

IS THERE A PRIVATE RIGHT TO PRIVACY IN MALAYSIA?

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ABSTRACT

Despite widespread recognition as a fundamental human right across common law and civil law jurisdictions, the right to privacy remains a novel concept yet to be fully defined in Malaysia. Due to the absence of written law, Malaysian courts remain starkly divided on whether the right to privacy can sustain a free-standing cause of action enforceable between individuals in civil actions distinct from trespass, nuisance and breach of confidence. To resolve this legal conundrum, this article examines the current state of Malaysian law in recognising invasion of privacy as an actionable tort based on conventional norms. Reference will be made to primary sources of law, *i.e.*, the Federal Constitution, statutes, and judicial decisions, as well as secondary sources of law inclusive of scholarly writings and judicial decisions from foreign common law jurisdictions where laws on privacy have ripened, *i.e.* the US, UK, New Zealand, and Canada. The article consists of three parts. The first part provides a summary of normative values of privacy. Second, examination of the judicial decisions by the Malaysian Federal Court, Court of Appeal, and High Court on the right to privacy. Third, evaluation of alternative sources of written law and the common law tests to establish the tort of invasion of privacy. This article concludes that a fresh paradigm is required to develop the Malaysian legal framework on privacy to ensure coherence with its normative origins and consistency with the legal standards of other common law jurisdictions.

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ADAKAH TERDAPAT HAK PRIVASI PERSENDIRIAN DI MALAYSIA?

ABSTRAK

Walaupun terdapat pengiktirafan luas sebagai suatu hak asasi manusia merentasi bidang kuasa *common law* dan undang-undang sivil, hak privasi masih merupakan konsep baru yang belum lagi ditakrifkan sepenuhnya di Malaysia. Oleh sebab ketiadaan undang-undang bertulis, mahkamah-mahkamah Malaysia masih berlainan pendirian samada hak privasi boleh menyokong kausa tindakan asal antara individu-individu dalam guaman sivil berbeza dengan pencerobohan, kacauganggu dan pelanggaran kesulitan. Untuk menyelesaikan persoalan perundangan ini, artikel ini meneliti kedudukan undang-undang terkini Malaysia mengenai pengiktirafan pencerobohan privasi sebagai tort yang boleh didakwa berdasarkan norma-norma lazim. Rujukan akan dibuat kepada sumber undang-undang utama iaitu Perlembagaan Persekutuan, statut-statut, dan keputusan-keputusan kehakiman, serta sumber undang-undang sekunder termasuk penulisan sarjana dan keputusan kehakiman dari bidang kuasa *common law* asing di mana undang-undang privasi telah berkembang iaitu Amerika Syarikat, UK, New Zealand, dan Kanada. Artikel ini mengandungi tiga bahagian. Pertama, nilai-nilai normatif privasi akan dirumuskan. Kedua, keputusan-keputusan kehakiman oleh Mahkamah Persekutuan, Mahkamah Rayuan dan Mahkamah Tinggi di Malaysia mengenai hak privasi akan diteliti. Ketiga, sumber-sumber alternatif undang-undang bertulis dan *common law* untuk mengasaskan tort pencerobohan privasi akan dinilai. Artikel ini menyimpulkan bahawa suatu paradigma baru diperlukan untuk memperkembangkan suatu rangka undang-undang privasi di Malaysia, agar ia koheren dengan asas normatifnya dan konsisten dengan standard undang-undang bidang kuasa *common law* yang lain.

Kata kunci: Pencerobohan privasi, penyalahgunaan maklumat peribadi, jangkakan privasi yang munasabah, penentuan maklumat sendiri, autonomi peribadi.

I. INTRODUCTION

Privacy is an amorphous concept. Even today, its exact contour befuddles scholars and judges alike. According to Solove, '[p]rivacy seems to encompass everything, and therefore it appears to be nothing in itself'.¹ Similarly to McCarthy, the term 'means so many different things to so many different people that it has lost any precise legal connotation that it might once have had.'² Thompson cynically observes that 'the most striking thing about the right to privacy is that nobody seems to have any clear idea what it is'.³

Neither have the courts come any closer to providing a conclusive definition. Privacy has been described as 'protean' by the apex courts of Canada⁴ and the UK.⁵ The European Court of Human Rights (ECtHR) is fond of starting its analysis with the classic opening line: 'Private life is a broad term not susceptible to exhaustive definition'.⁶ The doctrine of reasonable expectation of privacy – the

¹ Daniel Solove, *Understanding Privacy* (Cambridge: Harvard University Press, 2008), 7.

² Thomas McCarthy, *The Rights of Publicity and Privacy* (Toronto: Thomson Reuters, 2005), 5.59.

³ Judith Thomson, "The Right to Privacy" in *Philosophical Dimensions of Privacy: An Anthology*, ed. Ferdinand David Schoeman (Cambridge: Cambridge University Press, 1984), 272.

⁴ *R v Tessling* [2004] 3 SCR 432, paras. 19, 25 (Binnie J).

⁵ *In the matter of an application by JR38 for Judicial Review (Northern Ireland)* [2015] UKSC 42, para. 86 (Lord Toulson).

⁶ *Satakunnan Markkinapörssi Oy and Satamedia Oy v Finland* [GC], Application no. 931/13, 27 June 2017, para. 129; *Bărbulescu v Romania* [GC], Application no. 61496/08, 5 September 2017, para. 70; *S. and Marper v the United Kingdom* [GC], Application nos. 30562/04 and 30566/04, ECHR 2008, para. 66.

universal test utilised by the US,⁷ Canada,⁸ UK⁹ and Europe¹⁰ – continually draws fierce criticism for involving a degree of circularity and subjectivity.¹¹ For instance, the Supreme Courts of the US¹² and Canada¹³ reached polar opposite conclusions on the legality of the police’s use of a thermal imaging device outside a suspect’s home to detect heat signals for illegal marijuana farming.

In Malaysia, the conundrum is whether the right to privacy even exists. Due to the absence of written law, Malaysian judges remain starkly divided on its recognition.

This article aims to analyse to what extent Malaysian law recognises privacy as a *private right* individuals are entitled to claim against each other. First, privacy as a legal norm will be briefly expounded for greater appreciation of its three main conceptions *i.e.* territory, personality, and information. (II). Second, the judicial decisions in Malaysia will be critically reviewed to ascertain the current state of the law as it stands (III). Third, the possible sources of law that can nourish and nurture the right to privacy will be evaluated against the laws of the US, UK, New Zealand, and Canada (IV). In conclusion, the authors recommend that Malaysian law keep pace with the progressive jurisprudence of other common law jurisdictions to achieve legal coherence and consistency.

II. CONCEPTIONS OF PRIVACY

⁷ *Katz v United States*, 389 US 347 (1967), 361 (Harlan J).

⁸ *R v Tessling* [2004] 3 SCR 432, paras. 19, 32.

⁹ *In the matter of an application by JR38 for Judicial Review (Northern Ireland)* [2015] UKSC 42, paras. 86-87 (Lord Toulson); *R (Catt) v Commissioner of Police of the Metropolis* [2015] UKSC 9, para. 4 (Lord Sumption).

¹⁰ *Bărbulescu v Romania* [GC], Application no. 61496/08, 5 September 2017, para. 73.

¹¹ *United States v Jones*, 565 US 400 (2012), 10; *Kyllo v United States*, 533 US 27 (2001), 34; *R (Catt) v Commissioner of Police of the Metropolis* [2015] UKSC 9, para. 4 (Lord Sumption).

¹² *Kyllo v United States*, 533 US 27 (2001), 37.

¹³ *R v Tessling* [2004] 3 SCR 432, para. 45.

At its most elementary form, the right to privacy refers to the ‘right to be let alone’ as coined by Judge Cooley in 1880.¹⁴ Interestingly, the word ‘privacy’ itself is not embodied in most constitutional texts around the world. The constitutions of the US,¹⁵ Canada,¹⁶ and New Zealand¹⁷ merely protect individuals from ‘unreasonable searches and seizure’. This holds true in European civil law jurisdictions where privacy is even more deeply treasured.¹⁸ In Italy, privacy is derived from a cluster of constitutional rights, including the inviolability of personal liberty, the inviolability of the home, and the confidentiality of correspondence.¹⁹ The constitutions of the Netherlands²⁰ and Poland²¹ protect the ‘right to private life’.

