 189.

<sup>171</sup> [1969] 2 MLJ 129.

<sup>172</sup> *ibid* 147.

The relevance and authoritative value of the Indian cases have been discussed in details in *Yeap Hock Seng @ Ah Seng v Minister For Home Affairs, Malaysia & Ors.*<sup>173</sup> It was submitted by Abdoolcader J that:

Our Constitution and the laws providing for preventive detention have been primarily drawn from Indian sources, and accordingly decisions of the highest tribunal in India, the Supreme Court of India, and indeed also of the High Courts of her several States, are of great persuasive authority here upon the borrowed provisions and will be entitled to great weight in interpreting and considering the relevant local statutory counterparts, subject of course to such modifications as may be necessary owing to variation in language or context.<sup>174</sup>

As such, it is obvious that reference to the Indian cases would prove beneficial in interpreting the Malaysian Constitution whenever there is a lack of local authority. In addition, Article 10(1) of the Malaysian Constitution is to a large extent similar to Article 19(1) of the Indian Constitution. This has been acknowledged by Tuan Abang Iskandar J in the unreported case of *Mkini Dotcom Sdn Bhd.*<sup>175</sup>

Apart from the ‘four walls’ approach and the adoption of the Indian cases on constitutional issues, local courts appeared to have preferred the literal approach in interpreting the Malaysian Constitution.<sup>176</sup> By applying the literal interpretation, a greater emphasis would be placed on the ‘plain language’ of the provision so that its grammatical and ordinary sense would be applied. This approach was discussed in *Public Prosecutor v Datuk Harun Bin Haji Idris & Ors.*<sup>177</sup>

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<sup>173</sup> [1975] 2 MLJ 279.

<sup>174</sup> *ibid* 281.

<sup>175</sup> *Mkini Dotcom Sdn Bhd v Ketua Setiausaha Kementerian Dalam Negeri & Ors* (n 78).

<sup>176</sup> Shad Saleem Faruqi, ‘Human Rights, International Law and Municipal Courts’, <[http://www.suhakam.org.my/c/document\\_library/get\\_file?p\\_1\\_id=10408&folderId=69478&name=DLFE-6202.pdf](http://www.suhakam.org.my/c/document_library/get_file?p_1_id=10408&folderId=69478&name=DLFE-6202.pdf)> [accessed 21 April 2011].

<sup>177</sup> [1976] 2 MLJ 116.



A Comparative Study of Malaysia and the United Kingdom

The Constitution is not to be construed in any narrow and pedantic sense... but it is equally true that this does not mean that the court is at liberty to stretch or pervert the language of the Constitution in the interests of any legal or constitutional theory ...<sup>178</sup>

On a similar note, it was highlighted in *Ooi Kee Saik*:<sup>179</sup>

[I]n interpreting a written constitution such as the Federation of Malaya Constitution the court must look at the expressed wording of the written constitution itself rather than be guided by extraneous principles of other constitutions.<sup>180</sup>

Consequently, judges were of the opinion that they have no other options but to apply these laws. This is reflected in the ruling of Raja Azlan Shah J:

Once the court has determined that such law lies within the province of a competent authority, the court is not authorised to reweigh what a competent authority has weighed. The court will not assume the role of a third legislative chamber.<sup>181</sup>

These cases indicate the preference of the judiciary in Malaysia to focus on the language of the provisions than on the philosophical basis of the rights. It was alleged that the restrictive interpretation of the provisions on freedom of expression has resulted in the right looked illusory.<sup>182</sup> It was also contended that the superior court judges' immersion in the British legal philosophy of positivism and their familiarity with the British tradition of parliamentary supremacy have contributed to the judges' reluctance to invalidate restrictive laws on

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<sup>178</sup> *ibid* 120.

<sup>179</sup> *Public Prosecutor v Ooi Kee Saik* (n 48).

<sup>180</sup> *ibid* 113.

<sup>181</sup> *ibid* 114; cf *AXA General Insurance Ltd, Petitioners* [2011] UKSC 46, 2011 WL 4706943 [52] whereby in determining the validity of the Damages (Asbestos-related Conditions) (Scotland) Act 2009 which has reversed the earlier decision of the House of Lords in *Rothwell v Chemical & Insulating Co Ltd* [2007] UKHL 29, Lord Hope ruled that it would be wrong for judges to substitute their views as to what is rational or reasonable for the considered judgment of the democratically elected legislature. See Chris Himsworth, 'The Supreme Court Reviews the Review of Acts of the Scottish Parliament' (2012) April PL 205.

<sup>182</sup> Imtiaz Omar, *Rights, Emergencies and Judicial Review* (Kluwer Law International 1996) 19.

A Comparative Study of Malaysia and the United Kingdom the ground of human rights violation.<sup>183</sup> Further, it was argued that the escalating power of the executive has also weakened courts' powers in safeguarding freedom of expression.<sup>184</sup> The power is derived from consistent success of the ruling party in securing a two-third majority of Parliament seats in general elections.<sup>185</sup> Another critical factor is the eastern cultures and traditions of the people that do not encourage challenges against the ruling authority.<sup>186</sup> Consequently, the executive is not only able to dominate legislative functions and pass laws as it desires, but also to behave like feudal lords.<sup>187</sup>

Nonetheless, there have been positive developments in the interpretation of the Malaysian Constitution by local courts. This was highlighted by the Federal Court in *Dato Menteri Othman bin Baginda v Dato Ombi Syed Alwi*:<sup>188</sup>

In interpreting a constitution two points must be borne in mind. First, judicial precedent plays a lesser part than is normal in matters of ordinary statutory interpretation. Secondly, a constitution, being a living piece of legislation, its provisions must be construed broadly and not in a pedantic way – with less rigidity and more generosity than other Acts.<sup>189</sup>

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<sup>183</sup> Shad Saleem Faruqi, 'Severe Restraints on Media Operations' *The Star Online* (Kuala Lumpur, 5 May 2010) 77. <<http://thestar.com.my/columnists/story.asp?file=/2010/5/5/columnists/reflectingont helaw/6190046&sec=Reflecting%20On%20The%20Law>> [accessed 16 July 2010].

<sup>184</sup> Yatim, *Freedom under Executive Power in Malaysia: A Study of Executive Supremacy* (n 24) 186.

<sup>185</sup> Shad Saleem Faruqi, 'The All-Powerful Executive' (1 October 2005) <<http://www.sun2surf.com/articlePrint.cfm?id=11381>> [accessed 23 August 2010].

<sup>186</sup> Bari, 'Freedom of Speech and Expression in Malaysia After Forty Years' (n 28) 160.

<sup>187</sup> *ibid*; cf *R (on the application of Jackson) v Attorney General* [2005] UKHL 56, [2006] 1 AC 262 [102] whereby Lord Steyn in determining the question over the question of parliamentary sovereignty ruled that Acts of the Westminster Parliament were not themselves ultimately unassailable.

<sup>188</sup> [1981] 1 MLJ 29.

<sup>189</sup> *ibid* 31.

The same approach was later followed in *Merdeka University Berhad v Government of Malaysia*<sup>190</sup> and *Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & Another Appeal*.<sup>191</sup> In the latter case, Gopal Sri Ram JCA ruled that:

It is the solemn duty of the judicial arm of Government – the courts who are the guardians of constitutional rights – to interpret the fundamental rights provisions in Part II of the Constitution prismatically, so that our citizens obtain the full benefit and value of those rights. And it is in this simple way, through the exercise of the court's interpretive jurisdiction that our public law gains momentum. Accordingly, it cannot be over-emphasised that on no account should our courts adopt a narrow and pedantic approach to constitutional interpretation.<sup>192</sup>

The paradigm shift of the local courts from literal interpretation was reaffirmed in *Badan Peguam Malaysia v Kerajaan Malaysia*.<sup>193</sup> In this case, it was held that interpreting a constitution, which is the supreme law of the country, is not the same as interpreting a statute as it involves the application of *sui generis* principles. It was further ruled by the Federal Court that a constitution should be construed with less rigidity and more generosity than other ordinary statutes.<sup>194</sup>

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<sup>190</sup> [1981] 2 MLJ 356.

<sup>191</sup> [2005] 3 MLJ 97.

<sup>192</sup> *ibid* 119.

<sup>193</sup> [2008] 2 MLJ 285.

<sup>194</sup> *ibid* 328 – 329. Azmel FCJ highlighted a number of principles that ought to be applied by the judiciary in constitutional interpretations. These principles are: (i) A constitution should be considered with less rigidity and more generosity than other statutes; (ii) The only true guide and only course which can produce stability in constitutional law is to read the language of the Constitution itself, no doubt generously and not pedantically, but as a whole and to find a meaning by legal reasoning; (iii) The constitution is not to be construed in any narrow or pedantic sense; (iv) A vitally important function of the court is to interpret constitutional provisions conferring rights with the fullness needed to ensure that citizens have the benefit these constitutional guarantees are intended to afford; (v) Provisions derogating from the scope of guaranteed rights are to be read restrictively; (vi) Judicial precedent plays a lesser part than is normal in matters of ordinary statutory interpretation; and (vii) Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language.

The attitude of local courts in interpreting fundamental rights was tested in *Dr Mohd Nasir bin Hashim v Menteri Dalam Negeri Malaysia*.<sup>195</sup> The case concerned a refusal by the Registrar of Societies (ROS) to register a new political party, *Parti Sosialis Malaysia* (PSM), at national level on the ground that PSM's committee did not comprise of members from at least seven states in Malaysia. The appellant sought a judicial review claiming that his right to form association under Article 10(1)(c) had been infringed by ROS and the decision not to register the party is a restriction not authorised by the Malaysian Constitution. In delivering the judgment, the Court of Appeal had discussed the implication of the words 'such restrictions as it deems necessary or expedient' in Article 10(2)(c) and ruled that the words should not be given a literal meaning. It was observed by Gopal Sri Ram JCA that:

Against the background of these principles it is my judgment that the restrictions which art 10(2) empower Parliament to impose must be reasonable restrictions. In other words, the word 'reasonable' must be read into the sub-clauses of art 10(1)... the court must not permit restrictions upon the rights conferred by art 10 that render those rights illusory. In other words, Parliament may only impose such restrictions as are reasonably necessary. To emphasise, only proportionate legislative response is permissible under art 10(2)(c).<sup>196</sup>

The non-literal approach adopted by the Court of Appeal in the case has departed from the earlier ruling of Eusoff Chin J in *Nordin bin Salleh v Dewan Undangan Negeri Kelantan*<sup>197</sup> which ruled that 'reasonableness is not material in art 10(2)(c) of the Federal Constitution'.<sup>198</sup> Apparently, this judgment has a great impact on the fundamental rights as the word 'reasonable' must now be read before the word 'restrictions' in Article 10. Consequently, Parliament is no

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<sup>195</sup> [2006] 6 MLJ 213.

<sup>196</sup> *ibid* 220 - 222.

<sup>197</sup> [1992] 1 MLJ 343.

<sup>198</sup> *ibid* 356.

longer at liberty to pass restrictive laws at will since any limitations on such rights must be reasonable, for any non-compliance will render such laws to be declared unconstitutional by courts.

### **3.7.3 Reasonableness of Restrictions on Freedom of Expression**

The landmark ruling that requires the word ‘reasonable’ to be read before restrictions in Article 10 has been conceded by the unanimous decision of the Federal Court in *Sivarasa Rasiah*.<sup>199</sup> In delivering the judgment, Gopal Sri Ram FCJ said:

Provisos or restrictions that limit or derogate from a guaranteed right must be read restrictively... although the article says ‘restrictions’, the word ‘reasonable’ should be read into the provision to qualify the width of the proviso... when reliance is placed by the state to justify a statute under one or more of the provisions of art 10(2), the question for determination is whether the restriction that the particular statute imposes is reasonably necessary and expedient for one or more of the purposes specified in that article.<sup>200</sup>

The question of reasonableness of restrictive laws on the freedom of expression has been invoked in the subsequent case of *Muhammad Hilman*.<sup>201</sup> The appellants were political science undergraduates of the third respondent (*Universiti Kebangsaan Malaysia*). They were present at a parliamentary by-election in Hulu Selangor and were found to have in their possession paraphernalia supportive of, sympathetic with or opposed to a contesting political party during the campaign period. As a result, the appellants faced disciplinary proceedings for the alleged breach of section 15(5)(a) of the Universities and University Colleges Act 1971(UUCA) which

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<sup>199</sup> *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* (n 65).

<sup>200</sup> *ibid* 341.

<sup>201</sup> *Muhammad Hilman bin Idham & Ors v Kerajaan Malaysia & Ors* (n 155).

A Comparative Study of Malaysia and the United Kingdom prohibits students' involvement in politics.<sup>202</sup> The appellants denied the allegations and applied to the High Court for a declaration that the impugned section, which restricted their right to freedom expression, was unconstitutional as it violated Article 10(1)(a).

Nonetheless, their application was dismissed and the appellants then appealed against the decision by contending that not only restrictions on freedom of expression must be for one of the specified grounds, they must also be reasonable. In allowing the appeal and holding that the restrictive provisions were unconstitutional, the Court of Appeal by referring to the Federal Court decision in *Sivarasa Rasiah*<sup>203</sup> ruled that the word 'reasonable' should be read into the provisions in Article 10(2)(a) and thus any restrictions on the right must be reasonably necessary and expedient for one or more of the permitted purposes. The earlier decision by the Supreme Court<sup>204</sup> in *Pung Chen Choon*<sup>205</sup> that held that the question of reasonableness is immaterial for any restrictive laws passed by Parliament was no longer a good law.<sup>206</sup> It was highlighted by Mohd Hishamudin JCA that:

It is now settled law that Parliament can no longer impose a restriction on freedom of speech, in any manner it deems fit, for the purpose of protecting the interests spelt out in cl 2(a) of art 10. Any restriction imposed on freedom of speech by Parliament must be a reasonable restriction, and the court, if called upon to rule (such as in the present case), has the power to examine whether the restriction so imposed is reasonable or otherwise (besides

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<sup>202</sup> The impugned section was repealed by the Universities and University Colleges (Amendment) Act 2012 on 18 June 2012 and was substituted with a new section 15(1) which provides that 'a student of the University may become a member of any society, organization, body or group of persons, whether in or outside Malaysia, including any political party'. With the coming into force of the new amendment, university students are no longer banned from joining politics.

<sup>203</sup> *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* (n 65).

<sup>204</sup> The Supreme Court was previously the apex court in Malaysia until it was replaced by the Federal Court subsequent to the judiciary reforms in 1994.

<sup>205</sup> *Public Prosecutor v Pung Chen Choon* (n 76).

<sup>206</sup> In *Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ 1, it was held that when two decisions of the Federal Court conflict on a point of law, the later decision prevails over the earlier decision.

A Comparative Study of Malaysia and the United Kingdom

determining as to whether or not the restriction falls within the permissible exceptions as spelt out by cl (2)(a) of art 10); and – in the event it were to hold that the restriction is unreasonable – to declare the impugned law imposing the restriction as being unconstitutional and accordingly null and void.<sup>207</sup>

The decision has accorded a greater protection to freedom of expression since any restrictions on such a right must now satisfy two crucial requirements i.e. they must come within the ambit of the permitted grounds and must be reasonable. As a result, the power of Parliament to enact restrictive laws is no longer limitless. Further, the reasonableness of restrictive laws will not be determined by Parliament, but by the wisdom of the judges. Nonetheless, there is lack of clear interpretation and judicial guidelines in ascertaining the reasonableness of any restrictive laws on freedom of expression under the Malaysian Constitution.

### **3.7.4 The Test of Reasonableness**

The word ‘reasonable’ was first ruled to be read into Article 10 in *Dr Mohd Nasir*.<sup>208</sup> Though the case concerns freedom of association, the judgment is very critical as it considered the interpretation of the phrase ‘such restrictions as it deems necessary or expedient’ in Article 10, which also houses freedom of expression. In holding that any restrictions must be reasonably necessary, the court referred to equality clause in Article 8<sup>209</sup> and ruled that ‘only proportionate legislative response is permissible under art 10(2)(c)’.<sup>210</sup> The word ‘reasonable’ has then been equated with the word ‘proportionate’ and therefore, any restrictive laws that are disproportionate to the object sought to be achieved by Parliament will be rendered unreasonable and unconstitutional by courts.

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<sup>207</sup> *Muhammad Hilman bin Idham & Ors v Kerajaan Malaysia & Ors* (n 155) 523.

<sup>208</sup> *Dr Mohd Nasir bin Hashim v Menteri Dalam Negeri Malaysia* (n 195).

<sup>209</sup> Article 8(1) of the Malaysian Constitution provides ‘All persons are equal before the law and entitled to the equal protection of the law’.

<sup>210</sup> [1994] 1 MLJ 566 at 222.

A Comparative Study of Malaysia and the United Kingdom

The decision that requires restrictions in Article 10 to be reasonable was followed by the Federal Court in *Sivarasa Rasiah*.<sup>211</sup> The appellant, who was an advocate and solicitor as well as a member of the Malaysian Parliament, challenged the constitutionality of section 46A (1) of the Legal Profession Act 1976 which disqualified him from being a member of the Bar Council. He argued that the impugned section imposed unreasonable restrictions and violated his right to freedom of association. In holding that the word ‘reasonable’ should be read into the constitutional provisions, the court ruled that the disqualifications were reasonable and they were justifiable on the grounds of public morality as the absence of political influence secured an independent Bar Council.<sup>212</sup> It is important to note that the court in this case departed from the earlier decision in *Dr Mohd Nasir*<sup>213</sup> as it did not equate reasonableness with proportionality though the equality clause in Article 8 was discussed in details and was raised by the appellant. Unfortunately, the word ‘reasonable’ was not succinctly elaborated and its interpretation remains obscure.

The reasonableness of laws limiting freedom of expression has been invoked in *Muhammad Hilman*.<sup>214</sup> The appellant argued that the trial judge had erred in law and fact when he decided that the question of reasonableness was immaterial under Article 10(1)(a). On appeal, it was held that by virtue of the Federal Court’s rulings in *Sivarasa Rasiah*,<sup>215</sup> any restrictions imposed on freedom of expression must be reasonable. However, Low Hop Bing JCA dissented and ruled that the impugned section was reasonable as the issue of reasonableness had been extensively debated in Parliament and the question of whether restrictive laws are harsh and unjust was beyond the purview of the

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<sup>211</sup> *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* (n 65).

<sup>212</sup> *ibid* 344.

<sup>213</sup> *Dr Mohd Nasir bin Hashim v Menteri Dalam Negeri Malaysia* (n 195).

<sup>214</sup> *Muhammad Hilman bin Idham & Ors v Kerajaan Malaysia & Ors* (n 155).

<sup>215</sup> *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* (n 65).



A Comparative Study of Malaysia and the United Kingdom judiciary. However, by way of obiter he suggested Parliament to repeal or review the section or the whole act.<sup>216</sup>

On the contrary, Mohd Hishamuddin JCA ruled that court had the power to determine the reasonableness of laws passed by Parliament. Since no clear relation between the prohibition and the object sought to be achieved was established, the provision was regarded unreasonable and accordingly, the impugned section was declared unconstitutional.<sup>217</sup> The judgment had been conceded by Linton Albert JCA as the impugned section was found to be unreasonable for its manifest absurdity. It was further highlighted that inflexible propositions to determine the reasonableness of restrictive laws were neither necessary nor useful as each provision must be determined on its own facts and circumstances.

It is pertinent to highlight that the judgment was the first authority that demands restrictive laws on freedom of expression to be reasonable. Nonetheless, it is very unfortunate that none of the judges attempted to define the term 'reasonable' or promulgate clear guidance in ascertaining the reasonableness of any derogatory provisions as the restrictive provision was held 'self-explanatory in its manifest absurdity'.<sup>218</sup> The earlier cases of *Dr Mohd Nasir*<sup>219</sup> and *Sivarasa Rasiah*<sup>220</sup> also did not provide a clear interpretation of the word. This is very undesirable and may cause uncertainty since the reasonableness of any legislation will be entirely dependent on the personal assessment of judges.

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<sup>216</sup> *Muhammad Hilman bin Idham & Ors v Kerajaan Malaysia & Ors* (n 155) 520.

<sup>217</sup> *ibid* 526 – 527.

<sup>218</sup> *ibid* 532.

<sup>219</sup> *Dr Mohd Nasir bin Hashim v Menteri Dalam Negeri Malaysia* (n 195).

<sup>220</sup> *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* (n 65).

And in the recent case of *Mat Shuhaimi bin Shafiei v Public Prosecutor*,<sup>221</sup> the constitutionality of the Sedition Act 1948 was challenged on the ground that it offended the ‘reasonableness test’. The appellant, who was charged for publishing seditious posts in his blog, had urged the court to adopt a liberal interpretation of the word ‘reasonableness’ when he contended that any restrictions that derogate from the constitutional right to freedom of speech and expression must be read restrictively. In rejecting the argument, it was ruled by the Court of Appeal that:

... the judicial approach in dealing with the offence of sedition in Malaysia has favoured the restrictive approach as compared to the liberal approach adopted by the English common law... In our judgment, the Sedition Act is constitutional and it does not violate arts 10(1)(a) and 10(2)(a) of the Federal Constitution. It does not offend the reasonableness test. It is reasonable to maintain the Sedition Act because the Government has a right to preserve public peace and order, and therefore, has a good right to prohibit the propagation of opinions which have a seditious tendency.<sup>222</sup>

The case has clearly shown the positivist attitude of the local judges as they were reluctant to take a liberal interpretation of the word ‘reasonableness’ so as to accord protection for freedom of speech in general and political blogs in particular. Regardless of the current situation in Malaysia, reference to the jurisprudence in India would prove crucial as the Indian authorities are highly persuasive on the interpretation of the Malaysian Constitution.<sup>223</sup> Further, Article 10(1) of the Malaysian Constitution is also similar to Article 19(1) of the Indian Constitution.

In the Indian jurisprudence, it is a well-established principle that any restrictions on freedom of expression must be reasonable as the word ‘reasonable’ is clearly stipulated in clause 2 to Article 19. In order to

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<sup>221</sup> [2014] 2 MLJ 145.

<sup>222</sup> *ibid* 175 and 177.

<sup>223</sup> [1969] 2 MLJ 129.

be reasonable, it was held that restriction must have reasonable relation to the object which the legislation seeks to achieve and must not go in excess of that object.<sup>224</sup> On a similar note, the phrase 'reasonable' was defined by Mahajan J in *Chintaman Rao v M.P.*<sup>225</sup> to mean:

[L]imitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public. The word 'reasonable' implies intelligent care and deliberation, that is, the choice of a course which reason dictates. Legislation arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between the freedom guaranteed in article 19(1)(g) and the social control permitted by article 19(6) it must be held to be wanting in that quality.<sup>226</sup>

Several tests of reasonableness have been promulgated by courts but it was held that no abstract standard reasonableness can be laid down as applicable to all cases. This is pursuant to the judgment of Sastri J in *Madras v V. G. Row*:<sup>227</sup>

[T]he test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard, or general pattern of reasonableness can be laid down as applicable to all cases.<sup>228</sup>

Despite the aforesaid remarks, the Supreme Court of India in *M.R.F. Ltd v Inspector Kerala Government*<sup>229</sup> has laid down the following principles on the reasonableness of restrictions on freedom of expression under Article 19 of the Indian Constitution. The principles are as follow:<sup>230</sup>

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<sup>224</sup> *Superintendent Central Prison v Ram Manohar Lohia* AIR 1960 SC 633.

<sup>225</sup> (1950) SCR 759.

<sup>226</sup> *ibid* 763.

<sup>227</sup> (1952) SCR 597.

<sup>228</sup> *ibid* 607.

<sup>229</sup> (1998) 8 SCC 22.

<sup>230</sup> HK Saharay and India, *The Constitution of India: An Analytical Approach* (3rd ed, Eastern Law House 2002) 204.

1. While considering the reasonableness of the restrictions, the court has to keep in mind the Directive Principles of State Policy;
2. Restrictions must not be arbitrary or of an excessive nature so as to go beyond the requirement of the interest of the general public;
3. In order to judge the reasonableness of the restrictions, no abstract or general pattern or a fixed principle can be laid down so as to be of universal application and the same will vary case to case as also with regard to changing conditions, values of human life, social philosophy of the Constitution, prevailing conditions and the surrounding circumstances;
4. A just balance has to be struck between the restrictions imposed and the social control envisaged by cl. (6) of Art. 19 of the Constitution;
5. Prevailing social values as also social needs which are intended to be satisfied;
6. There must be a direct and proximate nexus or a reasonable connection between the restrictions and the object sought to be achieved. If there is a direct nexus between the restrictions and the object of the Act, then a strong presumption in favour of the constitutionality of the Act will naturally arise.

These principles have been followed by local judges in determining the reasonableness of restrictive laws on freedom of expression. This is apparent in *Muhammad Hilman's* case<sup>231</sup> when the court ruled that the impugned provision was unreasonable because it was irrational and there was no nexus between the restriction and the object sought to be achieved. As to the requirement of proportionality as per stated

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<sup>231</sup> *Muhammad Hilman bin Idham & Ors v Kerajaan Malaysia & Ors* (n 155).

A Comparative Study of Malaysia and the United Kingdom in *Dr Mohd Nasir*'s case,<sup>232</sup> the principle was only referred in relation to equality clause in Article 8 and this has been elaborated in details by Gopal Sri Ram JCA in *Sivarasa Rasiah*.<sup>233</sup> Thus, it is submitted that though the word 'reasonable' in relation to Article 10(1) has yet to be clearly defined, reasonableness should be distinguished from proportionality.

The test of reasonableness and proportionality of restrictions on freedom of expression has also been developed in other foreign decisions including English cases that are now greatly influenced by the European Court of Human Right Jurisprudence. The English authorities may lend some assistance and have indeed been frequently cited in numerous arguments before local judges plainly because of the special position of the English common law in the Malaysian legal system.

Article 160(2) of the Malaysian Constitution interprets the word 'law' to include 'Written law, the common law in so far as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law in the Federation or any part thereof'.

It is submitted that the phrase 'common law' refers to the English common law that is considered as one of Malaysia's unwritten sources.<sup>234</sup> Further, the reception and application of the English law is clearly enunciated in the Civil Law Act 1956. Section 3(1) of the Act states that:

'Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the Court shall -

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<sup>232</sup> *Dr Mohd Nasir bin Hashim v Menteri Dalam Negeri Malaysia* (n 195).

<sup>233</sup> *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* (n 65).

<sup>234</sup> Ibrahim and Jain, 'The Constitution of Malaysia and the American Constitutional Influence' (n 83) 12 – 15; Min Aun Wu, *The Malaysian Legal System* (2nd ed. Longman 2004) 20 – 21.

A Comparative Study of Malaysia and the United Kingdom

(a) in West Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on the 7th day of April 1956;

(b) in Sabah, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on the 1st day of December 1951;

(c) in Sarawak, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on the 12th day of December 1949, subject however to subsection (3)(ii):

Provided always that the said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary’.

The significant effect of this provision is that the English law as of the aforesaid cut-off dates shall continue to apply in Malaysia provided that the local circumstances permit and where no overriding provision has been made by statute law. With regard to the application of the English law after the cut-off dates, it is within the discretionary power of the courts on the basis of persuasive authority.

Despite the reception and application of the English law, local judges were found to have preferred the Indian principles in interpreting the provisions of the Malaysian Constitution. The reason for such approach has been expressed by Lee Hun Hoe CJ (Borneo) in *Selangor Pilot Association (1946) v Government of Malaysia & Anor.*<sup>235</sup>

[W]e are entitled to compare with similar statutory provision in other Commonwealth countries. Since our Constitution was modelled on the Indian Constitution what is more natural than to look into Indian authorities for assistance.<sup>236</sup>

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<sup>235</sup> [1975] 2 MLJ 66.

<sup>236</sup> *ibid* 71.

The judgment of the case has clearly indicated that the Indian cases are highly persuasive in interpreting the provisions of the Malaysian Constitution. Further, Article 10(1) of the Malaysian Constitution is also in *pari materia* with Article 19(1) of the Indian Constitution. Thus, it is argued that the interpretation of the word ‘reasonable’ that ought to be read into Article 10(1) should be rightly developed in parallel with the position in India.

### **3.8 Application of Freedom of Expression to Political Blogs**

Freedom of expression is typically exercised through the media but in Malaysia, it appears that the exercise of this right has been made to be subjected to a long list of restrictive laws.<sup>237</sup> As a result, the people in the country, particularly opposition members and human right groups, have hardly any avenues for expressing their views and criticisms.<sup>238</sup> They also lacked alternative news and information apart from those dictated to them by the traditional media.<sup>239</sup> This has arguably enabled the ruling government, to effectively contain political dissent and ultimately win every single general election in the country since 1959.<sup>240</sup>

Nonetheless, the development of new media appears to have liberated press freedom in Malaysia. Political blogs and other online publications are not susceptible to the licensing regime that controls

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<sup>237</sup> Articles 10(2) and (4), 149 and 150 of the Malaysian Constitution empower the Parliament to enact laws restricting the right to freedom of expression.

<sup>238</sup> Wang Lay Kim, ‘Media and Democracy in Malaysia’ (2001) 8(2) *Javnost-The Public* 67, 72 – 83.

<sup>239</sup> *ibid.*

<sup>240</sup> Mustafa K. Anuar, ‘Politics and the Media in Malaysia’ (2007) 20(1) *Kasarinlan* 25, 27 – 29; Zaharom Nain and Mustafa K Anuar, ‘IT Strategies in Malaysia: The Multimedia Super Corridor’ (United Nations Research Institute for Social Development 1998).

A Comparative Study of Malaysia and the United Kingdom the traditional media.<sup>241</sup> Further, the no censorship policy of the Internet as stated in the MSC Malaysia Bills of Guarantee and the Communications and Multimedia Act 1998 has enabled the people to enjoy ‘stronger’ freedom of expression in the cyber world. This mechanism that enables the people to make known their opinions and views was alleged to have improved the ranking of press freedom in the country.<sup>242</sup> This can be seen in the 2011-2012 Press Freedom Index issued by Reporters Without Borders (RSF)<sup>243</sup> that ranked Malaysia at 122<sup>nd</sup> spot<sup>244</sup> compared to the 141<sup>st</sup> place in 2010.<sup>245</sup>

At the international level, four international special rapporteurs on freedom of expression, namely the United Nations (UN), the Organization for Security and Co-operation in Europe (OSCE), the Organization of American States and the African Commission on Human and Peoples’ Rights, have on 1 June 2011 issued a ‘Joint Declaration on Freedom of Expression and the Internet’ (the Joint Declaration).<sup>246</sup> The Joint Declaration shapes essential principles<sup>247</sup> on Internet governance including the express guarantee of freedom of

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<sup>241</sup> Refer to Chapter 5 of the thesis entitled ‘Specific Media Law in Malaysia’ below.

<sup>242</sup> Suganthi Suparmaniam, ‘Malaysia Moves Up 19 Notches in Press Freedom’ *New Straits Times* (Kuala Lumpur, 22 February 2012) <<http://www.nst.com.my/latest/malaysia-moves-up-19-notches-in-press-freedom-1.50258>> [accessed 25 March 2012].

<sup>243</sup> Reporters Without Borders (RBF) is an international journalism watchdog group that advocates the press freedom and freedom of information. See <<http://en.rsf.org>> [accessed 25 March 2012].

<sup>244</sup> Reporters Without Borders, ‘Press Freedom Index 2011-2012’ (2012) <<http://en.rsf.org/press-freedom-index-2011-2012,1043.html>> [accessed 25 March 2012].

<sup>245</sup> ‘Rais: Improved Ranking Proves Press Freedom Exists in Malaysia’ *The Star Online* (Kuala Lumpur, 22 February 2012) <<http://thestar.com.my/news/story.asp?file=/2012/2/22/nation/2012022223758&sec=nation>> [accessed 25 March 2012].

<sup>246</sup> Full text of the Joint Declaration on Freedom of Expression and the Internet is available at <[www.osce.org/fom/78309](http://www.osce.org/fom/78309)> [accessed 25 March 2012].

<sup>247</sup> Other key areas of Internet policy stipulated in the Joint Declaration are intermediary liability, filtering and blocking of web sites, criminal and civil liability, network neutrality and access to the Internet.



A Comparative Study of Malaysia and the United Kingdom expression on the Internet.<sup>248</sup> Prior to this, the Council of Europe had developed general recommendations that promote freedom of expression on the Internet to its member states, most notably the 2003 Declaration of the Committee of Minister on freedom of communication on the Internet.<sup>249</sup> In addition, the European Parliament has adopted a resolution on freedom of expression on the Internet that demands commitment from the EU member states in protecting the rights of Internet users and promoting free expression on the Internet.<sup>250</sup>

As to the position in Malaysia, it is acknowledged that the Malaysian Constitution was drafted long before the advancement of the Internet. Freedom of expression on the Internet or political blogs is also yet to be discussed in great detail in any cases.<sup>251</sup> Despite this uncertainty, since freedom of expression can be exercised regardless of frontier, political blogs and other online publications should therefore be treated in the same manner as the traditional media. Political blogs are comparable to the mainstream media in the sense that they accord an avenue for expressing information and ideas. Their role has been recognised by Reporters Without Borders that claimed that blogging is a form of independent journalism and indeed bloggers are regarded as the real journalists particularly in countries where the traditional media are heavily censored or placed under government pressure.<sup>252</sup> Thus, political blogs should rightfully be accorded at minimum a

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<sup>248</sup> Clause 1(a) of the Joint Declaration provides that 'Freedom of expression applies to the Internet, as it does to all means of communication...'

<sup>249</sup> The Declaration was adopted on 28 May 2003 at the 840<sup>th</sup> meeting of the Ministers' Deputies and it is available at <<https://wcd.coe.int/ViewDoc.jsp?id=37031>> [accessed 20 February 2012].

<sup>250</sup> The resolution was adopted on 6 July 2006 and its full text is accessible at <[www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2006-0324&language=EN](http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2006-0324&language=EN)> [accessed 20 February 2012].

<sup>251</sup> Refer to Chapter 7 'Blogs and Online Defamation in Malaysia and the United Kingdom' below.

<sup>252</sup> J Pain, 'Bloggers, the New Heralds of Free Expression' in Reporters Without Borders (ed), *Handbook for Bloggers and Cyber Dissidents* (2005) 5.

similar right to freedom of the press and included within the scope of Article 10. Nonetheless, political blogs do not enjoy any special status although most of their entries consist of political ideas and information that is of public concern. This is because political speech in Malaysia is not constitutionally or judicially privileged over other types of expression. The position of political blog is now clear with the judgment of the Court of Appeal in the recent case of *Mat Shuhaimi bin Shafiei*<sup>253</sup> when the appellant, an opposition politician, who posted his personal views in relation to the Laws of the Constitution of Selangor in his blog was found guilty of the offence of sedition under the Sedition Act 1948.

### 3.9 Conclusion

The right to freedom of speech and expression is constitutionally conferred on all citizens in Malaysia. The exercise of such a right is however not absolute as it is subjected to restrictive laws passed by Parliament. The legislative power of Parliament was initially rendered beyond courts' power due to the existence of the clause 'necessary or expedient' in Article 10(1). Further, any restrictive laws passed by Parliament would be regarded constitutional so long as they were enacted within the purview of permissible exceptions. The legality of such laws could not be challenged though they were harsh and unjust due to the absence of the word 'reasonable' in Article 10(1) of the Malaysian Constitution.

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<sup>253</sup> *Mat Shuhaimi bin Shafiei v Public Prosecutor* (n 221).

Nonetheless, the situation has now changed as courts are authorised to determine the legality of restrictive laws passed by Parliament. This is due to the landmark ruling in *Muhammad Hilman*<sup>254</sup> which acknowledged the Federal Court decision in *Sivarasa Rasiah*.<sup>255</sup> Thus, any laws that have the effect of limiting freedom of expression have to be reasonable as the word ‘reasonable’ should be read before restrictions in Article 10 of the Malaysian Constitution. Unfortunately, the word is yet to be clarified in details and thus reference should be made to the jurisprudence in India since the article is in *pari materia* with Article 19 of the Indian Constitution. In relation to this development, it is submitted that there will be a brighter future to freedom of expression in the country. As to freedom of expression in political blogs, arguably such a right and other restrictions should be equally applicable to them as well.

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<sup>254</sup> *Muhammad Hilman bin Idham & Ors v Kerajaan Malaysia & Ors* (n 155).

<sup>255</sup> *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* (n 65).

## 4.1 Introduction

Freedom of expression is one of the fundamental rights and an indispensable characteristic of a free and democratic country. Its significance has been recognised in *Handyside v UK* that the right ‘constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man’.<sup>1</sup> Since then, the importance of the right has been repeatedly stressed either by the European Court of Human Rights (ECtHR)<sup>2</sup> or domestic courts. In *R v Secretary of State for the Home Department, ex p Simms*,<sup>3</sup> the prisoners were prevented from having oral interviews with journalists who were interested in publishing their stories. In deciding that the imposition of the ban by the prison authorities was unlawful, Lord Steyn observed:

Freedom of expression ... serves a number of broad objectives. First, it promotes the self-fulfilment of individuals in society. Secondly, in the famous words of Holmes J (echoing John Stuart Mill), ‘the best test of truth is the power of the thought to get itself accepted in the competition of the market.’... Thirdly, freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate.<sup>4</sup>

The judgment shows that apart from self-fulfilment and marketplace of ideas, argument from democracy is the most common justification for safeguarding freedom of expression. The argument, which is predominantly associated with the writings of Alexander Meiklejohn,<sup>5</sup> has been described as ‘the most easily understandable and fashionable

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<sup>1</sup> (1976) 1 EHRR 737, para 49.

<sup>2</sup> Examples of cases on freedom of expression at the ECtHR include *Lindon, Otchakovsky-Laurens and July v France*, (2007) 46 EHRR 761, *Guja v Moldova*, (App. 14277/04), 12 February 2008, [GC], ECHR 2008-nyr; and *Frankowicz v Poland*, (App. 53025/99), 16 December 2008.

<sup>3</sup> [2000] 2 AC 115 (HL).

<sup>4</sup> *ibid* 126.

<sup>5</sup> Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* (Harpers & Brothers Publishers 1948); Alexander Meiklejohn, *Political Freedom: The Constitutional Powers of the People*. (Oxford University Press 1965).

A Comparative Study of Malaysia and the United Kingdom free speech theory in modern Western democracies'.<sup>6</sup> It has also been regarded as 'the most influential theory in the development of contemporary free speech law' as people could only participate effectively in any democratic process if they are equipped with reasonable understanding of political issues.<sup>7</sup>

In relation thereof, this chapter is devoted to discuss the right to freedom of expression in the UK and to consider the possibility of applying relevant principles to political blogs. The study commences with a brief analysis of the right before and after the coming into force of the Human Rights Act 1998 (HRA), the scope and categories of expression, in particular political speech. Then, it will examine the permitted restrictions and necessary elements to justify derogation on freedom of expression. Finally, the application of these principles to political blogs will be highlighted at the concluding part of this chapter.

## **4.2 The Position of Freedom of Expression in the United Kingdom**

The position of freedom of expression in the UK is relatively unique since the country, prior to the incorporation of the HRA, had neither a codified written constitution nor a specific bill of rights that sets out details on individual freedoms.<sup>8</sup> However, such absence has not denied the people an access to freedom of expression as the right was traditionally protected by specific statutes and common law

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<sup>6</sup> Eric Barendt, *Freedom of Speech* (2nd ed, Oxford University Press 2005) 18.

<sup>7</sup> *ibid* 20.

<sup>8</sup> The question of whether the British Constitution is 'unwritten' or merely 'uncodified' is discussed by David Pollard, Neil Parpworth and David Hughes, *Constitutional and Administrative Law: Text with Materials* (4th ed, OUP Oxford 2007) 2.

A Comparative Study of Malaysia and the United Kingdom principles.<sup>9</sup> This has been clearly explained by Lord Goff in *AG v Guardian Newspaper Ltd (No. 2)*<sup>10</sup> that ‘Freedom of speech has existed in this country perhaps as long as, if not longer, than it has existed in any other country in the world’.<sup>11</sup> The judgment has then been echoed by the former British Prime Minister Sir John Major who proclaimed that ‘... we have no need for a bill of rights because we have freedom’.<sup>12</sup>

Nonetheless, it was alleged that without a written constitution or a human rights instrument, individual freedoms were merely residual leftovers that could only be exercised when they were not restricted by statutes or common law rules.<sup>13</sup> Due to the lack of protection in domestic laws, the affected parties had to file cases of human rights infringements against the state authorities in the ECtHR although they had to suffer a lengthy and expensive route to enforce their rights in Strasbourg. Unsurprisingly, the state was in many instances found guilty of violating the provisions of the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR).<sup>14</sup> Consequently, the HRA was enacted with the prime intention of giving ‘further effects to rights and freedoms’<sup>15</sup> of the ECHR in the UK. Thus, it is pertinent to analyse the position of freedom of expression prior to and post the operation of the HRA in the country.

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<sup>9</sup> Hilaire Barnett and Robert Jago, *Constitutional & Administrative Law* (8th ed, Routledge 2011) 492.

<sup>10</sup> [1990] 1 AC 109 (HL).

<sup>11</sup> *ibid* 283.

<sup>12</sup> John Major, ‘Mr Major’s Speech on British Constitution’ (26 June 1996) at <[www.johnmajor.co.uk/page846.html](http://www.johnmajor.co.uk/page846.html)> [accessed 5 August 2012].

<sup>13</sup> John Wadham, Mountfield Helen and Edmundson Anna, *Blackstone’s Guide to the Human Rights Act 1998* (4th ed, Blackstone 2007) 2.

<sup>14</sup> For the list of human rights violations prior to the incorporation of the HRA, see Murray Hunt, *Using Human Rights Law in English Courts* (Hart Publishing 1997).

<sup>15</sup> Long title to the HRA.

#### **4.2.1 Pre the Human Rights Act 1998 (HRA)**

Freedom of expression is not an alien concept in the UK legal system. It was for the first time delivered in an unequivocal language in the Bill of Rights 1689<sup>16</sup> that ‘Freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament’.<sup>17</sup> The provision affords a comprehensive and absolute legal immunity to members of the legislative body to freely express their minds and ideas in Parliament. It is not to be understood as a source for general freedom of expression. Nevertheless, the importance of such freedom had been recognised by the common law and it has even been labelled as a ‘constitutional right’ by courts.<sup>18</sup> In *R v Comr of Police of the Metropolis, ex p Blackburn (No 2)*,<sup>19</sup> the issue was whether an article written by an MP in the weekly newspaper ‘Punch’ which criticised the Court of Appeal did amount to a contempt of court. It was ruled that the writing was not a contempt of court as it was still within the limits of an individual’s right to freedom of speech. It was highlighted by Salmon LJ that freedom of expression was ‘one of the pillars of individual liberty... which our courts have always unfailing upheld’.<sup>20</sup>

Unfortunately, the uncodified written constitution and the lack of a bill of rights prior to the coming into force of the HRA had resulted in the right being viewed as residual in nature. The exposition of the right was discussed by A.V. Dicey that ‘it is essentially false’ to say that:

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<sup>16</sup> The Bill of Rights is not to be treated as a modern bill of rights for the UK. It is indeed an important historical document which regulates the relations between the Crown and Parliament. See Lucinda Maer and Oonagh Gay, ‘The Bill of Rights 1689’ (House of Commons 2009) SN/PC/0293 <<http://www.parliament.uk/documents/commons/lib/research/briefings/snpc-00293.pdf>> [accessed 11 October 2012].

<sup>17</sup> Article 9 of the Bill of Rights.

<sup>18</sup> *R v Secretary of State for the Home Department, ex p Simms* (n 3) 126.

<sup>19</sup> [1968] 2 QB 150 (CA).

<sup>20</sup> *ibid* 155.

A Comparative Study of Malaysia and the United Kingdom

The right to free expression of opinion, and especially that form of it which is known as the ‘liberty of the press’, are fundamental doctrines of the law of England ... and ... that our courts recognise the right of every man to say and write what he pleases, especially on social, political, or religious topics without fear of legal penalties.<sup>21</sup>

The precarious status of the right has been affirmed by Browne-Wilkinson LJ in *Wheeler v Leicester City Council* as ‘...an immunity from interference by others’.<sup>22</sup> On a similar note, it was expounded by Sir John Donaldson MR that ‘The starting point of our domestic law is that every citizen has a right to do what he likes, unless restrained by the common law, including the law of contract, or by statute’.<sup>23</sup> Thus, it is clear that a person may say or write whatever he desires as long as he does not violate any rules or rights of others.

Despite being regarded as a residual right, freedom of expression is and has been a value highly prized by the common law. In the absence of unambiguous and express provision, no statute will be construed as limiting such freedom.<sup>24</sup> Further, the common law principles on freedom of expression have often been invoked by judges to limit other common law rules that inhibit this fundamental right, especially in libel, breach of confidence and contempt of court cases.<sup>25</sup> Nevertheless, there were inherent problems in relying on the common law alone because courts were unable to extend the common law

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<sup>21</sup> Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed, Macmillan Education 1959) 235.

<sup>22</sup> [1985] AC 1054 (HL) 1065.

<sup>23</sup> *AG v Guardian Newspaper Ltd (No. 2)* (n 10) 178.

<sup>24</sup> The Hon Sir Anthony Mason, ‘The Relationship between Freedom of Expression and Freedom of Information’ in J Beatson and Yvonne Cripps (eds), *Freedom of Expression and Freedom of Information: Essays in Honour of Sir David Williams* (Oxford University Press 2000) 231 – 232.

<sup>25</sup> For instance, refer to *R v Comr of Police of the Metropolis, ex p Blackburn (No 2)* (n 19) and *Derbyshire CC v Times Newspaper Ltd* [1993] AC 534 (HL).



A Comparative Study of Malaysia and the United Kingdom principles in completely new areas as only incremental development is permitted.<sup>26</sup>

Domestic judges have been influenced by the ECHR when they ruled that Article 10 mirrored the common law principles on freedoms of expression.<sup>27</sup> The influence of the ECHR on the domestic courts has been considered in *R v Secretary of State for the Home Department, ex p Brind*.<sup>28</sup> In this case, the Secretary of State had issued directions under the Broadcasting Act 1981 requesting the Independent Broadcasting Authority (IBA) and the BBC to refrain from broadcasting any direct speech from persons representing specified terrorist organisations. The applicants (broadcasters) brought judicial review against the Secretary alleging that the directions contravened Article 10. Nonetheless, the application was dismissed by the House of Lords as there was no ambiguity in the provisions and therefore, the Secretary would not be mandated to exercise his power in conformity with the ECHR. As to the position of the ECHR, it has been elaborated by Lord Bridge that:

It is accepted ... like any other treaty obligations which have not been embodied in the law by statute, the Convention is not part of the domestic law, that the courts accordingly have no power to enforce Convention rights directly and that, if domestic legislation conflicts with the Convention, the courts must nevertheless enforce it.<sup>29</sup>

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<sup>26</sup> Wadham, Helen, and Anna, *Blackstone's Guide to the Human Rights Act 1998* (n 13) 3.

<sup>27</sup> Lord Goff in *AG v Guardian Newspaper Ltd (No. 2)* (n 10) 283, observed that '... I can see no inconsistency between English law on this subject and article 10 of the European on Human Rights'.

<sup>28</sup> [1991] 1 AC 696 (HL).

<sup>29</sup> *ibid* 747.

The ECHR has also been referred when there is ambiguity in the common law. This could be illustrated with the ruling of the Court of Appeal in *Derbyshire CC v Times Newspapers Ltd*,<sup>30</sup> whereby it was highlighted by Butler-Sloss LJ:

[T]he principles governing the duty of the English court to take account of article 10 appear to be as follows: where the law is clear and unambiguous, either stated as the common law or enacted by Parliament, recourse to article 10 is unnecessary and inappropriate... But where there is an ambiguity, or the law is otherwise unclear or so far undeclared by an appellate court, the English court is not only entitled but, in my judgment, obliged to consider the implications of article 10".<sup>31</sup>

Nonetheless, the application of Article 10 of the ECHR was not considered on appeal to the House of Lords. The court relied on the common law principles and ruled that it was contrary to the public interest to permit governmental authority to sue for libel as it would restraint the right to freedom of expression.<sup>32</sup> To sum up, prior to the coming into force of the HRA, the ECHR was only referred by domestic courts as the last resort when there is ambiguity in statutes or common law principles.

The non-application of the ECHR principles is due to the fact that the country is a dualist state that regards international law and domestic law as two different systems.<sup>33</sup> Further, the UK legal system had since the eighteenth-century<sup>34</sup> adopted and applied the principles of Parliamentary sovereignty and the separation of powers between the Crown, the Parliament and the courts.<sup>35</sup> These doctrines confer

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<sup>30</sup> [1992] QB 770 (CA).

<sup>31</sup> *ibid* 830.

<sup>32</sup> *Derbyshire CC v Times Newspaper Ltd* (n 25).

<sup>33</sup> Ian Brownlie, *Principles of Public International Law* (7th ed, Oxford University Press 2008) 31 – 33.

<sup>34</sup> Philip Sales and Joanne Clement, 'International Law in Domestic Courts: The Developing Framework' (2008) 124 LQR 388, 389.

<sup>35</sup> Anthony Aust, *Modern Treaty Law and Practice* (2nd ed, Cambridge University Press 2007) 188.

A Comparative Study of Malaysia and the United Kingdom Parliament with supreme power to enact laws whilst the treaty-making power is exclusively vested with the Crown (in practice the Secretary of State for Foreign and Commonwealth Affairs).<sup>36</sup> Any international treaties that was concluded and ratified by the Crown shall bind the state in international law but its provisions cannot be enforced directly in domestic courts.<sup>37</sup>

This position was confirmed by the House of Lords in *J.H. Rayner (Mincing Lane) Ltd v Dept of Trade and Industry*.<sup>38</sup> It was elaborated by Lord Oliver:

[T]he power of the Crown to conclude treaties with other sovereign states is an exercise of the Royal Prerogative, the validity of which cannot be challenged in municipal law... the Royal Prerogative, whilst it embraces the making of treaties, does not extend to altering the law or conferring rights upon individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of Parliament. ...a treaty is not part of English law unless and until it has been incorporated into the law by legislation'.<sup>39</sup>

The judgment highlights the Crown's prerogative power in making treaties but unincorporated treaties, including the provisions of the ECHR, have no legal effects domestically until they are incorporated into the domestic laws. Since the ECHR principles remained unenforceable in the domestic courts at that time, cases involving alleged violations of human rights by the state were filed by the affected parties in the ECtHR. It was argued that the loss of many cases in Strasbourg was among the main reasons that have prompted the UK government to pass the HRA that has ultimately incorporated

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<sup>36</sup> Anthony Aust, *Handbook of International Law* (Cambridge University Press 2005) 81.

<sup>37</sup> Aust, *Modern Treaty Law and Practice* (n 35) 189 – 192.

<sup>38</sup> [1990] 2 AC 418 (HL).

<sup>39</sup> *ibid* 499 – 500.

A Comparative Study of Malaysia and the United Kingdom  
the rights and fundamental freedoms in the ECHR (Convention  
rights)<sup>40</sup> into the domestic law.<sup>41</sup>

#### **4.2.2 Post HRA**

The enactment of the HRA has a great impact on the landscape of human rights law in the UK. It was purported to have ‘brought home’<sup>42</sup> the Convention rights<sup>43</sup> and strengthened protection to the fundamental rights including freedom of expression. With the coming into force of the HRA,<sup>44</sup> the ECHR principles will no longer be applied in very limited situations<sup>45</sup> as there is a strong presumption of the conformity of the UK law to these principles.

Section 2 obliges courts or tribunals in the country to ‘take into account’ the judgments, decisions, declarations or advisory opinions’ of the ECtHR, Commission and Committee of Ministers (Strasbourg jurisprudence) in cases involving the Convention rights. Nevertheless, the obligation does not render the Strasbourg jurisprudence to be binding on domestic courts. Arguably, this is because the ECtHR does not operate a rigid system of precedent, the roles of national judges and of the ECtHR are not identical, and there may be decisions made

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<sup>40</sup> Section 1(1) of the HRA defines ‘Convention rights’ as to include Articles 2 to 12 and 14 of the ECHR, Articles 1 to 3 of the First Protocol, and Articles 1 and 2 of the Sixth Protocol. However, the Convention Rights and other protocols set out in Schedule 1 are not entrenched in the HRA. For details, see Stephen Grosz, Jack Beatson and Peter Duffy, *Human Rights: The 1998 Act and the European Convention* (Sweet & Maxwell 2000) 6 – 10.

<sup>41</sup> Anthony Aust, ‘United Kingdom’ in David Sloss (ed), *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (Cambridge University Press 2009) 486.

<sup>42</sup> The slogan ‘rights brought home’ was used by the Labour Government to introduce the HRA.

<sup>43</sup> It was argued that the Convention Rights reflect both ‘general legal values’ and ‘distinctively public values’. See David Feldman, ‘The Human Rights Act 1998 and Constitutional Principles’ (1999) 19 LS 165, 171.

<sup>44</sup> The HRA received Royal Assent on 9 November 1998 and came into force on 2 October 2000.

<sup>45</sup> Prior to the HRA, the ECHR principles were applied either indirectly through the ECtHR judgments against the government, or directly through the use of arguments based on the ECHR in local courts.

A Comparative Study of Malaysia and the United Kingdom in Strasbourg that are considered unpersuasive.<sup>46</sup> It was observed by Lord Phillips P in *R v Horncastle*:

The requirement to take into account the Strasbourg jurisprudence will normally result in this Court applying principles that are clearly established by the Strasbourg court. There will, however, be rare occasions where this court has concerns as to whether a decision of the Strasbourg Court sufficiently appreciates or accommodates particular aspects of our domestic process. In such circumstances it is open to this court to decline to follow the Strasbourg decision, giving reasons for adopting this course.<sup>47</sup>

Despite the non-binding status of the jurisprudence, Lord Bingham in *Kay v Lambeth LBC* pronounced that:

The mandatory duty imposed on domestic courts by section 2 of the 1998 Act is to take into account any judgment of the Strasbourg Court and any opinion of the Commission. Thus they are not strictly required to follow Strasbourg rulings ... But it is ordinarily the clear duty of our domestic courts, save where and so far as constrained by primary domestic legislation, to give practical recognition to the principles laid down by the Strasbourg Court ... The effective implementation of the Convention depends on constructive collaboration between the Strasbourg court and the national courts of member states.<sup>48</sup>

Thus, the requirement to ‘take into account’ of the Strasbourg jurisprudence does not create a binding obligation on domestic courts. Nonetheless, judges are generally requested to abide by the rulings of the ECtHR or of the Commission. Only in special cases where certain rulings are not appropriate to any particular facts and circumstances that national courts could depart from the Strasbourg jurisprudence.

Apart from the requirement, the Convention rights have been effectively intertwined into the UK legal system by section 3. It imposed a statutory obligation on domestic courts wherever possible

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<sup>46</sup> *Human Rights Act 1998* (2nd ed, Sweet & Maxwell 1998), Current Law Statutes Annotated Reprints paras 42 – 10.

<sup>47</sup> [2009] UKSC 4, [2010] 2 AC 373 [11].

<sup>48</sup> [2006] UKHL 10, [2006] 2 AC 465 [28], [44].

to interpret and apply legislation that has been passed before or after the coming into force of the HRA, to be in conformity with the Convention rights. Lord Steyn in *R v A (No 2)* observed that:

Section 3 places a duty on the court to strive to find a possible interpretation compatible with Convention rights ... In accordance with the will of Parliament as reflected in section 3 it will sometimes be necessary to adopt an interpretation which linguistically may appear strained. The techniques to be used will not only involve the reading down of express language in a statute but also the implication of provisions.<sup>49</sup>

Courts are required to interpret and even permitted to stretch the meaning of any statutory provision so as to render it compliant with the Convention rights.<sup>50</sup> But if a Convention-compliant interpretation is impossible, the validity, continuing operation or enforcement of any primary or secondary legislation<sup>51</sup> (of which the parent act prevents removal of incompatibility)<sup>52</sup> may not be affected as courts have no power to invalidate conflicting provisions.<sup>53</sup> Lord Hope in *R v Lambert* observed that:

[T]he obligation is one which applies to the interpretation of legislation. This function belongs, as it has always done, to the judges. But it is not for them to legislate. Section 3(1) preserves the sovereignty of Parliament. It does not give power to the judges to overrule decisions which the language of the statute shows to have been taken on the very point at issue by the legislator.<sup>54</sup>

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<sup>49</sup> [2001] UKHL 25, [2002] 1 AC 45 [44].

<sup>50</sup> In *Ghaidan v Godin-Mendoza* [2004] 3 UKHL 30, [2004] 2 AC 557 the House of Lords used section 3 as a remedial section and gave a wider interpretation to the term 'spouse' under the Rent Act 1977 so as to allow surviving same-sex partners to enjoy equal tenancy rights and become a statutory tenant by succession.

