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Privacy as Freedom of Private Life:
the reexamination of the concept, the scope and its analysis and comparison with the law of confidence in the United Kingdom and Malaysia

by:

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In the Name of Allah, Most Gracious, Most Merciful

To Adzka, my Husband and my Mom for Forbearance;

To my Father whose gene runs in my blood;

To Professor Dr. Kenneth McK Norrie FRSE who made this possible.

Contents

Abstract

After more than a century debate on the matter, privacy remains a subject of discussion. The problem with the definition of privacy and lack of certainty of its scope are among the grounds cited to oppose the notion of privacy. Hence the thesis re-examines these aspects and offers the proper definition of privacy and the two conjunctive touchstones that, when read with the limitations, establish the clear parameter of privacy.

In England, the subject is shadowed by the fallacy that what worth protection of privacy is adequately covered by the existing legal principles most notably that of the principle of confidence. As such the thesis analyses the two hand in hand and shows how privacy differs in scope and context from the principle of confidence.

The more recent judiciary attitudes on the matter, both in England and Malaysia, are discussed along with relevant legislative provisions to ultimately show that despite the English Court of Appeal unanimous pronouncement in 1991 as so affirmed by the British House of Lords in 2003 that the English law does not recognize a general right to privacy, the principle that had conveniently been applied by the High Court of Malaya in December 2001, in both legal system there exist relevant legislative provisions that can be interpreted so as to provide the basis for privacy as a matter of individuals' human right to freedom of private life.

(word count: 231 words)

CHAPTER I

INTRODUCTION

Chapter Outline

Word Count (excluding endnotes): 15,361 Words

I am not unduly troubled
by the absence of English authority:
there has to be a first time for everything,
and if the principles of English law,
and not least analogies from the existing rules,
together with the requirements
of justice and common sense,
pointed firmly to such a right existing,
then I think the court should not be deterred
from recognising the right…
anything beyond that
must be left for legislation*

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* *per* Megarry V.C. in *Malone* v. *Metropolitan Police Commissioner* [1979] Ch 344, at pp. 372-3.

1.1 About This Thesis

The story is well known. Mr. Warren was very annoyed with the press coverage about some private life matters, particularly on the occasion of his daughter's wedding. He then approached Mr. Brandeis and together they wrote a paper entitled 'The Right to Privacy'[1] which marked the beginning of people's demand for legal recognition of the right to privacy. In this celebrated article, Warren and Brandeis highlighted that even though the common law had yet to expressly declare the existence of right to privacy, the principle that has been applied in cases that protect the rights associated with the principle of private property is in fact the rights as against the world – the rights to 'inviolate personality' – the rights that in reality arose from individuals' right to privacy. Warren and Brandeis argued that it is the right to privacy which protects, *inter-alia*, personal writings and any other products of the intellect or of the emotions. The protection is not based on a right arising from contract or from special trust, neither was it based on the principle of private property. No new principle is formulated when the protection for such law is being extended to the personal appearance, sayings, acts, and to personal relation, domestic or otherwise. 'If casual and unimportant statements in a letter, if handiwork, however inartistic and valueless, if possessions of all sorts are protected not only against reproduction, but against description and enumeration, how much more should the acts and saying of man in his social and domestic relations be guarded from ruthless publicity. If you may not reproduce a woman's face photographically without her consent, how much less should be tolerated the reproduction of her face, her form, and her actions, by graphic descriptions colored to suit a gross and depraved imagination.'[2]

The responses to that were massive. Some are in support of the demand;[3] others reiterated that there is no need to recognise separate right known as privacy as its aspects are governed by many branches of the existing laws.[4] This thesis is not intended to garner evidence to support or to contest the proposition made by Warren and Brandeis and therefore such kind of discussion is not being made part of this thesis. Rather this thesis looks at the essence of privacy, whether or not the existing legal framework recognises such a concept and the scope of such concept – which

remain the questions that have yet to be settled and are still subjects for debates. The gravity of the problem has been accumulated with the fact how this aspect of life has been and could be easily intruded with the advance of technology; which magnitude has driven for the preparation of this thesis. The foundation of the thesis is the belief that an individual as a person who lives has the freedom to do or omit about that which is exclusively his – his private life. Hence I undertook the initiative to re-examine the concept of privacy; initially with the intent to make appropriate proposals to allow the application of such concept within the context of cyberspace. As the research went further it became clear that the root of the problem is not with the technology and how fast it evolves. The debates and confusions surrounding privacy issues do not originate from the creation of new technology that makes privacy intrusion or simply surveillance become so easy to affect. It all starts from the very fact there is no unanimous understanding what privacy is and the law simply cannot effectively protect a concept which is 'abc' to a person and 'cde' to another. The matter is complicated further with the reality that nobody has really attempted to draw the clear scope of privacy, not even Warren and Brandeis and the subsequent writers who attempted to support or rebut their argument. The discussion concentrated on looking for privacy foundation, the basis for privacy, without really looking at its very essence. In other words, the focus has always been why or how privacy is protected (or the rebuttal to those) but not what is it to be protected. For that reason the design for the thesis has undergone significant change and the focus is shifted to fill up that gap. Instead of merely analysing privacy with the primary intention to introduce the concept and test its applicability within the context of cyberspace, which is merely one branch of the associated problems with privacy, the thesis is dedicated to address the root of the problem and thus concentrates on privacy as a concept that has a universal application. Such a radical change in the design of the thesis is urged for the need to have a clear and universal concept of privacy is more crucial as it is still lacking despite the fact that it is where the gist of the matter lies and that is notwithstanding the call for legal recognition of right to privacy had been started more than a century ago.

Before the discussion goes further, it is important to accentuate that any submission made with regard to privacy throughout this thesis refers to that as an individual's freedom to do or omit what he chooses to his private life or about his personal matter without any interference of others; subject always to fulfilment of the privacy touchstones and the limitations as discussed in Chapter III. In simple words, privacy really is the synonym of freedom of private life.

In this thesis, reference is made to the laws of the United States of America although the emphasis will be the examination of the relevant statutes in the United Kingdom, the English common law and the laws of Malaysia. Particularly the English common law is chosen as the benchmark because that is where the common law originated, being developed and subsequently introduced to the former British colonies. To a great extent, the English common law is still being applied and to a lesser extent is binding across the Commonwealth countries, including Malaysia. Nevertheless unlike the United Kingdom, since its Independence Day Malaysia already has the Federal Constitution; the supreme law of the land that codifies *inter alia* the fundamental rights and freedoms of its subjects.[5] That leads to many other differences: unlike the United Kingdom where parliamentary democracy system is being adopted and thus conferring the supremacy to the Parliament,[6] the power and conduct of the Parliament in Malaysia is subject to the Constitution; unlike the British Queen, who can by herself make law by virtue of the prerogative, the Yang Dipertuan Agung (which concept in relation to the Federal Parliament is the same as the English concept of the 'Queen in Parliament') is created by the Constitution whose powers derive from the Constitution and therefore the Yang Dipertuan Agung cannot by himself make laws.[7] Further grounds for choosing Malaysia as the point of comparison include the facts that although the common law of England is seen as the most influential source of law in Malaysia and that most of the existing legislation in Malaysia are either a codification of common law principles or an adoption of the United Kingdom legislation, the local custom and usage, the official religion of the country and the political orientation of Malaysia have driven the country to adopt some legal measures which are exceptionally different than those existing in England and other Commonwealth countries.[8] As a matter of fact, Malaysia is the only

Commonwealth country that consists of people of many different backgrounds, cultures, races and religions which its Federal Constitution recognises but despite of that the only religion that the Federal Constitution declares as the official religion of the country is Islam.[9] The Federal Constitution also provides for further privileges and special treatment applicable in matters related to Islamic religion[10] while expressly forbids any person, natural or legal, to question or challenge any part of those provisions. Aside to that unlike other Commonwealth countries, Malaysia uniquely applies a dual legal system whereby the federal legislation governs almost all aspects of the subjects' daily life such as contracts, torts, etc, while the state legislation cover some matters of personal law for the Muslim subjects.[11] The dual legal system in Malaysia is further reflected by the existence of a wholly separable Syariah courts system applying and enforcing the Syariah laws that parallel their civil counterparts. Consequently the personal law that applies to an individual in Malaysia depends on the religion such an individual professes.[12] Syariah laws of each state regulate the personal laws of the Muslim subjects of such a state, while others are subject to the civil law legislation or in the absence of the federal law on the matter, by customs and usage.[13]

In the United States of America, the legislature's concern about privacy goes back to 1980.[14] Prior to this, the Supreme Court of the United States of America had declared and recognised the existence of the right to privacy.[15] Additionally, it is also argued that the genesis of the right to privacy include the Ninth, Fourth and Fifth Amendments of the constitution of the United States of America.[16] In contrast, there has not been a single privacy legislation enacted by the Parliament in the United Kingdom. It is not unexpected that several attempts have been made to invite the courts in England to declare the existence of right to privacy either as part of the common law[17] (or rather equity) or as a result of the application of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)[18] in the country.[19] However, on several occasions the courts held that English law does not recognise a general right of privacy,[20] while in other occasions it was held so at least until 2 October 2000 when the Human Rights Act 1998[21] came into force.[22] Without any intention to refute the contention of those who opposed the

notion for the general right to privacy nor any intention to support the proposition that there has always been general right to privacy under the English common law, the later part of this thesis will evidence that it really is an exaggeration to say that the right to privacy is a concept that never exists or that the English judges never recognise such a concept. At this juncture, it suffices to say there are some instances where the English judges had accorded the existence of the right to privacy. In *Harman* v. *Secretary of State for the Home Department*[23] Lord Scarman, with whom Lord Simon of Glaisdale shared similar view, recognised that '... there is also the general right of the citizen to privacy'. Bingham LJ, in *R* v. *Inland revenue Commissioners, ex parte T C Coombs & Co*,[24] expressed recognition of the existence of general right to privacy, citing that '[t]he general importance of protecting a citizen's privacy was recognised by all members of the House of Lords in *Home Office* v. *Harman* ..., and such privacy is protected by article 8 of the European Convention on Human rights'. In *R (on the application of Morgan Grenfell & Co Ltd)* v. *Special Commissioner of Income Tax*, Lord Hoffmann noted that legal professional privilege '... is absolute and is based not merely upon *the general right to privacy* but also upon the right of access to justice'[25] (emphasis added). In *Morris* v. *Beardmore*,[26] Lord Keith of Kinkel, Lord Scarman and Lord Roskill accepted the existence of a citizen's right to privacy. However, it must be admitted that the judgment of Lord Scarman, Lord Simon of Glaisdale and Bingham LJ formed only dissenting judgment in the respective cases; Lord Hoffmann's pronouncement in *R (on the application of Morgan Grenfell & Co Ltd)* v. *Special Commissioner of Income Tax* was merely made by way of obiter dictum and that Lord Keith of Kinkel, Lord Scarman and Lord Roskill's judgment in *Morris* v. *Beardmore* might be read in the narrow context of one's right to privacy in one's home – not in the general context, thus tending towards the proposition that it is seen as a settled law that there is no general right to privacy under the English common law.

Similar to the position in the United Kingdom, there is no a single piece of legislation specifically dedicated for the protection of privacy in Malaysia. However, Articles 5 and 13 of the Federal Constitution may be relevant as those provisions guarantee individuals' right to personal liberty and to property respectively. Whether

there is or there is no such right to privacy being provided by the Federal Constitution of Malaysia is an issue yet to be settled even though the opportunity to analyse the matter had been brought to the superior courts in Malaysia. In *Re Kah Wai Video (Ipoh) Sdn Bhd*,[27] Edgar Joseph Jr. was invited to deal with the issue of right to privacy in Malaysia. However, his lordship abstained from giving any opinion as to the existence of the right to privacy.[28] With regard to the right to privacy by virtue of the constitutional right to property, Callow J in *PP* v. *Lee Sin Long*[29] held that '... [t]he privacy of a person in his home must be respected, and cannot be disturbed unless first shown to proper authority that reasonable cause for interference is warranted.' Hence, it is arguable that one's fundamental right to property warranted upon him – to a certain extent – the right to privacy.[30] Nevertheless, as with *Morris* v. *Beardmore*, it is arguable that the provision is to be read within the narrow context of individual's right to privacy in his home and not in the general context. The next alternative is to resort to the relevant common law principles to found the basis for cause of action or claim for remedy in cases of privacy intrusion. When common law remedy is sought on the matter, it may be argued that since the laws in Malaysia usually follow that of the common law of England; accordingly on the issue of privacy the position in Malaysia should be the same as that in England.[31] That may mislead even an able judge to hold the view which is not necessarily accurate. This matter is further discussed in Chapter II. At this stage it suffices to say that in the absence of binding precedent and enforceable legislation, the Malaysian courts have the freedom either to adopt what might be deemed as the more popular view in England, that there is no general right to privacy, or to adopt the alternative opinion.[32] That especially because unlike the position in the United Kingdom, in Malaysia the fundamental rights of individuals are safeguarded by the written constitution which is the supreme law of the land and the close analysis and examination of the relevant provisions of such constitution lead to the point where the right to privacy is arguably part and parcel of those fundamental rights safeguarded by the constitution.[33]

Having said that the more recent trend (which does not necessarily represent the current position) of the English common law refutes the existence of general right to

privacy, the commencement of the HRA 1998, however, has attracted the necessity to examine and evaluate the scope of the right to privacy, most notably within the context of an individual's '*right to respect for his private and family life, his home and his correspondence*'.[34] The magnitude of the issue is becoming more complicated as, while providing some sort of remedy to the plaintiff in *Douglas* v. *Hello! Ltd (No.5)*,[35] Lindsay LJ suggested that the scope of right to privacy might well be protected under the law of confidential information. While citing the 3 elements required in an action for breach of confidential information as laid down by Megarry J in *Coco* v. *Clark*,[36] his lordship went further by holding that '[i]f there was an intrusion in a situation in which a person could reasonably expect his privacy to be respected then that intrusion would be capable of giving rise to liability in an action for breach of confidence unless the intrusion could be justified.'[37] Such an attitude, to broaden the scope of common law breach of confidence to give effect to Article 8 of the ECHR that becomes applicable by virtue of the HRA 1998, was subsequently followed.[38] Therefore it becomes essential that the scope of both the law of confidence and what may be claimed as privacy shall be critically analysed to draw definite circumferences of both. Thus the research in this thesis focuses on the following hypotheses:

1. If there is the general right to privacy, part of the law of confidential information may overlap with what may be claimed as part of the right to privacy namely information privacy. That notwithstanding the facts that not every aspect of what may be claimed as privacy right is protected under the law of confidential information and conversely not everything that is protected under the common law principle of confidential information is within the concern of the notion of privacy.

2. If there is no general right to privacy, the law of confidential information may be of assistance especially because the demands for the protection of right to privacy have concentrated on this aspect (information privacy). However the law of confidence does not provide the protection to the extent that warrants privacy protection. There are private aspects of an individual that will not fall within the scope of the law of confidence, in particular those that an

individual wishes to do or omit about himself (physical privacy). Consequently, if the research were to prove that there exists no legal recognition to the right to privacy while there is the need to afford legal protection for such a right, there would be a need to formulate a 'new' principle of law that protects the aspects which would otherwise be protected as right to privacy.

It is also a very interesting fact that although much has been said about privacy, its definition is still a subject of arguments.[39] Wacks stated that: '[t]he long research for a 'definition' of 'privacy' has produced a continuing debate that is often sterile and, ultimately, futile.'[40] The research is undertaken not to prolong such debate; rather this thesis attempts to exemplify the scope of the right to privacy, which this thesis argues as being protected by virtue of Article 8 of the ECHR and, in the context of Malaysian legal system, to examine if such a right may be recognized by invoking individuals' fundamental right to personal liberty and when appropriate of property as protected respectively under Articles 5 and 13 of the Federal Constitution of Malaysia. Ultimately this thesis aims to ask why legal regulation in the area that people claim as 'privacy' has become necessary and offers the solutions to some privacy related yet previously unsolved problems by revisiting the concept, offering what is deemed as the appropriate context, scope and limitation of privacy and the tests to be deployed; presenting the evidence as to the inappropriateness of the existing approach and what would be the proper one; and finally pointing out the area for future research.

1.2 Thesis Outline

The thesis is divided into six chapters. **Chapter I** introduces the thesis and its objectives, the outlines of the thesis and the introductory analysis of the subject matter of the thesis. The discussion on the issue of privacy is started by looking at the original sources of the right to privacy, its historical backgrounds and some international statutory instruments that documented the right to privacy. The extent to which privacy as a concept recognised within a legal system is being examined within the context of England, as a constituent part of the United Kingdom, the

United States of America and Malaysia. While much has been written on the legal development on this aspect both in the United Kingdom and the United States of America, relatively little has been written about the law on the privacy aspect in Malaysia. As an introductory chapter by the end of Chapter I the thesis would have introduced the thesis, the chapters of the thesis and the subject matter of the thesis.

Chapter II continues with the examination of the relevant existing laws in England, including the United Kingdom statute law, and Malaysia. In the context of the legal systems of the United Kingdom the HRA 1998 is the main statute being examined. Hence, the review of Article 8 of the ECHR and its application particularly in cases brought against the United Kingdom become inevitable. As for the examination of the laws in Malaysia the Federal Constitution and the relevant legislation will be examined. Some related matters are also analysed and criticized especially those falling within the ambit of the notion of privacy – regardless the principles cited to found the cause of actions. This chapter aims to report concisely the finding of the analysis and examination thoroughly undertaken on the subject matter, to see the sufficiency and detect any deficiency with the currently available legal principles and/or the manner as to how the principles have been interpreted and subsequently applied. The examination of the relevant legislation proves that to a certain degree the right to privacy is recognised in both the United Kingdom and Malaysia, yet there is still a need to sanction express recognition for the right to privacy for the reasons detailed in this Chapter.

After examining the relevant existing legal principles, this thesis proposes the proper concept of privacy. **Chapter III** attempts to provide the answers to previously unsolved privacy related problems from the most fundamental one as to what privacy is to the more complex issues as to the scope, limitations and how to substantiate a cause of action based on the claim of privacy. Here the thesis offers the proper concept of privacy, the tests to be deployed to determine its scope, the limitations on the rights and how an intrusion to privacy occurs. As the concept of privacy is refined and the scope privacy seeks to protect is delineated, the ultimate objective of Chapter III is to show how the concept, when correctly construed and applied,

provides for the proper protection in circumstances where other legal principles fail to afford.

The common law of confidence is the subject of analysis and examination in **Chapter IV**. The examination includes the analysis of the concept of the law of confidence, the necessary elements for the cause of action for breach of confidence and the scope of the principle under the common law of England and the application of the same in Malaysia. Each element for the cause of action based on the law of confidence is being analysed and also tested against the context of the notion of privacy as this thesis advances. The emphasis of this chapter is to show the very essence of the principle of confidential information while examining its likelihood to be the substitute of privacy as has been suggested by some judges in England. However, the analysis reveals and makes apparent that the law of confidence is not the suitable substitute of privacy as it is neither meant to be one.

Chapter V analyses the two concepts: the notion of privacy and the law of confidentiality in each respective context. Here, the scope of both privacy and law of confidential information are being compared and scrutinized. It goes further by testing the two concepts against the idea of human rights. This chapter elaborates further why the law of confidence does not, and when accurately interpreted will not, provide sufficient protection for privacy in its aspects as part of the human rights.

Finally **Chapter VI** concludes the analysis. Besides presenting the research finding, this chapter make suggestions for future research and the proposal for any necessary matters that need to be materialized to ensure that the individuals will be afforded the right and respect they deserve for their private life – the sanctity of which arises from the very nature of individuals as persons who live.

1.3 Privacy as a Right: An Introductory Analysis

The issue whether the right to privacy exists or otherwise is an issue typical to countries where common law applies while at the same time such a country does not have either an express provision in the legislation that sanctions the right to privacy

or that the courts within the jurisdiction of such country have yet to express its assent for the recognition of such a right by way of interpreting the country's constitution that can be construed to such an effect. Here the concept will be analysed in term of its acceptance and recognition in some legal systems namely England, the United States of America and Malaysia. As Malaysia practices the dual legal system and applies the Syariah laws on personal matters of Muslims, when appropriate, reference will also be made to pertinent provisions of Al Qur'an, as one of the sources of Islamic law in Malaysia. Even though the reference to Islamic law will be minimum in this study,[41] the reference will be useful to show that Al Qur'an, the main source of law in Islam that was revealed more than 1400 years ago does provide guidelines to safeguard the privacy of individuals, a palladium that many of the modern legal systems are still lacking. Reference to the United States of America law is also made in this chapter as the way privacy is judicially being recognised in the United States of America is too important a matter to be excluded. However, the reference to the law of the United States of America in the subsequent chapters of this thesis will be done sparingly and only when necessary since the thesis concentrates on English and Malaysian legal system and also because this research aims to demonstrate that it is already high time to have express judicial or legislative recognition of privacy, especially for the countries where such legal recognition is still lacking such as England and Malaysia, but not in the United States of America where generally the courts have sanctioned their recognition to the existence of such right of privacy or even have the same being provided by legislation. That will be dealt with shortly after the discussion on the original sources of privacy and how 'privacy' as a legal concept has been given some degree of recognition at international level.

1.3.1 Original Sources of Right to Privacy

While it is essential to identify the scope of the right to privacy, it is also important that one should look at the origin of the claim for such right. As stated earlier, the first call for the recognition of the right to privacy was initiated by Warren and Brandeis in the celebrated article 'The Right to Privacy' that was published in

Harvard Law Review. However, the roots of right to privacy go back to ancient times.[42]

The term 'privacy' or its equivalent is nowhere to be found in the Bible. Neither is there any recommendation regarding privacy or prohibition against its intrusion.[43] However there are biblical passages that can be interpreted as distinguishing a realm of privacy. Milton Konvitz, as cited by DeCew, said:

> Almost the first page of the Bible introduces us to the feeling of shame as violation of privacy. After Adam and Eve had eaten the fruit of the tree of knowledge, 'the eyes of both were opened, and they knew that they were naked; and they sewed fig leaves together and made themselves aprons' Thus, mythically, we have been taught that our very knowledge of good and evil – our moral nature as men – is somehow, by divine ordinance, linked with a sense and a realm of privacy. When, after the flood, Noah became drunk, he 'lay uncovered in his tent,' and Ham violated his father's privacy by looking on his father's nakedness and by telling his brothers about it. His brothers took a garment, 'laid it upon their shoulders, and walked backward and covered the nakedness of their father. Their faces were turned away, and they did not see their father's nakedness.'[44]

Al Qur'an, on the contrary, has express regulations on privacy; and such provisions do secure upon individuals the freedom upon their private life. Islamic law regards privacy as a value which sanctity is highly recommended and its intrusion is condemned. To safeguard privacy Islam regulates the matter in two directions: namely that which are directed to the individual by recommending the individual to undertake reasonable steps to guard his privacy;[45] and secondly that which are directed to others, by drawing the lines of what can and cannot be done as a respect to other's privacy and also by prohibiting others from transgressing that.[46] In furtherance to that Islamic law recognises and protects both the physical and non-physical aspects of privacy. For physical aspect of privacy, Islam prohibits entrance to another's premises without the owner's permission.[47] It is also prohibited to spy upon another's premises and even if one is invited to come to a person's house, the invitee should stay in the premise merely for the purpose he is invited and not to stay

longer than necessary.[48] As a matter of fact, Islam recognises the existence of this right even among family members by setting the rules that any adult member of the family must ask for permission before entering the room of other adult at any time.[49] As for minors, they must ask for permission before entering any adult's room during certain period, namely before the morning prayer, and when an adult puts off clothes at midday in summer, and after the prayer of the nightfall; as these are three times of privacy.[50]

As for the non-physical aspect of individual's privacy, confidentiality is not the only aspect that is protected. Islam prohibits eavesdropping,[51] defamation,[52] spying on each other, backbiting[53] or speaking ill of each other.[54] The protection afforded by Islamic law is wider than the protection afforded by the known and well established cause of action for defamation in English legal system. Islamic law prohibits individuals to defame others and such prohibition applies even if the defaming statement is true.[55] This is outside the ambit of the English defamation law that accepts 'truth'[56] as the defence in an action for defamation, no matter how embarrassing it might be or how malicious the intention was.

Christianity and Islam are the two religions with most followers on the earth;[57] consequently the Bible and Al Qur'an are the holy books that found the faith of more than half of the world population. Since both the Bible and Al Qur'an recognise individual's right to privacy, it is safe to say that these sacred sources of law provide for the recognition of individuals' right to privacy and promote such a notion too.[58]

1.3.2 Historical Background

Despite the unsettled argument on whether there should be general law protecting the right to privacy, in the United States of America the legislature had acted in response to the concern about privacy. In 1980 the Privacy Protection Act 1980 was enacted. However, the United States of America government prefers to take a sector-based approach. Thus, for example, instead of providing one general statute that provides for general protection of personal data, there are several legislation which regulate different kinds of data. To mention a few, the Health Insurance Portability and

Accountability Act (HIPAA) has been enacted to deal with protection of health information; the Gramm-Leach Biley Act (GLB) governs financial privacy provisions; the Children's Online Privacy Protection Act (COPPA) is meant to regulate the privacy of children under the age of 13 and the Electronic Communications Privacy Act (ECPA) limits the circumstances under which federal and state governments may access the contents of transactional data in both real time communications and stored communications.

In the United Kingdom, Lord Mancroft had introduced Rights of Privacy Bill in 1961. In 1968 Mr Anthony Lester proposed, *inter alia*, that a bill of rights to be enacted.[59] In 1969 Mr. John MacDonald Q.C. advocated a bill of right enforceable in ordinary courts. Based on that, Lord Wade called for the House of Lords' attention to 'the need for protection of human rights and fundamental freedom ... and to the threat of personal privacy resulting from technological advance...'[60] Since then the debate continued on whether or not a bill of rights was needed. The debate has come to an end with the enactment of the HRA 1998 with the purpose 'to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights'.

Perhaps many human rights related issues find the answers in the provisions of the HRA 1998 when read together with the ECHR. However, the judiciary's attitude towards the issue of privacy complicates the matter, in particular the tendency to read the provisions of the HRA 1998 within the context of the existing common law principles. There is nothing in the HRA 1998 or the ECHR that explicates the protection for the right to privacy. However, Article 8 of the ECHR requires that an individual's right to private and family life must be respected and forbids government intrusion to that aspect. That has been accepted as to sanction individual's right to privacy. Nevertheless its local application is not without problems and there are arguments against the idea to interpret Article 8 as providing the general umbrella for the right to privacy.[61]

In Malaysia, on the contrary, privacy has never been given serious consideration despite the existence of the constitutional provision that prohibits the deprivation of one's personal liberty. It should be noted that there has been no initiative put forward to introduce a legislation to protect the right to privacy. Even the initiative towards enacting Data Protection Act, the legislation which to a certain degree will provide protection to privacy, is leading to nowhere. The first draft for that bill was presented for the public comments after 1998. In year 2000 it was announced that the draft was revised and further announcement made declaring that the draft should be ready in three years time and the so called '2003 Bill' would be made available for public comment. Time has lapsed since then and there has been no indication that the government will have the legislation enacted in near future. Similar hesitation is also shared by the Malaysian judiciary. With the exception of the case of *PP* v. *Lee Sin Long*,[62] until recently the courts in Malaysia did not wish to express its view as to whether or not privacy has had any room within the Malaysian legal system. More details on this matter are discussed in Chapter II.

1.3.3 International Instruments

The right to privacy is recognized as a fundamental human right as expressly provided in the Universal Declaration of Human Rights[63] and the International Covenant on Civil and Political Rights (ICCPR).[64] The General Assembly of the United Nations on 10 December 1948 adopted the Universal Declaration of Human Rights.[65] Works on the International Bill of Rights was undertaken but it was done with deliberate delay[66] and as a result, the International Covenant on Economic, Social and Cultural Rights[67] and the ICCPR were only opened for signature, ratification and accession by 16 December 1966 and came into force on 3 January 1976 and 23 March 1976 respectively.

Article 12[68] of the Universal Declaration of Human Rights states that: '[n]o one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.'[69] Almost

similar, though not identical provision provided in Article 17 of the ICCPR. It reads as follow:

1. 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.
2. Everyone has the right to the protection of the law against such interference or attacks.

In those two international instruments, the term 'privacy' is expressly used. Even though the term 'privacy' is not defined anywhere in both instruments and thus the scope of protection is not explained with certainty, those two instruments do acknowledge the existence of individual's right to privacy and prohibit arbitrary or unlawful interference with such a right. Unfortunately the existence of those international instruments does not automatically guarantee the availability of legal protection for individual's right to privacy at the national level. The applicability of each instruments will be further analysed below; however, generally the stance is this: in the absence of statutory incorporation and unless the international instruments embody generally recognised principles of customary international law, in the United Kingdom unincorporated international instruments are not part of the law of the land and therefore cannot be directly relied upon by individuals before the domestic courts.[70] It is very likely that the same is also the case with Commonwealth countries, including Malaysia, because they owe the origin of their law from the English common law.[71]

As a matter of fact, although the Declaration of Human Rights expressly had acknowledged, if not established, the existence of the human rights and freedoms as set out therein, it meticulously had avoided any reference to the corresponding obligations of the State. That coupled with these facts clarified the proposition. Nothing in the Charter of the United Nations expressly requires that Members of the United Nation shall observe human rights and freedom[72] and similarly the Declaration of Human Rights does not make it mandatory for the Members to make ratification or accession to the Declaration or in any manner adopt the provisions thereto or incorporated the same as part of the national law of the Members. The

Universal Declaration of Human Rights has become just a yardstick by which to measure the degree of respect for, and compliance with, international human rights standards. The Declaration was not intended to be a legal instrument. Even the Preamble to the Declaration expressly proclaims that the Declaration functions 'as a common standard of achievement for all peoples and all nations.'[73] Likewise the Universal Declaration of Human Rights has no application in the Federation of Malaysia, as the government has expressly declared, unless the corresponding rights are recognised by the Federal Constitution of Malaysia.[74]

The ICCPR, which by its nature is multilateral convention, is binding only on those States which have accepted them by ratification or accession. Malaysia has not ratified or accessed to it; thus, Malaysia is neither bound by provisions of the ICCPR nor required to ensure compliance with the provisions thereto. In 1976 the United Kingdom ratified the ICCPR.[75] However, treaty obligations binding on the United Kingdom under international law can only be directly enforced as law within the United Kingdom if they are given legislative effect.[76] The ICCPR provides that where not already provided for by existing legislative or other measures, each State Party to the ICCPR undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present ICCPR, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the ICCPR.[77] Until then, the ICCPR will have no binding effect and thus, unless and until legislation has been enacted to give effect to the provisions of the ICCPR, individuals in the United Kingdom cannot argue that the ICCPR has an automatic application in the United Kingdom and that any individual in the United Kingdom enjoys the rights as conferred thereto.[78]

Meanwhile in 1949 the Council of Europe was founded.[79] One of the Council's first tasks was to draft a legally-binding human rights convention for Europe, conferring enforceable rights upon individual against sovereign states.[80] In May 1948 the 'Congress of Europe' adopted a 'Message to Europeans' stating that: 'We desire a Charter of Human Rights. We desire a Court of Justice with adequate sanctions for the implementation of this Charter.' In February 1949 the International Council of

the European Movement approved a 'Declaration of Principles of the European Union' which stated that '[n]o state should be admitted to the European Union which does not accept the fundamental principles of a Charter of Human Rights and which does not declare itself willing and bound to ensure their application.'[81] Despite the proposal, the Council decided not to include the subject of human rights on the draft agenda proposed for the first session of the Consultative Assembly. The pressure from the Consultative Assembly however impelled the Committee of Ministers to agree to include the subject as part of the Assembly's work.[82] Finally in August 1950 the Council adopted the ECHR, which came into force in 1953.[83] It sets out a list of rights and freedoms which States are under an obligation to guarantee to everyone within their jurisdiction; among other things the right to respect for one's private and family life and correspondence.[84]

However as it has been discussed earlier there is a problem with the local enforcement of an international instrument in the absence of domestic laws incorporating the same.[85] The ECHR is an international treaty to which the United Kingdom has become a party. ECHR provides for one system of European human rights protection enforceable by legal means before the ECtHR,[86] but it does not automatically become part of municipal law in the United Kingdom and is not binding the courts in the United Kingdom without statutory incorporation.[87] As Lord Lester put it: '[f]or the courts to require ministers to comply with the Convention in performing their public functions would involve a violation of the constitutional separation of powers, by incorporating the Convention through the back door when the Parliament has refused to do so through the front door.'[88] Likewise in *Marckx* v. *Belgium* the ECtHR held that the Court judgment is essentially declaratory and cannot of itself annul or repeal inconsistent national law or judgments.[89] That being the case, it is appropriate to say that the ECHR had only gained its full legal effect in the United Kingdom on the 2 October 2000 when the HRA 1998, the municipal law incorporating the ECHR, came into force.[90]

1.4 The Notion of Privacy: Concise Analyses

One of the issues that complicates the notion of privacy is that the understanding of the concept of privacy is not unified. The aspects of privacy, its scope and its nature will vary from one locality to another or from a society to another, depending on the culture, custom, moral value, etc of a particular locality or society.[91] As a matter of fact, while this thesis is submitting that privacy really is an individual's freedom to do or omit what he chooses to his private life or about his personal matter without any interference of others which however limits its application within the ambit of such an individual's private sphere, an approach which has been adopted by the judiciary in New Zealand;[92] the judiciary in Canada,[93] the United States of America[94] as well as the ECtHR[95] have adopted a scope wider than that so as to find that in some aspects privacy exists even when private activities are undertaken in public for as long as such activities are not of public's concern. The general perception in England, on the other hand, has a much narrower view by associating privacy with secrecy, the point which is discussed in 1.4.1.

With that in mind, an idea of what the right to privacy embraces may become clearer by analysing certain aspects of behaviour.

(i) Abortion

In the United States of America for example, it was held that the right to abortion is a matter of one's right to privacy.[96] When tested against the notion of privacy as proposed in this thesis, i.e. an individual's freedom of private life, abortion will affirmatively be considered as a woman's privacy if and only if it is seen that a woman's decision to terminate her pregnancy is considered as a personal matter which, if read in conjunction with the first privacy touchstone, entails such a decision does not affect any other individual but herself.[97] The common law does not regard foetus as having any right as an individual,[98] consequently it may be argued that privacy embraces abortion within its ambit and as such a pregnant woman should have the freedom to choose whether to keep or terminate her pregnancy at any stage and in any manner she wishes. However that is not the case in England, as the Offences Against the Person Act 1861 in sections 58 and 59 respectively makes

administering drugs or using instruments to procure abortion and procuring drugs, etc. as an offence.[99] Neither is it in Malaysia, as the Penal Code prohibits both abortion and attempt to affect abortion.[100] Thus illustrates the point that in this aspect, privacy differs in the United States of America from that in England and Malaysia.

On the contrary, Islamic law recognises the individuality, and thus warrants some rights upon individuals,[101] from the very moment they are formed in their mothers' womb.[102] That follows that abortion, within the context of Islamic law, cannot be argued as the sole privacy matter of the expectant mother as her decision will affect another individual that is the foetus. Hence except when the abortion is necessary such as when its continuation may endanger the expectant mother's life, it is prohibited by Islam;[103] and a Muslim woman is morally not allowed to abort on the excuse that it is part of her right to privacy. Consequently, to enact a law that prohibits abortion on Muslims should not violate a Muslim's right to privacy.[104]

(ii) Clothing

The right to decide what one wishes to wear or not to wear has always been considered a petty matter that is not worth sanctioning the recognition for the right to privacy. However, the public response following the French Government initiative to ban 'signs and dress that ostensibly denote the religious belonging of students' in public elementary and high schools proves that it was not too petty a matter that does not need any consideration.[105] Based on the proposition that the right to privacy, as an individual's freedom of private life, entitles a person to do what he likes to his person within the private sphere, an individual has the right to decide what to put on his body. Any unjustified restriction, even done through legislation, will amount to a privacy intrusion and should not stand. Unless and only if the legislation that has the effect of restricting what otherwise is an individual right to privacy is based on justifiable basis and meets the necessary conditions for imposing such a restriction, no one may dictate to another what to and not to wear. Therefore the right to wear veil or the choice of a woman to cover any part of her body as she wishes in a manner that does not cause any effect to others should be part of a person's right to

privacy in Malaysia, the United States of America and the United Kingdom for there is no any law that has declared such a conduct as unlawful.