The Canadian Supreme Court provides arguably the most coherent and elegant legal method of distilling the multifarious interests protected by privacy into three broad types: territorial, personal, and informational.²² Such classification closely mirrors the typology favoured by Australian law reform experts²³ and the Inter-American Court of Human Rights.²⁴ All three aspects are complementary and overlapping.²⁵ More pertinently, they reflect the evolving values of privacy through time and space – over different eras and cultures.

¹⁴ Thomas M. Cooley, *Treatise on the Law of Torts* (2nd ed, 1888), 29.

¹⁵ *United States Constitution 1971*, amend IV.

¹⁶ *Canadian Charter of Rights and Freedoms 1982*, s 8.

¹⁷ *Bill of Rights 1990*, s 21.

¹⁸ Martin Abrams, “Privacy, Security and Economic Growth in an Emerging Digital Economy,” (Paper presented at Privacy Symposium, Institute of Law China Academy of Social Science, 7 June 2006), 18.

¹⁹ *Constitution of the Italian Republic 1947*, art 13-15.

²⁰ *Constitution of the Kingdom of the Netherlands 2008*, art 10(1).

²¹ *Constitution of the Republic of Poland 1997*, art 47.

²² *R v Dyment* [1988] 2 SCR 417, paras. 19-22; *R v Tessling* [2004] 3 SCR 432, para. 20; *R v Spencer* [2014] 2 SCR 212, para. 35.

²³ Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice* (Sydney: Commonwealth of Australia, 2008), vol 1, 142, para. 1.31, https://www.alrc.gov.au/wp-content/uploads/2019/08/108_vol1.pdf.

²⁴ *Fontevecchia y D’Amico v Argentina (Merits, Reparations and Costs)* Series C No. 238, 29 November 2011, para. 91.

²⁵ *Tessling* [2004] 3 SCR 432, para. 24.

A. Territorial Privacy

The traditional notion of privacy is grounded upon the property. This can be traced back to the classical English common law maxim in *Semanynne's Case* in 1604 that 'the house of everyone is to him as his castle and fortress'.²⁶ In 1886, the US Supreme Court in *Boyd v United States* affirmed the 'sanctity of a man's home'.²⁷ In 1995, the Canadian Supreme Court in *R v Silveira* reiterated that 'there is no place on earth where persons can have a greater expectation of privacy than within their 'dwelling-house''.²⁸

The prominence of private property is not just a common law ideal. Many civil law jurisdictions recognise the inviolability of the home as a constitutional norm, including Argentina,²⁹ Finland,³⁰ Greece,³¹ and South Korea.³²

The concept of *territorial privacy* is not limited to immovable property. Another protected property is correspondence. Unlike a house, letters are more vulnerable to intrusion. Once delivered, the letter is beyond the control of the sender. This is precisely why in olden times, letters were sealed by wax or passed through the hands of trustworthy messengers.³³ Hence, privacy could only be secured by way of institutional intervention. From the late 18th to early 19th century, the US Congress passed several laws prohibiting the improper opening of mail.³⁴ In 1877, the US Supreme Court in *Ex parte Jackson* affirmed that sealed parcels were constitutionally protected despite being handed over to the post office.³⁵

²⁶ *Semanynne's Case* [1558-1774] All ER Rep 62, 63 (Coke).

²⁷ *Boyd v United States* 116 US 616 (1886), 630 (Bradley J).

²⁸ *R v Silveira* [1995] 2 SCR 297, para. 140 (Cory J).

²⁹ *Argentine Constitution 1853*, art 18.

³⁰ *Constitution Act of Finland 1919*, s 10.

³¹ *Constitution of Greece 1975*, art 9.

³² *Constitution of the Republic of Korea 1948*, art 16.

³³ Solove, *Understanding Privacy*, 62.

³⁴ Solove, *Understanding Privacy*, 62.

³⁵ *Ex parte Jackson*, 96 US 727 (1877), 733 (Field J).

Once again, the privacy of correspondence is a universal norm. The sanctity of private communications is enshrined in constitutions worldwide, such as in Mexico,³⁶ Chile,³⁷ Germany,³⁸ and Belgium.³⁹

Lastly, the concept of *property* extends beyond the rigidity of ownership and possession. A tenant or habitual occupier enjoys the privacy of the home as much as a landlord.⁴⁰ Neither do individuals lose all rights to privacy in public spaces. There are common areas specially protected from intrusion, such as the office,⁴¹ school,⁴² and public streets.⁴³ In other words, the scope of *territorial privacy* has evolved.

B. Personal Privacy

The notion that privacy protects one's personality rather than property was planted in Warren and Brandeis' seminal article in 1890.⁴⁴ The main grievance was the inefficacy of laws of property such as contract and copyright to prevent the publication of a person's thoughts, sentiments and emotions without their consent.⁴⁵ Accordingly, the basis of the right to privacy is founded upon 'not the principle of private property, but that of an inviolate personality.'⁴⁶

However, it was not until almost 70 years later that the seeds of Warren and Brandeis' idea bore to fruition. The turning point was the

³⁶ *Constitution of Mexico 1917*, art 16.

³⁷ *Constitution of the Republic of Chile 1980*, art 19(5).

³⁸ *Basic Law for Germany 1949*, art 10.

³⁹ *Constitution of Belgium 1831*, art 29.

⁴⁰ *Minnesota v Carter*, 525 US 83 (1998), 95-96.

⁴¹ *Copland v the United Kingdom*, Application no. 62617/00, ECHR 2007-I, para. 41; *Halford v the United Kingdom*, Application no. 20605/92, *Reports of Judgments and Decisions* 1997-III, para. 44; *Bărbulescu v Romania* [GC], Application no. 61496/08, 5 September 2017, paras. 72-73.

⁴² *R. v M. (M.R.)* [1998] 3 SCR 393, para. 32.

⁴³ *Peck v the United Kingdom*, Application no. 44647/98, ECHR 2003-I, para. 57.

⁴⁴ Samuel Warren and Louis Brandeis, "The Right to Privacy," *Harvard Law Review* 4 (1890):193.

⁴⁵ Warren and Brandeis, "The Right to Privacy", 200.

⁴⁶ Warren and Brandeis, "The Right to Privacy", 205.

US Supreme Court's landmark decision of *Katz v United States* in 1967.⁴⁷ Aside from overriding its decades-long precedent of *Olmstead v United States* which construed the constitutional prohibition against search and seizure narrowly to proprietary trespass,⁴⁸ the decision left two legacies that endure to this day: the majority's catchphrase that privacy 'protects people, not places'⁴⁹ and Harlan J's test of reasonable expectation of privacy.⁵⁰ Six years later, in 1973, the US Supreme Court followed up with the equally ground-breaking decision of *Roe v Wade* which held that the right to privacy was 'broad enough to encompass a woman's decision whether or not to terminate her pregnancy'.⁵¹

Such a judicial watermark paved the way for privacy to expand its sphere of protection beyond the archaic shackles of proprietary rights. The ensuing decades witnessed personal privacy not only gaining ground but overtaking *territorial privacy* in relevance and impact. This should not come to any great surprise, as aptly noted by Binnie J in *R v Tessling*:

Privacy of the person perhaps has the strongest claim to a constitutional shelter because it protects bodily integrity, and in particular, the right not to have our bodies touched or explored to disclose objects or matters we wish to conceal.⁵²

Egregious examples of violations of *personal privacy* include warrantless strip searches⁵³ and non-consensual taking of bodily samples.⁵⁴ The ECtHR has expanded the protective ambit of the 'right to private life' under the *European Convention on Human Rights*

⁴⁷ *Katz v United States*, 389 US 347 (1967).

⁴⁸ *Olmstead v United States* 277 US 438 (1928), 464-465.

⁴⁹ *Katz v United States*, 389 US 347 (1967), 351.

⁵⁰ *Katz v United States*, 389 US 347 (1967), 360.

⁵¹ *Roe v Wade*, 410 US 113 (1973), 153 (Blackmun J).

⁵² *R v Tessling* [2004] 3 SCR 432, para. 21 (Binnie J).