<sup>51</sup> The definition of primary and subordinate legislation is provided in section 21 of the HRA.

<sup>52</sup> If the incompatibility of any subsidiary legislation is not prevented from removal by the parent act, court may declare such provision *ultra vires* and unlawful. Grosz, Beatson, and Duffy, *Human rights* (n 40) 52 – 58.

<sup>53</sup> Section 3(2) of the HRA.

<sup>54</sup> [2001] UKHL 37, [2002] 2 AC 545 [79].

Notwithstanding the aforesaid position, courts are not totally powerless as section 4 allows higher courts<sup>55</sup> to make a ‘declaration of incompatibility’ for any primary or subordinate legislation that conflict with the Convention rights. Such a declaration does not have the effect of striking down the offending provisions and should rather be avoided unless it is plainly impossible to do so. But when the courts have issued a declaration of incompatibility, it will certainly attract the attention of relevant minister and put considerable political pressure on the government to make legislative changes.<sup>56</sup>

The application for a declaration of incompatibility has been considered in *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport*.<sup>57</sup> The claimant sought judicial review of a decision by the Broadcast Advertising Clearance Centre refusing to advertise its proposed advertisements on the ground that it breached the ban on political advertising in section 321(2) of the Communications Act 2003. The claimant argued that the ban was incompatible with its right to freedom of expression in Article 10. It was ruled by the House of Lords that though the provisions constituted an interference with the claimant’s right, the ban on political advertising was lawful and not incompatible with the ECHR as it was designed to protect against the potential mischief of biased political advertisings.<sup>58</sup>

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<sup>55</sup> Higher courts refer to the High Court and above as per interpreted in section 4(5) of the HRA. Inferior courts have no such power but they are not refrained from expressing their opinion about the compatibility of any statutory provision.

<sup>56</sup> A minister is authorised under section 10 of the HRA to make amendments to the offending legislation by means of fast track procedure which provides for a remedial order to be made under the supervision of Parliament provided that he believes there are ‘compelling reasons’ to do so.

<sup>57</sup> [2008] UKHL 15, [2008] 1 AC 1312.

<sup>58</sup> The House of Lords judgment affirmed the earlier decision of the Court of Appeal in *R v Radio Authority, ex parte Bull* [1998] QB 294. Nonetheless, the latter is to be distinguished as the judges were reluctant to interfere with the express provisions of the infringing statute or to refer to the ECHR principles though there was ambiguity

Pertaining to the interpretative requirement in section 3, the obligation is not limited to the past or existing legislation, but extends to future legislation as well. It was argued that the statutory duty has been rendered stronger for future government-sponsored legislation by section 19(1).<sup>59</sup> This section mandated sponsoring minister to make a statement before the Second Reading of any bill that in his view the proposed legislation is compatible with the Convention rights, or alternatively to state that it is incompatible but the government still wishes Parliament to proceed.<sup>60</sup> Notwithstanding the existence of any accompanying statement of compatibility, the proposed bill shall not be absolved from judicial scrutiny as compatibility is a question of law that could only be determined by courts of competent jurisdiction.

The position of a statement of compatibility has been elaborated in *R v A (No. 2)* that ‘These statements may serve a useful purpose in Parliament... But they are no more than expressions of opinion by the minister. They are not binding on the court, nor do they have any persuasive authority’.<sup>61</sup> Thus, any legislation that has been previously identified as compatible with the Convention rights by relevant ministers can still be examined by the judiciary and may be the subject of a declaration of incompatibility. As to a statement of incompatibility, its issuance is likely to be in very exceptional

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in the provisions. These two cases have been subjected to a number of criticisms. See Byron M Sheldrick, ‘Judicial Review and Judicial Reticence: The Protection of Political Expression under the Common Law’ (1998) 3 JCL 191; Jacob Rowbottom, ‘Political Advertising and the Broadcast Media’ (2008) 67 CLJ 450; Nicola McCormick, ‘Freedom of Political Expression: *R. (on the Application of Animal Defenders International) v Secretary of State for Culture, Media and Sport*’ (2008) 19 Ent LR 147; Sarah Sackman, ‘Debating “Democracy” and the Ban on Political Advertising’ (2009) 72 MLR 475.

<sup>59</sup> Helen Fenwick, *Civil Rights: New Labour, Freedom and the Human Rights Act* (Longman 2000) 44.

<sup>60</sup> A statement of incompatibility under section 19(1)(b) of the HRA was made in respect of section 321(2) of the Communications Act 2003 that imposed a prohibition on political advertising in the UK. The legality of that provision had become the central issue in *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* (n 57).

<sup>61</sup> *R v A (No 2)* (n 49), [69].



A Comparative Study of Malaysia and the United Kingdom situations and so far has only been taken twice by the government in relation to the Local Government Act 2000<sup>62</sup> and the Communications Act 2003.<sup>63</sup>

Another core provision that gives direct effect to the ECHR principles is section 6. The section provides that 'it is unlawful for a public authority to act in a way which is incompatible with a Convention right'.<sup>64</sup> The provision differs from the interpretative duty that merely requires courts to have regard to the Strasbourg jurisprudence.<sup>65</sup> It imposed a strong obligation on public authorities not to act in a way that is incompatible with a Convention right. Further, it contains a broad principle, which renders all actions or inactions of public authorities that contravene the ECHR principles as ultra vires.<sup>66</sup> But where incompatible behaviour is mandated by primary legislation or other provisions made under primary legislation, such incompatibility is saved from illegality.<sup>67</sup> These exceptions are in parallel with sections 3(2)(b) and 4(6)(a) which aim to preserve the sovereignty of Parliament.

As to the application of section 6, it is largely dependent on the interpretation of the term 'public authority' itself. Unfortunately, no exhaustive interpretation was given as the term is elusively defined to include court or tribunal<sup>68</sup> and 'any person certain of whose functions

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<sup>62</sup> Clause 91 of the Bill (section 104 of the Local Government Act 2000) which provides prohibition on promotion of homosexuality is considered to be incompatible with Articles 8 and 10 of the ECHR.

<sup>63</sup> Clause 314(2) of the Bill (section 321(2) of the Communications Act 2003) which bans political advertising on radio and television is regarded to be incompatible with Article 10 of the ECHR.

<sup>64</sup> Section 6(1) of the HRA.

<sup>65</sup> Section 2(1) of the HRA.

<sup>66</sup> Section 6(6) of the HRA stipulates that the word 'act' includes omissions as well but excluding failure to enact or repeal any primary legislation or remedial order.

<sup>67</sup> Section 6(2) of the HRA.

<sup>68</sup> Section 21(1) defines 'tribunal' as any tribunal in which legal proceedings may be brought.

A Comparative Study of Malaysia and the United Kingdom are functions of a public nature', whilst either House of Parliament<sup>69</sup> or a person exercising functions in connection with proceedings in Parliament is expressly excluded.<sup>70</sup> As a result, the HRA contemplates two types of public authorities namely core and hybrid public authorities. It was argued that the partial definition was purposely adopted with intent to leave the extent and scope of such term to be determined by courts.<sup>71</sup>

The position of 'core' public bodies such as local authorities, statutory regulators and others that can never act privately is straightforward as they are undoubtedly bound by the provision. But courts are faced with an uphill task in relation to hybrid bodies that can perform both public and private functions. The HRA provides that persons or bodies will be subjected to the statutory duty where they have 'functions of a public nature'<sup>72</sup> and are not carrying out an act of a 'private' nature.<sup>73</sup> Thus, the key factor is the type of function performed by those parties.

In the media context, the status of regulatory bodies varies from one industry to another. The press industry is administered by a new self-regulatory body, the Independent Press Standards Association (IPSO). It has recently been established by the industry to regulate editorial content on printed newspapers and magazines as well as on electronic services of member publishers that subscribe to the Scheme Membership Agreement.<sup>74</sup> Currently, IPSO has neither statutory underpinning nor statutory power to enforce its rulings, although the Editor's Code of Practice (Code) has been recognised by the Data

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<sup>69</sup> Section 6(4) of the HRA.

<sup>70</sup> Section 6(3) of the HRA.

<sup>71</sup> *Human Rights Act 1998* (n 46) paras 42–14.

<sup>72</sup> Section 6(3) of the HRA.

<sup>73</sup> Section 6(5) of the HRA.

<sup>74</sup> IPSO is discussed in details in Part 6.2 of Chapter 6 below.

A Comparative Study of Malaysia and the United Kingdom Protection Act 1998<sup>75</sup> and the HRA.<sup>76</sup> Nonetheless, since IPSO performs public duties and was established as an alternative to government regulation, it is arguably to be treated as a public body.

As for the broadcast media, there are two separate bodies; namely Ofcom for commercial stations and BBC for all BBC content. Ofcom is a pure public authority as it was established as a ‘super-regulator’ for the communication industries under the Office of Communications Act 2002. It is vested with extensive regulatory duties and powers by the Communications Act 2003.<sup>77</sup> On the other hand, BBC is not considered as a public body although it was established by a Royal Charter and is largely funded by licence fees.<sup>78</sup> BBC will generally be regarded as non-governmental organisation,<sup>79</sup> but in certain circumstances it also exercises functions of public nature and is therefore amenable to judicial review.<sup>80</sup>

With regard to the Video on demand (VOD), Ofcom and the Association for Television on Demand (ATVOD) have been jointly entrusted as the co-regulators for the new industry. ATVOD is responsible to supervise editorial content of the VOD and has been conferred with relevant powers and duties as Ofcom’s designee by the Communications Act 2003.<sup>81</sup> Thus, it is apparent that ATVOD is also a public authority under section 6 of the HRA.

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<sup>75</sup> Section 32 of the Data Protection Act 1998 provides a defence for newspapers against action by the Information Commissioner and others if publication is in compliance with the Code.

<sup>76</sup> Section 12 of the HRA requires courts to consider compliance with the Code in determining the defence on free speech

<sup>77</sup> Ofcom is discussed in details in Part 6.3.2.1 of Chapter 6 below.

<sup>78</sup> BBC is discussed in details in Part 6.3.2.2 of Chapter 6 below.

<sup>79</sup> Andrew Nicol, Gavin Millar and Andrew Sharland, *Media Law & Human Rights* (2nd ed, Oxford University Press 2009) 53.

<sup>80</sup> *R (Prolife Alliance) v BBC* [2003] UKHL 23, [2004] 1 AC 185.

<sup>81</sup> ATVOD is discussed in details in Part 6.4.2 of Chapter 6 below.

As to the enforcement of the Convention rights, section 7 provides that a person may make an application to the appropriate court or tribunal if he has been or would be a ‘victim’ of an act or proposed act of a public authority made unlawful by section 6. The person may bring freestanding proceedings against the infringing authority or rely on the Convention rights in any other legal proceedings<sup>82</sup> if he could satisfy the ‘victim’ test under Article 34 of the ECHR.<sup>83</sup> Therefore, this provision has the effect of incorporating Article 34 and the concept of victim under the Strasbourg jurisprudence into domestic law.

Article 34<sup>84</sup> allows a wide range of bodies to be treated as a ‘victim’ of a violation of Convention rights by local authorities.<sup>85</sup> The ‘victim’ is not confined to an individual who can establish that his rights have actually been infringed. Any person who could show that there is a potential threat to his right is likely to be considered as a ‘victim’. In *Open Door Counselling and Dublin Well Woman v Ireland*,<sup>86</sup> some of the applicants, who were of child bearing age but not pregnant, were regarded as ‘victims’ as they could have been affected by the injunction that restrained publication of information about abortions abroad. Similarly, in *Bowman v UK*<sup>87</sup> it was held that an anti-abortionist applicant was able to complain about restrictions on election campaign spending though proceedings against her had been quashed on technical ground. The risk of further prosecutions in future

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<sup>82</sup> Section 7(1) of the HRA.

<sup>83</sup> Section 7(7) of the HRA.

<sup>84</sup> Article 34 of the ECHR states ‘The court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victims of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto...’.

<sup>85</sup> The scope of the article extends to legal persons but governmental organisations are not included as only non-governmental organisations are permitted to bring such applications.

<sup>86</sup> (1992) 15 EHRR 244.

<sup>87</sup> (1998) 26 EHRR 1.

campaigns was a strong indication that she could potentially be a victim. Nonetheless, the threat of violation must be real and not in abstract.<sup>88</sup>

As to the position of third parties or pressure groups, the Strasbourg case law does not directly recognise such groups as ‘victims’ under Article 34. It is generally accepted that the ‘victim test’ is narrower than the domestic rules on ‘sufficient standing’ as the latter had recognised public interest groups as possessing standing in any applications for judicial review.<sup>89</sup> Due to this divergence, the sufficient standing test will continue to apply to non-HRA judicial review cases and cases involving HRA claims where applicants are unable to meet the strict requirements of the victim under the ECHR.<sup>90</sup>

Apart from these provisions, section 12 of the HRA lays down specific provisions to further safeguard freedom of expression, especially in relation to press freedom. It applies whenever a court<sup>91</sup> is considering whether to grant relief that might affect the exercise of such a right. Subsection (2) concerns the grant of relief which is sought ex-parte and when no notice is given to the respondent. It allows the court to refuse such an application unless the applicant could demonstrate that necessary steps have been taken to notify the respondent, or that there are compelling reasons which render notification inappropriate.

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<sup>88</sup> In *R (Rusbridger) v AG* [2003] UKHL 38, [2004] 1 AC 357, an application for a declaration that the Treason Felony Act 1848 was incompatible with freedom of expression was rejected as there was no significant risk of prosecution nor the statute had any chilling effect on the right.

<sup>89</sup> Richard Drabble, James Maurici and Tim Buley (eds), *Local Authorities and Human Rights* (Oxford University Press 2004) 66.

<sup>90</sup> Jack Beatson and others, *Human Rights: Judicial Protection in the United Kingdom* (Sweet & Maxwell 2008) 312 – 318.

<sup>91</sup> Section 12(5) of the HRA states that ‘court’ includes a tribunal.

A Comparative Study of Malaysia and the United Kingdom

With regard to application for interlocutory injunction before publication, subsection (3) obliges the applicant to satisfy the test of likely success at trial before the relief could be granted by the court. Lastly, subsection (4) which relates to protection of journalistic, literary or artistic materials. It requires the court to have particular regard to the importance of freedom of expression and to the extent of publicity and public interest that attached to the materials and relevant privacy codes.

These specific provisions in section 12 seem to suggest a presumption in favour of freedom of expression over other competing rights. Nonetheless, the presumptive priority is inaccurate as it was ruled by Keene LJ in *Douglas v Hello! Ltd (No. 1)*:

The subsection does not seek to give a priority to one Convention right over another. It is simply dealing with the interlocutory stage of proceedings and with how the court is to approach matters at that stage in advance of any ultimate balance being struck between rights which may be in potential conflict.<sup>92</sup>

The principle was affirmed in *Ashdown v Telegraph Group Ltd*<sup>93</sup> whereby the court held that section 12 did not require the court to place extra weight on freedom of expression. It merely underlined the need to have regard to contexts in which the Strasbourg jurisprudence had given particular weight to freedom of expression.

Thus, the HRA has brought a positive development for the protection of human rights in the UK. As it is expressly stated in the preamble that its aims is to give 'further' effect to the Convention rights, undoubtedly individual rights including freedom of expression would be enhanced with the operation of the HRA.<sup>94</sup> The significant impact

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<sup>92</sup> [2001] QB 967 (CA) 1008.

<sup>93</sup> [2001] EWCA Civ 1142, [2002] Ch 149.

<sup>94</sup> Geoffrey Robertson and Andrew Nicol, *Media Law* (5th ed, Penguin 2008) 76.

A Comparative Study of Malaysia and the United Kingdom of the HRA on free speech was summarised by Lord Steyn in *Reynolds v Times Newspapers Ltd*<sup>95</sup>:

The starting point is now the right of freedom of expression, a right based on a constitutional or higher legal order foundation. Exceptions to freedom of expression must be justified as being necessary in a democracy. In other words, freedom of expression is the rule and regulation of speech is the exception requiring justification. The existence and width of any exception can only be justified if it is underpinned by a pressing social need.<sup>96</sup>

To sum up, the right to freedom of expression, which was initially regarded as a residual right and later has been accepted as a defence to other rights such as the right to reputation or fair trial rights, has now become a statutory right that is available to all persons in the UK. Thus, it is pertinent to discuss the meaning and scope of the right under Article 10.

### **4.3 The Meaning and Scope of Freedom of Expression**

The right to freedom of expression is stipulated in Article 10 of the ECHR and it is now incorporated into Schedule I of the HRA. The said article provides:

- (1) 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.
- (2) 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

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<sup>95</sup> [2001] 2 AC 127 (HC).

<sup>96</sup> *ibid* 208.

A Comparative Study of Malaysia and the United Kingdom  
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.

It is clear that all persons, natural or legal persons, are permitted to exercise freedom of expression as the right is explicitly conferred on ‘everyone’ in the country.<sup>97</sup> As to the expression guaranteed to be protected against state interferences, it is not confined to words, written or spoken only. The word ‘expression’, which is wider in scope than ‘speech’,<sup>98</sup> has been given a generous interpretation covering a wide range of expression and medium including paintings,<sup>99</sup> books,<sup>100</sup> films,<sup>101</sup> radio interviews,<sup>102</sup> information pamphlets<sup>103</sup> and the Internet.<sup>104</sup> Apart from that, it is also exercisable through certain forms of conduct such as peaceful march or demonstration,<sup>105</sup> and is likely to extend to symbolic speech (expressive conduct) like flag burning as well.<sup>106</sup>

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<sup>97</sup> In principle, all natural persons including members of the armed forces, civil servants, judges and lawyers have the right to freedom of expression, but their status is likely to be relevant in determining the proportionality of any interference to the right.

<sup>98</sup> Though the scope of the words ‘expression’ and ‘speech’ are literally dissimilar from each other, the phrase ‘freedom of expression’ or ‘freedom of speech’ is commonly used interchangeably with reference to the right under Article 10 of the ECHR.

<sup>99</sup> *Müller v Switzerland* (1991) 13 EHRR 485.

<sup>100</sup> *Handyside v UK* (n 1).

<sup>101</sup> *Otto-Preminger Institute v Austria* (1994) 19 EHRR 34.

<sup>102</sup> *Barthold v Germany* (1985) 7 EHRR 383.

<sup>103</sup> *Open Door Counselling* (n 86).

<sup>104</sup> *Perrin v UK* (App. 5446/03), Decision of 18 October 2005, ECHR 2005-XI.

<sup>105</sup> For details discussion on the difference between speech and conduct, see Barendt, *Freedom of Speech* (n 6) 78 – 88.

<sup>106</sup> See the concurring opinion of Judge Jambrek in *Grigoriades v Greece* (1997) 27 EHRR 464, where he drew on the US flag-burning cases including *Texas v Johnson* 491 US 397 (1989).



A Comparative Study of Malaysia and the United Kingdom

As to the scope of freedom of expression, plain reading of Article 10 indicates that the right covers three main components; freedom to hold opinions,<sup>107</sup> freedom to receive as well as to impart information and ideas. Nonetheless, it was argued that the right should not be limited to these freedoms only given that the ECtHR has avoided defining in exact terms which activities are covered by Article 10(1).<sup>108</sup> Further, in certain circumstances, the right to freedom of expression has been ruled to include the negative right not to speak or to remain silent.

With regard to a general right to freedom of information, the right is not included within the purview of Article 10. This is regardless the fact that the right is closely connected to freedom of expression,<sup>109</sup> and has indeed been treated as an aspect of free speech in other international instruments such as the Universal Declaration of Human Rights (UDHR)<sup>110</sup> and the International Covenant on Civil and Political Rights (ICCPR).<sup>111</sup> Arguably, this is due to the absence of the phrase ‘to seek information and ideas’, which is clearly stipulated in the UDHR and ICCPR, but is nowhere mentioned in the ECHR. Further, the textual reference to the right ‘to receive and impart information and ideas’ in Article 10 has been judicially interpreted as

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<sup>107</sup> It was argued that freedom to hold opinions should be accorded with almost absolute protection as restrictions in paragraph 2 are not applicable to such freedom. See Monica Macovei, *Freedom of Expression: A Guide to the Implementation of Article 10 of the European Convention on Human Rights* (2nd ed, 2004) 8.

<sup>108</sup> Nicol, Millar, and Sharland, *Media Law & Human Rights* (n 79) 15.

<sup>109</sup> The Hon Sir Anthony Mason, ‘The Relationship between Freedom of Expression and Freedom of Information’ (n 24) 225.

<sup>110</sup> Article 19 of the UDHR provides ‘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’ (emphasis added).

<sup>111</sup> Article 19(2) of the ICCPR states ‘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’ (emphasis added).

to prevent the government from restricting a person from receiving information that others wish or may be willing to impart to him.<sup>112</sup>

As to freedom of the press, the right is also nowhere mentioned in Article 10.<sup>113</sup> However, the importance of media freedom<sup>114</sup> and the role played by the media as a ‘public watchdog’<sup>115</sup> has been recognised by the ECtHR. In *Lingens v Austria*,<sup>116</sup> the journalist was found guilty of publishing defamatory remarks about the former Austrian Federal Chancellor and was fined by the Austrian court. In ruling that the conviction constituted an infringement of the journalist’s right under Article 10, the ECtHR ruled:

Whilst the press must not overstep the bounds set, inter alia, for the ‘protection of the reputation of others’, it is nevertheless incumbent on it to impart information and ideas on political issues just as on those in other areas of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them ...<sup>117</sup>

The prominence of press freedom has been reiterated in *Castells v Spain*.<sup>118</sup> A Member of the Parliament had been convicted of insulting the government in an article published in a weekly magazine and was

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<sup>112</sup> *Leander v Sweden* (1987) 9 EHRR 433, para 74.

<sup>113</sup> The relationship between press freedom and freedom of expression has been viewed in three different perspectives. Some argued that the two freedoms are really equivalent whilst others claimed that they refer to two distinct meanings and that the press should enjoy special rights and privilege beyond freedom of speech. The third group alleged that press freedom is not a distinct right from free speech and the former is protected only to the degree to which it promotes the values underlying the latter. See Dicey, *Introduction to the Study of the Law of the Constitution* (n 21) 246 – 247; Potter Stewart, ‘Or of the Press’ (1974) 26 Hastings LJ 631, 633 – 634; Judith Lichtenberg, ‘Foundations and Limits of Freedoms of the Press’ in Judith Lichtenberg (ed), *Democracy and the Mass Media: A Collection of Essays* (Cambridge University Press 1990) 102 – 105.

<sup>114</sup> It is generally acknowledged that through investigatory journalism, the media are able to discover and publish wrongdoings or abuses in the government to the public. A good illustration is the exposure of the scandal involving excessive and fraudulent claims by the UK MPs in 2009.

<sup>115</sup> *Observer and Guardian v UK* (1991) 14 EHRR 1537, para 59.

<sup>116</sup> (1986) 8 EHRR 407.

<sup>117</sup> *ibid* para 41.

<sup>118</sup> (1992) 14 EHRR 145.

sentenced to a term in prison. In holding that there was a violation of the right, it was observed by the court:

Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion...<sup>119</sup>

These cases have demonstrated the recognition of press freedom under Article 10. Nonetheless, press freedom is not confined to the print media per se as it has long been established to embody the broadcasting media as well. A good illustration is *Jersild v Denmark*<sup>120</sup> whereby a journalist had been convicted by the Danish court for spreading racist remarks when he granted a television interview to a group of young racists who made several racist claims during their conversations. It was held that though the racist remarks were not protected, the conviction amounted to a violation of the journalist's right to press freedom. The ECtHR ruled:

News reporting based on interviews, whether edited or not, constitutes one of the most important means whereby the press is able to play its vital role of 'public watchdog'... The punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so.<sup>121</sup>

The judgment has recognised the inclusion of the broadcast media within the scope of press freedom. Nevertheless, the broadcast media are not similar with the print media and have been treated differently from the latter.<sup>122</sup> Such a treatment is not incompatible with Article 10

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<sup>119</sup> *ibid* para 43.

<sup>120</sup> (1995) 19 EHRR 1.

<sup>121</sup> *ibid* para 35.

<sup>122</sup> The broadcast media are generally considered to be different from the print media. Even if they are perceived as essentially the same, the broadcast media are still distinguishable as they have different origins, have existed for different periods

A Comparative Study of Malaysia and the United Kingdom  
as the last sentence in paragraph 1 has expressly permitted states to impose licensing system for broadcasting, television or cinema enterprises. The purpose of the sentence has been discussed in *Informationsverein Lentia and Others v Austria*:<sup>123</sup>

[T]o make it clear that States are permitted to regulate by a licensing system the way in which broadcasting is organised in their territories, particularly in its technical aspects... Technical aspects are undeniably important, but the grant or refusal of a licence may also be made conditional on other considerations, including such matters as the nature and objectives of a proposed station, its potential audience at national, regional or local level, the rights and needs of a specific audience and the obligations deriving from international legal instruments.<sup>124</sup>

As such, licensing system for the broadcast media was considered necessary for technical reasons, in particular the scarcity of available frequencies.<sup>125</sup> Further, the need has also been justified due to the pervasive presence and powerful nature of the broadcast media as well as for pluralism and programme variety.<sup>126</sup> Nonetheless, the permission in Article 10(1) and these arguments do not render states to be absolved from the requirements in Article 10(2).<sup>127</sup> Since licensing system constitutes an interference with freedom of expression, it is only exercisable if it could be justified as necessary in a democratic country on the grounds stipulated in Article 10(2).

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of time and have been subjected to regulatory controls from their beginnings. See Lee C Bollinger, 'Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media' (1976) 75 Mich L Rev 1, 13 – 16.

<sup>123</sup> (1994) 17 EHRR 93.

<sup>124</sup> *ibid* para 32.

<sup>125</sup> Scarcity of frequencies is no longer a tenable justification with the advent of cable, satellite and digital broadcasting that has significantly increased the number of frequencies and channels.

<sup>126</sup> Eric Barendt and Lesley Hitchens, *Media Law: Cases and Materials* (Pearson Education 2000) 12 – 14.

<sup>127</sup> Article 10(2) of the ECHR will be discussed in details in Part 4.5 below.

## 4.4 Political Expression

Article 10 confers the right to freedom of expression on everyone, and its protection is not restricted to certain types of speech, particularly those of a political nature.<sup>128</sup> Artistic expression<sup>129</sup> and commercial speech<sup>130</sup> also fall within its ambit. Though the right is generally applicable to all types of expression, the ECtHR's conception of free political expression as a central feature of a democratic society has resulted in the speech to be elevated to a special status over other categories of speech.<sup>131</sup>

The preferred position of political speech has also been recognised by local courts. In *Derbyshire CC v Times Newspaper Ltd*,<sup>132</sup> the House of Lords gave strong protection to political speech and held that the libel action by the local authority should not be allowed as it would fetter freedom of expression. Similarly, in *R (Prolife Alliance)*,<sup>133</sup> the importance of political speech has been acknowledged by Lord Nichols that:

Freedom of political speech is a freedom of the very highest importance in any country which lays claim to being a democracy. Restrictions on this freedom need to be examined rigorously by all concerned, not least the courts.<sup>134</sup>

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<sup>128</sup> *Casado Coca v Spain* (1994) 18 EHRR 1.

<sup>129</sup> In *Müller v Switzerland* (n 99) para 27, the court interpreted the word 'expression' in Article 10 to include '...freedom of artistic expression, notably within freedom to receive and impart information and ideas – which affords the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds'.

<sup>130</sup> In *Mark Intern and Beerman v Germany* (1989) 12 EHRR 161, it was ruled that an article published by the claimant in a bulletin describing the failure of the mail order firm 'conveyed information of a commercial nature' which could not be excluded by the scope of Article 10(1).

<sup>131</sup> *Lingens v Austria* (n 116); *Bowman v UK* (n 87); *Castells v Spain* (n 118).

<sup>132</sup> *Derbyshire CC v Times Newspaper Ltd* (n 25).

<sup>133</sup> *R (Prolife Alliance) v BBC* (n 80).

<sup>134</sup> *ibid* [6].

Unfortunately, the phrase ‘political speech’ has yet been given a definite meaning. It was argued that it would be unsatisfactory to define such expression by reference to the intention or identity of the speaker, or the subject of publication.<sup>135</sup> The House of Lords in *Reynolds*<sup>136</sup> attempted to define political expression by confining it to:

[S]tatements made about the actions and qualities of those currently or formerly elected to Parliament and those with immediate aspirations to be members, so far as those actions and qualities directly affected their capacity ... to meet their public responsibilities.<sup>137</sup>

Nonetheless, the interpretation has been regarded as too narrow since it is very much unlikely to include discussion on matters of public interests which are not taken up by the state or political parties. The narrow interpretation would be in contradictory with the judgment in *Thorgeirson v Iceland* which ruled that ‘there is no warrant in its case-law for distinguishing, in the manner suggested by the Government, between political discussion and discussion of other matters of public concern’.<sup>138</sup>

The uncertainty as to the exact interpretation of political speech has been observed in *VgT Verein Gegen Tierfabriken v Switzerland* that ‘while the term “political” were somewhat vague, absolute precision were unnecessary...’.<sup>139</sup> Thus, the preferred position of political speech remains intact though its definition is nowhere stipulated in definite term. This has led to the proposition that political speech should refer to ‘all speech relevant to the development of public opinion on the whole range of issues which an intelligent citizen

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<sup>135</sup> Ivan Hare, ‘Is the Privileged Position of Political Expression Justified?’ in Jack Beatson and Yvonne M Cripps (eds), *Freedom of Expression and Freedom of Information: Essays in Honour of Sir David Williams* (Oxford University Press 2000) 108 – 109.

<sup>136</sup> *Reynolds v Times Newspaper Ltd* (n 95).

<sup>137</sup> *ibid* 175.

<sup>138</sup> (1992) 14 EHRR 843, para 64.

<sup>139</sup> (2001) 34 EHRR 159, para 51.

A Comparative Study of Malaysia and the United Kingdom should think about'.<sup>140</sup> It is argued that this interpretation would be more appropriate as it covers political speech in its strict sense as well as discussion on matters of public concern.

#### 4.5 Restrictions on Freedom of Expression

The right to freedom of expression is not absolute and may be subjected to a number of exceptions. Nevertheless, interference by the state entails a violation of the right unless it could satisfy the three-stage test in *Sunday Times v UK*<sup>141</sup> that provides:

1. Any interference, such as formalities, conditions, restrictions or penalties, must be prescribed by law;
2. The interference is aimed at protecting one or more of the legitimate aims: national security, territorial integrity, public safety; prevention of disorder or crime; protection of health or moral; protection of reputation or rights of others; preventing the disclosure of information received in confidence, and maintaining the authority and impartiality of the judiciary; and
3. The interference is necessary in a democratic society.

In applying the test, the ECtHR is generally disinclined to apply the notion of 'balancing' freedom of expression in Article 10(1) against the permitted aims in paragraph 2.<sup>142</sup> This is due to reason that the two paragraphs are not equal since the right protected has presumptive weight that any restrictions must be strongly justified and strictly construed.<sup>143</sup> Nonetheless, the application of the test by the ECtHR is in stark contrast with the position in the UK. The domestic courts

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<sup>140</sup> Barendt, *Freedom of Speech* (n 6) 162.

<sup>141</sup> (1979 – 80) 2 EHRR 245, para 49.

<sup>142</sup> Wadham, Helen, and Anna, *Blackstone's Guide to the Human Rights Act 1998* (n 13) 193.

<sup>143</sup> *ibid.*

A Comparative Study of Malaysia and the United Kingdom often refer to the importance of ‘balance’ between paragraphs 1 and 2 of Article 10 and seem to confer on each paragraph equal weight. It was claimed that the approach adopted by local judges was far less rigorous than that applied by the ECtHR.<sup>144</sup>

The approach taken by the local courts in the UK could be seen in *R (Farrakhan) v Secretary of State for the Home Department*.<sup>145</sup> The Secretary of State for the Home Department filed an appeal against the ruling of the High Court that had earlier quashed his decision to prevent the claimant, a US citizen, from entering into the UK. The exclusion order, which was made pursuant to the Immigration and Asylum Act 1999 on the ground that the claimant’s presence in the country was not conducive to the public good, was found by the trial judge to have amounted to an infringement of the claimant’s right to freedom of expression. In allowing the appeal, the Court of Appeal accorded a ‘particularly wide margin of discretion’ to the Secretary of the State as he was in a better position than the court to balance the claimant’s right to freedom of expression against the need to prevent disorder that would secure the broader interest of the community under Article 10(2).<sup>146</sup> In relation to this, it was claimed that the effect of such a wide margin seemed to be a less than rigorous enforcement of the requirement that restrictions with the right to freedom of expression as applied by the ECtHR.<sup>147</sup>

Another case that could highlight the approach by the domestic courts in balancing freedom of expression with the restrictions contained in Article 10(2) is *R v Shayler*.<sup>148</sup> In this case, one of the issues raised by the appellant was whether sections 1(1)(a), 4(1) and 4(3) of the

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<sup>144</sup> *ibid* 198.

<sup>145</sup> [2002] EWCA Civ 606; [2002] QB 1391.

<sup>146</sup> *ibid* paras 71 – 74, 77, 79.

<sup>147</sup> Wadham, Helen and Anna, *Blackstone’s Guide to the Human Rights Act 1998* (n 13) 198.

<sup>148</sup> *R v Shayler* [2002] UKHL 11, [2003] 1 AC 247.



A Comparative Study of Malaysia and the United Kingdom Official Secrets Act 1989, which impose a ban on disclosure of certain information, were incompatible with freedom of expression in Article 10(1). The House of Lords admitted that the ban constituted an interference with the appellant's freedom of expression, but the ban was not absolute and it was confined to disclosure without lawful authority. Consequently, it was ruled that the interference was not greater than was required to achieve the legitimate aim of protecting the interests of national security and was still within the qualifications in Article 10(2). In addition to these local courts rulings, it is then pertinent to analyse each aspect of the three-stage test that was formulated in *Sunday Times v UK*.<sup>149</sup>

#### **4.5.1 Prescribed by Law**

This first condition requires any interference to be 'prescribed by law'. The expression has been summarised in *Margareta and Roger Andersson v Sweden*:<sup>150</sup>

[T]he expression ... requires first that the impugned measures should have a basis in domestic law. It also refers to the quality of the law in question, requiring that it be accessible to the persons concerned and formulated with sufficient precision to enable them – if need be, with appropriate legal advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. A law which confers a discretion is not in itself inconsistent with this requirement, provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity, having regard to the legitimate aim in question, to give the individual adequate protection against arbitrary interference.<sup>151</sup>

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<sup>149</sup> *Sunday Times v UK* (n 141).

<sup>150</sup> (1992) 14 EHRR 615.

<sup>151</sup> *ibid*, para 75. Though the judgment in the case discussed the phrase 'in accordance with law' in Article 8(2), the court in *Silver v UK* (n 150) para 86 has expressly ruled that the expression has the same effect with the expression 'prescribed by law' in Articles 9(2) – 11(2).

A Comparative Study of Malaysia and the United Kingdom

The case established that any interference must have a basis in domestic law. The word ‘law’ has been extensively construed to cover not only statutes but also unwritten laws, including the common law,<sup>152</sup> rules of EU law,<sup>153</sup> secondary legislation and even rules of a professional body.<sup>154</sup> Interference without a legal basis would promptly result in a violation of the right. In *Malone v UK*,<sup>155</sup> it was ruled that since interceptions on the applicant’s communications were solely authorised by the internal administrative practices of the police, the interference was then regarded as not prescribed by domestic law.

Apart from that, the expression also demands the law in question to possess two important qualities (accessibility and foreseeability) in order to be compatible with the rule of law.<sup>156</sup> The concept of accessibility and foreseeability has been elaborated in *Sunday Times* that:

In the Court’s opinion, the following are two of the requirements that flow from the expression ‘prescribed by law’. Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a ‘law’ unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.<sup>157</sup>

The accessibility rule is meant to counter arbitrary power as it mandates any law that interferes with freedom of expression to be published in a form that is accessible by those who are likely to be

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<sup>152</sup> *Sunday Times v UK* (n 141).

<sup>153</sup> *Groppera Radio A-G v Switzerland* (1990) 12 EHRR 321.

<sup>154</sup> *Barthold v Germany* (n 102).

<sup>155</sup> (1984) 7 EHRR 14.

<sup>156</sup> *Kopp v Sweden* (1999) 27 EHRR 91, paras 55, 64.

<sup>157</sup> *Sunday Times v UK* (n 141) para 49.

A Comparative Study of Malaysia and the United Kingdom affected by it.<sup>158</sup> As for the foreseeability rule, it is intended to enable the individuals to foresee with a reasonable degree of accuracy the consequences of their actions. However, the foreseeability rule does not demand for absolute precision in the framing of such laws as this may lead to excessive rigidity in interpretation. In *Kokkinakis v Greece*,<sup>159</sup> the ECtHR recognised that many statutes have been deliberately couched in imprecise terms so that they are flexible and adaptable with changing situations and prevailing views of society.

The requirements of accessibility and foreseeability had been raised in *Silver*.<sup>160</sup> The court ruled that the application of censorship on prisoners' correspondence that had occasionally stopped several items of mail was not foreseeable by the claimant. Thus, it failed to satisfy the qualities that are expected from law purporting to limit freedom of expression. Similarly, in *Hashman and Harrup v UK*,<sup>161</sup> it was ruled that the binding-over order requesting anti-hunting protesters to be of good behaviour violated freedom of expression as the order was found to be too vague to be 'prescribed by law' under paragraph 2 of Article 10.

By contrast, the judgment in *Steel and others v. UK*<sup>162</sup> provided that the arrest and detention of the first and second claimants for breach of the peace due to their protests against grouse shoot and extension of a motorway was lawful under the ECHR. The court ruled that the concept of breach of the peace had been clarified by the English courts and was therefore drafted with the degree of precision required by the

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<sup>158</sup> Wadham, Helen, and Anna, *Blackstone's Guide to the Human Rights Act 1998* (n 13) 31.

<sup>159</sup> (1993) 17 EHRR 397.

<sup>160</sup> *Silver v UK* (n 150).

<sup>161</sup> (1999) 30 EHRR 241.

<sup>162</sup> (1999) 28 EHRR 603.

A Comparative Study of Malaysia and the United Kingdom  
ECHR. Since it fulfilled the requirements of ‘prescribed by law’, there was no violation of the claimants’ right to freedom of expression.<sup>163</sup>

#### **4.5.2 Legitimate Aim**

The second requirement demands the purpose of any restrictions on freedom of expression to fall within one of the legitimate aims in paragraph 2 of Article 10. The House of Lords in *A v Secretary of State for the Home Department*<sup>164</sup> stressed that there must be a link between the means employed and the legitimate aims pursued by the state. The list of legitimate aims is exhaustive but it has rarely caused any problems as the state is able to rely at least upon one of those protected interests.<sup>165</sup> Further, the grounds for interference are so broad, such as ‘the protection of public order’, ‘the interest of national security’ and the ‘prevention of disorder or crime’, that the state can usually make a plausible case that it does have a good reason for interfering with the right.<sup>166</sup> Upon finding that a legitimate aim sufficiently underlies an interference with freedom of expression, the court will then look into the third requirement in Article 10(2).

#### **4.5.3 Necessary in a Democratic Society**

The last prerequisite in Article 10(2) mandates the state to show interference with freedom of expression is ‘necessary in a democratic country’. It is the most decisive feature which necessitates any exceptions ‘must be narrowly interpreted and the necessity for any restrictions must be convincingly convinced’.<sup>167</sup> The term ‘necessary’

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<sup>163</sup> The phrase ‘prescribed by law’ has also been considered in *R v Shayler* (n 148) and *R (Gillan) v Comr of Police for the Metropolis* [2006] UKHL 12, [2006] 2 AC 307.

<sup>164</sup> [2004] UKHL 56, [2005] 2 AC 68.

<sup>165</sup> Robert Reed and Jim Murdoch, *Human Rights Law in Scotland* (3rd ed, Bloomsbury Professional 2011) 914.

<sup>166</sup> David John Harris, Michael O’Boyle and Colin Warbrick, *Law of the European Convention on Human Rights* (2nd ed, Oxford University Press 2009) 348.

<sup>167</sup> *Vogt v Germany* (1996) 21 EHRR 205, para 52.

A Comparative Study of Malaysia and the United Kingdom has been elaborated in *Handyside* as neither synonymous with 'indispensable' nor has the flexibility of such expressions as 'admissible', 'ordinary', 'useful', 'reasonable' or 'desirable'.<sup>168</sup> The judgment has excluded excessively strict or generous interpretation of the term 'necessary' in Article 10(2). It was further ruled that the term implies the existence of a 'pressing social need'.<sup>169</sup> Thus, the interpretation indicates that the existence of a 'pressing need' must be established in order to prove that the limitations on freedom of expression satisfied the necessity requirement.

The definition of the word 'necessary' has been frequently quoted with approval in a number of the ECtHR cases,<sup>170</sup> most notably the case of *Sunday Times*<sup>171</sup> which has set-out a three-fold test in order to assess the status of limitations on freedom of expression. The test requires any interference to correspond with a pressing need, be proportionate to the legitimate aim pursued and be justified by relevant and sufficient reasons.<sup>172</sup> For that reason, it appears that the necessity requirement is essentially underpinned by the principle of proportionality. This has been affirmed in *Olsson v Sweden* which provided that 'according to the Court's established case law-law, the notion of necessity implies that an interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued'.<sup>173</sup>

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<sup>168</sup> *Handyside v UK* (n 1) para 48.

<sup>169</sup> *ibid.*

<sup>170</sup> *Lingens v Austria* (n 116) para 39 and *Müller v Switzerland* (n 99) para 32.

<sup>171</sup> *Sunday Times v UK* (n 141).

<sup>172</sup> *ibid.*, para 62.

<sup>173</sup> (1988) 11 EHRR 259, para 67.

The emphasis on the proportionality principle has been asserted by the House of Lords in *Derbyshire CC v Times Newspapers Ltd.*<sup>174</sup> It was ruled by Lord Keith:

As regards the words ‘necessary in a democratic society’ in connection with the restrictions on the right to freedom of expression which may properly be prescribed by law, the jurisprudence of the European Court of Human Rights has established that ‘necessary’ requires the existence of a pressing social need, and that the restrictions should be no more than is proportionate to the legitimate aim pursued.<sup>175</sup>

The principle of proportionality aims to strike a fair or proportionate balance between the aim pursued and the means chosen to satisfy it. The means must not be arbitrary, unfair or based on irrelevant considerations.<sup>176</sup> They must be capable of achieving the intended objective and must impair the right no more than is needed i.e. the state cannot use ‘a sledgehammer to crack a nut’.<sup>177</sup> Further, if the objective may be achieved in more than one way, the way that is least harmful to freedom of expression should be chosen.<sup>178</sup> It was also ruled that a law that confers a discretion must indicate the scope of that discretion.<sup>179</sup> Similarly, any limitation that has a scope that is wider than is required would fail the proportionality test.<sup>180</sup>

The proportionality requirement has often been invoked in cases involving Article 10. In *Sunday Times*,<sup>181</sup> the government was found guilty of violating the right to freedom of expression when the interference with the newspaper’s freedom to publish the thalidomide

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<sup>174</sup> *Derbyshire CC v Times Newspaper Ltd* (n 25).

<sup>175</sup> *ibid* 50 – 51.

<sup>176</sup> Richard Drabble, James Maurici, and Tim Buley, *Local Authorities and Human Rights* (n 89) 27.

<sup>177</sup> *ibid*.

<sup>178</sup> *ibid*.

<sup>179</sup> *Malone v UK* (n 155) para 68.

<sup>180</sup> *de Freitas v Ministry of Agriculture* [1999] 1 AC 69 (PC) 81.

<sup>181</sup> *Sunday Times v UK* (n 141).

A Comparative Study of Malaysia and the United Kingdom  
tragedy was not justified by a ‘pressing social need’ and could not be considered ‘necessary’ within clause 2 of Article 10.

The doctrine of proportionality is strongly linked to the margin of appreciation. The margin refers to a degree of latitude or deference accorded by the ECtHR to the state in the observance of the ECHR provisions. It was elaborated in *Handyside* that:

Consequently, Article 10 para. 2 (art. 10 – 2) leaves to the Contracting States a margin of appreciation. This margin is given both to the domestic legislator (‘prescribed by law’) and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force ...<sup>182</sup>

The justification for conferring the state with a certain extent of discretion is that the state is in a better position than international judges in Strasbourg in assessing the existence a pressing social need and applying the appropriate measures to deal with it. This is crucial in cases involving sensitive issues like national security<sup>183</sup> and morality.<sup>184</sup> The preference given to the local authorities has been highlighted in *Mark Intern* that ‘the ECtHR should not substitute its own evaluation for that of the national courts in the instant case, where those courts, on reasonable grounds, had considered restrictions to be necessary’.<sup>185</sup>

Nonetheless, there are limits to the margin and the limits within which the state may act compatibly with the ECHR are determined by the ECtHR. They vary according to the context and importance of the right, the aim pursued and the degree to which practice varies among Convention States.<sup>186</sup> It was further stipulated in *Handyside* that:

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<sup>182</sup> *Handyside v UK* (n 1) para 48.

<sup>183</sup> *Leander v Sweden* (n 112).

<sup>184</sup> *Müller v Switzerland* (n 99).

<sup>185</sup> *Mark Intern and Beerman v Germany* (n 130) para 37.

<sup>186</sup> *Human Rights Act 1998* (n 46) paras 42 – 6.

Article 10 para. 2 (art. 10 – 2) does not give the Contracting States an unlimited power of appreciation. The Court ... is empowered to give the final ruling on whether a ‘restriction’ or ‘penalty’ is reconcilable with freedom of expression as protected by Article 10 (art. 10). The domestic margin of appreciation thus goes hand in hand with a European supervision. Such supervision concerns both the aim of the measure challenged and its ‘necessity’ ...<sup>187</sup>

Thus, it is obvious that though the state is accorded with certain margin, the final ruling is still vested with the ECtHR in deciding whether such interference is reconcilable or not with freedom of expression under Article 10(1).

## **4.6 Application of Freedom of Expression to Political Blogs**

The Internet has revitalised the notion of freedom of expression as an individual liberty.<sup>188</sup> It offers a novel platform for expressing information and ideas, especially the unrepresented individuals and minority groups in the society.<sup>189</sup> Above all, the Internet affords much more equal opportunities for mass communication than the traditional media, which are largely dominated by professional journalists and few individuals who hold media control and political power. Thus, it is apparent that the Internet plays a critical role in liberating the right to freedom of expression.

As to the application of the right on the Internet, Article 10 is apparently technology-neutral as it explicitly stipulates that the right to freedom of expression is exercisable ‘regardless of frontiers’. Without doubt, plain reading of the provision indicates that the Internet should be included within the scope of the provision. Thus,

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<sup>187</sup> *Handyside v UK* (n 1) para 49.

<sup>188</sup> It was claimed that without mass communication there is effectively no real expression of ideas. See Vincenzo Zeno-Zencovich, *Freedom of Expression: A Critical and Comparative Analysis* (Routledge-Cavendish 2008) 100 – 101.

<sup>189</sup> In *ACLU v Reno* (E.D. Pa. 1996) 929 F. Supp. 2 824, 883 Dalzell J. has described the Internet as ‘the most participatory form of mass speech yet developed’.



any persons are permitted to freely express themselves on the Internet as well as to receive information through the media.

Apart from the provision in Article 10, freedom of expression on the Internet has also been established in a number of cases at the ECtHR. In *Perrin*,<sup>190</sup> the claimant argued that his criminal conviction and sentence in relation to pornographic material exhibited on a US based web site constituted an unjustified interference with his right to freedom of expression. Nevertheless, the court ruled that there was no violation of Article 10 as it was satisfied that the conviction was necessary in a democratic society, in the interest of the protection of morals and the rights of others and that the sentence was not disproportionate.

In *Times Newspaper Ltd v UK (nos. 1 and 2)*, the court ruled that Internet archives should also be included within the ambit of Article 10. It was observed that:

In light of its accessibility and its capacity to store and communicate vast amounts of information, the Internet plays an important role in enhancing the public's access to news and facilitating the dissemination of information generally.<sup>191</sup>

And in the recent judgment of *Editorial Board of Pravoye Delo and Shtekel v. Ukraine*, the ECtHR admitted the importance of the Internet and it has indirectly imposed an obligation on the state to provide an appropriate regulatory framework in reassuring journalists' freedom of speech on the Internet. The court said:

[H]aving regard to the role the Internet plays in the context of professional media activities and its importance for the exercise of the right to freedom of expression generally, ... the Court considers that the absence of a sufficient legal framework at the domestic

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<sup>190</sup> *Perrin v UK* (n 104).

<sup>191</sup> (Applications 3002/03 and 23676/03), Decision of 10 March 2009, ECHR 2009, para. 27.

level allowing journalists to use information obtained from the Internet without fear of incurring sanctions seriously hinders the exercise of the vital function of the press as a ‘public watchdog’

<sup>192</sup>  
...

These judgments have demonstrated that the ECtHR equally protects expression on the Internet. Thus, online expression communicated on the Internet via Web 2.0 applications such as blogs and social networking sites should also be accorded due protection against interference by the state. The safeguard is particularly necessary for blogs which have been distinctively characterised as the closest representation of the Internet’s democratisation of publishing.<sup>193</sup>

Freedom of expression in blogs has been discussed in *Perry v Chief Constable of Humberside Police*.<sup>194</sup> The claimant sought to set aside an Anti-Social Behaviour Order that was imposed on him following the publication of several entries in his blog and the commission of certain physical contacts, which were regarded as anti-social in nature. It was ruled by Openshaw J that the postings in the blog may have been offensive, but they were largely related to the exposure of corruption and public wrongdoing. Thus, the qualified right under Article 10 including the right to hold opinions and to receive and impart information and ideas without interference by public authorities will be engaged. Since the District Judge had previously failed to establish that the order was necessary and proportionate to the risks that he presented, the court decided that the order should be quashed.

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<sup>192</sup> (Application 33014/05), Decision of 5 May 2011, ECHR 2011, para. 64.

<sup>193</sup> A Michael Froomkin, ‘Habermas@discourse.net: Toward a Critical Theory of Cyberspace’ (2003) 116 Harv L Rev 749, 857 – 860.

<sup>194</sup> [2012] EWHC 3226 (Admin), 2012 WL 4866945.

Blogs have also been resorted to disseminate political speech by politicians and political activists as they are able to enhance political debate and opinion of the people in matters of public interest.<sup>195</sup> The use of political blogs can be seen in *R (on the application of Calver) v Adjudication Panel for Wales*.<sup>196</sup> The claimant councillor applied for judicial review of a decision of the defendant panel that found postings on his blog breached a local authority's code of conduct. Further, the panel found that the blog entries, which were critical of the conduct of other councillors and the general running of the council, did not constitute political expression that was worthy of higher protection under Article 10. Beatson J observed that the panel had taken 'an over-narrow view of what amounts to "political expression"...' and held that the comments did 'fall within the term "political expression" in the broader sense the term has been applied in the Strasbourg jurisprudence'.<sup>197</sup> In view of that, it was ruled that the panel's decision that had found the postings in the claimant's blog broke the local authority's code of conduct was a disproportionate interference with his freedom of expression.

Apart from that, blogs are also widely used in journalism and they have often been seen as a 'watchdog' to 'the watchdog' due to their role in exposing and highlighting bias or omission in the coverage of the mainstream media.<sup>198</sup> Due to their popularity and widespread acceptance, it is not unexpected that the traditional media too have established their presence in the blogosphere.<sup>199</sup> Nonetheless, the

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<sup>195</sup> S Coleman, 'Blogs as Listening Posts rather than Soapboxes' in R. Ferguson and M. Howell (eds), *Political Blogs - Craze or Convention?* (Hansard Society 2004) 26.

<sup>196</sup> [2012] EWHC 1172 (Admin), [2012] ACD 81.

<sup>197</sup> *ibid* [80].

<sup>198</sup> Laura McKenna and Antoinette Pole, 'What Do Bloggers Do: An Average Day on an Average Political Blog' (2008) 134(1) PC 97, 102.

<sup>199</sup> R Ferguson and M Howell, 'Political Blogs, Craze Or Convention?' (Hansard Society 2004) 4 – 5.

Political Blogs and Freedom of Expression:  
A Comparative Study of Malaysia and the United Kingdom

position of amateur bloggers in the context of journalistic privilege under the UK laws remains unsettled.

Protection of confidential source is arguably among the most crucial rights for professional journalists and bloggers as citizen journalists. The importance of the privilege has been highlighted by the ECtHR in *Goodwin v United Kingdom* that:

Protection of journalistic sources is one of the basic conditions for press freedom ... Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected.<sup>200</sup>

The right not to disclose confidential source has also been explicitly stated in section 10 of the Contempt of Court Act 1981 which provides that:

No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interest of justice or national security or for the prevention of disorder or crime.

It is obvious from the aforesaid provisions that the statutory protection is conferred on any persons who wish to publish any kinds of publication to the public at large. It is not exclusively confined to institutional media alone<sup>201</sup> though it is acknowledged that professional journalists are imposed with a moral obligation not to disclose their sources<sup>202</sup> and that so far, reported cases on section 10 related with attempts by professional journalists to protect their

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<sup>200</sup> (1996) 22 EHRR 123, para 39.

<sup>201</sup> Barendt and Hitchens, *Media Law: Cases and Materials* (n 126) 12 – 14.

<sup>202</sup> Clause 14 of the Editors' Code of Practice says 'Journalists have a moral obligation to protect confidential sources of information'.

A Comparative Study of Malaysia and the United Kingdom confidential sources.<sup>203</sup> In relation to this, it is submitted that bloggers who style themselves as citizen journalists should be rightfully entitled to claim this statutory protection as well.

Another important privilege for journalists is the exemption from compliance with certain obligations in the Data Protection Act 1998 (DPA). Section 32 excludes any person processing personal data for the special purposes<sup>204</sup> from the data protection principles provided that the processing is undertaken with a view to the publication of journalistic material; the data controller reasonably believes that having regard to the special importance of the public interest in freedom of expression, publication would be in the public interest; and the data controller reasonably believes that, in all the circumstances, compliance with the provisions in the DPA is incompatible with the journalistic purpose.<sup>205</sup> At this point, it is imperative to stress that this privilege is also not exclusively reserved for professional journalists only. This is due to the express provision in the DPA that clearly stipulates that the exemption is available to ‘any person’ that fulfils the prescribed criteria in section 32. For this reason, it was claimed that amateur bloggers who act as citizen journalists should also be entitled to the ‘special purpose’ exemption.<sup>206</sup>

Nonetheless, an uncertainty arises over the application of the two aforementioned privileges to amateur bloggers since the majority of them do not receive any formal or proper training in journalism. Further, bloggers are also not bound by any standards or code such as

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<sup>203</sup> Helen Fenwick and Gavin Phillipson, *Media Freedom under the Human Rights Act* (Oxford University Press 2006) 324.

<sup>204</sup> The ‘special purposes’ in the DPA relates with journalistic, literary and artistic purposes.

<sup>205</sup> Subsection (1)(a)-(c) of section 32 of the DPA.

<sup>206</sup> Anne Flanagan, ‘The Blogger As Journalist under UK Law’ (2005) 10 *Comms L* 125, 126 – 127; Anne Flanagan, ‘Blogging: A Journal Need Not a Journalist Make’ (2005) 16 *Fordham Intell Prop Media & Ent LJ* 395, 419 – 420.

A Comparative Study of Malaysia and the United Kingdom

the Editor's Code of Practice that is enshrined in the contractual agreement between IPSO and member publishers that voluntarily subscribe to the self-regulatory regime of the press. On the contrary, it should be noted that journalism is an 'open profession' and anyone can be a journalist without the need to subscribe to any code of ethics or joining any professional body.<sup>207</sup> This is highlighted by the UN Human Rights Committee in its General Comment NO 34 that 'Journalism is a function shared by a wide range of actors, including ... bloggers and others who engage in forms of self-publication in print, on the Internet or elsewhere...'.<sup>208</sup> For that reason, it is submitted that the statutory right not to disclose confidential sources and the 'special purposes' exemption under the DPA accorded to professional journalists should be equally extended to amateur bloggers.

The relation between bloggers and journalism has been considered in *Author of a Blog v Times Newspaper Ltd.*<sup>209</sup> The claimant was a serving police officer and the author of 'NightJack', a popular blog, which was critical of politicians and police activities. The claimant applied for an interim injunction to restrain the defendant from publishing information that might reveal his true identity to the public. Private information about the claimant has been uncovered by one of the defendant's journalists, who had no direct relationship with the claimant but managed to deduce his identity by using information available on the Internet. The central issue was whether the claimant's identity was information capable of protection under the traditional

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<sup>207</sup> Damian Carney, 'Theoretical Underpinnings of the Protection of Journalists' Confidential Sources: Why an Absolute Privilege Cannot Be Justified' (2009) 1(1) JML 97, 108 – 109.

