

## **Personal Media Restrictions on Freedom of Speech: A Social Contract Theory Behind It**

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### **Abstract**

In the burst of sophisticated platforms, it reached its peak where people worship and preach their rights of freedom of speech. We witnessed a subsequent arose issue where people questioned the imposed restrictions on them in the realm of social media platforms by the authority. Nonetheless, the merely conferred freedom of speech will bring public disharmony. It was because people are exposed to and choose to be permeated by personal media applications. Thus, via the platforms, people are inclined to voice, issue and navigate their statements based on feelings, thoughts, and opinions without contemplating the effects and rationale of it. Normally, the statement is controversial while dripping at the edge of the sensitive topic while creating social disharmony and triggering social bonding. Thus, principle of Social Contract was brought in order to justify the restrictions imposed by the authority. At the same time, people used Social Contract as a defense to uphold their rights. Nevertheless, it may lead to numerous problems with the absence of restrictions. Besides, Twitter, Facebook, LinkedIn, Instagram and etc. were the examples of personal media platforms the writer referred to. Thus, the thrust of the paper is to examine to what extent the government may impose restrictions on their citizens via personal media platforms in relation to Social Contracts and the right of freedom of speech. Thus, the writers will conduct the paper through a qualitative approach which is a pure literature review. The gist of limitation is where the personal media platform would be focused, and restrictions referred to which were imposed by the governmental authorities instead of the personal media administrator. The The paper suggests that, notwithstanding the conventional Social Contract theory, the writers argued that the restrictions shall be imposed on personal media users.

**Keywords:** Personal Media Restriction, Freedom of Speech, Social Contract Theory, Democracy.

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## **1.Introduction**

Based on the case of *Datuk Seri Anwar (Datuk Seri Anwar Bin Ibrahim V Utusan Melayu (M) Bhd & Anor (2013))*. according to para 77, the scope of 'media' is no longer refers to traditional print media alone, it now encompasses modern media such as electronic media via the internet. It extends the scope of 'media' to include the modern media platform with the conventional media. Thus, conventional and modern personal media platforms will be distinguished in order to give a clear path to the readers. The court in *Peguam Negara Malaysia v Mkini Dotcom Sdn Bhd & Anor* made a scope under traditional media are media that have been published by a newspaper or broadcasted by television or radio. Traditional media also extended to include magazines (Odun and Utulu,2016).

In terms of restriction, Malaysia retains strict control over traditional broadcast and print media in order to encourage the growth of the internet (Daud,2010). It can be seen when Malaysian Government seeks to achieve by means of the creation of the Multimedia Super Corridor (MSC) to create a borderless world of information technology. Such intention has been materialised by referring to Section 3 which states 'nothing in this Act shall be construed as permitting the censorship of the internet' ("Communication and Multimedia Act,"1998). Nevertheless, in US's legal realm provides a different approach in term of conventional media restriction. US Constitution's First Amendment provides that government shall "make no law. abridging the freedom of speech, or the press." Besides, in the case of *New York Times v Sullivan (New York Times Co. v. Sullivan, 376 U.S. 254 (1964))*, the Supreme Court held that a public official cannot win a libel verdict against the press unless he proves that there is false and damaging and with 'actual malice.' The US philosopher Ronald Dworkin stated that the decision freed the press to investigate and report without the 'chilling' fear (DWORKIN,1996) and these two authorities confer the freedom of speech in the US region. As for the restriction over the modern personal media platform, which is the main thrust of this article, it will be discussed in the next chapter .

Normally, the statement with freedom of speech went to the fullest, is controversial while dripped at the edge of the sensitive topic. Thus, issues arose when the authority impose certain restrictions with regard to people's freedom of speech in that realm. Therefore, the purpose of the paper is to examine whether Social Contracts justified such imposed restrictions on

personal media users with respect to freedom of speech. The limitation of this article is the lack of resources and materials on the discussion between the Social Contract theory and personal media restrictions.

## **2. Methodology**

The study is doctrinal research. A doctrinal method is used in articles which discuss the human rights (Althabhwani, 2013). Doctrinal studies are designed to collect data from library-based sources (Althabhwani, 2022). Hence this article traced primary and secondary resources that encompass the personal media freedom social contract theory from the HeinOnline database and LexisNexis. It utilises the qualitative approach as proper approach in this type of studies (Hassan and et al., 2022; Khalid and et al., 2020). In terms of data analysis, the study employs content data analysis which were effective in studying state policies (Afzali and et al., 2023).

## **3. Media Restrictions in Malaysia**

### **3.1. Personal Media in Malaysia**

In the middle of the current technological revolution, freedom of speech faces and poses new obstacles. Today, the news is saturated with accounts of social media giants employing their algorithms for and against the propagation of disinformation. In light of this continuous argument, freedom of expression has become a major issue in the protection of individual rights, but it has also created questions regarding the obligations of the government, corporations, press, and all citizens to safeguard the integrity of democracy (bt Mohamed, 2017). In the contemporary day, eroding faith in institutions leads to the dearth of trustworthy information and threatens to bring down the system of checks and balances, so allowing disinformation to run rampant. This practise has contributed to the concept of a post-truth period in which facts are routinely contested, particularly when they are tied to political goals. However, these concerns may have contributed to the government's decision to place limitations on people's own media. Facebook users Gopinath Jayaratnam and Hidayat Muhamad were accused with insulting Islam and Hinduism in June 2014 (Azizuddin Mohd Sani, 2008). In September 2014, scholar Azmi Sharom was charged for an online essay he published on a news website concerning a political crisis in the country (Azizuddin Mohd Sani, 2008). Popular cartoonist Zunar was detained and charged with sedition for tweeting in support of Anwar that criticised the

Malaysian judicial system.