In *Hajjah Halimatussaadiah Binti Kamaruddin* v. *Public Services Commission, Malaysia & Anor*[106] the constitutionality of the civil service regulation restricting the use of certain apparels was challenged for being unconstitutional. When translated to English, paragraph 2.2.1 of Service Circular No. 2 of 1985 reads: '... However, "jeans", "slacks", shorts and any dress covering the face are not permitted to be worn during work.' The challenge was restricted to the specific prohibition against covering one's face that was challenged as amounting to interference with the appellant's freedom of religion as guaranteed by Article 11 of the Federal Constitution. While accepting the view 'that Islam as a religion does not prohibit a Muslim woman from wearing, nor requires her to wear a purdah'[107] the Supreme Court further accepted that:

> The hijab in Islam is rooted in a more general and basic issue. That is, Islamic precepts aim at limiting all kinds of sexual enjoyment to the family and the marital environment within the bounds of marriage so that society is only a place for work and activity. It is opposite of the western system of the present era which mixes work with sexual enjoyment. Islam separates these two environments completely... Clearly, those nations which came to accept Islam were following their own customs because Islamic precepts did not say it was obligatory to display the face, except in the haram. Nor did they say it was forbidden to cover the face, it gave a choice. It left it up to the various nations to practise their own customs of hijab if they so desired... History shows that non-Arabs felt it was obligatory to cover the face. Thus this custom of covering the face, as we find it now, is not a custom of the Holy Prophet and the Imams.[108]

Thus the appeal was dismissed as the restriction was not seen to have interfered with the appellant's constitutional right to practise her religion. In the light of the Supreme Court's decision it is appealing to see if the same conclusion would be reached if the claim were instead based on the interference to the appellant's right to privacy. In such a situation, the court would have to adopt a rather different approach. In that

case the focus was to see whether the constitutional right to practise a religion has been infringed by the restriction which was answered in negative. If the right to privacy were the issue, the court would have to examine if such a restriction to one's freedom of private life – in this case the choice to create the private sphere over the appellant's face – was lawful and justifiable. Consequently the outcome might also be different. While it is not obligatory to cover one's face – and thus prohibition of that does not interfere with any aspect of Islamic teaching, the choice whether or not to cover one's face is a matter for an individual to choose and not for the state to do so on his behalf without his consent and without any acceptable justification.

In a country which constitution declares Al Qur'an as its main source of law, such as some countries in the Middle East, any prohibition in matters upon which Islam allows choices to its followers, such as the recommendation to wear veil, would not be lawful and should not be of effect. That is because, for example, Al Qur'an gives the freedom to women to wear veil, the freedom that cannot be taken away by a country that binds itself by Al Qur'an.[109] The same argument may also be applicable to Christian women although in a narrower context: to cover the head while attending churches.[110] Otherwise there is nothing to prevent the government of a country from introducing a law to prohibit the use of veil or to wear any dress as compliance to any religious teaching, provided it is shown that such regulation is necessary in democratic society to preserve the public safety and that such regulation is proportional with the goal the restriction seeks to achieve, the justification that has been resorted by the French Government; without which such restriction will amount to interference of individuals' right to privacy.

Conversely, as the right to choose what not to wear is also one's individual preference, a restriction that demands women to wear a veil without a proper justification also amounts to an interference with the right to privacy. Even an Islamic country cannot make such a restriction without founding the same on justifiable and acceptable basis, such as to maintain and preserve the public order. Although Islam does encourage women to guard their modesty by among others drawing their veils over their bosoms, failure to observe such guidance is not

described as an offence and has not been made punishable by Islamic Law. As a matter of fact, Islam does not impose any compulsion on a matter of religious practices, not among the believers[111] moreover to others.[112] Unlike the matters which touch the aspect of an individual in its relations to other persons or the public for which the regulations and consequences are made clear and enforceable by and among the fellow humans; matters which are exclusively religious in nature are prescribed and explained as guidelines or what are supposed to be good practices in life. The latter is a matter that one owes towards nobody but his Creator. Only God can decide on that matter and fellow human being cannot undertake such task and attempt to enforce his values upon another. Hence any attempt by the legislature of a country to ban or to command the use of certain attire may be challenged as the intrusion of individuals' right to privacy. Unless it is shown that such prohibition or order is justified or necessary to preserve the national security or public safety and the goal it aims to achieve justifies such restriction and that the restriction is useful, indispensable and proportional to the established goal, such law may either be struck, quashed or declared void or incompatible with the relevant human rights legislation and there shall be a call for such legislation to be either abolished or amended whichever is deemed appropriate. On the contrary, it is arguable that the government of a country which declares Christianity as its official religion may impose certain restriction regarding its subject's apparel that either gender should not wear the apparel of the opposite gender. That argument may arise as the Bible uses the strict prohibition on the matter[113] unlike Al Qur'an which verse in relation to veil for women is worded in 'suggestion' like manner.[114]

(iii) Suicide

Suicide is usually thought to be a matter exclusively within one's privacy[115] and may be so argued if the notion of freedom of private life includes the right to terminate the private life. However, the perception is not universal. Islam forbids suicide as it also forbids any act that 'destroys' or harm oneself even when it is done voluntarily to himself without affecting others;[116] although quite the contrary, the Bible has recorded instances where suicide has been or would have been chosen to end a frustration.[117] While it may not make sense to make suicide as an offence because the

offender cannot practically be subjected to any punishment upon the completion of suicide,[118] the attempt to do so may be made punishable – provided such a restriction is based on justifiable and acceptable basis. As a Muslim is not allowed to end his own life, even on the basis that such a decision is purely of private matter, a Muslim country may make a ruling prohibiting suicide and an attempt to do so. Until 1961, under English criminal law suicide was a crime and thus when one failed to successfully 'murder' himself, one had nevertheless attempted to commit an offence and thus such failure was made punishable. The Suicide Act 1961 decriminalised the act of suicide so that those who failed in the attempt would no longer be prosecuted.[119] In Malaysia, suicide has never been made an offence although the attempt to commit one is, as a matter of public policy, a crime and punishable under the Penal Code.[120]

(iv) Eating and Drinking

One's meal and/or drink preference may be too small a matter for a government to regulate. It will fall within the ambit of privacy as what a person chooses to let into his body is entirely his personal matter and thus its exercise falls within his freedom of private life. However it shall also be noted that different society has its own culture related to that and may have an attitude towards the matter different from that of others. Thus, for instance, taking alcohol openly may be something usual in the western country but not in a more traditional Asian country especially as among the Muslim inhabitants of such country. A Muslim, for example, is not supposed to take alcohol. Yet, as a matter of privacy, an individual's freedom to choose what to do or omit about his private life, it is for an individual to decide whether to disregard the teaching of the religion he allegedly professes or to abide by the same. Hence if a Muslim has consumed alcohol in the privacy of his house, for instance, and a journalist surreptitiously takes his picture then threatens to publish such fact, in countries where privacy is a recognised legal right such an individual may apply for injunction to prevent the publication of the facts that infringes his privacy. That should be so even if the picture merely shows the man, instead of taking an alcoholic drink, was having a glass of water within the privacy of his kitchen.

Privacy, however, is not an absolute right. If there exists a law that prohibits Muslims from consuming alcohol and yet that has been disregarded, the publication of such fact will not be prevented as the existence of such prohibition negates one's expectation of privacy on the matter. Hence privacy may not offer a shield to a Muslim subject in Malaysia where numerous state laws have forbidden the consumption of alcohol by Muslims[121] but it may in Indonesia for the absence of similar prohibition in the country. To similar end, the right to privacy may also be limited by a legislature of any country by enacting the law prohibiting any Muslims or Jews to consume swine, for example, on the argument that such prohibition is necessary as protection of morals of Muslims or Jews.[122] But an attempt to affect the same on people who have not accepted the Muslim or Jewish teaching will interfere with an individuals' right to privacy.

(v) Sexuality

In a more concrete situation the privacy of sexuality will also vary from one country to another. The issue of homosexuality or lesbianism, same gender marriage, pre marital, outside marital or extra-marital sexual intercourse are just a few examples of activities that are usually considered as private matters in most western countries,[123] but considered as an offence in some other parts of the world.[124] It is thus apparent that the western countries accept that consensual adults' sexual relations are considered private and the government should not intervene on that. While promoting privacy to ensure individuals freedom of private life, Islam does not give absolute freedom to the Muslims so as to allow Muslims to behave in whatever manner they wish without taking into account the consequence of such act. While individual's privacy as against ill-will of others is well guarded in Islam,[125] privacy cannot be exercised in such manner that may harm or destroy the value of the family.[126] Thus, homosexuality is regarded as evil,[127] so is adultery,[128] or sex with animal/bestiality[129] – as only marital sex between the married couple is permitted in Islam.[130] The Bible also speaks strongly against the same gender sexual intercourse,[131] adultery,[132] sex before marriage,[133] or fornication in general. It is therefore obvious that, whether or not those aspects are considered as aspects of individuals' sexual

privacy, is a very subjective matter that depends on the applicability of factors as well as the availability of relevant laws or regulations in a locality.

Those are but five aspects of behaviour that usually come within the ambit of privacy: abortion as a woman's personal decision to terminate her pregnancy; one's clothing, food or drink which are matters of personal preference; suicide as a person's decision to end his life; and one's sexuality which is a matter very personal in nature. Although the culture, customs or moral values that apply in one locality may give different perception on those aspects as compared to the same in other area, taken on their face value those aspects relate to what an individual may choose to do or omit to himself and are usually regarded as private matters. It is submitted that unless proven otherwise and subject to its exercise within a private sphere, such actions of individuals which results are directed towards the individuals themselves are matters of such individuals' privacy, matters that fall within individuals' freedom of private life. Therefore, unless being affected on a lawful basis, any interference with the same should be regarded as privacy intrusion. That, of course, subject to the satisfaction of the touchstones of privacy as suggested in Chapter III, 3.3.1 and the limitations of privacy as delineated in Chapter III, 3.4.

While there are many other instances where the concept of privacy may differ between one locality to another, one custom to another, etc, this chapter will look at the perspective on privacy in England and Malaysia and the existing treatment being afforded thereto.

1.4.1 Privacy in the English Law

In England the main contention brought against the idea to afford legal protection to privacy is that such a principle is already governed under the existing common law of confidence.[134] The other equally known reason is that it is not proper to afford legal protection of privacy which concept is not fixed as legal protection cannot be conferred to cover uncertainties.[135] Both of these grounds indicate one point: that to the English privacy is very much about the '*right*' to protect '*personal information.*' As a response to that, there are two main points to be highlighted: namely that to

equate privacy with secrecy is a general misconception as privacy really is freedom of private life and not merely the right to secrecy or confidentiality; and secondly, privacy is not and should not be seen as a 'right' in the sense as though it is a mere 'entitlement' or 'privilege' rather than it is as one of an individual's fundamental human rights.

(i) Privacy v. Secrecy

It is not uncommon that people associate privacy with confidentiality.[136] In fact one of the often quoted definitions of privacy and among the influential one as offered by Westin implies that as he said that 'privacy is the claim of individuals, groups of institution to determine for themselves when, how, and to what extent information about them is communicated to others.'[137] When one talks about privacy, one will easily (if not automatically) associate the context within the latitude of secrecy[138] as much as people will associate any legislation that protects individual personal data with privacy legislation. Consequently it does not come as a surprise if the idea of having legal protection for the right to privacy is being resisted as there is the belief that the law of confidential information provides sufficient protection for the aspect of privacy.

However careful analysis of the concept of privacy proves these: first that the notion of privacy covers the scope wider than a mere informational privacy; and second, even within the context of informational privacy such as that proposed by Westin, there is an important distinction: secrecy law forbids the disclosure of information whereas within the context of privacy the disclosure is at the discretion of the owner of such data or information.[139] One's decision to make public any of his personal secrets is in reality an exercise of one's freedom of private life; although as the consequence of such act the person waives any subsequent privacy claim upon that particular secret he has chosen to disclose publicly.

As with the former, Lord Nicholls of Birkenhead correctly noted in *Campbell* that 'an individual privacy can be invaded in ways not involving publication of information. Strip-searches are an example.'[140] It is obvious that privacy is not solely

about protection of information. The idea of privacy as this thesis advances is to ensure individual's freedom upon his private life and not merely to protect some aspects of it and allow others to intrude upon the rest. Privacy encompasses a wider scope of individuals' interest and should not be restricted merely to one's exclusive control over his personal information. At this point, it is worth to cite what Kent Greenawalt emphasised on the matter:

> There are some situations where disclosure of information is involved in a loss of privacy but it is not the only element, or even the primary element, in the invasion of privacy... A person who is raped or brainwashed has suffered an extreme loss of privacy, and any information the intruder may have obtained is quite incidental to the major harm. An unwanted police search of one's home is disturbing to familial privacy entirely apart from whatever information the police discover. Thus loss of control over information may often occur as a consequence of an intrusion that is independently disturbing to one's sense of privacy....Another whole aspect of privacy which the Westin definition does not touch is the freedom to make choices about one's behaviour in respect to private matters. ..... The 'privacy' that is primarily involved in these cases is not freedom from unwanted disclosure of information of freedom from actual intrusion into a private situation, but freedom to live as one wishes in respect to certain private activities.[141]

The elements that distinguish privacy from the law of confidence are the subject being discussed in Chapter IV and further discussed, in their relation to human rights, in Chapter V. At this stage it suffices to note that the fundamental difference between the two is this: it does not matter whether the information or data are personal or otherwise, the principle can be invoked to protect the confidentiality of the information or data; while on the other hand for a person to invoke the right against disclosure of information or data on the basis of privacy intrusion, it has to be shown that the information or data so disclosed are of a personal nature and not otherwise. Another matter that shows that privacy is not about secrecy is that the right to privacy will include one's discretion to publish any part of his private facts. When one opts to reveal some personal information to public, he does so in the exercise of privacy. Although the public disclosure of private facts makes such facts no longer

'private', such publication is an exercise of one's privacy right. And when such disclosure is not made publicly, the privacy remains and such individual retains his control over such information. By way of analogy if a legislation were to be introduced that, *inter alia*, prohibits individuals from disclosing some kind of private facts or disseminating the same to others, such legislation - unless legitimately and lawfully justified - may be construed as amounting to intrusion of privacy in the sense that it would restrict and limit the individuals' freedom to decide for himself whether or not to disseminate or publish anything about his private facts. On the other hand such legislation would not in any way be contrary to the principle of law of confidence and would definitely preserve secrecy. That exemplifies that privacy is not only about secrecy or protection of confidential information.

(ii) Privacy: Freedom v. Subjective Right

In *Kaye*, Brooke LJ expresses that the basic principle that English law has historically been based upon freedom, not rights. Although it is argued that the concept of sovereignty of Parliament (acting in place of the monarch) disables the English subjects to possess fundamental rights, it is well accepted that individual's liberty does exist as supported by two principles: that an individual may say or do as he pleases provided he does not transgress the substantive law or infringe the rights of others; and that public authorities (including the Crown) may do only what they are authorised to do by some rule (including the royal prerogative) or by statute.[142]

This thesis argues that privacy as freedom of private life is part of an individual's human rights. The term 'human rights' refers to those fundamental freedom and rights that each person possesses by virtue of nothing more than an individual's status as a human being.[143] This point is further elaborated in Chapter III of this thesis. At this stage, it will be adequate to concisely state that as with other types of freedom, privacy does not demand an exhaustive definition that depicts its exact nature for it to be afforded with the legal protection it deserves.[144] The anxiety that such broad concept may lead to indefinite claims to be brought before the courts of law should not be reason to reject legal recognition to privacy altogether. The same concern also applies to other types of freedom, including the freedom of life,[145]

freedom of thought, conscience and religion,[146] freedom of expression,[147] freedom of association,[148] etc, each of which does not have exhaustive definition nor definite scope yet these freedoms, unlike the right to privacy, have been warranted with the legal protection and their existence have never been questioned nor challenged.

If it is accepted that the concept of privacy is equal to freedom of private life, the concern that affording legal protection to privacy will open the room for abuse and lead to many uncertainties is superfluous. As with any other types of freedom, the protection of privacy is never absolute. The right can be restricted when some conditions are met.[149] An example of such conditions can be found in paragraph 2 of Article 8 for the ECHR, which read as follow:

> There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Besides, there are many other factors that will minimize the availability of privacy protection in England including the current attitude of the government, legislature and the judiciary towards the notion of privacy, the arguably limited scope for the application of the HRA 1998, and the existence of the laws that further allows wide range of interference to be effected on individuals that otherwise amount to violation of individuals' right to privacy, such as the Terrorisms Act 2000, the Anti-Terrorism, Crime and Security Act 2001, the Prevention of Terrorism Act 2005 and the recently Terrorism Act 2006.

As conclusion, it can be said that there are two common misconceptions when privacy issue is put on the table. To straighten the matter, the response is two-fold. First, it is undeniably a common misconception to equate the notion of privacy with that of secrecy as privacy includes aspects much wider than a mere informational one and that even the right to disseminate private facts is part of privacy while the same will definitely fall beyond the scope of the idea of secrecy. Second, it is also

unwarranted to 'curb' the right to privacy as a mere privilege or entitlement as opposed to the fundamental right and individuals' freedom of private life. As with other type of freedom, privacy does not require a strict and definite definition to clearly and specifically spell out what comes within its scope and what does not. After all the right to privacy is not an absolute right. Despite all the concerns about the possibility of abuse if legal recognition is to be afforded to the right to privacy, there are more than enough factors in England that will only allow for a diminutive room for the right to privacy. As it will be shown as the writing progresses there is a seed of hope and it is also inevitable that it is just a matter of time for the notion of privacy to gain express legal recognition in England.

1.4.2 Privacy in the United States of America

It is generally accepted that Warren and Brandeis initiated the call for the legal recognition of the right to privacy. In their article Warren and Brandeis attempted to show that privacy is a common law right because, they argued, the common law has always recognised that an individual shall have full protection in person and property. The nature and extent of such protection, however, needs to be defined anew from time to time to meet the demands of the society. Prosser later suggested the codification of principles of privacy law[150] which Prosser subsequently entered into the Second Restatement of Torts at §§ 652A-652I (1977).

In the United States the notion for privacy initially called for legal protection against the unauthorised use or publication of personal data or sensitive information.[151] Within such a context, the right to privacy was deemed to imply an individual's power to control what can be made public about himself. The scope for privacy, however, has been widened since then. The following cases law have expanded the scope of privacy although the expansion ensued on subject to subject basis. In *Griswold* v. *Connecticut*,[152] the appellant, in his capacity as Director of Connecticut's Planed Parenthood League, gave out information, instruction and medical advice to married persons regarding the use of contraceptives. Connecticut law forbade such activity as it also prohibited married couples from using contraceptives devices. The appellant was arrested and convicted for violating that law. Upon the appeal, the

Supreme Court held that though the Constitution does not explicitly protect a general right to privacy, the various guarantees within the Bill of Rights create penumbras, or zones, that establish a right to privacy. It was held that when read together, the First, Third, Fourth, and Ninth Amendments create a new constitutional right that is the right to privacy in marital relations. The Connecticut statute was found to be in conflict with the exercise of that right and therefore was held to be null and void. In *Eisenstadt* v. *Baird*,[153] in extending the right to use contraceptives by unmarried couple, Justice Brennan writing for the majority held that: 'if the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted government intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.'[154] In *Carey* v. *Population Services International,*[155] the Court invalidated a New York law forbidding sale or distribution of contraceptive devices to persons under 16 years of age. Thus those cases have in effect widened the scope of privacy from concentrating predominantly on the right to control personal information to include an individual's freedom against unwarranted intrusion into the right to make fundamentally important decision about one's private life, in this case, the right to use the contraceptives and the individuals' decision whether to bear or beget a child.

In 1973 the scope of the right was again widened to include the right of a woman to choose to have her pregnancy aborted.[156] Over the next three decades, the Supreme Court was repeatedly called upon to decide whether a wide range of abortion statutes violated a woman's right to privacy. While many of these restrictions were found unconstitutional, the court upheld state and federal bans on funding for abortion services[157] and the legal requirements that young women must obtain the consent of or notify their parents prior to having an abortion.[158] The United States of America courts had allowed stricter procedures to be applied prior to allowing a woman to have a legal abortion. Thus, in *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*,[159] while the court reaffirmed the core holding of *Roe* - that a woman has a constitutional right to choose abortion before viability and thereafter if her life or health is at stake, nevertheless, the court ruled that in order to succeed in a constitutional challenge, a law must be shown to have the purpose or effect of

placing a substantial obstacle in the path of a woman seeking an abortion. Under this test many abortion restrictions have been upheld, including conditions that require women to make multiple trips to an abortion provider and to suffer an enforced delay prior to obtaining an abortion.[160]

Sexuality has also been declared as part of the right to privacy. In 1970s the Court declined to widen the scope of privacy to include other aspects of personal decision, by allowing local communities to set limits on the number of single, unrelated adults living together in one household[161] which objective is basically to promote anti-polygamy practices. The court had also refused to afford constitutional protection to the decision by homosexuals to have sexual intercourse with consenting adults in private.[162] However, in *John Geddes Lawrence and Tyron Garner, Petitioners* v. *Texas*[163] it was held that:

> [i]t suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.[164]

Aside from the judiciary's contribution for the development of the scope of privacy, such development is also contributed by the existence of relevant provisions in the United States of America Constitution.[165] In *Tehan v. U.S.* the majority opinion in the habeas corpus proceeding mentioned that the Fourth and the Fifth Amendments stand 'as a protection of quite different constitutional values reflecting the concern of our society for the right of each individual to be let alone.'[166] In *Katz v. U.S* the court held that recording by police of conversation in a public telephone booth was a violation of the Fourth Amendment, because the speaker had a reasonable expectation of privacy in the booth.[167] In *Griswold* the Supreme Court relied on the First, Third, Fourth, and Ninth Amendments to hold that there exist the right to privacy in marital relations that makes any law that conflicts with the exercise of this right null and void.[168] In addition to those, other privacy rights are contained in criminal statutes.[169]

However it is interesting to note that while some aspects of privacy might have been thoroughly regulated, some are left unregulated – although the latter may warrant the legal protection as much as the former and of no less significant to individual's privacy either . The close look to the incidents that led to the regulation of some specific aspects of privacy clarifies that the reason of such phenomenon is because such a regulation has been enacted in response to some specific 'historical accidents and political outcomes'.[170] Thus, for example, in response to the embarrassment caused to the Judge Robert Bork over the disclosure of his video rental records, the Video Privacy Protection Act of 1998 has been regulated to limit disclosure of records of videotape rentals. However no similar legislation has been enacted to regulate, for instance, the information that records individual's videotape purchases or book rentals or purchases even though these aspects pose the risk equal if not greater than that led to the enactment of the Video Privacy Protection Act.

To sum up, unlike its counterpart in England, the judiciary in the United States of America has sanctioned a very wide scope of privacy protection. In addition to that there are various privacy legislation in the United States of America and although some relevant legislation are too specific and are meant to cater to such specific needs or rather only some aspects of privacy, in overall, a wide scope of privacy protection is made available in the United States of America.[171] Among the contributing factors is the existence of relevant provision in the Constitution of the United States of America, which was lacking in the United Kingdom, and supported by the judiciary's attitude towards privacy in the United States of America, which again is very different from that of England since the 1990's. If those are the contributing factors that differentiate the position in the United States of America as opposed to that in the in England as regards the individual's right to privacy, that warrants further analysis of such factors to see if the existence of those or part of those factors in the Malaysia may distinguish the stand in the Malaysia as compared to that in the United Kingdom, at least within the context of the English common law before the HRA 1998 came into force.

1.4.3 Privacy in Malaysia

As with other ASEAN countries privacy is a topic that receives very little attention in Malaysia. Up to date, no legislation has been enacted specifically to protect individuals' privacy, neither as a distinct type of freedom, nor in a narrower scope that aims to protect any aspect of privacy. Even though Malaysia is among the pioneer in East-Asia region to respond to the need to have regulation that regulates internet activities,[172] the federal government is reluctant to pass the law to protect individuals' personal data as such legislation is seen as a factor that would add cost of doing business rather than serving public good and as an impediment to the proper policing of society.[173]

The academics too paid very little attention to privacy related issues. Until recently, there was no publication that analysed or examined the issue of privacy in Malaysia. Even the recent publications deal mainly either with the draft of the personal data protection legislation[174] or merely on informational privacy.[175] While the relevant Malaysian legislation, including in particular the relevant articles of the Federal Constitution, and relevant cases law will be examined and analysed in details in Chapter II, it should be noted here that the lack of literature available on privacy right in Malaysia is apprehensible due to the fact that most Asians do not disapprove the idea of government intervention in their private life simply on the supposition that such interference is necessary in order to preserve the national security and thus for the general benefit of the public.[176] It does not come as a surprise that in Malaysia there exists a draconian legislation that provides for the power that may be invoked on supposition that such exercise of power is necessary in order to preserve the internal security of Malaysia by among others allowing the government authority to effect a preventive detention, the prevention of subversion, the suppression of organised violence against persons and property in specified areas of Malaysia, and for matters incidental thereto.[177] Historically the Malayan emergency was an insurrection and guerrilla war of the Malay Races Liberation Army against the British and Malaysian Administration from 1948 to 1960.[178] It was the long and bitter insurgency that prompted for the imposition of the state of emergency.[179] The Internal Security Act 1960,[180] was originally enacted in response to such insurgency. It was

subsequently seen as necessary to counter what remained of the communist threat within Malaysia. In 1970 the communist threat again surfaced so as to provide the justification for the ISA. Unlike the 1948 Emergency Regulations which was a temporary measure to deal with extraordinary circumstances, the ISA was made permanent law. By virtue of this law, the police are authorised to enter and search without a warrant the homes of persons suspected of threatening national security and may also seize evidence. Judicial reviews of arrests under the ISA are limited to questions of procedure: at no point are authorities required either to produce evidence or detailed charges. Even worst, any person arrested under the ISA can be held for up to two years without being charged and such term can be renewed for further two years indefinitely.[181] Among the current justification for the ISA is to maintain the inter-ethnic harmony and economic stability of Malaysia. The legislation has since been invoked by the government against any individual that the government perceives to be a threat. Most of the people arrested under ISA are allegedly connected to Islamic terrorist groups. But the use of the phraseology 'terrorist threat' or 'terrorist' has increased remarkably since 11 September 2001, and is now used to describe a litany of individuals or actions that previously would not have been classified so.[182] At first, the USA government was among those who were strongly opposed to the ISA on the ground that such law violated fundamental human rights.[183] However, the USA government has refrained from making further suggestion to the ISA related human right issues with the passage of the USA Patriot Act which does much the same as the ISA. The Patriot Act authorises the government to exercise the power in a manner that otherwise would amount to infringement of fundamental freedoms by giving the government the power to, *inter alia*, access to medical records, tax records, etc without probable cause; the power to break into one's home and/or conduct secret searches without ever informing the subject of such search; and even to send a person secretly to jail without charges.[184] The United Kingdom is not any different on this aspect as the Terrorism Act 2000, the Anti-Terrorism, Crime and Security Act 2001, the Prevention of Terrorism Act 2005 as well as the Terrorism Act 2006 also legalise the commission of what otherwise amount to infringement of individuals' fundamental rights and freedom.

While it is out of the scope of this study to examine the details of ISA and to make recommendations to improve the preservation of human rights, it is appropriate to mention that the exercise of the powers given by virtue of ISA will deprive an individual of the right to privacy. The ISA provisions create the restrictions to many aspects of individuals' private life, the infringement of which would otherwise amount to violation of privacy. The ISA regime will overturn a claim against privacy intrusion. For example if a search of one's home or seizure of one's property is affected by the government authority without a warrant, such a search or seizure will not be illegal nor amount to privacy intrusion if ISA is being invoked as the basis for such conduct. Similarly, when one is being detained without being charged for two years or even more in pursuance to the ISA, it is unlikely that such a detainee may succeed in a claim of privacy violation for the detention is legally authorized by the ISA – even though it is obvious that such a person's private life has been completely violated as a result of such detention. The very existence of such law alone should be questioned for it allows and provides justification for the violations of many aspects of privacy. Unwarranted search without the consent of the individual being searched should amount to a clear violation of that person's privacy, i.e., right to 'omit' the search being conducted upon him. Detention without following the proper criminal law procedure should amount to invasion of privacy by restraining such person's freedom and choice of what to do or omit about his private life – and such person's freedom of private life has been restrained on the basis of the suspicion against such individual which has not been and may never be proven. Unfortunately since such privacy violations are being conducted within the umbrella of the ISA, it is unlikely that any challenge as to the legality or lawfulness of such acts in violation of right to privacy will ever be successful. If there is at all any chance to challenge the same, the legal action is to be brought to challenge the validity of the ISA itself and there is a chance of success if and only if the court had formed the opinion that the ISA is null and void for violating the rights duly safeguarded by the Federal Constitution. Then only the ISA could be quashed. Thus, unless and until either the ISA is quashed by the judiciary for infringing the rights duly recorded in the Federal Constitution or the legislation is abolished by the Parliament, there will be no hope for any claim of

privacy violation to succeed if the complained violation has been exerted in pursuant to the provisions of the ISA.

At this point, it is interesting to note that the Federal Constitution of Malaysia was born on 31 August 1957 – during the state of emergency. Taking that factor into consideration, it is unsurprising that, unlike the usual constitution of a nation that guarantees the fundamental liberties of the subject of such a nation, while recognising the existence of such rights the Federal Constitution of Malaysia explicates that the exercise of such freedoms are subject always to the restrictions or limitations duly imposed by the law.[185] In addition to the restrictions or limitations in each relevant article as mentioned in Chapter II 2.3.3, Article 149 that deals with the legislation against subversion, action prejudicial to public order and emergency powers further provides that the law that designed to stop or prevent against subversions, etc shall be valid notwithstanding that it is inconsistent with any of the provisions of Articles 5, 9, 10 or 13.[186] Curiously the whole Malaysia is still under the proclamation of state of emergency. There is not only one of such proclamation but there are at least two of nationwide scale and other two for the state of Sarawak and Kelantan respectively. That being the case, the provisions of article 149 can be invoked at any time resulting in the possible violation of such fundamental rights of individuals including the right to privacy which arguably is within the scope of the right duly safeguarded by Articles 5 and 13 of the Federal Constitution of Malaysia. The ground that justifies violation does exist and it will remain in existence until the proclamations of state of emergency are lifted and the provision of article 149 is duly amended.

The above demonstrates that the position in Malaysia in relation to the issue of privacy has similarities and differences with both the United Kingdom and the United States of America. Unlike the United Kingdom but similar to the United States, Malaysia has the Federal Constitution the relevant provisions of which may be invoked as the basis to protect the right to privacy although in both countries the right can be lawfully restricted when the restriction or limitation is being exercised in pursuance to the provisions of the ISA and the Patriot Act. However unlike the

United States of the America the Malaysian judiciary 'shared' the same hesitation as its English counterpart during the post *Kaye* era to express the view whether or not privacy has been made part and partial of the law of the land. Nonetheless the existence of the relevant provisions in the Federal Constitution do seed light of hope that one day either the Federal Government will enact the law to give express recognition to the right to privacy or the judiciary, invoking the relevant provisions of the Federal Constitution, will finally make the pronouncement that indeed the right to privacy has been all along safeguarded by virtue of those Federal Constitution provisions. That should make the position in Malaysia different from the position in England prior to the enforcement of the HRA 1998. However with the enforcement of the HRA 1998 that brings the convention rights to the United Kingdom, it is expected that England and Malaysia are heading towards similar destiny on the aspect of privacy – the possibility and viability of which is to be examined in the next chapter.

Endnotes – Chapter I:

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1 (1890) 4 Harvard Law Review 193

2 *Ibid,* at 213-214.

3 For example: Westin, A.F., *Privacy and Freedom* (London: The Bodley Head Ltd, 1970); DeCew, J.W., *In Pursuit of Privacy: Law, Ethic, and the Rise of Technology* (Cornell University Press: USA, 1997); Diffie, W. & Landau, S., *Privacy on the Line: The Politics of Wiretapping and Encryption* (The MIT Press: USA, 1998); Prosser, W., 'Privacy', (1960) 48 California Law Review 383 see also note 6 of Prosser's article for a longer list of articles that have agreed, expressly or tacitly, with Warren and Brandeis); Bloustein, E.J., 'Privacy as An Aspect of Human Dignity: An Answer to Dean Prosser', (1964) 39 New York University Law Review 962; Fried, C., 'Privacy', (1968) 77 Yale Law Journal 475; Rachels, J., 'Why Privacy is Important' (1975) Philosophy & Public Affairs 4(4) 323; Wade, D., 'Defamation and The Right of Privacy', (1962) 15 Vand. L. Rev. 1093; Wade, D., 'Developing Trends in the Tort Action for Invasion of the Right of Privacy', (1965) 16 VA. L. Weekly Dicta Comp. 7. See also: Tugendhat, M., Nicklin, M., and Busuttil, G., 'Publication of Personal Information' in Tugendhat, M., and Christie, I., *The Law of Privacy and the Media* (Oxford University Press, Oxford, 2004), at pp. 121-3.

4 For example: Prosser, W., 'Privacy', (1960) 48 California Law Review 383 - while advancing the idea that the legal principles recognize what are considered as aspects of privacy, Prosser's article can also be interpreted as the article that suggests privacy is not an independent value at all but rather a composite of interests in reputation, emotional tranquillity and intangible property – see Bloustein, E.J, 'Privacy as An Aspect of Human Dignity: An Answer to Dean Prosser' at p. 962. Also at pp. 965 - 966); Kalven, H., 'Privacy in Tort Law – Were Warren and Brandeis Wrong?', *Law and Contemporary Problems*, 326; Thomson, J.J., 'The Right to Privacy', (1975) 4(4) *Philosophy & Public Affairs* 295; Zimmerman, D.L., 'Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort', (1983) 68 *Cornell Law Review* 291; O'Brien, D., 'The Right of Privacy' (1902) 2 Columbia Law Review 437; Lisle, 'The Right of Privacy (A Contra View),' (1931) 19 KYLJ 137. For general discussion on the existing principles that may afford protection to privacy, see: Warby, M., Christie, I., and Wolanski, A., 'Context and Background' in Tugendhat, M., and Christie, I., *The Law of Privacy and the Media* (Oxford University Press, Oxford, 2004), at pp. 4-8; Browne, D., Coppola, A., Mansoori, A., and Jethani, S., 'Privacy Rights' in Tugendhat, M., and Christie, I., *The Law of Privacy and the Media* (Oxford University Press, Oxford, 2004), at pp. 73-116. For arguments brought against further development of the common law on the matter, see: Tugendhat, M., Nicklin, M., and Busuttil, G., 'Publication of Personal Information' in Tugendhat, M., and Christie, I., *The Law of Privacy and the Media* (Oxford University Press, Oxford, 2004), at pp. 123-124.

5 Article 4(1) of the Federal Constitution. See also *Loh Kooi Choon* v. *Government of Malaysia* [1977] 2 M.L.J. 187, *per* Raja Azlan Shah F.J., at p. 188. For general discussion on the supremacy

of the constitution, see: Suffian, M., *An Introduction to The Legal System of Malaysia,* 2nd ed. (Penerbit Fajar Bakti Sdn Bhd, Kuala Lumpur, 1989) in Chapter 4 at pp. 15 – 19. Article 4(1) of the Federal Constitution provides for the Federal Constitution Supremacy that displaces Parliamentary Sovereignty and therefore provides for judicial review. See: Articles 4, 128(1) and 130 of the Federal Constitution, *Public Prosecutor* v. *Datuk Harun bin Haji Idris & Ors* [1976] 2 M.L.J. 116 *per* Abdoolcader J. at 124. See also Ibrahim, A., 'Interpreting the Constitution: Some General Principles' in Trinidade, F.A., and Lee, H.P. (eds), *The Constitution of Malaysia: Further Perspectives and Developments*, 2nd ed. (Penerbit Fajar Bakti Sdn Bhd, Kuala Lumpur, 1988), at p. 20; Jain, M. P. 'Constitutional Remedies', in Trinidade, F.A., and Lee, H.P. (eds), *The Constitution of Malaysia: Further Perspectives and Developments*, 2nd ed., (Penerbit Fajar Bakti Sdn Bhd, Kuala Lumpur, 1988), at pp 160 - 162. The only exceptions to the supremacy rule are being provided in Article 4(2) and Article 150 of the Federal Constitution. In *Eng Keock Cheng* v. *Public Prosecutor* [1966] 1 MLJ 18, the Federal Court dismissed the appeal that was brought on the ground, among others, that the procedure set out in the Emergency (Criminal Trials) Regulation, 1964 was *ultra vires* and invalid as it infringed Article 8 of the Federal Constitution. To that Wylie CJ (Borneo) held that '... [t]he true effect of Article 150 is that, subject to certain exceptions set out therein, Parliament has, during an emergency, power to legislate on any subject and to any effect, even if inconsistencies with articles of the Constitution (including the provisions for fundamental liberties) are involved.'

[6] The supremacy of Parliament over the Crown in the United Kingdom was as the result of the English Bill of Rights 1689. Available online at: <http://www.webmesh.co.uk/englishbillofrights1689.htm> (last accessed on 30 April 2006).