<sup>208</sup> See <[www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf](http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf)> [accessed 26 January 2015].

<sup>209</sup> [2009] EWHC 1358 (QB), [2009] EMLR 22.

law of confidence and / or the newer tort of misuse of private information. In refusing the application, it was decided by Eady J that:

[T]he information does not have about it the necessary ‘quality of confidence’...; nor does it qualify as information in respect of which the claimant has a reasonable expectation of privacy – essentially because blogging is a public activity. Furthermore, even if I were wrong about this, I consider that any such right of privacy on the claimant’s part would be likely to be outweighed at trial by a countervailing public interest in revealing that a particular police officer has been making these communications.<sup>210</sup>

The judgment has a significant impact on bloggers in the UK as their names or identities have been regarded as public information that is not capable of any reasonable expectation of privacy under Article 8. The decision has however been met with severe criticisms for the failure of the court to provide satisfactory clarification on a number of difficult issues.

The principal argument is largely centred on the question of whether there was a reasonable expectation of privacy that the claimant’s identity would not be revealed to the public.<sup>211</sup> The claimant argued that the revelation would infringe his right to freedom of expression under Article 10 as his right to impart information would be inhibited as the exposure would enable the police authority to identify and take disciplinary proceedings against him.<sup>212</sup> For that reason, it was submitted that the judge should have thoroughly analysed the question by looking at the circumstances of the case,<sup>213</sup> rather than quickly adopting a ‘no’ answer simply because blogging was considered a

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<sup>210</sup> *ibid* [33].

<sup>211</sup> This is the first stage of the two-stage test for claims based upon the publication of allegedly private information in contravention of Article 8 and it has been derived from the leading case of *Campbell v MGN* [2009] EWCA Civ 443, [2009] EMLR 21.

<sup>212</sup> *Author of a Blog v Times Newspaper Ltd* (n 209) [14] – [18].

<sup>213</sup> The Court of Appeal in *Murray v Express Newspapers* [2008] EWCA Civ 446, [2008] 3 WLR 1360 suggested a number of non-exhaustive factors which are relevant to the first question of the two stage test.

A Comparative Study of Malaysia and the United Kingdom public activity.<sup>214</sup> Further, the decision is also in stark contrast with the Strasbourg jurisprudence that acknowledges anonymity-related interests in one's name or identity.<sup>215</sup> Accordingly, it has been claimed that the case does not put an end to all anonymous blogging.<sup>216</sup> At this point, it is therefore worthwhile to briefly discuss the significance of anonymity in blogging.

Anonymity is generally crucial in facilitating freedom of expression,<sup>217</sup> particularly in the online environment. The invisibility of bloggers' real identities enables them to provide and disseminate information of public interest without fear of reprisals, or at least with a highly reduced risk of detriments. Thus, bloggers may, as citizen journalists, cover certain areas or subject matters which professional journalists of the mainstream media ignore or have too little inclination or time to investigate. Nonetheless, there is a potential loss of trust and credibility in blog posts if bloggers' identities cannot be identified. Further, anonymity may be easily abused to make baseless claims or harmful allegations in the cyber world. Thus, it is submitted that neither absolute right to anonymity nor absolute ban on this protection would be in parallel with the exercise of the right to freedom of expression.

Apart from that, the ruling in *Author of a Blog*,<sup>218</sup> which stipulated that even if the claimant's rights to freedom of expression and privacy (anonymity) were engaged, they were ultimately trumped by the defendant's freedom of the press, has been argued to be at odds with

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<sup>214</sup> Kirsty Hughes, 'No Reasonable Expectation of Anonymity?' (2010) 2(2) JML 169, 172 – 173.

<sup>215</sup> See *S and Marper v UK* App No 30562/04 (2009) 48 EHRR 50 and *KU v Finland* App No 2872/02 (2009) 48 EHRR 52.

<sup>216</sup> Kate Brimsted, 'The Anonymous Police Blogger, the Newspaper and the Unmasking of Night Jack' (2009) 25(6) CLS Rev 583, 586.

<sup>217</sup> For a detailed discussion on the importance of anonymous speech, see Daniel J Solove, *Understanding Privacy* (Harvard University Press 2008).

<sup>218</sup> *Author of a Blog v Times Newspaper Ltd* (n 209).



the statutory privilege of not disclosing the sources of information.<sup>219</sup> The qualified privilege is meant to protect the sources of information for without such privilege, it would be difficult for journalists to obtain information that is of real interest to the public. Ironically, by permitting the defendant to publish the identity of the claimant who had been anonymously disseminating information of public interest, the decision appeared to suggest that the protection of sources of information is a privilege for the media, or for the other person claiming it, rather than for the source. It was alleged that the action by the defendant signified the burgeoning competition between the traditional and the new media.<sup>220</sup>

Regardless of the criticisms, the decision is noteworthy as the court for the first time has expressly admitted bloggers, who undertook almost similar journalistic tasks such as disseminating relevant information and reacting to newsworthy events, to be analogous with professional journalists of the traditional media.<sup>221</sup> For that reason, it was claimed that the special rights and privileges accorded to professional journalists should be extended to amateur bloggers as well.<sup>222</sup> Nevertheless, blogs in general are still being perceived as subordinate or alternative to the traditional media since the latter remains the dominant sources for news and political expression.<sup>223</sup>

Apart from that, it was submitted that online expression of Internet users in blogs and other web-based platforms is to be regarded as a 'low level' speech as it 'undergoes little preparation, is inexpensive, normally reaches a small audience and it is possible for anyone to

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<sup>219</sup> Eric Barendt, 'Bad News for Bloggers' (2009) 1(2) JML 141, 146.

<sup>220</sup> *ibid* 146 – 147.

<sup>221</sup> *Author of a Blog v Times Newspaper Ltd* (n 209) [10].

<sup>222</sup> Flanagan, 'The Blogger As Journalist under UK Law' (n 206); Flanagan, ' Blogging' (n 206).

<sup>223</sup> Sunny Woan, 'The Blogosphere: Past, Present, and Future - Preserving the Unfettered Development of Alternative Journalism, The' (2007) 44 Cal W L Rev 477, 485.

A Comparative Study of Malaysia and the United Kingdom engage in such expression'.<sup>224</sup> This is in stark contrast with expression by professional journalists in the mainstream media which is deemed 'high level' since such speech is 'normally intended to be widely disseminated, well prepared and researched in advance, presented with authority and supported with considerable resources to evaluate the legal risks'.<sup>225</sup> For that reason, it was previously argued that online expression of the established media should preferably be tiered at one level whilst smaller sites and amateurs at a different level.<sup>226</sup> Accordingly, it was further claimed that the low level speech deserves some protections and any restrictions on such speech must be proportionate to it.<sup>227</sup>

In addition, it has also been suggested that the protection to be accorded to entries in blogs and other online platforms should take into consideration the 'value' of the expression as well.<sup>228</sup> Online expression that largely focuses on political speech and public affairs should be treated as of 'high value' and therefore be granted the highest protection under Article 10. Whilst 'low value' online communications that are unlikely related to matters of public importance, should not be treated on the same footing but should nevertheless still enjoy certain limited protection under the law.<sup>229</sup> Therefore, it is submitted that political blogs should be regarded as 'high value' and should rightfully be afforded the same status as the traditional media that carry political expression.

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<sup>224</sup> Jacob Rowbottom, 'To Rant, Vent and Converse: Protecting Low Level Digital Speech' (2012) 71(2) CLJ 355, 369 – 376.

<sup>225</sup> *ibid.*

<sup>226</sup> Jacob Rowbottom, 'Media Freedom and Political Debate in the Digital Era' (2006) 69 MLR 489, 508.

<sup>227</sup> Jacob Rowbottom, 'To Rant, Vent and Converse: Protecting Low Level Digital Speech' (n 224) 377.

<sup>228</sup> *ibid* 368 – 370.

<sup>229</sup> *ibid.*

## **4.7 Conclusion**

To sum up, prior to the coming into force of the HRA, the right to freedom of expression in the UK was largely considered as residual in nature. This is mainly due to the reason that there was no codified written constitution or a specific bill of rights that guarantees the exercise of such a right in the country. Consequently, the right could only be applied when there was ambiguity in statutes or common law principles. The absence of sufficient protection in domestic laws had caused victims of human rights violation to bring their cases against the state authorities in the ECtHR in Strasbourg. The position has nonetheless changed when freedom of expression and other fundamental rights in the ECHR were later incorporated into Schedule I of the HRA. As a result, the right is now statutorily conferred on all persons, natural and legal alike, in the UK.

The statutory right covers a wide range of expression and is exercisable regardless of medium. It empowers any person freedom to hold opinions, freedom to receive and freedom to impart information and ideas. Freedom of the press (and broadcast media) is also included within the scope of freedom of expression. In addition, it has also been judicially acknowledged that political expression should enjoy a preferred legal status over other types of speech such as commercial or artistic.

Nonetheless, the exercise of the right to freedom of expression, particularly political speech, is not absolute. The state is permitted to impose restrictions on such a right provided that they are prescribed by law, made in pursuance of legitimate aims and necessary in democratic society. In determining the status of such interference, local courts are equipped with a certain margin of appreciation but the final say is reserved to the ECtHR.

As to the online expression in the blogosphere, it is submitted that the general rules and principles in Article 10 should be equally applicable to the cyber world as well. Alternatively, it has been claimed that since the majority of the digital communications in the blogosphere as well as other web-based platforms is deemed to be low level speech, such expression merits some protections and should be tiered at a different level from the offline or online expression of the traditional print and broadcast media.<sup>230</sup>

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<sup>230</sup> *ibid.*

## 5.1 Introduction

The traditional print and broadcast media in Malaysia have been subjected to a strict regulatory regime since the British colonial rule and the position remained even after the country gained her independence in 1957. A number of specific media statutes have been enacted to curtail media freedom, most notably through the imposition of prior restraints in the form of licence and permit requirements.

Apart from formal constraints via rules and regulations, the media have also been informally controlled through ownership mechanisms. This is clearly reflected in the ownership of the media industry that is largely dominated by certain groups and individuals who are either politically linked to the ruling party or closely aligned and friendly with the government.<sup>1</sup> As a result, news and information disseminated by the traditional media are often perceived as biased and partial towards the establishment, whilst critical and constructive comments, though genuine, will never get published.

The scenario has started to change with the convergence of communication, broadcasting and information technology and the advent of various forms of the Internet communications. These developments have not only rendered the previous controls to be less effective, but also caused the public to be less dependent on the traditional media. The technological advancements have empowered the public to express views and comments on any issue via various types of online publications, particularly political blogs that are claimed to have reshaped the landscape of the media in the country.<sup>2</sup>

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<sup>1</sup> Wang Lay Kim, 'Malaysia: Ownership as Control' (1998) 2 Dev Dialogue 61, 65 – 74.

<sup>2</sup> Tang Hang Wu, 'Let a Hundred Flowers Bloom: A Malaysian Case Study on Blogging towards a Democratic Culture', *Over-Commoditised; Over-Centralised; Over-Observed: The New Digital Legal World?* (BILETA 2005) 3 – 5; Jun-E Tan

As such, this chapter examines in detail the justifications for adopting strict regulatory controls over the traditional media, the statutory rules and regulations that are currently being used to govern the traditional print and broadcast media as well as the Internet industry and, finally, to evaluate the possibility of applying any of these legal regimes to the blogosphere.

## 5.2 Overview of Statutory Controls of the Media in Malaysia

The historical background<sup>3</sup> and political experiences in the past<sup>4</sup> are generally accepted to have had a significant impact on the regulatory system of the print and broadcast media in the country. Malaysia has a pluralistic society that consists of three main races namely Malays, Chinese and Indians.<sup>5</sup> Historically, the Malays were the natives while the Chinese and Indians were brought into the country from mainland China and the Indian subcontinent during the British colonization period.<sup>6</sup> As a result of this arrangement, Malaysia has become a multiracial, multicultural, multireligious and multilingual country.

Strict regulatory control over the traditional print and broadcast media has been introduced by the government because the media were perceived as 'vital agents of social change' in promoting unity among the people of different races and ethnics post-independence era.<sup>7</sup> This

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and Zawawi Ibrahim, *Blogging and Democratization in Malaysia: A New Civil Society in the Making* (SIRD 2008) 9 – 16.

<sup>3</sup> Zalina Abdul Halim and Mohammad Rizal Salim, 'The Media System and Co-Operative Regulatory Systems in the Media Sector of Malaysia' (Hans-Bredow-Institut for Media Studies 2005) 5.

<sup>4</sup> Shad Saleem Faruqi, *Mass Media Laws and Regulations in Malaysia* (Asian Media Information and Communication Centre 1998) 11.

<sup>5</sup> There are other ethnic groups in Sabah and Sarawak such as Ibans, KadazanDusun, Bajau and many others. For details, see the Population and Housing Census, Malaysia 2010 at <www.statistics.gov.my> [accessed 6 October 2011].

<sup>6</sup> Zaid Ahmad, 'Multiculturalism and Religio-Ethnic Plurality: The Malaysian Experience' (2007) 8(2) *Cult & Relig* 139, 139 – 140.

<sup>7</sup> Mustafa K Anuar, 'An Historical Overview of Media Development in Malaysia' in Premesh Chandran, Szu-Mae Yoon and Praemeenah Poobalan (eds) (Kinibooks, Mkini Dotcom Sdn Bhd 2004) 34.

justification appears to be fundamental, particularly in the aftermath of bloody racial riots on 13 May 1969, which erupted out of tensions between the Malays and the Chinese after the general elections prior to the tragedy.<sup>8</sup> Since the tragic riots were alleged to have been partly triggered by reckless reporting of racially sensitive issues,<sup>9</sup> the government immediately after the incident stiffened the rules relating to the traditional media. The Printing Press Ordinance 1948 which controlled the print industry was revised into the Printing Press Act 1948 (Revised 1971), whilst the broadcast stations continued to be directly controlled by the authorities and were for the most part employed as ‘the mouthpiece of the government of the day’<sup>10</sup> in promoting national unity, developing civic consciousness and providing information and entertainment.<sup>11</sup> Thus, strict regulatory control of the traditional media was considered indispensable to the extent that their role as ‘watchdog’ to the government’s activities has been non-existent.<sup>12</sup>

Similar to other developing countries, the mass media in Malaysia are also regarded as important instruments for modernization and development.<sup>13</sup> Since the early 1990s, regulatory control over the mainstream media has been shaped towards urging the people to support the government and promoting nation building in parallel with

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<sup>8</sup> For details on the 13<sup>th</sup> May tragedy, see Kee Beng Ooi, *March 8: Eclipsing May 13* (Institute of Southeast Asian Studies, 2008); Kia Soong Kua, *May 13: Declassified Documents on the Malaysian Riots of 1969* (SUARAM, 2007); Tunku Abdul Rahman Putra AlHaj, *13 Mei Sebelum Dan Selepas* (Kuala Lumpur: Utusan Publications, 2007); Leon Comber, *13 May 1969: A Historical Survey of Sino-Malay Relations* (Singapore: Graham Brash (Pte.) Ltd, 2001).

<sup>9</sup> Faruqi, *Mass Media Laws and Regulations in Malaysia* (n 4).

<sup>10</sup> Zaharom Nain, ‘Globalized Theories and National Controls: The State, the Market and the Malaysian Media’ in Myung-Jin Park and James Curran (eds), *De-Westernizing Media Studies* (Routledge 2000) 146.

<sup>11</sup> Halim and Salim, ‘The Media System and Co-operative Regulatory Systems in the Media Sector of Malaysia’ (n 3) 8.

<sup>12</sup> Mohd Azizuddin Mohd Sani, *The Public Sphere and Media Politics in Malaysia* (Cambridge Scholars Publisher 2009) 37.

<sup>13</sup> Mustafa K. Anuar, ‘Politics and the Media in Malaysia’ (2007) 20(1) *Kasarinlan* 25, 27.

A Comparative Study of Malaysia and the United Kingdom  
the Vision 2020.<sup>14</sup> The vision, which was launched in 1991 by the Fourth Malaysian Prime Minister, maps out the government's intention of turning the nation into a fully developed country by the year 2020.<sup>15</sup> In realising the plan, numerous projects have been developed, particularly the Multimedia Super Corridor (MSC Malaysia),<sup>16</sup> which aims to become a world-class technology hub<sup>17</sup> that would transform the country into a knowledge-based society driven by new economy.<sup>18</sup> In relation to this, the media are expected to collaborate with the government in portraying positive images about its economic policies to attract local and foreign investors.<sup>19</sup> It is even alleged that the media have indirectly been instructed to apply self-censorship or they face the consequences of being censored.<sup>20</sup>

The media have also been urged not to publish confrontational criticisms or contentious remarks that may be detrimental to the nation building process.<sup>21</sup> In addition, protection of morals and culture from foreign programmes that are unacceptable to the local values has been invoked to validate stringent media control.<sup>22</sup> It was claimed that the state's control is necessary to ensure the media publish information

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<sup>14</sup> Juriah Abd Jalil, 'Media in Digital Environment Legal Development of Television Broadcasting in Malaysia' (International Islamic University Malaysia 2002) 2 – 3.

<sup>15</sup> Vision 2020 was introduced by the former Malaysian PM, Dr Mahathir Mohamad, in a working paper titled 'Malaysia: The Way Forward'. The full text of the speech is accessible at <[www.wawasan2020.com/vision/](http://www.wawasan2020.com/vision/)> [accessed 10 October 2011].

<sup>16</sup> MSC Malaysia was launched on 1<sup>st</sup> August 1996 at the inaugural Multimedia Asia Conference and Exhibition. For historical conceptualisation of MSC Malaysia, see <[www.msomalaysia.my/topic/12073059315399](http://www.msomalaysia.my/topic/12073059315399)> [accessed 11 October 2011].

<sup>17</sup> The words used by the fifth Malaysian PM, Abdullah Ahmad Badawi in his opening remarks at the launch of the 8<sup>th</sup> MSC International Advisory Panel (IAP) Meeting on 2<sup>nd</sup> September 2004. The full text of Mr Abdullah's speech is available at <[www.pmo.gov.my/ucapan/?m=p&p=paklah&id=2889](http://www.pmo.gov.my/ucapan/?m=p&p=paklah&id=2889)> [accessed 12 October 2011].

<sup>18</sup> Vision and Mission of MSC Malaysia. See <[www.msomalaysia.my/topic/12073059198422](http://www.msomalaysia.my/topic/12073059198422)> [accessed 12 October 2011].

<sup>19</sup> Kim, 'Malaysia: Ownership as Control' (n 1) 62.

<sup>20</sup> *ibid* 63.

<sup>21</sup> Anuar, 'Politics and the Media in Malaysia' (n 13) 28.

<sup>22</sup> Peter G. Leonard and Kate Harrison, 'Satellite Broadcasting: An Overview of the Asian Market' (1998) 4 (4) *CTLR* 119, 124 – 125.



A Comparative Study of Malaysia and the United Kingdom relevant for positive development of the country and to accommodate the information technology revolution.<sup>23</sup> In short, the foregoing reasons have been conveniently resorted to by the government to justify the adoption of strict regulatory controls over the media in the country.

Nonetheless, the government's approach towards the media has severely tarnished the latter's image and their role as sources of accurate and reliable information providers. Since more often than not the scope and nature of the media content are glaringly biased and favourable towards the government, the people have started to question the credibility and reliability of the news and coverage of the mainstream media.<sup>24</sup> Some have even launched boycotts of these media as they failed to act as a watchdog to the government.<sup>25</sup> In view of that, excessive control and biased reporting would have resulted not only in abuse and exploitation of the media, but the people's right to accurate and impartial information would also be eventually denied.

Consequently, the public has resorted to the Internet and other online publications, especially political blogs, in seeking alternative and impartial information. These new media have fast gained widespread popularity and have been highly sought after by the public, particularly after the shock dismissal of the former Malaysian Deputy Prime Minister, Anwar Ibrahim, and his incredulous criminal trials in 1998.<sup>26</sup> Since then, alternative media and political blogs have flourished and become influential sources of information and effective

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<sup>23</sup> Juriah Abd Jalil, 'Legal Aspects of Television Broadcasting in Malaysia and the Challenge of New Media Technologies' (University of Exeter 2000) 109 – 112.

<sup>24</sup> Wang Lay Kim, 'Media and Democracy in Malaysia' (2001) 8(2) *Javnost-The Public* 67, 74.

<sup>25</sup> *ibid.*

<sup>26</sup> Anuar, 'Politics and the Media in Malaysia' (n 13) 44.

Political Blogs and Freedom of Expression:  
A Comparative Study of Malaysia and the United Kingdom  
platform for expressing views and critical dissent which are unlikely  
to be published in the mainstream media.<sup>27</sup>

## 5.3 Print Industry

### 5.3.1 Historical Background of the Regulatory System of the Press

The regulatory system of the press was introduced into the country during the British colonial rule after the end of World War II.<sup>28</sup> The Japanese occupation of Malaya<sup>29</sup> and British Borneo<sup>30</sup> from 1942 to 1945 made the British realise the influence of the press, which was effectively used by the Japanese military to spread propaganda against them. Afterwards, in order to contain the spread of anti-government propaganda by the Malayan Communist Party during the state of emergency,<sup>31</sup> the British government passed the Printing Press Ordinance 1948<sup>32</sup> which prevented the usage and storage of printing machines without licenses and mandated application for permit before publications.<sup>33</sup> When the country was granted her independence in 1957, the new government of the Alliance (*Perikatan*) party comprehended the significance of the press and decided to continue with the strict regulatory control over the press.<sup>34</sup> The occurrence of the racial riot on 13 Mac 1969 has led the government to revise the

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<sup>27</sup> Cherian George, 'The Internet's Political Impact and the Penetration/Participation Paradox in Malaysia and Singapore' (2005) 27(6) MCS 903, 916.

<sup>28</sup> Details on the historical background of the press in Malaysia, see Halim and Salim, 'The Media System and Co-operative Regulatory Systems in the Media Sector of Malaysia' (n 3) 31 – 39.

<sup>29</sup> Prior to the formation of Malaysia on 16 September 1963, the Peninsular Malaysia which consists of 11 states is known as Malaya. The name 'Malaya' was retained even after the country gained her independence from the British government on 31<sup>st</sup> August 1957.

<sup>30</sup> British Borneo refers to the East Malaysia which comprises of Sabah (North Borneo) and Sarawak before the two states joined the Federation of Malaysia.

<sup>31</sup> Anuar, 'An Historical Overview of Media Development in Malaysia' (n 7) 34.

<sup>32</sup> The Printing Press Ordinance 1948 was enacted on 1<sup>st</sup> July 1948.

<sup>33</sup> Sani, *The Public Sphere and Media Politics in Malaysia* (n 12) 35.

<sup>34</sup> *ibid* 36.

A Comparative Study of Malaysia and the United Kingdom Printing Press Ordinance 1948 into the Printing Press Act 1948 (Revised 1971). The amendment has further augmented the government's power to the extent of revoking licenses of newspapers that aggravated national sensitivities or were detrimental to national development goals.<sup>35</sup> Since then, the printing press continued to be statutorily controlled by the government through the provisions of the Printing Presses and Publications Act 1984.

### **5.3.2 The Printing Presses and Publications Act 1984**

The Printing Presses and Publications Act 1984 (PPA) is specific legislation enacted to regulate the use of printing presses and the printing, importation, production, reproduction, publishing and distribution of publications and for matters connected therewith.<sup>36</sup> It consolidates the Printing Presses Act 1948 and the Control of Imported Publications Act 1958 and covers all domestic publications including books, pamphlets and newspapers and publications imported from abroad.<sup>37</sup> The PPA, which is currently placed under the jurisdiction of the Ministry of Home Affairs,<sup>38</sup> exerts strict regulatory controls over the print industry through licensing system and content regulation.

#### **5.3.2.1 The Licensing System of the Press**

The crux of the PPA is the application of prior restraints in the form of licences and permits. Owners or operators of printing press, i.e. printing machine or equipment which can produce 1,000 impressions or more in one hour,<sup>39</sup> are required to apply for a licence from the

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<sup>35</sup> *ibid* 62.

<sup>36</sup> Preamble to the PPA.

<sup>37</sup> S Sothi Rachagan, *Law and the Electoral Process in Malaysia* (University of Malaya Press 1993) 169.

<sup>38</sup> For details on the powers of the Ministry of Home Affairs, see <[www.moha.gov.my](http://www.moha.gov.my)> [accessed 17 October 2011].

<sup>39</sup> Section 3(2) of the PPA provides that 'printing press means the machine, equipment or article for printing, copying or reproducing any document described in

Minister of Home Affairs to keep for use or to use a printing press.<sup>40</sup>

On a similar note, newspaper publishers are also mandated to procure permits before they can engage in printing, publishing, selling, circulating and distributing any newspaper in the country.<sup>41</sup>

As to the term ‘newspaper’, it has been given a very broad interpretation in the PPA so as to include almost anything that disseminates information. The term is defined to cover any magazine, comic, periodical or publication containing news, reports of occurrences or any comments in relation to such news, or to any other matter of public interest, irrespective of whether the publication is free or for sale.<sup>42</sup> And the term ‘publication’ refers to a document, newspaper, book, periodical, all written or printed matter, anything containing visible representation or suggesting words or ideas, and audio recording.<sup>43</sup> Unfortunately, these sweeping definitions, which encompass audio recording<sup>44</sup> as well, seem to include almost all publishers, except publications by the federal or state governments and statutory bodies.<sup>45</sup> This is likely to create confusion as the PPA is primarily enacted to regulate the printing press, whilst audio visual services are regulated by the Communications and Multimedia Act

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Schedule I’. And Schedule I of the PPA stipulates that ‘Letterpress, Lithography, Gravure, Intaglio or any other process of printing capable of printing at a rate of 1,000 impressions per hour or more’.

<sup>40</sup> Section 3(1) of the PPA provides ‘no person shall keep for use or use a printing press unless he has been granted a licence under subsection (3)’. Nonetheless, section 3(8) of the PPA stipulates that no licence is necessary when the press is engaged in engraving, printing of any visiting or business cards, billheads, letterheads or any letter, memorandum or document in the ordinary course of business.

<sup>41</sup> Section 5(1) of the PPA states ‘no person shall print, import, publish, sell, circulate or distribute, or offer to publish, sell, circulate or distribute, any newspaper printed in Malaysia or Singapore unless there has been granted by the Minister in respect of such newspaper a permit under paragraph 6(1)(a) or (b).

<sup>42</sup> Section 2 of the PPA.

<sup>43</sup> *ibid.*

<sup>44</sup> The phrase ‘audio recording’ is defined in section 2 as any material on which is recorded a recording of a human voice or of instrumental music or other sounds and includes phonograph records, tapes and laser disc.

<sup>45</sup> Section 25(1) of the PPA.

1998.<sup>46</sup> It is thus submitted that the phrase ‘audio recording’ should be removed from the interpretation of the term ‘publication’ in order to guarantee certainty and avoid impending conflict with other laws.

Apart from the indefinite interpretations, the central issue of the licensing system relates with the provision of a very wide power on the Minister by the PPA. By virtue of sections 3(3),<sup>47</sup> 6(1)(2)<sup>48</sup> and 12(2)<sup>49</sup> of the PPA, the Minister has been conferred with absolute discretion not only to grant or refuse application for printing press licence or publication permit, but also to revoke or suspend licence or permit which has been issued earlier. Further, such licence or permit is only valid for twelve months or such other shorter periods as determined by the Minister.<sup>50</sup> As a result, all proprietors and publishers have to make a fresh application every year because non-compliance with the rigid licensing system will expose them to criminal offences, which are punishable with fines and imprisonment.<sup>51</sup>

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<sup>46</sup> Further details, see discussion at Part 4.3 below on ‘the Communications and Multimedia Act 1998’.

<sup>47</sup> Sections 3(3) of the PPA states ‘The Minister may grant to any person a licence to keep for use or use a printing press and he may refuse any application for such licence or may at any time revoke or suspend such licence for any period he considers desirable’.

<sup>48</sup> Section 6 provides: ‘(1) The Minister may grant – (a) to any person a permit to print or publish a newspaper in Malaysia; or (b) to any proprietor of any newspaper in Singapore a permit allowing such newspaper to be imported, sold, circulated or distributed in Malaysia. (2) The Minister may at any time revoke or suspend a permit for any period he considers desirable’.

<sup>49</sup> Section 12(2) of the PPA stipulates that ‘The Minister shall have the absolute discretion to refuse an application for a licence or permit.’

<sup>50</sup> Section 12(1) of the PPA says ‘A licence or permit granted under this Act shall be subject to such conditions as may be endorsed therein and shall, unless sooner revoked or suspended, be valid for a period of twelve months from the date of the granting or issue of such licence or permit or for such shorter period as may be specified in the licence or permit’.

<sup>51</sup> Sections 3(4) and 5(2) of the PPA provide that upon conviction, the offenders are liable to imprisonment for up to three years or fine not exceeding RM20,000 or both.

A Comparative Study of Malaysia and the United Kingdom

The licensing system of the press is further worsened subsequent to the amendment to the PPA in 1998<sup>52</sup> that introduced an ouster clause that seeks to exclude judicial review of the Minister's decision. Section 13A(1) provides 'Any decision of the Minister to refuse to grant or to revoke or to suspend a licence or permit shall be final and shall not be called in question by any court on any ground whatsoever'. In addition, section 13B states that 'No person shall be given an opportunity to be heard with regard to his application for a licence or permit or relating to the revocation or suspension of the licence or permit granted to him under this Act'. These provisions have statutorily rendered any decisions made by the Minister under the PPA as final and not susceptible to judicial review. Further, the Minister is neither required to accommodate prior hearing nor furnish grounds of his decision<sup>53</sup> to applicants in relation to any application, suspension or revocation of licence or permit under the PPA. This setup is obviously inconsistent with Article 10(1) of the Malaysian Constitution that guarantees freedom of expression and freedom of the press in the country unless on specified permitted grounds.

The constitutionality of seemingly unlimited power of the Minister and the exclusion of judicial review by the PPA has been challenged in *Persatuan Aliran Kesedaran Negara v Minister of Home Affairs*.<sup>54</sup> In this case, the applicant had on a couple of times sought a permit to publish its English monthly magazine in the Malay language. However, the applications were turned down on both occasions and no specific reasons were offered by the Minister. The applicant then applied to the High Court for a judicial review of the Minister's decision. In holding that the Minister had no good reasons to refuse

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<sup>52</sup> The Printing Presses and Publications (Amendment) Act 1987 was passed on 29 December 1987 and came into force on 8 January 1998.

<sup>53</sup> Section 13A(2) of the PPA states that 'decision' includes any 'order or direction of the Minister'.

<sup>54</sup> [1988] 1 MLJ 440.

the applications, it was highlighted by Harun J that ‘It is common ground that although the discretion is absolute it is not unfettered. It follows that the exercise of the discretion is subject to judicial review’.<sup>55</sup>

Unfortunately, the decision was reversed on appeal and the Minister’s decision to refuse the publication permit was upheld by the Supreme Court.<sup>56</sup> In delivering the judgment, Ajaib Singh SCJ ruled:

Section 12(2) of the Printing Presses and Publications Act 1984 gives the Minister of Home Affairs ‘absolute discretion to refuse an application for a licence or permit.’ So unless it can be clearly established that the Minister of Home Affairs had in any way exercised his discretion wrongfully, unfairly, dishonestly or in bad faith, the High Court cannot question the discretion of the Minister of Home Affairs.<sup>57</sup>

The judgment should be seen as a blessing in disguise though the application for judicial review was rejected as the court found the Minister had not exercised his discretion wrongfully, unfairly, dishonestly or in bad faith. The ruling has recognised that the constitutionality of any provisions that would derogate the fundamental rights, including freedom of expression and press freedom, could not be prevented from the scrutiny of courts. Thus, any future application for judicial review can be initiated on the grounds of illegality, irrationality and procedural impartiality even with the existence of the ouster clause such as section 13A of the PPA.

The decision has been invoked in *Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Anor*.<sup>58</sup> In this case, the Minister had inter alia claimed that the ouster clause in section 13A prevented the applicant from challenging the Minister’s absolute

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<sup>55</sup> ibid 442.

<sup>56</sup> *Minister of Home Affairs v Persatuan Aliran Kesedaran Negara* [1990] 1 MLJ 351.

<sup>57</sup> ibid 354.

<sup>58</sup> [2010] 2 MLJ 78.

A Comparative Study of Malaysia and the United Kingdom discretion. It was decided by Lau Bee Lan J that the Minister's contention of the ouster clause is misconceived as there are many authorities which indicate that judicial review is not ousted to correct errors of law by an administrative body or tribunal.

Notwithstanding the positive development on the reviewability of the Minister's discretion, the struggle towards press freedom has still a long journey to go. This is partly due to the government's treatment of licence and permit as a privilege of the Minister and not a right of the people.<sup>59</sup> This has resulted in many local newspapers are directly owned and controlled by those who have good relations with the ruling party, whilst opposition parties and civil groups are prevented from publishing their newspapers on a daily basis.<sup>60</sup> The situation is further undermined with the application of self-censorship by editors<sup>61</sup> and their inclination to avoid controversial issues and to set aside journalist ethics in order to maintain good relations with the government.<sup>62</sup>

Since the licensing system has been successfully resorted in the past to instil public faith in the government and to alleviate political criticisms and dissent views from entering the public sphere,<sup>63</sup> it is very much expected that the system will remain in operation in the near future. Due to this situation, proponents of media freedom and media practitioners have frequently demanded the government to review the PPA in order to allow critical views to be published in the print media<sup>64</sup> or even to abolish it altogether.<sup>65</sup> Surprisingly, the Prime

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<sup>59</sup> Anuar, 'Politics and the Media in Malaysia' (n 13) 42.

<sup>60</sup> Sani, *The Public Sphere and Media Politics in Malaysia* (n 12) 35.

<sup>61</sup> Halim and Salim, 'The Media System and Co-Operative Regulatory Systems in the Media Sector of Malaysia' (n 3) 69.

<sup>62</sup> Kim, 'Malaysia: Ownership as Control' (n 1) 79.

<sup>63</sup> Sani, *The Public Sphere and Media Politics in Malaysia* (n 12) 41.

<sup>64</sup> Kazi Mahmood, 'Malaysia to Benefit More from Press Freedom', *MalaysiaToday.Com*, 2008, <<http://www.malaysia-today.net/archives/archives->



Minister has announced drastic plans to review or abolish a number of laws including the PPA as part of his political transformation programmes.<sup>66</sup> Subsequently, the long awaited amendment, the PPA (Amendment) Act 2012 has been passed by the Malaysian Parliament in June 2012.<sup>67</sup>

The PPA (Amendment) Act 2012 has removed the Minister's 'absolute discretion' in granting or refusing a printing press licence<sup>68</sup> and publication permit.<sup>69</sup> It has also removed the twelve-month validity period for a licence and permit and has allowed such licence and permit to remain valid as long as it is not revoked by the Minister.<sup>70</sup> As a result, proprietors of printing press and publishers of newspapers are no longer required to renew their licence or permit annually. Apart from that, the ouster clause which prevented any application for judicial review on the decision of the Minister to grant, refuse to grant, revoke or suspend a licence or permit has been

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2008/7058-malaysia-to-benefit-more-from-press-freedom> [accessed 18 January 2012].

<sup>65</sup> Sulaiman Abdullah, 'Public Statement on Press Freedom in Malaysia', *The Malaysian Bar*, 2000, <[http://www.malaysianbar.org.my/press\\_statements/public\\_statement\\_on\\_press\\_freedom\\_in\\_malaysia.html](http://www.malaysianbar.org.my/press_statements/public_statement_on_press_freedom_in_malaysia.html)> [accessed 28 October 2011].

<sup>66</sup> 'Najib to Table Motions Abolishing Two Acts Next Week', *The New Straits Times* (Kuala Lumpur, 30 September 2011), <<http://www.nst.com.my/nst/articles/NajibtotablemotionsabolishingtwoActsnextweek/Article/>> [accessed 28 October 2011].

<sup>67</sup> The draft bill was presented on 19<sup>th</sup> April 2012. It received Royal Assent on 18<sup>th</sup> June 2012 and came into operation on 22<sup>nd</sup> June 2012.

<sup>68</sup> Section 2 of the PPA (Amendment) Act 2012 substitutes subsection 3(3) of the PPA with the following: 'The Minister may grant to any person a licence to keep for use or use a printing press and he may refuse any application for such licence or may at any time revoke or suspend such licence for any period as he considers desirable'.

<sup>69</sup> Section 3 of the PPA (Amendment) Act 2012 stated that subsection 6(1) of the PPA is amended by deleting the words 'in his absolute discretion'.

<sup>70</sup> Section 4 of the PPA (Amendment) Act 2012 substituted section 12 of the PPA with the following: 'A licence or permit granted under this Act shall be subject to such conditions as may be endorsed in the licence or permit and shall remain valid for so long as it is not revoked'.

A Comparative Study of Malaysia and the United Kingdom altogether removed from the PPA.<sup>71</sup> In addition, the amendment has established a right to be heard for licence or permit holders before the Minister can exercise his power to revoke or suspend such licence or permit.<sup>72</sup>

The efficacy of the latest amendment to the PPA has been put to test in the unreported case of *Mkini Dotcom Sdn Bhd v Ketua Setiausaha Kementerian Dalam Negeri & Ors.*<sup>73</sup> By way of judicial review, the applicant sought to quash the decision of the second respondent who had earlier refused to grant publishing permit on the ground of procedural unfairness as the latter did not furnish any reasons for refusing to grant the permit to the applicant. The respondents argued that the Minister is not bound by any statutory duty to give reasons in the exercise of his discretion under the PPA and that the issuance of a permit is a privilege of the Minister and not a right of the applicant. It was observed by Tuan Abang Iskandar J that ‘This Court had found that the matter of printing permit is a right that emanates from Article 10 of the Federal Constitution and that it was not a mere privilege’.<sup>74</sup> Accordingly, the court ruled that the decision of the second respondent was defective for want of procedural fairness, as he had misconstrued the extent of the Minister’s power as a privilege and for his failure to provide any grounds of rejection to the applicant. The court then ordered the application for the publishing permit by the applicant to be remitted to the Minister so that it could be considered according to law and to make another lawful decision.

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<sup>71</sup> Section 5 of the PPA (Amendment) Act 2012 deleted the words ‘and shall not be called in question by any court on any ground whatsoever’ in section 13A(1) of the PPA.

<sup>72</sup> Section 6 of the PPA (Amendment) Act 2012 replaced section 13B of the PPA with the following ‘A person who has been granted a licence or permit under this Act shall be given an opportunity to be heard before a decision to revoke or suspend such licence or permit is made under subsection 3(3), 6(2) or 13(1), as the case may be’.

<sup>73</sup> *Semakan Kehakiman*: R1-25-455-2010.

<sup>74</sup> *ibid* para 24.

The aforesaid judgment, which was delivered<sup>75</sup> after the amendment to the PPA that abolished the ‘absolute discretion’ of the Minister in exercising his power and the removal of the ouster clause which prevented judicial review of the Minister’s decision, has judicially put a rest to the long-standing perception that the grant or refusal of a printing licence and publishing permit under the PPA is the privilege of the government and not part of the fundamental rights of the citizens to freedom of expression. Thus, it is submitted that the ruling has arguably indicated the inclination and recent trend of the courts in according greater protection to freedom of the press and freedom of expression in Malaysia.

The Home Ministry Secretary General had then filed an appeal against the judgment of the High Court. Later, on 30 October 2013, a three-member Court of Appeal panel unanimously rejected the government’s appeal and upheld the earlier decision that ordered the Home Ministry to issue a publication permit to Mkini.<sup>76</sup> Surprisingly, the government did not file an appeal to the Federal Court and this has led Mkini to resubmit a new application for a publication permit.<sup>77</sup> Nonetheless, it is too early to predict the fate of the print media in Malaysia after the latest amendment to the PPA as it still mandates the acquisition of printing licence and publishing permit. Further, Mkini’s new application for a permit to publish daily newspaper has yet to be decided by the Minister.

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<sup>75</sup> The decision of the case was pronounced on 10<sup>th</sup> January 2013.

<sup>76</sup> ‘Appellate Court Allows Judicial Review of Home Ministry Decision Denying Malaysiakini Print License’ *The Star Online* (Kuala Lumpur, 30 October 2013) <<http://www.thestar.com.my/News/Nation/2013/10/30/malaysiakini-COA-judicial-review-allowed/>> [accessed 3 February 2015].

<sup>77</sup> Pathma Subramaniam, ‘Media Freedom Not without Limits, Says Minister’ *The Malay Mail Online* (Kuala Lumpur, 20 June 2014) <<http://www.themalaymailonline.com/malaysia/article/media-freedom-not-without-limits-says-minister>> [accessed 3 February 2015].

### **5.3.2.2 Content Regulation**

The print industry is also subjected to content regulation under the PPA. The formulation of such regulation is arguably necessary and justified under Article 10(2) of the Malaysian Constitution in order to preserve the social values and ethical fabrics of the multicultural society in the country. Further, the content regulation is also crucial to prohibit the printing and dissemination of publication that is likely to be prejudicial to public interest and national security. For this reason, section 4(1) forbids the use of printing press from printing documents which are obscene or against public decency, or which incite to violence against persons or property, or which promote feelings of ill-will, hostility, enmity, hatred, disharmony or disunity. Further, section 7(1) permits the Minister to prohibit publishers from publishing materials that are deemed 'undesirable'. This includes the publication of article, caricature, photograph, report, notes, writing, sound, music, statement or any other content which is prejudicial or likely to be prejudicial to public order, morality, security or likely to alarm public opinion or likely to be contrary to any law or likely to be prejudicial to public interest or national interest. It is argued that the restrictions in section 4(1) are reasonably necessary and expedient with the object of restricting the circulation of materials that are specifically mentioned in the provision. However, section 7(1) appears to have accorded too much power to the Minister to the extent that he may even restrain the dissemination of content that may not be really undesirable as the criteria for undesirable publications are ill defined and ambiguous.

The print industry is further restrained with the inclusion of the offence of malicious publication of false news. Section 8A states that such an offence will be established if there is a publication, the publication contains false news and the accused maliciously published the false news. The malice will be presumed if the false news is published and no reasonable measures to verify the truth have been

A Comparative Study of Malaysia and the United Kingdom established prior to the publication.<sup>78</sup> Criminal prosecution will be initiated against the printer, publisher, editor and the writer, and if convicted, they are liable to be punished with imprisonment for up to three years, or a fine of maximum RM 20,000 or both.<sup>79</sup>

The rationale of the offence has been stated in *Lim Guan Eng v Public Prosecutor*<sup>80</sup>:

... Parliament's aim in enacting the provision was obviously to ensure truth in publication of news and providing severe penal consequences for those who publish false news maliciously. It is a serious thing in itself to publish false news. The seriousness of the matter is compounded when the publication is malicious.<sup>81</sup>

It is argued that although the provision was intended to counteract unsubstantiated allegations,<sup>82</sup> the conferment of too wide power on the authorities is open to abuse since it can be manipulated to silence criticisms and adversarial political speech, particularly against members of opposition parties and civic groups.

The offence has been invoked against politicians in *Lim Guan Eng v Public Prosecutor*.<sup>83</sup> The appellant, a Member of Parliament from the opposition party, was convicted by the High Court for maliciously publishing false news in the form of a pamphlet. The pamphlet related to the non-prosecution of an alleged rape case involving the former Chief Minister with an under-aged girl. On appeal to the Court of Appeal, the guilty finding of the appellant was upheld and the sentence was even increased to 18 months' imprisonment. The appellant appealed to the Federal Court and it was held that since the words were found to be false and there was no evidence that he took

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<sup>78</sup> Section 8A(2) of the PPA.

<sup>79</sup> Section 8A(1) of the PPA.

<sup>80</sup> [1998] 3 MLJ 14.

<sup>81</sup> *ibid* 52.

<sup>82</sup> Faruqi, *Mass Media Laws and Regulations in Malaysia* (n 4) 43.

<sup>83</sup> [2000] 2 MLJ 577.

reasonable measures to verify the truth of the words, the appellant was actuated by actual malice and therefore his guilt and sentence were sustained.<sup>84</sup>

A similar charge was also brought against Irene Fernandez, a social activist and director of *Tenaganita*,<sup>85</sup> for publishing a memorandum entitled '*Abuse, Torture and Dehumanised Conditions of Migrant Workers in Detention Centres*'. The memorandum exposed the ill-treatment, sex abuse and denial of adequate medical care to migrant workers in detention camps.<sup>86</sup> The criminal charge against her commenced in 1996 but she was only found guilty and sentenced to twelve months' imprisonment on 16 October 2003. She then appealed against her conviction to the High Court and on 24 October 2008, her earlier conviction was set aside and she was discharged and acquitted.<sup>87</sup>

In relation to this, it was contended that the content regulation of the PPA has created a serious derogation to press freedom as it empowers the authorities to censor publications on dubious grounds of undesirable and malicious content.<sup>88</sup> Thus, it is submitted that so long as the statutory provisions on content regulation of the print media have not been revised by the government, there is still uncertainty on the future of press freedom even though the latest amendment to the PPA seems to have relaxed the rigid licensing system of the PPA.

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<sup>84</sup> *ibid* 590.

<sup>85</sup> Tenaganita is a Malaysian NGO that protects and promotes the rights of women, migrants and refugees. For details, see <[www.tenaganita.net](http://www.tenaganita.net)> [accessed 21 October 2011].

<sup>86</sup> Amnesty International, 'Malaysia - Human Rights Undermined: Restrictive Laws in a Parliamentary Democracy' (Amnesty International 1999) 41.

<sup>87</sup> Lester Kong, 'Activist Irene Fernandez Acquitted', *The Star Online* (Kuala Lumpur, 24 November 2008) <<http://thestar.com.my/news/story.asp?file=/2008/11/24/nation/20081124141426&sec=nation>> [accessed 21 October 2011].

<sup>88</sup> Lim Kit Siang, *Malaysia - Identity Crisis* (Nan Yang Muda Sdn Bhd 1986) 135 – 144.

### **5.3.3 Application of the Press Regulatory System to Political Blogs**

The preamble to the PPA has explicitly indicated that the PPA is primarily enacted to regulate the printing presses and publications. In essence, the term ‘printing press’ which is interpreted in section 3(2)<sup>89</sup> and Schedule I<sup>90</sup> of the PPA refers to any printing machine or equipment that can produce 1,000 impressions or more in one hour. Whilst the term ‘publication’ has been given a very wide interpretation under section 2 of the PPA so as to include any written or printed materials, as well as audio recording. Thus, based on these provisions, it is obvious that political blogs and other web-based communications would fall outside of the interpretation of the term ‘printing press’ as they are clearly not a printing machine. Nonetheless, uncertainty arises as political blogs may contain audio materials that could have consequently resulted in such blogs to be regarded as ‘audio recording’ within the sweeping definition of the term ‘publication’ in the PPA. In that case, though political blogs are largely text based publications, the regulatory regime of the print media in Malaysia may arguably be extended to political blogs and other online platforms once it is established that they do incorporate audio postings and therefore satisfy the statutory interpretation of ‘publication’ in the PPA.

Despite the slight possibility of applying the licensing system of the press to political blogs and other online platforms, the provisions of the PPA have yet to be extended to the cyber world. Due to this, the government has proposed to prolong the remit of the PPA to political

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<sup>89</sup> Section 3(2) of the PPA provides that ‘printing press’ means the machine, equipment or article for printing, copying or reproducing any document described in Schedule I.

<sup>90</sup> Schedule I of the PPA stipulates ‘Letterpress, Lithography, Gravure, Intaglio or any other process of printing capable of printing at a rate of 1,000 impressions per hour or more’.

A Comparative Study of Malaysia and the United Kingdom blogs and online news portal.<sup>91</sup> The proposal suggested that the PPA should be amended so that it could be extended to the online environment.<sup>92</sup> The proposal has however received strong objections from local bloggers and proponents of media freedom.<sup>93</sup> Thus, so long as the proposal is yet to be materialised, the regulatory regime of the press will not be implemented in the cyber world. Although it is acknowledged that cyberspace is not totally unregulable and that Internet freedom is neither permanent nor absolute, it is argued that any attempts by the government to apply unnecessary and inappropriate prior restraints may lead to a violation of the no censorship guarantee of the Internet in the Communications and Multimedia Commission Act 1998<sup>94</sup> and the MSC Malaysia Bill of Guarantees.<sup>95</sup>

## 5.4 Broadcasting Industry

### 5.4.1 Historical Background of the Broadcast Media in Malaysia

The development of the broadcast industry in Malaysia can be traced back to the introduction of the first radio set in 1921 and the setting up of wireless associations in Kuala Lumpur and Penang that broadcasted radio waves in the 1930s.<sup>96</sup> Later, the Department of Broadcasting was established by the British government in Singapore on 1<sup>st</sup> April 1946

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<sup>91</sup> 'Online News Sites to Be Included Under PPPA', *Malaysiakini*, 2011, <<http://www.malaysiakini.com/news/154483>> [accessed 28 October 2011].

<sup>92</sup> 'Government Looking at Gaps in Printing Act', *The Star Online* (Kuala Lumpur, 27 July 2006), <<http://thestar.com.my/news/story.asp?file=/2006/7/27/nation/14961817&sec=nation>> [accessed 27 October 2011].

<sup>93</sup> Steven Gan, 'A Killer Blow to Online Media', *Malaysiakini*, 2011, <<http://www.malaysiakini.com/news/154538>> [accessed 28 October 2011].

<sup>94</sup> Section 3(3) provides 'Nothing in this Act shall be construed as permitting the censorship of the Internet'.

<sup>95</sup> Details on the MSC Malaysia Bill of Guarantees are discussed below at para 5.2.2.

<sup>96</sup> Details on the historical development of the broadcast media in Malaysia, see <[www.rtm.gov.my/rtmnew/index.php?option=com\\_content&view=article&id=83&Itemid=55&lang=en](http://www.rtm.gov.my/rtmnew/index.php?option=com_content&view=article&id=83&Itemid=55&lang=en)> [accessed 3 November 2011].



A Comparative Study of Malaysia and the United Kingdom

and afterwards several radio stations were built to broadcast radio services across the country.<sup>97</sup> After independence, the government proposed the initiation of a television service and accordingly, technical experts from the Canadian Broadcasting Corporation (CBC)<sup>98</sup> were engaged to advise on the setting up of such service.<sup>99</sup> The first television broadcast was aired on 28 December 1963 and it was inaugurated by the first Prime Minister as ‘Talivishen Malaysia’ or TV Malaysia.<sup>100</sup> In October 1969, the second television channel was launched and later, radio and television services were merged and placed under the Department of Broadcasting, or popularly known as RTM (Radio Television Malaysia).<sup>101</sup>

Since their inception, the broadcast media have been regarded as government tools to promote national policies and agenda.<sup>102</sup> This has only changed after more than 20 years when the first private commercial television, *TV Tiga* or TV3, was permitted to operate in 1984 under the privatisation policy.<sup>103</sup> The policy was adopted to reduce the participation of the government in the economy and to make the industry more profitable.<sup>104</sup> At the same time, it was also hoped that the provision of higher quality entertainment programmes

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<sup>97</sup> *ibid.*

<sup>98</sup> The CBC was consulted because of its capability to broadcast in various different languages.

<sup>99</sup> Ronny Adhikarya, *Broadcasting in Peninsular Malaysia* (Routledge & Kegan Paul Books 1977) 30.

<sup>100</sup> Jalil, ‘Legal Aspects of Television Broadcasting in Malaysia and the Challenge of New Media Technologies’ (n 23) 33.

<sup>101</sup> Prior to the amalgamation, RTM was made up of two separate bodies namely *Radio Malaysia* and *Television Malaysia*.

<sup>102</sup> Zaharom Nain, ‘The Impact of the International Marketplace on the Organisation of Malaysian Television’ in David French and Michael Richards (eds), *Contemporary Television: Eastern Perspectives* (Sage Publications 1996) 163.

<sup>103</sup> The privatisation policy was introduced by Dr Mahathir in 1983. For details, see Ministry of Public Enterprise, ‘Privatisation in Malaysia’ in Venkata Vemuri Ramanadham (ed), *Privatisation in Developing Countries* (Routledge 1989) 216 – 235.

<sup>104</sup> Ranganasamy Karthigesu, ‘Broadcasting Deregulation in Developing Asian Nations: An Examination of Nascent Tendencies Using Malaysia as a Case Study’ (1994) 16(1) MCS 73, 83.

A Comparative Study of Malaysia and the United Kingdom by private stations could tackle the propagation of video recorders and video rentals.<sup>105</sup>

The broadcast industry experienced noteworthy development in the 1990s when a number of private companies were granted broadcasting licences by the government. Metro Vision was the second private television station that commenced services in July 1995<sup>106</sup> and three months later, Mega TV became the first subscription cable service offered to the Malaysian audience.<sup>107</sup> After the nation's first communication satellite, MEASAT-1 (Malaysian East Asia Satellite), was launched in January 1996, satellite station, ASTRO (All Asia Television and Radio Company), was introduced in September 1996.<sup>108</sup> Later, another private company, NTV (National Television Network) was granted licence to broadcast the third commercial television service in 1998 under the name NTV7.<sup>109</sup> Since then, the broadcast media have further expanded with more private companies granted licences to broadcast their services.

#### **5.4.2 Legislative Framework of the Broadcast Media**

The broadcast media have been subjected to strict government controls since television was first introduced in 1963. Though the early government stations were neither set up through an Act of Parliament nor a Royal Charter,<sup>110</sup> they were bound by statutory

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<sup>105</sup> *ibid.*

<sup>106</sup> Metro Vision was operated by City Television Sdn Bhd but unfortunately due to the Asian financial crisis, it ceased operation in November 1999. Later, the station was taken over by Media Prima Berhad and after being restructured, it was relaunched as 8TV in January 2004.

<sup>107</sup> Mega TV was owned by Cableview Services Sdn Bhd but it is no longer in operation.

<sup>108</sup> ASTRO is owned by Measat Broadcasting Network System Sdn Bhd (MBNS).

<sup>109</sup> Maureen Tai Suet Yee, 'Protecting Our Culture: A Comparative Study of Broadcasting Content Regulation in Malaysia and Canada' (1997) 1 *Sing J Int'l & Comp L* 468, 469 – 474.

<sup>110</sup> Nain, 'The Impact of the International Marketplace on the Organisation of Malaysian Television' (n 102) 163.

A Comparative Study of Malaysia and the United Kingdom provisions as they were treated as being within the telecommunications sector and therefore subjected to the Telecommunications Act 1950.<sup>111</sup> The legal position remained the same for more than 20 years until the first private station was introduced in 1984. Consequently, the Broadcasting Act 1988<sup>112</sup> was enacted to enable the government to retain control over commercial stations and regulate content broadcast by these channels via the licensing mechanism.<sup>113</sup> Nevertheless, the convergence of communications, broadcasting and information technology has rendered the Broadcasting Act 1988 and the Telecommunications Act 1950 ineffective and as a result, these statutes were repealed and replaced by the Communications and Multimedia Act 1998.

#### **5.4.3 The Communications and Multimedia Act 1998**

The Communications and Multimedia Act 1998 (CMA) was specifically enacted to cater for convergence among different industries that were previously regulated by separate statutes. The broadcasting and telecommunications industries were governed by the Broadcasting Act 1988 and the Telecommunications Act 1950 respectively whilst the information technology was very much unregulated as it was not subjected to any licensing system.<sup>114</sup> With the passage of the CMA, these distinct industries are now being

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<sup>111</sup> The Telecommunications Act 1950 authorised the government to install transmitters on private lands in order to connect the country with television signals.

<sup>112</sup> The Broadcasting Act 1988 only came into force on 1 August 1998. Prior to this date, the first private station, TV3, was governed by the Telecommunications Act 1950.

<sup>113</sup> Section 4 of the Broadcasting Act 1988 permits the government to issue licence to the owners of private commercial stations in order to control media ownership, regulate broadcasting activities and regulate programme content. Government channels, namely TV1 and TV2, were exempted from the licensing requirement as section 3 reserves to the government the exclusive privilege to broadcast any matters within and without Malaysia.

<sup>114</sup> Safinaz Mohd Hussein, 'The Malaysian Communications and Multimedia Act 1998 - Its Implications on the Information Technology (IT) Industry' (2000) 9(1) Info & Comm Tech Law 79, 79.

A Comparative Study of Malaysia and the United Kingdom grouped as a new ‘communications and multimedia industry’<sup>115</sup> and subjected to a single regulatory framework under the CMA. In overseeing the operation of the converging industry, the government has established a new state regulator, the Malaysian Communications and Multimedia Commission.

#### **5.4.3.1 Malaysian Communications and Multimedia Commission**

The Malaysian Communications and Multimedia Commission (Commission) was established as a body corporate by the Malaysian Communications and Multimedia Commission Act 1998 (MCMCA).<sup>116</sup> The Commission is a single regulator entrusted to regulate and supervise the communications and multimedia industry<sup>117</sup> as well as other services which come within the ambit of the Postal Services Act 1991 and the Digital Signature Act 1997.<sup>118</sup> As such, the Commission is regarded as a ‘super regulator’ for all types of media but the print industry, which is still subjected to the provisions of the PPA.