Religion and race concerns have long been prevalent in Malaysia, as evidenced by the fact that they have always been the most discussed topics. With the intention of mitigating these issues, a number of restrictions had been placed on it. Nonetheless, it is possible that the limits have created some constraints on the fundamental rights of individuals. Hence, we can observe where in Malaysia's jurisdiction speech freedom was curtailed and constrained by the government.

### **3.1.1 Freedom of Speech in Personal Media**

Each person, regardless of where they dwell, may freely communicate their ideas through any medium and across any boundaries without fear of opposition, such as threats or abuse (Mohd Sani,2008). This is commonly regarded as apparent (Barak-Erez and et al.,2011). The Constitution guarantees articulation and the expression of ideas. People have been empowered by internet- based social media to limitlessly express themselves due to the high connectivity and ability to exchange ideas (Ersoy,2019).

Until recently, governments across the globe employed a variety of excuses to conceal their operations from the general public. Governments are attempting to exert control over social media, which they view as a threat due to its immense capacity for spreading information to the general public (Bansal and Rani,2021). Internet has established itself as the cornerstone of modern civilisation due to its boundless possibilities and vast reach. Because to its importance in preserving and disseminating information and ideas, throughout history it has played a vital role in the operation of democracies all over the world. Internet and social media platforms, such as Facebook and Twitter, have made it possible for people from all over the world to connect. Nonetheless, despite the fact that not everyone is there, the protest's effectiveness remains unaffected. Thus, it is clear why governments around the world are striving to restrict the usage and accessibility of the Internet (Reddy and et al.,2018).

Supplementary to its useful purpose, the Internet is susceptible to abuse, which supports the constitutionally mandated government supervision of online information in the benefit of the general public (Dahlberg,2001). A number of cyber-crimes, including defamation and breach of privacy, as well as incitement to commit crimes and racist statements, can be easily committed via social media. Once such offensive content is released, it

travels rapidly and is difficult to restrict or stop (Dahlberg,2001). In this environment, government control over social media is crucial. Individual and collective needs of the people can be satisfied by government authority so long as it supports the people's interests. In this instance, the government undertakes censorship, which implies it begins suppressing civil liberties such as freedom of expression. Despite the existence of protections, states are more likely than not to go above and beyond in some fashion, but the extent varies from state to state (Daud and Zulhuda,2020).

False news, unfair depictions of women, and harsh language are a some of the problematic issues that the new regulations seek to address in greater detail. Notifying the government of illegal content is permissible, however social media firms are obligated to take reasonable measures to guarantee that their platforms do not host illegal content (Kaplan and Haenlein,2010). In addition to the foregoing, news and current affairs publications must conform to a code of ethics and be subject to government oversight. The government must also be able to locate the senders of private communications on social media platforms when doing so is required to protect national security or combat criminal behaviour on those platforms (Mohd Sani,2008).

As a result, the restrictions have been fiercely criticised in India and around the world. As a result of the increasing usage of social networking sites like Facebook, at least two important human rights concerns have emerged. Freedom of expression and democracy are essential for the protection of individual rights. Without democracy, citizens' freedom of speech would be severely curtailed in many ways (Azizuddin Mohd Sani,2008). Secondly, democracy represents a form of governance in which the people hold power. In the modern context, this indicates that the people have some sort of engagement in the government and that, even if they do not directly participate in all government decisions, the authority of the government derives from the people (Azizuddin Mohd Sani,2008).

There are several forms and hues of democratic governments. In addition, there are a number of essential aspects of democracy, including fundamental moral ideals, basic rights and institutions, and empirical prerequisites (Sangsuvan,2013).

One of the most significant essentials of democracy is the autonomy and the moral values thereof. Autonomy can was defined as capacity to

conceptualise, formulate, and select rules for themselves to adhere to (Brettschneider,2006). Undeniably, democracy is based on the recognition of this moral ability as an individual's right to political autonomy (Sangsuwan,2013). Contemporary democracies are constitutional, which means that citizens have a set of fundamental rights and liberties independent of the outcome of elections or the political leanings of a given administration (Nor and Asraf,2015). Cohen and Fung identified equal opportunities for people to involve in discussions in public. Moreover, information shall be accessible from a reputable source (Cohen,2009).

Although academics and citizens may dispute the precise definition and conditions of democracy, there is a broad worry that information distortions generated by digital technologies pose a threat to its functioning. As a type of government, democracy depends on citizen participation in the political process (Mohd Sani,2008). In spite of the assumption that citizens have the general capacity to participate (self-determination), successful participation may need citizens to have access to a variety of information and communication channels. Citizens can learn about new problems, form opinions, deliberate, and take political action when they have access to information. Unfortunately, not all types of information are significant. Information from a single source (such as the government or media controlled by the government) may not be sufficient. Citizens require access to "alternative" information sources. Lastly, one of the two informational requirements of democracy is access to different information, the other being the truthfulness and dependability of information. Widespread exposure to erroneous or misleading information would not aid citizens in achieving an "enlightened view" of public concerns.