[7] See: A. Sani, H.Y., *How Our Laws Are Made* (Dewan Bahasa Dan Pustaka, Kementrian Pelajaran Malaysia, Kuala Lumpur, 1974), at p. 2 and pp. 20 – 22. The late Tan Sri Professor Ahmad Ibrahim, one of very prominent scholars Malaysia ever has, neatly pointed out the different between the position in the United Kingdom and Malaysia in his article: 'Interpreting the Constitution: Some General Principle', in Trinidade, F.A., and Lee, H.P. (eds), *The Constitution of Malaysia: Further Perspectives and Developments*, see 37 – 39. There Lord Diplock's judgment in *Duport Steels Ltd.* v. *Sirs* [1980] 1 All E.R. 529 at p. 541 said: '...that the British Constitution, though largely unwritten, is firmly based on the separation of powers: Parliament makes the laws, the judiciary interpret them. ..... Under our Constitution it is Parliament's opinion on these matters that is paramount.' In the same case at p. 551 Lord Scarman expressed similar view to this effect: 'In the field of statute law the judge must be obedient to the will of Parliament as expresses in its enactments. In this field Parliament makes and unmakes the law, the judge's duty is to interpret and apply the law, ... If the result be unjust but inevitable the judge may say so and invite Parliament to reconsider its provision. But he must not deny the statute.' To that Professor Ahmad Ibrahim commented at p. 38 that: 'All this is no doubt good law in the context of England where Parliament is supreme but how can it be applied to Malaysia where the

Constitution is supreme?' Recently the concept of Parliament's Supremacy in the United Kingdom was reaffirmed in *R (on the application of Jackson and others)* v. *Attorney General* [2005] UKHL 56; see para 102 where Lord Steyn in his conclusion said among others: 'The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom. Nevertheless, the supremacy of Parliament is still the general principle of our constitution. It is a construct of the common law. The judges created this principle...' see also Lord Hope's view at para 105. For the supremacy of the UK Parliament in Scotland, see: *MacCormick* v. *Lord Advocate.* (1953) SC 396; however having been conferred its power by virtue of the Scotland Act, the Scottish Parliament is not supreme, see *inter alia*: *Whaley* v. *Lord Watson* (2000) SC 340 and *Whaley* v. *Lord Advocate* (2004) SC 78. See also: *James Sillars Christopher James Mclean Douglas Struan Robertson Stephen Butler* v. *Edwin George Smith* (1982) SCCR 367 where the High Court of Justiciary held a Scottish court does not have the competency to challenge the validity of an Act of Parliament which has gone through the whole Parliamentary process and received the Royal Assent.

[8] See generally: Suffian, M., *An Introduction to The Legal System of Malaysia,* where he discussed in Part II of his book the general basic features of the Federal Constitution. Tun Salleh Abas, who was the VI Lord President of Malaysia, highlighted some distinctive aspects of the Federal Constitution of Malaysia in his article 'Traditional Elements of the Malaysian Constitution', in Trinidade, F.A., and Lee, H.P. (eds), *The Constitution of Malaysia: Further Perspectives and Developments*, 2nd ed., (Penerbit Fajar Bakti Sdn Bhd, Kuala Lumpur, 1988), at 1 – 17. Another important feature of the Federal Constitution is the preservation of some special privileges for Malays for which the Parliament is empowered to pass law to prohibit the questioning of any matter, right, status, position, privilege, etc (Article 10 (4) of the Federal Constitution) nor can it be seemed as discriminatory treatment (Article 8(2)(5) of the Federal Constitution). See also Tan, K., Yeo, T.M., and Lee, K.S., *Constitutional Law in Malaysia and Singapore* (Malayan Law Journal Pte Ltd, Singapore, 1991) at 421. Rutter, M. F. in his book *The Applicable Law in Singapore and Malaysia* (Malayan Law Journal Pte Ltd, Singapore, 1989), at p. 413 identified that among the factors that loosened the 'British connection' in legal matters in Malaysia include: (a) the moves towards replacing the use of English with Bahasa Malaysia in the courts and in the legal documents, (b) the promotion of Islamic legal doctrine, and (c) the questioning of assumptions about the relevance of the common law.

[9] See Article 3 of the Federal Constitution of Malaysia. Hence the basic concept of legal system in Malaysia is that the Constitution as the supreme law with Islam as the religion of the Federation. Despite the idea that the observance of this principle shall not impose any disability on non-Muslim nationals professing and practising their own religions and shall not imply the Federation is not a secular one (see: Paragraph 169 of the Reid Report as quoted by Abdul Hamid L.P in *Teoh Eng Huat v. Kadhi, Pasir Mas & Anor* [1990] 2 MLJ 300 at pp. 301 – 302; and para 57 of the Federation of Malaya Constitutional Proposal 1957 (The White Paper) as quoted by Faiza

Tamby Chik J in *Lina Joy* v. *Majlis Agama Islam Wilayah & Anor* [2004] 2 MLJ 119 at para 14); the Federal Constitution does provide some safeguards such as that it authorises the state law and in respect of the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, federal law to control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam (Article 11(4) of the Federal Constitution. The Federal Constitution went on further by providing that the Government, whether Federal or State has the liberty, power and privilege to establish or maintain or assist in establishing or maintaining Islamic institutions or to provide, or assist in providing, in the religion of Islam and to incur necessary expenditure for these purposes. The Government is also authorised to spend money on the administration of Islamic religion and its law. Such provisions are clearly authorised by Article 12(2) of the Federal Constitution. Even the legal and constitution definition of Malay, upon whom the Federal Constitution reserves and confers some privileges, includes one of its fundamental constituent elements that such a person professes the religion of Islam (see Article 160 of the Federal Constitution). For general discussion on the status of Islam in the Federal Constitution of Malaysia, see: Ibrahim, A., 'Kedudukan Islam dalam Perlembagaan Malaysia', in Suffian, M., Lee, H.P & Trinidade, F.A., .*Perlembagaan Malaysia Perkembangannya: 1957 – 1977* (Penerbit Fajar Bakti Sdn Bhd, Malaysia, 1983), at pp 49 – 80. See also: Abas, S., 'Traditional Elements of the Malaysian Constitution, at pp. 5-8.

[10] See among others the provisions of the Federal Constitution Articles 11(4), 12(2), 153 and 89 when read together with article 160 (definition of Malay).

[11] See: Article 73 for the extent of federal and state laws, Article 74 for subject matter of federal and state laws. Article 75 provides that if any State law is inconsistent with a federal law, the federal law shall prevail and the State law shall, to the extent of the inconsistency, be void; *The City Council of George Town & Anor* v. *The Government of The State of Penang & Anor* [1967] 1 MLJ 169. That generally applies when the issue relates to any matters set out in the Concurrent List, i.e. the Third List set out in the Ninth Schedule of the Federal Constitution. However, if the Parliament seeks to legislate upon the matter set out in the State List, i.e., the Second List set out in the Ninth Schedule, that can only be done when any of the conditions set out in Article 76 (1) and subject always to the provisions of such Article 76 (2) or (3) and (4). Otherwise Article 128 (1) (a) of the Federal Constitution provides that the Federal Court has the power to invalidate such a law. See: *East Union (Malaya) Sdn Bhd* v. *Government of State of Johore & Government of Malaysia* [1980] 2 MLJ 143 where the applicant company applied for leave of a Judge of the Federal Court to ask for a declaration that section 100 of the National Land Code is void, as it is *ultra vires* Articles 76(4) of the Federal Constitution. In that case Suffian LP granted the leave as, for the reasons given in the judgment, his lordship did not think that it was fair to deny the company the opportunity of having the matter ventilated in the Federal Court.

[12] In *Yap Tham Thai* v. *Low Hup Neo* (1919) FMSLR 204 at p 428 Farrer O Mandy JC observed, of this period: 'Headmen were appointed to assist a European Magistrate in petty civil cases. By

what law these headmen and the European Magistrate were guided does not expressly appear but there is no reason to suppose that Malays, Chinese and Chulia Captains were appointed to administer any other law than that with which they might be presumed to be acquainted – that of their nation. Thus we see in early times law administered to suit the different races in this part of the world.' In the same case Earnshard JC at p 432 observed that: 'The Treaty of Federation, 1895, so far as administration either legal or otherwise is concerned, sets forth only that the Malay Rulers agree to follow the advise of a British Officer in all matters of administration other than those touching the Muhammadan religion. Under such advice legislative bodies under the name of State Councils have been established in each State and in 1905 a Federal Council with power to enact law for the four States as a federation known as the Federated Malay States was established by agreement.'

[13] That has also been reflected in the amendment to the Federal Constitution, particularly Article 121 (1A) that was added by Act A704, s. 8, in force from 10 June 1988. Article 121 (1A) provides that the high courts in Malaysia do not have jurisdiction whatsoever in respect of any matter within the jurisdiction of the Syariah courts. To that effect, in *Mohamed Habibullah Bin Mahmood* v. *Faridah Bte Dato Talib* [1992] 2 MLJ 793 Harun Hashim SCJ held at p 800 that: '[i]t is obvious that the intention of Parliament by art 121(1A) is to take away the jurisdiction of the High Courts in respect of any matter within the jurisdiction of the Syariah Court.' Similarly at p 809 Mohamed Azmi SCJ held that: 'With effect from 10 June 1988, the new exclusion cl (1A) was introduced by the Constitution (Amendment) Act 1988 which expressly excludes the jurisdiction of the High Court in Malaya and the High Court in Borneo in respect of any matter within the jurisdiction of the Syariah Court.' Gunn Chit Tuan SCJ at p 824 held that 'and it is clear from the provisions of art 121(1A) of the Constitution that Parliament had declared and intended that as from 10 June 1988, the civil courts should have no jurisdiction in respect of any matter within the jurisdiction of the Syariah Courts.'

[14] Among others: the Privacy Protection Act, 1980; the Privacy Act 1994; the Video Privacy Protection Act, 1984; the Electronic Communications Privacy Act, 1986; and some other legislation that protect some aspects of privacy right of individuals.

[15] *Griswold* v. *Connecticut* 381 U.S. 479 (1965) and *Roe* v. *Wade* 410 U.S. 113 (1973).

[16] Ferrera, Lichenstein, Reder, August & Schiano, *Cyberlaw: Text and Cases* (West Thomson Learning, USA, 2000); Girasa, *Cyberlaw: National and International Perspectives* (Prentice Hall, New Jersey, 2002), argued that the roots of the right to privacy can be found in the First, Fourth, Fifth and Fourteenth Amendments.

[17] *Khan* v. *Regina* [1997] AC 558.

[18] Hereinafter referred to as the ECHR.

[19] See for example: *Malone* v. *Metropolitan Police Commissioner* [1979] Ch 344 where Sir Robert Megarry V-C noted that the courts in England are not bound by the ECHR in the absence of local legislation to that effect.

[20] See: *Kaye* v. *Robertson* [1991] FSR 62; per Lord Hoffman in *R* v. *Brown* [1996] 1 AC 543; per Lord Woolf CJ, Mummery and Buxton LJJ in *Home Office* v. *Wainwright and Another* [2001] EWCA Civ 2091. In some of those instances *Malone* v. *Metropolitan Police Commissioner* [1979] Ch 344 has been cited as the precedent to support the proposition to that effect. However the pronouncement by the then Sir Robert Megarry V-C in *Malone*, given the surrounding circumstances of the case, could not have been meant to be of general application. His lordship had rejected the invitation to hold that there is a right to telephonic privacy and that such a right has been infringed by defendant by tapping the plaintiff's telephone line without his consent even if done pursuant to a warrant of the Home Secretary. His lordship pronouncement thus should not have been interpreted to be that of a general application as the analysis within *Malone* was limited within the context of the right to telephonic privacy: *Malone*, at pp. 374G - 375C. As a matter of fact, in the last paragraph of his judgment in *Malone*, Sir Robert Megarry V-C cautioned at pp. 383 – 384 that: 'In the result, the plaintiff's claim fails in its entirety, and will be dismissed. In saying that I think *I should add a word to avoid possible misunderstandings as to the ambit of what I am deciding. Though of necessity I have discussed much, my actual decision is closely limited. It is confined to the tapping of the telephone lines of a particular person which is effected by the Post Office on Post Office premises in pursuance of a warrant of the Home Secretary in a case in which the police have just cause or excuse for requesting the tapping, in that it will assist them in performing their functions in relation to crime, whether in prevention, detection, discovering the criminals or otherwise, and in which the material obtained is used only by the police, and only for those purposes*. In particular, I decide nothing on tapping effected for other purposes, or by other persons, or by other means; nothing on tapping when the information is supplied to persons other than the police; and nothing on tapping when the police use the material for purposes other than those I have mentioned. The principles involved in my decision may or may not be of some assistance in such other cases, whether by analogy or otherwise: but my actual decision is limited in the way that I have just stated.' (emphasis added).

[21] Hereinafter referred to as the HRA 1998.

[22] *per* Harrison J in *R* v. *Brentwood Borough Council, ex parte Peck* [1998] EMLR 697; *A* v. *B PLC and Another* [2001] EWCA civ 337.

[23] [1983] 1 AC 280.

[24] [1989] STC 520.

[25] [2002] 3 All ER 1.

[26] [1980] 2 All ER 753.

[27] [1987] 2 MLJ 459.

[28] This aspect is further discussed and analysed in Chapter II, 2.3.1 of this thesis.

[29] [1949] 1 MLJ 51.

[30] This matter is further discussed and analysed in Chapter II, 2.3.2 of this thesis.

[31] This reasoning was adopted in *Ultra Dimension Sdn Bhd* v. *Kook Wei Kuan* [2004] 5 CLJ 285 and it is submitted, for the reasons to be elaborated throughout Chapter II 2.3, that the case has been decided *per incurium*.

[32] In *Jamil bin Harun* v. *Yang Kamsiah & Anor* [1984] 1 MLJ 217 the Privy Council held that it is for the courts in Malaysia to decide, subject always to the statutory law of the Federation, whether to follow English law. For general discussion on the extent to which Malaysian courts are influenced by decisions of local courts and courts in other countries, see: Rutter, M.F., *The Applicable Law in Singapore and Malaysia: A Guide to Reception, Precedent and The Sources of Law in the Republic of Singapore and The Federation of Malaysia* (Malayan Law Journal Pte Ltd, Singapore, 1989), at pp. 474 – 547.

[33] See the analysis of Article 5 and Article 13 of the Federal Constitution in Chapter II, 2.3.1-3.

[34] Article 8 (1) of the ECHR (available at http://www.hri.org/docs/ECHR50.html).

[35] [2003] EMLR 31 at p. 641.

[36] [1969] RPC 41.

[37] *Douglas* v. *Hello! Ltd (No.5)* [2003] EMLR 31 at para 9.

[38] *A* v. *B PLC.* it was criticized by an able academic, see: Phillipson, G., 'Judicial Reasoning in Breach of Confidence Cases Under the Human Rights Act: Not Taking Privacy Seriously' [2003] *EHRLR* 54-72. See also: Phillipson, G., 'Transforming Breach of Confidence? Towards a Common Law Right of Privacy under the Human Rights Act', [2003] 66(5) MLR 726-758; Phillipson, G. and Fenwick, H., 'Breach of Confidence as a Privacy Remedy in the Human Rights Act Era'[2000] 63(5) MLR 660-693.

[39] Cate, F. H., Privacy *in the Information Age* (The Brooking Institution: Washington, 1997)

[40] Wacks, R., 'The Poverty of 'Privacy'', (1980) 73 *Law Quarterly Review* 75.

[41] It is expected that the Islamic analysis of privacy and reference to the Islamic sources will be discussed in length in a book entitled *Rights to Personal Security, Privacy and Ownership in Islam* is currently being finalised by Professor Mohammad Hashim Kamali of International Islamic University Malaysia and expected to be published by the end of 2006.

[42] Interestingly Westin, A.F., relates the human's desire to privacy to man's animal origins. On that point, he made reference mainly to Hall, E.T., *The Hidden Dimension* (Anchor Books, New York: 1966) and Ardrey, R., *The Territorial Imperative* (Atheneum, New York: 1966) to support his theory. Nevertheless he noted that the 'contemporary norms of privacy are "modern" and "advanced values largely absent from primitive societies of the past and present' and despite acknowledging the long list of societies, primitive and modern that neither have nor would admire the norms of privacy, needs for individual and group privacy and resulting social norms are present in virtually every society. See: Westin, A.F., *Privacy & Freedom* (The Bodley Head Ltd, London, 1970), at pp. 8-18. See also Thomas, T., *Privacy & Social Services* (Arena Ashgate Publishing Limited, Aldershot, 1995), at pp. 1-6.

[43] The search is limited to these versions of the Bible: the King James Version, the American Standard Version, the New International Version, the Revised Standard Version, the Young's Literal Translation and the New American Standard Bible.

[44] Konvitz, M.R., 'Privacy and the Law: A Philosophical Prelude,' (1966) 31 *Law and Contemporary Problems*, 272 as cited by DeCew, J.W., *In Pursuit of Privacy: Law, Ethics, and the Rise of Technology* (Cornell University Press, Ithaca, 1997), at p. 11. Revelation about the same incident, but with different narration, can be found in Al Qur'an 2: 35-38 to the effect that: 'And We said: O Adam! Dwell you and your wife in the garden and eat from it a plenteous (food) wherever you wish and do not approach this tree, for then you will be of the unjust. But the Shaitan made them both fall from it, and caused them to depart from that (state) in which they were; and We said: Get forth, some of you being the enemies of others, and there is for you in the earth an abode and a provision for a time. Then Adam received (some) words from his Lord, so He turned to him mercifully; surely He is Oft-returning (to mercy), the Merciful. We said: Go forth from this (state) all; so surely there will come to you a guidance from Me, then whoever follows My guidance, no fear shall come upon them, nor shall they grieve.' And Al Qur'an's version about the Noah's incident did not make any reference about Noah's drunkenness and Muslims believe that Noah never did. Al Qur'an 11: 44-49 states that: 'And it was said: O earth, swallow down your water, and O cloud, clear away; and the water was made to abate and the affair was decided, and the ark rested on the Judi, and it was said: Away with the unjust people. And Nuh cried out to his Lord and said: My Lord! surely my son is of my family, and Thy promise is surely true, and Thou art the most just of the judges. He said: O Nuh! surely he is not of your family; surely he is (the doer of) other than good deeds, therefore ask not of Me that of which you have no knowledge; surely I admonish you lest you may be of the ignorant. He said: My Lord! I seek refuge in Thee from asking Thee that of which I have no knowledge; and if Thou shouldst not forgive me and have mercy on me, I should be of the losers. It was said: O Nuh! descend with peace from Us and blessings on you and on the people from among those who are with you, and there shall be nations whom We will afford provisions, then a painful punishment from Us shall afflict them. These are announcements relating to the unseen which We reveal to you, you did not know them- - (neither) you nor your people– before this; therefore be patient; surely the end is for those who guard (against evil).'

[45] For examples: Al Qur'an: 24.030 recommended the believing men should lower their gaze and guard their modesty and similarly in 024.031 it suggested that the believing women should lower their gaze and guard their modesty; that they should not display their beauty and ornaments except what (must ordinarily) appear thereof; that they should draw their veils over their bosoms and not display their beauty except to their husbands, their fathers, their husband's fathers, their sons, their husbands' sons, their brothers or their brothers' sons, or their sisters' sons, or their women, or the slaves whom their right hands possess, or male servants free of physical needs, or small children who have no sense of the shame of sex; and that they should not strike their feet in

order to draw attention to their hidden ornaments. For another provision to similar effect, see: Al Qur'an: 033.059. Some other instances may be found in the Hadith of the Messenger of Allah, among others: It is reported that the Messenger of Allah (P.B.U.H) recommended that one should draw around a curtain while taking a bath and he himself had observed that too, as reported in Sahih Muslim Book 3, Chapter 15:663-6 (during that period public bath or taking a bath in public was a common practise), however, the Messenger of Allah said that it is permissible to take a bath naked in complete privacy (Sahih Muslim, Book 3, Chapter 17:669); it is also required that individuals are to take utmost care for keeping private-parts of the body concealed (Sahih Muslim, Book 3, Chapter 18:670-2), and even when one is answering the call of nature, he should conceal his private parts (Sahih Muslim, Book 3, Chapter 19:673) except of course if he is in complete privacy.

[46] Among the instances, it has been reported that the Messenger of Allah has said: 'Beware of suspicion, for it is the worst of false tales and don't look for the other's faults and don't spy and don't hate each other, and don't desert (cut your relations with) one another' (see: Sahih Bukhari, Volume 8, Book 73, Number 92. See also Book 80, Number 717 and Book). It is also narrated in Sahih Muslim Book 032, Number 6214 that Allah's Messenger (may peace be upon him) said: 'Avoid suspicion, for suspicion is the gravest lie in talk and do not be inquisitive about one another and do not spy upon one another and do not feel envy with the other, and nurse no malice, and nurse no aversion and hostility against one another. And be fellow-brothers and servants of Allah.' Islam also forbids individuals to see the private parts of someone else (Sahih Muslim, Book 3, Chapter 16:667-8).

[47] 'O ye who believe! enter not houses other than your own, until ye have asked permission and saluted those in them: that is best for you, in order that ye may heed (what is seemly)' (Al Qur'an, 24:27). It is narrated by Ibn Jarir from Ibn Tsabit that the verse was revealed as a woman seek the advise from the Prophet PBUH about what she had to do when she was in her house in the condition that she did not want any one to see her but a member of her family used to come to the house while she was in such condition. Thus the verse that orders a person to ask for permission before entering other's premises.

[48] 'O ye who believe! Enter not the Prophet's houses,- until leave is given you,- for a meal, (and then) not (so early as) to wait for its preparation: but when ye are invited, enter; and when ye have taken your meal, disperse, without seeking familiar talk...' (Al Qur'an, 33:53).

[49] 'But when the children among you come of age, let them (also) ask for permission, as do those senior to them (in age): Thus does Allah make clear His Signs to you: for Allah is full of knowledge and wisdom.' (Al Qur'an, 24:59).

[50] 'O ye who believe! Let your slaves, and those of you who have not come to puberty, ask leave of you at three times (before they come into your presence): Before the prayer of dawn, and when ye lay aside your raiment for the heat of noon, and after the prayer of night. Three times of privacy for you. It is no sin for them or for you at other times, when some of you go round attendant upon

others (if they come into your presence without leave). Thus Allah maketh clear the revelations for you. Allah is Knower, Wise.' (Al Qur'an, 24:58).

[51] *Supra* note 46.

[52] 'O ye who believe! Let not some men among you laugh at others: It may be that the (latter) are better than the (former): Nor let some women laugh at others: It may be that the (latter are better than the (former): Nor defame nor be sarcastic to each other, nor call each other by (offensive) nicknames: Ill-seeming is a name connoting wickedness, (to be used of one) after he has believed: And those who do not desist are (indeed) doing wrong' (Al Qur'an, 49:11).

[53] 'O you who believe! avoid most of suspicion, for surely suspicion in some cases is a sin, and do not spy nor let some of you backbite others. Does one of you like to eat the flesh of his dead brother? But you abhor it; and be careful of (your duty to) Allah, surely Allah is Oft-returning (to mercy), Merciful.' (Al Qur'an 49:12).

[54] *Ibid.* See also Al Qur'an, 104:1 which reads: 'Woe to every (kind of) scandal-monger and-backbiter.'

[55] *Supra* note 53.

[56] For discussion on the meaning of 'truth' as defence in defamation case, see: *Grobbelaar* v. *News Group Newspapers Ltd and another* [2002] UKHL 40.

[57] See: <http://www.religioustolerance.org/worldrel.htm> (last visited: 23 April 2004); or <http://www.adherents .com/Religions_By_Adherents.html> (last visited: 23 April 2004).

[58] In PHR2004 – Overview of Privacy prepared by the Privacy International it has been further suggested that the Jewish law recognises the concept of being free from being watched, while classical Greece and ancient China accorded privacy protection. Reference was made to the Rosen, J., *The Unwanted Gaze: The Destruction of Privacy in America* (Random House Inc., New York, 2000). The report is available at: <http://www.privacyinternational.org/article.shtml?cmd[347]=x-347-82589&als [theme]=Privacy%20and%20Human%20Rights#_ftnref15>.

[59] Lester, A., *Democracy and Individual Rights*, Fabian Tract No. 390. For further discussion on this and relevant chronological events see Zander, M., *A Bill of Rights*?, 4th ed., (Sweet & Maxwell, London, 1997), at 1 – 39.

[60] Hansard, H.L. vol. 302, col. 1026 (June 18, 1969).

[61] See for example, the House of Lords contradicting opinions in *Wainwright* and *Campbell.*

[62] [1949] 1 MLJ 51. This case is further discussed in Chapter II – 2.3.2.

[63] Available online at <http://www.un.org/Overview/rights.html> (last visited 20 February 2004). For historical background discussion, see Möller, J., 'The Universal Declaration of Human Rights: How the Process Started' in Eide and others, eds., *The Universal Declaration of Human Rights: A Commentary* (Scandinavian University Press, Oslo, 1992), at p. 1-3. See also Eide, A and Alfredsson, G., 'Introduction' in Eide and others, eds., *The Universal Declaration of Human Rights: A Commentary* (Scandinavian University Press, Oslo, 1992), at pp. 5-16 for the analysis

of the significance, impact, roots and contemporary appraisal of the Universal Declaration of Human Rights.

[64] *Hereinafter* referred to as the ICCPR. Available online at <http://www.unhchr.ch/html/menu3/b/a_ccpr.htm> (last visited 20 February 2004).

[65] For background of the International Bill of Human Rights see <http://www.unhchr.ch/html/menu6/2/ fs2.htm> (last visited 22 February 2004).

[66] Lord Lester, 'History and Context,' in Lord Lester and Pannick, D, eds., *Human Rights Law and Practice,* (Butterworths, London, 1999), at p. 3.

[67] Available online at <http://www.unhchr.ch/html/menu3/b/a_cescr.htm> (last visited 20 February 2004).

[68] Originally Article 13 of the Commission on Human Rights' draft universal declaration, UN doc. A/777, and subsequently Article 10 of the working document of the UN General Assembly Third Committee (as contained in UN doc. E/800). See: Rehof, L.A., 'Article 12' in Eide and others, eds., *The Universal Declaration of Human Rights: A Commentary* (Scandinavian University Press, Oslo, 1992), at p. 187.

[69] For commentary on Article 12 of the Universal Declaration on Human Rights, see: Rehof, L.A., 'Article 12' in Eide and others, eds., *The Universal Declaration of Human Rights: A Commentary* (Scandinavian University Press, Oslo, 1992), at pp. 187-201.

[70] *per* Lord Lester, 'International Human Rights Codes and United Kingdom Law', in *Human Rights Law and Practice* at p. 315. Lord Bingham, who was then the Lord Chief Justice identified several situations where international human rights treaties may be relevant to statutory interpretation and the development of common law in the following ways: 1. where a United Kingdom statute is ambiguous, that is, reasonably capable of two interpretations, only one which is consistent with the appropriate international treaty, the courts will presume that Parliament intended to legislate in conformity with the international treaty; 2. where the common law is uncertain, unclear or incomplete, the courts will declare it, wherever possible, in a manner which conforms with the United Kingdom's international obligations; 3. when the courts are called upon to construe a statute enacted to fulfil an international obligation, the courts will assume that the statute was intended to be effective to that end; 4. where the courts are exercising a discretion, they will seek to exercise it in a way which does not violate our treaty obligations; 5. when the courts are called upon to decide what, in a particular situation, are the demands of public policy, it is legitimate to have regard to our international obligations. See: 574 HL Official Report (5th series) col 1454 (3 July 1996). See also: Hunt, M., *Using International Human Rights Law in English Court* (Hart Publishing, Oxford, 1997), at pp. 207-215; Singh, R., *The Future of Human Rights in the United Kingdom* (Hart Publishing, Oxford, 1997), at pp. 5-16. It may be argued that the inclusion of such a right in the international instrument implies that such a principle is part of the Law of Nations and therefore it is applicable in England on the basis that the Law of Nations – the *jus gentium* – is adopted in full extent as part of the law of England, see: Blackstone in the

fifth chapter of the fourth book of his *Commentaries on the Laws of England* at para 3 that: 'the law of nations (wherever any question arises which is properly the object of it's jurisdiction) is here adopted in it's full extent by the common law, and is held to be a part of the law of the land. And those acts parliament, which have from time to time been made to enforce this universal law, or to facilitate the execution of it's decisions, are not to be considered as introductive of any new rule, but merely as declaratory of the old fundamental constitutions of the kingdom; without which it must cease to be a part of the civilized world.' available at <http://www.yale.edu/lawweb/avalon/blackstone/bk4ch5.htm> (last visited on 4 February 2006). See also: *Buvot* v. *Barbuit* (1737) Cas. T. Talb. 281; *Triquet* v. *Bath (* 1764) 3 Burr. 1478; *Lockwood* v. *Coysgarne* (1765) 3 Burr 1676; *Heathfield* v. *Chilton* 1967 4 Burr. 2015; *Viveash* v. *Becker* (1814) 3 M&S 284; *The Emperor of Austria* v. *Day and Kossuth* (1861) 2 Giff. 628; *West Rand Central Gold Mining Co.* v. *The King* [1905] 2 KB 391; *Re Suarez* [1918]1 Ch. 176; *Engelke* v. *Musmann* [1928] AC 433. However the principle that allows for such an acceptance has been restricted. In *Alcom Ltd* v. *Republic of Colombia (Barclays Bank plc and another, garnishees)* [1984] 1 AC 580 Lord Diplock, with whom all House of Lords panel expressed their agreement, noted that 'the eighteenth century to the acceptance of the law of nations as part of the common law of England, the English courts during the twentieth century were slow to recognise and give effect to the change that had been taking place in public international law over the last 50 years.' The more restrictive principle views the matter is nearly summarized in the words of Lord Atkin in *Chung Chi Cheung* v. *The King* [1939] AC 160, at p. 167: 'It must be always remembered that, so far, at any rate, as the courts of this country are concerned, international law has no validity save in so far as its principles are accepted and adopted by our own domestic law.' Even if it was so found, the issue will squarely fall within the first exception which Lauterpacht stated as '... the rule of British constitutional law according to which treaties finally concluded by Great Britain, although fully valid in the international sphere as part of international law, do not form part of the law of the land until they have been expressly incorporated into municipal law.' Lauterpacht, H., 'Is International Law Part of The Law of England', in Lauterpacht, E. (ed.), International Law Being the Collected Papers of Hersch Lauterpacht, vol. 2, The Law of Peace, (Cambridge University Press, Cambridge, 1975), at p. 556.

[71] That view is affirmed by Abdoolcader J in *Merdeka University Bhd* v. *Government of Malaysia* [1981] 2 MLJ 356.

[72] See Lauterpacht, H., 'Towards an International Bill of Rights', in Lauterpacht, E., (ed.), *International Law: Being the Collected Papers of Hersch Lauterpacht* Vol. 3, Part II-VI, (Cambridge University Press, Cambridge, 1977), Chapter 3, at p. 411 and also Chapter 4, at p. 418, the last paragraph. See however the more constructive opinion of Lauterpacht in the same matter, 'State Sovereignty and Human Rights', Chapter 4, at pp. 417-21.

[73] For further discussion on the matter, see: Lauterpacht, H., 'Towards an International Bill of Rights', in Lauterpacht, E., (ed.), *International Law: Being the Collected Papers of Hersch Lauterpacht,* at pp. 410-15.

[74] As stated by the Malaysian Ministry of Foreign Affairs that 'the Universal Declaration of Human Rights shall be given regard to the extent that it is consistent with the Federal Constitution' (available at http://www.kln.gov.my/english/foreignaffairs/foreignpolicy/humanrights.htm). See also: *Merdeka University Bhd.* v. *Government of Malaysia* [1981] 2 MLJ 356 where Abdoolcader J. said at p. 366: 'The Universal Declaration of Human Rights was proclaimed and adopted on December 10, 1948 by the General Assembly of the United Nations. It is not a legally binding instrument as such and some of its provisions depart from existing and generally accepted rules. It is merely a statement of principles devoid of any obligatory character and is not part of our municipal law.'

[75] The United Kingdom ratified the ICCPR on 20 May 1976, and on 20 August 1976 the ICCPRT came into force. See: <http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1044360377428#ICESCR> and also <http://www.unhchr.ch/pdf/report.pdf> (last accessed on 3 March 2006).

[76] In 1765 Blackstone expressed in the fifth chapter of the fourth book of his *Commentaries on the Laws of England* that 'The Law of Nations ... is here adopted to its full extent by the common law, and is held to be a part of the land.' However, there are exceptions to that. Among the exception is that the conclusion of treaties by the Great Britain, although fully valid in the international sphere as part of international law, 'do not form part of the law of the land until they have been expressly incorporated into municipal law. In particular, treaties affecting private rights will not be enforced by the courts unless they have received the assent of the Legislature through an enabling Act of Parliament.' Lauterpacht, H., 'Is International Law Part of the Law of England', in Lauterpacht, E., ed., *International Law*, Vol 2, Part I, (Cambridge University Press, Cambridge, 1975), 538, 556. The legal pronouncement to that effect was made in the following cases: *The Parlement Belge* (1879) 4 P.D. 129, 154 (1880) 5 P.D. 197; *Walker* v. *Baird* [1892] A.C. 491; *J.H. Rayner (Mincing Lane) Ltd* v. *DTI, Maclaine Watson* v. *DTI, Re International Tin Council* [1990] 2 AC 418, 476, 499-500 (Lord Templeman and Lord Oliver); [1989] Ch 72, 163-64, 207, 239 (Kerr, Nourse and Ralph Gibson L.JJ.).

[77] Article 2(3) of the ICCPR. Max Sorensen reported and solemnly affirmed that 'it is established that a State has an obligation to make its municipal law conform to its undertakings under treaties to which it is a party.' Sorensen, M., 'Obligation of A State Party to A Treaty a regards its Municipal Law' in Robertson, A.H., ed., *Human Rights in National and International Law*, (Manchester University Press, Manchester, 1968), at p. 12. However at pp. 13-4 he noted that there are different methods of incorporating international treaties into national legal system and the Great Britain adopted a method that reflects a clear separation between international conventional law and municipal law.

[78] See *supra* note 76. However David Kinley argued that indirect legal obligations arise in situation where the state is held to be vicariously liable for the acts of private bodies within its jurisdiction such as that provided in article 2(1) of the ICCPR. Such indirect legal obligations on the part of the state ensue liability on the part of the state for infringing actions of both nature, one that directly attributed to the state and also the actions of others over whom the state has or may have jurisdiction. See Kinley, D., 'Human Rights as Legally Binding or Merely Relevant?', in Bottomley, S. and Kinley, D., (eds.), *Commercial Law and Human Rights* (Aldershot: Dartmouth Publishing Company, 2002), at p. 38-40. Although David Kinley used the term 'legal obligation' in his assertion, there is nothing to suggest that there is anything other than the international instruments themselves that shall place the state generally or the judiciary in particular under such an obligation. That being the case, it is more appropriate to construe such obligations as moral obligations rather than the legal ones as a non-statutory instrument cannot have binding effects unless it is willingly accepted to be so or being conferred with such binding effects by any statutory means. Thus, relying on the wordings of Article 1 read together with Article 25 that does not allow applications be brought against a private person and further Article 24 that supposed only inter-state applications, it is argued that because the Convention is a treaty that imposes obligations only upon states, it can have no application in relation to liability of private individuals or the horizontal applications of law, see: Harris, D.J., O'Boyle, M. and Warbrick, C., *The Law of The European Convention on Human Rights*, at p. 21.

[79] For Council of Europe in brief, see <http://www.coe.int/T/e/Com/about_coe/> (last visited 21 February 2004).

[80] Lester and Pannick, *Human Rights Law and Practice*, at p. 4.

[81] *Ibid*, at pp. 4-5.

[82] *Ibid*, at pp. 5-6.

[83] For further details on the historical background of the ECHR, its significance prior to its statutory incorporation and the campaign for incorporation, see Lord Lester, 'History and Context' in *Human Rights Law and Practice* pp. 4-13; Harris, D.J., Boyle, M., and Warbrick, C., *Law of The European Convention on Human Rights,* (Butterworths, London, 1995), at pp 1-3. The Convention protects most civil and political rights, but not all. See: Harris, D.J., Boyle, M., and Warbrick, C., *Law of The European Convention on Human Rights,* (Butterworths, London, 1995), pp. 3-5. For more elaborate history of ECHR and its effects in the United Kingdom, see: Lord Lester, 'History and Context' in *Human Rights Law and Practice*, at pp. 4-13.

[84] Article 8(1) ECHR.

[85] See *supra* note 76 and the text accompanying it.

[86] Lord Reed and Murdoch, J., *A Guide to Human Rights Law in Scotland* (Butterworths, Edinburgh, 2001), at p. 103; Mitchell, J.D.B., in *Constitutional Law*, 2nd ed (W. Green & Son Ltd, Edinburgh, 1968) at pp. 323-4 however viewed that by recognizing the right of individuals to petition to

European Commission of Human Rights provides for the existence of general declaration in relation to individual fundamental liberties.