The Commission is composed of a chairman, representatives from the government and other non-government members<sup>119</sup> who are appointed by the Minister.<sup>120</sup> It is empowered to establish and administer its own

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<sup>115</sup> Preamble to the CMA stipulates that the CMA is ‘An Act to provide for and to regulate the converging communications and multimedia industries, and for incidental matters’.

<sup>116</sup> Section 4 of the MCMCA.

<sup>117</sup> Preamble to the MCMCA provides that ‘An Act to provide for the establishment of the Malaysian Communications and Multimedia Commission with powers to supervise and regulate the communications and multimedia activities in Malaysia, and to enforce the communications and multimedia laws of Malaysia, and for related matters’.

<sup>118</sup> For the extended remit of the MCMC, see <[www.skmm.gov.my](http://www.skmm.gov.my)> [accessed 8 November 2011].

<sup>119</sup> Section 6 of the MCMCA.

<sup>120</sup> As a result of the Malaysian Cabinet reshuffle in 2009, the communications and multimedia industry is placed under the new Ministry of Information, Communications and Culture. See

A Comparative Study of Malaysia and the United Kingdom staff recruitment policy<sup>121</sup> and sources of fund.<sup>122</sup> The Commission is vested with extensive powers as stipulated in Part V of the CMA and Part III of the MCMCA. It is authorised to issue directions to licensee relating to non-compliance of licence conditions<sup>123</sup> and to make determinations on matters specified in the CMA.<sup>124</sup> It is also permitted to hold inquiries,<sup>125</sup> conduct investigations,<sup>126</sup> gather information relevant to the performance of its functions,<sup>127</sup> resolve disputes between conflicting parties<sup>128</sup> and draw up voluntary industry codes of conduct.<sup>129</sup> Further, the Commission is entrusted to advise the Minister on all matters relating to the national policy objectives for the converged industry,<sup>130</sup> to administer application and renewal process of licences under the CMA and to make recommendations to the Minister regarding the application and renewal of such licences.<sup>131</sup>

The establishment and provision of those powers on the Commission indicates the government's effort of promoting transparency in regulating the broadcasting media. This is due to the fact that prior to the existence of the Commission, all matters related to broadcasting industry were determined and regulated solely by the Minister pursuant to the provisions of the old Broadcasting Act 1998.<sup>132</sup> Undoubtedly, this was an unhealthy arrangement as there would be no check and balance on the exercise of such wide powers by the

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<[www.kpk.gov.my/index.php?option=com\\_content&view=article&id=267&Itemid=104&lang=en](http://www.kpk.gov.my/index.php?option=com_content&view=article&id=267&Itemid=104&lang=en)> [accessed 11 November 2011].

<sup>121</sup> Part IV of the MCMCA.

<sup>122</sup> Part V of the MCMCA.

<sup>123</sup> Chapter 1 of Part V of the CMA.

<sup>124</sup> Chapter 2 of Part V of the CMA.

<sup>125</sup> Chapter 3 of Part V of the CMA.

<sup>126</sup> Chapter 4 of Part V of the CMA.

<sup>127</sup> Chapter 5 of Part V of the CMA.

<sup>128</sup> Chapter 7 of Part V of the CMA.

<sup>129</sup> Chapter 9 of Part V of the CMA.

<sup>130</sup> The national policy objectives are expressly stipulated in section 3(2) of the CMA.

<sup>131</sup> Part IV of the CMA.

<sup>132</sup> Yee, 'Protecting Our Culture' (n 109) 477 – 479.

A Comparative Study of Malaysia and the United Kingdom Minister. As such, it is submitted that the regulatory system of the broadcast media, which is placed under the purview of the Commission, differs significantly from the previous regime as it strives to offer transparency, efficiency and less government control over communications and multimedia industry. In relation to this, it has been claimed that the Commission must be kept free from unnecessary government interferences in order to preserve its position as an independent regulatory body.<sup>133</sup>

#### **5.4.3.2 The Licensing System of the Broadcast Media**

The regulatory system for the communications and multimedia industry has also affected the licensing system of the broadcast media. The CMA employs a non-specific set of statutory provisions based on generic definitions of activities and services. Instead of the former familiar words such as ‘broadcast, television and radio’, new phrases of ‘network facilities’, ‘network services’, ‘application services’ and ‘content application services’ were used in the CMA. These provisions are specifically formulated to be technology and service neutral covering all areas of convergence and future changes. It has also been alleged that these phrases represent the language of media and market convergence.<sup>134</sup>

The CMA recognises only four categories of licensable activities; network facilities providers, network services providers, applications service providers and content applications service providers. Thus, broadcast media need to be licensed within these newly created groups. Based on the interpretations and the Commission’s website,<sup>135</sup>

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<sup>133</sup> Cassey Lee, ‘Telecommunications Reforms In Malaysia’ (2002) 73(4) *Annals Pb & Coop Econ* 521, 531.

<sup>134</sup> Philip Kitley, ‘Subject to What?: A Comparative Analysis of Recent Approaches to Regulating Television and Broadcasting in Indonesia and Malaysia’ (2001) 2(3) *IACS* 503, 509.

<sup>135</sup> MCMC, ‘Licence Application Procedure and Licensing Criteria’, 17 January 2011,

the broadcast media are considered to fall within the scope of content applications services. Content applications services are defined in section 6 as ‘an applications service that provides content’. Applications service refers to ‘a service provided by means of, but not solely by means of, one or more network services’, and the word content means ‘any sound, text, still picture, moving picture or other audio-visual representation, tactile representation or any combination of the preceding which is capable of being created, manipulated, stored, retrieved or communicated electronically’. It is submitted that the phrase ‘content applications services’, which is very loosely defined, will cover a wide range of broadcasting services including terrestrial, satellite, cable as well as online publications.

Apart from the classification of the licensable activities, licences issued under the CMA are further divided into two; individual and class licence. The former refers to ‘a licence for a specified person to conduct a specified activity and may include conditions to which the conduct of that activity shall be subject’ whilst the latter means ‘a licence for any or all persons to conduct a specified activity and may include conditions to which the conduct of that activity shall be subject’.<sup>136</sup> The difference is not clearly articulated but the Commission’s website provides useful assistance in distinguishing between individual and class licence. An individual licence is described as a type of licence granted for activities that require a high degree of regulatory control, whilst class licence is a light-handed

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<[http://www.skmm.gov.my/link\\_file/what\\_we\\_do/licensing/cma/pdf/Licensing%20Guideline%20-%2013012011.pdf](http://www.skmm.gov.my/link_file/what_we_do/licensing/cma/pdf/Licensing%20Guideline%20-%2013012011.pdf)> [accessed 11 November 2011].

<sup>136</sup> Section 6 of the CMA.

A Comparative Study of Malaysia and the United Kingdom  
form of regulation that only requires registration and is renewable annually.<sup>137</sup>

With regard to the broadcast media, which are regarded to have widespread coverage and great influence over the public, they require a high degree of control and thus need to be licensed as content applications service provider individual licensees.<sup>138</sup> It is also stated in Regulation 22 of the Communications and Multimedia (Licensing) Regulations 2000 that such a licence may be granted to those who provide satellite broadcasting, subscription broadcasting, terrestrial free to air TV, terrestrial radio broadcasting, or other content applications services which are not exempt under the CMA or not subject to a class licence under Part IV of these Regulations. Nonetheless, the licence cannot be conferred on a foreign company, an individual or a sole proprietorship, a partnership and other classes of persons as decided by the Minister to be ineligible to apply for an individual licence.<sup>139</sup> Apart from these groups of persons, any potential broadcasters need to possess individual licence for content applications service provider and failure to do so will expose them to a fine not exceeding RM500,000 or five years' imprisonment or both.<sup>140</sup>

Application for such a licence must be made in writing to the Commission<sup>141</sup> and it is then obliged to process the application and make a written recommendation to Minister within 60 days of the

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<sup>137</sup> See the MCMC's website on categories of licensable activities and types of licences at <[www.skmm.gov.my/index.php?c=public&v=art\\_view&art\\_id=76](http://www.skmm.gov.my/index.php?c=public&v=art_view&art_id=76)> [accessed 14 November 2011].

<sup>138</sup> The list of content applications service provider individual licensee as at 30 June 2011 is available at <[www.skmm.gov.my/attachment/Statistics/Q2\\_2011\\_Eng.pdf](http://www.skmm.gov.my/attachment/Statistics/Q2_2011_Eng.pdf)> [accessed 15 November 2011].

<sup>139</sup> MCMC, 'Licence Application Procedure and Licensing Criteria' (n 135).

<sup>140</sup> Section 205(3) of the CMA.

<sup>141</sup> Section 27(1) of the CMA.



A Comparative Study of Malaysia and the United Kingdom receipt of complete information.<sup>142</sup> If the Minister agrees with the recommendation, he will grant the licence and the Commission will notify the applicant by written notice.<sup>143</sup> And if the Minister rejects the application, the applicant will also be notified of the refusal in writing and the reasons for the refusals.<sup>144</sup> In case no feedback is received from the Minister within 30 days from the receipt of the Commission's recommendation, the application is deemed to be rejected.<sup>145</sup> Further, the Minister is empowered to suspend or cancel licences that have been previously issued on the recommendation of the Commission.<sup>146</sup>

The CMA also contains a chapter (Chapter 13) that provides review mechanisms to any aggrieved parties. The parties are even permitted to apply for judicial review of any decision either made by the Commission or the Minister once other remedies under the CMA have been exhausted.<sup>147</sup> As such, it is obvious that the licensing system of the broadcast media administered by the Commission under the CMA offers greater transparency and fairness compared to the regulatory regime of the print industry that is fully entrusted and administered by the Minister alone.

#### ***5.4.4 Application of the Broadcast Regulatory System to Political Blogs***

The regulatory regime of the converged industry has classified the broadcast media as content applications service providers and accordingly they are obliged to procure individual licences under the CMA. Interestingly, the phrase 'content applications service' is given

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<sup>142</sup> Section 29 of the CMA.

<sup>143</sup> Section 30(2)(3) of the CMA.

<sup>144</sup> Section 30(6) of the CMA.

<sup>145</sup> Section 30(8) of the CMA.

<sup>146</sup> Section 37 of the CMA.

<sup>147</sup> Section 121 of the CMA.

## Political Blogs and Freedom of Expression:

### A Comparative Study of Malaysia and the United Kingdom

a very wide statutory interpretation so as to encompass all types of broadcasting services and online publications including political blogs. Thus, the regulatory system of the broadcast media can possibly be applied to political blogs and consequently bloggers may be mandated to possess either individual or class licences as the CMA prohibits any persons from providing content applications service unless with a valid licence.<sup>148</sup>

The licensing requirements must be read together with the Communications and Multimedia (Licensing) Regulations 2000. Regulation 22 provides that a content applications service providers' individual licence is available to providers of broadcasting services or other content applications services which are not exempted (closed content, incidental content or limited content)<sup>149</sup> or not subject to a class licence. With regard to class licences, regulation 31 states that such a licence is applicable to providers of content which is limited in its availability, or of limited appeal or targeted at a special interest group and only available through subscription, or remotely generated and distributed through a network service and displayed on a screen, or content for distance learning or content for one-off event. Political blogs qualify to apply for an individual licence as they do not fall within the exemptions and do not fit within class licence.

Nonetheless, regulation 5 provides that an individual licence shall only be granted to a local corporate entity established under the Companies Act 1965 and not individuals or unincorporated bodies or groups. Since political blogs are largely operated by individuals or groups that are not registered as a corporate body, they are clearly

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<sup>148</sup> Section 205(1) provides 'Subject to such exemptions as may be determined by the Minister by order published in the *Gazette*, no person may provide a content applications service unless – (a) the person holds a valid individual licence granted under this Part to provide the content application service; or (b) the content applications service is subject to a valid class licence under this Part'.

<sup>149</sup> Sections 207 – 209 of the CMA.

A Comparative Study of Malaysia and the United Kingdom ineligible to apply for individual licences under the CMA. Further, order 6 of the Communications and Multimedia (Licensing) (Exemption) Order 2000 stipulates that providers of Internet content applications services are exempted from having individual or class licences. In short, it is submitted that the regulatory regime of the broadcast media in Malaysia will not be applicable to political blogs.

## 5.5 Internet Industry

### 5.5.1 Overview of the Internet Industry in Malaysia

The Malaysian community first experienced the Internet when the Malaysian Institute of Microelectronic Systems (MIMOS) launched the country's first ISP, the Joint Advance Research Integrated Networking System (JARING), in 1992.<sup>150</sup> Later, a range of policies and infrastructure projects, particularly the National IT Agenda<sup>151</sup> and the MSC Malaysia,<sup>152</sup> were developed to exploit the economic potential of the Internet and to bolster its take-up by the public.<sup>153</sup> At present, the usage of the Internet in Malaysia has soared tremendously with the latest report indicates that the Internet usage has reached 60.7% out of the total population at mid-year 2012<sup>154</sup> compared to merely 28 subscribers when JARING was commercialised in 1992.<sup>155</sup>

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<sup>150</sup> For details on JARING, see <[www.jaring.my/corporateinfo/index.cfm?tag=history](http://www.jaring.my/corporateinfo/index.cfm?tag=history)> [accessed 30 November 2011].

<sup>151</sup> The National IT Agenda, launched by the National IT Council in December 1996, lays out the basic framework for the utilisation of ICT in achieving the Vision 2020. For details, see <[www.nitc.my/index.cfm?&menuid=49](http://www.nitc.my/index.cfm?&menuid=49)> [accessed 5 December 2011].

<sup>152</sup> For details on the MSC Malaysia, see <[www.msomalaysia.my](http://www.msomalaysia.my)> [accessed 5 December 2011].

<sup>153</sup> Susan Xue, 'Internet Policy and Diffusion in China, Malaysia and Singapore' (2005) 31(3) JIS 247 – 248. <<http://jis.sagepub.com/cgi/content/abstract/31/3/238>> [accessed 6 March 2010].

<sup>154</sup> For the latest statistics, see <[www.newmediatrendwatch.com/markets-by-country/11-long-haul/55-malaysia](http://www.newmediatrendwatch.com/markets-by-country/11-long-haul/55-malaysia)> [accessed 30 April 2013].

<sup>155</sup> See <[www.jaring.my/corporateinfo/index.cfm?tag=history](http://www.jaring.my/corporateinfo/index.cfm?tag=history)> [accessed 30 November 2011].

The Internet has had a great impact on the country, particularly in the dissemination of information and news to the public. Although the claim that the Internet is an inherently democratizing force was rejected,<sup>156</sup> it is generally accepted that the Internet posed an automatic threat to the ruling government.<sup>157</sup> This can be seen in the shock dismissal of Anwar Ibrahim as the Deputy Prime Minister and his antagonistic arrest by the police in September 1998 that led to the explosion of anti-establishment activities on the Internet.<sup>158</sup> Numerous websites such as *Sang Kancil*, *Anwar*, *Voice of Freedom*, *Where Is Justice*,<sup>159</sup> and other online discussion groups were created to provide updates and fill the void in information since the traditional media have provided insufficient or no coverage of these incidents.<sup>160</sup>

This scenario is not unexpected as the Internet has altered the media landscape by shifting the power to publish to the new media.<sup>161</sup> The Internet has enabled the previously marginalised groups,<sup>162</sup> including the opposition parties and civil groups, to engage and compete with the mainstream media and even the government. Further, coverage on controversial issues, particularly relating to political economy or ethnic politics, that appears on web based communications such as online news portals and political blogs also differs greatly from the

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<sup>156</sup> Eric Loo, 'Conceptual Barriers to "e-democracy" in Malaysia', *WACC*, 1 (2003), <[http://archive.waccglobal.org/wacc/publications/media\\_development/archive/2003\\_1/conceptual\\_barriers\\_to\\_e\\_democracy\\_in\\_malaysia](http://archive.waccglobal.org/wacc/publications/media_development/archive/2003_1/conceptual_barriers_to_e_democracy_in_malaysia)> [accessed 11 December 2011].

<sup>157</sup> Janet Steele, 'Professionalism Online: How Malaysiakini Challenges Authoritarianism' (2009) 14(1) *IJPP* 91, 92.

<sup>158</sup> George, 'The Internet's Political Impact and the Penetration/Participation Paradox in Malaysia and Singapore' (n 27) 908.

<sup>159</sup> Kim, 'Media and Democracy in Malaysia' (n 24) VIII.

<sup>160</sup> Andreas Ufen, 'The Transformation of Political Party Opposition in Malaysia and Its Implications for the Electoral Authoritarian Regime' (2009) 16(3) *Democratization* 604, 610.

<sup>161</sup> Jacqueline Ann Surin, 'Occupying the Internet: Responding to the Shifting Power Balance' (2010) 99(407) *Round Table* 195, 196.

<sup>162</sup> Andrew Chadwick, *Internet Politics: States, Citizens, and New Communication Technologies* (Oxford University Press 2006) 148.

A Comparative Study of Malaysia and the United Kingdom traditional media.<sup>163</sup> Consequently, the Internet has become a viable alternative source of information and news, and ‘considerably more hospitable to contentious journalism’<sup>164</sup> since it is the only avenue which is not susceptible to the government’s prior restraints.

Unfortunately, the Internet has been misused to channel hatred and spread lies, particularly against the government and the cabinet ministers from the ruling party. Thereafter, a series of legal actions, including the blocking of access to certain blogs and websites, have been initiated to tackle the alleged ‘misuse’ of the Internet.<sup>165</sup> As such, the regulatory regime governing the Internet needs to be critically examined in order to ascertain the legal position of the Internet and other online publications, including political blogs in Malaysia.

## ***5.5.2 The Internet Governance in Malaysia***

### **5.5.2.1 The Licensing of the Internet Service Providers (ISPs)**

Prior to the coming into force of the CMA, the Internet industry was basically unregulated. The ISPs were not required to possess licences arguably because MIMOS that operated the only ISP at that time, JARING, was a unit under the Prime Minister’s Department.<sup>166</sup> The government could then exert direct control over the Internet without any specific regulations. The position has later changed when the second ISP, TM Net, was offered by the private sector in 1996. Subsequently, the CMA was passed in 1998 to regulate the converged communications and multimedia industry including the Internet.

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<sup>163</sup> Cherian George, ‘Media in Malaysia: Zone of Contention’ (2007) 14(5) *Democratization* 893, 901.

<sup>164</sup> George, ‘The Internet’s Political Impact and the Penetration/Participation Paradox in Malaysia and Singapore’ (n 27) 911.

<sup>165</sup> For the list of actions taken by the government, see Ida Madieha Azmi, ‘Legal and Ethical Issues in Knowledge Management in Malaysia’ (2010) 26(1) *CLS Rev* 61, 66 – 67.

<sup>166</sup> For details on MIMOS, see <[www.mimos.my/about/corporate-information/history](http://www.mimos.my/about/corporate-information/history)> [accessed 30 November 2011].

The CMA requires owners or providers of network facilities, network services and application services to possess valid licences to own or operate such facilities and services.<sup>167</sup> Though licensing for the Internet is not specifically mentioned, regulation 30 of the Communications and Multimedia (Licensing) Regulations 2000 stipulates that providers of Internet access services<sup>168</sup> are to be registered as applications service provider class licensees.<sup>169</sup> Thus, the ISPs that provide access to the Internet are no longer left unregulated as they are now required to possess applications service provider class license under the CMA.

### 5.5.2.2 No Censorship of the Internet Policy

Apart from the licensing requirement for the ISPs, regulations for the Internet appears to be minimal compared to the traditional print and broadcast media.<sup>170</sup> This is due to the promise of the no censorship on the Internet that was first announced by the former Prime Minister when he promoted the MSC Malaysia overseas.<sup>171</sup> The pledge was then incorporated into the MSC Malaysia Bill of Guarantees (Bill of

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<sup>167</sup> Section 126(1) provides “Subject to such exemptions as may be determined by the Minister by order published in the Gazette, no person shall (a) own or provide any network facilities; (b) provide any network services; or (c) provide any applications services, except under and in accordance with the terms and conditions of (aa) a valid individual licence granted under this Act; or (bb) a class licence granted under this Act, expressly authorising the ownership or provision of the facilities or services.”

<sup>168</sup> ‘Internet access service’ is interpreted in regulation 2 as ‘an application service whereby a person is able to access Internet services and applications in conjunction with either a dial-up connection or a direct connection’.

<sup>169</sup> Regulation 2 defines ‘applications service provider class licensee’ as ‘a person who is registered with the Commission to provide an applications service in accordance with the Act and these Regulations’.

<sup>170</sup> Jason P Abbott, ‘Democracy@Internet.Asia? The Challenges to the Emancipatory Potential of the Net: Lessons from China and Malaysia’ (2001) 22(1) TWQ 99, 104.

<sup>171</sup> In a 1997 speech in California, the Malaysian forth Prime Minister, Dr Mahathir Mohamad, expressly informed foreign investors about the government’s commitment towards no censorship of the Internet. See Janet Steele, ‘Malaysia’s Untethered Net’ [2007] Foreign Pol’y 86, 87.

A Comparative Study of Malaysia and the United Kingdom Guarantees)<sup>172</sup> and the CMA.<sup>173</sup> Despite the fact that cyber threats have been on the rise,<sup>174</sup> the government has maintained its commitment towards the no censorship guarantee.<sup>175</sup> The policy was part of the country's marketing effort to attract foreign investors to the MSC Malaysia<sup>176</sup> and to address the scepticism of investors and competition for investment from Singapore or other high-tech ventures in the Southeast Asia.<sup>177</sup> In relation to this, it is submitted that the Internet's perceived economic value has resulted in the government to adopt the 'no censorship' policy and disregard its strict regulatory controls that have been applied to regulate the traditional print and broadcast media in the country.

The existence of the no censorship policy has led to a speculative assertion that the Internet in Malaysia should be free from any shackles of rules and regulations.<sup>178</sup> The assumption is obviously unsubstantiated because the interpretation accompanying the Bill of Guarantees<sup>179</sup> provides that the government does not distinguish

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<sup>172</sup> The MSC Malaysia Bill of Guarantees is a set of incentives, rights and privileges in a form of grant conferred by the Government on companies that are awarded with MSC Malaysia status. See <[www.cmc.msc.com.my/topic/MS+Malaysia+Bill+of+Guarantees](http://www.cmc.msc.com.my/topic/MS+Malaysia+Bill+of+Guarantees)> [accessed 5 December 2011].

<sup>173</sup> Section 3(3) of the CMA states 'Nothing in this Act shall be construed as permitting the censorship of the Internet'.

<sup>174</sup> Hamidah Atan, 'No Internet Censorship Despite Cyber Threats, Says Najib', *The New Straits Times* (Kuala Lumpur, 8 September 2009), 1 - 2.

<sup>175</sup> Maria J. Dass, 'PM Reaffirms Censorship-free Internet', *The Sun* (Kuala Lumpur, 8 September 2009), 1.

<sup>176</sup> Cherian George, *Contentious Journalism and the Internet: Towards Democratic Discourse in Malaysia and Singapore*, Revised edition (Seattle: University of Washington Press, 2006).

<sup>177</sup> Aaron D Davidson, 'I Want My Censored MTV: Malaysia's Censorship Regime Collides with the Economic Realities of the Twenty-First Century' (1998) 31 *Vand J Transnat'l L* 97, 139 - 140.

<sup>178</sup> Sonia Ramachandran, 'Cyber Crimes: The Net Is Not in a Legal Vacuum', *New Sunday Times* (Kuala Lumpur, 31 August 2008), <[http://www.malaysianbar.org.my/information\\_technology\\_and\\_cyberlaws\\_2005\\_2007/cyber\\_crimes\\_the\\_net\\_is\\_not\\_in\\_a\\_legal\\_vacuum.html](http://www.malaysianbar.org.my/information_technology_and_cyberlaws_2005_2007/cyber_crimes_the_net_is_not_in_a_legal_vacuum.html)> [accessed 5 August 2010].

<sup>179</sup> Bill of Guarantees No. 7 reads that 'To ensure no censorship of the Internet'.

A Comparative Study of Malaysia and the United Kingdom between content published in the online and offline world.<sup>180</sup> Further, section 3(3), which incorporates the no censorship policy, does not prevent the imposition of any laws including defamation, sedition and even the provisions of the CMA on online content post-publications.<sup>181</sup> Therefore, it is wrong to regard the Internet as a legal vacuum merely with the existence of the no censorship guarantee because the government has been permitted to take appropriate actions against the illegal use of the Internet.

This would be best illustrated with a long list of criminal charges that have been initiated by the government commencing with the arrest of four persons in 1998 for spreading rumours on the Internet about knife-wielding Indonesians rioting in Kuala Lumpur.<sup>182</sup> Over the years, several other Internet users were charged mostly under defamation and sedition.<sup>183</sup> It was however alleged that though traditional laws may be used to govern the Internet, it would be preferable to charge those culprits under the provisions of the Malaysian cyber laws, namely the Computer Crimes Act 1997, the Digital Signature Act 1997 and the Telemedicine Act 1997, as well as the CMA because these statutes were specifically enacted to handle issues emerging in the cyberspace.<sup>184</sup>

In short, the no censorship policy on the Internet in Malaysia signifies the government's pledge that the online environment is generally protected from prior interference by the state. Such a guarantee is very

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<sup>180</sup> See the MSC Malaysia Bill of Guarantees which are available at <<http://mscmalaysia.my/article/MS+Malaysia+Bill+of+Guarantees/BoG+7+To+ensure+no+censorship+of+the+Internet>> [accessed 5 December 2011].

<sup>181</sup> Halim and Salim, 'The Media System and Co-Operative Regulatory Systems in the Media Sector of Malaysia' (n 3) 15.

<sup>182</sup> George, *Contentious Journalism and the Internet* (n 176) 70.

<sup>183</sup> Azmi, 'Legal and Ethical Issues in Knowledge Management in Malaysia' (n 165).

<sup>184</sup> Izwan Iskandar Ishak, 'Regulating Online Content', *New Straits Times*, 30 April 2007, <[http://www.cybersecurity.my/data/content\\_files/13/163.pdf](http://www.cybersecurity.my/data/content_files/13/163.pdf)> [accessed 20 July 2009].



significant looking from the context of statutory restraints that mandate the print and broadcast media to procure permits and licences before publications.<sup>185</sup> As such, the promise of no censorship is very critical as it excludes publications on the Internet from the requirement of permits and licences.<sup>186</sup> Nonetheless, the no censorship guarantee does not render the cyber world a legal vacuum as it is generally accepted that what is illegal offline is also illegal online. Therefore, existing laws such as the Sedition Act 1948, the Defamation Act 1957 as well as the Penal Code could be applied to unlawful publications on the Internet. In addition, the CMA, which provides the no censorship policy, also lays down certain provisions on the regulation of the online content.

### **5.5.2.3 Regulation of the Online Content**

Content published in the cyber world is bound by the provisions of the CMA. Section 6 defines the word ‘content’ as ‘any sound, text, still picture, moving picture or other audio-visual representation, tactile representation or any combination of the preceding which is capable of being created, manipulated, stored, retrieved or communicated electronically’. The definition is all-inclusive to cover any materials published electronically either via the Internet or the broadcast media. Section 211(1) provides that it is a criminal offence to provide online content which is ‘indecent, obscene, false, menacing or offensive content with intent to annoy, abuse, threaten or harass any person’. Such offence carries a maximum fine of RM50,000 or one year imprisonment or both.<sup>187</sup> Improper use of network facilities, network services or applications service to transmit illegal content is also not

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<sup>185</sup> Farid Sufian Shuaib, ‘Controlling Political Communication in the Blogosphere: Business as Usual in Malaysia’ (2011) 16 Communications Law 28.

<sup>186</sup> Farid Sufian Shuaib, ‘Contemporary Human Rights Issues in Malaysia’, *Human Rights Law: International, Malaysian and Islamic Perspectives* (Sweet & Maxwell Asia 2012) 316.

<sup>187</sup> Section 211(2) of the CMA.

A Comparative Study of Malaysia and the United Kingdom permitted. Section 233(1) states that the use of any facilities or services to transmit content which is 'obscene, indecent, false, menacing or offensive in character with intent to annoy, abuse, threaten or harass another' would amount to a criminal offence which carries a fine not exceeding RM50,000 or one year imprisonment or both.<sup>188</sup> It is argued that these provisions, which prohibit provision of illegal content and improper use of the Internet, are not contrary to the guarantee of no censorship on the Internet.

There is however uncertainty pertaining to blocking of access to the Internet as this may lead to violation of the no censorship policy. The most infamous censorship of political blogs occurred in August 2008 when all local ISPs were instructed by the Commission to block access to Malaysia Today.<sup>189</sup> It was alleged that the blog had been censored because its editors continuously ignored the government's warnings of not publishing defamatory statements.<sup>190</sup> The incident has raised fierce criticisms from the blogging community, politicians, civil rights groups and many others.<sup>191</sup> However, the Home Minister claimed that the Commission was permitted to issue the censorship order as the blog contained prohibited content.<sup>192</sup> This is pursuant to section 263(1) that requires licensees, including the ISPs, to prevent their facilities from being used in the commission of any offence. It is further stipulated that upon written request from the Commission or

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<sup>188</sup> Section 233(3) of the CMA.

<sup>189</sup> Nurbaiti Hamdan and Cheok Li Peng, 'ISPs Ordered to Cut Access to Malaysia Today Website', *The Star Online*, 28 August 2008, <<http://thestar.com.my/news/story.asp?file=/2008/8/28/nation/22187596&sec=nation>> [accessed 21 March 2010].

<sup>190</sup> 'Syed Hamid Tells Why Malaysia Today Was Blocked', *The Star Online* (Kuala Lumpur, 29 August 2008), <<http://thestar.com.my/news/story.asp?file=/2008/8/29/nation/22194389&sec=nation>> [accessed 30 November 2011].

<sup>191</sup> Royce Cheah, Lee Yuk Peng and Sim Leoi Leoi, 'Malaysia Today Controversy Gets Hotter (Update 4)', *The Star Online* (Kuala Lumpur, 28 August 2008), <<http://thestar.com.my/news/story.asp?file=/2008/8/28/nation/20080828134908&sec=nation>> [accessed 21 March 2010].

<sup>192</sup> 'Syed Hamid Tells Why Malaysia Today Was Blocked' (n 190).

other authority, the ISPs shall provide assistance in deterring the occurrence or future commission of such offence.<sup>193</sup>

Nonetheless, it is argued that instead of cutting of access to the blogs, it would be more effective if the blog owners were to be charged either under section 211 or section 233 of the CMA in order to avoid potential breach of the no censorship policy. Apart from that, the efficacy of filtering by the ISPs is also in doubt as mirror sites or other technical measures can be easily established to circumvent the ban. Hence, it is submitted that though the blocking of access has been adopted on several occasions, such action should only be resorted to handle evidently undisputed and appropriate cases such as copyright infringement and child pornography.

Apart from the statutory measures, the CMA has also advocated the industry players to adopt a self-regulatory approach in governing the online content with the application of the Malaysian Communications & Multimedia Content Code (Content Code).<sup>194</sup> The Content Code was formulated by the Communications & Multimedia Content Forum of Malaysia (Content Forum), an industry body designated to be a content forum by the Commission and to self-regulate online content and related issues.<sup>195</sup> Compliance with the Content Code is voluntary but it shall be a defence against legal actions under the CMA.<sup>196</sup>

In general, the Content Code sets out guidelines and procedures for the dissemination of materials which are regarded as ‘indecent content, obscene content, violence, menacing content, bad language, false content, children’s content, family values and persons with

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<sup>193</sup> Section 263(2) of the CMA.

<sup>194</sup> The Content Code was registered on 1<sup>st</sup> September 2004 and it was made pursuant to section 213 of the CMA.

<sup>195</sup> For details on the Content Forum, see < [www.cmcf.my](http://www.cmcf.my) > [accessed 11 December 2011].

<sup>196</sup> Item 6.0 of Part 1 of the Content Code.

A Comparative Study of Malaysia and the United Kingdom special needs'.<sup>197</sup> The Content Code also contains specific guidelines for providers and access providers to online content including Internet access service providers, Internet content hosts, online content developers, online content aggregators and link providers.<sup>198</sup> It was alleged that the scope of the Content Code is quite narrow as it does not cover other areas such as defamation and sedition.<sup>199</sup> Interestingly, the proclaimed 'self-regulatory' style of the online content is also supported by fall-back provisions administered by the Commission.<sup>200</sup> For this reason, it is argued that the regulatory regime should be properly termed as co-regulation instead of self-regulation.

### **5.5.3 Application of the Internet Regulatory Regime to Political Blogs**

The CMA and the Communications and Multimedia (Licensing) Regulations 2000 have introduced the licensing system for the Internet industry as it mandated providers of applications service,<sup>201</sup> including the ISPs, to possess class licences under the CMA.<sup>202</sup> Nonetheless, political blogs and other online publications do not fall within the meaning of applications service<sup>203</sup> and accordingly they will not be obliged to possess such licences. Section 6 renders political blogs to be included within the scope of content applications service,<sup>204</sup> but bloggers do not have to apply for licences because providers of

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<sup>197</sup> Part 2 of the Content Code.

<sup>198</sup> Part 5 of the Content Code.

<sup>199</sup> Ida Madiha Azmi, 'Content Regulation in Malaysia: Unleashing Missiles on Dangerous Web Sites', *JILT: Journal of Information Law and Technology*, 3 (2004), <[http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2004\\_3/azmi](http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2004_3/azmi)> [accessed 12 September 2009].

<sup>200</sup> Halim and Salim, 'The Media System and Co-operative Regulatory Systems in the Media Sector of Malaysia' (n 3) 17.

<sup>201</sup> Section 126(1) of the CMA.

<sup>202</sup> Regulation 30 of the Communications and Multimedia (Licensing) Regulations 2000.

<sup>203</sup> Section 6 of the CMA defines 'applications service' as 'a service provided by means of, but not solely by means of, one or more network services'.

<sup>204</sup> Section 6 of the CMA provides that 'content application service' means 'an applications service which provides content'.

Internet content applications services are excluded by the Communications and Multimedia (Licensing) (Exemption) Order 2000.<sup>205</sup> Further, the government has provided that it has no intention to issue licence for blogging activities or to set up a special body to supervise irresponsible blogging.<sup>206</sup> Thus, political blogs and other online services are basically free to publish content without the need to procure any licences, and arguably this appears to be in parallel with the no censorship of the Internet policy in the CMA and the Bill of Guarantees.

However, the absence of licensing requirements does not absolve political blogs and online publications from legal liabilities. Though political blogs are exempted from having content applications service licences, they are still subjected to the content regulations in the CMA. Section 211(1) prohibits political blogs and other online platforms from publishing indecent, obscene, false, menacing or offensive content with intent to annoy, abuse, threaten or harass any person. Further, political blogs are not permitted to use the ISPs to transmit illegal content. Section 233(1) prevents the ISPs from being used to transmit content that is obscene, indecent, false, menacing or offensive in character with intent to annoy, abuse, threaten or harass any person.<sup>207</sup>

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<sup>205</sup> Order 6 of the Communications and Multimedia (Licensing) (Exemption) Order 2000 provides that 'a person who provides any Internet content applications services is exempt from holding an individual licence or registering under a class under the Act'.

<sup>206</sup> '22 Websites, Blogs Probed', *The Star Online*, 27 May 2008, <<http://thestar.com.my/news/story.asp?file=/2008/5/27/parliament/21368174&sec=parliament>> [accessed 18 January 2012].

<sup>207</sup> On conviction, sections 211(2) and 233(3) of the CMA provide that the offenders will be exposed to a maximum fine of RM50,000 or imprisonment not more than one year or both.

A Comparative Study of Malaysia and the United Kingdom

The efficacy of section 211 has yet to be tested in courts, but section 233 has been invoked for the first time in 2009 against six people, who posted offensive comments towards the King of Perak in several blogs that were linked to the King's official website or to the Perak state government website.<sup>208</sup> The comments were made following the political crisis in Perak that caused the collapse of the *Pakatan Rakyat*-led government.<sup>209</sup> The King then ordered the Chief Minister from the ousted *Pakatan Rakyat* to make way for an assemblyman from *Barisan Nasional*, the ruling party at the federal level.<sup>210</sup> One of the accused pleaded guilty to the charge and was fined RM 10,000 or in default five months jail, whilst the others pleaded not guilty and claimed trial.<sup>211</sup> Recently, criminal charges for improper use of network facilities or network service have also been brought against Facebook<sup>212</sup> and Twitter users.<sup>213</sup>

As to the application of the Content Code to political blogs, some argued that the position is still unclear as the provision of personal content is not included within the interpretation of applications service

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<sup>208</sup> Lourders Charles, 'Six to Be Charged for Insulting Perak Sultan via Blogs, Postings (Update 2)' *The Star Online* (Kuala Lumpur, 12 March 2009) <<http://www.thestar.com.my/story/?file=%2F2009%2F3%2F12%2Fnation%2F20090312194041>> [accessed 8 February 2015].

<sup>209</sup> Further details, see 'Chronology of Events of the Perak's Political Crisis' <<http://www.malaysia-today.net/chronology-of-events-of-the-peraks-political-crisis/>> [accessed 8 February 2015].

<sup>210</sup> *ibid.*

<sup>211</sup> 'Six Charged for Insulting Perak Sultan, One Fined RM10,000' *The SUNDAILY* (Kuala Lumpur, 14 March 2009) <<http://www.thesundaily.my/node/157949>> [accessed 8 February 2015].

<sup>212</sup> A man pleaded guilty to making offensive comments on his Facebook account disparaging Muslim and the Prophet Muhammad. See Hidir Reduan, 'FB User Jailed for Posting Offensive Hari Raya Greeting' *NST Online* (Kuala Lumpur, 9 September 2014) <<http://www.nst.com.my/node/31563>> [accessed 8 February 2015].

<sup>213</sup> A Twitter user was charged under section 233 of the CMA for likening the Inspector-General of Police to Hitler. For details, see Pathma Subramaniam, 'Twitter User Charged with Provocation for Likening IGP to Nazi's Himmler' *The Malay Mail Online* (Kuala Lumpur, 15 September 2014) <<http://www.themalaymailonline.com/malaysia/article/twitter-user-charged-with-provocation-for-likening-igp-to-nazis-himmler>> [accessed 8 February 2015].

A Comparative Study of Malaysia and the United Kingdom provider.<sup>214</sup> Nonetheless, it is submitted that though political blogs contain personal content of bloggers, blog entries are freely accessible to the public and they should not be treated similar to ordinary private and / or personal electronic mail. Alternatively, if political blogs do not fall within the interpretation of applications service provider, they could be regarded as content application service provider<sup>215</sup> under the Content Code. Further, political blogs could also be included within the scope of ‘code subjects’ as they are ‘providers of online content or those who provide access to online content’ within Part 5 of the Content Code. Thus, it is argued that the Content Code is and should be available to political blogs and other online publications as its provisions are specially designed to voluntarily prevent publication of content that is ‘indecent, obscene, false, menacing or offensive in character with intent to annoy, abuse, threaten or harass any person’.

## 5.6 Conclusion

To sum up, comprehensive analysis of the existing regulatory systems, which are currently being applied to regulate the traditional print and broadcast media as well as the Internet industry in Malaysia, clearly indicates that at present political blogs and other online publications are not bound by any specific statutory controls. Even though there is a slight possibility of extending the regulatory regime of the print media to the online publications, it is very much unlikely that the statutory requirement of permit and licence under the PPA would be applied to the Internet as such prior constraints would definitely amount to an express violation of the government’s no censorship

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<sup>214</sup> Azmi, ‘Legal and Ethical Issues in Knowledge Management in Malaysia’ (n 165) 69.

<sup>215</sup> Item 5.0 of Part 1 of the Content Code defines ‘content application service provider’ as ‘a person who provides a content application service. Examples of content applications services include:- i) Direct To Home (DTH) subscription broadcasting, whether via satellite or cable; ii) Terrestrial Free-to-Air TV and Radio; and iii) Internet Web casting and Streaming Videos.’

A Comparative Study of Malaysia and the United Kingdom policy on the Internet. In relation thereof, it has been alleged that the existing regulatory framework of the traditional and new media is still lacking to regulate the conduct of bloggers and other Internet users in the country.<sup>216</sup>

Several recommendations have been proposed including the enactment of a code of ethics that specifies rights, duties and liabilities of bloggers; compulsory registration for all bloggers with the government registry;<sup>217</sup> and classification of bloggers into professionals or non-professionals.<sup>218</sup> Regardless of these propositions, it is submitted that the statutory provisions of the CMA and the industry's Content Code, which are specifically enacted to regulate the communications and multimedia industry, are more than adequate to tackle issues related with political blogs and other web-based communications. Further, there also exists a long list of general laws such as defamation and sedition that could equally be applied to govern political blogs in the country. Thus, it is submitted that such proposals are plainly unnecessary and may be prejudicial to the development of the communications and multimedia industry in Malaysia.

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<sup>216</sup> Aishath Muneeza, 'The Milestone of Blogs and Bloggers in Malaysia' (2010) 3 MLJ cvii, 10.

<sup>217</sup> *ibid.*

<sup>218</sup> 'Zam: Classify Bloggers', *The Star Online* (Kuala Lumpur, 6 May 2007), <<http://thestar.com.my/news/story.asp?file=/2007/5/6/nation/17648170&sec=nation>> [accessed 12 September 2009].



## 6.1 Introduction

The evolution of the Web 2.0,<sup>1</sup> commonly referred to as the ‘new’ read – write web, has led to the appearance of user-generated content (UGC)<sup>2</sup> in 2005.<sup>3</sup> Its emergence through a variety of platforms including blogs, wikis, social networking sites and other user generated media sites has expanded the range of new media services.<sup>4</sup> Though the availability of vast arrays of new media services are expected not to replace but simply to complement and coexist alongside with the traditional media,<sup>5</sup> this development will undoubtedly pose serious challenges to the existing regulatory bodies and regulations of the media industry in the UK.

Unlike the traditional media, which are currently governed either by the industry, the state or both, the new media particularly blogs are merely subjected to general laws. This raises a cause for concern as convergence and digital technology have enabled the traditional media to emulate and establish their presence in the blogosphere as well, and

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<sup>1</sup> The term was first used by Dale Dougherty of O’ Reilly Media Inc. in 2004. Paul Anderson, *What is Web 2.0? Ideas, Technologies and Implications for Education*, Joint Information Systems Committee (JISC), 2007, <[www.jisc.ac.uk/media/documents/techwatch/tsw0701b.pdf](http://www.jisc.ac.uk/media/documents/techwatch/tsw0701b.pdf)> [accessed 20 January 2011].

<sup>2</sup> There is no specific definition of UGC but it is generally understood to cover content that is put online by users, regardless of whether the content is created by the users or not. Katrien Lefever and Evi Werkers, ‘Digital Sports Content: The Rise of New Media Players and the Legal Consequences in Terms of Obligations and Liability Risk’ (2010) 21(6) Ent LR 215, 218.

<sup>3</sup> Peggy Valcke and Marieke Lenaerts, ‘Who’s Author, Editor and Publisher in User-Generated Content? Applying Traditional Media Concepts to UGC - Providers’ (2010) 24(1) IRLCT 119.

<sup>4</sup> New media services is regarded to be synonymous with ‘Information Society Services’ which is defined in section 2(1) of the Electronic Commerce (EC Directive) Regulations 2002 as ‘any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient of a service’. See Tarlach McGonagle, ‘Does the Existing Regulatory Framework for Television Apply to the New Media?’ [2001] Iris PLUS, European Audiovisual Observatory 3. <<http://dare.uva.nl/record/93782>> [accessed 29 November 2010].

<sup>5</sup> Mike Feintuck and Mike Varney, *Media Regulation, Public Interest and the Law* (2nd ed, Edinburgh University Press 2006) 3.

these blogs, which are associated with the traditional media, are currently being governed by different regulatory bodies. As such, this part of the thesis seeks to analyse the existing specific media laws and the regulatory bodies for the printing, broadcasting, on-demand and the Internet industries and to evaluate the possibility of applying any of these legal regimes to political blogs.

## 6.2 Print Industry

### 6.2.1 Overview of the Regulatory System of the Print Industry

The print industry in the UK has been subjected to self-regulatory system since the establishment of the Press Council in 1953.<sup>6</sup> The Press Council however failed to perform its functions, particularly in handling privacy issues,<sup>7</sup> and was largely perceived to have ‘reached a state of terminal discredit’.<sup>8</sup> As a result, the Report of the Calcutt Committee in 1990 recommended the Press Council to be replaced with a statutory tribunal, but a last opportunity was given to industry to set up a self-regulatory body.<sup>9</sup> Subsequently, the Press Complaints Commission (the PCC) was established ‘with almost indecent haste’<sup>10</sup> a year later to convince the government that the industry could regulate itself without resorting to any form of statutory body.<sup>11</sup> Since then, the self-regulatory system administered by the PCC continued to be in operation though it had over the years been subjected to

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<sup>6</sup> For chronological events on press regulation in the UK, see Culture, Media and Sport Committee, *Privacy and Media Intrusion*, (HC 2002-03, 458-I).

<sup>7</sup> Damian Tambini, Danilo Leonardi and Chris Marsden, *Codifying Cyberspace: Communications Self-Regulation in the Age of Internet Convergence* (Routledge 2008) 66.

<sup>8</sup> Richard Shannon, *A Press Free and Responsible: Self-Regulation and the Press Complaints Commission, 1991-2001* (John Murray 2001) 2.

<sup>9</sup> Committee on Privacy and Related Matters, *Report of the Committee on Privacy and Related Matters* (Cm 1102, 1990) para 10.

<sup>10</sup> Colin Munro, ‘Self-Regulation in the Media’ (1997) Spring PL 6, 6.

<sup>11</sup> Geoffrey Robertson and Andrew Nicol, *Media Law* (5th ed, Penguin 2008) 757.

numerous criticisms, particularly the call for its abolition that was made within two years of its inception.<sup>12</sup>

After more than 20 years in operation, the efficacy of the PCC has been seriously questioned following the hacking scandal at the News of the World.<sup>13</sup> This has prompted the setting-up of the Leveson Inquiry to investigate the culture, practices and ethics of the press.<sup>14</sup> On 29 November 2012, the Leveson Inquiry published its findings and recommendations including the proposal for the establishment of a ‘genuinely independent and effective system of self-regulation’ that would safeguard the interest of the public and the press industry.<sup>15</sup> It was further emphasised that legislation should underpin the new system of press-regulation.<sup>16</sup> In response to the Leveson Report, the PCC Chairman admitted that there is a need for a new regulator with effective sanctions and ‘teeth’, and independent from the industry and the government, but without statutory regulations.<sup>17</sup> This has led to the establishment of the Independent Press Standards Organisation (IPSO), which was launched on 8 September 2014 as a new press self-regulatory body to replace the PCC.

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<sup>12</sup> Department of National Heritage, *Review of Press Self-Regulation* (Cm 2135, 1993) ch 5.

<sup>13</sup> For chronological occurrence of the hacking scandal, see <<http://www.bbc.com/news/uk-14124020>> [accessed 7 January 2015].

<sup>14</sup> The Leveson Inquiry was chaired by Lord Justice Leveson with a panel of six independent assessors. For details, see <<http://www.levesoninquiry.org.uk>> [accessed 12 January 2015].

<sup>15</sup> Lord Justice Leveson, *An Inquiry into the Culture, Practices and Ethics of the Press: Executive Summary and Recommendations* (HC 779, 2012) para 51.

<sup>16</sup> *ibid* para 70.

<sup>17</sup> The press statement of the last PCC Chairman, Lord Hunt of Wirral, is available at <[http://www.pcc.org.uk/assets/111/Letter\\_to\\_Media\\_Standards\\_Trust\\_28\\_Feb.pdf](http://www.pcc.org.uk/assets/111/Letter_to_Media_Standards_Trust_28_Feb.pdf)> [accessed 7 January 2015].

### **6.2.2 Independent Press Standards Organisation (IPSO)**

The new self-regulatory system of the press is administered by IPSO, although in practice the whole system is not entirely dependent on IPSO alone.<sup>18</sup> There are a number of distinct bodies that have been specifically established to ensure the smooth running of the system particularly the Editor's Code of Practice Committee (the Code Committee)<sup>19</sup> and the Regulatory Funding Company (the RFC).<sup>20</sup> Nonetheless, IPSO plays a central role in overseeing the smooth running of the system and therefore it is pertinent to discuss IPSO in details.

#### **6.2.2.1 IPSO's Remit**

The remit of IPSO is expressly stipulated in its Articles of Association (AOA) and Regulations.<sup>21</sup> Article 7.1 of IPSO AOA<sup>22</sup> states that IPSO shall regulate 'editorial content included in a printed newspaper or magazine' and 'editorial content on electronic services operated by Regulated Entities<sup>23</sup> such as websites and apps, including text, pictures, video, audio/visual and interactive content'. As such, all editorial materials published by member publishers, whether in print or online, shall be subject to IPSO's regulation. Nonetheless, Article 7.3 of IPSO AOA<sup>24</sup> sets out certain exclusions to IPSO's remit, including complaints about 'user generated content' posted on

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<sup>18</sup> For details on IPSO, see <[www.ipso.co.uk](http://www.ipso.co.uk)> [accessed 7 January 2015].

<sup>19</sup> The Code Committee is responsible for writing the Editor's Code of Practice and it shall comprise both independent members and serving editors that are or could be regulated entities.

<sup>20</sup> For more about the RFC, visit <[www.regulatoryfunding.co.uk](http://www.regulatoryfunding.co.uk)> [accessed 7 January 2015].

<sup>21</sup> The documents are available <[https://www.ipso.co.uk/assets/1/IPSO\\_Articles\\_of\\_Association.pdf](https://www.ipso.co.uk/assets/1/IPSO_Articles_of_Association.pdf)> and <[https://www.ipso.co.uk/assets/1/REGULATIONS\\_\\_PDF\\_.PDF](https://www.ipso.co.uk/assets/1/REGULATIONS__PDF_.PDF)> [accessed 8 January 2015].

<sup>22</sup> Similar provision on the remit of IPSO is contained in IPSO Regulation 1.

<sup>23</sup> The phrase 'regulated entities' is defined in the Schedule to IPSO AOA to mean all publishers who have entered into the Scheme Membership Agreement and Regulated Entity refers to any one of them.

<sup>24</sup> Similar exclusion clauses are stipulated in IPSO Regulation 3.

A Comparative Study of Malaysia and the United Kingdom member publishers' websites which has not been reviewed or moderated by them.<sup>25</sup> Apart from that, complaints about online content that is not on member publishers' website is also excluded from IPSO's remit.<sup>26</sup> This indicates the requirement of actual knowledge on the part of member publishers before they could be held accountable for any online third party content.

The remit of IPSO appears to be similar to the remit of its predecessor, the PCC. The PCC's remit, which was set by the Press Standards Board of Finance (PressBof), was initially applicable to editorial content of print publications only. Subsequently, the remit was extended in 1997 to online versions of the press that replicate the print form.<sup>27</sup> Two years later, the PCC's remit has again been amended to embrace freestanding or online-only publications provided that they are primarily based in the UK and subscribe to the Code and the PressBof.<sup>28</sup> As such, it is obvious that IPSO's remit is very much equivalent with the PCC as IPSO is expressly empowered to adjudicate complaints on edited materials published by member publishers regardless of whether the publications are in the traditional printed form or online version.

### **6.2.2.2 The Editor's Code of Practice (the Code)**

The Editor's Code of Practice (the Code) remains central to the new self-regulatory regime of the print industry administered by IPSO. Its provisions have been adopted in total and without any changes by IPSO from the PCC's most recent version. The Code is the principal

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<sup>25</sup> IPSO AOA 7.3.6; IPSO Regulation 3.6.

<sup>26</sup> IPSO AOA 7.3.7; IPSO Regulation 3.7.

<sup>27</sup> PressBof, 'PCC's Remit Extended to Include Editorial Audio-visual Material on Newspaper and Magazine Websites' <[www.pcc.org.uk/news/index.html?article=NDMyMg==](http://www.pcc.org.uk/news/index.html?article=NDMyMg==)> [accessed 20 December 2010].

<sup>28</sup> PressBof, 'PCC's Remit Extended to Include On-line Only Publications', <[www.pcc.org.uk/news/index.html?article=NjEwOQ==](http://www.pcc.org.uk/news/index.html?article=NjEwOQ==)> [accessed 20 December 2010].

A Comparative Study of Malaysia and the United Kingdom

source in adjudicating complaints against the press. The Code is independently framed and revised by the industry through the Code Committee. As such, it is believed that editors and journalists will be more inclined to respect their own formulated Code.<sup>29</sup> This can be supported by several reports showing that even after more than 20 years the Code has been in operation, no editors have failed to publish adverse adjudications awarded against them.<sup>30</sup> Further, non-compliance with the Code is also prone to endanger the regulatory regime of the press as has been highlighted in *McIntosh v Sunday World*<sup>31</sup> that self-regulation could work only by the voluntary participation of the industry.<sup>32</sup>

The Code contains a preamble that expresses the ‘spirit of the Code’<sup>33</sup> and underlines the utmost responsibility of the press to balance the competing rights of individuals, especially privacy with freedom of expression. It is for the sake of maintaining the right to free speech that issues of taste and decency are not governed by the Code as these matters are highly subjective and cover a very broad range of readers’ tastes. It is to be noted that the Code neither replaces the law nor afford special protections to editors or journalists from civil or criminal liabilities.<sup>34</sup> Though the Code is distinct from the law, its significance is duly recognised by statutes. This can be illustrated with the Data Protection Act 1998 that provides a defence for newspapers

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<sup>29</sup> Eric Barendt and Lesley Hitchens, *Media Law: Cases and Materials* (Pearson Education 2000) 44.

<sup>30</sup> Ian Beales, ‘The Editor’s Codebook’ 9.

<sup>31</sup> Report No. 60 of 2002, see <[www.pcc.org.uk/news/index.html?article=MjA4Ng==](http://www.pcc.org.uk/news/index.html?article=MjA4Ng==)> [accessed 12 September 2010].

<sup>32</sup> Culture, Media and Sport Committee, *Press Standards, Privacy and Libel: Responses to the Committee’s Second Report of Session 2009-10* (HC 2010 – 11, 351).

<sup>33</sup> For more about the Code, visit <[www.editorscode.org.uk](http://www.editorscode.org.uk)> [accessed 8 January 2015].

<sup>34</sup> Brid Jordan, ‘The Editors’ Codebook - The Second Edition’ (2009) 20(7) Ent LR 249.

A Comparative Study of Malaysia and the United Kingdom against action by the Information Commissioner and others if publication is in compliance with the Code.<sup>35</sup> Similarly, the Human Rights Act 1998 requires courts to consider compliance with the Code in determining the defence on free speech.<sup>36</sup>

### **6.2.2.3 IPSO's Sanctions**

Unlike the PCC, which only had at its disposal publication of critical adjudication against newspapers or magazines that have breached the Code, IPSO is permitted to impose some other sanctions when a complaint is upheld by the Complaints Committee.<sup>37</sup> However, despite the availability of these sanctions, it is claimed that the publicity from publishing adverse adjudication in full and with due prominence is a very influential 'name and shame'<sup>38</sup> sanction as no publishers would like to make known their errors. This is based on past year records from the PCC annual reviews that showed majority of complaints were settled amicably through conciliation and without formal adjudication.<sup>39</sup> Due to this reason, Regulation 22 states that remedial actions shall include a requirement for member publishers to publish a correction or adjudication. It is further provided that IPSO has the power to determine the nature, extent and placement of corrections and adjudications as long as it acts proportionately and takes into consideration the nature of member publishers and their publications.

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<sup>35</sup> Section 32 of the Data Protection Act 1998.

<sup>36</sup> Section 12 of the Human Rights Act 1998.

<sup>37</sup> The Complaints Committee has 12 members including the Chairman. A majority of the members are independent members (7), while the other members (5) represent the newspaper and magazine industry. Composition of the Complaints Committee is stated in Regulation 33 of IPSO Regulations.

<sup>38</sup> Simon Sellars, 'Online Privacy: Do We Have It and Do We Want It? A Review of the Risks and UK Case Law' (2011) 33(1) EIPR 9, 14.

<sup>39</sup> Numerous types of remedial actions have been offered to complainants including publication of an apology or correction, removal of offending material from the publications' websites, publication of letters from the complainants and many others. For details see PCC Annual Reviews at <[www.pcc.org.uk/annualreports/annualreview.html](http://www.pcc.org.uk/annualreports/annualreview.html)> [accessed 30 December 2010].

Such power has been exercised in *Wilson v The Press Journal*<sup>40</sup> when the newspaper was ordered to publish its correction ‘in full, on page 3 or further forward’ instead of page 5 or 6 as per the newspaper’s initial proposal.