⁵³ *R v Golden* [2001] 3 SCR 679, paras. 90-92; *R v Pratt* [1994] 3 NZLR 21, 23.

⁵⁴ *R v Stillman* [1997] 1 SCR 607, paras. 40-43; *R v Shaheed* [2002] 2 NZLR 377, para. 6.

(ECHR)⁵⁵ to encompass moral⁵⁶ and psychological⁵⁷ integrity, such as homosexual marriages,⁵⁸ suicide,⁵⁹ and gender reassignment⁶⁰. In 2005, the UK House of Lords in *Campbell v MGN* finally loosened its conservative aversion and recognised ‘private information as something worth protecting as an aspect of human autonomy and dignity.’⁶¹ Yet the evolution of privacy does not end here. One final frontier beckons.

C. Informational Privacy

The advent of digital technologies in the 21st century brings forth new privacy concerns. Yet, such concerns have been foreshadowed by prescient scholars long before the birth of the Internet. As early as 1967, Westin was already perturbed by modern surveillance technology enabling the ‘reproducibility of communication’ for anyone to ‘obtain a permanent pictorial and sound recordings of subjects without their knowledge’.⁶² In turn, the growth of digital dossiers risks creating a ‘record prison’ whereby ‘mistakes, omissions, or misunderstood events become permanent evidence capable of controlling destinies for decades’.⁶³ Similarly, in 1987, Cannataci, the first and current UN Special Rapporteur on the right to privacy, expressed fears that information technology renders an individual

⁵⁵ *Convention for the Protection of Human Rights and Fundamental Freedoms* (opened for signature 4 November 1950, entered into force 3 September 1953), art. 8.

⁵⁶ *X and Y v the Netherlands*, Application no. 8978/80, Series A no. 91, 26 March 1985, para. 22.

⁵⁷ *Pretty v the United Kingdom*, Application no. 2346/02, ECHR 2002-III, para. 61.

⁵⁸ *Schalk and Kopf v Austria*, Application no. 30141/04, ECHR 2010, paras. 105-109.

⁵⁹ *Pretty v the United Kingdom*, Application no. 2346/02, ECHR 2002-III, paras. 69-76.

⁶⁰ *Christine Goodwin v the United Kingdom* [GC], Application no. 28957/95, ECHR 2002-VI, paras. 89-93.

⁶¹ *Campbell v MGN Ltd* [2004] UKHL 22, para. 50 (Lord Hoffmann).

⁶² Westin, *Privacy and Freedom*, 62.

⁶³ Westin, *Privacy and Freedom*, 160.

‘transparent and therefore manipulable [...] at the mercy of those who control the information’ concerning them.⁶⁴

Proponents of the theory of privacy as informational control are plentiful, including Miller,⁶⁵ Fried,⁶⁶ and Breckenridge.⁶⁷ Solove’s harm-based taxonomy premised on information collection, processing and dissemination is akin to modern data protection regimes.⁶⁸ Arguably, the essential component of privacy is *information* itself. As aptly put by Westin: ‘Privacy is the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others.’⁶⁹

In the past decade, *informational privacy* has dominated public consciousness and legal discourse – and understandably so, due to the escalating intensity of Internet usage in our everyday lives.⁷⁰ *Informational privacy* is intertwined with the concepts of secrecy, confidentiality, and anonymity.⁷¹ Recently, both the Canadian Supreme Court⁷² and ECtHR⁷³ recognised that individuals enjoy a reasonable expectation of privacy over their online activities and IP addresses. Anonymity complements other fundamental rights, especially freedom of expression, as observed by La Rue, the former UN Special Rapporteur on freedom of expression:

The right to privacy is essential for individuals to express themselves freely. Indeed, throughout history, people’s willingness

⁶⁴ Joseph A. Cannataci, *Privacy & Data Protection Law* (Oslo: Norwegian University Press, 1987), 6.

⁶⁵ Arthur R. Miller, *The Assault on Privacy* (Michigan: University of Michigan Press, 1971), 25.

⁶⁶ Charles Fried, “Privacy,” *The Yale Law Journal* 77, no. 3 (1968): 482-83.

⁶⁷ Adam C. Breckenridge, *The Right to Privacy* (Nebraska: University of Nebraska Press, 1970).

⁶⁸ Solove, *Understanding Privacy*, 103.

⁶⁹ Westin, *Privacy and Freedom*, 7.

⁷⁰ *R v Spencer* [2014] 2 SCR 212, para. 41.

⁷¹ *R v Spencer* [2014] 2 SCR 212, para. 39.

⁷² *R v Spencer* [2014] 2 SCR 212, paras. 50-51.

⁷³ *Benedik v Slovenia*, Application no. 62357/14, 24 April 2018, paras. 108-118.

to engage in debate on controversial subjects in the public sphere has always been linked to the possibility of doing so anonymously.⁷⁴

Further, there is a close connection between privacy and personal data protection, as affirmed by the ECtHR Grand Chamber in *Satakunnan Markkinapörssi Oy v Finland* in 2017.⁷⁵ Viewed in tandem, *informational privacy* embodies the right to informational self-determination, which grants individuals full autonomy to decide how their private information is to be collected, processed, and disseminated.

III. MALAYSIAN JURISPRUDENCE

The crux of our analysis turns upon a singular loaded question: to what extent does (or can) Malaysian law recognise privacy as a *private* and *independent* right of individuals actionable against others in a civil action. To appreciate this inquiry's narrow and specific context, two keywords merit elaboration. First, *private* right is distinguished from the *public* right, *i.e.*, constitutional law. Even if the law protects the privacy of individuals from intrusion by governmental agents, it does not naturally follow that they are also protected from intrusions by private actors.⁷⁶ Second, an *independent* right refers to a free-standing principle. It borders the truism that privacy has intrinsic values worth protecting.⁷⁷ However, recognising such values as a *norm* and a *principle* are two separate things.⁷⁸ Hence, whilst privacy interests may be protected by traditional causes of action such as breach of confidence, copyright, nuisance and defamation, the existence of invasion of privacy as a distinct cause of action remains unsettled.⁷⁹

⁷⁴ Frank La Rue, "Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression," UN Doc A/HRC/17/27 (16 May 2011), para. 53.

⁷⁵ *Satakunnan Markkinapörssi Oy and Satamedia Oy v Finland* [GC], Application no. 931/13, 27 June 2017, para. 137.

⁷⁶ *Wainwright v Home Office* [2003] UKHL 53, para. 33 (Lord Hoffmann); *Hosking v Runting* [2005] 1 NZLR 34, para. 114 (Gault J and Blanchard J), para. 229 (Tipping J).

⁷⁷ *Hosking v Runting* [2005] 1 NZLR 34, para. 238 (Tipping J), para. 264 (Anderson J).

⁷⁸ *Wainwright v Home Office* [2003] UKHL 53, para. 31 (Lord Hoffmann).

⁷⁹ *Jones v Tsige* [2012] ONCA 32, para. 15.

Accordingly, whilst public law principles and normative values often provide strong policy reasons that may guide judges in formulating a new tort grounded on privacy,⁸⁰ this section is primarily focused on Malaysian *civil* case law. The purpose here is to review the law as applied by Malaysian courts and not recommend the law that *should* be applied.

The doctrine of *stare decisis* dictates that the rulings of superior courts are to be our natural starting point. Our analysis of Malaysian judicial decisions is broken into three levels: Federal Court, Court of Appeal, and High Court. Within each level, cases will be examined in chronological order. This is critical to keep track of the logical flow of judicial reasoning built upon the incremental accumulation of principles established in earlier decisions.

A. Federal Court

At first blush, the question of whether the right to privacy is recognised in Malaysia appears clear-cut. After all, the Federal Court in *Sivarasa Rasiah v Badan Peguam Malaysia* opined that “[i]t is patently clear from a review of the authorities that “personal liberty” in art 5(1) [of the Federal Constitution] includes within its compass other rights such as the right to privacy.⁸¹ The authorities here refer to Indian Supreme Court decisions interpreting an identical clause in the Indian Constitution.⁸²

However, such *a dictum* is inconclusive for several reasons. First, the right to privacy was merely alluded to by way of example. The issue at stake was the personal liberty of a politically active

⁸⁰ See Section IV *infra*.