[87] See: *R* v. *Chief Immigration Officer, Heathrow Airport, ex parte Salamat Bibi* [1976] 1 WLR 979, 984-985; *Rantzen* v. *Mirror Group Newspapers* [1994] QB 670, 690; *J H Rayner (Mincing Lane) Ltd* v. *Department of Trade and Industry* [1990] 2 AC 418 per Lord Oliver of Aylmerton at 500C. See also Grosz, S., Beatson, J., and Duffy, P., *Human Rights: The 1998 Act and The European Convention* (Sweet & Maxwell, London, 2000), at p. 1.

[88] Lord Lester, 'History and Context', in Lord Lester of Herne Hill and David Pannick, (eds), *Human Rights Law and Practice* (Butterworths, London, 1999, reprinted 2000), at p. 10.

[89] (1979) 2 EHRR 330.

[90] For discussion on the effect of HRA 1998 see: Grosz, S., *Human Rights: The 1998 Act and The European Convention*, at pp. 7-10, 28-58. For further analysis of sources of privacy including those of other countries, see Tugendhat, M., and Coppola, A., 'Principles and Sources' in Tugendhat, M., and Christie, I., *The Law of Privacy and the Media* (Oxford University Press, Oxford, 2004), at pp. 45-72.

[91] The role of the culture, local value, etc, on privacy was recognised in *Regina (S)* v. *Chief Constable of the South Yorkshire Police* [2002] 1 WLR 3223. In that case despite the disunity in the conclusion, Lord Woolf CJ whose view constituted the majority opinion stated at para 32, at p. 3233 that 'the extent to which the retention of material of this nature is regarded as interfering with the personal integrity of the individuals ... depends very much on the cultural traditions of a particular state'. To the same effect, at para 68, at p. 3243 Sedley LJ in his dissenting judgment nevertheless held that: 'I respectfully agree with Lord Woolf CJ... that while the retention of personal material and data is much less invasive than the taking of them, it nevertheless represents a further and continuing invasion of the right recognised by article 8(1) to respect for one's private life. In reaching this view we are fully entitled to take into account the strong cultural unease in the United Kingdom about the official collection and retention of information about individuals.' Such difference As the diversity of culture, customs and moral values among societies are influenced by several factors including the inequality of opportunities exist in any society, such a factor will also influence the society's understanding and expectation of privacy. For a discussion on the idea of natural inequality, see Béteille, A., *The Idea of Natural Inequality and other Essays*, 2nd ed. (Oxford University Press, New Delhi, 1987, paperbacks 2003), at pp. 1-34.

[92] See for example: *Hosking & Hosking* v. *Simon Runting & Anor* [2004] NZCA 34 where Tipping J at para 260 explicates that there is no reasonable expectation of privacy about photographs taken in a public place. See also the observation of Gault P and Blanchard J at para 168.

[93] See for example: *Les Editions Vice-Versa Inc* v. *Aubry and Canadian Broadcasting Corporation* (1998) 157 DLR (4th) 577, where the majority of judges in the Supreme Court of Canada upheld the decision to award damages for breach of section 5 of the Quebec Charter of Human Rights

and Freedoms which guarantees every person "a right to respect for his private life" by publishing a picture of the respondent which was taken without her knowledge as she sat on a Montreal street.

[94] See for example: *Manola* v. *Stevens* (1890) NY Sup. Ct., in N.Y. Times, June 15, 18, 21, 1890 where it was held that publication of the picture of the actress that was snapped by the defendant from a box as she appeared upon the stage in tights amounted to privacy intrusion. The case is discussed in Chapter III, 3.3.1 (iii) at p. 209.

[95] See for example: *Von Hannover* v. *Germany* (2004) 40 EHRR 1 where the ECtHR held that publication of Princess Caroline of Monaco's photographs taken in public places interferes with her privacy. In *Peck* v. *The United Kingdom* (2003) (Application no. 44647/98) at para 62 the ECtHR found that Article 8 right existed although the applicant was in a public street because he was not there for the purposes of participating in any public event and he was not a public figure. Thus it was held that the disclosure of the relevant CCTV footage constituted a serious interference with the applicant's right to respect for his private life.

[96] See for examples: *Roe* v. *Wade* (1973) 410 US 113 and *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992) 505 US 833.

[97] See the proposed 'result test' for the first touchstone of privacy as discussed in Chapter III, 3.3.1 (i).

[98] Wall J in *Evans* v. *Amicus Healthcare Ltd and others* [2003] EWHC 2161 (Fam) affirmed the view that an embryo was not a person with protected rights. The view was affirmed by the English Court of Appeal as it held in *Evans* v. *Amicus Healthcare Ltd*, [2004] EWCA Civ 727 that under the English law a foetus prior to the moment of birth had no independent rights or interests. Malaysian followed the common law principle in that regard; see: Rashid, S.K., 'Legal Protection of The Unborn Child: A Comparative Perspective' [1996] 4 CLJ xvi.

[99] The Abortion Act 1967 provides for exemption from the Offences Against The Person Act 1861 and the Infant Life (Preservation) Act 1929 provided the abortion is being carried in pursuance to the conditions set out in the Abortion Act 1967. For an examination of abortion law in the United Kingdom, see Norrie, K.M., 'Abortion in Great Britain: One Act, Two Laws' [1985] Crim. L.R. 475 and Norrie, K.M., 'British Abortion Rules Altered: or Are They?' [1992] SLT 41.

[100] Section 312 of the Penal Code read: 'Whoever voluntarily causes a woman with child to miscarry shall be punished with imprisonment for a term which may extend to three years, or with fine, or with both; and if the woman be quick with child, shall be punished with imprisonment for a term which may extended to seven years, and shall also be liable to fine' and its explanation reads: 'A woman who causes herself to miscarry is within the meaning of this section.'

[101] Islamic law guarantees, upon the foetus, some rights including the right to inheritance, the right to lineage, the right to receive gift or benefit from will, etc. Even if the foetus is being harmed, the wrong-doer has to pay compensation and if it causes the death of the foetus, the person is liable for such death as it is so narrated in Sahih Bukhari, Volume 9, Book 83, Number 45: as Abu

Huraira narrated that two women from Hudhail fought with each other and one of them hit the other with a stone that killed her and what was in her womb. The relatives of the killer and the relatives of the victim submitted their case to the Prophet who judged that the Diya for the fetus was a male or female slave, and the Diya for the killed woman was to be paid by the 'Asaba (near relatives) of the killer. The same incident narrated in Sahih Muslim, Book 016, Number 4168:'Abu Huraira reported that two women of the tribe of Hudhail fought with each other and one of them flung a stone at the other, killing her and what was in her womb. The case was brought to Allah's Messenger (may peace be upon him) and he gave judgment that the diyat (indemnity) of her unborn child is a male or a female slave of the best quality, and he also decided that the diyat of the woman is to be paid by her relative on the father's side, and he (the Holy Prophet) made her sons and those who were with them her heirs. Hamal b. al-Nabigha al-Hudhali said: Messenger of Allah, why should I play blood-wit for one who neither drank, nor ate, nor spoke, nor made any noise; it is like a nonentity (it is, therefore, not justifiable to demand blood-wit for it). Thereupon Allah's Messenger (may peace be upon him) said: He seems to be one of the brothers of soothsavers on account of the rhymed speech which he has composed.' In Sahih Muslim, Book 016, Number 4171: Al-Mughira b. Shu'ba reported: A woman killed her fellow-wife with a tent-pole. Her case was brought to Allah's Messenger (may peace be upon him), and he gave judgment that blood-wit should be paid by the relatives (of the offender) on the father's side. And as she was pregnant, he decided regarding her unborn child that a male or a female slave of good quality be given. Some of her offender's) relatives said: Should we make compensation for one who never ate, nor drank, nor made any noise, who was like a nonentity? Thereupon Allah's Messenger (may peace be upon him) said: He was talking rhymed phrases like the rhymed phrases of desert Arabs. See also: Rashid, S.K., 'Legal Protection of The Unborn Child: A Comparative Perspective' [1996] 4 CLJ xvi.

[102] 'O mankind! if ye have a doubt about the Resurrection, (consider) that We created you out of dust, then out of sperm, then out of a leech-like clot, then out of a morsel of flesh, partly formed and partly unformed, in order that We may manifest (our power) to you; and We cause whom We will to rest in the wombs for an appointed term, then do We bring you out as babes, then (foster you) that ye may reach your age of full strength; and some of you are called to die, and some are sent back to the feeblest old age, so that they know nothing after having known (much), and (further), thou seest the earth barren and lifeless, but when We pour down rain on it, it is stirred (to life), it swells, and it puts forth every kind of beautiful growth (in pairs)' (Al Qur'an, 022:005).

[103] See among others: 'Lost are those who slay their children, from folly, without knowledge, and forbid food which Allah hath provided for them, inventing (lies) against Allah. They have indeed gone astray and heeded no guidance.' (Al Qur'an, 6:140); 'Say: "Come, I will rehearse what Allah hath (really) prohibited you from": Join not anything as equal with Him; be good to your parents; kill not your children on a plea of want; We provide sustenance for you and for them; come not nigh to shameful deeds. Whether open or secret; take not life, which Allah hath made

sacred, except by way of justice and law: thus doth He command you, that ye may learn wisdom' (Al Qur'an, 6:151); 'And when a daughter is announced to one of them his face becomes black and he is full of wrath. He hides himself from the people because of the evil of that which is announced to him. Shall he keep it with disgrace or bury it in the dust? Now surely evil is what they judge.' (Al Qur'an, 16:58-9); 'Kill not your children for fear of want: We shall provide sustenance for them as well as for you. Verily the killing of them is a great sin' (Al Qur'an 17:31); and 'Those who invoke not, with Allah, any other god, nor slay such life as Allah has made sacred except for just cause, nor commit fornication; - and any that does this (not only) meets punishment.' (Al Qur'an, 25:68).

[104] And arguably that applies to Christians too, as the prohibition may be inferred from the Exodus 21:22-23 which reads: 'If men strive, and hurt a woman with child, so that her fruit depart [from her], and yet no mischief follow: he shall be surely punished, according as the woman's husband will lay upon him; and he shall pay as the judges [determine]. And if [any] mischief follow, then thou shalt give life for life.'

[105] The proposal has triggered massive response from Muslims and non-Muslims alike as reported at <http://www.usatoday.com/news/world/2004-02-03-head-scarves_x.htm>; <http://www.wwrn.org/parse.php?idd=9636&c=24>; <http://www.ocnus.net/cgibin/exec/view.cgi?archive=39&num=10025&printer=1> (last visited 20 February 2004).

[106] [1994] 3 CLJ 532.

[107] *Ibid* at p. 538.

[108] *Ibid* at p. 539.

[109] Al Qur'an 24:31 states that: 'And say to the believing women that they should lower their gaze and guard their modesty; that they should not display their beauty and ornaments except what (must ordinarily) appear thereof; that they should draw their veils over their bosoms and not display their beauty except to their husbands, their fathers, their husband's fathers, their sons, their husbands' sons, their brothers or their brothers' sons, or their sisters' sons, or their women, or the slaves whom their right hands possess, or male servants free of physical needs, or small children who have no sense of the shame of sex; and that they should not strike their feet in order to draw attention to their hidden ornaments. And O ye Believers! turn ye all together towards Allah, that ye may attain Bliss.'

[110] 'Every man praying or prophesying, having [his] head covered, dishonoureth his head. But every woman that prayeth or prophesieth with [her] head uncovered dishonoureth her head: for that is even all one as if she were shaven. For if the woman be not covered, let her also be shorn: but if it be a shame for a woman to be shorn or shaven, let her be covered. For a man indeed ought not to cover [his] head, forasmuch as he is the image and glory of God: but the woman is the glory of the man. For the man is not of the woman; but the woman of the man. Neither was the man created for the woman; but the woman for the man. For this cause ought the woman to have power on [her] head because of the angels. Nevertheless neither is the man without the woman,

neither the woman without the man, in the Lord. For as the woman [is] of the man, even so [is] the man also by the woman; but all things of God. Judge in yourselves: is it comely that a woman pray unto God uncovered? Doth not even nature itself teach you, that, if a man have long hair, it is a shame unto him? But if a woman have long hair, it is a glory to her: for [her] hair is given her for a covering' (Corinthians 11:4-15) (*sic*).

[111] In Al Qu'an, 2:256 God himself expressed that: 'There is no compulsion in religion. The right direction is henceforth distinct from error. And he who rejecteth false deities and believeth in Allah hath grasped a firm handhold which will never break. Allah is Hearer, Knower' He has explained what is good and what is bad. He does advise, as His messengers all had, that to gain the happiness in this world and the hereafter one has to strive towards achieving and complying what has been described by Him as good and to restrain from committing what is depicted as evil deeds. The God has provided the guidelines but it is for us, human beings to choose for ourselves, whether to follow what is described as the right path or to choose not to comply with that as no one but ourselves will be responsible for our own conduct (Al Qur'an, 6:164). It is explained that: 'This is the Book; in it is guidance sure, without doubt, to those who fear Allah; Who believe in the Unseen, are steadfast in prayer, and spend out of what We have provided for them; And who believe in the Revelation sent to thee, and sent before thy time, and (in their hearts) have the assurance of the Hereafter. They are on (true) guidance, from their Lord, and it is these who will prosper' (Al Qur'an, 2:2-5) and it is for us, who have been granted brain with ability to reason and think (And We have not sent before you but men from (among) the people of the towns, to whom We sent revelations. Have they not then travelled in the land and seen what was the end of those before them? And certainly the abode of the hereafter is best for those who guard (against evil); do you not then understand? (Al Qur'an, 12:109)) while what other fellow human being thinks about us on religious matter does not count ('Surely the hypocrites strive to deceive Allah, and He shall requite their deceit to them, and when they stand up to prayer they stand up sluggishly; they do it only to be seen of men and do not remember Allah save a little (Al Qur'an, 4:142)).

[112] 'Unto you your religion, and unto me my religion' (Al Qur'an, 109:6).

[113] See Deuteronomy 22:5 which reads: 'The woman shall not wear that which pertaineth unto a man, neither shall a man put on a woman's garment: for all that do so [are] abomination unto the Lord thy God.'

[114] See supra note 109.

[115] For examination of this right in wider scope, see Beauchamp, T., 'The Right to Privacy and The Right to Die' in Paul, E., Miller, F., and Paul, J., *The Right to Privacy* (Cambridge University Press, USA, 2000) at pp. 276-292.

[116] Al Qur'an 4:29 states that: 'O ye who believe! Eat not up your property among yourselves in vanities: But let there be amongst you Traffic and trade by mutual good-will: Nor kill (or destroy) yourselves: for verily Allah hath been to you Most Merciful!'

[117] See among others: Judges 16:29-30; Samuel 31:4-5; Chronicles 10:4-5; Samuel 17:23; Kings 16:18; Matthew 27:5; Acts 1:18; and Acts 16:27. Suicide was equated with oneself murder and thus seen as the violation of the sixth commandment: 'you shall not murder' (Exodus 20:13). That view however has been departed and the prevailing view sees suicide as 'not what God wants for anyone" see: 'If a Christian commits suicide, will he go to Heaven?' available at: <http://www.christiananswers.net/q-dml/suicide-and-heaven.html> (last accessed on 30 April 2006). See also 'If a Christian commits suicide, Is he still forgiven?' where it was stated that: 'Jesus bore all that person's sins, including suicide. If Jesus bore that person's sins on the cross 2000 years ago, and *if suicide was not covered, then the Christian was never saved in the first place and the one sin of suicide is able to undo the entire work of the cross of Christ. This cannot be. Jesus either saves completely or he does not.*' (emphasis added) available at: <http://www.carm.org/questions/suicide.htm> (last accessed on 30 April 2006).

[118] It is interesting to note that there was a time suicide was an offence in Australia. While that is no longer the law today, attempt to commit suicide is still an offence in some territories in Australia. For further details on this, see <http://www.qrtl.org.au/euthanasia/legal.htm> (last visited 12 June 2004).

[119] However the statute does not legalise the aiding, abetting, counselling or procuring the suicide or attempted suicide and thus the House of Lords upheld the Director of Public Prosecutions' refusal to give an undertaking that he would not prosecute Mr. Pretty for aiding and abetting his wife's suicide even though that assistance was sought by the wife who was not able to do so herself due to her medical condition. See: *The Queen on the Application of Mrs Dianne Pretty (Appellant)* v. *Director of Public Prosecutions (Respondent) and Secretary of State for the Home Department (Interested Party)* [2001] UKHL 61. Available on internet at: <http://www.publications.parliament.uk/pa/ld200102/ldjudgmt/jd011129/pretty-1.htm>. The House of Lords' decision was challenged in the ECtHR as amounting to the United Kingdom's failure to observe convention rights of individual. It was however held that nothing in the UK legislation had offended the provisions of the ECHR and therefore the ECtHR unanimously found there was no violation of Articles 2, 3, 8, 9 and 14 of the ECHR. See: *Pretty* v. *The United Kingdom* [2002] ECHR 427.

[120] Section 309 of the Penal Code provides: 'Whoever attempts to commit suicide, and does any act towards the commission of such offence, shall be punished with imprisonment for a term which may extend to one year, or with fine, or with both.' The abettor, however, may face the consequence of imprisonment up to 10 years period and fine (section 306 of the Penal Code). However whoever abets the commission of suicide by any person under eighteen years of age, any insane person, any delirious person, any idiot, or any person, in a state of intoxication may face the death penalty or imprisonment for a term which may extend to twenty years and also fine (section 305 of the Penal Code).

[121] However, the Syariah Criminal Offences (Federal Territories) Act 1997 quite intriguingly provides in section 19(1) that: 'Any person who in *any shop or other public place*, consumes any

intoxicating drink shall be guilty of an offence and shall on conviction be liable to a fine not exceeding three thousand ringgit or to imprisonment for a term not exceeding two years or to both.' (Emphasis added). Subsequently section 19(2) provides that '(2) Any person who makes, sells, offers or exhibits for sale, keeps or buys any intoxicating drink shall be guilty of an offence and shall on conviction be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to both.' That being the case, it is open to argument that a Muslim in Federal Territories has not committed any crime within the ambit of the Act if he consumes any intoxicating drink in any place other than shop or other public place for as long as it cannot be shown that he keeps or has bought the intoxicating drink, e.g., he receives it as a gift and immediately consumes it.

[122] The holy books for the respective religion might be used as the basis of such law. On prohibition to consume pork: see Al Qur'an, 2:173, 5:3, 6:145 and 16:115; Bible, Leviticus 11:7-8, Deuteronomy 14:8 and Isaiah 65:2-5.

[123] For the outline of the development of homosexual activities, see Freeman, A., 'Survey of Key Development Worldwide', available at < http://www.sodomylaws.org/history/history11.htm> (last visited 12 June 2004).

[124] For example the Malaysian Penal Code section 377 forbids buggery with an animal, section 377A makes carnal intercourse against the order of the nature as an offence, even with mutual consent and provides for more severe punishment if such act is committer without consent (section 377C). The Malaysian was an adaptation of the Indian Penal Code which was based on 19th century English legislation. As such most of the provisions found therein can also be found in that of the Indian, including the provisions on those matters.

[125] See notes 47-55 and the accompanying texts.

[126] Al Qur'an 16:72, 30:21.

[127] Al Qur'an 26:165-6, 27:55, 29:28-9.

[128] Al Qur'an 17:32.

[129] Al Qur'an 42:11.

[130] Al Qur'an 2:187, 2:222-3 even Al Qur'an went further by dictating that 'O ye who believe! Ye are forbidden to inherit women against their will. Nor should ye treat them with harshness, that ye may Take away part of the dower ye have given them, except where they have been guilty of open lewdness; on the contrary live with them on a footing of kindness and equity. If ye take a dislike to them it may be that ye dislike a thing, and Allah brings about through it a great deal of good.' (4:19). See also Al Qur'an 4:34.

[131] See among others: Leviticus 20:13 that states 'If a man also lie with mankind, as he lieth with a woman, both of them have committed an abomination: they shall surely be put to death; their blood [shall be] upon them.'; Romans 1: 32 'Who knowing the judgment of God, that they which commit such things are worthy of death, not only do the same, but have pleasure in them that do them.'; and also Romans 1:26-7 'For this cause God gave them up unto vile affections: for even

their women did change the natural use into that which is against nature: And likewise also the men, leaving the natural use of the woman, burned in their lust one toward another; men with men working that which is unseemly, and receiving in themselves that recompence of their error which was meet.'

[132] As the Bible *inter alia* states: 'Thou shalt not commit adultery' (Exodus 20:14); 'Moreover thou shalt not lie carnally with thy neighbour's wife, to defile thyself with her' (Leviticus 18:20); 'Neither shalt thou commit adultery' (Deuteronomy 5:18) 'And the man that committeth adultery with [another] man's wife, [even he] that committeth adultery with his neighbour's wife, the adulterer and the adulteress shall surely be put to death. And the man that lieth with his father's wife hath uncovered his father's nakedness: both of them shall surely be put to death; their blood [shall be] upon them. And if a man lie with his daughter in law, both of them shall surely be put to death: they have wrought confusion; their blood [shall be] upon them.' (Leviticus 20:10-12); 'Cursed [be] he that lieth with his father's wife; because he uncovereth his father's skirt. And all the people shall say, Amen' (Deuteronomy 27:20); 'Cursed [be] he that lieth with his mother in law. And all the people shall say, Amen' (Deuteronomy 27:23).

[133] If any man take a wife, and go in unto her, and hate her, And give occasions of speech against her, and bring up an evil name upon her, and say, I took this woman, and when I came to her, I found her not a maid: Then shall the father of the damsel, and her mother, take and bring forth [the tokens of] the damsel's virginity unto the elders of the city in the gate: And the damsel's father shall say unto the elders, I gave my daughter unto this man to wife, and he hateth her; And, lo, he hath given occasions of speech [against her], saying, I found not thy daughter a maid; and yet these [are the tokens of] my daughter's virginity. And they shall spread the cloth before the elders of the city. And the elders of that city shall take that man and chastise him; And they shall amerce him in an hundred [shekels] of silver, and give [them] unto the father of the damsel, because he hath brought up an evil name upon a virgin of Israel: and she shall be his wife; he may not put her away all his days. But if this thing be true, [and the tokens of] virginity be not found for the damsel: Then they shall bring out the damsel to the door of her father's house, and the men of her city shall stone her with stones that she die: because she hath wrought folly in Israel, to play the whore in her father's house: so shalt thou put evil away from among you. If a man be found lying with a woman married to an husband, then they shall both of them die, [both] the man that lay with the woman, and the woman: so shalt thou put away evil from Israel (Deuteronomy 22:13-22).

[134] See among others, *Heather Mills*, *Douglas*, and *Wainwright*.

[135] See for example: *Malone* although the view was expressed within the narrow context of the telephone privacy.

[136] For examples Phillipson, G., 'Transforming Breach of Confidence? Towards a Common Law Right of Privacy under the Human Rights Act', [2003] 66 MLR 726 at page 732 defines privacy as 'the individual interest in controlling the flow of personal information about herself.'; Parent,

W., 'A New Definition of Privacy for the Law', *Law and Philosophy*, 2 (1983) 305 at page 306 proposed privacy to be defined as 'the condition of not having undocumented personal information about oneself known by others.'; Even the article written by Warren and Brandeis emphasised on the privacy as the right to control the publicity against embarrassing 'private' facts. That, however, should be interpreted in the light of the incident that triggered the writing of such article, and not meant to limit the scope of privacy merely to such aspects.

[137] Westin, *Privacy and Freedom*, at p. 7. It is interesting to note that Jerry M. Rosenberg has also been identified for having put forward the same definition as quoted by Carroll, J.M., *Confidential Information Sources: Public and Private*, 2nd ed. (Butterworth, Boston, 1991), at p. 323. However Westin is more known and more frequently cited as the source of the definition. It is also worth to note that Westin first published his book in 1967 whereas Jerry M. Rosenberg's book *The Death of Privacy* was published in 1969 by the Random House, New York.

[138] The inference to that effect can be seen in the judgment of Lord Johnston in *Robert A McGowan* v. *Scottish Water* [2005] IRLR 167 where at para 7 his lordship held that: '...they had misdirected themselves on the issue of Article 8(1) the matter not being one of privacy but a matter of respect for private and family life' Within the context of the appeal brought before him, it becomes apparent that his lordship sought to distinguish privacy aka secrecy as opposed to the right to private life in the sense that Article 8(1) protects the private aspect of individual and not mere secrecy. Such inference is strengthened by his subsequent sentence: '... some surveillance of employee at work, where it involved surveillance of non-work activities, is likely to be seen as an infringement of Article 8.'

[139] See Westin, A.F., *Privacy & Freedom* (The Bodley Head Ltd: London, 1970) at p. 26, citing the opinion of Edward A. Shils in *The Torment of Secrecy* (The Free Press, Illinois, 1956) pp. 21-2 and Edward A. Shils in 'Privacy: Its Constitution and Vicissitudes', 31 *Law and Contemporary Problems* (Spring, 196), pp. 281-3. Another aspect that differentiates privacy from secrecy is the domain within which each concept applies. The subject matter of both secrecy and privacy is categorised as the 'nonuse' of data; however, secrecy is in the area of public information whereas privacy is in the area of private information. See: Carroll, J.M., *Confidential Information Sources: Public and Private*, 2nd ed. (Butterworth, Boston, 1991) pp. 322-323.

[140] [2004] UKHL 22 at para 15.

[141] Greenawalt, K., 'Privacy and Its Legal Protections', (September 1974)2 Hasting Center Studies No. 3, pp 45-49 in Shattuck, J., *Rights of Privacy*, (National Textbook Company, Illinois, 1977), at pp. 197-9.

[142] Lord Lester, citing 8(2) Halsbury's Laws (4th ed. reissued) para 101 'History and Context' in *Human Rights Law and Practice*, at p. 2.

[143] Hoffman, D. and Rowe, J., Human Rights in the United Kingdom: A General Introduction to the Human Rights Act 1998 (Pearson Education Limited, Edinburgh, 2003), at p. 1.

[144] For a neat argument that privacy is neither a personality right not a subjective right, see, Gutwirth at pages 39-42. He argued, among other things, 'that a subjective right must have a clear subject, it must serve something which can be sufficiently defined... The "right to privacy" however, cannot be defined, or only in the vaguest of terms. ... The plea for a description of privacy as an absolute, inalienable, and extra-patrimonial personality right is open to more profound criticism. ...the absolute character of such a right can be put into question. Even if the right to property – the most absolute right – can be limited, the same goes, mutatis mutandis, for the right to privacy. This is not only because it is vague, but especially because privacy is pre-eminently contextual and relational. It only acquires a legal significance in a balancing of rights and interests in case-specific-circumstances.'

[145] See: Article 2 of the ECHR and Article 5 of the Federal Constitution.

[146] See: Article 9 of the ECHR and Article 11 of the Federal Constitution.

[147] See: Article 10 of the ECHR and Article 10 of the Federal Constitution.

[148] See: Article 11 of the ECHR and Article 10 of the Federal Constitution.

[149] Parent, 'A New Definition of Privacy for the Law,' at pages 311 proposed five requirements where intrusion will not violate privacy, i.e. in the context of advocating the acquisition disclosure of undocumented personal knowledge.

[150] Prosser, 'Privacy', (1960) 48 California Law Review 383.

[151] Warren and Brandeis, 'Right to Privacy' (1890) 4 Harvard Law Review 193.

[152] (1965) 381 U.S. 479.

[153] (1972) 405 U.S. 438.

[154] *Ibid*, at 453.

[155] (1977) 431 U. S. 678.

[156] In *Roe* v. *Wade*, (1973) 410 U.S. 113 it was held that such decision is part of privacy provided the decision concerns a nonviable foetus, i.e., between 24-28 weeks of gestation; and is made in consultation with a licensed physician.

[157] *Harris v. McRae* (1980) 448 U.S. 297.

[158] *Hodgson v. Minnesota* (1990) 497 U.S. 417.

[159] (1992) 505 U.S. 833, 856, 877.

[160] See, however, the court's latest decision in *Stenberg v. Carhart* (2000) 530 U.S. 914, that struck down a law that restricted certain abortion procedures without an exception to protect the health of the woman by a narrow majority 5:4.

[161] *Village of Belle Terre* v. *Boraas* (1974) 416 U.S. 1. However, such limitation is applicable to govern only unrelated individual, excluding those related by blood, marriage or adoption. See for example: *Moore* v. *City of East Cleveland* (1977) 431 U.S. 494.

[162] *Doe* v. *Commonwealth's Attorney* (1976) 425 U.S. 901. See also: *Bowers v. Hardwick* (1986) 478 U.S. 186A.

[163] (2003) 539 US 1; also available at <http://www.supremecourtus.gov/opinions/02pdf/02-102.pdf> (last visited 11 June 2004).

[164] For the critics on this judgement, see: Buster, R.S., 'Does High Court's Ruling Undermine Utah's Bigamy Statutes?', available at <http://www.principlevoices.org/article.php?story=20060416170531102&mode=print>.

[165] See Gerber, S., 'Privacy and Constitutional Theory', in Paul, E., Miller, F., and Paul, J., *The Right to Privacy* (Cambridge University Press, USA, 2000), at pp. 165-185. See also Tushnet, M., 'Legal Conventionalism in the U.S. Constitutional Law of Privacy', in Paul, E., Miller, F., and Paul J, *The Right to Privacy*, at pp. 141-164.

[166] (1966) 382 US 406, at p. 416.

[167] (1967) 389 US 347, at p. 350.

[168] Justices Harlan and White in this case at page 500 however noted that 'the proper constitutional inquiry in this case is whether the Connecticut statute infringes the Due Process Clause of the Fourteenth Amendment because the enactment violates basic values "implicit in the concept of ordered liberty".' Justice Rehnquist makes similar point in *Roe* v. *Wade* at page 172. This theory is supported by Henkin, L., 'Privacy and Autonomy,' (1974) 74 Columbia Law Review at 1410-33; Wellington, H., 'Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication,' (1973) 83 *Yale Law Journal* at pp. 221-311; and Parent, 'A New Definition of Privacy for the Law', (1983) 2 *Law and Philosophy* at pp. 305-338.

[169] For example, surreptitious interception of conversations in a house or hotel room is eavesdropping. *See e.g.*, N.Y. Penal §§ 250.00, 250.05; one has a right of privacy for contents of envelopes sent via first-class U.S. Mail. 18 USC § 1702; 39 USC § 3623; one has a right of privacy for contents of telephone conversations, telegraph messages, or electronic data by wire. 18 USC § 2510 et seq; one has a right of privacy for contents of radio messages. 47 USC §605; A federal statute denies federal funds to educational institutions that do not maintain confidentiality of student records, which enforces privacy rights of students in a backhanded way. 20 USC § 1232g. Commonly called the Buckley-Pell Amendment to the Family Educational Rights and Privacy Act. *See also Krebs v. Rutgers* (1991) 797 F.Supp. 1246 (D.N.J.); *Tombrello v. USX Corp.* (1991) 763 F.Supp. 541 (N.D.Ala.); Records of sales or rentals of video tapes are confidential. 18 USC §2710; Content of e-mail in public systems are confidential. 18 USC § 2702(a); Bank records are confidential. 12 USC §3401 et seq; library records are confidential in some states, e.g., N.Y. CPLR § 4509; *Quad/Graphics, Inc. v. Southern Adirondack Library Sys.* (1997) 664 N.Y.S.2d 225 (N.Y.Sup.Ct.), as summed up by Standler, R.B., 'Privacy Law in the USA', (1997) available at <http://www.rbs2.com/privacy.htm#anchor222222> (last visited: 11 June 2004).

[170] See Radin, M.J., Rothchild, J.A., and Silverman, G.M., *Internet Commerce: The Emerging Legal Framework* (Foundation Press, New York, 2002), at p. 548.

[171] For general discussion on regulatory initiatives in the U.S., see Flaherty, D.H., *Protecting Privacy in Two Ways Electronic Services*, at pp. 87 – 107.

[172] Malaysia has enacted laws that regulate internet related activities including the Communication and Multimedia Act 1998, the Malaysian Communication and Multimedia Commission Act 1998, the Digital Signature Act 1997, the Computer Crimes Act 1997 and the Telemedicine Act 1997 and had amended relevant intellectual property legislation to accommodate the use of new technology.

[173] The draft legislation was first prepared in 1998 and was said to have reached its final stage in 2002. The Star Online News on 5 November 2002 reported that the Deputy Energy, Communication and Multimedia Minister Datuk Tan Chai Ho said that the proposed Personal Data Protection Act 2003 was in the final draft. See <http://www.ktkm.gov.my/template01.asp?Content_ID=368& Cat_ID=4&CatType_ID=84> (last visited on 11 June 2004). The ministry is now known as Ministry of Energy, Water and Communication after the Prime Minister Dato' Seri Abdullah bin Haji Ahmad Badawi restructured the organisation of the Federal Government.

[174] Munir, A.B., and Mohammad Yasin, S.H., *Privacy and Data Protection: A Comparative Analysis with Special Reference to the Malaysian Proposed Law* (Sweet & Maxwell, Malaysia, 2002); Khaw, L.T., 'The Proposed Malaysian Personal Data Protection Law - Some Salient Features' 2002 available at <http://www.ippp.um.edu.my/research/bulletin.asp?IntBulletinID=141&IntArticleID=150> (last visited 10 July 2003); Mohd Nor Aziz, 'Data Protection and Privacy: Issues & Challenges', available at <http://www.mncc.com.my/infosec2k1/panel8a-2.ppt> (last visited 10 July 2003); Wong, A., and Chia, B., 'Implications of The Proposed Data Protection Bill', available at <http://www.shrmglobal.org/publications/baker/0901glob/malay.htm> (last visited 10 July 2003); and Azmi, I.M., 'E-commerce and Privacy Issues: An Analysis of The Personal Data Protection Bill', available at <http://www.bileta.ac.uk/02papers/madieha.html>(last visited 11 June 2004).

[175] El Islamy, H., 'Information Privacy in Malaysia: A Legal Perspective' [2005] 1 MLJ xxv; El Islamy, H., 'Privacy on the Internet and Legal Protection' (2004)3, Vol. 2, Issue: 1 at Obiter, pp: 21-31 <http://www.lawfile.org.uk> (last visited 11 June 2004); El Islamy, H., 'Privacy: Are We Really Concerned (2)' (2004)1, Vol 2, Issue: 1 at Obiter, pp: 19-24 <http://www.lawfile.org.uk> (last visited 11 June 2004); El Islamy, H., 'Privacy: Are We Really Concerned' (2003)11, Vol 1, Issue: 1 at Obiter, pp: 27-30 <http://www.lawfile.org.uk/>; El Islamy, H., 'Online Privacy and Its Impact on E-Commerce' (2003) published by Malaysia Current Law Journal <http://www.cljlaw.com> (last visited 11 June 2004).

[176] The Malaysian public's trust in the Government can also be seen from this: Mohd Yaakob Yusof in the article headlined as 'Proposal A Step In The Right Direction' as published by Malay Mail on 20 June 2005 reported that in a street poll conducted by The Malay Mail yesterday, nine out of 10 interviewed, support the Government's proposal to register prepaid cell phone users. These responses explicate that while the public may have some convenience issue concern, the proposal is welcome for basic reason that the public do not have any objection to having their data submitted to the authority, especially if that is meant to secure the national interest or for the

prevention of crimes: * Masyam Mohd Alif, 18, salesgirl, from Ampang: 'The Government's proposal is spot-on. Some prepaid mobile phone users are using the service to send vulgar or nuisance SMS. Registration will help the authorities, especially the police, to trace the culprits after a victim lodges a report.' * Umi Sarah Manaf, 24, salesgirl from Tanjung Permatang: 'I agree that such users be registered as the service is being abused. Some prepaid users have resorted to using SMS to defame those they detest.' 'The Government's plan to register them can deter nuisance callers.' * Liew Kar Yan, 20, supervisor from Ampang: 'This proposal by the Government is a step in the right direction.' 'Prepaid phone users have faced a host of problems, especially when they lose their mobile phones by misplacing them or due to thefts. As they are not registered, they are unable to get back their original numbers.' * Thanabrijai Uthaya Kuma, 21, student from Tasik Permai: 'I support the proposal, but the registering process should be systematic and not a burden to the user. The objective of using a prepaid cell phone is to make life easy.' * Maigala Selva Raja, 24, salesgirl from Selayang: 'I do not agree with it because it can intrude into our privacy. "I feel that registration will pose a burden as it may be a long process. Eventually, the prepaid mobile service will be no different from postpaid.' * Haezal Musa, 17, student from Kuching, Sarawak: 'Through registration and the database of the cell phone number, the police will be able to track down a criminal. This helps the police save time and they can handle more cases involving cell phone users.' * Lexvenna Ravindran, 15, student from Ampang: 'The proposal is good and it can ensure more privacy for users. Those who want to damage someone's reputation via SMS will think twice.' 'There will be more peace in our lives as registration would mean the end of irritating or abusive SMS.' * Johari Razak, 28, businessman from Selayang: 'I agree with the proposal. I had a bad experience when one of my dealers cheated me by selling a bundle of stolen prepaid numbers a year ago.' 'I think the Government's proposal can prevent would-be criminals.' * Mohd Azman Jamil, 23, contractor from Teluk Intan, Perak: 'Registration will help the authorities to nab criminals using prepaid mobile numbers.' 'I hope the registration process will not be tedious and make our lives difficult.' * Zalina Ghazali, 20, promoter from Bangsar: 'I agree with the proposal but they need to provide a proper database where they can manage it properly. They also need to keep personal data safely.' See also: Muzaffar, S., 'Privacy and Security: The Smart Card Conundrum' [2004] 2 MLJ lix where the author noted: 'Privacy in relation to security is about who can or cannot be trusted with such information and against whom the most protection is needed. It is interesting though that different countries have different perceptions about who is to be trusted. For example, in the US, many see the government as the enemy and insist that the private sector be entrusted with their data rather than the government. ... In 1984, a Gallup poll was conducted to determine whether or not Orwell's vision of an oppressive society had been realised. In response to the statement "there is no real privacy because the government can learn anything it wants about you", 47% of Americans, 68% of Canadians and 59% Britons responded that such a condition already exists. But only 18% of the German respondents agreed with the statement. It is interesting that out of

the four countries, Germany is the only one with a compulsory national identification card. ... In Malaysia, it is quite conceivable that the public perception would be more in line with Germany. In fact there is little printed material questioning the reason for having to trust the government with such information and whether it has been deserving of this trust.'