In addition, IPSO is now permitted to impose financial penalties or award monetary compensation to aggrieved complainants.<sup>41</sup> Any fines or costs will be flexible in amount and will be determined in accordance with IPSO Financial Sanctions Guidance<sup>42</sup> that is issued by the RFC.<sup>43</sup> Paragraphs 2.1 and 2.2 of IPSO Financial Sanctions Guidance provide that when a Standards Investigation has found member publishers to have committed a Systemic Failure,<sup>44</sup> they may be imposed a fine of up to 1% of their annual turnover, but subject to the maximum of £1,000,000 for each Standards Investigation. IPSO may also require publishers to pay reasonable costs of a Standards Investigation.<sup>45</sup> In relation to this, it is submitted that the introduction of monetary sanction is very much timely to address persistent critics that labelled IPSO’s predecessor, the PCC, as toothless and ineffective for its lack of power to impose fines. Further, this would be in parallel with the claim that the imposition of financial penalties is a vital balance as newspapers breach the Code for commercial gains in the form of readership ratings, advertising revenue and many others.<sup>46</sup>

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<sup>40</sup> Decision of the Complaints Committee in *Wilson v The Press Journal* 0120-14.

<sup>41</sup> Regulation 63.2 of IPSO Regulations.

<sup>42</sup> IPSO Financial Sanctions Guide is designed to assist IPSO in imposing financial sanctions. Further details see <[https://www.ipso.co.uk/assets/1/FINANCIAL\\_SANCTIONS\\_GUIDANCE\\_\\_PDF\\_.PDF](https://www.ipso.co.uk/assets/1/FINANCIAL_SANCTIONS_GUIDANCE__PDF_.PDF)> [accessed 8 January 2015].

<sup>43</sup> Regulations 64 and 65 of IPSO Regulations.

<sup>44</sup> Regulation 40.1 of IPSO Regulations defines a ‘systemic failure’ as ‘where the Regulator reasonably considers that there may have been serious and systemic breaches of the Editors’ Code’.

<sup>45</sup> Regulations 63.3 of IPSO Regulations.

<sup>46</sup> Jonathan Coad, ‘The Press Complaints Commission - Some Myths about Self-Regulation’ (2003) 14(8) Ent LR 211, 213.



### **6.2.3 Application of the Press Regulatory Regime to Blogs**

With the coming into operation of the new self-regulatory regime of the press administered by IPSO, only user generated content including blogs that appear on member publishers' newspaper and magazine websites and has been reviewed and moderated by member publishers will be subjected to the self-regulation by IPSO.<sup>47</sup> It is further clarified that IPSO will not be accountable for online material that is not on sites owned by or under the control of its member publishers.<sup>48</sup> This would expressly exclude blog entries published by journalists in their personal blogs that are not associated with or under the control of member publishers. Similarly, any comments by readers, which have been posted on member publishers' websites but have yet to be reviewed or moderated by them, will also be considered to fall outside of IPSO's remit. Therefore, the key factor in determining the remit of IPSO is the existence of actual knowledge as well as the exercise of prior editorial control on any online materials. To sum up, it is submitted that apart from blog postings that are posted on member publishers' online services and have been pre-moderated by their editors, it is very much unlikely for the new self-regulatory regime of the press administered by IPSO to be applicable to amateur blogs, which are largely published by individuals, or even personal blogs of their journalists that are not under the control and knowledge of IPSO's member publishers.

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<sup>47</sup> IPSO AOA 7.3.6; IPSO Regulation 3.6.

<sup>48</sup> IPSO AOA 7.3.7; IPSO Regulation 3.7.

## 6.3 Broadcasting Industry

### 6.3.1 Overview and Rationales for Strict Statutory Regulations

The broadcasting industry in the UK has been made subject to extensive statutory regulations ever since the radio was invented in the late 19<sup>th</sup> century.<sup>49</sup> The introduction of the Wireless Telegraphy Act 1904 and the subsequent conclusion of the Licence and Agreement between the Postmaster-General and the British Broadcasting Company<sup>50</sup> on 18 January 1923,<sup>51</sup> which had formally granted a single broadcasting licence to the BBC to broadcast ‘news, speeches, lectures, educational matter, weather reports, concerts and theatrical entertainment’,<sup>52</sup> clearly showed that the government has always intended the broadcast media to be governed by special statutory regulations. In relation thereof, rationales for establishing specific statutory regulatory system for the broadcasting industry need to be scrutinised.

The most common argument is the scarcity of spectrum that has in the past accorded strong weightage to the government to exert strict regulatory control. The situation has now changed with the availability of cable and satellite televisions, and modern shift towards digital technology have enabled broadcasting services to be transmitted over

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<sup>49</sup> Ingrid Silver and Denton Wilde Sapte, ‘Content Regulation’ in Mike Conradi and Kemp Little (eds), *Communications Law Handbook* (Bloomsbury Professional 2009) 125 – 128.

<sup>50</sup> The British Broadcasting Company was formed on 18 October 1922 by a consortium of wireless manufacturers in the UK. It was later dissolved on 31 December 1926 to make way for the establishment of a new public service corporation, British Broadcasting Corporation (BBC), on 1 January 1927. BBC is discussed in details in Part 6.3.2.2 of Chapter 6 below.

<sup>51</sup> For full chronology, see Barrie MacDonald, *Broadcasting in the United Kingdom: A Guide to Information Sources*, Rev. 2nd ed (London: Mansell, 1994).

<sup>52</sup> Asa Briggs, *The History of Broadcasting in the United Kingdom, Volume I: The Birth of Broadcasting* (Oxford University Press 1995) 112 – 125.

a variety of delivery services, other than the analogue terrestrial.<sup>53</sup> These technological advancements have resulted in less reliance on broadcast spectrum and consequently the government's control over the broadcast media is increasingly becoming limited. Therefore, the scarcity rationale is no longer a strong justification for imposing specific regulatory control over the broadcast media.

Another early justification for regulating broadcasting is that it was 'broad-casting to a universal audience, in terms of geographic reach and personal, and the audience has no effective control over the scheduling and content of the material received'.<sup>54</sup> With their unique ability to select and thrust information to the audience, the broadcast media are capable of shaping and influencing the audiences' views and opinions.<sup>55</sup> For this reason, they are considered the most pervasive and influential medium of communications and should thus be made subject to special regulatory framework.

Beside the scarcity of frequencies and the special impact theory, it is argued that specific broadcast regulation is necessary to preserve plurality and impartiality.<sup>56</sup> Since the newer forms of communication infrastructures are largely owned and controlled by private media corporations, they appear to have absolute powers in pursuing their own agenda and limiting other dissenting views from being delivered in their programmes. Thus, such development poses serious threat to freedom of expression and therefore special regulations for the broadcast industry are crucial in guaranteeing diversity of programmes for the audience.

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<sup>53</sup> Barendt and Hitchens, *Media Law* (n 29) 12 – 13.

<sup>54</sup> Thomas Gibbons, *Regulating the Media* (2nd ed, Sweet & Maxwell 1998) 302.

<sup>55</sup> Barendt and Hitchens, *Media Law* (n 29) 10 – 11

<sup>56</sup> Helen Fenwick and Gavin Phillipson, *Media Freedom under the Human Rights Act* (Oxford University Press 2006) 565.

### **6.3.2 Regulatory System of the UK Broadcast Media**

At present, the broadcast media in the UK are governed by two separate regulatory bodies namely Office of Communications (Ofcom) for commercial television and radio stations, and the British Broadcasting Corporation (BBC) for all BBC content whether transmitted over the television, radio or online.

#### **6.3.2.1 The Office of Communications (Ofcom)**

Ofcom was established as a body corporate by the Office of Communications Act 2002. It is regarded a ‘super-regulator’ for the UK communications industries covering television, radio, postal, telecommunications and wireless communications services.<sup>57</sup> With regard to the Internet, Ofcom’s remit was initially not applicable to the online communications as it has been clearly stipulated in the Communications White Paper<sup>58</sup> and the scope of the CA itself.<sup>59</sup> However, with the implementation of the Audiovisual Media Services Regulations 2009, Ofcom is now empowered to regulate television channels delivered over the Internet and notified on demand programme services (ODPS) where they are established in the UK.<sup>60</sup> Further, Ofcom has also certain functions under the Digital Economy Act 2010 in respect of ISPs and online copyright infringement.

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<sup>57</sup> Due to the convergence of the broadcasting, telecommunications and computing industries, the government has preferred the establishment of a single regulator to oversee the converged sector. For detailed discussions see Barendt and Hitchens, *Media Law* (n 24) 310 – 318

<sup>58</sup> Further details, see discussion at para 6.5.1 below on ‘Overview of the UK Internet Governance’.

<sup>59</sup> Department of Trade and Industry and Department of Culture, Media and Sport, *The Draft Communications Bill: The Policy*. (Cm 5508-III, 2002) 48.

<sup>60</sup> On demand industry is elaborated in details at para 6.4 below.

A Comparative Study of Malaysia and the United Kingdom

Ofcom is vested with extensive regulatory powers covering those that were inherited from five ‘legacy’ regulators<sup>61</sup> that it replaced, powers that were previously exercised directly by the Secretary of State,<sup>62</sup> and other powers that are specially conferred on Ofcom by a number of statutes including the Communications Act 2003 (CA), the Wireless Telegraphy Act 2006, the Broadcasting Acts 1990 and 1996, the Digital Economy Act 2010 and the Postal Services Act 2011. With these considerable powers, Ofcom is expected to perform a wide range of duties<sup>63</sup> including licensing of television and radio services and establishing a broadcasting code for setting standards for content of all programmes transmitted in the broadcast media.

### 6.3.2.2 The British Broadcasting Corporation (BBC)

The British Broadcasting Corporation (BBC) is a body corporate that was firstly established by a Royal Charter granted on 20 December 1926.<sup>64</sup> Since then, a number of Royal Charters were granted to the BBC to preserve its status as a corporation. The latest Royal Charter was granted on 19 September 2006 (the current Royal Charter).<sup>65</sup> The incorporation of the BBC by a Royal Charter enables the government to directly determine the BBC’s remit and duties without the need to legislate any statute through Parliament debate.<sup>66</sup>

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<sup>61</sup> The five regulatory bodies are the Independent Television Commission (ITC), the Broadcasting Standards Commission (BSC), the Radio Authority, Oftel and the Radio Communications Agency.

<sup>62</sup> Alex Haffner and Denton Wilde Sapte, ‘Powers and Duties’ in Mike Conradi and Kemp Little (eds), *Communications Law Handbook* (Bloomsbury Professional 2009) 177.

<sup>63</sup> It is reported that Ofcom has identified 263 duties to be performed under the CA.

<sup>64</sup> By Letters made Patent under the Great Seal, the first Royal Charter was granted by His Majesty King George the Fifth on 20 December 1926 and this marks the incorporation date of the BBC as a public service broadcaster in the UK.

<sup>65</sup> The current Royal Charter was granted by Her Majesty Queen Elizabeth the Second and it will be effective for the period of 10 years commencing from 1 January 2007 until 31 December 2016.

<sup>66</sup> Silver and Sapte, ‘Content Regulation’ (n 49) 136.

## Political Blogs and Freedom of Expression:

### A Comparative Study of Malaysia and the United Kingdom

A Royal Charter is a constitutional basis that sets out the BBC's objects and defines its constitution and governance. It stipulates the BBC's main activities as to promote the BBC's Public Purposes<sup>67</sup> through the provision of television, radio and online services and other related services that will inform, educate and entertain the people in the country.<sup>68</sup> The independence of the BBC in relation to its content and management is also guaranteed by a Royal Charter.<sup>69</sup> A Royal Charter is always accompanied by an Agreement made by a Deed between the BBC and the Secretary of State for Culture, Media and Sport. The present Agreement (the Framework Agreement)<sup>70</sup> was laid in Parliament in July 2006 and came into force on 1 January 2007.<sup>71</sup> It affirms the independence of the BBC as contained in the Royal Charter<sup>72</sup> and provides details of the BBC's role, rights and obligations as a public service broadcaster.

The current Royal Charter and the Framework Agreement have also laid down functions that are expected to be performed by the BBC. These functions shall be performed by two separate bodies that comprise of the corporation; namely the BBC Trust and the Executive Board.<sup>73</sup> The BBC Trust shall be the sovereign body<sup>74</sup> within the BBC

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<sup>67</sup> Article 4 of the Royal Charter provides that the six public purposes of the BBC are 'sustaining citizenship and civil society; promoting education and learning; stimulating creativity and cultural excellence; representing the UK, its nations, regions and communities; bringing the UK to the world and the world to the UK; and in promoting its other purposes, helping to deliver to the public the benefit of emerging communications technologies and services and, in addition, taking a leading role in the switchover to digital television'.

<sup>68</sup> Article 5(1) of the current Royal Charter.

<sup>69</sup> Article 6(1) of the current Royal Charter provides that 'The BBC shall be independent in all matters concerning the content of its output, the times and manner in which it is supplied, and in the management of its affairs'.

<sup>70</sup> Clause 2 of the Framework Agreement expressly stipulates its status as 'Framework Agreement' for BBC Charter purposes.

<sup>71</sup> Clause 3(1) of the Framework Agreement.

<sup>72</sup> Clause 4 of the Framework Agreement.

<sup>73</sup> Article 8 of the current Royal Charter stipulates '...all the functions of the Corporation shall be exercised through either the Trust or the Board in accordance with the provisions set out in this Charter and any Framework Agreement...'

<sup>74</sup> Article 9 of the current Royal Charter.

and it is responsible to set the overall strategic direction of the BBC and to oversee the work of the Executive Board in the interest of licence fee payers.<sup>75</sup> Meanwhile the Executive Board is entrusted to deliver the BBC's services according to the priorities set by the BBC Trust and to conduct the operational management of the BBC (except the BBC Trust Unit).<sup>76</sup> Nonetheless, despite the existence of close relationship between these two bodies, they should not act as a single corporate body and the BBC Trust is requested to keep its independence of the Executive Board.<sup>77</sup>

### **6.3.2.3 Licensing of the Broadcast Media**

At present, the regulation of the broadcast media is specifically undertaken through the medium of licence. Thus, any would be broadcasters must possess a valid licence before they could broadcast their programmes to the public. The CA<sup>78</sup> empowers Ofcom to regulate any public service and commercial broadcasters (excluding BBC) that operate terrestrial television channels (digital and analogue) and satellite and cable television services (which are called as 'television licensable content services').<sup>79</sup> In applying the licence, the broadcasters need to comply with a number of basic conditions and once all of these requirements are all met, Ofcom may only refuse to award the licence on very restricted grounds.<sup>80</sup> The licence will last for 10 years but Ofcom may reduce or even revoke the licences if the

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<sup>75</sup> Article 24 of the current Royal Charter provides detailed functions of the BBC Trust.

<sup>76</sup> Article 38 of the current Royal Charter provides detailed functions of the Executive Board.

<sup>77</sup> Articles 8 and 9 of the current Royal Charter.

<sup>78</sup> Section 211 of the Communications Act 2003.

<sup>79</sup> Sections 232 - 240 of the Communications Act 2003.

<sup>80</sup> These include where Ofcom is satisfied that the applicant is not a fit and proper person to hold such licence under section 3(3)(a) of the Broadcasting Act 1990, there is likelihood that the applicant would breach restrictions under the Broadcasting Act 1990 or where the applicant is likely to contravene the Ofcom's Broadcasting Code.

broadcasters are found to have breached the conditions of their licence.<sup>81</sup>

In addition, Ofcom is obliged by section 245 to regulate independent radio stations (not operated by BBC). Ofcom is not only responsible for licensing 'independent radio services' (which are referred to as sound broadcasting services, radio licensable content services and additional radio services)<sup>82</sup> but it has to ensure that a variety of radio services are offered to cater wide different tastes of the radio listeners. As such, among the radio services granted licences by Ofcom, there is at least one service that predominantly consists of spoken words and one service that broadcasts 'music other than pop music', together with a range and diversity of local services.<sup>83</sup> Ofcom may grant radio licences for up to 12 years to any persons that are satisfied to be 'fit and proper' but those who have been convicted of radio piracy and related offences in the preceding five years are not permitted to hold a radio licence.<sup>84</sup> Similar to the television licences, Ofcom also has a wide range of sanctions to enforce any breaches of the licence conditions including the ultimate revocation of the licences.<sup>85</sup>

#### **6.3.2.4 The Broadcasting Code**

Apart from the licensing system, the broadcast media is also made subject to strict content regulations, particularly the requirement of due accuracy and impartiality.<sup>86</sup> Ofcom is required by section 319(1) to produce a code, the Ofcom Broadcasting Code (Code) that establishes standards for television and radio programmes to be

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<sup>81</sup> Sections 40 – 42 of the Communications Act 2003.

<sup>82</sup> Section 85(1) and (8) of the Broadcasting Act 1990.

<sup>83</sup> Section 85(2) of the Broadcasting Act 1990.

<sup>84</sup> Sections 86 - 89 of the Broadcasting Act 1990.

<sup>85</sup> Sections 109 - 111 of the Broadcasting Act 1990.

<sup>86</sup> Barendt and Hitchens, *Media Law* (n 29) 9.



A Comparative Study of Malaysia and the United Kingdom transmitted in the country.<sup>87</sup> The Code is accompanied by non-binding Broadcasting Code Guidance issued by Ofcom in assisting the interpretation of the provisions of the Code.<sup>88</sup> All radio and television broadcasters licensed by Ofcom, and to some extent the BBC, are required to observe the provisions of the Code. The BBC's publicly funded TV and radio services are obliged to comply with the provisions of the Code in certain areas<sup>89</sup> only whilst the BBC's commercial services are expected to comply with the Code in its entirety.<sup>90</sup>

Non-compliance with the rules will expose them to sanctions by Ofcom's Content Sanctions Committee. There is a wide range of sanctions available at its disposal that range from a direction not to repeat a programme, publication of correction or Ofcom's findings on its service, imposition of financial penalty, reduction of the licence period or revocation of the licence.<sup>91</sup> Nonetheless, in certain cases, Ofcom may not impose sanctions on the breaches but they will be reported in the Broadcast Bulletins<sup>92</sup> and such publication will give bad publicity to the broadcasters.

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<sup>87</sup> The most recent version of the Ofcom Code took effect on 21 March 2013 and it covers all programmes that are broadcast on or after 21 March 2013. See <<http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/broadcast-code>> [accessed 1 January 2015].

<sup>88</sup> The latest version of the Ofcom Broadcasting Code Guidance is issued in February 2011 and applies to all programmes that are broadcast on or after 28 February 2011. See <<http://stakeholders.ofcom.org.uk/broadcasting/guidance/programme-guidance/bguidance>> [accessed 1 January 2015].

<sup>89</sup> Six areas which need to be observed by the BBC are protecting the under-eighteens, harm and offence, crime, religion, fairness and privacy.

<sup>90</sup> Robertson and Nicol, *Media Law* (n 11) 887.

<sup>91</sup> Sections 344 – 345 of the Communications Act 2003.

<sup>92</sup> Ofcom's Broadcast Bulletin is accessible at <<http://stakeholders.ofcom.org.uk/enforcement/broadcast-bulletins>> [accessed 30 August 2011].

A Comparative Study of Malaysia and the United Kingdom

As to the content regulation of the BBC, it is largely self-regulated by its own code, the BBC's Editorial Guidelines (the Editorial Guidelines) that set out standards expected of the BBC content.<sup>93</sup> The provisions of the Editorial Guidelines are nevertheless derived from the Royal Charter and the Framework Agreement<sup>94</sup> and they are commissioned and approved by the BBC Trust. The Editorial Guidelines are in most instances comparable to the Ofcom Broadcasting Code but broader as they apply to all types of content whilst the Ofcom Broadcasting Code is only applicable to radio and television services.<sup>95</sup> The Editorial Guidelines are supplemented by Guidance that provides further explanation and the Guidance is published on the Editorial Guidelines website.<sup>96</sup>

**6.3.3 Application of the Broadcasting Regulatory System to Blogs**

The statutory regime of the broadcast media administered by Ofcom is applicable to television (including Internet live TV) and radio services that are licensed by Ofcom. Whilst Internet communications are generally not subject to Ofcom's regulation, a different approach applies to blogs or other UGC that are associated with the BBC. This is because the Editorial Guidelines explicitly provide that the standards expected of BBC content are not limited to television and radio programmes only but to other forms of communication platforms including the Internet. Therefore, it is argued that apart from blogs that are related with BBC, it is very much unlikely for other blogs that are largely published by individuals to be governed by the

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<sup>93</sup> The Editorial Guidelines are published every five years. The latest version, the Editorial Guidelines 2010, was published on 12 October 2010. See <<http://www.bbc.co.uk/editorialguidelines>> [accessed 1 January 2015].

<sup>94</sup> Section 1.3 of the Editorial Guidelines.

<sup>95</sup> Section 2 of the Editorial Guidelines.

<sup>96</sup> The Guidance is accessible at <<http://www.bbc.co.uk/guidelines/editorialguidelines/guidance>> [accessed 30 August 2011].

Political Blogs and Freedom of Expression:  
A Comparative Study of Malaysia and the United Kingdom  
specific regulatory rules and regulations established by Ofcom and the  
BBC.

## **6.4 On Demand Industry**

### **6.4.1 Overview of Video on Demand (VOD) Services**

Video on demand (VOD) is a new rising technology that permits viewers to select and watch audiovisual ('television-like') content at their own preferred time, rather than the normal fixed time slots determined by broadcasters for traditional television services. VOD services are based on one-to-one connection between viewers and providers, in contrast with the one-to-many relationship between television broadcasters and viewers. VOD services are accessible over a variety of distribution platforms including the Internet, Internet Protocol television (IPTV), cable, satellite and digital terrestrial television (DTT), smart phones and games consoles such as Nintendo's Wii, Sony's PlayStation 3 and Microsoft's Xbox.<sup>97</sup> The VOD industry is expected to flourish in line with the exploitation of new digital services and rapid growth of high-speed broadband connections. Since it has huge potential to become a serious rival to the traditional broadcast media, it would be pertinent to examine the regulatory system of the VOD and the potential of applying the system to blogs.

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<sup>97</sup> Ofcom, *Proposal for the Regulation of Video on Demand Services*, 14 December 2009, para 2.17 <<http://stakeholders.ofcom.org.uk/binaries/consultations/vod/summary/vod.pdf>> [accessed 20 December 2010].

## **6.4.2 Regulatory System of the VOD**

### **6.4.2.1 Self-regulation by the Old ATVOD**

VOD services in the UK ceased to be regulated by specific statutory provisions upon the enactment of the CA. This reflected the UK's manifestation for light-touch regulation of VOD services and the prevailing perception that the industry would be in a better position to regulate itself.<sup>98</sup> It was also claimed that neither statutory nor co-regulation was favourable as it would be 'costly to tax payer and industry, bureaucratic, inflexible, slow moving, anachronistic, reactive, and not pro-active'.<sup>99</sup> Thus, self-regulation was considered as the preferred regulatory approach and later the Association for Television on Demand (the old ATVOD) was established in 2003 as an industry-led and self-regulatory body for VOD services in the UK.<sup>100</sup>

The old ATVOD was based on the industry's interest of making VOD services free from detailed requirements for content.<sup>101</sup> The old ATVOD formulated its own Code of Practice and it contained minimal content related provisions; namely protection for children and young people under eighteen from adult content and provision of sufficient advice and guidance to VOD consumers to enable informed selection of content and commercial services.<sup>102</sup> Nonetheless, these requirements were only imposed on service providers that voluntarily subscribed to the old ATVOD Code and were admitted as members by the old ATVOD Board. Service providers that did not subscribe to the

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<sup>98</sup> Culture, Media and Sport Committee, *Self-Regulation of the Press*, (HC 2006 – 07, 375).

<sup>99</sup> Elizabeth Filkin, 'Regulatory Forbearance in Operation', 2005 <<http://www.oecd.org/dataoecd/14/47/34985339.pdf>> [accessed 10 March 2011].

<sup>100</sup> ATVOD, *ATVOD Contribution to the Public Consultation on the Revision of the TVWF Directive Issue Paper on Commercial Communication*, 5 September 2005 <[http://ec.europa.eu/avpolicy/docs/reg/modernisation/issue\\_papers/contributions/ip4-atvod.pdf](http://ec.europa.eu/avpolicy/docs/reg/modernisation/issue_papers/contributions/ip4-atvod.pdf)> [accessed 20 December 2010].

<sup>101</sup> Tambini, Leonardi, and Marsden, *Codifying Cyberspace* (n 7) 99

<sup>102</sup> Section 3.1 of the ATVOD Code of Practice.

A Comparative Study of Malaysia and the United Kingdom self-regulatory body were not expected to comply with these requirements. Similarly, private websites and blogs were excluded from the remit of the old ATVOD and exempted from its content rules since the audiovisual content that appeared in such sites was considered to be incidental to their main services.<sup>103</sup>

#### **6.4.2.2 Co-regulation by the New ATVOD and Ofcom**

The short-lived self-regulatory system of VOD services has come to an end with the implementation of the Audiovisual Media Services Regulations 2009 (2009 Regulations) on 19 December 2009.<sup>104</sup> The 2009 Regulations, which inserted a new ‘Part 4A – On-Demand Programme Services (ODPS)’<sup>105</sup> into the CA, signify the dawn of a new co-regulatory system with the appointment of Ofcom as the appropriate regulatory body for the VOD industry. Nonetheless, the new regime was not fully in operation until formal designation of ATVOD (the new ATVOD<sup>106</sup> which is also called ATVOD 2.0)<sup>107</sup> as co-regulator for editorial content was made on 18 March 2010.<sup>108</sup> In performing its designated functions,<sup>109</sup> the new ATVOD (hereinafter referred to as ATVOD) has been conferred with relevant powers and duties as Ofcom’s designee by the CA. Apart from the designation,

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<sup>103</sup> Silver and Sapte, ‘Content Regulation’ (n 49) 139.

<sup>104</sup> The 2009 Regulations were made on 9 November 2009 and laid before Parliament on 10 November 2009.

<sup>105</sup> The phrase ‘on-demand programme service’ (ODPS) echoes the definition of ‘on-demand audiovisual media service’ (i.e. a non-linear audiovisual media service) in the AVMS Directive.

<sup>106</sup> The old ATVOD has remodelled itself into a new ATVOD that is sufficiently independent of ODPS providers. ATVOD was previously known as the Association for Television on Demand, but subsequently changed its name to the Authority for Television on Demand on 21 March 2011.

<sup>107</sup> Daithi Mac Sithigh, ‘Co-Regulation, Video-on-Demand and the Legal Status of Audio-Visual Media’ (2011) 2(1) JDTV 49, 57.

<sup>108</sup> Ofcom, *Designation Pursuant to section 368B of the Communications Act 2003 of functions to the Association for Television On-Demand in Relation to the Regulation of On-Demand Programme Services*, 18 March 2010 <<http://stakeholders.ofcom.org.uk/binaries/broadcast/tv-ops/designation180310.pdf>> [accessed 24 January 2011].

<sup>109</sup> The designated functions are set out in paragraph 5 of the designation document.

A Comparative Study of Malaysia and the United Kingdom  
the Audiovisual Media Services Regulations 2010 (the 2010 Regulations) have also been passed on the same day to complement the remaining aspects of the co-regulatory system.

The inherent feature of the co-regulatory regime is the imposition of a wide range of duties and obligation on VOD providers falling within the scope of ODPS.<sup>110</sup> Section 368A (1) provides that ‘a service is an “on-demand programme service” if –

- (a) its principal purpose is the provision of the programmes the form and content of which are comparable to the form and content or programmes normally included in television programme services;
- (b) access to it is on-demand;
- (c) there is a person who has editorial responsibility for it;
- (d) it is made available by that person for use by members of the public; and
- (e) that person is under the jurisdiction of the United Kingdom for the purposes of the Audiovisual Media Services Directive.

In short, the section outlines statutory prerequisites of ODPS providers as those that principally offer television-like programmes,<sup>111</sup> empower viewers to freely select and watch the programmes at their own preferred time, possess control over selection and organisation of the programmes, offer the programmes to the public at large and that they are bound by the jurisdiction of the country. These requirements are cumulative in nature and non-fulfilment of any criterion will exclude a service from being categorised as ODPS under the CA. In addition, ATVOD has also issued a non-binding guidance (ATVOD Guidance) that offers interpretative assistance on the meaning of an ODPS to existing and future ODPS providers.

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<sup>110</sup> The phrase on-demand programme service (ODPS) echoes the definition of ‘on-demand audiovisual media service’ (i.e. a non-linear audiovisual media service) defined in Article 1(g) of the AVMS Directive.

<sup>111</sup> The phrase ‘television-like’ is used in Recital 17 of the AVMS Directive / Recital 24 of the Codified AVMS Directive.

A Comparative Study of Malaysia and the United Kingdom

Another noteworthy feature of the system is the return of content regulation on VOD services that were absent during the previous regime. The CA transposed the minimum standards for VOD programmes in the AVMS Directive<sup>112</sup> by prohibiting any materials that are likely to cause hatred based on race, sex, religion or nationality to be included in any ODPS.<sup>113</sup> Further, any materials that might seriously impair the physical, mental or moral development of persons under the age of eighteen are also prohibited unless such materials are provided in a manner that is not accessible by those persons.<sup>114</sup> These editorial content rules have been reproduced as the ATVOD Rules<sup>115</sup> and shall be observed by ODPS providers. Undoubtedly, these provisions provide certainty and comprehensive safeguards against the provision of harmful materials on VOD content. Contravention of the content rules will permit Ofcom to enforce the provisions of the CA either by imposing financial penalties or suspending or restricting the services of the ODPS providers.

**6.4.3 Application of the ODPS Co-regulatory System to Blogs**

Blogs and other UGC will be subjected to the VOD co-regulatory system if they are regarded as ODPS under the CA. Section 368A provides that all of the ODPS criteria are cumulative in nature and a service would simply fall outside the scope even if only one criterion is not satisfied by the service provider. The defining character of ODPS is the provision of programmes, the form and content of which are comparable to the form and content of programmes normally

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<sup>112</sup> Articles 3b and 3h of the AVMS Directive / Articles 6 and 12 of the Codified AVMS Directive.

<sup>113</sup> Section 368E (1) of the Communications Act 2003.

<sup>114</sup> Section 368E (2) of the Communications Act 2003.

<sup>115</sup> Rules 10 and 11 of the ATVOD Rules.

A Comparative Study of Malaysia and the United Kingdom included in television programme services. These programmes are referred to as ‘television-like’<sup>116</sup> programmes in the AVMS Directive that compete for the same audience as television broadcast. Programmes that are not television-like such as videos intended for specific groups of viewers only or short extracts from longer programmes and audio-only services fall outside the scope of the CA.

In addition, it must be the principal purpose of the VOD service providers to offer such services to viewers. If these services are included as supplementary to the main services, such as video reports in text-based online news, then they are not ODPS under the CA. The principal purpose test has been analysed by Ofcom in deciding the appeal by News Group Newspapers Ltd, the parent company of the Sun, against ATVOD’s determination which ruled that the ‘Sun Video’ section of the Sun website was an ODPS and thus fell within its remit. In upholding the appeal, Ofcom ruled that the ‘Sun Video’ section was clearly ancillary to the main function of the Sun website which provided an online version of the Sun newspaper. Thus, the Sun Video was not regarded as an ODPS under Part 4A of the CA and should therefore not be subject to regulation by ATVOD.<sup>117</sup> As a result of the appeal ruling by Ofcom, ATVOD has immediately withdrawn its earlier determinations that video services from newspapers and magazine publishers including the Sunday Times Video Library, the Independent Video, Telegraph TV, FT Video, Guardian YouTube, News of the World TV and Elle TV were ODPS under section 368A of the CA.<sup>118</sup>

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<sup>116</sup> Recital 17 of the AVMS Directive / Recital 24 of the codified AVMS Directive.

<sup>117</sup> Ofcom decision in ‘The Sun Video’ appeal against ATVOD’s determination is available at <[http://www.atvod.co.uk/uploads/files/Ofcom\\_Decision\\_-\\_SUN\\_VIDEO\\_211211.pdf](http://www.atvod.co.uk/uploads/files/Ofcom_Decision_-_SUN_VIDEO_211211.pdf)> [accessed 3 January 2015].

<sup>118</sup> For details, see ATVOD’s response to Ofcom appeal decision in <<http://www.atvod.co.uk/news-consultations/news-consultationsnews/20111221-sun-appeal-verdict>> [accessed 3 January 2015].



## Political Blogs and Freedom of Expression:

### A Comparative Study of Malaysia and the United Kingdom

By applying the aforesaid principle, it is submitted that since the provision of audiovisual materials in most political blogs and other user-generated political content is normally incidental to their largely text-based services, therefore political blogs and other largely text-based UGC sites should not be subjected to the ATVOD's remit. Conversely, where the offering of television-like content in blogs (especially for video blogs or vlogs) or other UGC sites is their principal service or alternatively if there is a distinct section in blogs or websites that principally provides television-like content and that section exists as a stand-alone service, then such blogs or websites may be considered as ODPS.

Another important feature of ODPS is that providers of such services have editorial responsibilities regarding the selection and organisation of the television-like programmes. As for political blogs and other UGC political content media sites, it is common for bloggers and UGC producers to possess absolute control over the posting and audio content or even readers' comments that appear in their blogs or sites. In such a case, it is submitted that political blogs or UGC political content media sites do satisfy the element of editorial responsibility required of ODPS.

Apart from these key requirements, reference should be made to the ATVOD Guidance issued by ATVOD. Though the ATVOD Guidance is not legally enforceable, the power to determine the status of any services is solely vested with ATVOD,<sup>119</sup> and undoubtedly it will be referred to by ATVOD in its determination process. The ATVOD Guidance provides a non-exhaustive illustrative list of types of services that are likely to be regarded as out of ODPS scope, particularly services that are primarily non-economic and not in

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<sup>119</sup> Section 368BA of the Communications Act and Rule 1 of the ATVOD Rules.

## Political Blogs and Freedom of Expression:

A Comparative Study of Malaysia and the United Kingdom competition with television broadcasting.<sup>120</sup> Though the economic dimension is not mentioned in the CA, the AVMS Directive<sup>121</sup> has clarified this point by excluding ‘private websites and services consisting of the provision or distribution of audiovisual content generated by private users for the purposes of sharing and exchange within communities of interest’ as they are not normally provided for remuneration. Nevertheless, the demarcation line between economic and non-economic services begins to blur as YouTube has in January 2007<sup>122</sup> launched YouTube Partner Program whereby popular content contributors within the YouTube community will be entitled to a portion of revenue from advertisement that run next to their videos.<sup>123</sup> Thus, it is argued that the UGC videos are likely to fall within the scope of the AVMS Directive as the contributors’ motive for uploading such content becomes commercial.<sup>124</sup>

Aside from those YouTube contributors, majority of political blogs and other user-generated political content sites do not acquire considerable economic value so as to be excluded from the scope of the regulations. Thus, it is argued that though certain blogs (such as video blogs but not text-based political blogs) may have fulfilled the prescribed elements of ODPS under the Act, they may still lack the economic motive prescribed by the ATVOD Guidance and the AVMS Directive and would therefore be unlikely to be governed by ATVOD.

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<sup>120</sup> Section 3 of the ATVOD Guidance.

<sup>121</sup> Recital 16 of the AVMS Directive / Recital 21 of the Codified AVMS Directive.

<sup>122</sup> ‘YouTube Blog: Partner Program Expands’ <<http://youtube-global.blogspot.com/2007/12/partner-program-expands.html>> [accessed 29 May 2011].

<sup>123</sup> For details on the programme, see <[www.youtube.com/partners](http://www.youtube.com/partners)> [accessed 29 May 2011].

<sup>124</sup> Elizabeth Newman, ‘EC Regulation of Audio-Visual Content on the Internet’ in Lilian Edwards and Charlotte Waelde (eds), *Law and the Internet* (3rd ed, Hart 2009) 166.

## **6.5 Internet Industry**

### **6.5.1 Overview of the UK Internet Governance**

In general, the Internet industry in the UK is currently not subjected to any specific self-regulatory or statutory bodies like the traditional media. The fact that the IPSO's remit applies to online editorial content of its member publishers and the ATVOD's remit is also applicable to all types of ODPS regardless of the platform including the Internet do not render these bodies to be regulators for the Internet as they are not specifically established to govern the Internet industry. Nevertheless, the emergence of technical and self-regulations has appeared as alternative sources to the Internet regulation.<sup>125</sup> Further, a new set of mechanisms in the form of hierarchical, market and network governance have also been developed and adopted by public and private institutions.<sup>126</sup> Thus, this indicates that the absence of formal regulatory control does not render the Internet industry to be in lawlessness as other forms of controls had been developed to address the gap in the Internet regulation.

### **6.5.2 Industrial and Legal Control of the Internet in the UK**

#### **6.5.2.1 ISPs Liability & the E-Commerce Regulations 2002**

A formal form of the Internet governance has been initiated by the Internet industry in the UK in mid-1990s,<sup>127</sup> in parallel with the 'Green Paper on the protection of minors and human dignity in audio-

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<sup>125</sup> Jacques Berleur and Yves Poulet, 'What Governance and Regulations for the Internet? Ethical Issues' in Chris Zielinski, Penny Duquenoy and Kai Kimppa (eds), *The Information Society: Emerging Landscapes*, vol 195 (Kluwer Academic Publishers 2006) 186 – 188.

<sup>126</sup> Richard Collins, 'Networks, Markets and Hierarchies: Governance and Regulation of the UK Internet' (2006) 59(2) *Parliam Aff* 314, 326 – 327.

<sup>127</sup> European Commission Communication to the European Parliament, The Council, The Economic and Social Committee and the Committee of the Regions, *Illegal and Harmful Content on the Internet* (Brussels-Luxembourg, 16 October 1996), <<http://aei.pitt.edu/5895/>> [accessed 13 June 2010].

A Comparative Study of Malaysia and the United Kingdom visual and information services'.<sup>128</sup> The industry players, particularly the UK Internet service providers (ISPs), have been pressured into self-regulation in order to avoid statutory regulation.<sup>129</sup> The wide availability of child pornography on Usenet discussion groups prompted the Metropolitan Police to issue stern warning to the ISPs,<sup>130</sup> as they were perceived to be accountable for the materials they transmit<sup>131</sup> though they were neither producers nor consumers of such content. The enrolment of the ISPs as 'Internet porn cops' is not unexpected as it is claimed to be the most obvious way to regulate the Internet<sup>132</sup> after the earlier strategies of targeting producers or recipients of illegal content have failed to bring any significant success.<sup>133</sup>

Despite being regarded as natural gatekeepers to the Internet, the ISPs should not be imposed full liability as they lack legal and actual capacity to effectively check the legality of all online content on their servers; they are merely messengers and not content providers; and the imposition of unlimited content liability on the ISPs for third party content would affect the public interest in term of access to the

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<sup>128</sup> Commission of the European Communities, *Green Paper on the Protection of Minors and Human Dignity in Audiovisual and Information Services* (Brussels, 16 October 1996), <[http://eur-lex.europa.eu/smartapi/cgi/sga\\_doc?smartapi!celexplus!prod!DocNumber&lg=en&type\\_doc=COMfinal&an\\_doc=1996&nu\\_doc=483](http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!DocNumber&lg=en&type_doc=COMfinal&an_doc=1996&nu_doc=483)> [accessed 16 June 2011].

<sup>129</sup> Parliamentary Office of Science and Technology, 'Regulating Internet Content', 2001, <<http://www.parliament.uk/documents/post/pn159.pdf>> [accessed 15 December 2010].

<sup>130</sup> Yaman Akdeniz, *Internet Child Pornography and the Law: National and International Responses* (Ashgate 2008) 251 – 252.

<sup>131</sup> 'Letter from the Metropolitan Police to the UK ISPs', August 1996, <[www.cyber-rights.org/documents/themet.htm](http://www.cyber-rights.org/documents/themet.htm)> [accessed 20 October 2010].

<sup>132</sup> Lilian Edwards, 'Pornography, Censorship and the Internet' in Lilian Edwards and Charlotte Waelde (eds), *Law and the Internet* (3rd ed, Hart 2009) 268.

<sup>133</sup> T. J. McIntyre, 'Internet Filtering: Implications of the "Cleanfeed" System' (presented at the Third Year PhD Presentation Series, University of Edinburgh, 2010) <[http://www.law.ed.ac.uk/file\\_download/communities/245\\_tj%20macintyre%20-%20internet%20filtering-%20implications%20of%20the%20cleanfeed%20system.pdf](http://www.law.ed.ac.uk/file_download/communities/245_tj%20macintyre%20-%20internet%20filtering-%20implications%20of%20the%20cleanfeed%20system.pdf)> [accessed 12 November 2010].

Internet as their business could not sustain such profound burden.<sup>134</sup> In view of that, the European Parliament and Council had issued the Directive on Electronic Commerce (the EU E-Commerce Directive) on 8 June 2000.<sup>135</sup> The EU E-Commerce Directive has spelt out limitations on the liability of the ISPs in order to remove ‘existing and emerging disparities in Member States’<sup>136</sup> legislation and case-law concerning liability of service providers acting as intermediaries’ which ‘prevent the smooth functioning of the internal market, in particular by impairing the development of cross-border services and producing distortions of competition’.<sup>137</sup> It is important to note that the immunity accorded by the EU E-Commerce Directive covers an array of information society services providers<sup>138</sup> (or alternatively referred to as intermediary service providers)<sup>139</sup> ranging from the traditional ISP sector as well as the newer forms of online intermediaries,<sup>140</sup> which are labelled as the new ‘Internet points of control’, such as search engines, hosting providers and many others.<sup>141</sup>

The EU E-Commerce Directive has been incorporated into the UK law with the enactment of the Electronic Commerce (EC Directive) Regulations 2002 (E-Commerce Regulations).<sup>142</sup> As a result, all UK ISPs and other online intermediaries that are considered as ‘service

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<sup>134</sup> Lilian Edwards, ‘The Fall and Rise of Intermediary Liability Online’ in Lilian Edwards and Charlotte Waelde (eds), *Law and the Internet* (3rd ed, Hart 2009) 59 – 61.

<sup>135</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market Directive (Directive on Electronic Commerce).

<sup>136</sup> Member States of the European Economic Area (EEA) which includes all 27 Member States of the EU plus Iceland, Liechtenstein and Norway.

<sup>137</sup> Recital 40 of the EU E-Commerce Directive.

<sup>138</sup> Article 2(b) of the EU E-Commerce Directive.

<sup>139</sup> The phrase is used as the title of section 4 of the EU E-Commerce Directive.

<sup>140</sup> Discussion on players of Internet content regulation, see Marie d’Udekem-Gevers and Yves Poulet, ‘Internet Content Regulation: Concerns from a European User Empowerment Perspective About Internet Content Regulation: An Analysis of Some Recent Statements - Part I’ (2001) 17(6) CLSR 371, 374.

<sup>141</sup> Jonathan Zittrain, ‘Internet Points of Control’ (2002) 44 BCL Rev 653, 653.

<sup>142</sup> The E-Commerce Regulations came into force on 21 August 2002.

## Political Blogs and Freedom of Expression:

A Comparative Study of Malaysia and the United Kingdom providers' of an 'information society service' under the E-Commerce Regulations are exempted from liabilities for mere conduit, caching and hosting information by regulations 17, 18 and 19 respectively.<sup>143</sup> However, the immunity from hosting is subject to the ISPs' actual knowledge or awareness of the third party content. Service provider (including ISPs) will be exempted from criminal sanction if it 'does not have actual knowledge of unlawful activity or information'; and will be protected from civil liability if it has no such actual knowledge and is 'not aware of facts or circumstances from which it would have been apparent to the service provider that the activity or information was unlawful'.<sup>144</sup> Thus, notice of actual knowledge is the key factor in determining the liability of the ISPs but the onus of proving such knowledge would not be imposed on the ISPs. The enforcement authorities or any other parties who intend to implicate the ISPs are expected to prove that the ISPs are actually aware of such content and yet fail to take appropriate action.<sup>145</sup>

The E-Commerce Regulations do not explain how actual knowledge is obtained by the ISPs but it do provide a clear interpretation on the phrase 'notice for the purpose of actual knowledge' of the ISPs, though such definition was nowhere mentioned in the EU E-Commerce Directive. Regulation 22 mandates the courts to consider a number of relevant factors including the full name and address of the sender of the notice, details of the location of the information and details of the unlawful nature of the information in order to ascertain the actual knowledge of the ISPs pursuant to regulations 18(b)(v) and 19(a)(i) of the E-Commerce Regulations.

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<sup>143</sup> These regulations have incorporated almost in verbatim the provisions of Articles 12, 13 and 14 of the EU E-Commerce Directive.

<sup>144</sup> Regulation 19(a)(i) of the E-Commerce Regulations.

<sup>145</sup> Department of Trade and Industry, 'A Guide for Business to the Electronic Commerce (EC Directive) Regulations 2002', 31 July 2002, para 6.6 and 6.8, <[www.dti.gov.uk/files/file14635.pdf](http://www.dti.gov.uk/files/file14635.pdf)> [accessed 25 October 2010].

The significance of this requirement was highlighted in *Bunt v. Tilley*,<sup>146</sup> whereby three ISP defendants were sued in respect of defamatory posting made by their customers in the Internet chat rooms. The defendants invoked the defence under the E-Commerce Regulations to escape from liability in defamation. It was ruled by Eady J that since the notice by the claimant did not include details of the location or the unlawful nature of the information, the defendants were not liable for hosting the content as they did not have actual knowledge of the alleged content.

The judgment is highly commendable as it would be wholly impractical to rule the ISP defendants as having actual knowledge without furnishing specific details, and to hold them otherwise would require the ISPs to vigorously check enormous amount of third party materials in their servers. The finding is in line with the government's derogation of Article 15 of the EU E-Commerce Directive which provides a 'no general obligation to monitor' to the ISPs. It is claimed that the inclusion of the aforesaid article 'would not only confer no additional legal certainty on intermediaries but could even introduce uncertainty if the prohibition were interpreted differently from its meaning in the Directive'.<sup>147</sup>

Although actual knowledge is critical in determining the liability of the ISPs, its presence or existence does not automatically render ISPs to be liable for hosting illegal content. ISPs would be extinguished from civil or criminal liability if they 'act expeditiously to remove or to disable access to the information'.<sup>148</sup> Unfortunately, there is no clear explanation as to what constitutes 'expeditious' and whether ISPs are required to check the alleged illegality before removing or

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<sup>146</sup> [2006] EWHC 407 (QB), [2007] 1 WLR 1243.

<sup>147</sup> Mark Turner, Mary Traynor and Herbert Smith, 'UK E-Commerce Liability: Ignorance Is Bliss' (2003) 19(2) CLSR 112, 116.

<sup>148</sup> Regulation 19(a)(ii) of the E-Commerce Regulations.

disabling access to it. It is suggested that instead of simply removing such content upon receiving the notice, ISPs should ‘do what is reasonable to prevent further communication of that notified content’.<sup>149</sup> Nonetheless, it is argued that the lack of formal guidance has resulted in the removal of the content by ISPs as they seek to avoid any legal liability for hosting third party content.<sup>150</sup>

Regulation 19 of the E-Commerce Regulations is claimed to have inserted notice and takedown provisions for third party content.<sup>151</sup> Nevertheless, the UK Government insisted that the Regulations do not include any ‘statutory notice and takedown procedures’ as it persisted to promote self-regulation and industrial codes of conduct.<sup>152</sup> The establishment of the Internet Services Providers’ Association (ISPA) in 1995 as the ISPs’ trade association is in line with the Government’s policy. All of the UK ISPs that have voluntarily become ISPA members are obliged to abide by the rules contained in the ISPA Code of Practice (the ISPA Code).<sup>153</sup> The ISPA Code, which was adopted in January 1999 and lastly amended in July 2007,<sup>154</sup> mandates its members to protect consumers and adhere to the law in promoting their services, and to ensure that ‘child abuse images’ are not offered by the ISPA members.<sup>155</sup> In the meantime, the government limits its role to merely being a facilitator as it preferred a co-regulatory

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<sup>149</sup> Chris Reed, ‘Policies for Intermediary Immunity’ (2009) 19(6) *Comps & Law* 20, 20.

<sup>150</sup> Turner, Traynor, and Smith, ‘UK E-commerce liability’ (n 147) 115.

<sup>151</sup> Akdeniz, *Internet Child Pornography and the Law* (n 130) 238.

<sup>152</sup> Gerald Spindler, *Study on the Liability of Internet Intermediaries: Country Report - United Kingdom*, 12 November 2007, <[http://ec.europa.eu/internal\\_market/e-commerce/docs/study/liability/uk\\_12nov2007\\_en.pdf](http://ec.europa.eu/internal_market/e-commerce/docs/study/liability/uk_12nov2007_en.pdf)> [accessed 16 October 2010].

<sup>153</sup> For brief description of ISPA, see <[www.ispa.org.uk/about\\_us/](http://www.ispa.org.uk/about_us/)> [accessed 15 June 2011].

<sup>154</sup> Details on the ISPA Code see <[www.ispa.org.uk/about\\_us/page\\_16.html](http://www.ispa.org.uk/about_us/page_16.html)> [accessed 15 June 2011].

<sup>155</sup> Silver and Sapté, ‘Content Regulation’ (n 49) 142.



A Comparative Study of Malaysia and the United Kingdom approach.<sup>156</sup> In relation to criminal matters, there is however a statutory notice and takedown procedure being incorporated into the Terrorism Act 2006 pertaining to encouragement of terrorism and dissemination of terrorist publications over the Internet.<sup>157</sup> Apart from terrorism-related materials, it is observed that the UK ISPs could still technically be requested to monitor illegal activities or content in specific cases,<sup>158</sup> particularly child abuse images that have been placed under the supervision of the Internet Watch Foundation (IWF).

### 6.5.2.2 Internet Watch Foundation (IWF)

The Internet Watch Foundation (IWF) is a self-regulatory association that was jointly established by several players of the UK Internet industry in September 1996.<sup>159</sup> It is the only private establishment that is officially recognised as a quasi-governmental body<sup>160</sup> and funded by voluntary contributions from the European Union and its members in the Internet industry.<sup>161</sup> Its set up has been initiated by the industry as self-regulation was preferred over government regulation in

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<sup>156</sup> *ibid.*

<sup>157</sup> Section 3 of the Terrorism Act 2006.

<sup>158</sup> Akdeniz, *Internet Child Pornography and the Law* (n 130) 239.

<sup>159</sup> The Internet Service Providers Association (ISPA), the London Internet Exchange (LINX) and the Safety Net Foundation (a charitable foundation) have jointly established the IWF (initially known as Safety-Net Foundation) subsequent to the signing of the R3 Safety Net Agreement which focuses on rating, reporting and responsibility of ISPs in handling child pornography and illegal materials on the Internet. For details, see Department for Trade and Industry, 'R3 Safety-Net', 1996, <<http://www.mit.edu/activities/safe/labeling/r3.htm>> [accessed 23 March 2011].

<sup>160</sup> The IWF has been acknowledged as a relevant authority under section 46 of Sexual Offences Act 2003 and has been granted immunity in reporting, handling and combating online child pornography. This is clearly spelt out in the Memorandum of Understanding between Crown Prosecution Service (CPS) and the Association of Chief Police Officers (ACPO), dated 6 October 2004 at <[www.iwf.org.uk/assets/media/hotline/SOA2003\\_mou\\_final\\_oct\\_2004.pdf](http://www.iwf.org.uk/assets/media/hotline/SOA2003_mou_final_oct_2004.pdf)> [accessed 23 March 2011].

<sup>161</sup> The IWF member companies include Internet service providers (ISPs), mobile operators, content providers, hosting providers, filtering companies, search providers, trade associations and the financial sector. Further details on the IWF governance, see <[www.internetwatch.org.uk/accountability/governance](http://www.internetwatch.org.uk/accountability/governance)> and <[www.internetwatch.org.uk/members](http://www.internetwatch.org.uk/members)> [accessed 23 March 2011].

A Comparative Study of Malaysia and the United Kingdom  
controlling access to illegal and unsuitable materials on the Internet.<sup>162</sup>

The IWF was entrusted to tackle the online content related issues and this approach was in parallel with the popular belief in the 1990s that regarded self-regulation as the most effective means of regulating the Internet.<sup>163</sup> Though the IWF could also be perceived as the industry's effort of evading regulatory controls, it should be noted that several governmental agencies<sup>164</sup> had also directly involved in discussions with the industry prior to its establishment. Thus, the IWF should ideally be regarded as a co-operation between the government and the industry as a partnership approach between them has been regarded as the best solution to the illegal content issues<sup>165</sup> and in meeting with the European Union's objective of ensuring the Internet as a safe and secure place to work, learn and play.<sup>166</sup>

The IWF operates a national Internet Hotline that receives complaints on potentially illegal materials from the public and IT professionals. At present, the IWF remit covers child pornography (child sexual abuse images)<sup>167</sup> hosted anywhere in the world, non-photographic materials of child pornography, such as computer generated images, animated images and cartoon drawings, and obscene adult content hosted in the UK.<sup>168</sup> Incitement to racial hatred has been removed

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<sup>162</sup> Akdeniz, *Internet Child Pornography and the Law* (n 130) 251 – 252.

<sup>163</sup> Mark O'Brien, 'Clear and Present Danger? Law and the Regulation of the Internet' (2005) 14(2) *Info & Comm Tech Law* 151, 153.

<sup>164</sup> Particularly the former Department for Trade and Industry (DTI), the Home Office and the Metropolitan Police.

<sup>165</sup> Yaman Akdeniz, 'Internet Content Regulation: UK Government and the Control of Internet Content' (2001) 17(5) *CLSR* 303, 305.

<sup>166</sup> European Commission Communication to the European Parliament, The Council, The Economic and Social Committee and the Committee of the Regions, 'Illegal and Harmful Content on the Internet' (n 127).

<sup>167</sup> The IWF prefers the term 'child abuse image' instead of child pornography as it claims that the term accurately reflects the gravity of the problem.

<sup>168</sup> The IWF remit is available at <[www.iwf.org.uk/about-iwf/remit-vision-and-mission](http://www.iwf.org.uk/about-iwf/remit-vision-and-mission)> [accessed 23 March 2011].

A Comparative Study of Malaysia and the United Kingdom from its remit as a new online service, True Vision,<sup>169</sup> has been launched by the police to handle complaints on such materials.<sup>170</sup> This development will definitely be applauded since many scholars have for long proposed for the elimination of such content alleging that any extension to the IWF original remit beyond child pornography is prone to mission creep.<sup>171</sup> Further, the complexity and seriousness of online hate crime and the lack of expertise and authority on the IWF to investigate criminal activity<sup>172</sup> may have also rendered the IWF to be an incompetent body. Thus, it is timely for hate speech to be removed from the IWF remit and be handled by a dedicated online reporting service that is monitored by the police.

Apart from the Internet Hotline, the IWF also provides a 'notice and takedown service' to the Internet hosting providers. Complaints received by the IWF will be checked and assessed by its trained staffs, Internet Content Analysts, against a number of laws.<sup>173</sup> Where the materials found to be illegal are hosted in the UK, relevant reports will be forwarded to the police and the UK ISPs.<sup>174</sup> As for overseas hosted content, the IWF will pass the reports to international Hotlines, particularly members of International Association of Internet Hotlines (INHOPE)<sup>175</sup> and police agency in that particular country. The

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<sup>169</sup> For an overview of True Vision, see <[www.report-it.org.uk/home](http://www.report-it.org.uk/home)> [accessed 23 March 2011].

<sup>170</sup> The removal of such content from the IWF remit is available at <[www.internetwatch.org.uk/about-iwf/iwf-history/iwf-highlights](http://www.internetwatch.org.uk/about-iwf/iwf-history/iwf-highlights)> [accessed 23 March 2011].

<sup>171</sup> Julian Petley, 'Web Control' (2009) 38 *Index Censorship* 87. <<http://ioc.sagepub.com/content/38/1/78.abstract>> [accessed 9 August 2011].

<sup>172</sup> Service Level Agreement between the Association of Chief Police Officers (ACPO) and the IWF dated 5 October 2010 is available at <[www.iwf.org.uk/assets/media/hotline/SLA%20ACPO%20IWF%20FINAL%20OCT%202010.pdf](http://www.iwf.org.uk/assets/media/hotline/SLA%20ACPO%20IWF%20FINAL%20OCT%202010.pdf)> [accessed 23 March 2011].

<sup>173</sup> List of laws that relate to the IWF remit is available at <[www.iwf.org.uk/hotline/the-laws](http://www.iwf.org.uk/hotline/the-laws)> [accessed 30 April 2011].

<sup>174</sup> Report process of the IWF, see <[www.iwf.org.uk/hotline/report-process](http://www.iwf.org.uk/hotline/report-process)> [accessed 13 May 2011].