⁸¹ *Sivarasa Rasiah v Badan Peguam Malaysia* [2010] 2 MLJ 333, para. 15 (Gopal Sri Ram FCJ).

⁸² The Federal Court cited *Kharak Singh v State of Uttar Pradesh* AIR 1963 SC 1295 and *Govind v State of Madhya Pradesh* AIR 1975 SC 1378). In a powerful dissent, Tengku Maimun CJ opined that ‘personal liberty’ also ‘guarantees the right to privacy’ by relying on the same constellation of Indian authorities in *Maria Chin Abdullah v Ketua Pengarah Imigresen* [2021] 1 MLJ 750, para. 158. See also *Muhammad Juzaili bin Mohd Khamis v State of Government of Negeri Sembilan* [2015] 3 MLJ 513, paras. 81-83 (Court of Appeal affirmed that Article 5(1) encompasses the ‘right to live with dignity’ in the context of gender identity).

advocate and solicitor barred from holding office in the Bar Council.⁸³ Second, and more importantly, the appeal arose from a judicial review application. As stated at the outset, constitutional protection from State intrusion *does* not automatically translate into an actionable tort. Indeed, as will be examined in depth later,⁸⁴ such distinction has been acknowledged by the Malaysian High Court. Hence, the *Sivarasa* ruling is strictly *obiter* and only applies as a matter of public law.

B. Court of Appeal

Taking a step lower to the Court of Appeal, one will discover the absence of judicial consistency. The good news is that civil claims for the tort of invasion of privacy have reached this intermediate level on two notable occasions. The bad news is that the existence of the tort was not even an issue on appeal directly canvassed by the judges, and worst still, resulted in two conflicting judgments – ironically within eight months apart.

1. *Maslinda Ishak v Mohd Tahir Osman (1 September 2009)*

The appeal was heard by a panel consisting of Suriyadi Halim Omar JCA, Sulaiman Daud JCA and Jeffrey Tan JCA. A female nightclub patron was arrested in a joint operation by religious authority i.e., JAWI and a volunteer organisation (RELA).⁸⁵ Her photograph was taken by a RELA officer as she was squatting to urinate in a truck. The officer pleaded guilty and was convicted under Section 509 of the Penal Code. The High Court only allowed the victim's claim against the officer and dismissed the claim against the other co-defendants, *i.e.*, JAWI, RELA and the Government of Malaysia (GOM).⁸⁶ Dissatisfied, the victim appealed against the decision absolving RELA, JAWI and GOM from vicarious liability – and succeeded.⁸⁷ Neither defendant appealed against the High Court's decision.

⁸³ *Sivarasa Rasiah v Badan Peguam Malaysia* [2010] 2 MLJ 333, para. 16.

⁸⁴ See Section IV(A) *infra*.

⁸⁵ *Maslinda Ishak v Mohd Tahir Osman* [2009] 6 CLJ 653, para. 4.

⁸⁶ *Maslinda Ishak v Mohd Tahir Osman* [2009] 6 CLJ 653, para. 6.

⁸⁷ *Maslinda Ishak v Mohd Tahir Osman* [2009] 6 CLJ 653, paras. 23-24.

As the appeal entirely turned on the issue of vicarious liability, the Court of Appeal made the briefest mention of 'invasion of privacy' when setting out the background facts in the preliminary part of the judgment:

There was abundance of evidence as regards this invasion of privacy, amongst others, his subsequent prosecution for a charge under s. 509 of the Penal Code (...) In fact, this issue of the invasion of privacy was never under challenge.⁸⁸

2. *Dr Bernadine Malini Martin v MPH Magazines (17 May 2010)*

The appeal was heard by a different panel consisting of Zaleha Zahari JCA, KN Segara JCA and Ramly Ali JCA. A female medical officer sued the publisher of a local women's magazine, bridal boutique, and photo studio for defamation over the publication of photographs of her dressed in a bridal gown.⁸⁹ The High Court dismissed the claim but ordered the first and second defendants to pay the plaintiff's cost and the third defendant's cost award to be halved.⁹⁰ Both plaintiff and defendants appealed against the decision. The Court of Appeal dismissed both appeals and upheld the High Court's order.

On the cost issue, the Court of Appeal saw 'no reason to interfere with the trial judge's discretion and was 'satisfied that the trial judge had exercised his discretion judiciously and fairly'.⁹¹ The Court of Appeal approved several parts of the High Court's judgment cited in verbatim, including:

To my mind, it was unethical and morally wrong for the 1st and 2nd defendants to have published the plaintiff's photograph for their commercial promotion without her consent. It was an unwarranted invasion of the plaintiff's privacy. It is unfortunate for the plaintiff, that the law of this country, as it stands presently, does not make an invasion of actionable privacy wrongdoing (it is actionable under

⁸⁸ *Maslinda Ishak v Mohd Tahir Osman* [2009] 6 CLJ 653, para. 5.

⁸⁹ *Dr Bernadine Malini Martin v MPH Magazines Sdn Bhd* [2010] 7 CLJ 525, paras. 3-8.

⁹⁰ *Dr Bernadine Malini Martin v MPH Magazines Sdn Bhd* [2010] 7 CLJ 525, para. 14.

⁹¹ *Dr Bernadine Malini Martin v MPH Magazines Sdn Bhd* [2010] 7 CLJ 525, para. 30.

the law of some other jurisdictions, for example, in the United States).⁹²

Similar to *Maslinda*, the recognition of invasion of privacy was not even put as an issue on appeal before the Court of Appeal. It is noteworthy that *Maslinda* was not even cited, let alone distinguished. Yet, this has not stopped lawyers and judges from relying on both *dicta*, unwittingly setting the stage for a fierce battle below in the High Courts that endures to this day.

C. High Court

Predictably, the conflicting *dicta* of *Maslinda* and *Bernadine* have resulted in judicial schism. The pendulum has swung both ways in equal weight, albeit with a slight tilt of frequency in favour of *Maslinda*.

1. *Ultra Dimension v Kook Wei Kuan* (3 December 2001)

The battle lines had been drawn in the High Court even before the year 2009. The earliest reported case on privacy concerned a claim against the publication of photographs of kindergarten pupils in newspaper advertisements premised on two causes of action: invasion of privacy and breach of confidence.⁹³ Upon the Sessions Court dismissing the defendant's application to strike out the claim, the defendant appealed to the High Court – and succeeded.

Particularly, Faiza Tamby Chik J accepted the defendant's contention that 'English common law does not recognise privacy rights' and therefore the plaintiff's claim on the invasion of privacy 'does not give rise to cause of action and is not actionable'.⁹⁴ Such a

⁹² *Dr Bernadine Malini Martin v MPH Magazines Sdn Bhd* [2010] 7 CLJ 525, para. 29.

⁹³ *Ultra Dimension v Kook Wei Kuan* [2004] 5 CLJ 285, 287.

⁹⁴ *Ultra Dimension v Kook Wei Kuan* [2004] 5 CLJ 285, 289-290.

view was justified upon the learned judge's survey of authorities from England, Australia and the US.⁹⁵

2. *Lew Cher Phow v Pua Yong Yong (16 November 2009)*

The unreported High Court case concerned an application for an interim injunction to restrain a neighbour from installing CCTVs at home overlooking the plaintiff's house.⁹⁶ Kamardin Hashim JC refused to grant the judgment primarily on the factual circumstances disclosing a lack of substantial harm, *i.e.* no evidence that the CCTVs captured the everyday activities and movements of the plaintiff, and balance of convenience, *i.e.* the defendants' right to ensure the security and safety of themselves and family. Towards the end, the learned judge cited *Ultra Dimension* with approval. Since the decision was delivered barely two months after *Maslinda*, the learned judge was likely unaware of the Court of Appeal's decision.

3. *Lee Ewe Poh v Dr Lim Teik Man (2 September 2010)*

The case was decided exactly a year and a day after *Maslinda*. A female patient sued a doctor and his clinic for taking photographs of her anus during a surgery to treat swellings around her rectal region (haemorrhoids).⁹⁷ The defendants contended that the claim on the invasion of privacy was not recognised in Malaysia as held in *Ultra Dimension* and *Lew Cher Phow*. In turn, the plaintiff relied on *Maslinda*. However, *Bernadine* was not cited by either party.