### **3-1-2. Restrictions of Freedom in Personal Media**

Part II of the Malaysian Federal Constitution established the essential liberties, rights, and freedoms that every human being possesses (Constitution, 2006). In this provision, fundamental liberties including the liberty of a person, prohibition of slavery and forced labour, protection against retroactive criminal laws and repeated trials, equality, freedom of movement, freedom of speech, assembly, and association, freedom of religion, right to education, and right to property (Balkin,2017). Among all these rights provided, the issue of freedom of speech is one of the most controversial issues in our society .

Generally, this provision explains that every citizen has a right to freedom

of speech. This freedom includes the freedom to express opinions, the right to access information, obtain and receive information, freedom of media, freedom to create artwork, freedom to engage in political parties and freedom of academics (Mohd Sani,2008). These rights are necessary because they can bring satisfaction to individuals as this freedom enables individuals to convey views that aimed at self-development and personality (Assembly,1986). Aside from that, these rights are critical in developing a democratic society because the existence of democracy depends on the freedom of speech. Looking at the bigger picture, when each individuals given an equal opportunity to practice their rights, at the end of the day everyone has the chance to develop their own judgement on every matter. However still, the freedom of speech provided in Article 10(1) is not an absolute right as it is subject to some restrictions.

According to Article 10(2), the Parliament has a duty to restrict freedom of speech in some situations (Constitution,2006). The situations that enable the restrictions to be imposed are when there is a threat to the Federation's security, when the speech is against the public order or morality, or restrictions intended to protect the privileges of the Parliament or any Legislative Assembly, or to prevent any contempt of court, defamation and incitement to any offence (Sangsuvan,2013).

The right to expression is essential for a healthy democracy to function. Speech without fear of reprisal from the state pushes the limits of the status quo and enables growth in all forms (Azizuddin Mohd Sani,2008). The legal status of free speech shields it from government censorship, but it is also a deeply held societal value safeguarded by cultural standards. Today, we face threats to both the legal protection of free speech and the Social Contract that enables a respectful environment for freedom of expression. When the conventional public square managed and protected by government, it migrates online to areas governed by private enterprises, so do the rules governing the expression and censorship of speech (Henderson,2013). How should legal protections for expression adapt to these new technology-powered, private forums?

There are two significant cases that can be discussed under this subheading. First, in considering the case of Mohd Fahmi Reza Mohd Zarin lwn. PP (Mohd,2020). In this case, the appellant, a political graphic designer, street artist, and documentary filmmaker from Malaysia, was convicted under

section 233(1) of the Act for disseminating fraudulent communications on his Facebook page with the intent to cause harm to others. The appellant was sentenced to one month in jail and an RM30,000 fine. However, the appellant, displeased with the court's judgement, filed an appeal with the High Court. The appellant asserted that the communication was satirical and that it was protected by the First Amendment to criticise the political parties in this nation. The court, however, was convinced that, notwithstanding the fact that the communication in Appendix A was a beautiful and innovative work of art created by the appellant to criticise the government and authorities, the artwork was created with the intent to offend and harm others. Therefore, such communication should not be considered as a parody because it does not meet the criteria for the term. This communication may not be made public in the absence of legal witnesses; consequently, it is not protected under Article 10(1).

Next, another relevant case can be a contributing factor in restricting the freedom of speech. In 2015, Malaysian Communication and Multimedia Commission (MCMC) requested Facebook and YouTube to remove controversial Malaysian blogger Alvin Tan's video that showed him insulting the adhan or the Islamic call of prayer (Lee May Ling V Public Prosecutor, 2018). To date, Alvin Tan is still on trial for several other cases in which he had insulted Islam and the Malaysian political leaders. However, the cases are still pending, and Alvin has fled to the United States of America to avoid trial in Malaysia. There are similarities that can be found in both cases. In these cases, the accused had committed an act that disrupted the public harmony that revolve around the three most sensitive issues that include race, religion and royalty. Following with that, these cases might be a stepping stone on why the government indeed should impose restrictions over the freedom of expression on the usage of personal media .

Therefore, The Defamation Act of 1957 is one of the statutes that shall be utilized against Internet users. The Act includes the categories of libel and slander. A media report is considered privileged under Section 12(1) of the Act if it is determined to be generally fair, accurate, and without malice ("Defamation Act," 1957). However, online media such as blogs are not covered by Section 12(1) of the Act because they are considered to be defamatory personal opinions (Wok and Mohamed, 2017). In 2012, the Evidence Act of 1950 was changed to hold online users accountable for

sedition content placed on their platforms ("Evidence Act,"1950). This means that hosts of websites, online forums, news outlets, blogs, and even internet service providers (ISPs) can be held liable for any content that originates on their platform or network, regardless of whether they are the creator (Wok and Mohamed,2017).

In accordance with the law in question, it remains one of the restrictions imposed by the government to prevent the misuse of free expression. It seems unlikely that a statute like the Sedition Act of 1948, which has been actively utilised despite five decades of freedom, could successfully manage personal media users. Sedition law has significant being anti-democratic elements that must be addressed ("Sedition Act,"1948). Blogging in Malaysia has the ability to function as a democratising force in a country with limited freedom of expression by promoting the open exchange of ideas, information, and opinions (Mia and et al.,2021). Hence, the concept of freedom of speech has enabled individuals to openly share their ideas and opinions on political blogs as a new public forum. This prompted the government to enact the Sedition Act in order to control and prevent the abuse of such liberties, particularly those that come under the category of sedition or sedition tendencies. As the country develops towards being a developed nation by 2022, the necessity of the sedition law and the question of whether the law impedes the bloggers' freedom of expression have become essential. Yet, democratic expectations of the local blogosphere must be balanced by an appreciation of its limitations and the government's hegemonic and sometimes coercive control techniques.