<sup>175</sup> Details about INHOPE, see <[www.inhope.org/gns/home.aspx](http://www.inhope.org/gns/home.aspx)> [accessed 13 May 2011].

identified web pages are added to the IWF block list to prevent accidental access until they are removed from the source.<sup>176</sup>

Nonetheless, concerns arise over the transparency and legitimacy of the assessment made by the IWF over complaints handled by the Internet Hotline. It is stipulated that once the illegality of such content has been established, the UK police will be notified for further investigation. But it is uncertain whether the police, assuming that they have completed the investigation and discovered that the materials are not illegal, are empowered to overturn the IWF earlier judgments. Though such event is highly unlikely to occur since the IWF team of analysts are trained by the police themselves,<sup>177</sup> the position should be clearly spelt out to avoid any misconception.

Apart from the police, a takedown notice will be issued to the UK ISPs requesting them to remove at source materials rendered as illegal by the IWF. Following the decision in *Godfrey v Demon Internet Ltd*<sup>178</sup> and the E-Commerce Regulations,<sup>179</sup> it is observed that ISPs are generally keen to immediately disable access or remove illegal materials from their servers upon notification.<sup>180</sup> These principles, which impose knowledge-based liability on ISPs, is claimed to have led to a ‘takedown first, ask question later’ approach.<sup>181</sup> The claim was proved by the ‘Mystery Shopper’ test which concludes that ‘the current regulatory settlement has created an environment in which the incentive to take down content from the Internet is higher than the

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<sup>176</sup> *ibid.*

<sup>177</sup> Petley, ‘Web Control’ (n 171) 86.

<sup>178</sup> [2001] QB 201, [2000] 3 WLR 1020.

<sup>179</sup> Regulation 19 of the E-Commerce Regulations.

<sup>180</sup> Tyler Moore and Richard Clayton, ‘The Impact of Incentives on Notice and Take-Down’, *Managing Information Risk and the Economics of Security* (Springer US 2009) 199.

<sup>181</sup> McIntyre, ‘Internet Filtering: Implications of the “Cleanfeed” System’ (n 133).

## Political Blogs and Freedom of Expression:

A Comparative Study of Malaysia and the United Kingdom potential costs of not taking it down'.<sup>182</sup> As a result, it is almost unlikely for ISPs to spend additional times and efforts to investigate the accuracy of such notice. The accuracy of the notice will remain unchecked even the IWF Board has approved content assessment appeal that permits anyone, including content owners and Internet users, to challenge and appeal against the accuracy of the IWF assessment. This assertion could be supported with the latest IWF Annual Report that reveals that no appeals have been received by the IWF from the UK ISPs in 2010.<sup>183</sup> Thus, it is claimed that the transparency and legitimacy of the IWF assessment will remain disputable as the UK ISPs are basically left with no options but to respond to the takedown notice to avoid any legal implications.

The approach adopted by the UK ISPs in response to the IWF takedown notice is liable to constitute a direct infringement on content producers' right to freedom of expression. This is because ISPs are inclined to substitute their views of harmful or potentially illegal content without providing proper mechanisms and effective legal procedures for content producers to challenge and appeal against such judgment.<sup>184</sup> Though the takedown notice is aimed at illegal materials, the probability that this enforcement could have affected legitimate content should not be totally ruled out. For this reason, a 'put back procedure' has been proposed to be inserted into the E-Commerce Directive so that materials that have been wrongly removed could be

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<sup>182</sup> Christian Ahlert, Chris Marsden and Chester Yung, *How "Liberty" Disappeared from Cyberspace: The Mystery Shopper Tests Internet Content Self-Regulation*, <<http://pcmlp.socleg.ox.ac.uk/sites/pcmlp.socleg.ox.ac.uk/files/liberty.pdf>> [accessed 2 April 2011].

<sup>183</sup> IWF, *IWF Annual Report 2010*, <<http://www.iwf.org.uk/assets/media/annual-reports/Internet%20Watch%20Foundation%20Annual%20Report%202010%20web.pdf>> [accessed 20 June 2011].

<sup>184</sup> Christopher T Marsden, 'Co- and Self-Regulation in European Media and Internet Sectors: The Results of Oxford University's Study' in Christian Möller and Arnaud Amouroux (eds), *The Media Freedom Internet Cookbook* (Organization for Security and Co-operation in Europe (OSCE) 2004) 97.

A Comparative Study of Malaysia and the United Kingdom restored by ISPs.<sup>185</sup> It is believed that the rights of content producers and Internet users to freedom of expression would be protected if the proposal were implemented.

The efficacy of the notice and takedown system administered by the IWF has also been criticised as under-effective.<sup>186</sup> It is reported that the system can only trace illegal materials distributed over websites but not other channels such as peer-to-peer (P2P), Internet Relay Chat, ICQ Environment and other file sharing networks like Kazaa and eDonkey.<sup>187</sup> This shortcoming is very serious as recent records show that P2P sites are the most preferred channels for distributing illegal content and they are also difficult to be traced and intercepted.<sup>188</sup>

The effectiveness of the system in handling illegal materials hosted abroad also remains questionable. Even though the IWF proudly claimed that it has successfully reduced illegal content hosted in the UK from 18% in 1997 to less than 1% since 2003,<sup>189</sup> the same success story is yet to be seen for non-UK hosted content which currently amounts to almost 99% of the total numbers of illegal content. The problem is intensified as illegal materials hosted overseas are said to have remained accessible to Internet users in the UK at a longer period compared to the UK hosted content. This is reflected in the recent report that shows materials hosted in the UK are removed within one day<sup>190</sup> compared to weeks or days for the materials hosted abroad. The

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<sup>185</sup> Pablo Asbo Baistrocchi, 'Liability of Intermediary Service Providers in the EU Directive on Electronic Commerce' (2002) 19 Santa Clara Computer & High Tech LJ 111, 125.

<sup>186</sup> Tambini, Leonardi, and Marsden, *Codifying Cyberspace* (n 7) 122.

<sup>187</sup> Akdeniz, *Internet Child Pornography and the Law* (n 130) 7.

<sup>188</sup> Child Exploitation and Online Protection Centre (CEOP), *Strategic Overview 2009-10*, <[www.ceop.police.uk/Documents/Strategic\\_Overview\\_2009-10\\_%28Unclassified%29.pdf](http://www.ceop.police.uk/Documents/Strategic_Overview_2009-10_%28Unclassified%29.pdf)> [accessed 20 April 2011].

<sup>189</sup> IWF, 'Removal of Criminal Online Content', <<http://www.iwf.org.uk/services/removal>> [accessed 27 June 2011].

<sup>190</sup> Weixiao Wei, *Online Child Sexual Abuse Content: The Development of a Comprehensive, Transferable International Internet Notice and Takedown System*

cause of this discrepancy is attributed to the jurisdictional limitation on the part of the IWF as it has no authority to directly liaise with the foreign ISPs and could only notify the local enforcement agency and members of INHOPE in that country about the illegal materials.

To sum up, the IWF is regarded as a macro-gatekeeper that possesses absolute power over the UK ISPs and greater capacity to control the conduct of the Internet users in relation to child pornography and obscene adult content.<sup>191</sup> Although it has demonstrated great ability in tackling the UK hosted child pornography via its notice and takedown services and has attempted to solve the non-UK child pornography content by way of the Internet filtering, a number of issues particularly relating to the legitimacy, transparency and efficacy of the IWF remain in doubt. Thus, the recommendation for the IWF to be reconstituted as a public body for specifically handling child pornography and obscene adult content, and managed by a team of professional members from legal and industrial experience should be considered.<sup>192</sup>

### **6.5.2.3 Cleanfeed System**

'Cleanfeed' system is the Internet blocking system that has currently been applied in the UK to prevent inadvertent access to illegal content hosted abroad. The system was originally developed and implemented by the British Telecom (BT) in 2004.<sup>193</sup> It was designed as a short term solution to protect the UK Internet users' access from inadvertent

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(IWF & Nominet Trust, May 2011) <<http://www.iwf.org.uk/resources/independent-report>> [accessed 6 August 2011].

<sup>191</sup> Emily B Laidlaw, 'A Framework for Identifying Internet Information Gatekeepers' (2010) 24(3) IRLCT 263, 273.

<sup>192</sup> Edwards, 'Pornography, Censorship and the Internet' (n 132) 658.

<sup>193</sup> Philip Hunter, 'BT's Bold Pioneering Child Porn Block Wins Plaudits amid Internet Censorship Concerns' [2004] Comp Fr & Sec 4, 4.

## Political Blogs and Freedom of Expression:

A Comparative Study of Malaysia and the United Kingdom exposure to web sites that have been added to the IWF blacklist<sup>194</sup> i.e. child pornography sites hosted abroad.<sup>195</sup> The system is ‘voluntarily’<sup>196</sup> being adopted by almost all UK ISPs after the government threatened to legislate if ISPs refused to subscribe to the IWF blacklist by the end of 2007.<sup>197</sup> The legislation has never been passed<sup>198</sup> and this has led to numerous criticisms, in particular on the issues of legitimacy, transparency and accountability of the system.<sup>199</sup> The Internet blocking system has been jointly implemented by the private parties, namely the IWF and the UK ISPs, with the government threat at the background and without public debate.<sup>200</sup> It is also argued that this mechanism results in ‘legal action is nearly impossible, accountability difficult and the system is not open or democratic’.<sup>201</sup>

Since the IWF’s role in the application of the filtering system is limited to providing the IWF blacklist, the transparency of the alleged illegal websites has become the central issue, as they will be deployed

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<sup>194</sup> IWF, ‘IWF Facilitation of the Blocking Initiative’, <[www.iwf.org.uk/services/blocking](http://www.iwf.org.uk/services/blocking)> [accessed 27 June 2011].

<sup>195</sup> Child pornography is the only non-UK content that falls within the IWF remit and is universally recognised as illegal in Article 9 of the Cybercrime Convention in 2001.

<sup>196</sup> Children NGOs demanded the UK ISPs to sign up the system but many refused to do so citing commercial and practical reasons. See <<http://news.bbc.co.uk/1/hi/uk/4687904.stm>> and <<http://www.guardian.co.uk/technology/2006/jun/29/guardianweeklytechnologysession>> [accessed 12 July 2011].

<sup>197</sup> HC Deb 15 May 2006, col 716W.

<sup>198</sup> Chris Williams, ‘Home Office Backs Down on Net Censorship Laws’, *The Register*, 16 October 2009, <[http://www.theregister.co.uk/2009/10/16/home\\_office\\_iwf\\_legislation](http://www.theregister.co.uk/2009/10/16/home_office_iwf_legislation)> [accessed 15 August 2011].

<sup>199</sup> TJ McIntyre, ‘Blocking Child Pornography on the Internet: European Union Developments’ (2010) 24(3) IRLCT 209, 209.

<sup>200</sup> Lilian Edwards, ‘From Child Porn to China, in One Cleanfeed’, *SCRIPT-ed*, 3 (2006), <<http://www.law.ed.ac.uk/ahrc/script-ed/vol3-3/editorial.asp>> [accessed 13 April 2011].

<sup>201</sup> Yaman Akdeniz, ‘Who Watches the Watchmen? The Role of Filtering Software in Internet Content Regulation’ in Christian Möller and Arnould Amouroux (eds), *The Media Freedom Internet Cookbook* (Organization for Security and Co-operation in Europe (OSCE) 2004) 111.



A Comparative Study of Malaysia and the United Kingdom by ISPs. However, the IWF blocklist has never been published to the public for fearing that they would be a roadmap for paedophiles. Unfortunately, this opaque application is prone to manipulation and susceptible to function creep as the list could include not only child pornography but other materials as well.<sup>202</sup> For this reason, it has been proposed that an external audit of blocking databases against clear agreed criteria should be regularly conducted<sup>203</sup> so that the occurrence of similar incident to the Wikipedia blocking in 2008<sup>204</sup> could be avoided in the future.<sup>205</sup>

Apart from that, other issues on the Internet blocking system are related with the role of ISPs in filtering users' access. It is argued that the adoption of the system by ISPs could deprive users' right to freedom of expression and privacy since the blocking system will limit the accessibility of online content and monitor users' communications and behaviours over the Internet.<sup>206</sup> It is claimed that the Internet blocking does not facilitate police investigation and prosecution of offenders, as it could not preserve the evidence of the illegal materials.<sup>207</sup> Further, the filtering system is unlikely to accord total protection to Internet users as it merely misleads them by presenting an error message rather than specifying that a site is

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<sup>202</sup> Edwards, 'From Child Porn to China, in One Cleanfeed' (n 200).

<sup>203</sup> Tambini, Leonardi, and Marsden, *Codifying Cyberspace* (n 7) 117.

<sup>204</sup> The Wikipedia was unable to be edited by the UK users because one page containing an image of pubescent girl on the Scorpion's album cover has been rendered as illegal by the IWF and was blocked by the UK ISPs.

<sup>205</sup> John Ozimek, 'Scorpions Tale Leaves IWF Exposed: "Look, That Regulator Isn't Wearing Any Clothes"', *The Register*, 9 December 2008 <[www.theregister.co.uk/2008/12/09/iwf](http://www.theregister.co.uk/2008/12/09/iwf)> [accessed 12 March 2011].

<sup>206</sup> Ian Brown, 'Beware Self-Regulation' (2010) 39(1) *Index Censorship* 102. <<http://ioc.sagepub.com/content/39/1/98.abstract>> [accessed 12 May 2011].

<sup>207</sup> Wei, 'Online Child Sexual Abuse Content: The Development of a Comprehensive, Transferable International Internet Notice and Takedown System' (n 190).

A Comparative Study of Malaysia and the United Kingdom blocked<sup>208</sup> and it is also vulnerable to over blocking or under blocking.<sup>209</sup> The system is also not fool proof as it can be circumvented by users that are technically skilled and it is also incapable of handling closed networks such P2P, IRC or instant messaging.<sup>210</sup>

### **6.5.3 Application of the Internet Regulatory Regime to Blogs**

Since the Internet industry is currently not governed by specific rules or regulatory bodies, undoubtedly political blogs would also be subjected to none.<sup>211</sup> The IWF, the self-regulatory body that is entrusted to handle online content in the country, does not regulate political blogs since its role and remit are designed to tackle child pornography and obscene adult materials. Though it could be argued that the Internet blocking system, which is being applied by the IWF and the UK ISPs in an opaque mode, could be exploited to filter other types of content including dissident political views and opinion, the likelihood of such incident is very much unlikely.

Further, the Bloggers' Code of Ethics<sup>212</sup> has also been created by CyberJournalist.net based on the Society of Professional Journalists Code of Ethics in 2003. Nonetheless, its provisions only provide advisory guidelines on online journalistic ethics without formal

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<sup>208</sup> Frank Fisher, 'Caught in the Web', *The Guardian*, 17 January 2008, <[www.guardian.co.uk/commentisfree/2008/jan/17/caughtintheweb](http://www.guardian.co.uk/commentisfree/2008/jan/17/caughtintheweb)> [accessed 18 August 2011].

<sup>209</sup> Akdeniz, 'Who Watches the Watchmen? The Role of Filtering Software in Internet Content Regulation' (n 201) 108 – 109.

<sup>210</sup> *ibid.*

<sup>211</sup> The only legislation applicable to the Internet industry is the E-Commerce Regulations which accord immunity to any service providers of an information society service from liabilities for mere conduit, caching and hosting information. The availability of the defence to blogs is elaborated in details in Part 6.2 of Chapter 7 below.

<sup>212</sup> The Bloggers' Code of Ethics, see <[www.cyberjournalist.net/news/000215.php](http://www.cyberjournalist.net/news/000215.php)> [accessed 18 August 2011].

A Comparative Study of Malaysia and the United Kingdom sanction.<sup>213</sup> There were also reports that stated the European Union planned to regulate blogs for ‘polluting cyberspace with misinformation and malicious intent’.<sup>214</sup> Nonetheless, it is submitted that so long as blogs do not create any novel issues that could not be governed by general laws, there appears to be no concrete reasons for them to be regulated by specific rules or regulatory bodies.

## 6.6 Conclusion

The incessant development and prevalent acceptance of numerous forms of social media, including blogs, Facebook and Twitter, have resulted in the emergence of these platforms as influential means of mass communication and self-expression. Consequently, anyone with a computer and Internet connection may publish or share his personal views or thoughts to an unlimited audience via these online channels. Nonetheless, the instantaneous and ubiquitous access as well as the ease of use of these new social media websites, in particular Facebook and Twitter,<sup>215</sup> have tempted certain Internet users to misuse these channels by publishing comments or remarks with too little regard for the consequences for others or themselves. The growing use of these new ways of communication, particularly in the past 10 years, undoubtedly presents new challenges to legislators and enforcement bodies in the UK over how to regulate illegal content in the cyber world.

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<sup>213</sup> Tambini, Leonardi, and Marsden, *Codifying Cyberspace* (n 7) 114.

<sup>214</sup> Danial Hannan, ‘How the EU Plans to Regulate Blogs’, *The Telegraph*, 4 September 2009, <[http://blogs.telegraph.co.uk/news/danielhannan/5145273/How\\_the\\_EU\\_plans\\_to\\_regulate\\_blogs](http://blogs.telegraph.co.uk/news/danielhannan/5145273/How_the_EU_plans_to_regulate_blogs)> [accessed 21 April 2011].

<sup>215</sup> At present, Facebook and Twitter are the most widely used social applications in the UK with more than 31 million and 15 million active users respectively. Details on the UK Social Media Statistics in 2014 see <<http://www.rosemcgrory.co.uk/2014/01/06/uk-social-media-statistics-for-2014>> [accessed 13 January 2015].

A Comparative Study of Malaysia and the United Kingdom

A number of criminal prosecutions have been initiated against social media users for messages posted on Facebook, Twitter and other social media applications. Among the earlier case occurred in October 2012 when a teenager from Lancashire, Matthew Woods,<sup>216</sup> was sentenced to 12 weeks' imprisonment (cut to eight weeks on appeal) after he pleaded guilty for posting incredibly distasteful jokes and sexually explicit comments about the missing of a young girl on his Facebook page. The most notable criminal prosecution against social media users is the case of Paul Chamber, better known as the 'Twitter joke trial'.<sup>217</sup> Mr Chamber was initially convicted for tweeting a joke about blowing up Robin Hood Airport in Doncaster Sheffield, but fortunately his conviction was overturned on appeal. Following public criticisms against criminal prosecutions of social media users as well as uncertainties surrounding the Twitter joke trial, the Director of Public Prosecutions has on 19 December 2012 issued interim guidelines on social media prosecutions. And after three month consultation period, the final guidelines, which set a high threshold for prosecution in cases involving communications that may be considered grossly offensive, indecent, obscene or false, were finally published in June 2013.<sup>218</sup>

As for blogs with political expression, detailed analysis of the various types of regulatory bodies that are currently being employed to regulate the media in the UK shows that certain blogs have already been subjected to some forms of existing controls. IPSO and the BBC, for instance, are empowered to adjudicate on complaints involving blogs that are associated with the press and the BBC. Nonetheless,

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<sup>216</sup> *DPP v Woods (Matthew)* Unreported October 2012 (MC).

<sup>217</sup> *Chambers v DPP* [2012] EWHC 2157 (Admin), [2013] 1 All ER 149.

<sup>218</sup> For details on guidelines on prosecuting cases involving communications sent via social media, see <[http://www.cps.gov.uk/legal/a\\_to\\_c/communications\\_sent\\_via\\_social\\_media](http://www.cps.gov.uk/legal/a_to_c/communications_sent_via_social_media)> [accessed 14 January 2015].

## Political Blogs and Freedom of Expression:

### A Comparative Study of Malaysia and the United Kingdom

they are not permitted to extend their powers beyond their remits and therefore political blogs or other UGC administered by individuals and ordinary public members will be out of their reach. Likewise for ATVOD, it may only regulate any service providers that are considered to have offered ODPS under the CA. Since political blogs are very much unlikely to fall within ATVOD's remit, then the co-regulatory regime for VOD services cannot be applied to political blogs. As for the IWF, though it is the only self-regulatory body that has been established to regulate online content, its remit does not include political blogs as it has been specifically designed to handle child pornography and obscene adult materials. Thus, it is submitted that the specific regulatory regimes that have been established to regulate the traditional media as well as the emerging on-demand and the Internet industries cannot be applied to political blogs or other UGC in the UK.

## 7.1 Introduction

The advent of various forms of web-based communications has facilitated the exercise of the right to freedom of expression. Nonetheless, the ease of accessibility and publication in the online world creates a number of risks, as these digital platforms are prone to be exploited by unscrupulous Internet users in the name of freedom of speech. By resorting to numerous forms of Web 2.0 applications, in particular social media and blogs, all types of online content, including hate speech, incitement to racial and religious hatred, and defamatory publications can be easily created and disseminated to the public. As such, it is important that similar legal safeguards are put in place for online and offline speech to protect the interests of the public and the state. On the other hand, the complexity of online speech must be taken into account and any restrictions on speech must be clearly set out in laws, be based on compelling grounds, be proportionate and necessary.

There is a wide range of legal controls that may be applied to control online expression on the Internet. These include public order laws, specific laws for targeted communications and media law.<sup>1</sup> Public order laws have been controversially used to convict a Facebook user for inciting riots simply because he created a web page called ‘The Warrington Riots’ during the August 2011 riots in England.<sup>2</sup> In another incident, a student was charged under section 4A of the Public Order Act 1986 and was sentenced to imprisonment for 56 days for

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<sup>1</sup> Jacob Rowbottom, ‘To Rant, Vent and Converse: Protecting Low Level Digital Speech’ (2012) 71(2) CLJ 355, 356 – 365.

<sup>2</sup> In *R v Blackshaw* [2011] EWCA Crim 2312, [2012] 1 WLR 1126 Mr Sutcliffe pleaded guilty to the criminal charge of encouraging or assisting the commission of an offence under section 44 of the Serious Crime Act 2007. He was sentenced to four years’ imprisonment though he insisted that the page was only a joke and he had in fact removed the page and issued an apology.

Political Blogs and Freedom of Expression:  
A Comparative Study of Malaysia and the United Kingdom  
posting offensive comments on Twitter about the on-pitch collapse of  
a Premier League footballer.<sup>3</sup>

Laws designed to govern harmful messages to a specific individual or set of individuals have also been extended to communications on the Internet. The Malicious Communications Act 1998, which was enacted to tackle the problem of poison pen letters, has been used to caution a man for making a false allegation about a TV show in his blog.<sup>4</sup> And in the infamous Twitter joke trial, a man was convicted for sending a message of a menacing character by a public electronic communication network contrary to sections 127(1)(a) and (3) of the Communications Act 2003.<sup>5</sup> The widescale prosecution of social media users has led to growing disquiet and public criticism about the heavy-handed enforcement of the criminal laws. Subsequently, the Director of Public Prosecutions of England and Wales on 19 December 2012 issued interim guidelines on prosecuting cases involving communications sent via social media.<sup>6</sup> Apart from that, actions for defamation and misuse of private information have also been brought in relation to online content.

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<sup>3</sup> Steven Morris, 'Student Jailed for Racist Fabrice Muamba Tweets' *The Guardian* (27 March 2012) <<http://www.guardian.co.uk/uk/2012/mar/27/student-jailed-fabrice-muamba-tweets>> accessed 11 April 2013. at <[www.guardian.co.uk/uk/2012/mar/27/student-jailed-fabrice-muamba-tweets](http://www.guardian.co.uk/uk/2012/mar/27/student-jailed-fabrice-muamba-tweets)> [accessed 3 April 2013].

<sup>4</sup> Press Association, 'Britain's Got Talent Blogger Cautioned by Police' *The Guardian* (3 July 2011) <<http://www.guardian.co.uk/tv-and-radio/2011/jul/03/britains-got-talent-blogger-cautioned>> [accessed 11 April 2013].

<sup>5</sup> *Chambers v DPP* [2012] EWHC 2157 (Admin), [2013] 1 All ER 149. Fortunately, the conviction was quashed on his third appeal as the court found that his tweet 'did not constitute or include a message of a menacing character'.

<sup>6</sup> The interim guidelines set out the approach prosecutors should take when deciding whether to prosecute individuals for offences committed on social media. However, the guidelines do not have the effect of replacing the Code for Crown Prosecutors as they merely supplement the provision of the Code. See <[www.cps.gov.uk/consultations/social\\_media\\_consultation.html](http://www.cps.gov.uk/consultations/social_media_consultation.html)> [accessed 12 January 2013].

The control of blogs through the general law or specific media rules involves a vast area and it is not possible to discuss at any length all of the aforesaid laws in this study. For this reason, this part of the thesis will focus on the field of defamation. This is because defamation law constitutes one of the many permitted restrictions on freedom of expression and one, which is open to being deployed in relation to political speech. It is therefore imperative to see how online defamatory materials are dealt with in the UK and Malaysia. In view of this, the chapter provides a brief overview of defamatory statements; the status of defamatory posts by bloggers and defamatory comments by readers (libel or slander); the application of multiple and single publication rules to Internet publication; liability of online intermediaries for third party content and linking; and potential defences in online defamation proceedings under the Defamation Act 1996, the Defamation Act 2013 and the Electronic Commerce (EC Directive) Regulations 2002 in the UK; as well as under the Malaysian Defamation Act 1957 and the Malaysian Communications & Multimedia Content Code for the Internet industry in Malaysia.

## 7.2 Overview of Defamatory Statement

The law of defamation in the UK<sup>7</sup> is principally governed by the Defamation Act 1996 though now is also significantly shaped by the Defamation Act 2013.<sup>8</sup> The 1996 statute does not provide explicit definition of what defamatory means and nor does the subsequent act. In the leading case of *Sim v Stretch*,<sup>9</sup> it was proposed by Lord Atkin that a defamatory statement is one which injures the reputation of

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<sup>7</sup> Defamation may attract civil and criminal liability, but criminal libel in the UK has been abolished following the Law Commission Working Paper, *Criminal Libel* (Law Com No 84, 1982).

<sup>8</sup> The Defamation Act 2013 received Royal Assent on 25 April 2013 and came into force on 1 January 2014.

<sup>9</sup> [1936] 2 All ER 1237 (HL).



another by exposing him to ‘hatred, contempt or ridicule’, or which tends to lower him ‘in the estimation of right-thinking members of society’.<sup>10</sup> Since then, it has been generally accepted that defamation refers to ‘the publication of a statement which reflects on a person’s reputation and tends to lower him in the estimation of right-thinking members of society generally or tends to make them shun or avoid him’.<sup>11</sup>

The decision was referred by Tugendhat J in *Thornton v Telegraph Media Group Ltd*<sup>12</sup> which ruled that ‘whatever definition of “defamatory” is adopted, it must include a qualification or threshold of seriousness, so as to exclude trivial claims’.<sup>13</sup> The imposition on the existence of a ‘threshold of seriousness’ in what is defamatory appears to be in parallel with the judgment in *Jameel v Dow Jones & Co*<sup>14</sup> that necessitates the commission of real and substantial tort in any defamation suit.

The Defamation Act 2013 has inserted an additional prerequisite, as section 1(1) requires the claimant to prove the publication of the alleged defamatory statement has caused or is likely to cause serious harm to his reputation before a defamation action can be initiated.<sup>15</sup> As for bodies trading for profit, the ‘serious harm’ condition requires them to demonstrate that the publication of allegedly defamatory statement has caused or is likely to cause serious financial loss to

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<sup>10</sup> *ibid* 1240.

<sup>11</sup> W. V. H. Rogers, *Winfield & Jolowicz on Tort* (18th ed, Sweet & Maxwell 2010) 515.

<sup>12</sup> [2010] EWHC 1414 (QB), [2011] 1 WLR 1985.

<sup>13</sup> *ibid* [90].

<sup>14</sup> [2005] EWCA Civ 75, [2005] QB 946.

<sup>15</sup> Section 1(1) of the Defamation Act 2013 states ‘A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant’.

A Comparative Study of Malaysia and the United Kingdom them.<sup>16</sup> It is argued that the requirement of serious harm is likely to make it more difficult to commence defamation proceedings as it has raised the bar for bringing a claim in the UK.

In Malaysia, the law on defamation is contained in the Malaysian Defamation Act 1957.<sup>17</sup> Unfortunately, the statute provides no single definition of what defamation is. As a result, local courts in Malaysia have closely followed the law in the UK. Even then, there is no comprehensive definition of what constitutes defamatory matter. The interpretation of the word has been deliberated in a number of cases. In *Syed Husin Ali v Syarikat Perchetakan Utusan Melayu Bhd & Anor*,<sup>18</sup> Mohd Azmi J set out the defamatory test as follows:

[T]he test of defamatory nature of a statement is its tendency to excite against the plaintiff the adverse opinion of others, although no one believes the statement to be true. Another test is: would the words tend to lower the plaintiff in the estimation of right thinking members of society generally? The typical type of defamation is an attack upon the moral character of the plaintiff attributing crimes, dishonesty, untruthfulness, ingratitude or cruelty.<sup>19</sup>

In the subsequent case of *Tun Datuk Patinggi Haji Abdul-Rahman Ya'kub v Bre Sdn Bhd & Ors*,<sup>20</sup> Richard Malanjum concluded that the test of defamatory nature of a statement is its tendency to excite against the plaintiff the adverse opinion of others, even though nobody believes in the truth of the statement. It was highlighted that:

As to whether the words complained of in this case were capable of being, and were, in fact, defamatory of the plaintiff, the test to be considered is whether the words complained of were calculated to

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<sup>16</sup> Section 1(2) of the Defamation Act 2013 provides 'For the purpose of this section, harm to the reputation of a body that trades for profit is not "serious harm" unless it has caused or is likely to cause the body serious financial loss'.

<sup>17</sup> The Malaysian Defamation Act 1957, which is in *pari materia* with the English Defamation Act 1952, governs civil defamation whilst criminal libel is dealt with under sections 499 and 500 of the Malaysian Penal Code.

<sup>18</sup> (1973) 2 MLJ 56.

<sup>19</sup> *ibid* 58.

<sup>20</sup> [1996] 1 MLJ 393.

A Comparative Study of Malaysia and the United Kingdom

expose him to hatred, ridicule or contempt in the mind of a reasonable man or would tend to lower the plaintiff in the estimation of right – thinking members of society generally.<sup>21</sup>

The issue has also been discussed in *Chok Foo Choo @ Chok Kee Lian v The China Press Bhd.*<sup>22</sup> It was observed by Gopal Sri Ram JCA:

[T]he test which is to be applied lies in the question: do the words published in their natural and ordinary meaning impute to the plaintiff any dishonourable or discreditable conduct or motives or a lack of integrity on his part? If the question invites an affirmative response, then the words complained of are defamatory.<sup>23</sup>

In *Mark Ignatius Uttley @ Mark Ostyn v Wong Kam Hor & Anor*,<sup>24</sup> Kamalanathan Ratnam J highlighted that ‘as to whether the said meaning is defamatory, the test is to see if such words tend to make reasonable people think the worse of the plaintiff or whether such words would cause him to be shunned or avoided’.<sup>25</sup> These judicial interpretations have been considered in *Dato’ Seri Anwar bin Ibrahim v The New Straits Times Press (M) Sdn Bhd & Anor*.<sup>26</sup> It was ruled that:

In my assessment, therefore, an imputation would be defamatory if its effect is to expose the plaintiff, in the eyes of community, to hatred, ridicule or contempt or to lower him or her in their estimation or to cause him or her to be shunned and avoided by them. This is to be judged by ordinary, right-thinking members of the community or an appreciable and reputable section of the community.<sup>27</sup>

As to the requirement of ‘threshold of seriousness’ that was established in *Jameel v Dow Jones & Co*<sup>28</sup> and is now incorporated in the Defamation Act 2013, it has yet to be required by the courts in

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<sup>21</sup> *ibid* 402 – 403.

<sup>22</sup> [1991] 1 MLJ 371.

<sup>23</sup> *ibid* 374.

<sup>24</sup> [2002] 4 MLJ 371.

<sup>25</sup> *ibid* 382.

<sup>26</sup> [2010] 2 MLJ 492.

<sup>27</sup> *ibid* 504.

<sup>28</sup> *Jameel v Dow Jones & Co* (n 13).

Malaysia. In the absence of any reported decisions and express statutory provisions, the publication of any statement will be regarded as defamatory under the Malaysian law if such statement conforms to the criteria formulated by the courts. As such, if an imputation exposes a person to hatred, contempt or ridicule, or tends to lower him in the estimation of right-thinking members of society generally, or causes him to be shunned or avoided, such statement will be deemed defamatory. For that reason, it is submitted that what constitutes defamation in Malaysia is to be distinguished from the current position in the UK as the Malaysian law does not require a serious harm threshold to be proved before defamation proceedings be initiated against the defendant.

### 7.3 Libel or Slander

In the UK and Malaysia, a defamatory statement may constitute a libel or slander. The differences between these two types of defamation have been highlighted by Kay L.J in *South Hetton Coal Company Ltd v North-Eastern News Association Ltd*:

[I]n an action for libel, i.e., where the defamatory statement is printed or written and published, and not merely communicated orally, generally speaking damage is presumed, and that which is called special damage, viz., the suffering some definite loss, need not be proved or alleged.<sup>29</sup>

As such, it is generally understood that libel is committed when a defamatory statement is made and published in some permanent and visible form like writing, printing, pictures, visual images, gestures and other methods of signifying meaning even waxworks or effigies.<sup>30</sup> On the other hand, slander refers to oral defamation or defamation published in transient form. It may also include disparaging gestures

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<sup>29</sup> [1894] 1 QB 133, 145.

<sup>30</sup> *Monsoon v Tussauds Ltd* (1894) 1 QB 671, 692.

A Comparative Study of Malaysia and the United Kingdom or actions.<sup>31</sup> Nonetheless, defamatory words spoken over the air on television or radio are treated as libel and not slander<sup>32</sup> since such words are normally read out from written materials. Thus, the central distinction between libel and slander lies in the ‘form’ of publication, ‘permanent’ versus ‘transient’.

Apart from that, libel is actionable per se as damage is presumed and that special damage need not be proved or alleged. This however does not mean that a substantial award of damages is to be given to the claimant where it is proved that as a result of the publication of the defamatory statement, the claimant has suffered limited damage or no damage at all. Further, the claimant is now statutorily required to prove that the defamation has caused or is likely to cause serious harm.<sup>33</sup> With regard to slander, it requires the claimant to prove that some special damage (i.e. pecuniary loss or loss capable of assessment in monetary terms) has been suffered as a result of the slanderous statement, unless it falls within specified exceptions.<sup>34</sup>

Further, libel has a greater capacity to cause harm and its damages could be normally much higher than slander.<sup>35</sup> This is perhaps due to the permanency of libellous statement and its wide reach in terms of

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<sup>31</sup> *BHLB Trustee Bhd & Anor v HSBC (M) Trustee Bhd & Ors* [2006] 4 MLJ 48.

<sup>32</sup> Section 166(1) of the Broadcasting Act 1990.

<sup>33</sup> Section 1(1) of the Defamation Act 2013.

<sup>34</sup> Slanderous statements that are actionable per se include words imputing a crime for which the claimant can be made to suffer physically by way of punishment, words imputing to the claimant a contagious or infectious disease, words calculated to disparage the claimant in any office, profession, calling, trade or business held or carried on by him at the time of publication, and words imputing adultery or unchastity to a woman or girl. Patrick Milmo, WVH Rogers and Clement Gatley (eds), *Gatley on Libel and Slander* (11th ed, Sweet & Maxwell/Thomson Reuters 2008) paras 4.3, 4.13, 4.15, 4.20; Shad Saleem Faruqi, *Mass Media Laws and Regulations in Malaysia* (Asian Media Information and Communication Centre 1998) 53.

<sup>35</sup> Mohamed Ali Saeh, ‘Online Defamation and Intermediaries’ Liability: International’ (Social Science Research Network 2012) SSRN Scholarly Paper ID 2191844 14. <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2191844](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2191844)> [accessed 29 January 2013].

A Comparative Study of Malaysia and the United Kingdom dissemination compared to slander.<sup>36</sup> In addition, libel denotes a more deliberate act or contemplated state of mind, whilst slander can sometimes arise in the heat of the moment of exchanges.<sup>37</sup> Therefore, it is important to classify defamatory publications as libel or slander as there are grave legal consequences between them.

Nonetheless, the difference between the two becomes more difficult to discern with the convergence of telecommunications, broadcasting and information technology industries and the development of numerous forms of Internet based publications such as social networking sites, blogs and many others. Thus, reference must be made to the existing provisions and relevant cases in order to determine the status of defamatory content published on the Internet-based platforms, particularly blogs under the law in the UK and Malaysia.

By virtue of section 166(1) of the Broadcasting Act 1990,<sup>38</sup> broadcasting by radio and television are treated as libel. The section provides:

For the purposes of the law of libel and slander (including the law of criminal libel so far as it relates to the publication of defamatory matter) the publication of words<sup>39</sup> in the course of any programme included in a programme service shall be treated as publication in permanent form.

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<sup>36</sup> K. Kuldeep Singh, *Tort of Defamation* (LexisNexis 2007) 13.

<sup>37</sup> *ibid.*

<sup>38</sup> Section 204(3) of the Broadcasting Act 1990 states the statute is applicable to the whole UK. However, there are a few exceptions and one of them relates to the distinction between libel and slander in section 166(1). By virtue of subsections (4) and (5) of section 166, the difference is only applicable to England, Wales and Northern Island but not Scotland as all forms of defamation are actionable in Scots law without proof of special damage.

<sup>39</sup> Section 16(1) of the Defamation Act 1952 provides that any reference to words 'shall be construed as including a reference to pictures, visual images, gestures and other methods of signifying meaning'.

Nonetheless, the application of this provision to online content is yet to be judicially scrutinised by courts in the UK. Materials transmitted via the Internet could be rendered as publications in permanent form and consequently constitute libel if such publications fall within the coverage of the phrase ‘publication of words in the course of any programme included in a programme service’. Section 202(1) of the Broadcasting Act 1990 defines the word ‘programme’ as including ‘an advertisement and, in relation to any service, includes any item included in that service’. Further, section 201(1) provides that the term ‘programme service’ refers to:

[A]ny of the following services (whether or not it is, or it requires to be, licensed under this Act), namely—

(aa) any service which is a programme service within the meaning of the Communications Act 2003;<sup>40</sup>

(c) any other service which consists in the sending, by means of an electronic communications network (within the meaning of the Communications Act 2003),<sup>41</sup> of sounds or visual images or both either –

(i) for reception at two or more places in the United Kingdom (whether they are so sent for simultaneous reception or at different times in response to requests made by different users of the service); or

(ii) for reception at a place in the United Kingdom for the purpose of being presented there to members of the public or to any group of persons.

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<sup>40</sup> Section 405(1) of the Communications Act 2003 defines ‘programme service’ to mean a television programme service, the public teletext service, an additional television service, a digital additional television service, a radio programme service, or a sound service provided by the BBC. ‘Television programme’ is defined as any programme (with or without sounds), which is produced wholly or partly, to be seen on television and consists of moving or still images or of legible text or of a combination of those things.

<sup>41</sup> The phrase ‘electronic communications network’ in section 32(1)(a) of the Communications Act 2003 refers to ‘a transmission system for the conveyance, by the use of electrical, magnetic or electro-magnetic energy, of signals of any description’.

Based on these provisions, it is clear that Internet publications such as blogs, Wiki, YouTube, and many others are most likely to be included within the interpretation of the phrase ‘programme services’ in section 201(1)(c), and these transmitted materials either in the form of text, image, audio or video are to fall within the meaning of ‘programme’ in section 202(1) of the Broadcasting Act 1990. Thus, the likelihood is that libel, rather than slander, is the dominant tort for Internet-based publications.

On the contrary, it may be argued that online content would fall short of the requirement of ‘sending’ in section 201(1)(c) since such content is not being ‘sent’ but ‘pulled’ by Internet users. However, this argument is difficult to sustain due to the presence of the words in parentheses in section 201(1)(c)(i) which states that ‘whether they are so sent for simultaneous reception or at different times in response to request made by different users of the service’. Therefore, defamation published via online publications including blogs will be deemed as publications in permanent form and constitute libel under section 166(1) of the Defamation Act 1996.<sup>42</sup>

Regardless of the conflicting argument, it has been suggested that court should treat online defamation, especially blog postings as slander rather than libel.<sup>43</sup> Blog entries are said to have more in common with the spoken words, as they exist in a ‘low-trust culture’ and are unlikely to be viewed as authoritative, errors in blogs can be corrected within minutes, and those who have been defamed by blogs

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<sup>42</sup> Internet publications which are not sent for reception at two or more places in the country such as e-mail sent to one person in the UK or to recipients outside the country as well as online conversation between two persons in the UK or with people outside the country by using instantaneous forms of Internet communication like Voice over Internet Protocol (VoIP) and video-conferencing services shall not be included within the scope of the provision.

<sup>43</sup> Glenn Reynolds, ‘Libel in the Blogosphere: Some Preliminary Thoughts’ (Social Science Research Network 2007) SSRN Scholarly Paper ID 1030527 1164 – 1166. <<http://papers.ssrn.com/abstract=1030527>> [accessed 10 February 2013].



have a greater ability to reply to such accusations.<sup>44</sup> Nonetheless, the assertion has been criticised as wanting to represent the entire blogosphere and unfounded.<sup>45</sup> It failed to consider the role of search engines in establishing authority and the devastating impact of defamatory blog entries that are linked with traditional websites, discussion boards and other blogs.<sup>46</sup> Further, not all bloggers are active in correcting errors and the victims may also not be immediately aware of the defamatory posts after they have been published online.<sup>47</sup>

Apart from that, cases involving defamatory posts by bloggers in the UK have also been commenced and tried under the law of libel rather than slander.<sup>48</sup> Even though the main issues of these cases centred on the seriousness threshold for damage to reputation and the issue of abuse of process, there is little doubt that entries by bloggers are not to be regarded as libel since postings or articles in blogs usually signify a deliberate act or contemplated state of mind of bloggers. It is however submitted that these criteria may accord some protection to amateur bloggers since they normally do not have huge number of readers or followers in the blogosphere.

Nonetheless, there arises uncertainty with regard to comments by blog readers though defamatory words that are written in a permanent form are almost certainly libel in technical sense. This is due to the rulings

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<sup>44</sup> Ibid 1164 – 1166.

<sup>45</sup> Anthony Ciolli, ‘Defamatory Internet Speech: A Defense of the Status Quo’ (2006) 25 QLR 853, 854.

<sup>46</sup> Ibid 859 – 860.

<sup>47</sup> Ibid 861 – 862.

<sup>48</sup> This can be illustrated with a number of cases including *Carrie v Tolkien* [2009] EWHC 29 (QB), [2009] EMLR 9; *Ali v Associated Newspapers Ltd* [2010] EWHC 100 (QB), 2010 WL 20036; *Kaschke v Gray* [2010] EWHC 690 (QB), [2011] 1 WLR 452; *Davison v Habeeb* [2011] EWHC 3031 (QB), [2012] 3 CMLR 6. Nonetheless, the question of whether blog posts constitute libel or slander has not been contested in these cases.

A Comparative Study of Malaysia and the United Kingdom in *Smith v ADVFN Plc*<sup>49</sup> whereby the court ruled that bulletin board exchanges on the Internet are more susceptible of being equated with slander. It was observed by Eady J that such comments resemble:

[C]ontributions to a casual conversation (the analogy sometimes being drawn with people chatting in a bar) which people simply note before moving on; they are often uninhibited, casual and ill thought out; those who participate know this and expect a certain amount of repartee or ‘give and take’.<sup>50</sup>

Further, statements in bulletin boards were not meant to be taken seriously as ‘it is often obvious to casual observers that people are just saying the first thing that comes into their heads and reacting in the heat of the moment’.<sup>51</sup> The decision appears to be a bold departure from the earlier judgment in *Godfrey v Demon Internet Ltd*<sup>52</sup> which ruled that defamatory articles posted on the Usenet as libel.

The ruling by Eady J has been subsequently quoted with approval by Sharp J in *Clift v Clarke*<sup>53</sup> when the court refused to grant an order for the disclosure of the identity of the persons who made comments on the Daily Mail website on the ground that such comments were mere ‘pub talk’ and it would be ‘fanciful to suggest any reasonable sensible reader would construe them in any other way’.<sup>54</sup> In relation to this, it is submitted that comments on blogs could be equally considered as ‘pub talk’ that are expressed in ‘the heat of the moment’ and should therefore be rightly regarded as slander. Nonetheless, certain blog comments imputing that a person has committed a criminal offence, or is suffering from a disease,<sup>55</sup> or disparaging remarks on his

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<sup>49</sup> [2008] EWHC 1797 (QB), 2008 WL 2872559.

<sup>50</sup> *ibid* [14].

<sup>51</sup> *ibid* [17].

<sup>52</sup> [2001] QB 201, [2000] 3 WLR 1020.

<sup>53</sup> [2011] EWHC 1164 (QB), 2011 WL 441883.

<sup>54</sup> *ibid* [36].

<sup>55</sup> Section 2 of the Defamation Act 1952.

A Comparative Study of Malaysia and the United Kingdom professional or business reputation<sup>56</sup> and statements relating to a woman's chastity<sup>57</sup> could not be regarded as slander because these statements are actionable per se under the law.<sup>58</sup> To sum up, it is submitted that blog comments are more likely to be treated in general as slander but comments by third parties on certain issues as mentioned above will be treated differently.

As to the publication of defamatory content in Malaysia, section 3 of the Malaysian Defamation Act 1957 provides that 'For the purpose of the law of libel and slander the broadcasting of words by means of radio communication shall be treated as publication in a permanent form'. It is plainly stated that reports or matters broadcast by radio are regarded as equal to publications in newspapers.<sup>59</sup> These provisions have been extended to cover publications on televisions as well since legal suits relating to defamatory materials broadcast on television stations have been judicially tried and decided under the libel law.<sup>60</sup> Therefore, it is an established principle that publications in printed materials and broadcasting through radio or television constitute libel rather than slander.

With regard to defamatory statements published on various types of Internet-based platforms including blogs, such materials will be subjected to libel law if they fall within the scope of 'the broadcasting of words by means of radio communication'. The term 'word' is

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<sup>56</sup> Section 3 of the Defamation Act 1952.

<sup>57</sup> Section 1 of the Slander of Women Act 1891.

<sup>58</sup> Milmo, Rogers, and Gatley, *Gatley on Libel and Slander* (n 34).

<sup>59</sup> Section 13(1) of the Defamation Act 1957 provides 'The provisions of this Act shall apply in relation to reports or matters broadcast by means of radio communication as part of any programme or service provided by means of a broadcasting station within Malaysia, and in relation to any broadcasting by means of radio communication of any such report or matter, as they apply in relation to reports and matters published in a newspaper and to publication in a newspaper'.

<sup>60</sup> Among notable cases are *Mohamed Azwan bin Haji Ali v Sistem Televisyen (M) Bhd & Ors* [2000] 4 MLJ 120; and *YB Dato' Dr Hasan bin Mohamed Ali v YB Mulia Tengku Putra bin Tengku Awang* [2010] 8 MLJ 269.

A Comparative Study of Malaysia and the United Kingdom defined in section 2 of the Malaysian Defamation Act 1957 to include 'pictures, visual images, gestures and other methods of signifying meaning'. Whilst the phrase 'broadcasting by means of radio communication' is provided in the same section as:

Publication for general reception by means of a radio communication within the meaning of the Telecommunications Act 1950,<sup>61</sup> and includes the transmission simultaneously by telecommunication line in accordance with a licence granted in that behalf under the Telecommunications Act of words broadcast by means of radio communication.

By way of analogy with broadcast publications, since online content is transmitted via telecommunication lines and is normally composed of a varied combination of written texts, visual images and sounds, it is to be expected that defamatory materials published via Internet platforms to be regarded as libel. The uncertainty of the issue is resolved when cases involving defamation suits against bloggers have been tried and decided according to the law of libel.<sup>62</sup> Hence, it is an established principle that publication of defamatory statements in blogs and other online communications would be regarded as libel and such publication shall not be treated differently from printed materials and broadcasting through radio or television under the Malaysian Defamation Act 1957. As to the status of defamatory blog comments, there appears to have attracted comparatively little attention of the judges. In the absence of reported cases and by applying the provisions of the Malaysian Defamation Act 1957, it is very much unlikely that courts in the country will make a distinction between defamatory postings by bloggers and defamatory comments by blog

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<sup>61</sup> The Malaysian Telecommunications Act 1950 has been repealed by section 273 of the Malaysian Communications and Multimedia Act 1998, which has been passed to regulate the convergence of communications, broadcasting and information technology in Malaysia.

<sup>62</sup> *The New Straits Times Press (M) Bhd & Ors v Ahirudin bin Attan* [2008] 1 MLJ 814; *Datuk Seri Utama Dr Rais bin Yatim v Amizudin bin Ahmat* [2012] 2 MLJ 807; and *YB Hj Khalid bin Abdul Samad v Datuk Aziz bin Isham & Anor* [2012] 7 MLJ 301.

readers. Thus, any publication of defamatory materials in the blogosphere will generally be considered as libel and not slander under the Malaysian law.

## 7.4 Multiple and Single Publication Rule

The basis of defamation liability is publication<sup>63</sup> as no action can be maintained unless it can be shown that the alleged defamation have been published to a person other than the claimant or their spouse.<sup>64</sup> This has been highlighted in *Hebditch v MacIlwaine*<sup>65</sup> that ‘The material part of the cause of action in libel is not the writing, but the publication of the libel’.<sup>66</sup> Thus, publication is the gist of defamation.<sup>67</sup>

Unfortunately, publication on the Internet has created a major issue for publishers and authors of online defamatory materials. This is because most of online content remains accessible for long or an indefinite period after it was first published. Further, publication of defamatory words on the Internet may occur in more than one place and they are potentially accessible anywhere in the world. By virtue of the multiple publication rule, which derived its origin in *Duke of Brunswick v Harma*,<sup>68</sup> each communication of the defamatory statement constitutes a separate publication and gives rise to a distinct cause of action. Hence, regardless of the limitation rule on defamation, the statement is considered to have published at the time

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<sup>63</sup> In *Pullman v W. Hill & Co Ltd* [1891] 1 QB 524 at 527, Lord Esher MR defined publication as ‘The making known of defamatory matter after it has been written to some person other than the person to whom it is written’.

<sup>64</sup> In a very old case of *Wennhak v Morgan* (1880) 20 QBD 637, the court ruled that there was no publication where the communication was made to the spouse of the defendant.

<sup>65</sup> [1894] 2 QB 54.

<sup>66</sup> *ibid* 61.

<sup>67</sup> However, publication is not part of the Scots Law because defamation is regarded as an injury to a person’s feelings and reputation.

<sup>68</sup> (1849) 14 QB 185.

when, and in the place where, it is received or accessed from the Internet and this could result in endless liability for publishers and authors of online defamatory statement.

The multiple publication rule has been criticised for its incongruity with online publication and the argument had been invoked in *Loutchansky v Times Newspapers Ltd (Nos 2 – 5)*.<sup>69</sup> The claimant brought defamation suit against the defendants for articles that were published in a newspaper and online. After more than a year from the date of original publication, the plaintiff sued one of the defendants in respect of the same articles stored in the online archive. The defendant argued that the single publication rule should be adapted to online materials and that the publications should be deemed to take place just once when they were placed on the website for the first time. The court disagreed with the contention and ruled that ‘It is a well established principle of the English law of defamation that each individual publication of a libel gives rise to a separate cause of action, subject to its own limitation period’.<sup>70</sup> It was held that each time the articles were accessed, it constituted a fresh publication and a separate cause of action.

The claimant then brought an action in the ECtHR<sup>71</sup> arguing that the judgment constituted an unjustifiable and disproportionate interference with its freedom of expression as it was exposed to ceaseless liability for libel. Unfortunately, the Strasbourg court rejected the contention as it ruled that in the circumstances of the case, it was not necessary to consider the point. Thus, the issue of ‘ceaseless liability’ has not been addressed by the ECtHR. In relation to this, it has been suggested that in order to avoid being exposed to the risk of

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<sup>69</sup> [2001] EWCA Civ 1805, [2002] QB 78.

<sup>70</sup> *ibid* [57].

<sup>71</sup> *Times Newspapers Ltd (Nos 1 and 2) v United Kingdom* [2009] EMLR 14.

liability in the future, the publishers are obliged to remove or attach qualifications to the alleged defamatory materials.<sup>72</sup>

The enduring concern finally came to an end when the single publication rule<sup>73</sup> was incorporated into the Defamation Act 2013 to replace the problematic multiple publication rule. The single publication rule is crucial for online content, in particular Internet archives, as section 8(1)(3) of the Defamation Act 2013 stipulates that the first publication of the defamatory material to the public (including a section of the public)<sup>74</sup> triggers the one year limitation period within which the claimant must initiate his claim. The rule has prevented an indefinite defamation action against the same person for publishing the same defamatory materials on the Internet. The single publication rule however does not apply to subsequent publication which is ‘materially different’ from the manner of the first publication.<sup>75</sup> In deciding the issue, the court may have regard to the level of prominence given to the statement and the extent of subsequent publication.<sup>76</sup>

Apart from that, the single publication rule does not apply to second persons or third parties who republish the defamatory content, as they are not the same person who published the first statement. Each republication of such materials is considered a fresh publication and

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<sup>72</sup> Matthew Collins, *The Law of Defamation and the Internet* (3rd ed, Oxford University Press 2010) 148.

<sup>73</sup> The single publication rule was subjected to numerous criticisms as it was claimed that the rule was unsatisfactorily drafted. See Molly Grace, ‘The Draft Defamation Bill - A Radical Change?’ (2012) I *The Manchester Review of Law, Crime and Ethics* 86, 91; Alistair Mullis and Andrew Scott, ‘Lord Lester’s Defamation Bill 2010: A Distorted View of the Public Interest?’ (2011) 16 *Comms L* 6, 13 – 4; Alistair Mullis and Andrew Scott, ‘Worth the Candle? The Government’s Draft Defamation Bill’ (2011) 3 *JML* 1, 13 – 15.

<sup>74</sup> Section 8(2) of the Defamation Act 2013 states ‘publication to the public’ includes ‘publication to a section of the public’.

<sup>75</sup> Section 8(4) of the Defamation Act 2013.

<sup>76</sup> Section 8(5) of the Defamation Act 2013.

A Comparative Study of Malaysia and the United Kingdom will give rise to a distinct cause of action.<sup>77</sup> The liability of the original author or publisher for the repetition of the disputed statements will depend on whether the republication is reasonably foreseeable.<sup>78</sup> The potential application of this principle to the Internet materials can be best referred to the judgment in *Slipper v British Broadcasting Corp.*<sup>79</sup> The plaintiff claimed that he was defamed in a film by the defendants. A few days after the film was broadcast, it was reviewed in national newspapers. The plaintiff alleged that the reviews repeated the sting of defamatory references to him in the film. The issue was whether the defendants could be held liable for the republication of the defamatory words in the subsequent reviews. It was held that the jury would be entitled to conclude that the defendants anticipated that there would be reviews and that the reviews would repeat the sting.

Republication of defamatory content on the Internet has been considered in the Malaysian case of *YB Hj Khalid bin Abdul Samad v Datuk Aziz bin Isham & Anor.*<sup>80</sup> The plaintiff, an opposition MP, sued the defendants (chief editor and a national daily newspaper) for libel arising out of their republication of an article defamatory of him which originally appeared on the official blog of another MP. The issue was whether the defendants could be held liable for an article that was posted by another MP. The court found the defendants liable for defamation as they made no attempts to verify the veracity of the article and they failed to publish disclaimer indicating that the views in the article were those of the MP and not of the defendants.

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<sup>77</sup> Yaman Akdeniz and Horton Rogers, 'Defamation on the Internet' in Yaman Akdeniz, Clive Walker and David Wall (eds), *The Internet, Law and Society* (Longman 2000) 311.

<sup>78</sup> Rogers, *Winfield & Jolowicz on Tort* (n 11) 544.

<sup>79</sup> [1991] 1 QB 283.

<sup>80</sup> [2012] 7 MLJ 301.



## **7.5 Online Intermediary Liability**

Online intermediaries play an important role in online publication as they generally perform one of three functions, mere conduits, caches or hosts of information.<sup>81</sup> The intermediaries,<sup>82</sup> including Web 2.0 platforms and blogs, are easier to trace and often operate locally. They become an attractive target in legal proceedings since they represent a point of control or gatekeeper over materials on the Internet. Further, most intermediaries may also have deeper pocket and are more capable of paying damages than individuals in defamation actions. This has resulted in undesirable consequences as intermediaries are likely to be exposed to defamatory postings by third parties. As such, this part of the study examines the potential liability of bloggers as online intermediaries in relation to third party defamatory content and their liability for providing link to defamatory materials in external websites.

### **7.5.1 Liability for Third Party Content**

The liability of intermediaries for content created by others depends on their status under the Defamation Act 2013. Section 10(1) provides that:

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<sup>81</sup> Intermediaries are mere conduits when they facilitate the communications of others by carrying the constituent signals and the signals are not stored on their networks for any period longer than is necessary for the transmission of the content. Intermediaries perform caching function when they store online content temporarily on their networks to enable the materials to be retrieved quickly at a later time. Intermediaries become content hosts when they store online content on their networks and become the primary storage site for that content.