Chew Soo Ho JC rightly observed that *Maslinda* 'is not directly on point' since the High Court's finding that invasion of privacy is an actionable tort 'was not canvassed' before the Court of Appeal.⁹⁸ Nevertheless, by not overruling such a finding which departs from traditional English law, the learned judge construed there being tacit acceptance by the Court of Appeal:

⁹⁵ The learned judge's appraisal of US law is arguably misconceived (see Section IV(B) *infra*).

⁹⁶ *Lew Cher Phow v Pua Yong Yong* [2009] MLJU 1331.

⁹⁷ *Lee Ewe Poh v Dr Lim Teik Man* [2011] 4 CLJ 397, para. 1.

⁹⁸ *Lee Ewe Poh v Dr Lim Teik Man* [2011] 4 CLJ 397, para. 8.

The privacy right of a female concerning her modesty, decency and dignity in the context of the high moral value existing in our society is her fundamental right in sustaining that high morality that is demanded of her and it ought to be entrenched. Hence, it is just right that our law should be sensitive to such rights.⁹⁹

Alternatively, Chew Soo Ho JC held that even if such a view was erroneous, the plaintiff's claim constituted a breach of confidence due to the nature of a doctor-patient relationship imposing a trust upon the doctor to respect the 'modesty and dignity' of female patients.¹⁰⁰

4. *Sherina Nur Elena v Kent Well Edar (25 February 2011)*

A civil suit was commenced by a former female beauty queen over photographs displayed on the packaging of food products sold in retail shops, grocery stores, and hypermarkets and a large roadside advertisement board.¹⁰¹ Stephen Chung JC gave due consideration to the traditional position of English and Australian courts in rejecting privacy as a new tort distinct from breach of confidence, as noted in *Ultra Dimension*. However, the learned judge proceeded to find that 'the law on the invasion of privacy has developed since then' in reliance on *Lee Ewe Poh* and *Maslinda*.¹⁰² Similar to Chew Soo Ho JC, the learned judge considered that the Court of Appeal in *Maslinda* 'implicitly recognised the plaintiff's rights to privacy'.¹⁰³

Despite finding that the plaintiff had *locus standi* to sue for invasion of privacy, Stephen Chung JC struck out the claim because the photographs were published many years ago in local newspapers and a book by the Sabah Tourism Board and therefore entered the public domain.

5. *M. Mohandas Gandhi v Ambank (30 July 2014)*

⁹⁹ *Lee Ewe Poh v Dr Lim Teik Man* [2011] 4 CLJ 397, para. 8.

¹⁰⁰ *Lee Ewe Poh v Dr Lim Teik Man* [2011] 4 CLJ 397, para. 15.

¹⁰¹ *Sherina Nur Elena bt. Abdullah v Kent Well Edar* [2014] 7 MLJ 298, paras. 1-7.

¹⁰² *Sherina Nur Elena bt. Abdullah v Kent Well Edar* [2014] 7 MLJ 298, paras. 21-26.

¹⁰³ *Sherina Nur Elena bt. Abdullah v Kent Well Edar* [2014] 7 MLJ 298, para. 25.

In yet another pro-privacy case, a debtor being sued by a bank commenced an action against a credit reporting agency for defamation and invasion of privacy over the publication of information on the first suit in its database. Similar to *Sherina*, although the plaintiff was deemed to have *locus standi* to sue for invasion of privacy, the claim was dismissed on the merits since the information had been collated from the public domain.¹⁰⁴

For the first time, the High Court considered the two Court of Appeal rulings. Preferring *Maslinda* over *Bernadine*, Lau Bee Lan J reasoned that Malaysian law ‘has developed in the sense that there is recognition of a cause of action in invasion of privacy’ which is not merely ‘limited to matters of private morality and modesty’.¹⁰⁵

6. Mohamad Izaham v Norina Zainol Abidin (13 August 2015)

This case triggered the resurgence of *Bernadine*. The plaintiff was initially convicted and sentenced to jail under Section 5(1) of the Film Censorship Act 2002 for possessing or circulating obscene films.¹⁰⁶ Upon being acquitted on appeal, the plaintiff sued the deputy public prosecutors and investigating police officers for searching for his house and seizure of a computer hard drive containing 106 clips of sexually explicit videos (some of which depicted the plaintiff and his wife) for invasion of privacy and malicious prosecution.¹⁰⁷ The High Court allowed the defendants’ application to strike out both claims.

Vazeer Alam J held that the Court of Appeal’s upholding of the High Court ruling on cost in *Bernadine* constituted ‘a clear endorsement’ of the legal proposition that ‘invasion of privacy is not

¹⁰⁴ *M. Mohandas Gandhi v Ambank (M) Berhad* [2014] LNS 1025, paras. 1, 25, 27.

¹⁰⁵ *M. Mohandas Gandhi v Ambank (M) Berhad* [2014] LNS 1025, para. 22.

¹⁰⁶ *Mohamad Izaham Mohamed Yatim v Norina Zainol Abidin* [2015] 7 CLJ 805, paras. 5-9 (‘No person shall: (a) have or cause himself to have in his possession, custody, control or ownership; or (b) circulate, exhibit, distribute, display, manufacture, produce, sell or hire, any film or film-publicity material which is obscene or is otherwise against public decency’).

¹⁰⁷ *Mohamad Izaham Mohamed Yatim v Norina Zainol Abidin* [2015] 7 CLJ 805, paras. 2-4.

actionable'.¹⁰⁸ In contrast, the Court of Appeal in *Maslinda* 'did not expressly or impliedly recognise invasion of privacy as an actionable wrong' because the liability established against the defendants was based on negligence.¹⁰⁹

Next, Vazeer Alam J disarmed *Lee Ewe Poh* and *Mohandas Gandhi* due to their flawed reliance on *Maslinda*¹¹⁰ and empathically reiterated the correctness of *Bernadine*:

However, in the face of a direct and express affirmation by the Court of Appeal in [Bernadine] (a case later to *Maslinda Ishak*) that the law does not recognise invasion of privacy as an actionable tort, I am not prepared to make a definitive ruling to the contrary. In as much as I may agree that this area of the law is ripe for reform, I am bound by the doctrine of stare decisis to apply the law as it stands...¹¹¹

Lastly, even if such decisions were followed, Vazeer Alam J opined that invasion of privacy was 'limited to matters of private morality and modesty and that the unauthorised search and seizure of the plaintiff's house would instead 'sustain a claim of trespass.'¹¹²

7. *Toh See Wei v Teddric Jon Mohr (8 February 2017)*

Two years after *Mohamad Izaham*, the pendulum swiftly swung back in the opposite direction. A former employee sued the managers of a hospital for accessing his private e-mail account and disclosing the contents of his work-related email to the hospital's board of trustees. Delving into the wealth of past precedents, Abdul Wahab JC acknowledged that common law did not traditionally recognise the invasion of privacy and that even the authorities in favour of

¹⁰⁸ *Mohamad Izaham Mohamed Yatim v Norina Zainol Abidin* [2015] 7 CLJ 805, para. 17.

¹⁰⁹ *Mohamad Izaham Mohamed Yatim v Norina Zainol Abidin* [2015] 7 CLJ 805, paras. 18-19.

¹¹⁰ *Mohamad Izaham Mohamed Yatim v Norina Zainol Abidin* [2015] 7 CLJ 805, paras. 20-22.

¹¹¹ *Mohamad Izaham Mohamed Yatim v Norina Zainol Abidin* [2015] 7 CLJ 805, para. 22.

¹¹² *Mohamad Izaham Mohamed Yatim v Norina Zainol Abidin* [2015] 7 CLJ 805, paras. 23-24.

recognition such as *Maslinda* and *Lee Ewe Poh* are limited to private morality and modesty, especially of women.¹¹³

The case is particularly notable due to the recognition that the invasion of privacy here involved ‘email privacy’.¹¹⁴ Abdul Wahab JC embarked on an admirable tour de force linking the normative origins of traditional privacy to the modern evolution of informational privacy:

The right to privacy refers to the specific right of an individual to control the collection, use and disclosure of personal information. Personal information could be in the form of personal interests, habits and activities, family records, education records, communication (including mail and telephone) records, and medical records, to name a few.¹¹⁵

Ultimately, the claim was dismissed due to the rule of iniquity *i.e.* the plaintiff’s inequitable conduct and defence of public interest *i.e.* the emails revealed the plaintiff’s wrongdoings.