#### **4.Jurisprudential Theory Behind IT**

##### **4-1. Social Contract Theory**

A Social Contract refers to a set of norms, principles, and expectations that dictate the conduct of individuals and institutions in a specific domain, such as a workplace, culture, or nation. In the context of this article, we limit our discussion to the national realm. It is important to note that the interpretation and definition of Social Contract may vary across jurisdictions based on their unique historical and cultural backgrounds. Unlike private law contracts, the Social Contract is generally considered non-negotiable and not subject to suspension or abrogation due to external events or force majeure. (Bagheri and et al.,2021)

Experiencing the English Civil War, Hobbes propounded a theory based on

a model of absolutist rule; while Locke was affected by the event which culminated in the 'Glorious Revolution' of 1688 which ended the Dynasty of Stuart, thus having the believe to be ruled by Divine right (Curzon,1995). Thus, Locke propounded the theory based on subjects' individual and inalienable rights (Curzon,1995).

According to Rousseau, Social Contract explains the root and justification and legitimation of governance. "To find a form of association which shall defend and protect with the public force the person and property of each associate and by means of which each uniting with all shall obey however only himself and remain as free as before. Such is the fundamental problem of which the Social Contract gives the solution" (Rousseau,1913).

Juris tends to use the terms 'state of nature', it was not offered or intended to be taken as an anthropological fact but was a hypothetical premise derived by abstraction from the social reality in which human beings always and already find themselves (Gunkel,2014)

Despite the different interpretations, the Social Contract serves as a good to ensure the sustainability of the system and protect the individual within it as it also guides general moral behaviour.

#### **4-1-1. Hobbes' Theory**

According to Hobbes (1588-1679), people's 'state of nature' was equal, but they desire to hurt each other because they have an appetite for the same thing at the same time, which yet they can neither enjoy in common nor divide it. The strongest individual will benefit by deciding on the sword. Thus, it produced a war 'of all against all.' In other words, Hobbes claimed that humans will attempt to secure and gain as much power as possible, to achieve their desires such as primary desire of self-preservation (Zenzinger, 1992). Possessing the nature of the liberty to use any power, it therefore will create rivalry of power and lead to quarrels. It transforms the state of nature into a state of rivalry and war where the people life is nasty, brutish and short, thus, Hobbes suggested that individual should contract with each other to surrender such liberty to an absolute sovereign (Zenzinger,1992).

There could be no ordered community in these circumstances because 'there was no society.' It produces continual fear and danger of 'violent death' and, man's life was 'solitary, poor, nasty, brutish and short according to Hobbes' (Curzon,1995). Thus, wising to end such an intolerable state of affairs, men surrender their right of governing themselves to some persons or authority, with the condition that others would surrender their right as

well. In other words, Hobbes propounded that the state of nature could not have been otherwise than a perpetual "condition of war of everyone against everyone"(Hobbes,1651), the original agreement was sought in order to mitigate and reduce the exposure to violence (Gunkel,2014).

Hobbes's theory produces that the sovereign authority would have absolute power. It was because social aggregates coalesce when naturally solitary and self-interested individuals reasonably decided to cede some rights. (Gunkel,2014) Thus, total obedience of people to absolute sovereign power and that command and power require unchallenged ability (Curzon,1995). Therefore, obeying the sovereign is a prerequisite for justice. Law would be regarded as the sovereign's command, and it would justify the justice only if there is obedience to the law. Thus, we can said that the term 'unjust law' was a contradiction based on the theory above. Besides, 'Bad law' only counts when the sovereign fails to exercise the function of being protective subject to the agreed covenant .

It can conclude that the main concept of Hobbes is based on the linkage between person and authority where the sovereign alone possesses the power to determine the needs in the interests of his subjects; he must act based on an exercise of that power. It shows that if a person questioned his judgment, it would revert to the anarchy of the 'state of nature' from which men had wished to be delivered .

The duty lied on people not to question the sovereign as part of the price paid in exchange for social peace. It can be observed in Hobbes's 'The Leviathan' which conferred such right to the Leviathan as the authority who has the absolute right in protecting the common peace and safety of the ruled person (Sahamid,2005).

#### **4-1-2. Lockes Theory**

Locke (1632-1704) believed that 'state of nature' of a men is surrounded by freedom and equality (Sahamid,2005):“ A state also of equality, wherein all the power and jurisdiction is reciprocal, no one having more than another; there being nothing more evident than that creature of the same species and rank, promiscuously born to all the same advantages of nature, and the use of the same faculties, should also be equal one amongst another without subordination or subjection...” (Locke,1690)

Men found it necessary to unite in one 'political society' to preserve their lives, liberties and estates and thus create a unity based on Pactum Unionis

where people sought protection of their lives and property by building a society where they respect each other and live in peace and harmony (Elahi, 2005).

Under this theory, it was stated that with the community now responsible for upholding justice, the community is to be understood as one body and it imperative that the body move in one direction (Wester,2021). Moreover, because it is a near impossibility to regularly obtain unanimous consent, Locke argues that the keys to determining the actions or direction of the body is “the consent of the majority.”