<sup>82</sup> Online intermediaries have been categorically classified into connectivity intermediaries such as ISPs, navigation intermediaries such as Google and commercial and social networking providers and other hosts such as Wikipedia, Facebook, Twitter, blogs and many others. See Uta Kohl, 'The Rise and Rise of Online Intermediaries in the Governance of the Internet and Beyond - Connectivity Intermediaries' (2012) 26 IRLCT 185, 185.

A Comparative Study of Malaysia and the United Kingdom

A court does not have jurisdiction to hear and determine an action for defamation brought against a person who was not the author, editor or publisher of the statement complained of unless the court is satisfied that it is not reasonably practicable for an action to be brought against the author, editor or publisher.

The provision has limited defamation action against those who are not the primary author, editor or publisher of the complained words. Section 10(2) states that the terms ‘author’, ‘editor’ and ‘publisher’ are to have the same meaning as in section 1 of the Defamation Act 1996. Accordingly, ‘author’ refers to ‘originator of the statement, but does not include a person who did not intend that his statement be published at all’; ‘editor’ means ‘a person having editorial or equivalent responsibility for the content of the statement or the decision to publish it’; and ‘publisher’ denotes ‘a commercial publisher, that is, a person whose business is issuing material to the public, or a section of the public, who issues material containing the statement in the course of that business’.<sup>83</sup>

Prior to the operation of the Defamation Act 2013, the liability of intermediaries has been considered in *Godfrey v Demon Internet Ltd*.<sup>84</sup> The plaintiff brought libel proceedings against the defendants (ISPs) as they failed to remove third party’s defamatory content from the bulletin boards they administered after notification by the plaintiff. The defendants argued they should not be held liable because they were not the ‘publisher’ of the libellous statement. It was ruled by Morland J:

[W]henever they transmit and whenever there is transmitted from the storage of their news server a defamatory posting, publish that posting to any subscriber to their ISP who accesses the newsgroup containing that posting. Thus every time one of the defendants’

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<sup>83</sup> Section 1(2) of the Defamation Act 1996.

<sup>84</sup> *Godfrey v Demon Internet Ltd* (n 52).

customers accesses *soc.culture.thai* and sees that posting defamatory of the plaintiff there is a publication to that customer.<sup>85</sup>

The case has laid down an important proposition that online intermediaries are to be treated as publishers at common law regardless of whether they have actual knowledge of the content or not. Their liability will turn on whether they manage to establish a defence to the defamation action or not.

A seemingly contrary view has been established in *Totalise Plc v Motley Fool Ltd.*<sup>86</sup> The plaintiff filed a *Norwich Pharmacal* application<sup>87</sup> against the defendants in order to discover the identity of an anonymous author who had posted defamatory remarks on their sites. The defendants had removed the materials but they refused to disclose the identity of the wrongdoer. It was ruled that the defendants took no responsibility for what was posted on the bulletin boards because they simply provided a facility for discussion and exercised no editorial control over the postings. They were absolved from liability because they had removed the materials from their servers after receiving notification from the plaintiff.

A bold departure from the orthodox approach that treats all online intermediaries as publishers was established in *Bunt v Tilley*.<sup>88</sup> The ISP defendants applied to strike out the defamation suits alleging that they were not publishers of the content at common law. It was ruled by Eady J that ‘as a matter of law that an ISP which performs no more than a passive role in facilitating postings on the Internet cannot be

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<sup>85</sup> *ibid* 208 – 209.

<sup>86</sup> [2001] EWCA Civ 1897, [2002] 1 WLR 1233, [2003] 2 All ER 872.

<sup>87</sup> The proceedings, which were established by the House of Lords in *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133, allow a claimant in certain circumstances to file an independent action against a person who is believed to have necessary information about the identify of a wrongdoer. Without such information, the claimant would not be able to commence legal action against the actual wrongdoer.

<sup>88</sup> [2006] EWHC 407 (QB), [2007] 1 WLR 1233.

A Comparative Study of Malaysia and the United Kingdom deemed to be a publisher at common law'.<sup>89</sup> The judge went further by holding that the ISP defendants were not even required to invoke any defences to escape liability.<sup>90</sup>

The principle has been applied in the subsequent case of *Metropolitan International School Ltd v Designtecnica Corp.*<sup>91</sup> It was ruled by Eady J that the third defendant search engine operators (Google Inc.) could not be characterised as a publisher at common law as it has not authorised or caused the disputed snippets to appear on the user's screen.<sup>92</sup> This is in line with *Bunt v Tilley*'s<sup>93</sup> case that requires actual knowledge on the part of online intermediaries before they could be imposed liability for publishing defamatory materials.

The rulings have been considered in *Davison v Habeeb*.<sup>94</sup> The issue was whether the fifth defendant (Google Inc), who offered blogging platform (Blogger.com) that had been used by the second and third defendants to post defamatory statement about the plaintiff, was a publisher at common law as it had been notified by the plaintiff but refused to take down the materials. It was ruled that 'there is in my judgment an arguable case that the fifth defendant is the publisher of the material complained of, and that at least following notification it is liable for publication of that material'.<sup>95</sup>

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<sup>89</sup> *ibid* [36].

<sup>90</sup> *ibid* [37].

<sup>91</sup> [2009] EWHC 1765 (QB), [2009] EMLR 27.

<sup>92</sup> *ibid* [51].

<sup>93</sup> *Bunt v Tilley* (n 88).

<sup>94</sup> [2011] EWHC 3031 (QB), [2012] 3 CMLR 6.

<sup>95</sup> *ibid* [48]. However, it is to be noted that the fifth defendant managed to set aside the plaintiff's action for defamation on the ground that mere notification by the plaintiff did not fix the fifth defendant with actual knowledge of unlawful activity or information pursuant to Regulation 19 of the Electronic Commerce Regulations 2002.

In *Tamiz v Google Inc.*,<sup>96</sup> the respondent (Google Inc.) was sued for providing Blogger.com, a blogging platform that had been used by one blogger to post defamatory comments of the appellant. Nonetheless, the comments had been removed by the respondent three days after it was notified by the appellant. It was held by Eady J that though the comments complained of were arguably defamatory, the respondent was not a publisher at common law either before or after it was notified of the complaint. The decision was reversed by the Court of Appeal as it was observed by Richards LJ that there was an arguable case that the respondent was a publisher after notification. Since the respondent allowed the defamatory postings to remain, ‘it might be inferred to have associated itself with, or to have made itself responsible for, the continued presence of the material.’<sup>97</sup> Nonetheless, the appeal was dismissed as the court concluded that any damage to the appellant’s reputation after notification by the appellant but before removal would have only been trivial. Thus, it is a settled law that online intermediaries will only be treated as publishers of the third party defamatory content at common law if they have actual knowledge of the existence of such content.

As to the liability of blog owners for defamatory comments by third parties, the issue should also be determined in accordance with section 10 of the Defamation Act 2013 which explicitly stipulates that a court does not have jurisdiction to determine an action against a person who was not the author, editor or publisher of the defamatory publication. It is obvious that bloggers are not the author of such statement, but they could still be held liable in defamation if it could be shown that they are to be regarded as editor or publisher of the disputed words.

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<sup>96</sup> [2013] EWCA Civ 68 (CA), [2013] WL 425761.

<sup>97</sup> *ibid* [34].

The application of section 10 to blogs has yet to be seen in any reported cases, but reference can be made to *Kaschke v Gray*.<sup>98</sup> The plaintiff brought libel action against the author of defamatory comments on *Labourhome* blog (the first defendant) and the blogger who had set up the blog (the second defendant). The second defendant argued that he did not participate in the publication of the postings and applied to strike out the suit. The court granted the second defendant's application as an abuse of process. It was ruled that 'there is no realistic prospect of an award of more than very modest damages in this action and that for similar reasons to those identified by Eady J it would be an abuse of process for this action to proceed to trial'.<sup>99</sup>

It is important to note that although the plaintiff's action was rejected, the decision does not lay down a definite principle on the liability of bloggers for defamatory third party postings. It is far from clear that bloggers are not liable for such materials since there is an arguable case that bloggers could be held liable for comments posted on their websites.<sup>100</sup> As such, it has been suggested that bloggers must be wary of comments and preferably moderate them, and if in doubt remove them, especially if they are advised that the comments are defamatory.<sup>101</sup> Alternatively, the easiest way to avoid any liability is to turn off the commentary section in blogs.<sup>102</sup>

With the enactment of the Defamation Act 2013, it is submitted that the uncertainty surrounding the liability of bloggers for third party comments is now resolved. By virtue of section 10, bloggers could avoid liability in defamation by proving that they are not the author,

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<sup>98</sup> [2010] EWHC 690 (QB), 2010 WLR 903089.

<sup>99</sup> *ibid* [21].

<sup>100</sup> James Tumbridge, 'Defamation: Any Lessons from Labourhome's Misfortune?' (2011) 33 EIPR 458, 460.

<sup>101</sup> James Tumbridge, 'Defamation - The Dilemma for Bloggers and Their Commenters' (2009) 31 EIPR 505, 507.

<sup>102</sup> *ibid*.

editor or publisher of the defamatory words.<sup>103</sup> Based on the interpretation in section 1 of the Defamation Act 1996, bloggers are unlikely to be treated as the author or publisher of the third party content. However, they may still be imposed liability in defamation if they exercise editorial control over readers' comments. Thus, it is submitted that bloggers could escape liability simply by not moderating posting by third parties. Alternatively, they may moderate third party statements on their blogs but must immediately remove any defamatory content upon notification of its existence. This is in line with the common law principles which treat online intermediaries including bloggers as publishers only if they have actual knowledge of the disputed content.

As to the position in Malaysia, the liability of bloggers for third party content has been raised in *Kho Whai Phiaw v Chong Chieng Jen*.<sup>104</sup> The petitioner presented a petition to the Election Court to have the respondent's victory in the Parliamentary election be declared void for undue influence. The respondent was alleged to have exerted undue influence by publishing or allowing to be published on his blog, Chong Chieng Jen's Blog, an article written by Mr Smith (Mr Smith's article) which was said to contain threatening statements towards the voters. The petitioner contended that the respondent has absolute control over his blog and that he could control all entries including hiding, editing and deleting postings, or limiting the type of visitors who could add postings or comments on his blog as well as moderate those comments. For that reason, the petitioner argued that the respondent should be regarded as publisher of all information on his blog, including Mr Smith's article, though it was written by third

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<sup>103</sup> This is to be distinguished with section 5 of the Defamation Act 2013 which provides a new statutory defence to operators of websites. For details, see discussion in Part 7.6.4 below.

<sup>104</sup> [2009] 4 MLJ 103.

parties since the act of publication could not have taken place without the respondent's consent or knowledge. The court ruled that since there was no sufficient evidence to prove that Mr Smith's article was posted on the respondent's blog with his knowledge or consent, the respondent could not be regarded as the publisher of Mr Smith's article.<sup>105</sup>

The case has established that in the absence of knowledge or consent on the part of bloggers, no liabilities could be imposed on them as they are not to be treated as publishers of the third party content.<sup>106</sup> A crucial question arises as to whose duty is to establish the element of knowledge. It was observed by Clement Skinner J:

The general law is that the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence. Accordingly in this election petition, the burden of proving that Mr Smith's article was published with the knowledge or consent of the successful candidate i.e. the respondent, is on the petitioner who wishes the court to believe in its existence.<sup>107</sup>

Despite the aforesaid judgment, it is pertinent to highlight the implication of a new section 114A in the Malaysian Evidence Act 1950 which came into force on 31<sup>st</sup> July 2012. The amendment was aimed at tackling the problem of online anonymity, but it has rendered all persons who act as owners, hosts, administrators, editors or sub-editors, or who facilitate to publish or re-publish any publication to be presumed as publishers under the law unless otherwise stated.<sup>108</sup> Thus,

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<sup>105</sup> On appeal, the findings of the trial judge have been unanimously upheld by the judges of the Federal Court. *Kho Whai Phiaw v Chong Chieng Jen* [2009] 4 MLJ 776.

<sup>106</sup> It was alleged that blogs or other Internet communications should be distinguished from the traditional media, as the online materials are generally not subjected to supervision or moderation prior to their publication. See Aishath Muneeza, 'The Milestone of Blogs and Bloggers in Malaysia' (2010) 3 MLJ cvii.

<sup>107</sup> *Kho Whai Phiaw v Chong Chieng Jen* (n 105) 125.

<sup>108</sup> For details on the implication of the new section 114A of the Evidence Act and the principle of presumption of fact in online publication, see Mariette Peters, 'Section 114A: A Presumption of Guilt?' (2012) 6 MLJ ciii..



the element of knowledge in the aforesaid case could be no longer essential as this development appears to make all bloggers or operators of Internet communications as publishers and liable for online materials posted on their websites, including the third party content. Nonetheless, there is yet any reported case on the application of this new amendment and it is therefore very premature to hold blog owners or editors to be strictly liable for any defamatory entries by third party.

### **7.5.2 Liability for Linking**

Hyperlinks (hypertext link) are essentially a crucial part of the Internet as they create interconnection or cross-reference between a large amounts of information on the Internet. The term 'hyperlink' can be defined as an electronic link providing direct access from one distinctively marked place in a hypertext or hypermedia document to another in the same or a different document.<sup>109</sup> Hyperlinks enable users to be transported from one website to another when the text or image is clicked.<sup>110</sup> They can be classified into several categories,<sup>111</sup> but the most common forms are ordinary linking (shallow or deep linking<sup>112</sup>) and framing (framed linking).<sup>113</sup> Ordinary linking involves a simple hyperlink from one webpage to another, whereas framing usually involves the inclusion of a hyperlink on a webpage that causes

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<sup>109</sup> Merriam Webster Dictionary (2013) <[www.merriam-webster.com/dictionary/hyperlink](http://www.merriam-webster.com/dictionary/hyperlink)> [accessed 7 March 2013].

<sup>110</sup> George Chloros, 'Licence to Link: Unlimited Distribution of Information or Violation of Copyright Laws?' (2001) 6 Cov LJ 57.

<sup>111</sup> Hyperlinks can be divided on the basis of depth, visibility and programming. See Tanushree Sangal, 'IP Issues in Linking, Framing and Keyword Linked Advertising' (2010) 16 CTLR 64..

<sup>112</sup> Shallow linking transports users to the homepage of a website, whilst deep linking enable users to bypass the homepage and goes straight to an internal page within the linked site.

<sup>113</sup> Collins, *The Law of Defamation and the Internet* (n 72) 28.

A Comparative Study of Malaysia and the United Kingdom  
content from other websites to be displayed within a frame on the  
original webpage.<sup>114</sup>

The legal status of online intermediaries for providing a hyperlink to another website that contains defamatory or illegal materials has yet to be established in the UK. Currently, there is no specific regulation on providers of hyperlinks, location tools and content aggregation services. This is due to the findings of the Department of Trade and Industry (DTI) consultation on the Electronic Commerce Directive in 2005 that concluded that there are no compelling reasons for the UK government to regulate these matters.<sup>115</sup> Unfortunately, the absence of statutory provisions has resulted in uncertainty over the potential liability of online intermediaries for hyperlinked materials that are defamatory or illegal.

As a general rule, providers of hyperlinks who deliberately insert hyperlinks or frames on websites within their control are to be treated as publishers of the external materials. This is because they intentionally direct online users to the materials and may have actual knowledge or possess a certain degree of awareness of the linked content.<sup>116</sup> However, there is a very limited judicial consideration on this issue and consequently, their liability will be entirely dependent on the merits of each case.

The question on hyperlinked materials was first considered in *Shetland Times Ltd v Wills*.<sup>117</sup> The plaintiffs (Shetland Times) sought an interim interdict precluding the defendants (Shetland News) from deep linking to the plaintiffs' internal pages through hyperlinks that

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<sup>114</sup> *ibid.*

<sup>115</sup> DTI Consultation Document on Electronic Commerce Directive: The Liability of Hyperlinkers, Location Tool Services and Content Aggregators at <[www.dti.gov.uk/consultations/page13985.html](http://www.dti.gov.uk/consultations/page13985.html)> [accessed 27 February 2013].

<sup>116</sup> Collins, *The Law of Defamation and the Internet* (n 72) 87 – 92.

<sup>117</sup> 1997 SC 316, 1997 SLT 669.

bypassed their homepage. The plaintiffs alleged that the defendants' conduct amounted to a copyright infringement under the UK Copyright Designs and Patents Act of 1988. In granting the injunction, Lord Hamilton ordered all links to the plaintiffs' websites from the defendants' website should be removed. The defendants appealed but before a full trial was about to begin, the parties reached a mutual settlement.<sup>118</sup> As a result, the court had lost the opportunity to scrutinise the liability of hyperlink providers in details at trial.<sup>119</sup>

In *Elton John v Countess Joulebine*,<sup>120</sup> the defendant (owner of gossip website) was sued for breach of confidence in relation to a stolen draft advice of counsel to the claimants. The draft was initially placed on her website by an unknown individual, but when she realised that the document was of value, she placed a link on the home page of her website to the draft. The draft remained accessible on her website and it was only removed when the claimants obtained an injunction against its publication. The defendant argued that she should not be held liable as she did not know the draft was genuine or confidential material. It was ruled that the defendant ought to have known that there was a risk that the document was being imparted in breach of confidence and she should not have continued to have it published on her website. Accordingly, the defendant was liable for breach of confidence from the moment she became aware of the material and yet still allowed the content to be placed on her website and even created a link to it from her home page. Hence, the case shows that

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<sup>118</sup> As part of the settlement, the defendants agreed to link only through the plaintiffs' front page and to include a legend identifying the headlines from the plaintiffs' websites. Details on the terms of the settlement, see P Eve Athanasekou, 'Internet and Copyright: An Introduction to Caching, Linking and Framing' (1998) 2 JILT <[http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/1998\\_2/athanasekou/](http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/1998_2/athanasekou/)> [accessed 22 February 2013].

<sup>119</sup> It is important to highlight that although the case was considered the first linking case in the UK, the main question for the court's determination was a copyright infringement and not the validity of the hypertext links.

<sup>120</sup> 2001 WL 98221, [2001] Masons CLR 91.

intermediaries who knowingly provide hyperlinks to defamatory materials in other external websites would be treated as publisher of the illegal content.

The liability of online intermediaries for hyperlinked materials has again been raised in *Ali v Associated Newspapers Ltd.*<sup>121</sup> The plaintiff brought a libel action for articles which had been published by the defendants (newspaper publishers) in two daily newspapers and their websites. The defendants applied summary judgment for the claim to be struck out. One of the issues was whether the existence of a hyperlink in the plaintiff's blog to another website would have the effect of incorporating the hyperlinked materials as part of his blog. It was ruled by Eady J:

[I]t is so far undecided in the authorities whether ... any material to which attention is drawn in a blog by this means should be taken to be incorporated as part of the blog itself... Much will depend on the circumstances of the particular case... for present purposes I proceed on the assumption that the Irish Times interview is not to be treated as an integral part of the Claimant's blog.<sup>122</sup>

Despite the fact that the defendants' application has been granted by the court and the hyperlinked content was not regarded as part of the plaintiff's blog, the ruling in the summary judgment has stated that the correct approach in determining the liability for hyperlinked materials would depend on the facts of each case. This is to be distinguished with the case of *McGrath v Dawkins and others.*<sup>123</sup> The plaintiff brought libel proceedings against several defendants, including the second defendant (operator of UK websites) for its part in publishing defamatory remarks by the fourth defendant. All of the defendants applied for a summary judgment against the plaintiff's claim. It was alleged by the second defendant that it should not be held responsible

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<sup>121</sup> [2010] EWHC 100 (QB), 2010 WL 20036.

<sup>122</sup> *ibid* [28].

<sup>123</sup> [2012] EWHC B3 (QB), 2012 WL 1555287.

A Comparative Study of Malaysia and the United Kingdom for defamation since the entries were posted on forums administered by its sister company in the US. Nonetheless, there was a link from the home page of the UK site to the forums on the US site. In holding that the second defendant should be held liable for the hyperlinked content, it was observed by HHJ Moloney QC:

The law on liability for hyperlinks is in a state of some uncertainty at present. Even if the general English rule were ... that a mere hyperlink does not render the operator of the linking website liable for the content of the linked site, the decision may well be a fact-sensitive one, especially when, as here, the two websites are very closely associated, the link is hidden, and the point of contact is the 'Home' button which is normally regarded as taking you to the central hub of the same website you are already on. I therefore conclude that I am not satisfied at this stage that the 2nd Defendant was not answerable for the .net forum at the material time, and that it is a question fit for trial.<sup>124</sup>

The case indicates that pending a full trial on the liability of linked content, there is a possibility for website operators to be held liable for defamatory words in external sites which are linked to their websites. In relation to this, it was argued that should the ruling be later affirmed by court at trial, it may have far-reaching legal implications on website operators and online intermediaries as they may have to be watchful that any linked websites do not contain defamatory or illegal content.<sup>125</sup>

With regard to the position in Malaysia, the liability of blog owner for hyperlinked materials has first been raised in *The New Straits Times Press (M) Bhd & Ors v Ahiruddin bin Attan*.<sup>126</sup> The plaintiffs had commenced an action for libel and malicious falsehood against the defendant in relation to various postings on his blog called the

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<sup>124</sup> *ibid* [26].

<sup>125</sup> Saadat Nisar, 'The Uncertain State of the Law on Liability for Hyperlinking: Christopher Anthony McGrath v Professor Richard Dawkins' (2012) 18 CTLR 121, 123.

<sup>126</sup> [2008] 1 MLJ 814.

A Comparative Study of Malaysia and the United Kingdom  
*'Rocky's Bru'*. As the suit was pending, the parties had agreed not to publish comments or posts related to the case. Later, the plaintiffs applied for leave to commence committal proceedings against the defendant alleging that the blogger had breached his undertakings by linking his blog to an external blog called *'Walk With Us'* which contained discussions of the suit and criticisms of the plaintiffs. The plaintiffs alleged that the defendant's act of providing link to the impugned blog amounted to a republication of the content of the blog on his *'Rocky's Bru'* blog. It was ruled by Mohd Hishamudin J that the defendant could not be held liable for the content of the *'Walk With Us'* blog as he was 'neither the author nor the publisher of that weblog'.<sup>127</sup> Further, the link to the disputed blog was only 'a passive link as only the name or title of the link *'Walk With Us'* appears on the right hand column of the defendant's blog together with the names or titles of other 85 hyperlinks'.<sup>128</sup>

The judgment has then been considered in an unreported case of *Stemlife Berhad v Bristol-Myers Squibb (M) Sdn Bhd*.<sup>129</sup> Some messages were posted on the defendant's online forum by two users operating under the pseudonyms *'stemlie'* and *'kakalily'*. The messages provide a link to an external blog which contains defamatory materials of the plaintiff. The plaintiff then filed an application for a pre-action discovery against the defendant, compelling the disclosure of the true identity of the forum users pursuant to the *Norwich Pharmacal* principles. The question arose as to whether the defendant should be liable for the link posted on the forum by the two users. It was observed by Azman Abdullah JC that there was evidence that the defendant's forum had a posting inviting users to visit the offending blog. Further, there were terms and

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<sup>127</sup> *ibid* 821.

<sup>128</sup> *ibid* 822.

<sup>129</sup> [2008] MLJU 0354.

A Comparative Study of Malaysia and the United Kingdom conditions on editorial rights that conferred absolute discretion on the defendant either to edit or remove any postings if the defendant so desired without prior notice or explanation. It was ruled that by allowing the forum to provide an active deep link to the external blog with defamatory materials, the defendant was no longer a 'mere bystander' as it had performed 'an active role in facilitating the wrongdoing'.<sup>130</sup> By virtue of the active link, the judgment in *The New Straits Times Press v Ahiruddin*<sup>131</sup> was distinguished and accordingly, the defendant was ordered to disclose the identity of the forum users.

It is pertinent to highlight that the court simply ordered the defendant to comply with the pre-action discovery as the plaintiff intended to file defamatory proceedings against the forum users and not the defendant. Nonetheless, the judgment appears to suggest that online intermediaries, including blog owners or editors, could be held liable for hyperlinked content when there is active deep link to another website and when they have actual knowledge and control over the link on their sites.

## 7.6 Defences

Following the discussion on liability for third party content and hyperlink, there are instances where online intermediaries may be considered as publishers of defamatory materials created by others but published on their services. In such cases, they have to establish a defence to escape liability in defamation. The common defences of truth (justification) and honest opinion (fair comment) may be used for online defamation. Apart from that, the defence of innocent dissemination under the Defamation Act 1996 as well as related defences for mere conduit, caching, or hosting under the Electronic

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<sup>130</sup> *ibid* 5.

<sup>131</sup> *The New Straits Times Press (M) Bhd & Ors v Ahiruddin bin Attan* (n 126).

A Comparative Study of Malaysia and the United Kingdom  
Commerce (EC Directive) Regulations 2002 are also of particular importance to bloggers in the UK. Further, the Defamation Act 2013 has introduced a specific defence to operators of websites against defamation<sup>132</sup> and the defence of publication on matter of public interest,<sup>133</sup> which has replaced the common law defence of *Reynolds* privilege. As to the position in Malaysia, apart from the principal defences of justification and fair comment, there have yet any statutory provisions that provide specific defences to Internet publications. Nonetheless, the discussion will be turned on the *Reynolds* privilege and the defence of innocent carrier, which is introduced, in the Malaysian Communications & Multimedia Content Code (Content Code) for the Internet industry.

### **7.6.1 Truth & Justification**

Section 2 of the Defamation Act 2013 provides for a new defence of truth, which replaces the common law defence of justification.<sup>134</sup> Subsection (1) states that the defendant will be able to invoke the defence if he can show that the statement complained of is substantially true.<sup>135</sup> He is not required to prove that every single aspect of the imputation is true. It has been argued that this is in line with the current law<sup>136</sup> as established in *Chase v News Group Newspaper Ltd.*<sup>137</sup> It was ruled by Brooke LJ that ‘The defendant does not have to prove that every word he/she published was true. He/she

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<sup>132</sup> Section 5 of the Defamation Act 2013.

<sup>133</sup> Section 4 of the Defamation Act 2013.

<sup>134</sup> Section 2(4) of the Defamation Act 2013 stipulates ‘The common law defence of justification is abolished and, accordingly, section 5 of the Defamation Act 1952 (justification) is repealed’.

<sup>135</sup> Section 2(1) states ‘It is a defence to an action for defamation for the defendant to show that the imputation conveyed by the statement complained of is substantially true’.

<sup>136</sup> Explanatory Notes to the Defamation Act 2013, para 14.

<sup>137</sup> [2002] EWCA Civ 1772, [2003] EMLR 11.



has to establish the “essential” or “substantial” truth of the sting of the libel’.<sup>138</sup>

The principle has been followed in *Turcu v News Group Newspaper*<sup>139</sup> whereby the newspaper had successfully pleaded the defence of justification when the court found that the allegations against the claimant were substantially, if not wholly, accurate. It was observed that journalists ‘need to be permitted a degree of exaggeration even in the context of factual assertions’. It was highlighted by Eady J:

In deciding whether any given libel is substantially true, the court will have well in mind the requirement to allow for exaggeration, at the margins, and have regard in that context also to proportionality. In other words, one needs to consider whether the sting of a libel has been established having regard to its overall gravity and the relative significance of any elements of inaccuracy or exaggeration.<sup>140</sup>

Where the statement complained of bears more than one imputation, subsections (2) and (3) provide that the defence will not fail if the imputations which are not substantially true do not ‘seriously harm’ the reputation of the claimant. Finally, subsection (4) abolishes the common law defence of justification and repeals section 5 of the Defamation Act 1952. It has been argued that the insertion of the new defence of truth is aimed at reflecting the current law while simplifying and clarifying uncertainties of the defence of justification as the court would now be required to adhere to the words used in the statute.<sup>141</sup>

As to the context in Malaysia, the common law defence of justification is available to the defendant in defamation. Once justification is pleaded, the burden lies on the defendant to prove that

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<sup>138</sup> *ibid* [34].

<sup>139</sup> [2005] EWHC 799 (QB), 2005 WL 1232720.

<sup>140</sup> *ibid* [108].

<sup>141</sup> Explanatory Notes to the Defamation Act 2013, para 13.

the defamatory imputation is true.<sup>142</sup> Nonetheless, it is not necessary to prove the truth of all allegations as section 8 of the Malaysian Defamation Act 1957<sup>143</sup> provides:

In an action for libel or slander in respect of words containing two or more distinct charges against the plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges.<sup>144</sup>

The provision has been highlighted by RK Nathan J in *Dato' Seri Anwar bin Ibrahim v Dato' Seri Dr Mahathir bin Mohamad*<sup>145</sup> that:

At common law the Defendant was required to prove the truth of all the material statements in the libel. However, by virtue of s 8 of the Defamation Act 1957 (the Act), the defence of justification 'shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges.' It follows therefore that what is true, cannot be defamatory.<sup>146</sup>

In *Chew Peng Cheng v Anthony Teo Tiao Gin*,<sup>147</sup> it was held that the defence of justification in the Defamation Act 1957 does not require the truth of every word of the alleged libel to be proved. Further, it was elaborated by Zainun Ali JCA in *Chong Swee Huat & Anor v Lim Shian Ghee (t/a L & G Consultants & Education Services* that the court will examine 'the truth of the imputation of the overall

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<sup>142</sup> *Tjanting Handicraft Sdn Bhd & Anor v Utusan Melayu (M) Bhd & Ors* [2001] 2 MLJ 574 at 597.

<sup>143</sup> The Malaysian Defamation Act 1957 derived its origin from the UK Defamation Act 1952.

<sup>144</sup> Section 8 of the Malaysian Defamation Act 1957 is in *pari materia* with the repealed section 5 of the UK Defamation Act 1952.

<sup>145</sup> [1999] 4 MLJ 58.

<sup>146</sup> *ibid* 69.

<sup>147</sup> [2008] 5 MLJ 577.

A Comparative Study of Malaysia and the United Kingdom statement<sup>148</sup> for the defence to be successfully pleaded by the defendant.

The defence of justification has been invoked in *Dato' Seri Mohammad Nizar bin Jamaluddin v Sistem Televisyen (M) Bhd & Anor.*<sup>149</sup> The plaintiff brought libel proceedings against the defendants for broadcasting news which accused the plaintiff of sending tweets alleging the King of Johor had misused his power for his personal needs and that the plaintiff had thereafter made an open apology to the King in his Twitter. The issue was the status of the defendants' plea of justification since it was found that the second part of the news that stated that the plaintiff had apologised on Twitter was erroneous. By virtue of section 8, Yeoh Wee Siam J decided that the defence did not fail, as the news report was substantially true. Therefore, it is arguably apparent that the decisions of the Malaysian courts in relation to the defence of justification mirrored the approach adopted by the UK judges prior to the enactment of the Defamation Act 2013.

Pertaining to the application of the defence of truth or justification in the cyberspace, it is obvious that the defence may be invoked by bloggers or authors of the online content provided that it can be shown the statement is substantially true. As for hosts and moderators of online content which may include bloggers, it has been argued that the defence will unlikely be relied on by them due to the absence of trust between online publishers and content contributors as well as the difficulty on the part of the former to ascertain the truth or falsity of the third party materials.<sup>150</sup>

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<sup>148</sup> [2009] 3 MLJ 665 at 710.

<sup>149</sup> [2013] 4 MLJ 448.

<sup>150</sup> Collins, *The Law of Defamation and the Internet* (n 72) 155 – 156.

### **7.6.2 Honest Opinion & Fair Comment**

Section 3 of the Defamation Act 2013 replaces the common law defence of fair comment with a new defence of honest opinion.<sup>151</sup> Subsections (2) to (4) list down three elements for the defence to apply, namely the statement was a statement of opinion, the statement indicated the basis of the opinion, and that an honest person could have held the opinion either on the basis of any fact which existed at the time the statement was published or on anything asserted to be a fact in a privileged statement published before the statement was complained of.

The first requirement in subsection (2) of section 3 replicates the current law as formulated in the Hong Kong case of *Tse Wai Chun Paul v Albert Cheng*.<sup>152</sup> In this case, Lord Nicholls set out five important elements of the common law defence of fair comment including the second proposition that stipulates that ‘the comment must be recognisable as comment, as distinct from an imputation of fact’.<sup>153</sup> For the statement to be considered as an opinion or comment, subsection (3) requires the defendant to specify the basis of the opinion. This is in parallel with the Supreme Court decision in *Spiller v Joseph*<sup>154</sup> which had unanimously ruled that the second part of the fourth proposition that readers should be in a position to evaluate the comments for themselves should be removed as it could not be

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<sup>151</sup> Section 3(8) of the Defamation Act 2013 states that ‘The common law defence of fair comment is abolished and, accordingly, section 6 of the Defamation Act 1952 (fair comment) is repealed’.

<sup>152</sup> [2001] EMLR 777.

<sup>153</sup> *ibid* para 17. The rest of the propositions are that the comment must be on a matter of public interest; be based on facts which are true or protected by privilege; explicitly or implicitly indicate, at least in general terms, the facts on which the comment is being made and the reader or hearer should be in a position to judge for himself the extent to which the comment was well-founded; and be one which could have been made by an honest person however prejudiced he might be and however exaggerated or obstinate his views.

<sup>154</sup> [2010] UKSC 53, 2010 WL 4810789.

reconciled with the authorities and would rob of the efficacy of the defence in the online world.<sup>155</sup> Accordingly, it was highlighted by Lord Phillips that the fourth proposition should be rewritten as ‘Next, the comment must explicitly or implicitly indicate, at least in general terms the facts on which it is based’.<sup>156</sup>

As to the third condition of the defence, which is stipulated in subsection (4), it is an objective test that consists of two elements. The third condition will be fulfilled if one of the elements is satisfied. The elements are whether an honest person could have held the opinion either on the basis of any fact that existed at the time the statement was published, or on anything which asserted to be a fact in a ‘privileged statement’ that was published before the statement complained of. A statement is a ‘privileged statement’ if the person responsible for its publication would have one of the defences listed in subsection (7) of section 3.<sup>157</sup>

Subsection (5) provides that the defence will fail if the claimant can prove that the statement was actuated by malice. Where the defendant was not the author of the statement, subsection (6) stipulates that the defence will be defeated if the claimant can show that the defendant knew or ought to have known that the author was actuated by malice.

As to the position in Malaysia, the defence of fair comment may also absolve the defendant in defamation. Section 9 of the Malaysian Defamation Act 1957, which is in *pari materia* with section 6 of the UK Defamation Act 1952, provides:

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<sup>155</sup> *ibid* para 99.

<sup>156</sup> *ibid* para 105.

<sup>157</sup> The defences are absolute and qualified privileges under sections 14 and 15 of the Defamation Act 1996, the defences in sections 4 and 6 of the Defamation Act 2013 relating to publication on a matter of public interest and peer-reviewed statements in a scientific or academic journal.

A Comparative Study of Malaysia and the United Kingdom

In an action for libel or slander in respect of words consisting partly of allegations of fact and partly of expression of opinion, a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved.

In order to rely on this defence, the defendant is required to prove that the statements complained of are comments and not facts; there is a basis for the comments; the comments are of public interest; and the comments are made honestly without malice. This has been highlighted by Azmel J in *Hussin Mohd Ali v Ho Kay Tat & Anor*<sup>158</sup> who quoted with approval the decision of the Privy Council in *JB Jeyaratnam v Goh Chok Tong*.<sup>159</sup>

The first condition requires the defendant to prove that the disputed words are in the form of comment since the defence does not apply to statements of fact. In both cases of *SB Palmer v Rajah & Ors*<sup>160</sup> and *JB Jeyaratnam v Goh Chok Tong*<sup>161</sup> the plaintiff was alleged to have incited all those who were attending a meeting to leave the meeting. In the first case, the statement was construed as an allegation of fact and therefore, the defence of fair comment failed. Whilst in the second case, relevant facts were stated before the alleged defamatory statement was made. Consequently, the defence was successfully pleaded as the court found that the statement was a comment and not an allegation of fact.

The defence of fair comment has again been invoked in *Harry Isaac & Ors v Berita Harian*.<sup>162</sup> The Court of Appeal ruled that the defence ought to have been rejected because the articles included allegations

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<sup>158</sup> [2004] 3 MLJ 140 at 144.

<sup>159</sup> [1989] 1 WLR 1109.

<sup>160</sup> [1949] MLJ 6.

<sup>161</sup> [1985] 1 MLJ 334; affirmed [1987] 1 MLJ 176, CA; affirmed [1989] 3 MLJ 1, PC.

<sup>162</sup> [2012] 4 MLJ 191.

A Comparative Study of Malaysia and the United Kingdom of facts without disclosure of the sources for such facts and which facts the appellants never sought to justify. It was highlighted by Anantham Kasinather JCA that ‘it is trite law that the defence of fair comment is concerned with the protection of comment and not facts’.<sup>163</sup> In deciding whether the disputed words are fact or comment, the test is whether the ordinary and reasonable man, upon hearing or reading the words, would regard them as a statement of fact or as comment.<sup>164</sup> However, where the facts and comments are so mixed up that one cannot be distinguished from the other, the defence of fair comment will not be available to the defendant.<sup>165</sup>

The second condition for the defence of fair comment is that the comment must be based on true facts. In *Hasnul bin Abdul Hadi v Bulat bin Mohamed & Anor*<sup>166</sup> the defence was rejected because the defendants failed to prove that the facts on which the comment was founded were true. In *Joshua Benjamin Jeyaretnam v Goh Chok Thong*,<sup>167</sup> it was ruled by the Privy Council that:

It is of course well established that a writer may not suggest or invent facts and then comment upon them, on the assumption that they are true. If the facts upon which the comment purports to be made do not exist, the defence of fair comment must fail. The commentator must get his basic facts right.<sup>168</sup>

Therefore, the defendant must prove the truth of the facts on which the comment is based. In *Datuk Seri Anwar bin Ibrahim v Utusan Melayu (M) Bhd & Anor*,<sup>169</sup> the defendants invoked a number of statutory defences including fair comment. Unfortunately, the defence was rejected as the court found that the defamatory articles published by

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<sup>163</sup> *ibid* 202.

<sup>164</sup> *Lee Kuan Yew v Derek Gwyn Davies & Ors* [1990] 1 MLJ 390.

<sup>165</sup> *Noor Asiah Mahmood v Ramdhir Singh & Ors* [2000] 2 AMR 1475.

<sup>166</sup> [1978] 1 MLJ 75.

<sup>167</sup> [1989] 3 MLJ 1.

<sup>168</sup> *ibid* 3.

<sup>169</sup> [2013] 3 MLJ 534.

the defendants were not founded on true facts. Thus, it is essential that a true statement of fact that forms the basis of the comment must exist for the defence of fair comment to succeed. Nonetheless, it is not essential that all of the facts to be proved since it would be sufficient that the facts, which form the basis of the comment, are proven. This is in pursuant with section 9 that does not mandate the defendant to prove the truth of every fact before he can plead fair comment.<sup>170</sup>

The third element of the defence is that the comment must be fair and is not malicious. In order to be fair, the comment must be an honest expression of the writer and is not made maliciously. Malice is ill will or spite or some previous quarrel or bad relationship or any indirect or improper motive in the mind of the defendant at the time of publication.<sup>171</sup> Where it is shown that the defendant did not believe that what he published was true, or that he knew the statement to be false; that is generally conclusive evidence of express malice.<sup>172</sup>

The existence of malice will have a significant impact on the defendant and this can be seen in *Datuk Harris Mohd Salleh v Datuk Yong Teck Lee & Anor*.<sup>173</sup> The case involved a clash between two ex-Chief Ministers of Sabah over press statements by the defendant insinuating the plaintiff to have conspired in the air-crash tragedy that had killed his predecessor and more than half of the cabinet ministers. The statements defamatory of the plaintiff were made pursuant to a public speech by a veteran ex-Minister about the air-crash incident. The issue was whether the defendant was actuated by malice, spite or improper motive when he uttered the statements. The court discovered that the defendant did not make any attempts to verify the accuracy of

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<sup>170</sup> *Mohd Jali bin Haji Ngah v The New Straits Times Press (M) Bhd & Anor* [1998] 5 MLJ 773.

<sup>171</sup> *Chong Siew Chiang v Chua Ching Geh & Anor* [1992] 4 CLJ 1839.

<sup>172</sup> *S Pakianathan v Jenni Ibrahim* [1988] 2 MLJ 173.

<sup>173</sup> [2012] 4 MLJ 372.



the speech and did not even bother whether it was true or not. Further, there was evidence of bad blood between the plaintiff and the defendant when the latter lost his seat in the state assembly as a result of the election petition filed by the plaintiff. Accordingly, the court ruled that the defendant was actuated by malice and this disposed of the defence of fair comment.

Referring to the last requirement of the defence, the comment must be on an issue of public interest, otherwise the defence will not be available to the defendant. There is no exact definition as to what constitutes public interest, but the court is bound to distinguish between ‘that which the public is interested in’ with ‘which is in the public interest’ i.e. for the benefit of the public which the courts will protect.<sup>174</sup> Matters that are regarded as issues of public interest may encompass the administration of justice and thus the defence of fair comment in relation to court proceedings is applicable.<sup>175</sup> Comments concerning the acts and activities of politicians and people who are influential in the community, such as the conduct and acts of ministers or opposition leaders are also regarded as matters of public interest.<sup>176</sup> Other matters accepted as being in the public interest are comments in newspaper with regard to the quality and content of secondary school textbooks,<sup>177</sup> comments in newspaper that consultant architect in a project to build additional car-park floors of a hospital did not comply with building plans,<sup>178</sup> comments about an invitation to the public to

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<sup>174</sup> *DP Vijandran v Karpal Singh* [2000] 3 MLJ 22 at 48.

<sup>175</sup> *Cargill v Carmichael & Anor* [1883] 1 Ky 603 (Civ).

<sup>176</sup> *Abdul Rahman Talib v Seenivasagam & Anor* [1965] 1 MLJ 142 and *Datuk Seri Anwar bin Ibrahim v Utusan Melayu (M) Sdn Bhd & Anor* [2013] 3 MLJ 534.

<sup>177</sup> *Pustaka Delta Pelajaran Sdn Bhd v Berita Harian Sdn Bhd* [1998] 6 MLJ 529.

<sup>178</sup> *Perunding Alam Bina Sdn Bhd v Errol Oh & Ors* [1999] 1 AMR 64.

A Comparative Study of Malaysia and the United Kingdom  
invest in ostrich farming,<sup>179</sup> and comments that certain international  
higher institutions offered unaccredited degrees.<sup>180</sup>

Based on the discussion, it is obvious that the defence of fair comment in Malaysia is not parallel in its operation to the new statutory defence of honest opinion that has replaced the defence of fair comment in the UK. Interestingly, in the recent unreported case of *Liu Thian Leong v Jee Nyen Chong*,<sup>181</sup> counsel for the defendant had invited the court's attention to the Lord Phillips's proposal in *Spiller v Joseph*<sup>182</sup> and suggested that the defence of fair comment in Malaysia should be renamed 'honest comment' and for the proof of public interest in the defence be dropped. Unfortunately, the argument was ignored by the court and accordingly, the legal position of fair comment in Malaysia still remains unchanged.

With regard to the application of the defence of honest opinion and fair comment to defamatory statements in blogs or other online media, it is submitted that both defences are most likely available to bloggers or authors of the online content provided that they could fulfil all of the required elements. The availability of the defence of fair comment to the defendants in online defamation cases in Malaysia has been indirectly observed by the Court of Appeal in *Dato' Seri Mohammad Nizar*.<sup>183</sup> Nonetheless, since there was malice that could be readily inferred from the surrounding circumstances of the published defamatory statements against the plaintiff, it was ruled that

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<sup>179</sup> *Ratus Mesra Sdn Bhd v Shaik Osman Majid & Ors* [1999] 3 MLJ 529.

<sup>180</sup> *Irish International University v New Straits Times Press (M) Bhd & Ors* [2011] 9 MLJ 40.

<sup>181</sup> [2013] MLJU 264.

<sup>182</sup> *Spiller v Joseph* (n 154).

<sup>183</sup> *Dato' Seri Mohammad Nizar bin Jamaluddin v Sistem Televisyen (M) Bhd & Anor* (n 149) para 50.

defendants in this case could not successfully rely on such a defence.<sup>184</sup>

The defence of fair comment has again been raised in *Datuk Seri Anwar bin Ibrahim v Wan Muhammad Azri bin Wan Deris*.<sup>185</sup> The plaintiff, the leader of opposition party, had filed defamation suit against the defendant, a political blogger, for his blog posts and articles that were understood to have alleged the plaintiff as ‘an immoral person; a person with no dignity; a person unfit to hold public office; not qualified as a political leader; not fit to be Prime Minister of Malaysia; and a leader who is not responsible and cannot be trusted’.<sup>186</sup> The defendant raised four defences including the defence of fair comment, but it was rejected by the court as he was unable to prove that the defamatory statements were ‘true or a fair comment on a matter of public interest’.<sup>187</sup> Thus, the judgment has impliedly indicated that although the defence of fair comment under the Malaysian Defamation Act 1957 predated the advent of online platforms including blogs, the defence could be successfully pleaded by bloggers or other Internet publishers in defamation cases provided that all of the requirements are met by them.

As for content hosts and online moderators, it is submitted that in a practical sense that the defence of honest opinion and fair comment is likely to be difficult for them to rely on since they have no view as to the honesty or otherwise of the original authors or contributors in uttering the alleged defamatory words. Further, the defence will be defeated if it is proved that the hosts or moderators know or ought to have known that the authors or contributors were actuated by malice.

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<sup>184</sup> *ibid* para 54.

<sup>185</sup> [2014] 9 MLJ 605.

<sup>186</sup> *ibid* para 21.

<sup>187</sup> *ibid* para 74.

### **7.6.3 Publication on Matter of Public Interest & the Reynolds Defence**

The Defamation Act 2013 has also incorporated a new defence of publication on a matter of public interest. Explanatory notes to the Defamation Act 2013 state that the new statutory defence reflects the existing common law *Reynolds* defence<sup>188</sup> which had established protection for publication on matters of public interest provided that the criteria of ‘responsible journalism’ are satisfied.<sup>189</sup> The defence is contained in section 4 of the Defamation Act 2013 that stipulates:

- (1) It is a defence to an action for defamation for the defendant to show that –
  - (a) the statement complained of was, or formed part of, a statement on a matter of public interest; and
  - (b) the defendant reasonably believed that publishing the statement complained of was in the public interest.

It is claimed that the provisions have been formulated to reflect the *Reynolds* defence as most recently set out in *Flood v Times Newspapers Ltd*<sup>190</sup> in which the Supreme Court had adopted a liberal interpretation of the defence in order to offer a robust protection for publications on matters of public interest.<sup>191</sup> It is also obvious from the wordings that there is no express requirement for the defendant to prove that he has met a standard of responsible journalism, satisfied

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<sup>188</sup> The *Reynolds* defence has been established by the House of Lords in *Reynolds v Times Newspaper Ltd* [2001] 2 AC 127.

<sup>189</sup> In *Reynolds*’ case, Lord Nicholls laid down ten non-exhaustive criteria of responsible journalism which include the seriousness of the allegation, the type of information, the source, verification attempts, status of the information, urgency, whether any attempt to obtain comment from the claimant had been made, whether both sides of the story were included in the publication, the tone of the published material and the background to, and timing of, the publication.

<sup>190</sup> [2012] UKSC 11, [2012] 2 AC 273.

<sup>191</sup> David Tan, ‘The Reynolds Privilege Revitalised’ (2013) 129 (Jan) LQR 27, 27. The judgment was considered a strong authority to unravel the conundrum faced by the media defendants as they have in almost all cases been denied the common law defence by the English lower courts, but on the contrary been expansively accorded with the privilege by the highest English appellate courts.

any or all of the prescribed conditions for *Reynolds* defence or acted both fairly and responsibly in gathering and publishing information.<sup>192</sup>

The defence will be available if the defamatory statement was on a matter of public interest and the defendant had reasonably believed that its publication was in the public interest. In determining the defendant's reasonable belief, the court is required to take into account 'all the circumstances of the case'<sup>193</sup> and must 'make such allowance for editorial judgment as it consider appropriate'.<sup>194</sup>

Subsection (3) of section 4 of the Defamation Act 2013 codifies the common law doctrine of reportage.<sup>195</sup> It provides that in circumstances where the doctrine applies, the defendant is not required to verify the information reported before publication. In determining whether it was reasonable for the defendant to believe that the publication was in the public interest, the court should disregard any failure on the part of the defendant to take necessary steps in verifying the truth of the statement. Apart from that, the new defence may be relied on irrespective of whether the publication is one of fact or opinion.<sup>196</sup> Ultimately, the defence of publication on matter of public interest has effectively abolished the *Reynolds* defence.<sup>197</sup>

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<sup>192</sup> Timothy Pinto, 'Defamation Act 2013 – A Boost for Free Speech', 2 May 2013, <<http://www.taylorwessing.com/news-insights/details/defamation-act-2013-a-boost-for-free-speech-2013-05-02.html>> [accessed 21 May 2013].

<sup>193</sup> Section 4(2) of the Defamation Act 2013.

<sup>194</sup> Section 4(4) of the Defamation Act 2013.

<sup>195</sup> The doctrine was first surfaced in *Al-Fagih v HH Saudi Research & Marketing (UK) Ltd* [2001] EWCA Civ 1634, [2001] EMLR 13 and it was described by Simon Brown LJ as 'a convenient word to describe the neutral reporting attributed allegations rather than their adoption by the newspaper'. In *Roberts & Anor v Gable & Ors* [2007] EWCA Civ 721, [2008] 2 WLR 129 Ward LJ has aptly described reportage as 'the neutral reporting without adoption or embellishment or subscribing to any belief in its truth of attributed allegations of both sides of a political and possibly some other kind of dispute'. Nonetheless, it was highlighted by the Supreme Court in *Flood v Times Newspaper Ltd* (n 190) that reportage is not a separate defence but a 'special, and relatively rare, form of *Reynolds* privilege'.

<sup>196</sup> Section 4(5) of the Defamation Act 2013.

<sup>197</sup> Section 4(6) of the Defamation Act 2013 expressly stipulates that 'The common law defence known as the *Reynolds* defence is abolished'.

By analysing the aforesaid provisions, it seems easier for the defendant to rely on the defence if the defamatory publication is really on a matter of public interest as he is only required to prove that he has a reasonable belief that the words complained of is in the public interest. Thus, it appears that the new defence is more flexible and more in favour of freedom of expression than the *Reynolds* defence. Nonetheless, it should be noted that courts may consider relevant principles on the *Reynolds* defence that have been established in *Reynolds*,<sup>198</sup> *Jameel v Wall Street Journal Europe SPRL (No. 3)*<sup>199</sup> and *Flood*<sup>200</sup> although there is no requirement for judges to do so.<sup>201</sup>

As to the position in Malaysia, there is no statutory defence of publication on matter of public interest. Nonetheless, the *Reynolds* defence has been accepted and applied by the local courts. The defence was considered in *Mark Ignatius*<sup>202</sup> whereby the defendants relied on the defence of qualified privilege when they were sued by the plaintiff for publishing defamatory articles in their newspaper. Nonetheless, the court rejected the defence since the publication was not of concern to the general public. Further, Kamalanathan Ratnam J referred to the rulings in *Reynolds*<sup>203</sup> and held that the defence also failed because the disputed statement was published without canvassing the plaintiff's point of view that had been issued earlier to the public via a press conference. The judgment is crucial because it indicates the court's application of the *Reynolds* defence as formulated by the House of Lords in the UK.

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<sup>198</sup> *Reynolds v Times Newspaper Ltd* (n 188).

<sup>199</sup> [2006] UKHL 44, [2007] 1 AC 359.

<sup>200</sup> *Flood v Times Newspapers Ltd* (n 190).

<sup>201</sup> Pinto, 'Defamation Act 2013 – A Boost for Free Speech' (n 192).

<sup>202</sup> *Mark Ignatius Uttley @ Mark Ostyn v Wong Kam Hor & Anor* (n 24).

<sup>203</sup> *Reynolds v Times Newspaper Ltd* (n 188).

Regardless of the decision, it is important to highlight that in the earlier case of *Dato' Seri Anwar bin Ibrahim v Dato' Seri Dr Mahathir bin Mohamad*<sup>204</sup> the Malaysian High Court referred to the *Reynolds'* rulings in the Court of Appeal<sup>205</sup> and applied the three-step test established therein. A couple of other cases followed and adopted the *Reynolds'* rulings by the Court of Appeal including *Halim Arsyat v Sistem Televisyen Malaysia Bhd*<sup>206</sup> and *Dato' Seri S Samy Vellu v Penerbitan Sahabat (M) Sdn Bhd (No 3)*.<sup>207</sup> Nonetheless, it should be noted that these judgments were made prior to the House of Lords' rulings that had effectively established the common law *Reynolds* defence.

Subsequent to the decision in *Mark Ignatius*,<sup>208</sup> the ten indicative factors in *Reynolds*<sup>209</sup> and the *Jameel's*<sup>210</sup> decision was referred in *Irene Fernandez v Utusan Melayu (M) Sdn Bhd*.<sup>211</sup> Tee Ah Sing J said:

The impugned article read in its entirety clearly put the blame entirely on the plaintiff, taking sides with the police. The plaintiff was never interviewed prior to the impugned article being published. There was never any attempt to verify the truth of the defamatory imputations with the plaintiff. There was no urgency to have published the impugned article. The defendant also did not give the plaintiff any opportunity to comment before the publication of the impugned article. The defendant clearly ignored to seek the plaintiff's comments as the plaintiff would be in the best position to comment on the accusation levelled against her in the impugned article.<sup>212</sup>

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<sup>204</sup> [1999] 4 MLJ 58.

<sup>205</sup> [1998] 3 WLR 862, [1998] 3 All ER 961.

<sup>206</sup> [2001] 6 MLJ 353.

<sup>207</sup> [2005] 5 MLJ 561.

<sup>208</sup> *Mark Ignatius Utley @ Mark Ostyn v Wong Kam Hor & Anor* (n 24).

<sup>209</sup> *Reynolds v Times Newspaper Ltd* (n 188).

<sup>210</sup> *Jameel v Wall Street Journal Europe SPRL (No. 3)* (n 199).

<sup>211</sup> [2008] 2 CLJ 814.

<sup>212</sup> *ibid* 847 – 848.

A Comparative Study of Malaysia and the United Kingdom

In relation thereof, the court viewed the defamatory article was not a piece of responsible journalism and as a result, the plea of *Reynolds* privilege was rejected. In *Sivabalan a/l P Asapathy v The New StraitsTimes Press (M) Bhd*,<sup>213</sup> the court has expounded two requirements that must be shown for the defence to apply – ‘the publication concerned a matter of public interest’ and ‘the steps taken to gather, verify and publish the information were responsible and fair’.<sup>214</sup> It was underlined by Zawawi Salleh J that these guidelines were merely ‘pointers and not to be treated as hurdles’.<sup>215</sup> In this case, the court ruled that since the defendants managed to satisfy both of the prescribed conditions, they were entitled to rely on the *Reynolds* privilege. On a similar note, the defence was considered and applied in *Tan Sri Dato’ Tan Kok Ping, JP v The New Straits Times Press (M) Bhd*.<sup>216</sup>

The prerequisites of the defence were reiterated in *Mahadi bin Mohameddiah v Ibrahim Isa & Ors*.<sup>217</sup> It was expressed by Gunalan a/l Muniandy JC:

[T]he *Reynolds* defence ... is predicated on two primary elements: public interest and responsible journalism. For the defence to be invoked, the defendant has first to establish that the publication was on a matter of public interest. Having done so, the defendant (media) has to satisfy the court that it had acted reasonably.<sup>218</sup>

Thus, the decisions have shown that the *Reynolds* privilege would only be allowed if all conditions are satisfied by the defendant. In *Chong Siew Chiang v Ng Kim Ho & Anor*,<sup>219</sup> the defendants took no steps to verify the allegations made against the plaintiff. As a

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<sup>213</sup> [2010] 9 MLJ 320.

<sup>214</sup> *ibid* 340.

<sup>215</sup> *ibid* 341 – 342.

<sup>216</sup> [2010] 2 MLJ 694.

<sup>217</sup> [2012] 1 LNS 150.

<sup>218</sup> *ibid* [26].

<sup>219</sup> [2011] 6 CLJ 62.



A Comparative Study of Malaysia and the United Kingdom  
consequence, the court rejected the defendants' plea of the *Reynolds* privilege. Similarly, in *Dato' Seri Mohammad Nizar*,<sup>220</sup> the court ruled that the defendant could not seek protection under the *Reynolds* defence as it was apparent that the defendants did not practise responsible journalism in verifying the defamatory statements with the plaintiff and in getting the latter's comment on the issues. Further, the court viewed the defendants' publication was unbalanced and was deliberately aimed at giving a negative impression towards the plaintiff.