8. *Chan Ah Kien v Brite-Tech (14 October 2019)*

This is yet another case involving informational privacy. A company director sued related subsidiaries and a holding company for disclosing information of his remuneration to the tax authorities upon request. Since the information was not confidential, Azimah Omar J deemed such factual finding sufficient to dismiss the entire claim premised upon negligent dissemination, breach of confidence, and breach of privacy.¹¹⁶

Nevertheless, the learned judge also felt inclined to follow ‘the brilliant decision and digest of Vazeer Alam J’ in *Mohamad Izaham* finding that the weight of authorities ‘has always remained constant’ in recognising breach of privacy to the limited extent of private morality and modesty.¹¹⁷

Once again, the issue has been thrown back into legal limbo. Judges continue to sway back and forth between *Maslinda* and

¹¹³ *Toh See Wei v Teddric Jon Mohr* [2017] 11 MLJ 67, paras. 58-59.

¹¹⁴ *Toh See Wei v Teddric Jon Mohr* [2017] 11 MLJ 67, para. 63.

¹¹⁵ *Toh See Wei v Teddric Jon Mohr* [2017] 11 MLJ 67, para. 48.

¹¹⁶ *Chan Ah Kien v Brite-Tech Berhad* [2019] 1 LNS 2277, paras. 2, 46.

¹¹⁷ *Chan Ah Kien v Brite-Tech Berhad* [2019] 1 LNS 2277, para. 48.

Bernadine with no sign of resolution. Yet, a tiny blot of judicial unanimity appears to be gradually converging into some semblance of common ground – that invasion of privacy is actionable in the context of *personal privacy* to protect modesty and dignity.

IV. SOURCES OF LAW

What is the normative basis underlying the tort of invasion of privacy in Malaysia? What types of privacy fall under its sphere of protection? These are critical questions to unravel. The pursuit of legal certainty should not be at the expense of legal coherence. Whilst it is laudable that Malaysian judges have gone to great lengths to rationalise their decisions within an internal logic, the prevailing judicial trajectory, unfortunately, appears to be rather circular. Neither *Maslinda* nor *Bernadine* serves as a reliable starting point. Hence, there is little need to deconstruct their *dicta*.

The article's final analysis examines the possible legal sources that Malaysian common law can – and *should* – draw from to develop a coherent framework for the right to privacy. Such sources will be addressed in order of hierarchy: constitution, legislation, and common law.

A. Constitutional Law

Can the privacy tort be built upon the fundamental liberties guaranteed under the Federal Constitution?¹¹⁸ The short answer: quite difficult. First, despite the positive *dicta* in *Sivarasa*, the Federal Court in *Maria Chin Abdullah v Ketua Pengarah Imigresen* recently reverted to the traditional interpretation of 'personal liberty to mean the 'person of the body of the individual' and 'antithesis of physical restraint or coercion.'¹¹⁹ Second, more pertinently, there is a clear dichotomy between public law and private law. This point was explicitly made clear by the Federal Court in *Beatrice a/p AT Fernandez v Sistem*

¹¹⁸ *Federal Constitution*, Part II (Malaysia).

¹¹⁹ *Maria Chin Abdullah v Ketua Pengarah Imigresen* [2021] 1 MLJ 750, paras. 645, 663 (Abdul Rahman Sebli FCJ) (affirming *Government of Malaysia v Loh Wai Kong* [1979] 2 MLJ 33).

Penerbangan Malaysia in determining that the prohibition of discrimination under Article 8 did *not* extend to the collective agreement between private employers and employees:

Constitutional law, as a branch of public law, deals with the contravention of individual rights by the legislature, the executive, or its agencies. Constitutional law does not extend its substantive or procedural provisions to infringements of an individual's legal right by another individual.¹²⁰

In *Lee Lai Cheng v Lim Hooi Teik*, the High Court dismissed the claim of a woman to compel her former lover to undergo a DNA test to determine the paternity of her child. Following *Beatrice*, Lim Chong Fong JC held that Article 8 did not confer minors the 'right to pedigree' to know their true identities due to the absence of any statute providing civil remedies.¹²¹

Although both cases concerned Article 8, there is little doubt that the principle applies to all constitutional rights across the board. The same conclusion was reached in *Toh See Wei*. Initially, Abdul Wahab JC affirmed that the right to privacy can be 'inferred' from Article 5 despite not being expressly enumerated in the Federal Constitution as *per Sivarasa*.¹²² However, the learned judge clarified that the 'recognition of such constitutional right may not be enforced by an individual against another individual as *per Beatrice*.'¹²³

Indeed, the *Beatrice* principle merely reflects the fundamental feature of common law governing the activities between private individuals, in stark contrast to constitutional law governing the relationship between individuals and State authorities.¹²⁴ Most notably, the House of Lords in *Wainwright v Home Office* refused to recognise the tort of invasion of privacy despite the right to private life being enshrined under the ECHR and incorporated under the UK Human Rights Act 1998. This is because there is a 'great difference between

¹²⁰ *Beatrice a/p AT Fernandez v Sistem Penerbangan Malaysia* [2005] 3 MLJ 681, para. 13 (Abdul Malek Ahmad PCA).

¹²¹ *Lee Lai Cheng v Lim Hooi Teik* [2017] 10 MLJ 331, para. 66.

¹²² *Toh See Wei v Teddric Jon Mohr* [2017] 11 MLJ 67, paras. 55-56. In *Ultra Dimension v Kook Wei Kuan* [2004] 5 CLJ 285 at 291, Faiza Tamby Chik J held that 'privacy rights' does not fall within the ambit of Article 5(1) of the Federal Constitution.

¹²³ *Toh See Wei v Teddric Jon Mohr* [2017] 11 MLJ 67, paras. 56-57.

¹²⁴ *Jones v Tsige* [2012] ONCA 32, para. 45.

identifying privacy as a value which underlies the existence of a rule of law (and may point the direction in which the law should develop) and privacy as a principle of law in itself.¹²⁵ Any inadequacy in existing remedies ‘can be achieved only by legislation rather than the broad brush of common law principle’.¹²⁶

Similarly, any recourse to international standards under human rights law is fraught with difficulty. Article 17 of the *International Covenant on Civil and Political Rights* (ICCPR) explicitly protects the right to privacy.¹²⁷ However, due to the ICCPR not being ratified by Malaysia nor incorporated into legislation, the Federal Court recently in *Letitia Bosman v Public Prosecutor* made it unequivocally clear that its ‘international principles ought not to be considered applicable in the Malaysian context’.¹²⁸

Hence, it appears that the Federal Constitution is insufficient to establish an actionable tort of invasion of privacy in Malaysia.

B. Statutory Law

To what extent can the right to privacy be inferred from legislation? Before examining the relevant Malaysian statutes, it is instructive to first survey the legislative landscape in other jurisdictions to appreciate the different frameworks that privacy laws can take form.

Our first destination is the US where the seeds of privacy had not only first taken root but also had been the quickest to blossom.¹²⁹ Aside

¹²⁵ *Wainwright v Home Office* [2003] UKHL 53, para. 31 (Lord Hoffmann).

¹²⁶ *Wainwright v Home Office* [2003] UKHL 53, para. 33 (Lord Hoffmann).

¹²⁷ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (‘No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.’)

¹²⁸ *Letitia Bosman v Public Prosecutor* [2020] 5 MLJ 277, paras. 156-158 (Azahar Mohamad CJ). The Federal Court declined to strike down the mandatory death penalty in the *Dangerous Drugs Act 1952* as unconstitutional because the Federal Constitution lacked any express guarantee against ‘cruel, inhumane or degrading punishment’ despite being enshrined under the ICCPR.

¹²⁹ *Hosking v Runting* [2005] 1 NZLR 34, para. 240 (Tipping J).

from Warren and Brandeis, the writings of Prosser left an indelible impact on American privacy jurisprudence.¹³⁰ In 1960, Prosser identified four distinct privacy torts protecting different privacy interests.¹³¹ Such categories have been codified in the legislation of most states,¹³² and adopted in the federal statute of *Restatement (Second) of Torts (1977)*:¹³³

1. Unreasonable intrusion upon the seclusion of another.
2. Appropriation of the other's name or likeness.
3. Unreasonable publicity given to the other's private life.
4. The publicity that unreasonably places the other in a false light before the public eye.