Men must not only consent as individuals to the original compact to exit the state of nature, but the resulting community must obtain the consent of the majority in order to take action and form a government on behalf of its members. According to Locke, an action of the majority is rightly considered “an act of the whole” (Wester,2021). Apart from this, Locke asserts, “it is impossible it should act or continue as one body, one community, which the consent of every individual that united into it, agreed that it should; and so, everyone is bound by that consent to be concluded by the majority. As Locke explains, it is majority, acting on behalf of the whole, that establishes government to order the lives and affairs of the community. Plus, according to him, “the beginning of Politic Society depends upon the consent of the individuals...who, when they are thus incorporated, might set up what form of government they thought fit (Locke,1960).

Though Locke’s state of nature is presented as a mixture of peace and discord, not a permanent state of war, he nonetheless imagines it to be full of inconveniences and potential threats to the people’s natural rights. Thus, in Locke’s view, to escape these inconveniences, specifically, dealing with violators of the natural law that threaten their lives, liberties and property, human beings would eventually come together via contract to form a community to better secure these rights (Wester,2021). In so doing, members of the contract agree to exit the state of nature, and implicit in their agreement to the contract. The people also agree to become subjects of a common government. But in order to ensure that life under government is not less desirable than life in the state of nature, any government formed by the social compact is to be administered according to the consent of the majority, with narrowly tailored mandate of upholding justice and protecting natural rights, which Locke characterises as peace, safety and the public

good (Ashcraft,1994).

Under Locke's theory, the resistance to authority only justified when there is a long series of abuses and the very 'lives, liberties and estates of citizens are imperilled (Ashcraft,1994). It must aim to restore the social order which has been ravaged by absolutist ruler. Locke said that people come into an effort to ensure the continued enjoyment of natural rights and to manage any conflict during the exercise of such right, instead of binding with one another for mutual protection (Ashcraft,1994). Hence, people gathered and agreed to live under mutual compact for preservation of free-exercised will and prevent harm

The governing body's power should be limited to the extent that is necessary for the good of society (Curzon,1995). The Social Contract bestows no arbitrary powers upon the authority as no one has absolute power over himself or over anyone. The fiduciary nature of government results from the Social Contract based on the desire of ruled people. For Locke, the authority's power has no other end but preservation (Curzon, 1995). 'Where law ends, there tyranny begins', (Locke,1690) Locke showed that he insisted upon the ultimate right of the ruled community to check unbridled power.

Hence, the resistance to authority only justified when there is a long series of abuses and the mentioned interests were getting jeopardised. The resistance must only aim to restore the form of social order which has been salvaged by an absolutist ruler.

#### **4-1-3. Rousseaus Theory**

In his work, *Du Contrat Social* (1792), Jean-Jacques Rousseau posits that human nature is inherently good and innocent, and that the negative aspects of civilization are the result of corrupting influences .

The Social Contract, according to Rousseau, is founded upon the inalienable rights of freedom and equality possessed by citizens who enter into it. In civil society, no individual is subject to another individual, but rather to the "general will" of the community, which is based on the collective and general will of the people to thrive and succeed in a democracy (Curzon, 1995). The authority must act in accordance with the general will of the people concerning their collective interests. The general will, as Rousseau argues, is based on the majority opinion of all individual citizens and serves to promote the good state of nature of humanity. He emphasizes the

distinction between the general will and individual wills, as the latter may conflict with the former, leading to different outcomes. Self-interested individual wills may cancel each other out, resulting in a will that reflects the desires of society as a whole. According to Rousseau, the legitimacy of government depends on the consent of the governed people, and the sovereign community is the sole creator of law. The inalienable will of the governed people is of utmost importance, creating an absolute democracy. Rousseau posits that there can be no conflict between the general will and individual will, as the former always corrects and prevails (Sahamid,2005). The general will is manifest as it was based on the majority opinion of all individual citizens, it will cast the measure which is good based on men's good state of nature. Rousseau emphasises the general will of people and distinguished from individual wills. Rousseau opined that individual wills could drive general wills into a different directions as self-interested individual wills may cancel out each other, leaving a resultant will from what the society as a totality wishes to move.

Rousseau entrenched the view that government depends on the consent of the governed people and that the sovereign community is the sole maker of law. The sovereign power should rest on governed people as the importance of their will is inalienable. It creates an absolute democracy as Rousseau suggests no restriction on the people's inalienable rights since he did not accept any conflict between the general will and individual will as the former always corrects and prevails, which is more radical (Sahamid,2005).

#### **4-1-4. Discussion on Social Contract Impose Restrictions**

In the traditional view of Social Contract, the discussion is mainly focused on the linkage between the people and authority and the degree of right conferred by the people to the authority to govern. The Social Contract illustrates the consent of people between each other to give up certain degree of right to authority. Nevertheless, the issue arose where there is a contradiction when the authority imposes certain restrictions on the people where it contradicts what they agreed upon .

Based on the theory by Hobbes, when men surrender their right of governing to authority, it produces absolute power and the obedience of people to absolute sovereign power should not be challenged. 'Bad law' or bad imposition or bad restriction only happens when the sovereign fails to exercise the protective function based on what people agreed in the covenant while it usually objects to provide common peace and safe of

people.

Applying to the thrust of this paper, the restriction of personal media by the authority should not be challenged by the people in pursuant to this theory. Nevertheless, the concept of sovereign loses his absolute right for his failure to provide common peace and safety of people, leaving an unclear borderline .