[177] Preamble to the Internal Security Act 1960.

[178] For further discussion on the matter see: Das, C. V. *Governments & Crisis Powers: A Legal Study on the Use of Emergency Powers* (Malaysian Current Law Journal Sdn Bhd, Kuala Lumpur, 1996), at pp. 101-57; Lee, H. P., 'Emergency Powers in Malaysia', in Trinidade, F.A., and Lee, H.P. (eds), *The Constitution of Malaysia: Further Perspectives and Developments*, 2nd ed., (Penerbit Fajar Bakti Sdn Bhd, Kuala Lumpur, 1988), at pp. 135-56.

[179] The proclamation of state of emergency was lifted on 29 July 1960. However, further proclamations were made on 3 September 1964 due to the confrontation with Indonesia; on 14 September 1966 in the state of Sarawak to deal with the political crisis that arose from the efforts of the Federal Government to replace the Chief Minister of Sarawak; on 15 May 1969 due to racial riots; and on 8 November 1977 in the state of Kelantan to deal with a political crisis caused by the effort of the party in power at the federal level to impose on the state a Chief Minister of its own choice. It shall also be noted that all these four proclamations are still in force for none has been lifted as yet. See: Das, C.V. *Governments & Crisis Powers: A Legal Study on the Use of Emergency Powers* (Malaysian Current Law Journal Sdn Bhd, Kuala Lumpur, 1996), at pp 158 – 78.

[180] *Hereinafter* referred to as ISA.

[181] For further discussion on the scheme of detention under the ISA, see Tikamdas, R, 'National Security and Constitutional Rights – The Internal Security Act 1960" available at <http://www.malaysianbar.org.my/content/view/1582/27/>.

[182] See for criticism on ISA at <http://www.privacyinternational.org/survey/phr2003/countries/malaysia.htm> (last visited 11 June 2004).

[183] See: http://web.amnesty.org/library/Index/ENGASA280062003?open&of=ENG-300. For further criticism on the ISA and the influence of mistreatment of detainees by the USA officers to the abuse of ISA see <http://www.hrw.org/reports/2004/malaysia0504/1.htm> (last visited 11 June 2004).

[184] For further discussion on the scope of the Act, see: Chesney, R.M., 'The Sleeper Scenario: Terrorism Support Laws and the Demands of Prevention', (2005) Harvard Journal on Legislation, available at: <http://www.law.harvard.edu/students/orgs/jol/vol42_1/chesney. php> . For some criticisms on the Patriot Act, see: Herman, S., 'PATRIOT Games: Terrorism Law and Executive Power' available at: <http://jurist.law.pitt.edu/forumy/2006/01/patriot-games-terrorism-law-and.php>; T.J. Rodgers, 'British, US Spying Draws Us Closer to Orwell's Big Brother' available at: <http://www.commondreams.org/views05/1229-35.htm>. For the stages of privacy development in the United States of America including the discussion on the effect of the 9/11 to

the notion of privacy, see: Westin, A.F., 'Social and Political Dimension of Privacy', (2003) 59 Journal of Social Issues, vol. 2, at pp. 431-53.

[185] Part II of the Federal Constitution provides for the Fundamental Liberties which include the rights as set out in article 5 – 13 of the Federal Constitution. However the caveat 'save in accordance with law' or something to similar effect accompanied each and every such articles, see: 5(1), 6 (2), 8(2)(5), 9(2) (3), 10(2)(3)(4), 11(4), 12(1) read together with article 8, and 13(1). The only exception can be found in article 7 that prohibits the imposition of retrospective punishment in criminal law and against repeated trials and article.

[186] As recently re-affirmed in the High Court Malaya Kuala Lumpur's decision in *Yazid Sufaat & Ors* v. *Suruhanjaya Pilihanraya Malaysia* [2006] 5 CLJ 606. Another issue brought before the court was on the constitutional right to vote of persons who have been detained under the ISA. It is interesting how Raus Sharif J found that the applicants were not prisoners and thus are qualified voters but since they were not registered postal voters, in order to exercise the right to vote they have to personally be present at the respective constituencies.

CHAPTER II

ANALYSIS OF LEGAL RIGHT TO PRIVACY

Chapter Outline

Word Count (excluding endnotes): 24,811 words

And if it had been Our Will,

We could have transformed them

(to remain) in their places;

then should they have been unable to move about,

nor could they have returned (36:67)

2.1 Introduction

More than a century ago Samuel D. Warren and Louis D. Brandeis jointly authored an article published in Harvard Law Review calling for legal recognition of the right to privacy. They argued that:

> The common law secures to each individual *the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others*. Under our system of government, he can never be compelled to express them (except when upon the witness-stand); and even if he has chosen to give them expression, he generally retains the power to fix the limits of the publicity which shall be given them.[1] (emphasis added)

Warren and Brandeis were talking about the common law as applied in the United States of America, the legal system that owes its origin to the common law of England. Ironically while the authors sought to rely on the common law of England to found their argument and to evidence the existence of such a principle as part of the common law and since then the principle and its application have flourished in the United States of America, they have met resistance in England from both the judiciary and legislative alike.

In the United States of America, following the publication of the paper by Warren and Brandeis, privacy has been generally welcome and being afforded the legal protection.[2] There are few instances when some judges in the United States of America did question the existence of such a notion. However, when in a given situation the judiciary found that the common law principle did not provide protection for that specific matter, the legislature has been responsive by enacting the necessary legislation to deal with the issue thus affording the protection over the right to privacy in the given circumstance(s). An example for that would be this: when the New York Court of Appeals held that there was no authority to support the claim brought against the flour company by Abigail, a lady whose photographs and likeness was used by such company for advertisement purposes without her knowledge or consent, the New York State Legislature had promptly acted in response to such a judgment and in the following year passed the law that made it

illegal to do what had been done to Abigail.[3] The legislature in the United States had also reacted to some rather exceptional incidents, namely when privacy invasion has led to undesirable consequence. Among the most notorious ones include the Video Privacy Protection Act 1988, which was passed as a result of invasion of privacy of one prominent USA's judge when a newspaper reporter obtained video store records that suggested the judge liked to watch pornography;[4] and the Driver's Privacy Protection Act 1994, which *inter alia* prohibits state DMVs from releasing personal information about license holder, that was enacted after a stalker who obtained actress Rebecca Schaeffer's address through the California Department of Motor Vehicles murdered her.[5]

The contrast is the case in the United Kingdom. Despite several attempts that have been made to introduce bills which will either protect privacy simpliciter, such as Lord Mancroft's Right to Privacy Bill 1961, or to generally protect human rights (including the right to privacy), except for the HRA 1998 which the United Kingdom Parliament has enacted, as a step towards securing to everyone within the United Kingdom's jurisdiction the ECHR rights and freedoms, which the United Kingdom's government chose as a way to fulfil part of its conventional obligations[6] and some other legislation that may afford the protection to some aspects of privacy, namely the informational privacy, such as the Data Protection Act 1998 which was required by virtue of the Directive 95/46/EC;[7] the Privacy and Electronic Communications (EC Directive) Regulations 2003 which as the title itself suggests was vital in order to comply with the Directive 2002/58/EC,[8] the Parliament had refused to legislate on the matter.[9]

To similar end, whilst the judiciary in the United States of America are more open and more willing to expand the notion for the legal protection of privacy,[10] the judiciary in England, on the other hand, hesitates to do so. That hesitation is shown by the judiciary in England on several occasions. In *Malone* v. *Metropolitan Police Commissioner*,[11] although carefully explicated that his judgment does not make any formal declaration in relation to the issue of privacy as within the scope of Article 8 of the ECHR, the then Sir Robert Megarry VC held that English common law does

not recognise the plaintiff's cause of action for the infringement of telephonic privacy.[12] There were two contradicting views since then; not to count those who abstained from expressing the views on the matter.[13] That was until the decision in *Kaye* v. *Robertson and Another*[14] where for the first time the Court of Appeal judges unanimously held that there was no actionable right of privacy in English law.[15] Consequently the position in England has been that in order to afford legal protection for any aspects of privacy, one has to establish a cause of action that comes within the ambit of acceptably established common law principles – most notably on the basis of the common law of confidence.[16] However it shall also be noted that there were instances when those 'actionable' common law principles failed to protect individual's aspect of private life which should merit legal protection. A good instance of that can be found in the facts that gave rise to the cause of action in *Kaye*. In that case the Court of Appeal acknowledged that the act of journalists from the first defendant's newspaper who gained access to the plaintiff's private hospital room ignoring the notices prohibiting such entry, interviewed the plaintiff at length and took photographs using flash photography while the plaintiff was in hospital recovering from his injuries, was undesirable intrusion to privacy. In that case, Glidewell LJ affirmed that '[t]he facts of the present case are a graphic illustration of the desirability of Parliament considering whether and in what circumstances statutory provision can be made to protect the privacy of individuals.'[17] Bingham LJ opined that '[t]he defendants' conduct towards the plaintiff here was "a monstrous invasion of his privacy".'[18] Yet, the Court of Appeal did nothing but reiterated what was deemed as the 'persistent refusal' of the English court to recognise the existence of legal right to privacy[19] while noting, in the words of Bingham LJ that: '[t]his case nonetheless highlights, yet again, the failure of both the common law of England and statute to protect in an effective way the personal privacy of individual citizens' and while '[t]he problems of defining and limiting a tort of privacy are formidable, but the present case strengthens my hope that the review now in progress may prove fruitful.'[20]

There was a belief that when the United Kingdom Parliament passed the HRA 1998 that gives legal effects to the bundles of rights encompassed in the ECHR including

the right for respect of private life[21] the notion of privacy would finally be awarded the express legal recognition.[22] However the House of Lords' majority judgment in *Wainwright*[23] rejected that notion and muddied the issue which had always seemed to be complicated, i.e., if privacy has always been or has never been part of the common law.[24] In the more notorious privacy case involving the supermodel Naomi Campbell, five senior judges rejected her claim and four allowed it,[25] yet she won the case as the House of Lords in *Campbell* v. *MGN Limited* by majority judgment of 3:2 allowed the appeal brought by the supermodel which entails that the defendants publication as complained constituted an infringement of the supermodel's right to have her private life respected.[26] That seeds the hope that the English judiciary has finally sanctioned its recognition of the right to privacy.

In Malaysia, the issue has been brought to the superior courts' attention in several occasions. Yet until recently the court refused to express the opinion as to whether there exists within the Malaysian legal system any right to privacy, either as part of the fundamental rights of individuals safeguarded by the Federal Constitution or by virtue of the English common law application in Malaysia.[27] In an unprecedented judgment of the High Court, the judge expressed her opinion on the matter albeit lack of proper analysis of the local law. While the case is analysed in great detail at the later part of this Chapter II, it is apt to state at this juncture that the judgment so expressed in *Ultra Dimension* was based solely, although not necessarily appropriately, on the English Court of Appeal's pronouncement in *Kaye*.

In the light of these developments, it is appropriate to ask if, as proclaimed by Warren and Brandeis, there is any place for privacy among the common law principles. Hence in this Chapter II the examination focuses on that of the existing statutory provisions of the United Kingdom, the common law of England and the existing laws of Malaysia in order to find the answer to the question as posed.

2.2 The Law in England

Being the 'mother' of the common law jurisdiction, the examination of the law of the England has to start from there, even for the discussion within the scope of this

thesis. However that alone will not be sufficient. Some legislation, in particular those which majors in the protection of some aspect of privacy such as the Data Protection Act, the HRA 1998, etc., have to be analysed to ensure the completeness of this study.

2.2.1 The English Common Law

The prevailing view in England (or so it seemed) was that there was no general right to privacy, as concluded in several publications[28] and even by the English Courts.[29] It was hoped that once the HRA 1998 has come into force, the debate whether there is such a right to privacy would be put to an end and the struggle for such recognition would finally gain its victory.[30] The House of Lords decision in *Wainwright and Another* v. *Home Office* [31] has weakened the hope.[32] However, in less than a year after the decision in *Wainwright*, the House of Lords adopted a rather different approach in the case of *Campbell*. Both cases and the judgment of the respective cases will be discussed at length following the brief counts of earlier precedents below.

It is perhaps an exaggeration to hold that 'it is well known that in English law there is no right to privacy, and accordingly there is no right of action for breach of privacy.'[33] Until the Court of Appeal's decision in *Kaye*, the appellate courts in England has never made similar pronouncement; and even the pronouncement made at the high court level was restrictive in nature.[34] The most frequently cited support to such proposition is the judgment of Sir Robert Megarry VC in *Malone* v. *Metropolitan Police Commissioner.*[35] In that case, the plaintiff's telephone conversations were intercepted on the authority of the Secretary of State's warrant on suspicion that the plaintiff dealt with stolen property. The plaintiff argued that the interception was in breach of his privacy. The then Sir Robert Megarry VC rejected the claim and his lordship refused to accept the invitation extended by the counsel of the plaintiffs to pronounce that there exists under the English law the right to a telephonic privacy. To that, his lordship held:

> I am not unduly troubled by the absence of English authority: there has to be a first time for everything, and if the principles of English law, and not least

analogies from the existing rules, together with the requirements of justice and common sense, pointed firmly to such a right existing, then I think the court should not be deterred from recognising the right. On the other hand, it is no function of the courts to legislate in a new field. The extension of the existing laws and principles is one thing, the creation of an altogether new right is another. At times judges must, and do, legislate; but as Holmes J. once said, they do so only interstitially, and with molecular rather than molar motions: see Southern Pacific Co. v. Jensen (1917) 244 U.S. 205, 221, in a dissenting judgment. Anything beyond that must be left for legislation. No new right in the law, fully-fledged with all the appropriate safeguards, can spring from the head of a judge deciding a particular case: only Parliament can create such a right.

It shall be borne in mind, however, despite the rejection Sir Robert Megarry VC took the caution in explaining that his judgment is restricted within the narrow refusal to declare that the common law recognises a specific right to be known as telephonic privacy.[36]

The next milestone in the notion of privacy was marked by the decision of the Court of Appeal in *Kaye* v. *Robertson*.[37] Mr. Gorden Kaye, a well-known actor, had suffered severe head injuries when a plank of wood was blown off a building site and smashed through the windscreen of his car. He was taken to a hospital. A reporter and a photographer secured access to his hospital room and took his photographs. It was intended that these should form the basis of a feature in a Sunday newspaper. An action was brought on behalf of Kaye seeking to prevent publication of the material. The plaintiff's case argued that there was intrusion to the plaintiff's privacy. The Court of Appeal, however, unanimously rejected the argument. It was held that there was no actionable right of privacy in English Law. In rejecting the argument on the breach of privacy, Glidewell LJ held that '[i]t is well-known that in English law there is no right to privacy, and accordingly there is no right of action for breach of a person's privacy. The facts of the present case are a graphic illustration of the desirability of Parliament considering whether and in what circumstances statutory

provision can be made to protect the privacy of individuals'.[38] To the same effect, Bingham LJ noted the followings:

> This case nonetheless highlights, yet again, the failure of both the common law of England and statute to protect in an effective way the personal privacy of individual citizens. ... The defendants' conduct towards the plaintiff here was "a monstrous invasion of his privacy" (to adopt the language of Griffiths J. in *Bernstein* v. *Skyviews Ltd.* [1978] Q.B. 479 at 489G). If ever a person has a right to be let alone by strangers with no public interest to pursue, it must surely be when he lies in hospital recovering from brain surgery and in no more than partial command of his faculties. It is this invasion of his privacy which underlies the plaintiff's complaint. Yet it alone, however gross, does not entitle him to relief in English law.[39]

In *R* v. *Khan*[40] the House of Lords considered the issue in the course of deciding whether surveillance evidence obtained in the alleged intrusion to privacy was admissible in a criminal court. Lord Nolan (with whom Lord Keith concurred) pronounced his view that there was no right to privacy in the England.[41] However, Lord Browne-Wilkinson,[42] Lord Slynn[43] and Lord Nicholls of Birkenhead[44] preferred to leave the question open.

Finally the issue was unanimously considered in House of Lords in *Wainwright*. The case was based on an incident occurred on 2 January 1997 relating to strip-search effected upon plaintiffs during a visit to Leeds' prison. The plaintiffs, Mrs Wainwright and her son Alan, were strip searched because the person they intended to visit was suspected of being involved in drugs transaction in the jail and thus an order was made that any of his visitors ought to be strip-searched prior to meeting him openly. Such an order was made in pursuance to rule 86(1) of the Prison Rules 1964 that confers a general power to prisoner officer to search any person entering a prison. To affect the order, some internal guidelines as to how the search should be conducted were laid down. Among the required procedures were laid down in order to lessen the embarrassment that might be caused by a strip-search including that a person should be searched by two persons of the same gender as the visitor; that such

a search must take place in a completely private room; that in conducting the search, the visitor is required to expose first the upper half of his body and then the lower but not to stand completely naked; that in conducting the search, apart from hair, ears and mouth, the visitor's body is not to be touched; and that before a search begins, the visitor is to be asked to sign a consent form which outlines the search procedures. In disregard of such procedures, both Mrs Wainwright and Alan were ordered to be completely or virtually naked and were only asked to sign the consent form after the search had been completed. Mrs Wainwright was ordered to take off all her clothes in a room with an uncurtained window from which someone across the street could have seen her. In the case of Alan, one of the prison officers touched his penis to lift his foreskin. Such search had caused emotional distress to both Mrs. Wainwright and Alan. In fact, it was proven to have caused post-traumatic stress disorder to Alan, thus the claim in Leeds county court. Judge McGonigall found that the search was contrary to the procedure. He also held that such action was in breach of Article 8 of the ECHR[45] to which the United Kingdom is a signatory country.[46] Damages and aggravated damages were awarded for both Mrs. Wainwright and Alan. Upon the appeal, the Court of Appeal agreed that the search was contrary to the procedure but reversed the finding on the breach of the right to privacy, holding that there is no such right recognized by the courts in England. In effect, only damages for battery was upheld. Thus the plaintiffs' appeal to the House of Lords. Lord Hoffmann, with whom the other four judges expressed their agreement,[47] explored some aspect of privacy.[48] His Lordship did make reference to the celebrated article 'the Right to Privacy' written by Warren and Brandeis[49] and the work of Prosser.[50] His Lordship, relying and applying the reasoning given by Sir Robert Meggary VC in *Malone,* concluded that despite the legal recognition to the right to privacy in the United States of America, there is no tort of invasion of privacy and dismissed the appeal.

Analysis of case law shows that aside to the Court of Appeal judgement in *Kaye* and the House of Lords' decision in *Wainwright*, there has been no unanimous judicial pronouncement to the effect that privacy is a concept foreign to the English Law and that there has been no room whatsoever for the recognition of such a concept.[51] As a result of those decisions, it is seen that in order to succeed in an action that otherwise

afforded protection to individual's privacy, such cause of action must be based on established principles, for examples, breach of confidence, breach of contract, breach of trust or infringement of intellectual property rights such as copyright. However, the precedents indicate the contrary. In *Prince Albert* v. *Strange*,[52] the landmark case that usually being cited as the foundation for the cause of action based on breach of confidence, the Lord Chancellor, Lord Cottenham quoted the case of *Wyatt* v. *Wilson*, in particular, the judgment of Lord Eldon to this effect: '[i]f one of the late King's physicians had kept a diary of what he had heard and seen, this court would not in the king's lifetime, have permitted him to print or publish it.'[53] The statement is apparent; it explicates the Court's recognition of the right to privacy as distinct from the right of confidentiality. The order against the publication of the diary would be in order to protect the information that were private to the King, regardless whether or not such information was confidential in nature or was communicated in confidence. What was written might reflect the physician's mere opinion, comments etc, and yet, they would be protected for that would relate to the private aspect of the King. In his book *What Next in the Law*[54] the late Master of the Rolls, Lord Denning commented on the case as providing the right to privacy and it will only do justice by quoting it as such. He said:

> That observation is significant. It is the first instance I know of a right of privacy as distinct from a right of confidence. The King had not given any confidential information to the physician. But by publishing the diary, the physician would infringe the King's right of privacy. King George III, as you will remember, went off his head. Suppose the physician had written in his diary: 'The King walked into the garden and behold, like the Emperor in the fable, he had no clothes' and proposed to publish it. Lord Eldon would, I am sure, have granted an injunction to restrain the publisher. To bring it to modern times: Suppose a photographer with a long-distance lens took a picture of a prominent person in a loving embrace in his garden with a woman who was not his wife. Surely an injunction would be granted to stop it being published. The only cause of action, so far as I know, would be for infringement of privacy.[55]

In Chapter III I advance the proper concept of privacy and the two touchstones that delineate its scope. The proposition is that privacy is a freedom of private life which scope is limited within the two conjunctive touchstones: i.e., private matters, and private sphere. This study concurs with Lord Denning's comment as above but with several observations. First, that the right to privacy is infringed for as long as that 'prominent person' and that 'woman' were in the circumstances that a reasonable person can justifiably expect to have his privacy respected (i.e., within a private sphere), thus, no right to privacy is infringed for a mere use of telescopic lens if the location is as such that no reasonable person should have expected to have his privacy respected – for example if the garden is situated in such a place that allows public gaze with ease. Secondly, provided the private activities are undertaken within a private sphere, the right to privacy shall persist regardless the status of the person being observed. Thus there is infringement of privacy even if the picture is about a lay person, a human being whose existence may not be known to anyone but his close relatives and/or associates. Furthermore, provided the two conjunctive touchstones of privacy are satisfied, it is immaterial whether the facts to be revealed by such picture will cause any embarrassment or otherwise. Hence there is infringement of privacy even if the 'woman' in issue is that prominent person's wife (and thus should not cause an embarrassment to a reasonable person within such society) or even if the picture simply shows such a person was by himself relaxing in his garden.

At this instance, Lord Denning's further observation, after elaborating the case or *Argyll* v. *Argyll*[56] where injunction has been granted prohibiting the Duke of Argyll and a Sunday newspaper *the People* from publishing the Argylls' marital secrets, is worth quoting here:

> But the reason I mention the case here at this stage is this: Suppose the husband had not broken any confidence. Suppose the husband and wife – or any other couple – were in a hotel bedroom which has been 'bugged' by a device which recorded their entire private conversations: that it was all on tape and was to be published by *the People*. The bugger (if I may use that word) would not have been guilty of a breach of confidence: because he had not been entrusted with any confidence. But surely he would have been

> guilty of an infringement of privacy. The hotel might sue him for trespass in placing the device there, but the couple could only sue for infringement of privacy.[57]

Thus it is clear that it is not completely accurate to say the English law does not recognise the right to privacy as early precedents have shown the contrary.[58] Be that as it may, the Court of Appeal decision in *Kaye* creates the landmark that rejected the notion for the common law right of privacy and the House of Lords judgment in *Wainwright* seems to have utterly closed the door for any argument to the contrary. Up to that point it might be concluded that – setting aside the effect that HRA 1998 may have upon the issue of privacy – unless overruled, *Wainwright* leaves no room for privacy argument solely rested on common law principle for the same. Fortunately the binding effect of the judgment in *Wainwright* is only applicable for any claims which cause of action occurred prior to the commencement of the HRA 1998 since the cause of action in *Wainwright* occurred before the HRA 1998 had come into force.[59] Furthermore although Lord Hoffmann did express his view that 'a finding that there was a breach of Article 8 will only demonstrate that there was a gap in the English remedies for invasion of privacy' he also acknowledged that such a gap 'has since been filled by sections 6 and 7 of the 1998 Act'[60] and that 'Article 8 guarantees a right of privacy.'[61] Moreover, despite the decision in *Wainwright* in more recent case of *Campbell* v. *MGN Limited*[62] the House of Lords by majority 3:2 ruled in the supermodel's favour. It may be argued that such a decision by the House of Lords is a symbol of victory for privacy partisans. The case illustrates the situation where two convention rights were competing and the House of Lords had to weigh which should prevail over the other. Here the right to privacy was weighted against the press' right to freedom of expression. Both Lord Nicholls of Birkenhead and Lord Hoffmann favoured the freedom of expression and therefore affirmed the decision of the Court of Appeal.[63] Lord Hope of Craighead, Baroness Hale of Richmond and Lord Carswell however were of the opinion that the circumstances of the case justified the right to privacy to be preferred over the freedom of expression.

Unlike the situation that gave rise to the action in *Wainwright*, the plaintiff in Campbell brought the action against the defendant for the defendant's conduct that

occurred after the HRA 1998 had come into force. It involved a series of conduct, the first of which was regarding the publication made about the plaintiff on 1 February 2001 on which date the defendant's newspapers, the Mirror, carried on its first story on its front page a prominent article headed 'Naomi: I am a drug addict'. To that the defendant added one picture of the plaintiff as a glamorous model and another picture of her dressed in baseball cap and jeans. There was a longer article inside headed 'Naomi's finally trying to beat the demons that have been haunting her'. This inside article spread across two pages and was supported by several other pictures including one over the caption 'Hugs: Naomi, dressed in jeans and baseball hat, arrives for a lunchtime group meeting this week'. In certain respects the articles were inaccurate, including the total duration the plaintiff has been attending meetings of Narcotics Anonymous, the frequency of her attendance and the caption of the photographs. On the same day the plaintiff commenced proceedings against the defendant. The defendant responded by publishing further articles that were highly critical of the plaintiff. For instance on 5 February 2001 the article that was published about the plaintiff was headed in large letters 'Pathetic'; the photograph was captioned 'Help: Naomi leaves Narcotics Anonymous meeting last week after receiving therapy in her battle against illegal drugs'; the text of articles was headed 'After years of self-publicity and illegal drug abuse, Naomi Campbell whinges about privacy'; and an editorial article in the same edition which was headed 'No Hiding Naomi' was concluded with this: 'If Naomi wants to live like a nun, let her join a nunnery. If she wants the excitement of a show business life, she must accept what comes with it.' The defendant did not stop there. Two days later the defendant published an offensive and disparaging article that was headed: 'Fame on you, Ms Campbell' which includes the sentence which read: 'As a campaigner, Naomi's about as effective as a chocolate soldier.' This 7 February 2001 article was the basis for the plaintiff's claim for aggravated damages. The plaintiff's claim was upheld and Morland J awarded £2,500 as damages and £1,000 aggravated damages.[64] The Court of Appeal, however, unanimously reversed the judgment and discharged the judge's order,[65] which finding was affirmed by Lord Nicholls of Birkenhead and Lord Hoffmann but rejected by Lord Hope of Craighead, Baroness Hale of Richmond and Lord Carswell. Lord Nicholls of Birkenhead while endorsing the

pronouncement in Wainwright' that unlike the United States of America, there is no over-arching, all embracing cause of action for 'invasion of privacy' in the United Kingdom acknowledged that protection of various aspects of privacy is a fast developing area of the law in the United Kingdom.[66] In his judgment his lordship however excluded any analysis of privacy as the appellant's common law claim was based on breach of confidence.[67] Despite that in examining the applicability of Article 8 to the case, his lordship applied the 'reasonable expectation of privacy' test and found that the test was not satisfied in the circumstances of the case,[68] before concluded that at any rate, the respondent's right pursuance to Article 10 of the ECHR outweighed Article 8 right of the appellant.[69] On the principle of law of confidence Lord Hoffmann expressed the view similar to that of Lord Nicholls of Birkenhead with further emphasis on the balancing exercise between the two competing rights[70] and noting that the HRA 1998 by virtue of section 6 imposes the duty to respect the right of privacy but merely on public authorities and not on private persons or corporations.[71]

The other House of Lords judges who allowed the appeal took similar approach. The two competing rights under articles 8 and 10 were balanced;[72] but they reached the opposite conclusion, reversed the court of appeal's finding and restored the judgment of the high court.

On the issue whether the HRA 1998 has introduced a new cause of action with regard to privacy, the judges were divided into three groups. One represents the view of the Lord Hope of Craighead and Lord Nicholls of Birkenhead who are ready to accept privacy as a new cause of action arising under Article 8 of the ECHR that becomes locally available by virtue of the HRA 1998. While agreeing that it was a matter for the journalist to decide the presentation of the material to convey to the public without breaching the duty of confidence,[73] Lord Hope of Craighead held that decisions about the publication of material that is private to the individual raise issues that are not simply about presentation and editing and any interference with the public interest in disclosure has to be balanced against the interference with the right of the individual to respect for their private life.[74] Although his analysis

concentrated initially on the basis of confidence,[75] his further examination focused on the right to privacy as he said: '[t]he tests which the court must apply are the familiar ones. They are whether publication of the material pursues a legitimate aim and whether the benefits that will be achieved by its publication are proportionate to the harm that may be done by the interference with the right to privacy.'[76] While exercising the balancing between the two rights, his lordship noted that: '... the potential for disclosure of the information to cause harm is an important factor to be taken into account in the assessment of the extent of the restriction that was needed to protect Miss Campbell's right to privacy.'[77] Similarly Lord Nicholls of Birkenhead showed the readiness to accept privacy as a cause of action albeit his decision to dismiss the appeal based on the two competing rights balancing exercise. His lordship noted at paragraph 15 that: '[i]n the case of individuals this tort, however labelled, affords respect for one aspect of an individual's privacy. That is the value underlying this cause of action. An individual's privacy can be invaded in ways not involving publication of information. Strip-searches are an example'; after earlier noted at paragraph 11 that: '[i]n this country development of the [privacy] law has been spurred by enactment of the Human Rights Act 1998' (insertion added). On the other side, Lord Hoffmann and the Baroness Hale of Richmond teamed up in holding that although the public authority now is duty bound to respect individual's private life, the HRA 1998 does not create a new cause of action between private parties and thus any cause of action brought within the HRA 1998 regime must be based on any existing principle(s).[78] Lord Carswell played the neutral role by abstaining to express any view on the matter, which after all was not required in the light of the fact that the case was founded, *inter alia*, on breach of confidence and the appellant did not complain of any privacy intrusion.

Thus it can be concluded that although the decision in Campbell is regarded as the symbol of victory for the privacy partisans; that is neither completely correct nor sustainable. It is not entirely correct because although some extent of recognition has been accorded to privacy as a right, such view was expressed merely by two of the five judges, one of which held the minority opinion. Nor is it sustainable because even though the four judges expressed similar view and agreed that public authorities

are duty bound to respect individuals' right to privacy, the right to privacy was never argued by the appellant – thus the view so expressed constitutes nothing more than a mere dictum. The appellant founded her case *inter alia* on breach of confidence and not for intrusion of privacy. Despite the fact that the principle that was applied in *Campbell* does not necessarily have any binding effect on the issue of privacy, it may be quoted to support the proposition that the HRA 1998 introduces the cause of action for privacy intrusion against public authorities. Whether or not the HRA 1998 creates the cause of action protecting the right of privacy against private entities remains an issue that has yet to be answered. As such, it is yet to be seen if any part of the judgment will be of value towards the development of the notion of privacy and if so, the extent of such value and its applicability to subsequent cases when the issue of privacy is put on the table.

2.2.2 Privacy Legislation

New threats to privacy are among the grounds that drove the initiatives for the preparation of bills of rights in the United Kingdom.[79] Various privacy bills were introduced into the Parliament during the 1960s and early 1970s. Lord Mancroft's Rights of Privacy Bill 1961 marked the initiative. In 1967 Mr. Lyon took similar initiative. The step was followed by Kenneth Baker in 1968, then Mr. Walded and Mr. Huckfield in 1969. Those, to name but a few initiatives, had been taken to 'invite' the Parliament to legislate upon the matter. That indicated that even though privacy was not a new subject, it was becoming increasingly important. The initiatives showed some fruit. In May 1970 a committee in Privacy chaired by Kenneth Younger was formed. The committee produced what is known as the Younger Report.[80] It led to the passing of the Data Protection Act which, however, was not dedicated exclusively for the protection of privacy. There are some others: white papers entitled Computers and Privacy[81] and Computers: Safeguards for Privacy[82] and the Protection of Privacy Bill 1989. As with other earlier attempts, these do not result in exclusive privacy legislation being enacted. To date the UK Parliament has not passed any legislation on the general right to privacy. That however may not be seen necessary now that the HRA 1998 has been enacted to 'bring home' the convention rights and it does arguably provide for the room that

may afford protection of the right to privacy as it is so argued at the later part of this Chapter.

2.2.3 Data Protection 1998

One kind of legislation that has always been associated with the issue of privacy is the data protection legislation.[83] Although such assumption is not accurate, data protection legislation does offer legal protection to an aspect of privacy, namely the informational privacy. In the United Kingdom, the Data Protection Committee was set up in July 1976 under the chairmanship of Sir Norman Lindop – to advise the government of the best way forward following the Younger recommendations, to ensure appropriate privacy safe-guards in the operation of computers in both the public and private sectors and to look for the establishment of such safeguards in some permanent form. Lindop reported in December 1978 and recommended legislation covering both public and private sector and the legislation to be supervised by an independent data protection authority.[84] That led to the presentation in April 1982 of Data protection; the Government's proposals for legislation.[85] In December 1982 the Data Protection Bill was introduced into the House of Lords 'but its passage was brought to an end by the 1983 General Election.'[86] In July 1983 a further Bill was introduced in the House of Lords which was to become the Data Protection Act 1984.[87]

DPA 1984 included eight data principles for data handling very much influenced by two international instruments, namely the OECD's guidelines governing the protection of privacy and transborder flows of personal data (adopted in Paris on 23 September 1980) and the Council of Europe's Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (treaty 108 opened for signature on 28 January 1981) and the Younger and Lindop reports. It shall be noted, however, although the Younger and Lindop reports were driven by the concern over the loss of personal privacy in the computer age and both the OECD Guidelines and Treaty 108 relate to the importance of privacy protection, the DPA 1984 'remained resolutely silent on the point.'[88] That can be seen in the long title of the DPA 1984, that is – an Act to regulate the use of automatically processed

information relating to individuals and the provision of services in respect of such information.

The Data Protection Directive 98/46/EC was adopted in October 1995, and a Directive in European law imposes a requirement on Member States to pass national law in conformity with it; thus the passage of the Data Protection Act 1998.[89] Just like the DPA 1984, the DPA 1998 recognises the eight data protection principles, most of which are almost the 'copy' of the DPA 1984, except for the absence of the old principle 7 (data subject access right) which is replaced by new principle 6; and the new principle 8 that prohibits the transfer of data outside the European Economic Area unless the country to where such data are to be transferred has 'adequate' level of data protection.[90]

The existence of data protection legislation in one way or another affords protection to some aspects of privacy, in particular the informational privacy. Such legislation, however, is not meant to be privacy legislation (for which it is commonly mistaken to be) or to afford protection for the same. Although people may mistakenly refer to data protection legislation as privacy legislation, the close reading of the relevant regulation makes it clear that some regulations, such as the OECD regulation and the United Kingdom DPAs are meant to enable the transfer of personal data in more regulated manner rather than to protect them. This study is not meant to explore the data protection principles which have been the subject matter of many publications.[91] At this point, the attention shall be drawn upon the legislation to show that, even though the DPA 1998 is neither privacy legislation nor it is intended to be one, the DPA 1998 does offer protection to some aspects of privacy.