In Canada, there is a complex network of legislation at the federal and provincial levels. The *Personal Information Protection and Electronic Documents Act 2000* merely governs organisations subject to federal jurisdiction and does not expressly provide for civil liabilities.¹³⁴ Four common law provinces, namely British Columbia, Manitoba, Saskatchewan and Newfoundland, have enacted a similar *Privacy Act* establishing a limited right of civil action where the defendant has acted willfully.¹³⁵ As the lone civil law province, Quebec stands out as an exemplary exception for having a statutory regime heavily influenced by French law where privacy has long been incorporated into its civil code, and which affords individuals 'a right to respect for his private life.'¹³⁶ Such a wide ambit protects the right to one's image.¹³⁷

Similarly, in New Zealand, privacy laws are lacking in civil remedies. The *Privacy Act 1998* merely empowers a Privacy Commissioner to investigate complaints and award limited damages

¹³⁰ Daniel Solove and Neil Richards, "Prosser's Privacy Law: A Mixed Legacy," *California Law Review* 98 (2010): 1890.

¹³¹ William L. Prosser, "Privacy," *California Law Review* 48 (1960): 389.

¹³² *Jones v Tsige* [2012] ONCA 32, paras. 19, 55.

¹³³ *Restatement (Second) of Torts (1977)*, §652A-625E.

¹³⁴ *Jones v Tsige* [2012] ONCA 32, para. 50.

¹³⁵ *Jones v Tsige* [2012] ONCA 32, para. 52. The requirement of 'acting willful' is absent in Manitoba.

¹³⁶ *Hosking v Runting* [2005] 1 NZLR 34, paras. 62-64.

¹³⁷ *Aubry v Éditions Vice-Versa* [1998] 1 SCR 591, paras. 52-53.

for unlawful collection and disclosure of personal information.¹³⁸ However, no right to commence civil action in court is conferred. Under the *Broadcasting Act 1989* governing the media industry, advisory guidelines on the protection of privacy have been issued by the regulatory authority.¹³⁹ However, violations by broadcasters entail no civil liability.

Lastly, in the UK, the long-standing reluctance of courts to recognise invasion of privacy under common law stems from the absence of meaningful legislation.¹⁴⁰ Only in the past two decades, privacy interests have gradually attained statutory protection in the form of the *Human Rights Act 1998* and *Data Protection Act 1998*.¹⁴¹

Where does Malaysia fall within the spectrum between comprehensive codification and legal lacunae? Unfortunately, Malaysia leans toward the latter end. Not a single statute provides for the possibility of civil action for invasion of privacy. The *Personal Data Protection Act 2010*¹⁴² (PDPA) is purely a penal statute stipulating only criminal sanctions for non-compliance. This is evinced by the lack of any provision on civil liabilities,¹⁴³ and official clarification of the Department of Personal Data Protection.¹⁴⁴

¹³⁸ *Hosking v Runting* [2005] 1 NZLR 34, paras. 98-99.

¹³⁹ *Hosking v Runting* [2005] 1 NZLR 34, paras. 101-104.

¹⁴⁰ *Wainwright v Home Office* [2003] UKHL 53, paras. 31-34 (Lord Hoffmann).

¹⁴¹ The statute has been replaced by the *Data Protection Act 2018* to incorporate the EU's *General Data Protection Regulation*.

¹⁴² Personal Data Protection Act (Act 709) (Malaysia).

¹⁴³ The right to compensation is provided in Sections 168-169 of the UK Data Protection Act 2018. Also, contrast can be drawn with Section 64(1) of the Malaysian Competition Act 2010 ('Any person who suffers loss or damage directly as a result of an infringement of any prohibition under Part II shall have a right of action for relief in civil proceedings in a court under this section against any enterprise which is or which has at the material time been a party to such infringement').

¹⁴⁴ The FAQ section of its official website states that 'The Act does not provide for a specific right to claim for damages' and 'Remedies under the Personal Data Protection Act is in the form of a criminal offence' (see "Frequently Asked Questions," Department of Personal Data Protection, accessed January 28, 2022, <https://www.pdp.gov.my/jpdpv2/frequently-asked-questions/?lang=en>).

There is a singular provision in the *Penal Code of 1997*¹⁴⁵ which touches on ‘privacy’ – the very same provision that secured the conviction of the officer in *Maslinda* and formed the basis of the civil claim allowed by the High Court and Court of Appeal. Section 509 reads:

Whoever, intending to insult the modesty of any person, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen by such person, or intrudes upon the privacy of such person, shall be punished with imprisonment for a term which may extend to five years or with fine or with both.

Such provision provides a possible bridge between privacy crimes and privacy claims. In the criminal appeal of *Pendakwa Raya v Nor Hanizam bin Mohd Noor* in 2019, the High Court increased the sentence of a man convicted under Section 509 for surreptitiously recording a woman bathing with a mobile phone from two to six months’ imprisonment. The cases of *Maslinda*, *Toh See Wei* and *Lee Ewe Poh* were cited in support.¹⁴⁶

On the flipside, drawing an analogy with Section 509 may be self-defeating to the growth of privacy claims in the long run. Despite not being explicitly cited in civil cases aside from *Maslinda*, the provision seems to play heavily on the minds of the High Court judges. This is regrettable. The right to privacy should *not* be confined to private morality and modesty. Privacy engages protection over personal information and not just personal dignity.

Simply put, such legislation should be treated as reinforcing the pre-existing right to privacy under common law, and not creating a new right or restricting the scope of a common law right.¹⁴⁷ Broadly speaking, the PDPA protects *informational privacy*, whilst Section 509 of the Penal Code protects *personal privacy*. Since the tort of trespass is well-established, there is understandably less need to expand the boundaries of *territorial privacy*. Whilst Malaysian statutory law does

¹⁴⁵ Penal Code (Revised 1997) (Act A327) (Malaysia).

¹⁴⁶ *Pendakwa Raya v Nor Hanizam bin Mohd Noor* [2019] MLJU 638, paras. 21-24.

¹⁴⁷ *Hosking v Runting* [2005] 1 NZLR 34, para. 108 (Gault J and Blanchard J), paras. 227-228 (Tipping J).

not conclusively recognise the right to privacy, they nevertheless still reflect the *values* of privacy worthy of protection.¹⁴⁸

C. Common Law

Presently, Malaysia lags far behind other Commonwealth jurisdictions in defining the scope of privacy as a private right, if any. Whilst the gaps in Malaysian constitutional and statutory laws may be more glaring, it is still possible for Malaysian common law to develop as a gap-filler.

Despite initial reservations, the courts of New Zealand, Canada and the UK eventually stepped in to create a tort of invasion of privacy. After all, providing civil remedies where none exists epitomises ‘the very process of common law’.¹⁴⁹

Perhaps the more important and immediate inquiry is not so much where privacy rights are to be found, but rather *how they should be framed*. Once a principle is framed, the task of justifying its recognition is made easier. Judges feel more comfortable relying on coherent principles. In short, counter-intuitively as it may be, the ideal process involves putting the horse before the cart – to determine whether the right to privacy exists, one must first appreciate what the right is about.

There are two alternative approaches ripe for reception – the more descriptive but less flexible American-made typology of torts adopted by New Zealand and Canada, or the more flexible but less descriptive European-influenced tort of misuse of information adopted by the UK.

1. New Zealand

In 2003, the New Zealand Court of Appeal made the first breakthrough in the razor-thin 3-2 decision of *Hosking v Runting*. A celebrity couple brought a claim of invasion of privacy to restrain a magazine photographer from publishing photographs of the couple's newborn twin girls pushed in a stroller on a street. Although all five judges

¹⁴⁸ *C v Holland* [2013] 3 LRC 78, paras. 67-70.