It is unclear whether the restriction of freedom of speech in personal media platform is good law or otherwise, with regard to Hobbes' theory. The restriction may be good law if the restriction is to prevent the speech that may threaten the peace and safety of people. Nonetheless, if the restriction of freedom of speech was imposed at the beginning and with such extreme ways, it can be regarded as 'bad law' as it contradicts with the purpose to preserve the peace and safety .

Locke propounded a limitation of power on the authority. While surrendering their right to the authority, the Social Contract also preserves the right for the people to confine a government based on covenant. It only aims to restore the spectrum as agreed in the covenant that being manipulated by the authority. Based on this theory, people have the right to confine the government if they impose the restrictions on personal media that was contradicted with the covenant .

Rousseau propounded the Social Contract where the people enter on the basis of their inalienable rights to freedom and equity and the authority governs based on the 'general will' of people. The purpose of it was to thrive and prevail over the democracy of people .

Therefore, when the government impose such personal media, it should be based on the 'general will' of people and it will prevail. It will disregard the 'individual will' that disagrees with such restrictions.

These juris theories leave a question of whether the personal media restriction in Malaysia was based on any Social Contract? If so, does the restriction still comply with the people consent that time?

If there is a Social Contract in personal media restriction, in Malaysia's context, the main source of covenant should be the Federal Constitution (Mahisha Sulaiha Abdul Majeed v Ketua Pengarah Pendaftaran & Ors and another appeal, 2022) as the subject matters was based on people's agreement with the government between the various races of our country embodied in the Federation of Malaya Independence Act 1957 is

safeguarded and forever ensures to the Malaysian people as a whole for their benefit (Shah,2004).

Nevertheless, night changes, the provisions of Federal Constitution did not make any clear restrictions on the personal media platform. It only provides the restrictions on the freedom of speech without specified on the spectrum of personal media platform. Only the development of court's interpretation on the article to include the restriction on the personal media platform .

If there is no Social Contract in personal media restriction in Malaysia, it can refer to the legal provision such as Section 233 of Communications and Multimedia Act 1998. Nonetheless, it should be noted that the Act itself was not Social Contract as the subject matters of personal media restrictions were not agreed between people and government.

#### **4-2. Social Contract Theory Behind Freedom of Speech**

Influenced by Rousseau and others, Georg Wilhelm Friedrich Hegel, a German philosopher, accepts the principle of autonomy and social project of realising freedom as the core of modernity, but argues that a new relationship of happiness and freedom was made visible when we empirically observed around us within the totality of philosophic history .

The aim and form of happiness of the man could only be happy when he was free. Hegel argued that freedom should be read in the widest, most expressive sense.

Freedom is a historical process; the freedom which man seeks in modernity is to be realised through a normatively based society (Morrison,2016). It is a society which recognises individual autonomy, while its structures mediate individuality into an ethically constituted whole (Morrison,2016).

Hegel appeals to reject the idea of Social Contract as the basis for the explanation of nature political obligation that propounded by Hobbes and Locke. Hegel argued that the justifications and legitimacy attached to authorities were in foundations of principles of political morality immanent in the pre-legal norms, customs and practices which comprises what he called 'civil society.'

Hegel finds even Rousseau's idea of Social Contract is unacceptable, as in paragraph 258:

“This principle of Rousseau is will. But he conceives of the will only in the limited form of the individual will, as did also Johann Gottlieb Fichte afterwards, and regards the universal will not as the absolutely reasonable will, but only as the common will, proceeding out of the individual will as

conscious. Thus, the union of individuals in a state becomes a contract, which is based upon caprice, opinion, and optional, explicit consent” (Hegel,1820).

Besides, Hegel emphasised that humanity shall achieve a total consciousness on their existence instead of accepting an absolute traditional patriarchy (Morrison,2016). Nevertheless, it shall not abandon any element of individuality. Alongside with the principle of liberty, the authority shall settle any issue of divisions among the society (Morrison,2016). Each of the individuals must be protected by incorporating the individuality elements within the growth of jurisprudence (Morrison,2016). To put it differently, to maintain the individual, the concept of individuality shall be accepted as dependent within the entirety of society throughout the development (Morrison,2016).

Thus, Hegel’s theory differs from Rousseau. Rousseau propounded ‘general will’ and limited ‘individual will’; Hegel centralised individual rights that comes along with ‘individual’s will.’ Therefore, based on this theory of Social Contract, it guarantees the freedom of people in term of speech.

#### **4-2-1. Discussin on Social Contract that Confers to Freedom of Speech**

Moreover, the relationship between democracy and the media can be viewed as a social compact. In the same way that democracy requires its citizens, it also requires a framework for the flow of information, for public discourse, and for an independent watchdog function. By protecting free expression, democracy establishes this structure for itself. Constitutional protections for the freedoms of speech and the press in democracies around the world underscore the need of a system for free discourse.

There are two factors that must be considered whenever freedom is restricted. First, the interest of the society, which consists of the citizens, and second, the government's interest in maintaining public harmony. Within this sphere, the right to free expression cannot be granted without restriction to any individual. However, this will result in a violation of rights. People live together and form a society; hence, in the long run, every one of them must exercise their rights to promote social peace.

In pursuit of justice for each person's rights, they are still entitled to enjoy their freedom and rights unrestrictedly. Nonetheless, the social compact establishes a balance between the rights citizens should enjoy and the constraints they should impose. Based on Hegel, he emphasises the scope of

the social compact, distinguishing it from conventional jurists and emphasising the freedom it grants to the people. In order to achieve a balance between the interests of society and those of the government that imposes the limits, each party is responsible for acting within their own rationale in order to prevent public unrest.