Apart from the *Reynolds* privilege, the doctrine of reportage has also been adopted and applied by judges in Malaysia. It was considered in *Dato' Seri Anwar bin Ibrahim v The New Straits Times Press (M) Sdn Bhd & Anor*.<sup>221</sup> The plaintiff, the leader of the opposition party, brought libel action against the defendants for publishing an article defamatory of him in their daily newspaper. The defendants resisted the claim and relied on the defence of reportage as they alleged that the impugned article was a mere reproduction of another report and it did not carry their own comments or views towards the plaintiff. The availability and application of the defence was then thoroughly scrutinised by Harmindar Singh JC that:

[I]t can be safely asserted that reportage would normally apply ... in cases where there is an ongoing dispute where allegations of both sides are being reported. The report, taken as a whole, must have the effect that the defamatory material is attributed to the parties in the dispute. The report must not be seen as being put forward to establish the truth of any of the defamatory assertions. This means that the allegations must be reported in a fair, disinterested and neutral way. The important consideration here is that the allegations are attributed and not adopted. Therefore

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<sup>220</sup> *Dato' Seri Mohammad Nizar bin Jamaluddin v Sistem Televisyen (M) Bhd & Anor* (n 149).

<sup>221</sup> [2010] 2 MLJ 492.

A Comparative Study of Malaysia and the United Kingdom

reportage will not apply where the journalist had embraced, garnished and embellished the allegations.<sup>222</sup>

Accordingly, the court ruled that the defence of reportage was not available to the defendants as the publication did not involve a continuing dispute between parties. Further, it was found that there was only one version of the view about the plaintiff and it was certainly not reported in a fair, disinterested and neutral way.

The doctrine of reportage has then been invoked in a number of subsequent cases. In *Chong Siew Chiang v Ng Kim Ho & Anor*,<sup>223</sup> the defendants pleaded the defence of reportage as they were merely reporting news and were unable to determine the falsity or truth of the allegations against the plaintiff. In rejecting the defence of reportage, it was observed by Ravinthran Paramaguru JC:

The reportage as a defence is subject to limitations. Otherwise, the defence of accurate reporting or neutral reporting would give an unconditional licence to media organisations to destroy reputations of innocent men and women under the pretext of merely reporting statements of others, however false, unwarranted and scurrilous they may be.<sup>224</sup>

In *YB Hj Khalid*,<sup>225</sup> the disputed article was a republication of the views of another politician taken from his personal blog. The article was published in toto without any verification of the truth of its content. It was decided that though the concept of reportage has been accepted by the courts in Malaysia, this was not a case to which the defence would apply because the article was reported with emotional undertones that would arouse anger and suspicion against the plaintiff.

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<sup>222</sup> *ibid* 520.

<sup>223</sup> [2011] 6 CLJ 62.

<sup>224</sup> *ibid* 97.

<sup>225</sup> *YB Hj Khalid bin Abdul Samad v Datuk Aziz bin Isham & Anor* (n 80).

A Comparative Study of Malaysia and the United Kingdom

Pertaining to the availability of the statutory defence of publication on matter of public interest in the online environment, it is argued that the new defence is capable to be used in defamatory proceedings. This is based on the express provisions in the Defamation Act 2013 that requires the defendant to prove the defamatory statement was on a matter of public interest and the defendant had reasonably believed that its publication was in the public interest. Further, in *Seage v Harper*<sup>226</sup> it was decided by the Privy Council that the *Reynolds* defence, which was repealed and now replaced by the defence of publication on matter of public interest, was not exclusively conferred on the printing press and broadcasting media. Such defence was held to be applicable to ‘publications made by any person who publishes material of public interest in any medium, so long as the conditions framed by Lord Nicholls as being applicable to “responsible journalism” are satisfied’.<sup>227</sup> The judgment was affirmed by the Supreme Court in *Flood*<sup>228</sup> and it was underlined that ‘*Reynolds* privilege is not reserved for the media, but it is the media who are most likely to take advantage of it, for it is usually the media that publish to the world at large’.<sup>229</sup>

With regard to the application of the *Reynolds* privilege to non-media practitioners including amateur bloggers in Malaysia, the High Court in *Chong Siew Chiang v Ng Kim Ho & Anor*<sup>230</sup> had referred to the judgment in *Reynolds*<sup>231</sup> and refused to extend the defence to the first defendant who was not a news publisher. The defence was regarded as a special defence in defamation to the traditional media only. In relation to this, it is argued that the court seems to have misunderstood

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<sup>226</sup> [2008] UKPC 9, [2009] 1 AC 1.

<sup>227</sup> *ibid* [11].

<sup>228</sup> *Flood v Times Newspapers Ltd* (n 190).

<sup>229</sup> *ibid* [44].

<sup>230</sup> [2011] 6 CLJ 62.

<sup>231</sup> *Reynolds v Times Newspaper Ltd* (n 188).

the concept of the *Reynolds* privilege as it has been judicially accepted in the UK that the defence should not be confined to the media only. Further, Varghese George J in *Lim Guan Eng v Utusan Melayu (M) Bhd*<sup>232</sup> had referred to the position in the UK which provides that the defence is available to all publications on public interest.<sup>233</sup> Apart from that, it was alleged that though the defence refers to journalism, the label of ‘responsible journalism’ is merely a shorthand means of identifying the defence and is no way limited to journalistic publications. In addition, it was acknowledged by VT Singham J in *Datuk Seri Anwar*<sup>234</sup> that the expression ‘press’ is no longer confined to the traditional media alone as it now encompasses the electronic media. In line with this ruling, it is submitted that the *Reynolds* defence should not be exclusively confined to journalists from the traditional media only. Amateur bloggers or other online users who could satisfy all of the prescribed criteria of the common law defence should also be permitted to plead such defence in defamation cases.

#### **7.6.4 Defence to Operators of Websites**

The Defamation Act 2013 provides a new defence to operators of websites in respect of defamatory words posted on their websites. Section 5 stipulates:

- (1) This section applies where an action for defamation is brought against the operators of a website in respect of a statement posted on the website.
- (2) It is a defence for the operator to show that it was not the operator who posted the statement on the website.
- (3) The defence is defeated if the claimant shows that –
  - (a) it was not possible for the claimant to identify the person who posted the statement,

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<sup>232</sup> [2012] 2 MLJ 394.

<sup>233</sup> *ibid* 410 – 411.

<sup>234</sup> *Datuk Seri Anwar bin Ibrahim v Utusan Melayu (M) Bhd & Anor* (n 169) para 77.

A Comparative Study of Malaysia and the United Kingdom

- (b) the claimant gave the operator a notice of complaint in relation to the statement, and
- (c) the operator failed to respond to the notice of complaint in accordance with any provision contained in regulations.

The section has conferred an increased protection on website operators in relation to third party defamatory postings. The operators may invoke the defence if the claimant can identify the actual poster of the statement,<sup>235</sup> the operators have not received a notice of complaint<sup>236</sup> from the claimant, and if they receive such notice, they comply with the regulations<sup>237</sup> such as by taking down the disputed posts or provide the claimant with the identity or contact details of the poster. The defence is defeated if the claimant can prove that the website operators has acted with malice in relation to the posting of the statement.<sup>238</sup> The defence is however not defeated if the operators moderate the statements posted on their websites by others.<sup>239</sup> Thus, the defence is still available even if the website operators exercise editorials over third party postings on their websites.

By analysing the statutory provision in section 5 of the Defamation Act 2013, it is obvious that the new defence is certainly applicable to bloggers. They may invoke such defence to escape liability for

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<sup>235</sup> Section 5(4) of the Defamation Act 2013 states that it is possible for the claimant to 'identify' the poster pursuant to section 5(3)(a) if the claimant has sufficient information to initiate legal action against the poster of the defamatory materials on the website.

<sup>236</sup> Section 5(6) of the Defamation Act 2013 stipulates that a notice of complaint is a notice which '(a) specifies the complainant's name, (b) sets out the statement concerned and explains why it is defamatory of the complainant, (c) specifies where on the website the statement was posted, and (d) contains such other information as may be specified in regulations'.

<sup>237</sup> Section 5(5) of the Defamation Act 2013 provides details of provision that may be included in regulations. This includes provision as to the action which an operator must take in response to a notice, provision specifying a time limit for the taking of any such action and for conferring a discretion on the court to treat action taken after the expiry of a time limit as having been taken before that expiry or any other provision for the purposes of this section.

<sup>238</sup> Section 5(11) of the Defamation Act 2013.

<sup>239</sup> Section 5(12) of the Defamation Act 2013.

A Comparative Study of Malaysia and the United Kingdom  
defamatory comments posted on their blogs by blog readers provided that could satisfy all of the prerequisites in that section.

### **7.6.5 Innocent Dissemination**

The Defamation Act 1996 provides a statutory defence of innocent dissemination to any persons who are not directly involved in the making of the defamatory statements. The defence seems to be a modern equivalent of the common law defence of innocent dissemination and is of particular significance to Internet intermediaries, which act as mere conduit, cache or host of such content on their services. Section 1, which is headed 'Responsibility for publication', states that:

- (1) In defamation proceedings a person has a defence if he shows that –
  - (a) he was not the author, editor or publisher of the statement complained of,
  - (b) he took reasonable care in relation to its publication, and
  - (c) he did not know, and had no reason to believe, that what he did caused or contributed to the publication of a defamatory statement.

These requirements are cumulative in the sense that all of them must be fulfilled for the defence to succeed. Firstly, the intermediaries must prove they are not the author, editor or publisher<sup>240</sup> of the content they host, cache or carry on their services. To fulfil this condition, they will have to demonstrate that their conduct is confined to 'operating or providing any equipment, system or service by means of which the statement is retrieved, copied, distributed or made available in

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<sup>240</sup> Section 1(2) of the Defamation Act 1996 defines the word 'author' as 'the originator of the statement, but does not include a person who did not intend that his statement to be published at all'. Whilst 'editor' means 'a person having editorial or equivalent responsibility for the content of the statement or the decision to publish it' and 'publisher' refers to 'a commercial publisher, that is, a person whose business is issuing material to the public, or a section of the public, who issues material containing the statement in the course of that business'.

A Comparative Study of Malaysia and the United Kingdom electronic form',<sup>241</sup> or operating or providing access to 'a communications system by means of which the statement is transmitted, or made available, by a person over whom he has no effective control'.<sup>242</sup> Where their conduct has not exceeded the limits in section 1(3), they are not to be regarded as author, editor or publisher of the materials under section 1(1)(a) and thus, they could invoke the defence of innocent dissemination.

Subsequently, the application of the defence will turn on the successful fulfilment of the remaining elements. Section 1(1)(b) contemplates any intermediaries seeking the section 1 defence to show that they have exercised reasonable care in relation to the publication of the defamatory words. In determining whether they have exercised 'reasonable care', courts must have regard to the matters set out in section 1(5) of the Defamation Act 1996 such as the extent of responsibility for the content of the statement or the decision to publish it, the nature of the publication, and the previous conduct or character of the author, editor or publisher.

Finally, the intermediaries are required by section 1(1)(c) to prove that they 'did not know, and had no reason to believe', that their conduct caused or contributed to the publication of a defamatory statement. The requirement would be satisfied if the intermediaries could prove that either they had no reason to believe that the information was defamatory or they had no reason to believe that their actions caused or contributed to the publication. In assessing whether the intermediaries have the required knowledge of the defamatory materials complained of, courts must take into account the facts that

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<sup>241</sup> Section 1(3)(c) of the Defamation Act 1996.

<sup>242</sup> Section 1(3)(e) of the Defamation Act 1996.

are actually known by the intermediaries and not facts that they might or ought to have known.<sup>243</sup>

The requirements of the section 1 defence had been considered in *Godfrey v Demon Internet Ltd.*<sup>244</sup> The court found that the ISP defendants were not the publisher of the defamatory postings pursuant to section 1(1)(a) and they had thus successfully satisfied the first requirement of the defence. Nonetheless, the ISP defendants could not invoke the section 1 defence because they fell foul of the remaining conditions by continuously storing the defamatory remarks on their servers even after they had been notified and were requested to delete the postings. It was ruled by Morland J that ‘as from 17 January 1997 they knew of the defamatory content of the posting, they cannot avail themselves of the protection provided by section 1 of the Defamation Act 1996 and their defence under section 1 is, in law, hopeless.’<sup>245</sup>

The judgment has established an important principle that upon gaining actual knowledge of the existence of the defamatory materials, the intermediaries will lose the protection of the section 1 defence if they failed to expeditiously take down such content. The decision was followed in *Bunt v Tilley*<sup>246</sup> whereby the court ruled that section 1 would provide the ISP defendants with a defence to the libel claim because the e-mail notifications by the claimant had not effectively put the ISPs on notice or fixed them with actual knowledge of the defamatory postings. Thus, the availability of the defence will depend on the non-existence of actual knowledge of the defamatory words and the exercise of reasonable care by expeditiously removing the disputed materials upon notification by the defamed persons.

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<sup>243</sup> *Bunt v Tilley* (n 88) [61]; cf *Milne v Express Newspapers* [2004] EWCA Civ 664 (CA) [50], [2005] 1 All ER 1021.

<sup>244</sup> *Godfrey v Demon Internet Ltd* (n 52).

<sup>245</sup> *ibid* 212.

<sup>246</sup> *Bunt v Tilley* (n 88).



In *Davison v Habeeb*,<sup>247</sup> the issue was whether the fifth defendant (Google Inc.), who operated the blogging platform of Blogger.com, could rely on the section 1 defence from the date of receipt of notification from the plaintiff to the day the defamatory articles were removed. The court ruled that though the fifth defendant was not a publisher under the Defamation Act 1996, it would still have to satisfy the necessary conditions in section 1(1)(b) and (c). Since the fifth defendant allowed the defamatory content to stay on its servers for a certain period of time after obtaining actual knowledge of its existence, the defence should fail and it should become liable for continued publication of the materials.<sup>248</sup>

In *McGrath v Dawkins and others*,<sup>249</sup> the issue arose as to whether the third defendant (Amazon UK) was a commercial publisher or editor of the comments published on its website and, if so, whether it could seek protection under the section 1 defence. The court ruled that the third defendant's role was merely limited to provider of the service and by virtue of sections 1(2) and 1(3)(c), it was neither commercial publisher nor editor under the Defamation Act 1996. It was observed that due to the vast size and diverse nature of the website, it was not possible for the defendant to have actual knowledge of any unlawful information prior to the plaintiff's complaint. Nonetheless, the court was not satisfied that the third defendant had exercised reasonable care in relation to the publication of the defamatory statement. As a result, the application to strike out the defamation claim was rejected.

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<sup>247</sup> *Davison v Habeeb* (n 94).

<sup>248</sup> cf *L'Oreal SA v eBay International AG* (C-324/09) [2012] All ER (EC) 501 (ECJ (Grand Chamber)) whereby it was ruled that the existence of constructive knowledge was sufficient to render the intermediary liable for copyright infringement. This has the potential to be of great concern to intermediaries. See Sarosh Khan, 'The Potential Impact on Host Intermediaries of Defamatory Remarks Posted Following *L'Oreal v eBay*' (2012) 18 CTLR 204.

<sup>249</sup> *McGrath v Dawkins and others* (n 123).

The section 1 defence has again been considered in *Tamiz v Google Inc.*<sup>250</sup> The Court of Appeal expressed disagreement with the earlier decision of Eady J, which ruled that section 1 would provide a defence to the respondent (Google Inc.) since all of the conditions were satisfied. Richards LJ partially concurred with the High Court rulings that the respondent had complied with the requirements in section 1(a) and (b) of the Defamation Act 1996. Nonetheless, it was ruled that the respondent failed to satisfy the condition in section 1(c) after notification as the respondent knew or had reason to believe that what it did caused or contributed to continued publication of the defamatory content. In view of that, the respondent could not rely on the defence of innocent dissemination in libel actions.

To sum up, it is an established principle that upon notification of the existence of defamatory publication, online intermediaries should swiftly delete such content from their services. Failure to do so may have a grave implication as they may not be able to take advantage of the defence of innocent dissemination under the Defamation Act 1996. This seems to imply that the intermediaries are now placed in the position of a judge or jury over the queried remarks, but it has been contended that it is far better for them to err on the side of caution<sup>251</sup> as immediate removal of the materials could potentially absolve them from liability in defamation suit.<sup>252</sup>

As to the availability of the defence to blogs, the question appears to have attracted comparatively little attention of the courts. By referring to relevant cases involving hosting intermediaries such as *Godfrey v*

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<sup>250</sup> *Tamiz v Google Inc* (n 96).

<sup>251</sup> Nick Armstrong, 'Blog and Be Damned??' (2008) 158 NLJ 387, 388.

<sup>252</sup> Notwithstanding the prospect of losing the defence of innocent dissemination for not removing the defamatory content, the online intermediaries may nonetheless invoke the provisions of sections 5 and 10 of the Defamation Act 2013 which provide defences to persons who are not the author, editor or publisher of the disputed statement. For details, see the discussion in Parts 5.1 and 6.4 above.

A Comparative Study of Malaysia and the United Kingdom  
*Demon Internet Ltd*,<sup>253</sup> *Davison v Habeeb*,<sup>254</sup> *McGrath v Dawkins and others*<sup>255</sup> and *Tamiz v Google Inc*,<sup>256</sup> bloggers may have no problem to satisfy the first requirement in section 1(1)(a) as they are very much unlikely to be regarded as author, editor or publisher, but difficulties may arise in fulfilling other requirements in section 1(1)(b) and (c).

Apart from that, there is an established defence of innocent dissemination under common law.<sup>257</sup> The defence had been exploited by 'subordinate distributors',<sup>258</sup> in cases where they can prove they did not know the publication complained of contained a libel; they did not know the disputed statement was of such a character that it was likely to contain libel; and the absence of knowledge was not due to their negligence. The common law defence continues to apply in certain circumstances<sup>259</sup> though it has been superseded by the Defamation Act 1996. This is based on the ruling of Eady J in *Metropolitan International School Ltd*<sup>260</sup> which stated that the common law defence has not been actually abolished with the coming into operation of the defence in the Defamation Act 1996. Nonetheless, it was argued that the common law defence has failed to keep pace with the rapid development of the information communication

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<sup>253</sup> *Godfrey v Demon Internet Ltd* (n 52).

<sup>254</sup> *Davison v Habeeb* (n 94).

<sup>255</sup> *McGrath v Dawkins and others* (n 123).

<sup>256</sup> *Tamiz v Google Inc* (n 96).

<sup>257</sup> The common law defence existed long before the coming into force of section 1 of the Defamation Act 1996 on 4 August 1996.

<sup>258</sup> These include newspaper and magazine distributors and vendors, book distributors and libraries and wholesale newspaper agents and any other persons who are 'not the printer or the first or main publisher of a work which contains a libel'. The concept of 'subordinate distributor' has been derived from the Romer LJ's judgment in *Vizetelly v Mudie's Select Library, Ltd* [1900] 2 QB 170, 180.

<sup>259</sup> The common law defence might be applicable to a person who would qualify as a mere distributor at common law and who believed he had sufficient evidence that the defamatory publication was not actionable as some defences such as justifications and fair comment are available to the originator.

<sup>260</sup> *Metropolitan International School Ltd v Designtecnica Corp* (n 91) [70].

A Comparative Study of Malaysia and the United Kingdom technology<sup>261</sup> and consequently, it is almost no longer relied upon after the operation of the section 1 defence.

### **7.6.6 Electronic Commerce (EC Directive) Regulations 2002**

The UK Electronic Commerce (EC Directive) Regulations 2002 (E-Commerce Regulations)<sup>262</sup> have incorporated the Directive on Electronic Commerce (EU E-Commerce Directive)<sup>263</sup> into the country. The provisions have dealt with many aspects of electronic commerce, including the establishment of immunity regime that exempts online intermediaries from liabilities for carrying (mere conduit), caching (automatic and temporary storage of information for faster transmission) or hosting (storage) illegal content on their services.<sup>264</sup> The immunities will be available to service providers<sup>265</sup> that are considered to have offered ‘information society service’.

The phrase ‘information society service’ is defined as covering ‘any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient of a service’.<sup>266</sup> Based on this interpretation, many commercial Internet intermediaries such as ISPs, bulletin board operators, and web hosting services may be covered by the scope of

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<sup>261</sup> Akdeniz and Rogers, ‘Defamation on the Internet’ (n 77) 306.

<sup>262</sup> The E-Commerce Regulations were laid before Parliament on 31 July 2002 and they came into force on 21 August 2002.

<sup>263</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market Directive (Directive on Electronic Commerce).

<sup>264</sup> Regulations 17, 18 and 19 of the E-Commerce Regulations which have incorporated almost in verbatim the provisions of Article 12, 13 and 14 of the EU E-Commerce Directive.

<sup>265</sup> The phrase ‘service provider’ is defined in section 2(1) of the E-Commerce Regulations as ‘any person providing an information society service’.

<sup>266</sup> Section 2(1) of the E-Commerce Regulations.

A Comparative Study of Malaysia and the United Kingdom the provision.<sup>267</sup> The status is less clear-cut for bloggers as they are not directly remunerated by the ‘recipients of their services’.<sup>268</sup> Nonetheless, some bloggers may derive modest income from advertising banners and affiliate sales and for that reason, it is arguable that they may be included within ‘information society service’ under the E-Commerce Regulations.

The question of non-payment to service providers by online users has been raised in *Davison v Habeeb*.<sup>269</sup> The second defendant (a blogger called ‘Peter Eyre’s Pace’) did not make payment to the fifth defendant (Google Inc.) that provided the blogging services (Blogger.com). By referring to the decisions in *Bunt v Tilley*<sup>270</sup> which ruled that services offered by the ISPs defendants were within the scope of Regulation 19 and the ruling in *Metropolitan International School Ltd*<sup>271</sup> that ‘information society services’ should be given an ‘extended definition’ so as to embrace search engines which were not remunerated by their service users, Parkes J concluded that the Blogger.com service constituted an information society service and accordingly, the fifth defendant should be entitled to take advantage of the intermediary immunities.<sup>272</sup> Thus, it is submitted that bloggers who make available their blogs to Internet users could satisfy the interpretation of ‘information society services’ despite the fact that they normally do not receive any payment from blog readers.

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<sup>267</sup> Collins, *The Law of Defamation and the Internet* (n 72) 268; Milmo, Rogers, and Gatley, *Gatley on Libel and Slander* (n 34) 194.

<sup>268</sup> Section 2(1) of the E-Commerce Regulations refers the phrase ‘recipient of the service’ to ‘any person who, for professional ends or otherwise, uses an information society service, in particular for the purposes of seeking information or making it accessible’.

<sup>269</sup> *Davison v Habeeb* (n 94).

<sup>270</sup> *Bunt v Tilley* (n 88) [41].

<sup>271</sup> *Metropolitan International School Ltd v Designtecnica Corp* (n 91) [84].

<sup>272</sup> The judgment has been quoted with approval by Eady J in the subsequent case of *Tamiz v Google Inc* (n 96) [55] when it was ruled that the provision of Blogger.com by the first defendant (Google Inc.) constituted an information society service within the E-Commerce Regulations.

A Comparative Study of Malaysia and the United Kingdom

Following the potential inclusion of blogs within the ambit of the ‘information society services’, a related question arises as to which type of immunities may be invoked by bloggers for publishing third party defamatory materials. Since online intermediaries are categorically recognised for the purpose of the E-Commerce Regulations by their role or involvement either as mere conduit, cache or host of content, bloggers are most likely to apply the hosting defence as they are principally involved in the storage of the online information. Regulation 19 of the E-Commerce Regulations provides:

Where an information society service is provided which consists of the storage of information provided by a recipient of the service, the service provider (if he otherwise would) shall not be liable for damages or for any other pecuniary remedy or for any criminal sanction as a result of that storage where –

(a) the service provider –

(i) does not have actual knowledge of unlawful activity or information and, where a claim for damages is made, is not aware of facts or circumstances from which it would have been apparent to the service provider that the activity or information was unlawful; or

(ii) upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information, and

(b) the recipient of the service was not acting under the authority or the control of the service provider.

The host immunity is only available to online providers that confine their services to a mere storage of Internet content. Thus, the defence will be definitely not available when the conduct of bloggers goes beyond mere storage of the third party materials. Such incidents may occur when bloggers exercise editorial control over comments by blog readers, move blog entries to more prominent positions, or even apply spelling and grammar checks on the third party postings.

Apart from the storage requirement, the exemption requires the service providers to show that they do not have ‘actual knowledge’ or / and ‘awareness’ of the unlawful content on their services. However, there is uncertainty as to whether both ‘actual knowledge’ and ‘awareness’ must not exist before the defence could be pleaded. It was contended that in defamation or civil cases which involve claims for damages, the hosting immunity will be lost even if the service providers do not have actual knowledge of the illegal materials they hosted.<sup>273</sup> This is due to the reason that such cases require a lower standard of awareness of facts or circumstances from which the unlawful nature of the content would have been apparent to the service provider.<sup>274</sup> On the contrary, it was argued that in a defamation case, a host will only be aware of the facts or circumstances if the host has actual knowledge of the existence of the disputed materials, and actual knowledge of facts or circumstances from which it would have been apparent the materials were unlawful.<sup>275</sup> Thus, mere general awareness will not deny the host of the hosting immunity under Regulation 19.

This issue has been considered in *Kaschke v Gray*.<sup>276</sup> In relation to the requirement of ‘actual knowledge’ or / and ‘awareness’ of the unlawful content, it was observed by the court that:

Initially Mr Harris appeared to submit that it was not necessary for Mr Hilton to establish both these things. However by the end of the oral hearing he accepted that both had to be proved. That concession was in my view not only rightly made but, given the language in Regulation 19(a)(i) inevitable.<sup>277</sup>

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<sup>273</sup> Milmo, Rogers, and Gatley, *Gatley on Libel and Slander* (n 34) 197.

<sup>274</sup> *ibid* 197.

<sup>275</sup> Collins, *The Law of Defamation and the Internet* (n 72) 270.

<sup>276</sup> *Kaschke v Gray* (n 98).

<sup>277</sup> *ibid* [94].

The judgment appears to have suggested that mere general awareness on the host of the services is insufficient as it requires the presence of actual knowledge before the availability of the hosting exemption could be denied. Pertaining to the issue of actual knowledge, Regulation 22 of the E-Commerce Regulations states:

In determining whether a service provider has actual knowledge for the purposes of regulations 18(b)(v) and 19(a)(i), a court shall take into account all matters that appear to it in the particular circumstances to be relevant and, among other things, shall have regard to —

- (a) whether a service provider has received a notice through a means of contact made available in accordance with regulation 6(1)(c), and
- (b) the extent to which any notice includes —
  - (i) the full name and address of the sender of the notice;
  - (ii) details of the location of the information in question; and
  - (iii) details of the unlawful nature of the activity or information in question.

The importance of the requirement has been considered in *Bunt v Tilley*<sup>278</sup> as the facts showed that the notice issued by the claimant did not include details of the location and the unlawful nature of the information. It was ruled by Eady J. that the ISP defendant could not be held liable for hosting the online content on its services by virtue of Regulation 19 of the E-Commerce Regulations.<sup>279</sup> It was observed that in order to be able to characterise any information as ‘unlawful’, a person ‘would need to know something of the strength or weakness of available defences’.<sup>280</sup>

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<sup>278</sup> *Bunt v Tilley* (n 88).

<sup>279</sup> The decision was followed with approval by Stadlen J in *Kaschke v Gray* (n 98).

<sup>280</sup> *ibid* [72].



In *Davison v Habeeb*,<sup>281</sup> the issue was whether upon notification of the defamatory posts by the claimant fixed the fifth defendant (Google Inc.) with actual knowledge of unlawful information, and made it aware of circumstances from which it would have been apparent to it that the information was unlawful. It was held by Parkes J:

[T]he service provider who is simply notified of a defamatory allegation, in circumstances where it is not clear whether a defence is available, will have received a notification which is inadequately substantiated. In those circumstances, the service provider will not have actual knowledge of unlawful information or awareness of facts or circumstances from which it would have been apparent to the service provider that the information was unlawful.<sup>282</sup>

Thus, mere notification of the content will not fix online intermediaries with actual knowledge under Regulation 19. Further, publication of the defamatory material of and concerning a person would only become unlawful when there is no defence available to them. It was contended that the decision was praiseworthy as it would be a comfort to website owners, upon receiving complaints that certain postings on their websites are defamatory, to request from the defamed victim more than the normal one-liner 'this is defamatory, take it down'.<sup>283</sup>

In *McGrath v Dawkins and others*,<sup>284</sup> the issue was whether the third defendant (Amazon) had actual knowledge of unlawful activity or information, and / or was made aware of facts or circumstances from which it would have been apparent that the activity or information was unlawful. It was held by Moloney QC:

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<sup>281</sup> *Davison v Habeeb* (n 94).

<sup>282</sup> *ibid* [63].

<sup>283</sup> Eileen Weinert, 'A New Dawn for Website Owners - Liability in Libel for Blogs and Posts - *Davison v Habeeb*' (2012) 23 Ent LR 35, 37.

<sup>284</sup> *McGrath v Dawkins and others* (n 123).

A Comparative Study of Malaysia and the United Kingdom

A corporation can have actual knowledge only through a human representative, and given the vast size and diverse nature of Amazon's website there is no reason to suppose that anyone in Amazon was actually aware of these postings, let alone of their possible unlawfulness, prior to C's complaints.<sup>285</sup>

The court also found out that the claimant's notice had failed to clearly specify the location of neither the postings nor the facts that would show them to be unlawful. Further, the claimant had failed to comply with Regulation 19 that had been held to import the further requirement that the third defendant should know something of the strength or weaknesses of available defences. Accordingly, the third defendant had succeeded with its Regulation 19 defence but not with the section 1 defence under the Defamation Act 1996. For this reason, the hosting exemption under Regulation 19 appears to be broader in scope than the section 1 defence as the latter will be defeated when the intermediaries merely know, or have reason to believe, that their conduct caused or contributed to the publication of a defamatory statement.<sup>286</sup>

Apart from that, the hosting defence requires online intermediaries to expeditiously remove or disable access to the unlawful content upon gaining actual knowledge of it, or awareness of facts and circumstances from which the existence of the unlawful material would have been apparent.<sup>287</sup> The requirement has been considered in *Kaschke v Gray*<sup>288</sup> whereby it was observed by Standlen J that 'the need to prove expeditious removal arises only where the defendant has actual knowledge of unlawful activity or information or awareness of facts from which the illegality would have been apparent'.<sup>289</sup>

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<sup>285</sup> *ibid* [42].

<sup>286</sup> The case has been quoted with approval by Richards LJ in the recent case of *Tamiz v Google Inc* (n 96) [57].

<sup>287</sup> Regulation 19(a)(ii) of the E-Commerce Regulations 2002.

<sup>288</sup> *Kaschke v Gray* (n 98).

<sup>289</sup> *ibid* [104].

Unfortunately, there is no clear explanation as to what constitutes ‘expeditious’ and whether the Internet intermediaries are required to check the alleged illegality before removing or disabling access to it. It is suggested that instead of simply removing unlawful content upon receiving any notice of its existence, the online intermediaries should ‘do what is reasonable to prevent further communication of that notified content’.<sup>290</sup> Nonetheless, it is argued that the lack of formal guidance has resulted in the removal of the content by the ISPs as they seek to avoid any legal liability for hosting third party content.<sup>291</sup>

Finally, the hosting defence would not be available where the author of the unlawful statements acted as an agent or employee of the online intermediaries because in such cases the author is regarded to be ‘under the authority or the control’ of the intermediaries pursuant to the express provision in Regulation 19(b). In an unreported case of *Imran Karim v Newsquest Media Group Ltd*,<sup>292</sup> the claimant brought a libel action against the defendant in respect of an article and user comments posted to the bulletin boards on websites hosted by the defendant. With regard to the user comments, the defendant sought to rely upon the host immunity in Regulation 19. Based on the evidence in the case, Eady J found that the defendant did not have actual knowledge of unlawful information nor was aware of it until it was pointed out by the claimant. The unlawful material was also taken down as soon as the nature of the complaint reached the defendant. It was also clear that the recipient of the service was not acting under the authority or control of the service provider within the meaning of

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<sup>290</sup> Chris Reed, ‘Policies for Intermediary Immunity’ (2009) 19(6) *Comps & Law* 20, 20.

<sup>291</sup> Department of Trade and Industry, ‘A Guide for Business to the Electronic Commerce (EC Directive) Regulations 2002’, 31 July 2002, para 6.6 and 6.8, Department of Trade and Industry, ‘A Guide for Business to the Electronic Commerce (EC Directive) Regulations 2002’, 31 July 2002, para 6.6 and 6.8, <<http://www.dti.gov.uk/files/file14635.pdf>> [accessed 25 October 2010].

<sup>292</sup> [2009] EWHC 3205 (QB), 2009 WL 4113763.

regulation 19. As a result, it was ruled that the defendant is entitled to rely upon that defence.

### **7.6.7 Innocent Carrier**

There are no specific provisions that afford the defence of innocent dissemination or exempt online intermediaries from carrying, caching or hosting unlawful Internet content in Malaysia. Nonetheless, the Communications and Multimedia Act 1998 (CMA) provides for the adoption of self-regulatory system for the communications and multimedia industry in the country, and in view of that, the CMA has entrusted the Malaysian Communications and Multimedia Commission (Commission) to establish relevant industry forums to regulate online content and related issues. Accordingly, the Communications and Multimedia Content Forum of Malaysia (Content Forum) was established as a self-regulatory body that will be responsible for drafting and formulating content codes for the industry.<sup>293</sup>

The Content Forum has prepared a non-binding content code,<sup>294</sup> the Malaysian Communications & Multimedia Content Code (Content Code), which sets out guidelines on approved and prohibited content in Malaysia.<sup>295</sup> The Content Code has established a defence of innocent carrier in Item 2.0 of Part 5 that states:

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<sup>293</sup> The Content Forum was established in February 2001 under section 212 of the CMA.

<sup>294</sup> Item 6.0 of Part 1 of the Content Code states that compliance with its provisions is voluntary but it shall be a defence against any legal actions under the CMA.

<sup>295</sup> The Content Code was made pursuant to section 213 of the CMA and it was officially registered with the Commission with effect from 1 September 2004.

A Comparative Study of Malaysia and the United Kingdom

Code Subjects<sup>296</sup> providing access to any Content but have neither control over the composition of such Content nor any knowledge of such Content is deemed an innocent carrier for the purposes of this Code. An innocent carrier is not responsible for the Content provided. Nonetheless, this does not exempt such access providers from adhering to the General measures as outlined in Part 6.0 of this Part where it expressly applies to them.

It is apparent that providers of online content or those who provide access to prohibited content<sup>297</sup> under the Content Code are entitled to rely on the innocent carrier defence provided that they have neither control over the creation of such content nor any knowledge of it. Apart from that, they are expected to comply with the general and special measures prescribed in the Content Code. Nonetheless, it is not immediately apparent the standard of knowledge (actual or constructive) required from the content and access providers in order to take advantage of the defence.<sup>298</sup>

As to the availability of the innocent carrier defence to blog authors or editors, their position is still unclear as it has yet to be tested in any cases. Nonetheless, it is submitted that they could be rightly included within the interpretation of ‘code subjects’ as they are clearly ‘providers of online content or those who provide access to online content’ within Part 5 of the Content Code. Thus, blog authors or editors may rely on the innocent carrier defence in order to avoid liability for publishing third party prohibited content on their services.

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<sup>296</sup> The phrase ‘Code Subjects’ is defined in Item 5.1 of Part 1 of the Content Code as ‘persons who are subject to the Code’. And Item 1.2 of Part 5 of the Content Code provides that ‘Code subjects in this Part are providers of online content or those who provide access to online content through present and future technology. These include, but are not limited to: (a) Internet Access Service Providers; (b) Internet Content Hosts; (c) Online Content Developers; (d) Online Content Aggregators; and (e) Link Providers’.

<sup>297</sup> Part 2 of the Content Code has classified ‘prohibited content’ into nine categories namely indecent content, obscene content, violence, menacing content, bad language, children’s content, family values and people with disabilities.

<sup>298</sup> Ida Madieha Azmi, ‘Content Regulation in Malaysia: Unleashing Missiles on Dangerous Web Sites’, *JILT: Journal of Information Law and Technology*, 3 (2004), <[http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2004\\_3/azmi](http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2004_3/azmi)> [accessed 12 September 2009].

Nonetheless, it is very much unlikely for the defence to be successfully pleaded in defamation proceedings as the scope of the Content Code has been limited to certain categories only.<sup>299</sup> In relation thereof, it was claimed that the situation would be better addressed if the Malaysian Defamation Act 1957 could provide for a defence of innocent dissemination similar to the UK Defamation Act 1996.<sup>300</sup> In the absence of specific provisions, the usual defences may be relied upon by blog authors or editors in cases involving publication of defamatory materials on their blogs in Malaysia.<sup>301</sup>

## 7.7 Conclusion

To sum up, defamatory materials published on blogs or other Internet publications shall be subjected to defamation laws if they fulfil all of the prescribed criteria. Defamatory blog posting by bloggers in the UK and Malaysia are considered as publication in permanent form and thus shall be governed by libel law. On the other hand, defamatory comments by blog readers in the UK are treated as communication in transient form and thus a slander, whilst the Malaysian law does not distinguish between blog comments and blog postings. Regardless of the difference, defamatory content on blogs is normally accessible for an indefinite period of time and can be easily repeated or republished in the cyber world.

Nonetheless, bloggers in the UK are no longer exposed to indeterminate liability as the Defamation Act 2013 has introduced single publication rule that renders bloggers' liability to expire after one year the statement was first published. On the contrary, the

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<sup>299</sup> Part 2 of the Content Code (n 297).

<sup>300</sup> Cirami Drahaman, 'Computers and Internet' (2006) 27 BLR 2, 11.

<sup>301</sup> Qualified privilege and justification have been commonly invoked by bloggers in defamation cases and these can be seen in *Datuk Seri Utama Dr Rais bin Yatim v Amizudin bin Ahmat* [2010] 2 MLJ 807 and *YB Hj Khalid bin Abdul Samad v Datuk Aziz bin Isham & Anor* [2012] 7 MLJ 301.

multiple publication rule is still in force in Malaysia and as such, online defamatory content in blogs or other online publications is exposed to unlimited liability.

Bloggers are also prone to be held liable for publishing defamatory statements created by third parties as well as for unlawful content in external websites due to the existence of hyperlinks to such materials from their blogs. Fortunately, bloggers in the UK could invoke the section 1 defence of innocent dissemination under the Defamation Act 1996 and the immunity from hosting under the E-Commerce Regulations in order to escape liability. Further, bloggers may also rely on the principal defences of truth and honest opinion, as well as the new statutory defence of publication on matter of public interest which has been introduced by the Defamation Act 2013.

As for Malaysian bloggers, there are no comparable statutory defences available to them and the innocent carrier defence contained in the Malaysian Content Code is most unlikely to be applicable in defamation proceedings. In the absence of any specific defences for online defamatory content, blog authors or other online publishers have to rely on the usual defences of justification and fair comment as well as the common law defence of *Reynolds* privilege and reportage.

## 8.1 Conclusion

This thesis has considered the interplay between political blogs and the right to freedom of speech and expression in Malaysia, comparing this with the position in the UK. I use the term ‘blog’ to refer to frequently updated websites, which are usually displayed in reverse-chronological order, with entries comprising personal observations, comments on other stories and often hyperlinks to external websites. ‘Political blogs’ are a form of blogs that focuses on politics and related issues.

In chapter 2, I analysed the distinctive nature and importance of political blogs. In a country such as Malaysia, where the traditional media have been strictly controlled by the government, political blogs have been hailed as an influential channel for independent news and information, enabling the people to acquire a reasonable understanding of political issues and ultimately to make informed judgment in elections. Apart from that, political blogs have also been resorted to as a novel platform for the electorate, members of opposition parties and civil right groups to freely discuss and debate matters of public interests. Therefore, it has been concluded that political blogs have, and will continue to play, a crucial role in augmenting public participation in politics and ultimately democratic process in Malaysia.

The right to freedom of speech and expression is guaranteed to all of the Malaysian citizens ever since the country gained her independence in 1957 by Article 10(1) of the Malaysian Federal Constitution. The right embraces freedom of the press and the right to receive information, but unfortunately the right of access to information is not included within its ambit. Apart from that, the article does not provide statutory distinction between political speech and other non-political



A Comparative Study of Malaysia and the United Kingdom expression such as commercial and artistic speech. Further, no judicial decisions have ruled that political speech should be accorded special status under the Malaysian law. In the absence of express statutory provisions and decided cases, political speech in Malaysia will not be given a privileged legal status like the position in the UK. Therefore, political speech will be governed by the same rules and regulations that are applicable to other types of expression.

Unfortunately, the position of political speech is further exacerbated with the enactment of the Sedition Act 1948, which has on numerous occasions been resorted to deter and prevent opposition politicians and civic groups from making critical comments on matters of public interest. Thus, it is submitted that since open public dialogue and criticisms towards the government is hardly permissible, it is very much unlikely that political speech will be freely exercised by the people in the country.

Pertaining to the legality of restrictive laws on freedom of expression, in general any restrictive laws passed by Parliament that fall within the ambit of the fourteen permitted exceptions would be regarded as constitutional though harsh and unjust, due to the omission of the word 'reasonable' in Article 10(1). However, this thesis has established that pursuant to the landmark ruling in *Sivarasa Rasiah v Badan Peguam Malaysia & Anor*,<sup>1</sup> any laws that have the effect of limiting freedom of expression have to be reasonable, as the word 'reasonable' should be now read before restrictions in Article 10. The legality of the Sedition Act 1948 has been challenged in the recent case of *Mat Shuhaimi bin Shafiei v Public Prosecutor*<sup>2</sup> on the ground that it offended the 'reasonableness test'. The Court of Appeal however rejected the appellant's contention as it ruled that it is

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<sup>1</sup> [2010] 2 MLJ 333.

<sup>2</sup> [2014] 2 MLJ 145.

reasonable to maintain the impugned provisions of the statute since the government has a good right to preserve public peace and order in the country. The judgment appears to demonstrate the positivist attitude of the local judges, as they were still reluctant to take a liberal interpretation of the word 'reasonable' so as to give greater protection to freedom of expression, particularly political speech.

There is also uncertainty as to whether the constitutional guarantee to freedom of expression in Article 10 and related restrictive laws passed by Parliament are applicable to political blogs, in that the constitutional provisions were drafted long before the development of the Internet and without the technological advancement in mind. Nonetheless, since the right can be exercised via any platform or channel, it is argued that the same principles should equally be applicable to political blogs.

In addition, political blogs are comparable to the mainstream media in the sense that the former provides an avenue for disseminating information and news. As such, it is concluded in chapter 3 that political blogs should be granted, at minimum, a similar right to freedom of the press that is impliedly contained in Article 10. Political blogs are not conferred any special status although their postings are largely related with discussion on matters of public concern. This is mainly because political speech itself is not statutorily or judicially privileged over other types of speech in the country. The position of political blogs is now resolved with the recent decision in *Mat Shuhaimi bin Shafiei*<sup>3</sup> whereby the appellant blogger was found guilty of posting seditious remarks in his personal blog under the Sedition Act 1948. Thus, it is submitted that in general, the right to freedom of expression in Malaysia is also exercisable through political blogs, but

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<sup>3</sup> *ibid.*

the exercise of such a right is not without limit as it is made subject to restrictive laws that have been Parliament.

A comparative study of freedom of expression in the UK is contained in chapter 4. Prior to the enactment of the Human Rights Act 1998 (HRA), the UK had neither a codified written constitution, nor a specific bill of rights that protected fundamental rights. Consequently, freedom of expression was merely residual in nature and could only be exercised when there were no express restrictions in statutes or the common law. Some domestic judges were influenced by Article 10 of the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR).<sup>4</sup> However, it was held that the provision could only be applied when there was ambiguity in statutes or the common law.<sup>5</sup> Further, the ECHR had yet to be incorporated into the domestic law and thus they remained unenforceable in the UK. This scenario has changed when freedom of expression and other fundamental rights in the ECHR were incorporated as a schedule in the HRA. As a result, freedom of expression is now statutorily available to all persons in the UK.

The right to freedom of expression embraces freedom to hold opinion, freedom to receive and freedom to impart information and ideas. Apart from that, freedom of the press is also included within the scope of this fundamental right. With regard to the position of political speech in the UK, it has been observed that although such a right is applicable to all forms of expression, local courts have judicially recognised its preferred legal status over other types of speech such as

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<sup>4</sup> It was observed by Lord Goff in the case of *AG v Guardian Newspaper Ltd (No. 2)* [1990] 1 AC 109 (HL) at 283 that ‘... I can see no inconsistency between English law on this subject and article 10 of the European Human Rights’.

<sup>5</sup> Lord Bridge in *R v Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696 (HL).

A Comparative Study of Malaysia and the United Kingdom commercial or artistic expression.<sup>6</sup> This is evidently in stark contrast with the position in Malaysia that does not statutorily or judicially distinguish between all categories of expression and therefore, does not accord special preferred position to political speech.

Freedom of expression in the UK is not absolute and its exercise is subject to a number of limitations. The state is allowed to impose restrictions on such a right provided that they are prescribed by law, made in pursuance of legitimate aims and be necessary in democratic society. In determining the validity of such derogation, domestic judges are granted a margin of appreciation but the final decision still rests with the European Court of Human Rights (ECtHR). With regard to the application of the right in political blogs, Article 10 has clearly stipulated that freedom of expression is exercisable ‘regardless of frontiers’. As such, it is submitted that the general rules and principles governing freedom of expression in the UK should be equally applicable to the blogosphere. Alternatively, it is has been claimed that since majority of the digital communications in blogs and other web based platforms are regarded as low level speech,<sup>7</sup> this kind of online expression merits some protections and any restrictions on such speech must be proportionate to its level.<sup>8</sup>

Chapter 5 of the study has analysed the specific regulatory regime of the media in Malaysia. In general, the traditional print and broadcast media have been subjected to strict regulatory control by the state. The Printing Presses and Publications Act 1984 (PPA), the main legislation for the print industry, imposes prior constraints in the form

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<sup>6</sup> The courts’ attitude towards political expression can be seen in *Derbyshire CC v Times Newspaper Ltd* [1993] AC 534 (HL) and *R (Prolife Alliance) v BBC* [2003] UKHL 23.

<sup>7</sup> Jacob Rowbottom, ‘To Rant, Vent and Converse: Protecting Low Level Digital Speech’ (2012) 71(2) CLJ 355.

<sup>8</sup> Jacob Rowbottom, ‘Media Freedom and Political Debate in the Digital Era’ (2006) 69 MLR 489.

A Comparative Study of Malaysia and the United Kingdom of a printing licence and publication permit on newspaper publishers and operators of printing presses. Unfortunately, the grant, refusal, suspension or revocation of licence or permit is placed under the discretionary power of the Ministry of Home Affairs. Apart from that, the press is also bound by the content regulation under the PPA that prohibits the publication of materials which are obscene or against public decency, or which incite to violence against persons or property, or which promote feelings of ill-will, hostility, enmity, hatred, disharmony or disunity.<sup>9</sup> Further, not only publication of materials that are deemed undesirable or malicious content is prohibited under the PPA, such publication is also regarded as a criminal offence that is punishable with imprisonment or fine.<sup>10</sup>

As to the application of the regulatory regime of the press to political blogs, an uncertainty arises since political blogs may comprise of audio materials that could have then resulted such blogs to be considered as ‘audio recording’ within the broad definition of the term ‘publication’ in the PPA. Therefore, there is a slight possibility that the provisions of the PPA might be extended to political blogs that incorporate audio postings even though such blogs are largely text-based publication. Nonetheless, it is argued that it is very much unlikely for political blogs or other online publications be mandated to procure licence or permit under the PPA as these prior constraints may contravene the government’s guarantee of no censorship of the Internet in the country.

With regard to the broadcast media, the Communications and Multimedia Act 1998 (CMA), the primary statute for the converged industries, has categorised such media as content applications service providers that must procure and hold valid individual licence before

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<sup>9</sup> Section 4(1) of the PPA.

<sup>10</sup> Sections 7(1) and 8A of the PPA.

A Comparative Study of Malaysia and the United Kingdom offering their services to the public. And in contrast with the licensing system of the press, the Malaysian Communications and Multimedia Commission (MCMC) has been entrusted as an independent regulatory body that will administer applications for licences and make recommendations to the Minister whether to approve or reject any applications. Therefore, it is submitted that with this setup, the licensing system of the broadcast media appears to offer greater transparency and less governmental control over the broadcast media in the country compared to the print industry.

Pertaining to the application of the broadcast regulatory system to political blogs, it is submitted that since the phrase ‘content application service’ has been given a very broad interpretation so as to encompass online publications, political blogs may be subjected to the licensing system of the broadcast media. Nonetheless, regulation 5 of the Communications and Multimedia (Licensing) Regulations 2000 states that an individual licence shall only be granted to local corporate entities and not individuals or unincorporated bodies or groups. In addition, order 6 of the Communications and Multimedia (Licensing) (Exemption) Order 2000 expressly stipulates that providers of Internet content application services are exempted from having individual or class license. Thus, it is apparent that the regulatory regime of the broadcast media will not be applicable to political blogs.

As for the Internet industry in Malaysia, it is evidently clear that the Internet is less regulated compared to the traditional media as only the Internet service providers (ISPs) are required to be licensed as applications service provider class licensees,<sup>11</sup> whilst political blogs or other web-based communications are exempted from the licensing

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<sup>11</sup> Regulation 30 of the Communications and Multimedia (Licensing) Regulations 2000.

A Comparative Study of Malaysia and the United Kingdom regime under the CMA. This is perhaps due to the 'no censorship' principle of the Internet in the MSC Malaysia Bill of Guarantee<sup>12</sup> and the CMA<sup>13</sup> that puts into effect the government's pledge that the online environment is generally protected from prior interferences by the state. Therefore, political blogs and other online publications are basically free to publish content without the need to procure any licence or permit from the authority. Regardless of the no censorship promise, provision of illegal content<sup>14</sup> and improper use of the Internet<sup>15</sup> are regarded as criminal offences punishable with fine and imprisonment under the CMA. Further, the players of the Internet industry are also encouraged to voluntarily subscribe to the Malaysian Communications & Multimedia Content Code (Content Code), which sets out guidelines and procedures on the publication of 'indecent content, obscene content, violence, menacing content, bad language, false content, children's content, family values and persons with special needs'.<sup>16</sup>

In short, chapter 5 of the study has established that political blogs and other online publications are currently not bound by any specific regulatory controls that govern the traditional media as well as the Internet industry in Malaysia. Even though there is a slight possibility of extending the licensing system of the press to the blogosphere, it is submitted that such application would definitely amount to a violation of the no censorship guarantee of the Internet. For that reason, it has been alleged that the existing legal regime of the traditional and new

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<sup>12</sup> Bill of Guarantee No. 7 provides that 'To ensure no censorship of the Internet'.

<sup>13</sup> Section 3(3) states that 'Nothing in this Act shall be construed as permitting the censorship of the Internet'.

<sup>14</sup> Section 211 states that it is a criminal offence to provide online content which is 'indecent, obscene, false, menacing or offensive content which intent to annoy, abuse, threaten or harass any person'.

<sup>15</sup> Section 233 provides that the use of any facilities or services to transmit content that is 'obscene, indecent, false, menacing or offensive in character with intent to annoy, abuse, threaten or harass another' would amount to a criminal offence.

<sup>16</sup> Part 2 of the Content Code.

media is still lacking in regulating the blogosphere or other online publications.<sup>17</sup> Nonetheless, it is submitted that post publication rules and regulations are more than sufficient to handle content-related issues in political blogs and therefore, it is concluded that at present they should not be mandated to comply with any licensing requirements such as those applicable to the traditional print and broadcast media.

An analysis of specific regulatory regime applicable to the media in the UK is elaborated in chapter 6 of the thesis. The print industry is currently subject to a new self-regulatory system administered by the Independent Press Standards Organisation (IPSO). Its remit covers editorial content included in a printed newspaper and magazine and editorial content on electronic services operated by member publishers that voluntarily subscribe to the Editor's Code of Practice (Code).<sup>18</sup> This includes blogs belonging to newspapers and magazines that subscribe to the Code and pre-moderated before publication. It is further clarified that IPSO will not be accountable for online materials that is not on sites owned by or under the control of its members.<sup>19</sup> As such, it is concluded that the self-regulatory system of the press is not applicable to political blogs that are generally operated by individual bloggers or even personal blogs of professional journalists since such blogs are not owned by or under the control of IPSO's member publishers.

As for the broadcast media in the UK, they have been made subject to extensive statutory regulations and are governed by two separate regulatory bodies; Office of Communications (Ofcom) for commercial televisions and radio stations, and the British Broadcasting

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<sup>17</sup> Aishath Muneeza, 'The Milestone of Blogs and Bloggers in Malaysia' (2010) 3 MLJ cvii.

<sup>18</sup> IPSO AOA 7.3.6; IPSO Regulation 3.6.

<sup>19</sup> IPSO AOA 7.3.7; IPSO Regulation 3.7.



A Comparative Study of Malaysia and the United Kingdom Corporation (BBC) for all BBC content whether transmitted over the television, radio or online. Any would be broadcasters are required to abide by the licensing requirements under the Communications Act 2003 (CA). Apart from that, the broadcast media are also bound by strict content regulations that are not applicable to other media, in particular the requirement of due accuracy and impartiality though the IPSO's Code calls for accuracy.

The regulatory system of the broadcast media administered by Ofcom is not applicable to political blogs because Internet communications, apart from Internet live TV and VOD services, are generally excluded from Ofcom's remit by the CA. Nonetheless, blogs or other user-generated content (UGC) that are associated with the BBC are to be subjected to regulatory control by the BBC as the BBC's Editorial Guidelines have clearly stated that the standards expected of BBC content are not confined to television and radio stations only but also to other forms of communication channels, including the Internet. Therefore, it is concluded that apart from blogs that are related to the BBC, political blogs and other online publications that are largely published by individuals or ordinary public members are not bound by the specific regulatory regime of the broadcast media in the UK.

Regarding the video on demand (VOD) industry, this new medium is currently co-regulated by Ofcom and the Association for Television on Demand (ATVOD). VOD providers that principally offer 'television-like' programmes, empower viewers to freely select and watch the programmes at their own preferred time, control selection and organisation of the programmes, and offer the programmes to the public at large are considered as providing on-demand programme

A Comparative Study of Malaysia and the United Kingdom services (ODPS) under the CA.<sup>20</sup> These requirements are cumulative in nature and non-fulfilment of any criterion will exclude a provider from statutory duties and obligations that are imposed on VOD providers by the CA. In relation to this, since most audio visual materials in political blogs are not television-like, normally incidental to their largely text-based entries, and are not normally provided for remuneration, it is concluded that the co-regulatory regime of VOD services will not be applicable to political blogs.

As for the Internet industry in the UK, the government has generally excluded Internet communications, including political blogs from the licensed sectors that are governed by Ofcom. The Internet Watch Foundation (IWF), the only self-regulatory body that has been established by the industry to govern online content in the UK, does not regulate political blogs since the IWF's role and remit are solely designed to handle issues of online child pornography and obscene adult materials. To sum up, it is concluded in chapter 6 of the thesis that the specific regulatory systems and bodies that have been formulated to govern the traditional print and broadcast media, the VOD services and the Internet industries in the UK would be unlikely to be applied to political blogs.

Chapter 7 of the study has examined blogs and online defamation in Malaysia and the UK. It is clear that defamatory blog entries by bloggers will be governed by libel law in both countries. Nonetheless, there is dissimilarity with regard to comments by blog readers as in the UK they are considered to be slander, whilst in Malaysia such comments are treated in the same manner as blog posts. Blog owners may also be liable for defamatory content posted by third parties as well as defamatory materials in external websites due to the existence

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<sup>20</sup> Section 368A(1) of the CA provides statutory interpretation of the phrase 'on-demand programme service' that falls within the remit of ATVOD.

## Political Blogs and Freedom of Expression:

A Comparative Study of Malaysia and the United Kingdom of hyperlinks from their blogs. As a consequent, they have to establish a defence to escape liability in defamation proceedings. Bloggers in Malaysia have to rely on the usual defence of justification and fair comment in the Malaysian Defamation Act 1957, and the common law defence of *Reynolds* privilege and reportage. In the UK, on the other hand, bloggers may invoke specific defences for online content in the section 1 defence of innocent dissemination under the Defamation Act 1996 and the immunity from hosting under the Electronic Commerce (EC Directive) Regulations 2002. Furthermore, they may rely on the principal defences of truth and honest opinion, as well as the new defence of publication on matter of public interest in the Defamation Act 2013. The study therefore shows that political blogs in both Malaysia and the UK may be open to challenge on the basis of private suits in defamation and, in resolving such cases courts need to be aware of the special importance that this form of communication now plays in furthering democratic debate and a functioning public sphere.

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