¹⁴⁹ *Hosking v Runting* [2005] 1 NZLR 34, para. 109.

unanimously dismissed the appeal and claim, the majority recognised that the tort of invasion of privacy existed under common law.¹⁵⁰ The majority regarded the claim as falling within the third type of American tort *i.e.*, publicity of private facts¹⁵¹ consisting of two elements:

1. The existence of facts in respect of which there is a reasonable expectation of privacy.
2. The publicity given to those private facts would be considered highly offensive to an objective reasonable person.

Recognition of the other torts was left open to be determined in future cases. Nevertheless, the majority felt compelled to make a passing observation on the tort of intrusion to seclusion:

In many instances, this aspect of privacy will be protected by the torts of nuisance or trespass or by laws against harassment, but this may not always be the case. Trespass may be of limited value as an action to protect against information obtained surreptitiously. Long-lens photography, audio surveillance and video surveillance now mean that intrusion is possible without a trespass being committed.

Unsurprisingly, it did not take long for this tort to come under judicial scrutiny. In 2013, the High Court in *C v Holland* allowed a claim over the surreptitious video recording of a nude woman showering in a bathroom from the roof cavity. Whata J affirmed the existence of the tort of intrusion upon seclusion premised on four elements:

1. an intentional and unauthorised intrusion;
2. into seclusion (namely intimate personal activity, space or affairs);
3. involving infringement of a reasonable expectation of privacy; and
4. that is highly offensive to a reasonable person.¹⁵²

¹⁵⁰ *Hosking v Runting* [2005] 1 NZLR 34. The majority decision was delivered by Gault J and Blanchard J (at para. 148) with a concurring opinion from Tipping J (at para. 259). Dissenting opinions were penned by Keith J (at paras. 176 and 221) and Anderson J (at para. 271).

¹⁵¹ *Hosking v Runting* [2005] 1 NZLR 34, paras. 117-118 (Gault J and Blanchard J).

¹⁵² *C v Holland* [2013] 3 LRC 78, paras. 93-94.

2. *Canada*

Similarly, in Canada, the American typology of torts has received a favourable reception. The leading authority is the Ontario Court of Appeal's decision in *Jones v Tsige* in 2012. Both plaintiff and defendant worked in different branches of the same bank. The defendant, upon becoming romantically involved with the plaintiff's ex-husband, used her workplace computer to access the plaintiff's bank account information over four years at least 174 times. The Court of Appeal found that such intrusion fell within the tort of intrusion of seclusion. Reliance was drawn from a multitude of sources, including domestic legislation, provincial case law, constitutional law jurisprudence, scholarly writings, and developments in other jurisdictions, such as the US, UK, Australia, and New Zealand. Ultimately, the claim was characterised as involving *informational privacy* aimed at protecting against evolving threats in the digital era:

It is within the capacity of the common law to evolve to respond to the problem posed by the routine collection and aggregation of highly personal information that is readily accessible in electronic form. Technological change poses a novel threat to a right of privacy that has been protected for hundreds of years by the common law under various guises and (...) recognised as a right that is integral to our social and political order.¹⁵³

3. *United Kingdom*

In the UK, the growth of privacy rights has been painstakingly incremental. As previously alluded to,¹⁵⁴ the courts are restrained from fashioning alternative remedies that 'distorts the principles of common law'.¹⁵⁵ In *Wainwright*, a mother and son being strip-searched during a prison visit were left without a remedy.¹⁵⁶

In 2004, the House of Lords in *Campbell v MGN* finally relaxed its conservative dogmatism. The first seismic shift was abandoning the strict dichotomy between public law and private law. As conceded by

¹⁵³ *Jones v Tsige* [2012] ONCA 32, para. 68 (Sharpe JA).

¹⁵⁴ See Section IV(B) *supra*.

¹⁵⁵ *Wainwright v Home Office* [2003] UKHL 53, para. 52 (Lord Hoffmann).

¹⁵⁶ *Wainwright v Home Office* [2003] UKHL 53, paras. 4-5, 50-52 (Lord Hoffmann).

Lord Hoffmann, there is ‘no logical ground for saying that a person should have less protection against a private individual than he would have against the state for the publication of personal information for which there is no justification’.¹⁵⁷

The second change is decoupling invasion of privacy from breach of confidence. Whilst the latter is ‘based upon the duty of good faith applicable to confidential personal information and trade secrets’, the former ‘focuses upon the protection of human autonomy and dignity – the right to control the dissemination of information about one’s private life’.¹⁵⁸

Still, even after breaking free from the rigid shackles of common law, the tort of misuse of private information struggled to step out of the shadows of breach of confidence. Courts were still inclined to consider both types of action in tandem.¹⁵⁹ It was not until 2014 in *Vidal-Hall v Google* that the tort was fully recognised as a distinct cause of action.¹⁶⁰

The tort of misuse of private information turns upon a simple two-stage test:¹⁶¹

1. Whether the claimant enjoyed a reasonable expectation of privacy over the information.
2. Whether the privacy rights of the claimant are outweighed or must yield to a countervailing interest (*e.g.*, freedom of expression and right to information).

The evolution of common law on the right to privacy in New Zealand, Canada, and the UK is evidently more nuanced than depicted in the summation above.¹⁶² Nevertheless, even by scratching the surface, one can discern a meticulous process to formulate a functional legal framework that meets the prevailing needs of society. It is noteworthy

¹⁵⁷ *Campbell v MGN Ltd* [2004] UKHL 22, para. 50 (Lord Hoffmann).

¹⁵⁸ *Campbell v MGN Ltd* [2004] UKHL 22, para. 51 (Lord Hoffmann). Similar views were expressed by Tipping J *Hosking v Runting* [2005] 1 NZLR 34, para. 246.

¹⁵⁹ *Campbell v MGN Ltd* [2004] UKHL 22, para. 53 (Lord Hoffmann).

¹⁶⁰ *Vidal-Hall v Google* [2015] EWCA Civ 31, paras. 41-43, 51.

¹⁶¹ *Bloomberg LP v ZXC* [2022] UKSC 5, para. 47.

¹⁶² Both torts are subject to closely analogous defences (*e.g.* ‘legitimate public concern’ and ‘public interest’).

that the courts of all three jurisdictions constantly keep track of each other's evolving jurisprudence.

V. CONCLUSION

The question of whether common law recognises the right to privacy has bedevilled the courts across the Commonwealth for over a century. Ever since Warren and Brandeis penned their ground-breaking article in 1890, judges and scholars continue to fiercely debate whether the values of privacy deserve an independent cause of action distinct from copyright, defamation, trespass, nuisance, and breach of confidence.¹⁶³

Today, the question has been settled in New Zealand, Canada and the UK in favour of recognising invasion of privacy between individuals as an actionable tort. What remains to be determined is the scope of the right to privacy, and the test to be employed to ascertain whether such right has been violated.

However, in Malaysia, great uncertainty engulfs both questions. There is an absence of any explicit recognition of the right to privacy under written law, including the Federal Constitution. On one hand, High Court judges are still divided whether a right to privacy even exists under common law. On the other hand, the majority of judges are inclined to accept, at the very minimum, that such a right is triggered by matters of private morality and modesty. Hence, Malaysian law as it currently stands to appear most receptive towards *personal privacy*, whilst remaining deeply sceptical of *territorial privacy* (too identical to trespass) and *informational privacy* (too novel).

The solution is simple. The common law jurisprudence in New Zealand, Canada and the UK has ripened to maturity. That is where the Malaysian courts should draw guidance from. There is no need to reinvent the wheel, nor a good reason to develop the common law in isolation. Both the American taxonomy of torts and the UK's tort of misuse of private information are equally compelling – and may even be applied in tandem.

It is not too late to re-construct Malaysian law on the right to privacy with a clean slate. After all, neither the Federal Court nor the

¹⁶³ *Jones v Tsige* [2012] ONCA 32, paras. 15-17.

Court of Appeal has truly examined the matter with rigour. Whilst the High Court's constant efforts to refer, review and reconcile its previous decisions are necessary to achieve certainty, it is becoming evident that such a narrow inward-looking approach has invariably left them walking in circles and clutching at straws. Instead, the best way forward for judges is to cast their gazes beyond the seas and free their minds from the archaic shackles of common law. Nothing is set in stone yet. The time is still ripe for Malaysian courts to build a coherent legal framework underpinned by the doctrine of reasonable expectations of privacy.