#### **4-3. Critiques on Social Contract Theory**

There are several issues with both formulations of the Social Contract idea, and the contrasts between Hobbes and Rousseau are instructive. This part will address the specific defects and issues that stem from the transaction that induces individuals to constitute into Social Contract.

There are a few relevant issues with the Social Contract's accounts. Hobbes' dilemma is where there is no apparent distinction between a dictator who conquers a nation along with the people by force and a representative government constituted democratically. The directives of both sovereign bodies are valid and should be given legal force. Hobbes relies heavily on the concept of 'fear' to sustain his theory. In addition, the concept of moral and conscience values is no more weighted and palatable to current society. Williamson M. "Bill" Evers which is an American libertarian activist and education researcher argues that Hobbes's idea of will should not be viewed as a morally significant capacity, but rather as a component of the human mechanism that is governed by a person's desires (Evers,1977). For Hobbes, it is morally irrelevant whether a person 'wills' to enter a social compact out of fear or a more virtuous desire. The will can take any shape, including submission, silence, and forbearance. In a Hobbesian view, the individual has very restricted freedom of choice, and it makes fair for Rousseau's criticism of Hobbes in parallel with Hobbes' logic which is similar to the saying by Emperor Caligula, a former Roman emperor that 'some are born for slavery and others for dominion' (Judd Owen,2005) .

Rousseau avoids these challenges and clearly distinguishes himself from Hobbes by recognising fundamental dignity and respecting the will of the individual as one of the most significant aspects in the construction of the Social Contract. Yet, he also faces difficulties, such as needing to account law on punitive sanctions, as by doing so, Rousseau's propound-sovereign scheme is essentially contradicting himself (Fried, 2003). Evers argues that Rousseau's solution still lead to a society having the same effect of Hobbes's concept (Evers,1977). He envisages and contemplates where the body politic will delegate its authority to subordinates such as other

executive authorities or court magistrates, having them administering punishments and demanding individuals to either accept such punishment or revert to a state of nature (Evers,1977).

Yet, state of nature propounded by Rousseau is not well defined like Hobbes; it was ambiguous what inherent rights a person possesses in this state. Rousseau mentioned that to punish for the social compact would be severe enough to allow the body politic the right to punish the offender regardless (Marks,2005). This raises an entirely new set of questions, such as who judges when a contract is breached and whether this means that no one can ever withdraw from a deal. Or possibly the consent is irrevocable once the law has been breached. Rousseau leaves these concerns unanswered.

A further concern is that the executive will have authority over individual legislators. Rousseau admitted that a state government must be managed by a minority; it is sociologically impossible for the majority of a society's members to govern, and therefore the minority will ultimately control the majority (Marks,2005). It may bring a tendency to be oligarchic which may suppress the democracy of society. Hobbes pushed for a kindred concept of tacit acquiescence to the dictates of those who govern, a tacit consent. This might be contrasted with Locke's requirement that a society's consent is granted by an ongoing majority.

What must be remembered is that for Hobbes and Rousseau, the contractarian ideal was not a revolutionary concept, it is the paradigm of a contract between the ruled and the ruler had existed since Roman times. The model of a contract, of oath and promise, dominated feudal relationships, the operation of city principalities, and entry into select guilds at the time. It had been a paradigm for authors with wildly varied viewpoints, therefore there were accusations by some authors that the contractual paradigm was impacted by the rise of the bourgeoisie and their commercial connections. Hobbes and Rousseau's differing approaches to what is ultimately a very similar arrangement were therefore not unique.

Rousseau's and Hobbes's conceptions of natural rights are distinctive, but defective, according to their respective Social Contract theories. In order for people to gain their freedom of society, they must have natural rights to trade for their right. Hobbes demonstrated that every person has natural right of self-preservation (Hobbes,1651). The trouble is where having rights to

everything, the right granted will render the rights regard meaningless, where there is a saying that 'the effects of this right are essentially identical to if there had been no right at all' (Fried,2003). The issue arose as Hobbes fails to account for a man's natural rights before he enters a social contact as the right appear to be a semantic trick .

The approach of natural right by both philosophers, is confusing, but Hobbes, Locke and Rousseau shared the same view of "the centrality of self-preservation" is "the basis for politics and the denial of man's political nature."(Judd Owen,2005) Self-preservation would have been a 'natural' concern in a state of nature; hence, it has been the driving force behind the establishment of civilisation. Rousseau is being aspirational while Hobbes takes on account being descriptive. Hobbes was interested in tracing the transition between society and nature, while Rousseau sought to establish an abstract standard against which societies could be measured (Evers,1977). Rousseau conducted a comprehensive empirical investigation into the backdrop and reality of people's state of nature and concluded that Locke and Hobbes were likely correct about the initial impulses that led to the formation of society (Marks,2005). From Rousseau's perspective, it is possible to argue that he viewed the formation of societies as a sociological process with self-preservation, instead of an exchange of individual freedom for security. He regards this model as the foundation of society, but Rousseau may have viewed his as less of a reality and more of a model. This presents the intriguing viewpoint that individuals revert to the state of nature, not in an actual sense, but in a theoretical sense to the human situation outside of mutually obligatory contracts. This method has considerable challenges as a result of the conceptual difficulties of imagining what life in a modern society without mutual agreements may be like. Nonetheless, it appears that Hobbes does not permit opting out, and this is confirmed when we consider the commitment not to rebel in a Hobbesian Social Contract.