As outlined at page 82 and discussed in details in Chapter III, the notion of privacy as this thesis advances refers to individual's freedom of private life, not only in the context of the right to seclusion or being 'left' alone, but includes the positive right to control the aspects of private life. It is within that context that the following analysis is made. The DPA 1998 is indeed a very useful tool that provides protection to informational privacy. The data protection principle 1, for instance, provides that

in order for data processing to be legitimate, such processing must meet one of the conditions set out in Schedule 2; or Schedule 3 if the data to be processed are sensitive data. By virtue of the requirement of section 4(3) of the DPA 1998, data processing is only legitimate if, among others, the data subject has given its consent (Schedule 2; or express consent in case of processing of sensitive data as per Schedule 3). Such a principle affords the protection to individual's right to privacy in the sense that it provides the individual with the control whether or not to allow the processing of his personal data. The DPA 1998 makes the consent of data subject as a pre-condition as well as continuing condition for legitimate data processing which means the data subject can refuse the consent for data processing or at any time withdraw his consent that results in any processing or further processing of the data illegitimate. To that extent, the legislation protects individuals' privacy – the right of an individual to determine what to do or omit about his private life; in this regard the right to dictate others whether or not they can process one's personal data and the right to duly require the processing of such data not being pursued further after the consent has been withdrawn. The subsequent data principles provide for a wider right of individual, which can be interpreted as protecting an individual's right to privacy.

The second principle requires that personal data shall be obtained only for one or more specified and lawful purposes and shall not be further processed in any manner incompatible with that purpose or those purposes. The plain reading of this principle protects individual right to privacy – freedom of private life – in the sense that data processing is only allowed for the specified purposes and the data subject has all the right to prevent processing if such processing is meant for any purpose(s) incompatible with the specified purpose or purposes for which the data subject has given his consent.[92]

Besides the earlier mentioned two principles, the other principle which may be read as giving the protection to privacy is the sixth principle which requires that personal data shall be processed in accordance with the rights of data subjects under the DPA 1998. The data subject's rights set out in sections 7, and 10 to 12 of the DPA 1998.

All the rights guaranteed therein may be interpreted so as to ensure individuals' privacy to some extent.

Section 7 provides for the data subject's right of access to personal data. By virtue of the provisions of section 7, a data subject has the right to be informed by any data controller if his personal data is being processed by or on behalf of the latter.[93] The information being so provided shall include the description of the personal data of such data subject; the purpose of processing; and the recipients or classes of recipients to whom the data are or may be disclosed.[94] Furthermore, the data subject is also entitled to have communicated to him in an intelligible form the information constituting his personal data and the source of such data.[95] In case of processing by automatic means for the purpose of evaluating matters relating such data subject, the data subject is also entitled to be informed as to the logic involved in that decision-taking.[96] This right of access to personal data, subject to the fulfilment of the conditions set out in section 7, may be used as a safeguard of individual's privacy. The right of access will provide the means for individual to examine the real nature of the processing of his data, the accuracy of the data, the means by which the data has been made available to the data controller, etc. When read with other provisions of the DPA 1998, that will allow the data subject to exercise control over his personal data; to determine whether or not to allow the process to be affected to such data and to prevent or stop further processing of his data as he may deem necessary, for example by withdrawing his consent to such processing or by asserting that such processing is in contravention of any provision of DPA 1998. In that context, the DPA 1998 does provide protection to individual's informational privacy, by allowing the individual to have the 'control' over his personal data, to determine what can and cannot be done about them.[97]

Further protections of individuals' aspect of privacy which are declared as a data subject's rights includes the provision of section 10 that provides the data subject with the right to prevent processing that is likely to cause damage or distress; section 11 that explicates a data subject's right to prevent processing for purposes of direct marketing and section 12 entitles a data subject to require a data controller not to

allow any decision that significantly affects such data subject to be taken solely based on processing by automatics means, subject to the fulfilment of the conditions set out in section 12.[98]

Finally, the eighth data protection principle dictates that no data shall be transferred to a country or a territory outside the European Economic Area[99] unless such country or territory ensures an adequate level of protection for the rights and freedoms of data subjects in relation to the processing of personal data. That principle provides further assurances that any rights and protection thereto meant to be afforded to the data subjects are not limited merely within the EEA territory and if any data is to be processed outside the EEA territory that is only allowed subject to such condition of the eighth principle.

Having outlined the provisions that protect the data subject rights, the DPA 1998 also lists the exemptions that apply to particular data or processing.[100] Sections 28 to 39 of the DPA 1998 spell out the exemptions that make the respective particular data or processing not to fall within the enforcement power of the Information Commissioner. This matter has been analysed and discussed in great details by able writers.[101] It is sufficient to state here that the exemptions left an individual with no redress under the DPA 1998 even if the data are inaccurate or the processing causes him loss or damage; but that does not preclude an individual's right to remedy that may exist under any other existing legal principle, including that of Article 8 of the ECHR that becomes applicable by virtue of the HRA 1998.[102]

2.2.4 Human Rights Act 1998

The HRA 1998 is the United Kingdom legislation that gives express recognition and enforceability to the fundamental human rights as incorporated and declared in the ECHR.[103] The ECHR was adopted by the Council of Europe on 4 November 1950 and was ratified by the United Kingdom in 1951. The Convention, however, was not incorporated into domestic law in the United Kingdom on ratification. As a result, although since 1966 individuals have been able to take legal action against the United Kingdom in the ECtHR its application in the United Kingdom courts was

limited[104] and individuals were not able to rely on convention rights directly in the United Kingdom courts.[105] The HRA 1998 received Royal Assent on 9 November 1998 and came into force on 2 October 2000. In effect, the HRA 1998 requires that primary and subordinate legislation shall be read and given effect in a way which is compatible with rights guaranteed under the ECHR;[106] that public authorities including courts and tribunals must not act in a way which is incompatible with the rights guaranteed under the ECHR;[107] that a Minister of the Crown in charge of a Bill in either House of Parliament must, before the second reading, make a statement about the compatibility of the Bill with the rights guaranteed under the ECHR;[108] and although the HRA does not empower the court to strike down any legislation found to be incompatible with the rights guaranteed under the ECHR, the HRA 1998 empowers the court to make declaration of incompatibility[109] that consequently will encourage the government and Parliament to consider appropriate amendments to be affected to the relevant legislative provisions.[110]

Being the statute that gives 'further effect to the ECHR', section 1(1) of HRA 1998 provides that the rights protected by the HRA 1998, as set out in Schedule 1 of the HRA 1998, are called convention rights. The convention rights include the rights and fundamental freedoms set out in Articles 2 to 12 and 14 of the ECHR; Articles 1 to 3 of the First Protocol; and Articles 1 and 2 of the Sixth Protocol. All these rights, however, are to be read with Article 16 which places restrictions on political activities of aliens; Article 17 that prohibits the abuse of rights and Article 18 that provides for limitation on use or restrictions on rights.[111] It shall be noted that not all convention rights are afforded absolute protection.[112] Some are known as special rights – which are strongly protected but can be restricted in times of war or other public emergency – and qualified rights which are to be balanced against the public interest and can be restricted in times of war and other public emergency.[113]

(i) Article 8(1)

The convention right most relevant to the issue of privacy is that provided in Article 8 of the ECHR, namely the right of individuals to have their private and family life respected. Article 8(1) provides that 'everyone has the right to respect for his private

and family life, his home and his correspondence.' The plain reading of such article explicates that privacy as the freedom of private life is the guaranteed right by virtue of such article.[114] In *Harrow London Borough Council* v. *Qazi*[115] Lord Hope of Craighead expressed that privacy 'is the concept which underlies article 8 of the Convention, as the language of article 8(1) shows.'[116]

Privacy, as submitted in this thesis, refers to individuals' freedom to do or omit what he wishes about his private life and personal matters. The literal reading of the same may imply that privacy as a matter of right is stronger in context than the obligation to respect individuals' private life under Article 8(1) of the ECHR. Although the plain reading of the provision of Article 8(1) will lead into the conclusion that the obligation thereunder is passive in nature, the ECtHR has given wider scope to the context by requiring that in some circumstances some positive actions need to be undertaken to ensure the respect for individuals' private life.[117] Such more flexible reading of Article 8(1) of the ECHR will put the notion of privacy as submitted in this thesis at par.

In order to set the limit of the scope of privacy, this thesis in Chapter III, 3.3.1 proposes the two conjunctive touchstones which shall be deployed in drawing the parameter of privacy. The second touchstone which limits the exercise of privacy within individuals' private sphere may draw a slight difference between the notion proposed in this thesis and the ECtHR's interpretation of 'respect for private life'. While agreeing with the ECtHR's general observation in *Peck* v. *The United Kingdom*[118] that '[p]rivate life is a broad term not susceptible to exhaustive definition. The Court has already held that elements such as gender identification, name, sexual orientation and sexual life are important elements of the personal sphere protected by Article 8. That Article also protects a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world' the notion does not include what the ECtHR said as '...a zone of interaction of a person with others ... in a public context'.[119] In that sense except where the ECtHR has upheld the existence of the Article 8(1) right in area beyond private sphere,[120] the principles in the ECtHR's judgment on the right to respect for

an individual's private life will have similar extent of applicability to the notion of privacy as this thesis advances.

With that in mind, it is paramount to understand what 'private life' means within the context of Article 8(1) of the ECHR. It has been held by the ECtHR that the notion of private life is a broad one and is not susceptible to exhaustive definition.[121] In *Botta* v. *Italy*,[122] the ECtHR held that: '... private life ... includes a person's physical and physiological integrity; the guarantee afforded by Article 8 is primarily intended to ensure development, without outside interference, of the personality of each individual in his relations with other human beings.'[123] In *Niemietz* v. *Germany*, the ECtHR explicated that the notion of 'private life' is not limited merely to the 'inner circle' in which an individual may live his own personal life as one chooses.[124] It went on further to say that the notion must comprise to a certain degree the right to establish and develop relationship with other human beings. That being so, the notion of private life does not exclude the activities of a professional or business nature because '... it is, after all, in the course of their working lives that the majority or people have a significant, if not the greatest, opportunity of developing relationship with the outside world.'[125]

The boundaries of what is considered as part of private life and what is not are unclear. The precedents have been set so as to include, within the notion of private life, the right for respect of individual's moral and physical integrity;[126] right to personal identity;[127] sexual orientation;[128] individual's reputation[129] including professional reputation,[130] etc.[131] The precedents also establish that interception of communications without legitimate basis for such interception;[132] and collection, storage and use of personal data concerning an individual's private life[133] amount to interference of the Article 8(1) right. Despite the broad interpretation the ECtHR has accorded to the term 'private life' it is not without a limit. In *Bruggemann and Scheuten* v. *Germany*[134] the ECmHR expressed that:

> ... there are limits to the personal sphere. While a large proportion of the law existing in a given state has some immediate or remote effect on the individual's possibility of developing his personality by doing what he wants to do, not all of these can be considered to constitute an interference with

> private life in the sense of Article 8 ... the claim to respect for private life is automatically reduced to the extent that the individual himself brings his private life into contact with public life or into close connection with other protected interests[135]

When the relevant ECtHR cases are analysed, one will not fail to notice that Article 8(1) indeed provides for the protection of the right to privacy. Despite that, the local applications of such principle meet some difficulties even after the convention rights made part of the law in the United Kingdom by virtue of the HRA 1998. Most notably is that when interpreted within the context of the HRA 1998, Article 8(1) of the ECHR can be so interpreted as to require public authorities to respect each individual's right to private life. Hence if an action of public authorities infringes an individual's right to have his private life respected, Article 8 (1) read together with the HRA 1998 will provide such an individual with a cause of action against the concern public authorities. However, nothing in the HRA 1998 imposes parallel or similar obligation upon individuals or non-public institutions or entities. Section 6 merely declares that it is unlawful for public authorities to act in a way which is incompatible with a Convention right. The HRA 1998, however, does not indicate in any way that the same is applied if the breach has been committed by a private party, be it an individual or any entity other than the State or its agent. In *Campbell*, Lord Nicholls of Birkenhead ignored that and went on to say that '[i]t is sufficient to recognise that the values underlying articles 8 and 10 are not confined to disputes between individuals and public authorities. This approach has been adopted by the courts in several recent decisions, reported and unreported, where individuals have complained of press intrusion.'[136]

If that was the end of the matter, then it may be seen as settled that privacy is protected by virtue of the HRA 1998 read together with Article 8(1) of the ECHR. However, the matter did not stop there. It had been expressed by the fellow judges of the House of Lords in the very same case[137] and on several other occasions[138] that where an individual's right to private life has been infringed by a private party; such individual will have to bring his action under any cause of action currently recognised by the court then argue that such claim should be interpreted so as to

protect his right to private life.[139] The view is based on the argument that, except to the extent expressly provided in the HRA 1998, it does not create a new cause of action. During the third reading, the Lord Chancellor, Lord Irvine of Lairg, commented that the HRA 1998 does not create new human rights...;[140] some judges have also expressed similar view. As such it has been suggested that in the absence of such new cause of action the claim for invasion of privacy, even brought on basis of Article 8(1) right, must be substantiated by the existing causes of action such as that of the law of confidence.[141]

On that matter the analysis goes to examine whether the scope of application of the HRA 1998 as expressed in section 6 thereto is intended to have a mere vertical or also horizontal application. It is very much a matter of interpretation. It is unanimously agreed that the courts, as public institutions are duty bound to act in the manner compatible with the convention rights. The narrow interpretation of that requires the courts to make sure that, as per the scope of section 6 of the HRA, the judges, attorney generals and all public employees must not act in any manner that is incompatible with the convention rights and when it has or about to do so, the courts are duty bound to stop further commission or prevent the same. However, since section 6 limits its scope to those of public authorities, the courts do not have similar obligations with regards to the privacy intrusion or threat of intrusion posed by private body or individuals.[142]

That is one way of looking at the matter. The second view that has been advanced on the matter argues that since the court is duty bound to ensure that it acts in a manner compatible with the convention rights, it is inevitable that it has to enforce such a right when relevant matter brought before it whether or not the proceedings are between private parties or involve both the private party(ies) and public authority(ies); that is because the failure to enforce the convention rights or sanction the recognition thereto will by itself amount to an act incompatible with the convention rights.[143]

Although any further discussion on the matter is beyond the scope of this thesis and despite the arguments that have been advanced either to support the vertical or horizontal scope of the HRA 1998, my view on the matter is this: the plain reading of the provisions of the HRA 1998 as a whole tends to indicate that section 6 is not meant to limit the scope of the statute merely to causes of action one party of which must be a public authority. I am holding that opinion on the following grounds:

First, when read as a whole, it is not justified to assume that the HRA 1998 has been drafted in such a way so as to limit the application of the HRA 1998 merely to the causes of action one party of which is a public authority. Section 12 provides for an obvious instance which will rebut such assumption. Namely, it is unlikely that a situation will arise where the public authority needs to put forward freedom of expression as the defence in a claim brought by an individual for infringement of any of the convention rights against such public authority. Such exercise of balancing convention rights as required by section 12 (1) would be needed when the parties are of equal position, in a horizontal level. The subsequent sub-sections provide further grounds that indicate the applicability of such exercise to private parties.

Second, section 6 requires the courts to act compatibly with the convention rights, not with the provision of the HRA 1998. Nothing in the provisions of the ECHR, which guarantee the individuals freedom, that limit its applicability merely to individuals' in their relation to the government as opposed to their relations among their fellow men. As mentioned earlier the rights can either be absolute, special or qualified. Despite providing the circumstances where the observance of special and/or qualified rights may be 'ignored' and the restrictions that limit the availability of the qualified rights, the terminology used in relation to all those rights is 'every one' and 'no one' within its respective context and without qualification. They do not say, for examples: 'no one shall be required, by the government or a public authority, to perform forced or compulsory labour' or 'no one shall be required to perform forced or compulsory labour, except by private individuals'; or 'everyone has the right to liberty and security of person against the government or a public authority'; or that 'everyone has the right to respect, from the government or any

public authority, for his private and family life, his home and his correspondence.' As a result, it is arguable that a court's failure to regard an individual's convention rights merely on the ground that the other party is an individual as opposed to a public authority is not lawful for that would amount to an act in a way which is incompatible with the convention rights. As a matter of fact distinguishing the treatment of judicial proceedings on a mere basis of presence or absence of a public authority as one of the litigant will amount to a discrimination which is prohibited by Article 14 of the ECHR or Article 14 read together with Article 6(1) in relation to an individual's fair hearing in the determination of his civil rights and obligations or of any criminal charge against him.

Third, the HRA 1998 is said as the legislation to bring the convention rights home, to the United Kingdom.[144] To say that the rights are 'brought home' only for the infringements by a public authority will lead to a situation such as that in case of *A.* v. *The United Kingdom*[145] whereby a plaintiff, in the absence of the common law principles or legislation on the matter and just because he cannot rely on the convention rights in cases between individuals, has to resort to all available avenues in the United Kingdom, then to go to the ECtHR to invite the ECtHR to consider that the United Kingdom is in breach of the ECHR for not providing the avenue to protect his convention right. If that remains the case then which rights have been brought home?

Further discussion on the matter is not only beyond the scope of this thesis but also it will not do justice to the subject to include it merely as part of the thesis. It is also not appropriate to place more emphasise on the matter as the topic is merely incidental and is not primary to the thesis' hypotheses. It suffices to say here that some arguments on the matter have been advanced and discussed by many able writers.[146] However, it is actually a matter for the judiciary to decide whether to adopt the rigid or more flexible interpretation in that regard. As a matter of fact, since the courts in the United Kingdom are duty bound, by virtue of section 2 of the HRA 1998, to take into account *inter alia* the decisions and judgments of the ECtHR, the ECtHR's judgment in *Von Hannover* v. *Germany*[147] will require the courts in the United

Kingdom to consider extending the scope of the HRA 1998 to include those acts of non-public authorities.[148] In that case the ECtHR gave judgment for Princess Caroline of Monaco against the decisions of the German courts which failed to provide her with remedies for the publication of her photographs, holding that:

> The court reiterates that although the object of article 8 is essentially that of protecting individual against the arbitrary interference by the public authorities, it does not merely compel the state to abstain from such interference; in addition to this primarily negative undertaking, there may be positive obligations inherent in the adoption of measures designed to secure respect for private life even in the sphere of relations of individuals between themselves.[149]

In addition to the problem with the scope of applicability as discussed above, section 12 of the HRA 1998 may give the false impression that special treatment is to be afforded to the freedom of expression, which has already been afforded in general manner together with other convention rights by virtue of section 1. The support for such a view may be gathered from the speech of Lord Irvine, the then Lord Chancellor when addressing the House of Lords for the 2nd reading of the Bill of Rights.[150] However, the wordings of section 12 plainly show that it does not provide for anything beyond outlining the particular procedure to be adopted when the relief sought, if granted, will affect the exercise of the freedom of expression. It is also an overstatement to regard so; both Article 8 and Article 10[151] of the ECHR are constructed in identical form – they state the rights before delineating similar limitations for the respective right. In fact Article 12(2) has allowed for more grounds to limit the freedom of expression as compared to that for the right to respect of private life.[152] In short rather than affording the freedom of expression a preference above any other convention rights, section 12 merely provides for special provisions applicable when freedom of expression may be affected.[153]

The below provide the summary of the current position of privacy in England following the enforcement of the HRA 1998:

1. At the very least the view is unanimous that Article 8(1) of the ECHR does afford for individuals the right to privacy – the right to do or omit, as one

wishes, anything about his private life, to exercise and have the freedom of private activities or personal matters - against the intrusion or illegitimate interference by public authorities;

2. However, the issue remains as to whether the laws in England recognise such a right and that it may be enforced against any intrusion or interference affected by anyone other than public authorities. This issue whether the HRA 1998 has any horizontal effect purely relates to the rule of interpretation and the outcome depends on the readiness and willingness of the courts whether to apply the narrower scope or to adopt the more flexible approach;
3. Presumably it is accepted that the HRA 1998 does not create a new cause of action and it is accepted that the HRA 1998 only applies against the acts of public authorities, then a plaintiff will have to found an action for infringement of his Article 8(1) against the non public authority defendant on any existing principle. In that sense, the HRA 1998 has not brought home the convention rights completely; it does with regard the acts of public authorities but not otherwise; and
4. Section 12 may give the impression that the freedom of expression has to be given more preference to be given more preference over any other convention rights, including the right to privacy[154] as it reiterates the importance of observing the freedom of expression which otherwise is already being made part of the HRA 1998 and enforceable in domestic courts by virtue of section 1 read together with section 6. However, it has been suggested that section 12 'serves no sensible purpose'[155] and the courts so far has been exercising the balancing exercise without giving a 'more particular' regard to the same at the cost of preserving an individual's right to privacy.

(ii) Limitation to Article 8(1) Right

As with most of the convention rights, the Article 8(1) right is also subject to some restrictions, e.g., those as set out in Article 8(2) ECHR, and has to be balanced against the public interest. Such qualification thus classifies the right as qualified right.

However, the restriction to such right can only be done for as long as such restriction meets the followings:

1. the restriction must be prescribed by law;[156]
2. the restriction must be legitimate;[157]
3. the restriction must be necessary and proportionate;[158] and
4. the restriction is not discriminatory.[159]

No doubt domestic legislation, be it primary or subordinate, forms a sufficient basis to say that the restriction is prescribed by law. Home office guidelines and internal police guidelines, however, are unlikely to satisfy that requirement as it was so held in *Govell* v. *The United Kingdom*;[160] *Silver and Others* v. *The United Kingdom*;[161] and *Khan* v. *The United Kingdom*.[162] To similar effect, prison regulations regulating the interception of prisoners' correspondence which are unpublished were held to be in breach of Article 8 ECHR in *Petra* v. *Romania*.[163] To be legal not only must the restriction be prescribed by law, it is also essential that the law restricting the convention rights must be accessible and foreseeable.[164] That was reiterated in *Amman* v. *Switzerland*[165] where ECtHR held:

> ... that the phrase "in accordance with the law" implies conditions which go beyond the existence of a legal basis in domestic law and requires that the legal basis be "accessible" and "foreseeable" . ... According to the Court's established case-law, a rule is foreseeable if it is formulated with sufficient precision to enable any individual if need be with appropriate advice to regulate his conduct (see the Malone v. the United Kingdom judgment of 2 August 1984, Series A no. 82, pp. 31-32, § 66). [166]

And, while citing with approval the judgment in *Kopp* v. *Switzerland*,[167] it went on to say:

> ... tapping and other forms of interception of telephone conversations constitute a serious interference with private life and correspondence and must accordingly be based on law which is particularly precise. It is essential to have clear, detailed rules on the subject, especially as the technology available for use is continually becoming more sophisticated...[168]

The requirement of precision however does not require that the provision of the legislation prescribing the restriction must be detailed and of exact nature. Although the requirement will not be satisfied by a restriction which is too general – such as prohibition against conduct *contra bonos mores*, i.e., behaviour which was wrong rather than right in the judgment of the majority of contemporary fellow citizens, because such definition did not give sufficiently clear guidance, and was too imprecise and unpredictable;[169] such a requirement is satisfied if the concept causing such a restriction is sufficiently clarified, even if such a clarification is being provided by way of the court's interpretation on the matter and with foreseeable legal consequence .[170] Neither must such a requirement be of such precision so as to enable an individual to foresee when the restriction is going to be exercised so that he can adapt his conduct accordingly.[171]

The second condition requires that the restriction to the convention right must be legitimate. For restriction to the right as guaranteed in Article 8(1) to be legitimate, the restriction must be for the purpose to protect those interests provided for in Article 8(2), i.e., the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

In addition to that, the restriction must be 'necessary in a democratic society'. Similar 'wording' is found in article 10(2) which the ECtHR had interpreted to the following effect:

> This means, among other things, that every 'formality', 'condition', 'restriction', or 'penalty' imposed in this sphere must be proportionate to the legitimate aim pursued.[172]

Applying the same within the context of Article 8, the restriction is seen to be necessary if any such interference with the right to privacy is needed to accomplish a legitimate objective and at the same time, the manner and extent of such interference is proportionate to the objective such interference aims to achieve. The issue of proportionality was also considered in *Robert A McGowan* v. *Scottish Water*.[173] Here the Employment Appeal Tribunal found that the covert surveillance of the

appellant's home, unbeknown to him, 'which tracks all people coming and going from it, quite apart from persisting with it over a period of bereavement, raises at least a strong presumption that the right to have one's private life respected is being invaded...'[174] Nevertheless the majority found that as the objective the surveillance aimed to achieve was not disproportionate, thus held that the Article 8 right has not been invaded. It is interesting to note that here the proportionality has been associated with justifiability as the majority decided that it was proportionate for they found that the employer was bound to carry out the surveillance to protect the assets of the company which thus justified the surveillance;[175] whereas the minority member 'was of the view that the surveillance operation was not justified against the background of the Convention and was accordingly *disproportionate*.'[176]

As for the requirement that the limitation must not be discriminatory, it is interesting to note that Article 14 provides for prohibition against discrimination but does not impart the requirement of equality treatment.[177] It also explicates that the provision is applicable with regard to such discriminatory treatment which 'interferes' with the 'rights and freedoms set forth' in the ECHR.[178] However, the ECtHR has allowed a claim based on discrimination alone;[179] and there have been occasions when the ECtHR refused to rule whether there is any infringement of Article 14 if it has been determined that another provisions of ECHR has been breached.[180] It is not within the scope of the thesis to discuss in details the circumstances where differential treatment does not violate Article 14 of the ECHR; it suffices to say that case law indicates that the ECtHR approach in the matter is two-fold: namely by requesting the state to put forward the argument showing the legitimate aim it strives to achieve that necessitates the different treatment, then judging whether it is a reasonable justification for the differences of treatment.[181]

In addition to those grounds that may justify the restriction of an individual's right to privacy, Article 17 of the ECHR is also relevant. Article 17 ECHR provides that '[n]othing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction on any of the rights and freedoms set forth herein or at their limitation to a greater

extent than is provided for in the Convention.' That provision provides for another justification to limit any of the convention rights, including the right to privacy in the sense that the right to privacy may not be exercised in such a manner that may infringe the right or freedom of others.

2.2.5 Freedom of Information Act 2000

The Freedom of Information Act was passed on 30 November 2000.[182] This legislation does not introduce a totally new concept of access to data as the same right has been provided expressly by section 7 of the DPA 1998 discussed earlier. Despite the title, the Act adopted the mechanism to ensure that any request by a data subject for access to his personal data held by any public authorities is to continue in pursuance to the provisions of the DPA 1998.[183] The Act does, however, expand the range of data held by public authorities to which the right of access under the DPA 1998 applies. As elaborated earlier in the discussion of the DPA 1998, the DPA 1998 covers both automatic processing of data[184] and some manual processing – if the data is either stored in a 'structured' form [185] or made part of 'an accessible record'.[186] By virtue of the Freedom of Information 2000, however, the scope of the DPA 1998 has been broadened so as to include all information held by a public authority and accordingly the earlier discussion pertaining some relevant provisions of DPA that afford protection to individual's privacy is made equally available by the Freedom of Information Act only in wider scope of data – as section 68(2) of the Act effected the insertion of section 1(1)(e) to the DPA 1998 for the definition of data so as to include '...recorded information held by a public authority which does fall within the existing definitions of 'data' within any of paragraphs 1(1)(a) to 1(1)(d) of the 1998 Act.'[187] However, as indicated earlier, such wide scope as a result of the broader definition of data is only made available regarding some of the rights duly afforded by DPA 1998. Section 70(1) of the Act affects the amendment to the DPA1998 as the new section 33A(1) and explicates that such broad definition of data is only to be subjected to the data subject's right to access (section 7 of the DPA 1998); the fourth data principle requiring information to be accurate and where necessary up-to-date; the right to rectify, block, erase or destroy inaccurate data (section 14 of the DPA 1998); the sixth data principle to the extent that this requires data controllers to

comply with data subjects' rights to access or to rectify, block, erase or destroy inaccurate data; and the right to compensation for damage arising as a result of a breach of a data subject's right of access to data or of the fourth data protection principle. There are some exemptions to the right to access as provided in sections 27-39 DPA 1998 – discussed above.[188]

If the access to data, however, is being requested by a third party, such request will be governed by the provisions of the Act. However, it shall be noted that such access will be very restricted as section 40(2) provides that such third party request is 'exempt from disclosure' if either one of the conditions as set out in section 40(3) and (4) is satisfied. By virtue of section 40(3), disclosure is exempted if such disclosure would contravene any of the data protection principles or the right provided under section 10 of the DPA 1998 in case of data falling within section 1(1)(a)(b)(c) or (d). Even if it is proven that the disclosure would not contravene any of the data protection principles or the right guaranteed under section 10 of the DPA 1998, the public authority may refuse to provide access to such third party if the relevant information is exempt from the data subject's right of access under section 7(1)(c) of the DPA 1998.

That being so, in relation to the notion of privacy, the legislation does both contribute and reduce the data subject's right. It does contribute towards affording protection to individuals' privacy as it broadens the scope of data upon which the data-subject can access but it also reduces the scope as it allows the access to data by a third party.[189]

2.2.6 Privacy and Electronic Communications (EC Directive) Regulations 2003

The Privacy and Electronic Communications (EC Directive) Regulations 2003 (PECR) came into force on 11 December 2003.[190] PECR revokes the Telecommunications (Data Protection and Privacy) Regulations 1999 and the Telecommunications (Data Protection and Privacy) (Amendment) Regulations 2000.[191] It regulates marketing by electronic means[192] which includes the area such as

the automated calling system;[193] the telephone marketing;[194] the fax marketing;[195] and electronic mail (which includes the use of short message service)[196] marketing.[197]

Besides requiring that some security measures have to be adopted by the electronic communication services providers,[198] the PECR explicates some qualified rights which are of concern to the notion of privacy. Regulation 6(1) for example, requires the confidentiality of communication; regulation 7 restricts the processing of the data by requiring that the data are either erased or modified so that they cease to constitute personal data once they are no longer required for the purpose of transmission of the communication; regulation 8 requires the data subject to be given the information regarding the types of traffic data which are to be processed and the duration of such processing; regulation 9 provides that the users may request for non-itemised bills which the electronic communication services provider must be able to provide; similarly regulations 10 and 11 require that, where a facility enabling the presentation of calling line identification is available, the electronic communication services provider shall provide, within the respective context, to the users and the subscribers to the service the facility to prevent the calling line identification of outgoing calls and to the called subscriber the facility to prevent the calling line identification of incoming calls and the means to reject incoming calls where the presentation of the calling line identification has been prevented by the calling user or subscriber. The PECR also regulates some other aspects including confidentiality of communications, traffic data, location data, directories of subscribers, etc., as explained in the PECR Guidance: Part 2 issued by Information Commissioner's office.[199]

Overall, the PECR does afford individuals with protection to an aspect of privacy, namely the right of individuals to refuse unsolicited marketing materials which is an individual's right to determine what to omit about his private life.

From the above analysis it can be concluded that the evaluation of the privacy related legislation in the United Kingdom shows that apart to legislation which the United

Kingdom have to adopt locally by virtue of its membership to the EU, the United Kingdom Parliament has refused to enact privacy legislation.[200]

2.3 The Law in Malaysia

The sources of law of Malaysia can be both written and unwritten.[201] The written sources include the Federal Constitution, States Constitutions, Federal and States Legislation, and Subsidiary Legislation – commonly known as Regulations. As for the unwritten sources of law, Malaysian law is very much influenced by the English common law principles, rules of equity[202] and the local customs. The legal system in Malaysia is theoretically straightforward. The provisions of the Federal Constitution, being the supreme law of the land, will prevail over any other written law that is inconsistent with the Federal Constitution. To similar effect, any subsidiary legislation shall not contravene its Parent Act, i.e. the legislation that allows for the creation of such subsidiary legislation. In any case, written laws prevail over unwritten law that is to say that if any legal principles introduced by the common law of England are contrary to the provision of any written law enforced in Malaysia, then the former will be disregarded.[203]

2.3.1 Constitutional Right to Life and Personal Liberty

Article 5 of the Federal Constitution provides that 'no person shall be deprived of his life and personal liberty save in accordance with law.'[204] The analysis of cases law reveals that even though this provision was promulgated more than half a century after Warren and Brandeis wrote their paper, it has been interpreted in the way Warren and Brandeis talked about the law 'in very early times' that is when '...the law gave a remedy only for physical interference with life...the "right to life" served only to protect the subject from battery in its various forms; liberty mean freedom from actual restraint;...' Thus, for example, the most common instances upon which reliance on Article 5 of the Federal Constitution has been sought for are related to claims against detention and the related right to apply for writ of habeas corpus,[205] while some other relates to the unsuccessful attempts that challenged the validity of death penalty[206] or mandatory life imprisonment[207] as the violation of Article 5; which

shows that reliance on the Article 5 right is very much sought for cases involving one's physical right to 'life and personal liberty'.

There are two related but separable limbs in article 5(1) of the Federal Constitution. One that relates to the right to life and the other does to personal liberty. The former is not of particular interest to this thesis and for that it suffices to state that the courts in Malaysia prefer to limit the narrow scope of its application to protect literally individuals' right to live.[208] That is still seen as the prevailing view[209] although there were instances where some judges have expressed its readiness to accept the more flexible interpretation of the term 'life' so as to incorporate 'all those facets that are an integral part of life itself and those matters which go to form the quality of life' and not limited to mere existence.[210]

The second limb is of our particular interest in relation to privacy. Until very recently the right to personal liberty has not been given a broad interpretation either. In the 1970s, the tendency was to give a restrictive interpretation to the term 'personal liberty'. For example in *Public Prosecutor* v. *Tengku Mahmood Iskandar & Anor*[211] Raja Azlan Shah J (as he then was) made the following remarks: '..."No person shall be deprived of his life, or personal liberty save in accordance with law." That fundamental right implies that no person is punishable or can be lawfully made to suffer in body except for a distinct breach of law proved in a court of law.'[212] While the Federal Court went further holding that:

> Article 5(1) speaks of personal liberty, not of liberty simpliciter... It is well-settled that the meaning of words used in any portion of a statute - and the same principle applies to a constitution - depends on the context in which they are placed, that words used in an Act take their colour from the context in which they appear and that they may be given a wider or more restricted meaning than they ordinarily bear if the context requires it. In the light of this principle, in construing "personal liberty" in art. 5(1) one must look at the other clauses of the article, and doing so we are convinced that the article only guarantees a person, citizen or otherwise, except an enemy alien, freedom from being "unlawfully detained"; the right, if he is arrested, to be informed as soon as may be of the grounds of his arrest and to consult and

> be defended by his own lawyer; the right to be released without undue delay and in any case within 24 hours to be produced before a magistrate; and the right not to be further detained in custody without the magistrate's authority. It will be observed that these are all rights relating to the person or body of the individual, and do not, in our judgment, include the right to travel overseas and to a passport.[213]

Such an approach, however, has gradually been 'relaxed'. Although these matters are yet to be seen as settled, the right to personal liberty has been interpreted so as to include the right to livelihood;[214] the right of transsexuals to have their (new) gender officially registered;[215] and an attempt was also made to include within its context the right to have interfaith marriage.[216]

Whether or not Article 5(1) of the Federal Constitution may be used as the general umbrella that provides the protection for privacy is an issue that has yet to be settled. The opportunity to analyse the matter had been brought to the superior courts in Malaysia several times. In *Re Kah Wai Video (Ipoh) Sdn Bhd*,[217] Edgar Joseph Jr. was invited to deal with the issue of right to privacy in Malaysia. However, his lordship abstained from giving any opinion as to the existence of the right to privacy. In *Public Prosecutor* v. *Haji Kassim*,[218] Ong CJ who delivered the opinion of the then Federal Court stated that:

> ..... but having subsequently referred to certain American text-books on evidence, particularly on the subject of invasion of privacy, felt (if we may so put it) some uneasiness about infringement or erosion of fundamental liberties, as declared in article 5(1) of the Constitution, that "no person shall be deprived of his life or personal liberty save in accordance with law". This was what, we think, prompted the first question.

By far, that was the closest manner in which the provision of Article 5(1) of the Federal Constitution has been 'linked' with privacy. Unfortunately there is nothing in the opinion of the then Federal Court that indicates its approval or disapproval upon the matter. Neither was there anything to confirm that was the actual reason that has

prompted the first question. Thus, if anything, such pronouncement has value no more than a mere obiter dictum.

Despite that, the plain reading of the provision implies that as long as what one does is legal; he has the right to do whatever he wishes free from any interference of others, it is not liberty simpliciter but it is personal liberty.[219] Consequently, the wordings of the article may be construed that this provision is meant to include the safeguard of individuals' right to privacy as it is so argued in this thesis. Although of no binding effect, the support for such proposition can be seen in *Pavesich* v. *New England Life Insurance Co.* where it is stated that:

> Liberty includes the right to live as one will, so long as that will not interfere with the rights of another or of the public. One may desire to live a life of seclusion; another may desire to live a life of publicity; still another may wish to live a life of privacy as to certain matters and of publicity as to others. ..... The right of one to exhibit himself to the public at all proper times, in all proper manner is embraced within the right of personal liberty. The right to withdraw from the public gaze at such times a person may see fit, when his presence in public is not demanded by any rule of law is also embraces within the right of personal liberty. Publicity in one instance and privacy in the other is each guaranteed. If *personal liberty embraces the right of publicity, it no less embraces the correlative right of privacy.*[220]

Until recently reference to privacy as a right has been taken for granted and had not been given due consideration.[221] In *Ultra Dimension Sdn Bhd* v. *Kook Wei Kuan*[222] the High Court pronounced that on the issue of privacy the position in Malaysia is the same as that in England (post Kaye pre HRA 1998). Such pronouncement, however, was made without giving proper analysis and examination of the local law; as such is unsubstantiated. Not only the judge failed to evaluate the relevant local law in presence of which the English common law does not have any room for application in Malaysia; she also referred to and relied on the principle in *Kaye* which does not necessarily represent the approach adopted in England at the material time. Since as of today this is the only Malaysian case where privacy has been

discussed along with other causes of action, it warrants its discussion in greater details as follow.

The issue brought before the court in *Ultra Dimension* was whether or not the picture of the respondent that was taken by the appellant's staff at an open area amounts to invasion of privacy and breach of confidence. The appellant argued, among others, that privacy right pleaded by the respondent is not recognised under Malaysian laws. The learned judge was persuaded by such an argument and allowed the appeal reversing the decision of the Sessions Court. As regards the issue of invasion of privacy, the learned Faiza Tamby Chik J first referred to section 3 of the Civil Law Act 1956 that says:

> (1) Save so far as other provisions had been made or may hereafter be made by any written law in force in Malaysia, the Court shall: (a) in West Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on the 7th of April 1956.

Despite the clear provision of section 3(1) of the Civil Law Act 1956 the judge went on straight to the Halsbury's Laws of England, the 4th edition where at page 631, paragraph 1383 it says: '1383. Infringement of Privacy. A person does not commit a tort merely because he unreasonably invades personal privacy of another; a recognized existing tort may serve to protect privacy in particular circumstances.....' On that basis the judge concluded that: '....invasion of privacy will only give rise to a cause of action provided that the facts fall within the boundaries of an existing and recognized tort. For example, defamation, infringement of copyright and nuisance.' Then the learned judge proceeded by testing the facts of the case against these three established causes of actions and unsurprisingly found that none has been breached as the appellant did nothing which might lower the reputation of the respondent which otherwise would give rise to defamation;[223] the respondent did not own the copyright upon the picture so as to give rise to its copyright infringement; and the appellant did not unlawfully interfere with the respondent's use or enjoyment of the land or some right over, or in connection with it so as to cause nuisance. The learned judge went on saying:

I think the publication of the said photograph in the said advertisement did not give the respondent a cause of action as the facts of the case does not fall within the boundaries of any recognised and existing tort. The case of *Kaye* v. *Robertson* [1991] FSR 62 referred to in the book of *"Torts in the Nineties - Nicholas J Mullany"* fortifies the view that privacy rights is not recognized under English law and therefore, there is no cause of action for invasion of privacy rights..... Based on the above authorities, I am of the view that it is clear that English Common Law does not recognise privacy rights and it therefore follows that invasion of privacy rights does not give rise to cause of action. As English Common Law is applicable in Malaysia pursuant to s. 3 of the Civil Law Act 1956, privacy rights which is not recognised under English Law is accordingly not recognised under Malaysian law. Thus, the respondent does not have the right to institute an action against the appellant for invasion of privacy rights.[224]

For the reason explained in Chapter III, 3.3.1 (ii) this thesis does not object to the outcome of the case. However, with the highest respect it is submitted that the ratio applied to the judgment is flawed. That is because the judge had conveniently disregarded the following facts and matters of procedure:

1. Unlike the United Kingdom, Malaysia has written constitution that safeguards the fundamental rights and freedom of its subjects;
2. Reference to the common law is only allowed when there is a lacuna in the local law;
3. Even if there was any lacuna on the matter, only those common law principles decided prior to certain dates are binding;
4. In any case the judge has made reference to the law in England that not only does not have any binding effects in Malaysia, but also it does not represent the current approach adopted by the courts in England at the time the reference was made.

The last three grounds will be discussed at 2.3.5 at the later part of this Chapter while this part deals with the evaluation of Article 5(1) of the Federal Constitution.

In a country where a written constitution is made the supreme law of the land such as that in Malaysia, the constitution shall always be of paramount consideration. That is expressly provided for in the Federal Constitution of Malaysia[225] and had also been affirmed in several judgments of the Malaysian courts.[226] Only when the constitution is silent on a matter then the subsequent sources of law are to be considered following the sequence of hierarchy.[227] Unfortunately this route was not adopted in *Ultra Dimension*. After briefly stating the facts of the case, the judge went on straight to section 3(1) of the Civil Law Act to justify her next move: to apply the common law principle on the matter.[228] It was very awkward how the judge mainly, if not solely, relied on references quoted in a chapter of a text book that includes the review of the English law on the matter. First of all, text books do not have any legal authority whatsoever; and although the judges are not prevented from using them for reference or to guide them on the matter – that exercise should be done in a thoughtful manner to ensure such reliance is not exerted at the expense of and by overlooking any of the binding sources of laws, not especially when the book was published several years before reference is sought and thus does not include more recent decisions on the topic. Most notably this article to which the judge has made reference was written with one legal system in mind, that of English common law system. Malaysian law was obviously not considered or made part of the analysis in that article. The fact that the two legal systems respect the individuals' fundamental rights in a rather distinctive way (at least at the material time) was not considered either. Following the hierarchy of the sources of law, in Malaysia a judge in formulating his judgment shall first examine if there exists any written legislation in Malaysia. That is mandatory before any reference to English cases can be made. In this regard, the judgment of Gopal Sri Ram JCA may be used as 'words of wisdom' that:

> [i]t is wholly unnecessary for our Courts to look to the Courts of England for any inspiration for the development of our jurisprudence on the subject under consideration. That is not to say that we may not derive useful assistance from their decisions. But we have a dynamic written Constitution and our primary duty is to resolve issues of public law by having resort to its provisions.'[229]

In *Ultra Dimension*, the judge's attention was brought to Article 5(1) of the Federal Constitution, the supreme law of the land. To that, however, the learned judge only made brief remark while again referring to the chapter in a book edited by Mullany, holding that:

> "Privacy Rights" which is the right to be left alone and live free from all intrusions by others as defined in the above extract is different from "Life" and "Personal Liberty" which can be interpreted to mean enjoyment of life and freedom of an individual to move and be engaged in any activities (which does not contravene the laws) without any hinderance or obstacles as define in art. 5 of the Federal Constitution. Therefore "privacy rights" is not included and not provided under art. 5(1) of the Federal Constitution.[230] (sic.)

Except for the two sentences as cited above, Article 5(1) has not been discussed nor analysed within the judgment. No local precedent has been referred to examine the scope of the fundamental right guaranteed by Article 5(1) of the Federal Constitution. Neither analysis has been made thereto to the closest UK equivalent, the HRA 1998.

There are a few instances where the issue could have been dealt with by the courts in Malaysia including this one. However, no effort has been taken to elaborate the point and examine the substance of the matter and consider the ambit of protection of individuals' right to personal liberty as per Article 5(1) of the Federal Constitution. In the absence of any ambiguity, the literal interpretation shall be adopted and the article is to be construed accordingly. With all due respect, the judge has expressed that the term 'personal liberty' can be interpreted as the freedom of an individual to move and be engaged in any activities that do not contravene the law. It is hard to think how an individual can be enabled to move and be engaged in any 'personal' activities without sanctioning upon such an individual the right to be free from unwelcome intrusions into his private life that may be affected by others. An individual who knows that he is being subjected to surveillance would behave himself in a manner that he thinks is acceptable to his fellow citizens even at the cost of doing things not in accordance to his liking. One may also fear to dedicate himself

and time for the full enjoyment of his intimate activities while aware that his solitude may at any time be intruded by others. The thought of possible surveillance and privacy intrusion will affect an individual's freewill and may motivate him to be at constant vigilant.

Literally, 'liberty' is the synonym of 'freedom' and 'personal' is the synonym of 'private' – as such these are synonymous: personal liberty; personal freedom; private (life) liberty; or private (life) freedom. Although the term 'freedom of private life' is not the express term being used in Article 5(1) of the Federal Constitution, the context within which the safeguard for personal liberty being set out unmistakably is meant to provide the protection within the scope similar to that which the freedom of private life aims to safeguard.

If analogy is to be drawn, Article 8(1) of the ECHR that becomes enforceable by virtue of the HRA 1998 will be the United Kingdom counterpart with the closest match to Article 5(1) of the Federal Constitution except that the former requires 'respect' while the later provides for 'guarantee'. It is settled that Article 8(1) of the ECHR provides for the protection of privacy. That view has been expressed by the ECtHR.[231] Even locally in the United Kingdom the view is unanimous that Article 8(1) indeed confers on individuals the right to privacy.[232] What remains an issue is the extent of the convention rights' local applicability in view of the existence of section 6 of the HRA 1998 as it is argued that the applicability of causes of actions under the HRA 1998 is limited to those against public authority as expressly provided in section 6 therein. However, unlike the HRA 1998, there is nothing in the Federal Constitution that is parallel to the section 6 restriction. If, except for the limitation imposed in section 6 of the HRA 1998, the House of Lords in the United Kingdom is ready, willing and has expressed the view that the right to privacy is enshrined in Article 8(1) ECHR and is enforceable in the United Kingdom, that is on the basis that the subject are given the right to have their private life being respected; by way of analogy the right to privacy shall also be recognised in Malaysia as its Federal Constitution guarantees the personal liberty of its subjects.[233]

Having argued that the right to privacy falls squarely within the ambit of Article 5(1), difficulty may arise for the absence of clear guideline that can be used to determine which things are considered personal and which are not. This issue is common to many jurisdictions dealing with the issue of privacy. This thesis analyses this in more details and also offers the solution for the problem as elaborated in Chapter III, 3.3.1.

2.3.2 Constitutional Right to Property

Article 13(1) of the Malaysian Federal Constitution reads: '[n]o person shall be deprived of property save in accordance with law.' Article 13 has mainly been invoked in cases involving issues of compulsory acquisition of property in Malaysia.[234] Nevertheless the plain reading of the article clearly provides for the right to property.[235] It may thus be argued that this entitles the owner of property to exclude others from his property, thus ensuring such a person's exclusive freedom on his property – and in a way ensure the private sphere thereupon. In order to see if this provision may be invoked to protect certain aspect of privacy the examination of what the term 'property' means becomes imperative.

The term 'property' is not defined anywhere in the Federal Constitution. Neither is it defined in the Interpretation Acts 1948 and 1967 of Malaysia. Some legislation in Malaysia contains a provision offering the definition of 'property';[236] however, none actually defines what property is. They merely state that the term 'property' shall include movable and immovable property, etc. The Oxford Concise Dictionary provides that 'property' means a thing or things belonging to someone. The courts in Malaysia had in several occasions considered the matter.[237] In *Selangor Pilot Association (1946)* v. *Government of Malaysia & Anor*[238] Suffian LP was of the opinion that since the word 'property' is not defined in the constitution, there is no good reason to restrict its meaning. His lordship had adopted the definition given by Ghulam Hassan J in *Dwarkadas, Shrivinas* v. *The Sholapur Spinning & Weaving Co Ltd and Others*[239] to the effect that the term 'property' must be construed in the widest sense (and its meaning shall not be restricted) as connoting a bundle of rights exercisable by the owner in respect thereof and embracing within its purview both corporeal and incorporeal rights.

Having said that the courts in Malaysia prefer to construe the term 'property' in its widest sense; it has yet to be confirmed if Article 13(1) does provide for the protection of privacy. In *Re Kah Wai Video (Ipoh) Sdn Bhd*[240] it was argued that the search and seizure in this case violated Article 13. Although it was held that such seizure and search are not unconstitutional as they were only temporary in nature and necessary for the limited purpose of investigation – the Court had quoted with approval a passage of Denning M.R's judgment in *Ghani v Jones*[241] which states: '... We have to consider, on the one hand, the freedom of the individual. His privacy and his possessions are not to be invaded except for the most compelling reasons. On the other hand, we have to consider the interest of society at large in finding out wrongdoers and repressing crime.'[242]

It is interesting to note that in this case, reference was made to the case *Sharma & Ors* v. *Satish Chandra*,[243] where similar point was taken based on the corresponding Article 19 of the Indian Constitution and it was held, *inter alia*:

> A power of search and seizure is ... an overriding power of the State for the protection of social security and that power is necessarily regulated by law. When the Constitution makers have thought fit not to subject such regulation to constitutional limitations by recognition of *the fundamental right to privacy* ... there is no justification for importing into it, a totally different fundamental right by some process of strained construction. (Emphasis added)

Unfortunately, despite reference made to this case, Edgar Joseph Jr. J. abstained from giving any opinion as to whether Article 13(1) provides protection to the right to privacy. However, it is submitted that the very words used in Article 13(1) does guarantee, save in accordance with law, that an individual has the exclusive right over his property and he has all the right to exclude any unlawful act of intrusion to his property and thus guaranteeing him with privacy over and while on his property. Further support for that can be inferred from the judgment of Callow J in *PP* v. *Lee Sin Long*[244] where his lordship held that '[t]he privacy of a person in his home must be respected, and cannot be disturbed unless first shown to proper authority that

reasonable cause for interference is warranted.' Hence, one's fundamental right to property warranted upon him a certain degree of the right to privacy.

The above principle clearly dispels physical interference of others that will amount to infringement of the right to property. However, it is yet to be tested if this right entitles such an owner to stop others from prying or using any devices or means to eavesdrop or monitor activities on one's property without being physically present on that owner's property. The gap becomes obvious when privacy of data is at stake. This illustrates the point. Supposedly a love letter that my husband wrote to me few years ago happened to go to a stranger's hand. On the basis that I have the constitutional right of property I have the right to prevent the publication of the letter because the letter is mine. I may even demand for the same to be returned to me. The same argument will be applicable if instead of the love letter the stranger has acquired a picture of me taken by my husband on our honeymoon. In all these instances the constitutional right of property provides the protection to the same extent as the right to privacy will. Now consider this: supposedly my neighbour, from the convenience of his house, uses a special x-ray device that belongs to him to see what my husband and I do in our house; or deploys a special amplifier to eavesdrop the conversation between my husband and I. It becomes apparent that while my neighbour has violated the privacy of both my husband's and mine, it is arguable that he has done nothing to violate our right to property for he has not deprived my husband and I from what we own. Even if he goes further by taping the activities that take place in my house or recording the conversation, no right to property has been violated. In all instances, the intrusion will arguably infringe one's right to privacy. However, unless the notion of the right to property is extended so as not to limit the right of enjoyment to such property merely against physical interference but any interference, either physical or otherwise to such right, then only the right to property offers, in conjunction with the ownership right, the safeguard to an individual to the same extent as the right to privacy. Although the supports for that more flexible interpretation exist,[245] the use of the term 'deprived' in Article 13(1) may pose a strong argument against such a notion.

Even if that more flexible approach is to be accepted, while such definition may cover the non physical intrusion against what is owned or construed to be owned by an individual; that does not guarantee similar protection will be available with regard to private information shared with a party whose presence on the complainant's property was legal. This is again the lacuna that can be perfectly filled by the notion of privacy. Thus, for example, while the right to privacy may protect this, the property right will not be applicable to allow an individual to prevent a publication of an article which describes him or any aspect of his private life that a journalist has compiled from and which represents the opinions expressed by such an individual's acquaintances. If any part of the statement is untrue and offensive, than such an individual may have the cause of action for libel. If there exists confidential relationship between such an individual and the source of the information, it is probable that he may prevent the publication on the basis of law of confidence. In the absence of any of these two, the right to privacy will still be applicable based on the principle and in the manner similar to that as expressed by Lord Eldon in *Wyatt* v. *Wilson* that prohibited the publication of what the physician might have written on what he saw or heard from King George III.

To conclude, despite the existence of the constitutional provisions in Malaysia that may afford the protection for privacy, the courts in Malaysia have not given adequate consideration on the matter. It is arguable that the infringement of the right to personal privacy is actionable in the court of law in Malaysia on the basis of one's right to personal liberty. When appropriate and to a lesser degree, an individual's fundamental right to property may also be of assistance. It shall be noted, however, that the latter covers a limited aspect of privacy; namely one that is tied with one's property and not beyond. For that reason it could not replace the notion of privacy completely and would not serve such purpose either because even if the scope of this right is to be extended so as to protect one's freedom against any interference either physical or otherwise, this provision would not provide the comprehensive scope that the right to privacy would. That however shall not be construed as suggesting that privacy could replace the property right. Although there is grey area where the scope of both rights may overlap on each other, each principle has its own purpose to be

served and while the former serves to protect the private life of an individual without the limitation of the idea of ownership, the latter on the other hand is tied with the notion of ownership regardless the privacy of the sphere or otherwise.

2.3.3 Limitation to the Constitutional Rights

Part II of the Federal Constitution records the fundamental rights it seeks to safeguard. This part includes several fundamental rights as provided in Articles 5 to 13, out of which, except for Article 6(1) that prohibits slavery, Article 7 that provides for protection against retrospective criminal laws and repeated trials, and Article 9(1) that guarantees no citizen shall be banished or excluded from the Federation, all other rights are qualified. Thus, for examples, forced labour is prohibited but the Parliament may pass a law for compulsory service for national purpose;[246] all persons are deemed equal before the law and entitled to the equal protection of the law[247] however discrimination is allowed if it has been so provided within the Federal Constitution itself[248] and within the circumstances set out in Article 8(5) of the Federal Constitution; every citizen has the right to move freely throughout the Federation and to reside in any part thereof[249] however Article 9(3) describes the situation where such right may be restricted; Article 10(1) provides for the freedom of speech, assembly and associations, the subsequent Articles 10(2)(3) and (4) provides for restriction which practically almost diminish the significance of such freedom itself; the freedom of religion is recognised by Article 11(1)[250] however the right to propagate a religion may be and has been restricted to control and restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam[251] and further restriction on matters which may be deemed as contrary to any general law relating to public order, public health or morality;[252] and the right to education as so accorded in Article 12(1) prohibit discrimination in matters related thereto except for the different treatment allowed by article 12(2).

The detailed discussion of those is outside the scope of this thesis. They are cited to show that although those rights are qualified yet the qualifications are described and limited within the constitution itself; intriguingly both Article 5(1) and Article 13(1) rights are qualified by the qualification most general among all other fundamental

rights in Chapter II of the Federal Constitution as it simply says: 'save in accordance with law'.[253] This term allows for too wide a scope and unfortunately it has also been loosely construed. In *Public Prosecutor* v. *Tengku Mahmood Iskandar & Anor*[254] Raja Azlan Shah J (as he then was) in interpreting the expression 'save in accordance with law' made this remarks: '[t]hat fundamental right implies that no person is punishable or can be lawfully made to suffer in body except for a distinct breach of law proved in a court of law.'[255]

Then it becomes necessary to consider what is meant by 'law' in such expression. Literally the term law will include any legislation either passed by the Federal Parliament or the State Parliament or even those enacted prior to the Merdeka Day.[256] Consequently any of those may lawfully affect the restrictions to what otherwise guaranteed by Articles 5(1) and 13(1) as the fundamental rights. As a matter of fact Article 160 of the Federal Constitution defines the term 'law' in a much wider sense so as to include written law, the common law in so far as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law in the Federation or any part thereof. As such it is arguable that in the absence of any particular specification for the term 'law' as used in both Article 5(1) and Article 13(1), it shall be conferred with the meaning so provided within the Federal Constitution hence includes all those as set out in Article 160.

That has also been the approach adopted by the courts in Malaysia. When it is claimed that either Article 5(1) or 13(1) right has been infringed, the court will determine if such intrusion is authorised or has been affected in pursuance to the law. Thus, for example, it has been held that the provisions imposing mandatory death penalty does not infringe the right to life as such a penalty has been imposed by way of legislation.[257] Similarly an arrest made in pursuance to any legislation does not infringe an individual's right to personal liberty for as long as such an arrest complies with the procedures duly described under the legislation in pursuance to with the arrest has been affected.[258]

If an individual's fundamental rights have been infringed by any acts that have been authorised on any legal basis, a claimant has two options:

1. the less plausible yet usually much faster option is to 'attack' any part of procedural matter which has not been strictly followed by the authority;
2. the more plausible but slower option is to take a separate action to challenge the legality of the provision of the law that the complainant argued has interfered with his fundamental right and freedom.

In the second scenario the plaintiff has to submit the issue to the Federal Court requesting the Court to exercise its judicial review power on the matter. However in cases where the legality of the pertinent provision has been upheld in earlier precedents such as those relating to mandatory death penalty under the Dangerous Drugs Act 1952 or the Penal Code, the matter is usually seen as settled; leaving an individual with no prospect to win any challenge on the legality of what otherwise amounts to interference with either Article 5(1) right or Article 13(1) right. Rather he will have to 'attack' the failure to strictly comply with any requirements or procedure so described in the respective law.

To conclude, as with most of human rights provisions in any other legal systems, the rights are also being subjected to some restrictions in Malaysia. Article 8(1) of the ECHR may be limited for the ground set out in Article 8(2) of the ECHR, Article 5(1) of the Federal Constitution, similarly, is also subjected to a limitation. However it is also obvious that although Article 8(1) of the ECHR merely speaks about 'respect' to individual's private life while the Federal Constitution speaks about 'guarantee' of the personal liberty of its subjects, the scope for restriction of the right in Malaysia is far wider that that in the United Kingdom. 'Save in accordance with law' without spelling out the manner or goal that the legislative restriction may aim to achieve entails the legislature with unlimited power to describe the law without limitation as to how restrictive it may be and without proper justification as to why we need such a law that works as restriction to what otherwise is a fundamental right of the subjects.

2.3.4 Statutory Protection

No specific legislation has been enacted by the Malaysian Parliament to protect individuals' right to privacy – not as a general right or for some aspects of privacy. The term 'privacy' however has been used in several statutes and regulations, including: Births and Deaths Registration Act 1957 (Revised 1983); Child Act 2001; Law Reform (Marriage & Divorce) Act 1976; Penal Code (Revised 1997); Private Healthcare Facilities & Services Act 1998; and two regulations namely Communication and Multimedia (Licensing) Regulations 1999 and Private Hospitals Regulations 1973.

The use of the term 'privacy' in the context of right to data protection can be found in section 4 of the Births and Deaths Registration Act 1957; section 9 of the Communication and Multimedia (Licensing) Regulations 1999; section 46A of the Law Reform (Marriage and Divorce) Act 1976 and section 107 of the Private Healthcare Facilities and Services Act 1998. In each of these provisions, the word 'privacy' has been used in connection with confidentiality and security of individuals' information. The provisions require that the person maintaining the data has to assure that the data he keeps are well protected and safe.

In Private Hospitals Regulations 1973 (s. 10) and the Child Act 2001 (s. 12(2)) the word privacy has been used to connote the state in which one is secluded from public's monitor – thus physical privacy. In the former, the law has made it compulsory upon private hospitals that in each room individual bed screen facilities for privacy for patients shall be made available – that is to say – to allow the patients to exclude himself from the public's or others' monitor and observation.[259] That at least gives assurance that a patient in a private hospital will have the private sphere within which he can expect his privacy to be respected. The word privacy is also used in section 12(2) of the Child Act 2001 which requires that if Courts for Children is to be at the same building as other courts, it shall have different entrance and exit to allow the children to be brought to and from the court with privacy – that is – without being monitored and observed by public or others. This is meant to protect the identity of the child from being embarrassed or getting unwarranted publication.

Aside to that, the legislation does not provide any assistance for the expansion of the notion for privacy.

Section 509 of the Penal Code uses the word 'privacy' in a wider scope. It reads: 'whoever, intending to insult the modesty of any person, ... 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' The phrase 'intrudes upon the privacy of such person' as used in this provision connotes a broader aspect of an individual's private life. Such context does not limit the notion of privacy merely to the confidentiality of individuals' data, nor to a particular place designated for or owned by individuals. It implies that the offence is committed if the intrusion of privacy is committed with the intention of insulting the modesty of the victim – regardless the where being of such person. There are two points pertinent to the provision that worth noting. First, despite the generality of such provision, so far its application has been limited merely to the offences involving acts of physical nature. Fortunately the provision has been construed so as to include physical act of intruding one's privacy that does not necessarily involve any direct contact between the offender and the victims. Hence a person commits that offence by exposing his private part for other to see which would naturally cause embarrassment to the latter.[260] That regardless as to where and when such action takes place.[261] The provision has not been tested nor has any attempt that seeks reliance on the provision been made to see if the provision will apply with regard to any non-physical intrusion of privacy. Secondly, the provision only becomes available with a condition, that is, if the intrusion is done with the intention to insult the modesty. Otherwise, there is still no express statutory provision that recognises or confers protection over the right of privacy, covering its broad aspect, in Malaysia.

2.3.5 The Common Law in Malaysia

Until recently, the aspect of privacy has not been subject to judicial analysis. The first case where privacy has been given one of the major points of discussion is in the *Ultra Dimension* case.[262] This is also the only case in Malaysia where the court has taken the liberty to make reference on the matter to the English common law –

although not without flaws. As the learned judge was convinced that the English common law does not recognise the right to privacy as a cause of action she concluded that the same applies in Malaysia that because as her judgment indicates the English common law is applicable in Malaysia by virtue of section 3 of the Civil Law Act 1956.[263] Although it would be appropriate to rely on section 3 of the Civil Law Act 1956 to enable the reference made to the Law in England, the common law application is not automatic and not without qualification. Section 3 of the Civil Law Act 1956 makes it express that the common law of England is only applicable when the conditions expressed thereto are met. They can be summarized as follow:

1) only in the absence of any written law in Malaysia;[264]
2) (in East-Malaysia) only those cases decided before 7 April 1956 are binding;[265] and
3) subject always to the local customs.[266]

Of utmost concern, the learned judge failed to make proper analysis and pay due consideration to the written law, specifically Article 5(1) of the Federal Constitution to which her attention had been drawn. The learned judge's approach, to go straight away making reference to the common law of England, applying the same to Malaysia and quickly 'dismissed' the possibility of expanding the relevant local statutory provision, is not justified; especially since it is a matter of procedure and requirement that the common law of England is not applicable unless it has been confirmed that the local counterpart in a form of written law does not exist.

Be that as it may, the draftsmen of the Civil Law Act 1956 has purposely included the date up to which period, in the mind of the draftsmen and to which the Parliament concurred, it might have been necessary for the courts in Malaysia to refer to the judgment of the courts in England while Malaysia was developing one of its own. It is apparent that on the issue of privacy the learned judge has not made any reference except to the case of *Kaye* as cited and discussed in a chapter of Mullany's book. The principle in *Kaye*, by then, is neither binding in Malaysia (for having been decided after the date set out in the Civil Law Act 1956) nor represented the latest approach adopted by the court in England at the given time.[267] The proper application of the English precedents by virtue of the Civil Law Act 1956 will be in favour of giving the recognition for the right to privacy.[268] When interpreted and applied correctly,

section 3 of the Civil law Act 19567 will point to those precedents where privacy had been accorded legal protection on a case-by-case basis although without elaborate discussion whether or not such a right existed. If the decision such as that in *Wyatt*, *Harman* or *Morris* were properly referred, the approach as adopted by the judge would have brought her to the opposite end of the conclusion. More importantly, if at all the judge was to allowed to refer to the common law and apply its principle to the case before her, the strict application of section 3 of the Civil Law Act 1956 obliges her to adopt the finding in those precedents as opposed to that in *Kaye*.

Even if it is argued that the principle as applied in the more recent decisions of the courts in England is more preferred than the earlier ones, the approach as adopted by the judge is nevertheless criticisable. The judge made her decision on the 3rd of December 2001. By that time the courts in England has not strictly followed the *Kaye* and in some instances the case is conveniently left out of discussion.[269] Not especially in cases following the commencement of the HRA 1998. If the courts in England are ready, willing and have taken direction that turns away from that as in *Kaye* and would definitely not regard the decision in Kaye as of binding effect after the HRA 1998 came info force, it is dubious why the judge bound herself to such a decision while she should have taken the notice of the availability of the local statute, not a mere statute but the supreme law of the land with no equivalent in the United Kingdom at least when *Kaye* was decided; while a simple research on the subject matter would have indicated that those common law precedents which might be applied by virtue of the Civil Law Act 1956 (provided there exists no local statutory provision which is not the case here anyway) are in favour and do accord protection of individual's privacy; and the precedents more recent than *Kaye* are heading to the position in England before the Court of Appeal decided the case of *Kaye* (although this time with more clarity and certainty on the matter). These pose curiosity and yet the judge did not offer any reason for the 'departure' in her approach; inevitably the part of her judgment that discussed privacy shall be considered and treated as *per incurium*.

2.4 Why Privacy

Having analysed the existing legal framework that may be of relevancy to the notion of privacy, it is of concern that despite having some of its aspect scatteredly protected by many different principle of laws there is still a need to sanction express recognition to privacy.

As submitted in this thesis, privacy is in reality the freedom of private life a.k.a personal liberty in the most general sense. It may intrigue curious mind into thinking, if it is just a class of freedom why would we need to confer a special recognition for privacy simpliciter; why not recognise the right as part of individuals liberties? It has been suggested that in England 'the liberties of the subject are merely implications derived from two principles. The first principle is that we may say or do as we please, provided we do not transgress the substantive law, or infringe the legal rights of others. The second principle is that public authorities (including the Crown) may do only what they are authorised to do by some rule (including the royal prerogative) or by statute.'[270]

That makes it obvious that the idea of liberty or freedom simpliciter confers individuals the freedom to do or omit anything as one may wish for as long as it is not against the law but that also means others have similar rights. If the right to privacy is not recognised as a class of freedom, this will be the likely scenario: an individual may choose to do or omit anything including those which otherwise amount to privacy intrusion of other but since the law does not recognise the existence of this species of freedom, the right to privacy, the intruder can walk free and use 'freedom' as the shield for his conduct or omission.[271] The intruder could easily argue that after all 'under English law, there is in general nothing unlawful about a breach of privacy'[272] and that he does not need an express legal provision to found the basis of his action as much as one does not need the same to justify, for instance, the act of smoking.[273]

Take the case of *Kaye* as an example. The journalists who intruded to the hospital room where Kaye was admitted, took the picture without the latter's consent and

attempted to interview Kaye while he was recovering from the head injury – unmistakably had conducted himself towards Kaye in a manner unacceptable by any reasonable person in Kaye's situation. That was regarded and also admitted by the three able judges of the Court of Appeal who nevertheless failed to 'punish' the journalists for their very act of intruding into the privacy of Kaye. In the absence of the recognition for the right to privacy, the journalists could profusely argue that they had not done anything wrong; they had merely exercised their freedom to do what the law does not prohibit them from doing. Similar argument will also be available for the prison officer in Wainwright who touched Alan's genital when conducted strip-search upon the later; it could be argued that no wrong had been committed as he was authorised to conduct the strip-search and therefore unless there is a specific prohibition against such a conduct nothing would prohibit him from touching Alan's private part during the process of strip-searching him. The point is, when there is no specific law that awards upon individuals specific right, and in term of privacy the specific type of freedom, each and every individual may argue that, in the absence of any law that prohibits their actions or omissions, the general umbrella of freedom entails them with the right to do what they wish to do.[274] However, when the law recognises a specific right belongs to individuals, such a right creates the corresponding duty on others not to infringe such a right and freedom will not encompass the right to affect infringement of the same. That will limit what otherwise is too general a right within the concept of freedom. Notice that even the notion of freedom has a limitation – one may do what he pleases to do provided he does 'not transgress the substantive law, or *infringe the legal rights of others*'[275]

In addition to the above general observation, Sir Robert Meggarry V.C (as he then was) in *Malone* held that the English law does not recognise the right to telephonic privacy on the basis that one could not expect to have such a privacy as he is aware of the risk of a crossed line when telephone is used as the mode of communication.[276] While it is true that one has to accept the risk of a crossed line as it is still inevitable for such a problem to occur, that does not mean that one has to accept the risk of an eavesdropper. In *Ashburton* v. *Pape*[277] Swifen Eady J said that: '[t]he principle upon which the Court of Chancery has acted for many years has been to restrain the

publication of confidential information *improperly* or *surreptitiously obtained* or of information imparted in confidence which ought not be divulged.'[278] As a matter of fact, in *Francome* v. *Mirror Group Newpapers Ltd*,[279] the Court of Appeal did not follow Sir Robert Megarry V.C.'s approach in *Malone*. It was held that the eavesdropper was under a duty of confidentiality with regard to the telephone conversations and that the defendants, who knew how the tapes had been acquired, were under a similar obligation.[280]

Many aspects of privacy have been given legal protection as part of other existing legal principles. Informational privacy may be protected by the law of confidence, provided the essential elements of the latter are satisfied. Bodily attack, which violates physical integrity, is regulated by the criminal law. Philosophical, social and cultural choices of a person have strong links with freedom of religion, expression and education. The existence of those, however, should not be the ground to reject the notion for privacy. As it will be put forward in Chapters III and IV of the thesis, the so called established common law principles cannot provide for the comprehensive protection that the notion of privacy has to offer. Unlike those so called established common law principles, 'privacy gives everybody the freedom to establish an individual path in life and the potential to resist any infringement on this freedom of choice. It is totally irrelevant whether this way of life is predominant or backed by the majority of a nation or group to which the individual belongs. The autonomy of an individual can express itself in dress codes, tattoos, haircuts, piercings, earrings, or three-piece suits. But always, privacy is the common denominator: the right to express oneself. It even goes well beyond this, everybody has the freedom to create, change, express, or reject a religious, cultural, linguistic, and social identity.';[281] the aspects that not a single principle but the notion of privacy can comprehensively embrace.

It is the objective of this thesis to show that the right to privacy has its basis in the respective legislation in England and Malaysia. The thesis also aims to prove that despite the judiciary's attempts to afford what warranted privacy protection on the basis of any other legal principles, such as the law of confidence, the notion of

privacy offers the scope that no other existing legal principles, even when combined, could comprehensively provide. The case of *Kaye* and *Wainwright* are but some illustrations of that and while the whole thesis dedicated to prove this, the point is being reiterated that although the recognition of legal right to privacy has been long delayed, the protection shall be afforded as a matter of individuals' fundamental right, individuals' freedom of private life and the advance of technology has contributed to nothing but the paramount need to have the express legal recognition to such need.

2.5 Appraisal

Before we focus the analysis on the substance of privacy in the next chapter, it is prudent at this point to gather the finding of the analysis we have in this Chapter II. If we were to map the common law position on the issue of privacy, there are three stages where the position in England has significantly shifted.

The first will be the pre *Kaye* position where despite the absence of express pronouncement on the common law general right to privacy, the right was taken for granted as existed and judgments were made to preserve the sanctity of privacy and to prohibit its transgression. There are some instances where the claim for privacy has been rejected; but these are done on specific reason and case-by-case basis. This period should start from the time within the memory of humankind[282] until the Court of Appeal made its decision in *Kaye*.

The second is the post *Kaye* and pre HRA 1998 period that lasted for about a decade.[283] In *Kaye* the Court of Appeal pronounced that the English common law did not recognise the right to privacy. Although there were instances where the 'trend' was not followed,[284] the House of Lords' judgment in *Wainwright* put the issue to an end. During this period the alternative cause of action one might have was to resort to all possible avenues locally and when he had exhausted that he could bring the matter for the ECtHR to decide.

Fortunately in 1998 the United Kingdom Parliament passed the HRA 1998 which upon coming into force allowed individuals to ask the local courts to grant them remedies previously were only available from the ECtHR. 'Bringing home' the convention rights to the United Kingdom does not put privacy related issue to a rest. Although the post HRA 1998 period extinguishes the effect of *Kaye*, some issues remain unsettled. Among the issues may be conveniently summarised as follow:

1) the term 'privacy' is not used in the ECHR; that gives rise the issue of interpretation (although the courts are usually willing and ready to interpret Article 8(1) as affording right to privacy);
2) unlike the straight forward rights provided by the ECHR, the HRA 1998 poses the problem with applicability as it is argued that section 6 restricts the enforceability of the convention rights, within the scope of HRA, merely to actions brought by or against public authority;
3) when two competing rights collide, balancing privacy and freedom of expression has been required even under the ECHR regime. However the existence of section 12 of the HRA may give false impression as to the importance of the latter compared with the former. It is not clear if section 12 will serve any purpose beyond outlining the procedural matter; otherwise its presence adds nothing but further complication to the matter.