### **5.Opinions on Rights and Liberties**

Freedom of expression is one of the rights that must be protected for all citizens. Regarding freedom in personal media, each owner has the right to express themselves on whatever topic they choose. In spite of this, it is essential to have regulations governing its operation and functionality, given the worldwide trend and its enormous social impact. Immanuel Kant, a German philosopher, observed that positive laws can be effective guides to

the relevant concepts (Van Der Zande, 1995). Positive law may apply in this circumstance. Positivist like Kant holds that if a person's behaviour constitutes the exercise of a right, it is both permissible and inviolable .

Before examining the Malaysian examples, we might turn to Hohfeld, who is an American jurist and Kant's perspectives on rights and liberties in relation to this subject. First, in Kantian terminology, exercising one's rights does not breach any obligation, and others have a duty not to interfere with the exercise of one's rights. It is vital to conflate permissibility with inviolability in order to comprehend the nature of rights. He feels that there is an underlying complexity to rights. Everyone has rights; we cannot violate one person's liberty in order to aid one or more others. A legal right provides the foundation for a number of deductions regarding the permissibility and inviolability of actions, the presence of immunities, and the power of waiver, according to Kant. Therefore, legal rights serve as crucial nodes within the legal meaning, allowing attorneys and judges to draw complicated conclusions from ostensibly basic premises. Therefore, Kant believes that justice and right are concerned with how one's actions effect the freedom of another, as opposed to the act's good or evil intent. It is feasible to define the permissible limits of liberty without regard to the individual's motivation.

On the other hand, according to Hohfeld, a right is a legally enforceable claim to demand execution, action, or prohibition from the opposing party. A person, for instance, has the right not to be tortured. This is not a 'right' in the strict Hohfeldian sense, as the State (or anybody else) has no corresponding obligation to refrain from torturing persons. Instead, the 'right' of an individual not to be tortured is protected by a number of normative safeguards provided by the state through general prohibitions on assault and trespass. Consequently, the general right not to be assaulted created the boundary within which a person's legal "right" to be free from torture can exist. Therefore, according to this idea, the press is free and has its own independence so long as there are no laws or responsibilities that constrain the press.

Secondly, liberty is the absence of an obligation to refrain from an activity. Regarding liberty, it implies the permissibility of an action against the other party to the legal relationship, but imposes no obligation on that person or anybody else. Liberties do not constitute claim rights. Both ideas illustrate

the disagreement between Hohfeld and Kant about rights and liberty. Kant proposed a second anti-Hohfeldian theory in which it is required to conflate permissibility and inviolability to comprehend the essence of rights. According to Kant, the presence of a right has various implications. The concept that rights constitute regions in which an individual's will should reign supreme, and so activities conducted within the scope of a right are acceptable, legally untouchable, and have repercussions. According to Hohfeld, the essence of the right-element is static which is by applying to a specific situation, the right-element will automatically entail a particular obligation or result (Efroni,2011). The Hohfeldian concept provides a direct instrument to identify the case's issue and then describe the ruling's effect on that issue. Comparing the method used by Kant's internal complexity, it consists of the right with the basis of combining permissibility and inviolability which is not desired nor necessary (Efroni,2011). Therefore, Hohfeld's interpretation of the concept should be adopted due to its clarity and precision.

## **6.Conclusion**

Throughout history, talks regarding freedom, particularly freedom of speech and democracy, have encountered numerous obstacles where it has revealed the advantages and disadvantages of human social order, and these problems are now the subject of heated debate. Everyone should preserve the right to speak freely and express themselves quickly. This is the initial step and objective of the general people in achieving democracy and value. It also implies that those who are not free to speak and who are barred from speaking must exercise this right. They should have the freedom to communicate how they see fit. Regardless, the state must give everyone equal rights to be heard in public .

People must directly participate in the democratic process in a democratic system. This engagement only applies when the citizens are well-informed about both sides of the subjects and getting asked and involved to share their thought and opinions. When the means of communication are getting monopolised, it produces non-and-dis-information and one-sided information that renders democracy a comedy and farce. Because the people trust the government, it is the government's responsibility to inform the populace in order to prevent this monopoly .

Quoting for Henry Clay, Former United States Secretary of State stated in this context, correctly, that " government is a trust and the officers of the

government are trustees and both the trust and the trustees are created for the benefit of the people." A well-informed and accessibility to information is essential for a democracy operation for the society, along with making the authorities responsible. The public needs to be well-informed on government policies, actions, and failures if it is to audit the government's performance. Genuine and participatory democracy require knowledgeable citizens as prerequisites.

As what had been discussed under the Social Contract theory, citizens do agree for the government especially legislative body to imposes any restrictions with the view that public order can be maintained. However, in accordance to the modern jurisprudence theory, individual rights shall not be repressed with the justification of Social Contract theory. With due respect, it was envisaged in the Malaysian Federal Constitution which had exclusively grants the privilege of freedom of expression to citizens and not to non-residents. Freedom of speech and democracy is a fundamental demand for all citizens of a state. Therefore, it is the responsibility of the state to provide free conditions for the resolution of all public-dwelling individuals while ensuring their fundamentals freedom had not been violated. However, the right shall not be absolute or used to trigger negativity such as violence. It would normally require a severe threat to justify democracies to ban speech that may trigger the democracy itself. At the end of the day, the democracies faced the challenge of being balance between preserving the freedom of speech whilst countering it from triggering democracy itself.

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