Prior to the enactment of the HRA 1998, one factor that distinguishes the position in Malaysia and that in England in matters related to individuals' fundamental rights was this: the fundamental rights of individuals are guaranteed in Malaysia by its very supreme law of the land, the Federal Constitution (and further rights are safeguarded by the States Constitutions for the subject of the respective states in Malaysia). In England, on the other hand, prior to October 2000 when the HRA 1998 first came into force, an individual had to analyse the precedents first to see if such a right has been given legal recognition by the local courts before he should initiate any legal action; unless if he had in mind the intention to pursue the matter up to the ECtHR. That was because there has been no code of human rights whatsoever in the United Kingdom.[285] Even that being the case, the role of equity allows the courts in England to provide remedies in situations where the common law has failed to provide. In any

case, the plaintiffs must have exhausted all the possible local avenues before they could raise the issues before the ECtHR. The hope arose when the government declared its intention to bring ECHR home.[286] Following the enactment of the HRA, despite the obiter dictum in *Wainwright*[287] the House of Lords has adopted a more flexible application of the right for the respect of private life in the more recent case of *Campbell*[288]

As for the Post HRA 1998 position, this factor distinguishes Malaysia from England: while England has the unsettled issue whether or not the right for respect of private life can be extended to intrusion or transgression by individual or private entity as opposed to a public authority, in Malaysia the Federal Constitution has stipulated the express guarantee of an individuals' personal liberty with no limitation of that nature.

Despite the above in both jurisdictions the right is not absolute. In the United Kingdom, at the very least the right is arguably restricted by those limitations expressed in Article 8(2) as well as Article 14 of the ECHR, while in Malaysia, the limitation is broader as it simply allows any restriction imposed by way of law, written or unwritten, substantial or procedural.

Besides the provisions of Articles 5(1) and 13(1) of the Federal Constitution of Malaysia and Article 8(1) of the ECHR that becomes applicable in the United Kingdom by virtue of the HRA 1998, there is no specific legislation that provides protection for one's right to privacy in both United Kingdom and Malaysia, albeit some legislation that may afford privacy protection for specific aspect and/or to a certain degree as elaborated in 2.2.3, 2.2.5 and 2.3.4 above.

However it is arguable that the right to privacy shall be recognised and intrusion to this right is actionable in the court of law in England on the basis of an individual's right to respect of his private life; and in Malaysia on the basis of one's right to personal liberty and in lesser degree, his fundamental right to property (except, of course, where the intrusion is legally sanctioned or warranted).

It follows that due to the presence of those provisions, the door for privacy exists but it is not quite opened yet. Problem of interpretation is the major factor in both legal systems. The hesitation of the courts to adopt a wider and more flexible interpretation on the matter is the other contributing factor to the slow 'growth' of the notion of privacy. At the time of writing this thesis it is not ascertainable yet if the notion will flourish in future or if the notion will evolve very slowly. One thing is definite, recognizing privacy as a right will become inevitable – not in the presence of Article 8(1) of the ECHR and Article 5(1) of the Federal Constitution in the respective jurisdiction. It is just a matter of time before the courts in the respective jurisdiction will find itself to be bound by a precedent that obliges them to express the recognition to privacy as a matter of right. This may sound like an overstatement now but the time will surely come where the failure to protect an individual's right to privacy may diminish the very value of life of such an individual. The want for private time will not necessarily be requested in order to evade justice or do something against the interest of the public. Every person is blessed with its own mind; accordingly the way one thinks will not be identical to that of his fellow humans. Each individual is entitled to think and do what he thinks is best for him (and equally to have the thought of others – which he should or would like to keep private), do what he wants to do without affecting the general good of the public in the manner he wishes. There are times we just want to do things about ourselves unobserved, to keep those things to ourselves. If we have to stay vigilant at all time, to be cautious about our conduct worrying that someone is watching and worrying of what others will think about us; we will not allow ourselves to develop fully, to allow our instinct and individuality to grow, to live as a free person with free wishes with no worry about what others will think about us. To let us grow in the environment where we need to 'watch' our conduct, every single movement we make and every single word we say will unconsciously create the unseen 'walls' and place ourselves in that invisible 'prison'. That surely will diminish the very value of life. And that is no longer hypothetical, not with the enormous advance of technology, how the technology may be deployed effortlessly to facilitate surveillance, to intrude upon the privacy of others to satisfy one's curiosity and desire to know about others, to learn that his fellow human has erred or simply to snoop. It will not be long before one

will not be able to have any reasonable expectation of privacy without the assistance of the law that has to put the limit to surveillance and prohibit unjustified intrusion to individuals' private life. The necessity for recognition is growing, the provision that will provide the basis for recognition does exist, if anything is still lacking, apart from the judiciary willingness to broaden the way it interprets the relevant provision, that relates to the substance of the notion itself, the definition of privacy, the clarity of its scope, its limitations and how one can tell, with certainty, if he has the cause of action for the intrusion of his privacy. Those are the subject for discussion in the next Chapter III.

Endnotes – Chapter II:

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[1] Warren, S., and Brandeis, L., 'The Right to Privacy' (1890) 4 Harvard Law Review 193 at p. 198, para 3.

[2] Thus, the right to privacy has been given express recognition either as part of constitution of some states such as Louisiana, Florida, California, Illinois, Montana, Alaska and Hawaii while in some other states, the legislation is not seen necessary for the court of such states had given the affirmation on the existence of such a right. Aside to that, it has been argued that the right could be implied and/or gathered from some provisions of the United States Constitution. This point is further discussed in Chapter I, 1.4.2 at pp 33-6.

[3] Roberson v. Rochester Folding Box (1902) 64 NE 442.

[4] This is very ironic as the person was the judge who insisted that the Constitution does not imply any right to privacy as declared in cases such as *Griswold* v. *Connecticut* (1965) 381 U.S. 479 and *Roe* v. *Wade* (1973) 410 U.S. 113. See Henderson, H., *Privacy in the Information Age* (Facts on File, USA, 1999), at. p. 52-53.

[5] For further discussion on the matter see Henderson, *Ibid*, at pp. 43-44.

[6] See Article 1 of the ECHR. The Preamble to the HRA 1998 states that among the purpose of the legislation is to give further effect to rights and freedoms guaranteed under the ECHR.

[7] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. Article 32 (1) of the Directive reads: 'Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive at the latest at the end of a period of three years from the date of its adoption.'

[8] Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications). Article 17(1) of the Directive reads: 'Before 31 October 2003 Member States shall bring into force the provisions necessary to comply with this Directive.'

[9] For relevant history, debates, arguments for and against the bills of rights, see Zander, M., *A Bill of Rights*, 4th Edition (Sweet & Maxwell, London, 1997), at pp. 1-138. Arguably the recent Gender Recognition Act 2004 which was also the result of the pressures expressed by ECtHR is a piece of legislation that affords the protection to an aspect of privacy, i.e., the right to respect of personal choice of one's gender. In *Christine Goodwin* v. *The United Kingdom* [2002] ECHR 588 *(Application no. 28957/95)* and *I.* v. *The United Kingdom* [2002] 2 FLR 518 *(Application no. 25680/94)* the ECtHR found that the United Kingdom had breached the Convention rights of these two transsexual people, under Articles 8 (right to respect for private life) and Articles 12 (right to

marry) (The cases are searchable at: http://cmiskp.echr.coe.int> (last accessed on 1 December 2005)). See also the House of Lords' judgment in *Bellinger* v. *Bellinger* [2003] UKHL 21. For relevant information on the matter, see: <http://www.dca.gov.uk/constitution/ transsex/intro.htm> (last accessed on 1 December 2005).

[10] To mention a few of the United States of America Supreme Court's decision on privacy include *Meyer* v. *Nebraska* (1923) 262 U.S. 390 where the Court struck down state law that required schools to teach only in English to children who had not passed the eighth grade; *Pierce* v. *Society of Sisters* (1925) 268 U.S. 510 where the Court struck down state law that required all children to attend public schools; in *Griswold* v. *Connecticut* (1965) 381 U.S. 479 the Court struck state law that prohibited distribution of contraceptives to married adults; in *Loving* v. *Virginia* (1967) 388 U.S. 1, the Lovings were an interracial couple who were lawfully married in the District of Columbia, then moved to Virginia, which not only did not recognize marriages between people of different races, but also provided criminal penalties for such marriages. In this case, the U.S. Supreme Court invalidated the Virginia state law; *Stanley* v. *Georgia* (1969) 394 U.S. 557 it was held that a person may possess obscene material inside his home, although that person can neither receive nor distribute obscene material; *Rowan* v. *USPO* (1970) 397 U.S. 728 the Court upheld federal statute that allowed a person to prohibit sexual advertisements from being sent to him through the mail; The U.S. Supreme Court in *Boddie* v. *Connecticut* (1971) 401 U.S. 371 struck down a Connecticut state law that required payment of court costs as a prerequisite for obtaining a divorce, a law that prevented indigent people from obtaining a divorce: and in *Eisenstadt* v. *Baird* (1972) 405 U.S. 438 it struck down state law that prohibited distribution of contraceptives to *un*married adults; *Wisconsin* v. *Yoder* (1972) 406 U.S. 205 the Court upheld right of Amish to withdraw their children from public school after the eighth grade and struck state law that required twelve years of attendance at school; *Roe.* v. *Wade* (1973) 410 U.S. 113 allowed abortions during first trimester; *Moore* v. *City of East Cleveland* (1977) 431 U.S. 494 the Court struck down a local zoning law that required all members of a single-family dwelling to be members of the same family (e.g., grandparents could *not* live with their grandchildren); again in *Carey* v. *Population Planning International* (1977) 431 U.S. 678 the Court struck down state law that prohibited sales of contraceptives to persons under 16 years of age; in *Zablocki* v. *Redhail* (1978) 434 U.S. 374 the Court struck a Wisconsin statute that required a resident of Wisconsin who was supporting minor children not in his custody to have permission of the court before marrying; *Frisby* v. *Schulz* (1988) 487 U.S. 474 it was held that a city may forbid picketing in front of home; *Cruzan* 497 U.S. 261 (1990) upheld that a person has right to refuse medical treatment; while *Vacco* v. *Quill* (1997) 117 S.Ct. 2293 reiterated that competent adults can refuse life-sustaining treatment. Further discussion on the matter is beyond the scope of this thesis, for some detail counts on the development of the doctrine in the USA see: Ernst, M.L. and Schwartz, A,U., *Privacy: The Right*

To Be Let Alone (Macgibbon and Kee Limited, London, 1968).

[11] [1979] Ch 344.

[12] See *Malone* at pp. 374G-375C. The issue whether or not there is a general right to privacy in England was never really argued in this case as the Counsel for the Plaintiff had readily 'accepted that the books assert that in English law there is no general right to privacy' See *Malone* at p. 357.

[13] In *O'Neill* v. *Department of Health And Social Services (No 2)*, [1986] NI 290, Carswell J, while acknowledging that '[o]ur law has until now developed no such specific tort' did propose that '...it may be arguable that a claim for damages in tort for breach of confidence should in some circumstances be recognised.' In *Bernstein of Leigh (Baron)* v. *Skyviews & General Ltd.* [1978] Q.B. 479 Griffiths J. opined at p. 488 'I am far from saying that the court would not regard such a monstrous invasion of his privacy as an actionable nuisance for which they would give relief. However, that question does not fall for decision in this case and will be decided if and when it arises.'

[14] [1991] FSR 62.

[15] *Ibid.*, Glidewell LJ at p. 66 where his lordship stated that: 'It is well-known that in English law there is no right to privacy, and accordingly there is no right of action for breach of a person's privacy'; Bingham L.J. at p. 70 (see infra, the main text for note 20 at p. 38), and Leggatt L.J at p. 71 where his lordship said: 'This right [privacy] has so long been disregarded here that it can be recognized now only by the legislature.' (insertion added).

[16] *per* Lord Hoffmann in *Wainwright* and the recent judgment of House of Lords in *Campbell*.

[17] *Ibid* at p. 66.

[18] *Ibid* at p. 70.

[19] It seems that the Court of Appeal in this case has taken as though it was settled that there is no right to privacy in English law, see Glidewell LJ in *Kaye* at p. 66. However that was an overstatement taking into account of the very few number of precedents to that effect prior to the decision in *Kaye*. See the discussion at pp. 80-3 and the respective notes 50-58.

[20] *per* Bingham LJ, *Ibid*, at p. 70. In the same case at p 71, Leggatt LJ expressed similar desire to this effect: '[w]e do not need a First Amendment to preserve the freedom of the press, but the abuse of that freedom can be assured only by the enforcement of a right to privacy. This right has so long been disregarded here that it can be recognized now only by the legislature...., it is hoped that the making good of this signal shortcoming in our law will not be long delayed.'

[21] Schedule 1 of the HRA read together with Article 8 of the ECHR. However, it's worth quoting that Lord Irvine of Lairg, PC, QC, did address the House of Lords, during the 2nd Reading of the Human Rights Bill that: 'You know that, regardless of incorporation, the judges are very likely to develop a common law right or privacy themselves" before his lordship continued to say: 'What I say is that any law of privacy will be a better law after incorporation, because the judges will have

to balance Article 10 and Article 8, giving Article 10 its due high value'. See: Lord Irvine of Lairg, PC, QC in *Human Rights, Constitutional Law and the Development of the English Legal System: Selected Essays* (Hart Publishing, Oxford, 2003), at p. 11.

[22] Douglas and Zeta Jones and ors v. Hello! [2001] QB 967.

[23] Lord Scott of Foscote expressed some reservation in his judgment, see in particular that at para 62.

[24] Although the pronouncement made therein would not of any binding effect for the action brought in *Wainwright* was based on the incidents that took place before the HRA 1998 came into force. Furthermore, in *Wainwright* Lord Scott of Foscote expressed some reservation in his judgment, see in particular that at para 62. See also Lord Scott of Foscote's judgment at para 63.

[25] Five judges, three from the Court of Appeal and two from the House of Lords rejected Campbell's claim while four judges, one of the High Court and three of the House of Lords allowed her privacy infringement claim. The case is further discussed in Chapter II, 2.2.1, at p. 83-7.

[26] [2004] UKHL 22.

[27] *Ultra Dimension,* see *infra* n. 212. The case is discussed, within the scope of Chapter II, at pp. 66-70.

[28] See for examples: Singh, R., *The Future of Human Rights in the United Kingdom,* at p. 81; Singh, R., 'Privacy and The Media after The Human Rights Act' [1998] E.H.R.L.R. 712. The same has also been conveniently assumed, *inter alia*, in these publications: Wenderoth, A., 'Private Lives in The Public Eyes -- Recent Developments in The Law of Privacy' (2004) PDP 4.8(10); Fenwick, H., 'Covert Surveillance under the Regulation of Investigatory Powers Act 2000, Part II' (2001) JoCL 65(521); Smith, R., 'Is There A Right to Privacy?' (2002) Human Rights & UKP 3.1 (11) (while acknowledging that there is an evolving actionable right to privacy in English law post the HRA 1998); Mahendra, B., 'Confidentiality Confounded' (2002) NLJ 152.7028 (573); Ganley, P., 'Access to The Individual: Digital Rights Management Systems and The Intersection of Informational and Decisional Privacy Interests' (2002) IJL&IT 2002.10 (241). While these opined there was no such a right until the introduction of the HRA 1998: Keenan, L., 'A Middle Wicket: Striking the Balance Between Freedom of Expression and Data Protection', (2002) IP & IT Law 7.3(2); Baker, R.K., 'Offshore IT Outsourcing and the 8th Data Protection Principle – legal and regulatory requirements – with reference to Financial Services', (2006) IJL&IT 2006.14 (1).

[29] See for instances: *Khan*, *Kaye* (CA); *Wainwright* (HL); *Campbell* (CA).

[30] The indication to this effect can be seen in the judgment of Sedley LJ in *Douglas* v *Hello! Ltd* [2001] QB 967. Hereinafter referred to as *Douglas*. See also the judgment of Bingham LJ in *Kaye* at p. 70 and the pronouncement of Morison J in *A.* v. *B. ex parte. News Group Newspapers Ltd* [1998] ICR 55 at p. 72.

[31] [2003] UKHL 53. Hereinafter referred to as *Wainwright.*

[32] Hewson, B., 'Privacy claims hit the rocks' [2003] NLJ 153.7104(1694) had reviewed the case but

she did no more than re-telling what happened in the case and gave very brief comment about the judgment. Similarly, the judgment has been briefly summed up by Welch, P.H., 'Law Digest' [2003] NLJ 153.7102(1629).

[33] *per* Glidewell L.J. in *Kaye* v. *Robertson* [1991] F.S.R. 62 at 66.

[34] *Malone* – telephonic privacy.

[35] [1979] Ch 344. Hereinafter referred to as *Malone.*

[36] See *Malone*, at pp. 374G - 375C as cited in Chapter I, note 20.

[37] [1991] F.S.R. 62.

[38] *Kaye* at p. 66.

[39] *Kaye* at p. 70.

[40] [1997] AC 558.

[41] *Ibid* at p. 577.

[42] *Ibid* at p. 571.

[43] *Ibid* at p. 571.

[44] *Ibid* at pp 582, 583.

[45] Available online at <http://www.hri.org/docs/ECHR50.html>.

[46] The convention was signed by the United Kingdom on 4 November 1950, ratified on 8 March 1951 and the date the entry came into force was on 3 September 1953 at <http://conventions .coe.int/Treaty/ EN/CadreListeTraites. htm> (last visited 15 January 2004).

[47] See however the reservation expressed by Lord Scott of Fascote, *supra* notes 23-24.

[48] There are two main grounds for the appeal. However this paper will only concentrate on the issues related to claim on invasion of privacy, leaving aside the claim based on battery.

[49] (1890) 4 Harvard Law Review 193.

[50] Prosser, D., *The Law of Torts*, 4th ed., (West Publishing Co., St. Paul, 1971).

[51] Not at least within the context of the parameter of right to privacy as proposed in this study.

[52] (1849) 1 Hall & Twells 1. For the facts of the case, see Chapter IV, 4.3.

[53] (1820) 1 Hall & Twells 25.

[54] Lord Denning, *What Next in the Law* (Butterworths, London, 1982 reprinted 2004).

[55] *Ibid* at pp. 222-223.

[56] [1967] 1 Ch 302.

[57] Lord Denning, *What Next in the Law* at p. 224.

[58] Although the argument centered on a rather narrower ground, Rabinder Singh, despite his view that there is no right to privacy in English law, does assert that recognition of privacy as a value in the common law has been judicially referred and such references are to be found in the law reports throughout the centuries; see: Singh, R., *The Future of Human Rights in the United Kingdom,* at pp. 83-90.

[59] Indeed Lord Scott of Foscote has expressed this in *Campbell* at para 63: 'Whether today, the Human Rights Act 1998 having come into effect, conduct similar to that inflicted on Mrs Wainwright and Alan Wainwright, but without any element of battery and without crossing the line into the territory of misfeasance in public office, should be categorised as tortious must be left to be decided when such a case arises. It is not necessary to decide now whether such conduct would constitute a breach of article 8 or of article 3 of the Convention.'

[60] *Wainwright* at para 52.

[61] *Wainwright* at para 51.

[62] [2004] UKHL 22. Also available at <http://www.parliament.the-stationery-office.co.uk/pa/ld200304/ldjudgmt/jd040506/campbe-1.htm> (last visited 12 June 2004).

[63] It shall be noted that Lord Nicholls of Birkenhead at para 17 and Lord Hoffmann at paras 44-6 insisted on associating the right to 'private life' as in Article 8(1) ECHR with the law of confidence. Phillipson, G., in 'Transforming Breach of Confidence? Towards a Common Law Right of Privacy under the Human Rights Act', [2003] MLR 726 at 731 pointed that among the reasons why Article 8 ECHR has very little impact on the reasoning and findings is the tendency to gravitate back towards confidentiality principles.

[64] [2002] EWHC 499.

[65] [2002] EWCA Civ 1373.

[66] *Campbell* at para 11.

[67] *Ibid* at para 15.

[68] *Ibid*, para 21, paras 26-7.

[69] His lordship argued that as to divide the further disclosure which was the subject of the complaint from the information upon which the appellant admitted that she could not complain due to her previous lie 'would be to apply altogether too fine a toothcomb' see para 26.

[70] Lord Hoffmann, paras 55-66.

[71] See *Campbell* para 49.

[72] See *Campbell*, *per* Lord Hope of Craighead paras 112-24; *per* Baroness Hale of Richmond paras 142-58; and *per* Lord Carswell paras 167-70.

[73] Lord Hope of Craighead at para 112.

[74] Ibid para 113.

[75] Ibid paras 88- 92.

[76] Ibid para 113.

[77] Ibid at para 118.

[78] At para 49 Lord Hoffmann held that: 'Even now that the equivalent of article 8 has been enacted as part of English law, it is not directly concerned with the protection of privacy against private persons or corporations. It is, by virtue of section 6 of the 1998 Act, a guarantee of privacy only

against public authorities.' But his lordship also acknowledged that: 'the Convention, as an international instrument, may impose upon the United Kingdom an obligation to take some steps (whether by statute or otherwise) to protect rights of privacy against invasion by private individuals' The Baroness Hale of Richmond held even stricter view as she said at para 132 that: 'The 1998 Act does not create any new cause of action between private persons. But if there is a relevant cause of action applicable, the court as a public authority must act compatibly with both parties' Convention rights.'

[79] Cited by Mr. John Macdonald QC in his pamphlet *A Bill of Rights* (Liberal Party Pamphlet). On 18 June 1969 Lord Wade started a four-hour debate in the House of Lords based on that pamphlet and especially referred to the threat to personal privacy resulting from technological advance as among the reasons why such Bill of Rights has become necessary. *Hansard*, H.L. Vol. 302, col. 1026 (18 June 1969). For details narration on the chronological events related to the Bills of Rights, see Zander, M., *A Bill of Rights?*, (4th ed.) Sweet & Maxwell, London, 1997 at 1-39.

[80] Cmnd 5012, July 1972.

[81] Cmnd 6353, presented December 1975. See: <http://www.bopcris.ac.uk/bopall/ref19058.html> (last accessed on 19 April 2006).

[82] Cmnd 6354, presented December 1975. See: <http://www.bopcris.ac.uk/bopall/ref19057.html> (last accessed on 19 April 2006).

[83] For concise counts and background to data protection legislation in the Europe, see Lloyd, I., *Legal Aspect of the Information Society* (Butterworths, London, 2000), at pp. 48-52. For general analysis of the legislation in its relation to privacy, see: Tugendhat, M., Sherborne, D., Barnes, J., 'Data Protection and the Media' in Tugendhat, M., and Christie, I., *The Law of Privacy and the Media* (Oxford University Press, Oxford, 2004), at pp. 153-92.

[84] Report of the Committee on Data Protection Cmnd 7341, December 1978.

[85] Cnmd 8539, April 1982.

[86] Jay, R. and Hamilton, A., *Data Protection: Law and Practice* (Sweet & Maxwell, London, 1999), at p. 7.

[87] Hereinafter referred to as the DPA 1984. For the analysis of the DPA 1984, see Savage, N. and Edwards, C., *The Data Protection Act: Implementing the Act*, 2nd ed. (Blackstone Press Limited, London, 1985).

[88] Jay and Hamilton, Data Protection: Law and Practice, at p. 8.

[89] Hereinafter referred to as the DPA 1998.

[90] For more detailed discussion on the eight data protection principles, see Jay & Angus, *Data Protection: Law and Practice*, at 45 - 69; Lloyd, I., *Legal Aspects of the Information Society*, at 61-6.

[91] See among others: Jay and Hamilton, *Data Protection: Law and Practice*; Townsend, L., 'Subject

Access and Third Party Rights', (2006) PDP 6.6 (3); Sharpe, A., 'Access to Personal Information Held by a Public Authority – Part II', (2006) PDP 6.5 (11); Brownsdon, E., 'The Use of Photographs For Marketing Or Advertising Purposes', (2003) PDP 4.2 (10); Spedding, L.S., 'Comments on Data Protection: A Practical View on Key Aspects of the Law', (2003) AB 2(3), 11-13; Brewster, 'The Data Protection Act 1998 – What Do You Need to Know', (2003) JLSS 48(5), 54-5; Warner, J., 'Data Culling: The Scope of the Fifth Data Protection Principle', (2002) SLT 37, 303-8.

[92] There the discussion on the meaning of the word 'incompatible' in such principle, see Jay and Hamilton, *Data Protection: Law and Practice*, at 60.

[93] Section 7(1)(a) the DPA 1998.

[94] Section 7(1)(b) the DPA 1998.

[95] Section 7(1)(c) the DPA 1998.

[96] Section 7(1)(d) the DPA 1998.

[97] For further discussion on the matter, see Jay and Hamilton, *Data Protection: Law and Practice*, at 162-90.

[98] For further discussion on the matter, see Jay and Hamilton, *Data Protection: Law and Practice*, at 191-221.

[99] *Hereinafter* referred to as EEA.

[100] See section 27 of the DPA 1998.

[101] See among others: Rosemary Jay and Angus Hamilton, *Date Protection: Law And Practice* (Sweet & Maxwell, London, 1999), Chapters 13-17 at pp 245-99;

[102] Although were brought during the DPA 1984 regime and not directly analogous to the proposition, in *Gaskin* v. *The United Kingdom* (1989) 12 EHRR 36 [1990] the petitioner was allowed to bring the action under articles 8 and 10 of the ECHR when the DPA 1984 offered him no redress. Following similar line of argument an individual may claim that the if any part of the exemption is either too ambiguous, disproportionate or unjustifiable or discriminating in nature, such individual may have the cause of action for infringement of the relevant ECHR right(s) and under the HRA, the court is empowered to make the incompatibility declaration upon finding the judgment in favour the plaintiff.

[103] The Long Title states that the HRA 1998 is designed 'to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights...' In explaining why the word 'further' is being used, the Lord Chancellor, Lord Irvine of Lairg during the committee stage of the Bill in the House of Lords said that 'the reason the Long Title uses the word "further" is that our courts already apply the Convention in many different circumstances,'(583 HL Official Report (5th Series) col 478 (18 November 1997) at para 2.03) and during the third reading he added that the HRA 'does not create new human rights or take any existing human rights away. It provides

better and easier access to rights which already exist' (585 HL Official Report (5th Series) col 755 (5 February 1998) at para 211). The United Kingdom Prime Minister, Tony Blair, in the Preface to the White Paper *Bringing Rights Home* (Cm 3789, 1997), p.1 explained that the law is intended to 'give people in the United Kingdom opportunities to enforce their rights under the European Convention in British courts rather than having to incur the cost and delay of taking a case to the European Human Rights Commission and Court in Strasbourg. It will enhance the awareness of human rights in our society. And it stands alongside our decision to put the promotion of human rights at the forefront of our foreign policy.' Available online at <http://www.archive.official-documents.co.uk/document/hoffice/rights/ preface.htm> (last accessed on 20 February 2006). Similar indication was made by Lord Irvine of Lairg, PC, QC in *Human Rights, Constitutional Law and the Development of the English Legal System: Selected Essays*, p. 17 and also p. 22. The necessity of incorporating the ECHR into domestic law especially in country that lacks its own national bill of right such as the United Kingdom has long been pointed out by able writers. See for example: Harris, D.J., O'Boyle, M., and Warbrick, C., *Law of the European Convention on Human Rights*, pp. 23-5.

[104] In *R* v. *Secretary of State for the Home Department, ex p. Brind* [1991] A.C. 696 the convention was looked at as an aid to interpretation in the case of ambiguity; in *AG* v. *Guardian Newspapers (No. 2)* [1987] 3 All E.R. 306 it was held that the convention can be used to influence judicial decisions where there is an element of discretion, see also *Derbyshire County Council* v. *Times Newspapers Ltd* [1992] QB 770 and *Rantzen* v. *Mirror Group Newspapers (1986) Ltd* [1994] QB 670; in *R* v. *Ministry of Defence, ex p Smith* [1996] QB 517 at 554E-G Sir Thomas Bingham MR for the Court of Appeal held that the human rights context as per the ECHR is relevant in determining whether the Minister or other public authority acted reasonably and had regard to all relevant considerations. That was approved by Lord Woolf MR in *R* v. *Secretary of State for the Home Department, ex p Canbolat* [1997] 1 WLR 1569 at 1579E-H. For the position in Scotland, see Lord Reed and Jim Murdoch, *A Guide to Human Rights Law in Scotland* (Butterworths, London, 2001), pp. 8-10. Lord Clarke indicated that prior to the incorporation of the ECHR into the law of the UK the position adopted was one of a presumption that legislation, acts and decisions were intended to have been arrived at in accordance with the ECHR's provisions. See: Lord Clarke, 'Human Rights, Devolution and Public Law', in Boyle, A., Himsworth, C., Loux, A., and MacQueen, H., (eds.), *Human Rights and Scots Law* (Hart Publishing, Oregon, 2002), p.13.

[105] In England, the Court of Appeal in *Rantzen* v. *Mirror Group Newspapers (1986) Ltd and Others* [1993] 3 WLR 953 it is stated at p. 690 that: '[i]t is always to be remembered that the Convention is not part of English domestic law and therefore the courts have no power to enforce Convention rights directly.' In Scotland Lord Ross in *Surjit Kaur* v. *Lord Advocate* (1980) SC 319 expressed the view that a Scottish court was not entitled to have regard to the ECHR either as an aid to

construction or otherwise unless and until its provisions were given statutory effect. It was held in the case that there was no ambiguity in the legislation in issue in that case and thus there was no room for the use of the ECHR as an aid to interpretation making such a pronouncement as a mere obiter dictum; however the dictum was approved by the Inner House in *Moore* v. *Secretary of State for Scotland* (1985) SLT 38. See, however, *Lord Advocate* v. *Scotsman Publications Ltd* (1989) SC 122 where references to the ECHR could be found in the speeches in the House of Lords and also the view expressed by Lord Hope in 'From Maastricht to the Saltmarket', Society of Solicitors in the Supreme Courts of Scotland, Biennial Lecture 1992, at 16-7; Lord Hope of Craighead, 'Devolution and Human Rights' [1998] EHRLR 367 and in *T, Petitioner* (1997) SLT 724 where he stated: 'Lord Ross' opinion...has been looking increasingly outdated in the light of subsequent developments, and in my opinion, with respect, it is time that it was expressly departed from' (1997) SLT 714 at 733.

[106] Section 3 of the HRA 1998. For the interpretation of this section, see Lord Lester and Pannick, D., 'The Human Rights Act 1998' in *Human Rights and Practice*, at pages 23-26.

[107] Section 6 of the HRA 1998. For the interpretation of this section, see Lord Lester and Pannick, D., 'The Human Rights Act 1998' in *Human Rights and Practice*, at pages 29-34.

[108] Section 19 of the HRA 1998. For the interpretation of this section, see Lord Lester and Pannick,D, 'The Human Rights Act 1998' in *Human Rights and Practice*, at pages 58-9.

[109] Section 4 of the HRA 1998. For the interpretation of this section, see Lord Lester and Pannick, D.,'The Human Rights Act 1998' in *Human Rights and Practice*, at pages 26-8. It shall be noted that the declaration of incompatibility does not by itself invalidate the legislation provision in question. Such a declaration will not have any effect whatsoever on the validity, continuing, operation or enforcement of such a provision; thus, it serves no purpose other than to alert the Parliament and/or the responsible ministers of such matter. (see: Munro, J., 'Judicial Review, *Locus Standi* and Remedies: The Impact of the Human Rights Act 1998', in Boyle, A., Himsworth, C., Loux, A., and MacQueen, H., (eds.), *Human Rights and Scots Law* (Hart Publishing, Oregon, 2002, p.83). However if it is a Scottish legislation that has been found to be incompatible with the ECHR or that it contravenes the convention rights, such incompatibility and/or contravention when read together with section 57(2) of the Scotland Act 1998 may result to such a legislation being struck down and even be declared as 'not law' as per section 29 of the Scotland Act 1998. See also: Lord Clarke, 'Human Rights, Devolution and Public Law', in Boyle, A., Himsworth, C., Loux, A., and MacQueen, H., (eds.), *Human Rights and Scots Law* (Hart Publishing, Oregon, 2002), at p.17; Chris Himsworth, 'The Hamebringing: Devolving Rights Seriously', in Boyle, A., Himsworth, C., Loux, A., and MacQueen, H., (eds.), *Human Rights and Scots Law* (Hart Publishing, Oregon, 2002), pp. 22-3.

[110] Section 10 of the HRA 1998. For the interpretation of this section, see Lord Lester and Pannick,

D., 'The Human Rights Act 1998' in *Human Rights and Practice*, at pp. 43-5.

[111] Section 1(1) of the HRA 1998. For the interpretation of section 1, see Lord Lester and Pannick, D., 'The Human Rights Act 1998' in *Human Rights and Practice*, at pp. 18-21.

[112] The rights which are considered as absolute, cannot be infringed in any circumstances, eg, *Selmouni* v. *France* (1999) 29 EHRR 403. In that case, the ECtHR at para 95 held that 'even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment.'

[113] For further discussion on the point, see, Starmer, K., with Byrne, I., *Blackstone's Human Rights Digest* (Blackstone Press Limited, London, 2001), at 2-3. For General discussion on the key provisions of the HRA 1998, see: Strachan, J., 'The Human Rights Act 1998 and Commercial Law in the United Kingdom' in Bottomley, S., and Kinley, D., *Commercial Law and Human Rights* (Dartmouth Publishing Company, Aldershot, 2002), p. 165-76. For more detail discussion see Pannick, D., and Lord Lester, 'The Human Rights Act 1998' in Lord Lester of Herne Hill and Pannick, D., (eds.), *Human Rights Law and Practice*, pp. 15-8. The same in regard to the position in Scotland is discussed by Lord Reed, 'Scotland' chapter five in *Human Rights Law and Practice* at 267-85; Lord Reed & Murdoch, J., *A Guide to Human Rights in Scotland* (Butterworths, Edinburgh, 2001), at pp. 29-51.

[114] Mole, N., Shaw, M., and Mare, T.D.L., 'Right to Respect for private and family life, home and correspondence' in Lord Lester of Herne Hill and Pannick, D., (eds.), *Human Right Law and Practice*, at p. 168 provides that 'Article 8 encompasses...the right to *be* oneself, to *live* as oneself and to *keep* to oneself'.

[115] [2004] 1 A.C. 983.

[116] *Ibid* at para 49 at p. 1004.

[117] See among others: *Marckx* v. *Belgium* (1979) 2 EHRR 330 and *Rees* v. *The United Kingdom* (1986) 9 EHRR 56.

[118] *Peck* v. *The United Kingdom* (2003) [2003] ECHR 44 (Application no. 44647/98)

[119] *Ibid* at para 57.

[120] Cases such as *Von Hannover* v. *Germany* (2004) 40 EHRR 1 and *Peck* v. *The United Kingdom* [2003] ECHR 44.

[121] *Niemietz* v. *Germany* (1992) 16 EHRR 97; *Costello-Roberts* v. *The United Kingdom* (1993) 19 EHRR 112. See generally Reid, K., A Practitioners Guide to the European Convention on Human Rights (Sweet & Maxwell Limited, London 1998, reprinted 2003), at pp. 323-3.

[122] (1998) 26 EHRR 241.

[123] *Ibid* para 32.

[124] (1992) 16 EHRR 97.

[125] *Niemietz* at para 29.

[126] See for examples, the ECtHR's judgments in *X and Y* v. *The Netherlands* (1985) 8 EHRR 235; *Stubbings and others* v. *The United Kingdom* (1996) 23 EHRR 213; *A* v. *The United Kingdom* (1998) 27 EHRR 611; *Osman* v. *The United Kingdom* (1998) 29 EHRR 245 and the European Commission of Human Rights' decision in *Whiteside* v. *The United Kingdom* (1994) 76-A DR 80. However, in *Costello-Roberts* v. *The United Kingdom* (1993) 19 EHRR 112, it was held that while '[t]he Court agrees with the Government that the notion of "private life" is a broad one, which, as it held in its recent judgment in the case of Niemietz v. Germany (16 December 1992, Series A no. 251-B, p. 11, at para 29), is not susceptible to exhaustive definition. Measures taken in the field of education may, in certain circumstances, affect the right to respect for private life (see, mutatis mutandis, the judgment of 23 July 1968 on the merits of the "Belgian Linguistics" case, Series A no. 6, p. 33, para. 7), but not every act or measure which may be said to affect adversely the physical or moral integrity of a person necessarily gives rise to such an interference.' See also Lord Reed & Murdoch, J., *A Guide to Human Rights Law in Scotland*, at pp. 388-9, where private life which includes the physical and moral integrity of the person, including the sexual life, the quality of private life as affected by the amenities of one's home said to accommodate the range of issues including educational provision, infliction of corporal and other forms of punishment or treatment falling short of violations of the ECHR, etc.

[127] Including the right to choose or discover who one is, see *Gaskin* v. *The United Kingdom* (1989) 12 EHRR 36. That will also include the right of the transsexuals to have the change of identity to be given legal recognition. In *Van Oosterwijk* v. *Belgium* (1981) 3 EHRR 557, the European Commission of Human Rights was persuaded that article 8 was breached by the Belgian's state refusal to amend the applicant's birth certificate which constituted a refusal to recognize an essential element of his personality. The ECtHr, however, took no view on the merits finding there to be no exhaustion of domestic remedies. However, without diminishing one's right to have his personal identity respected, the ECtHR has not formulated a straight forward formula to determine the extent of positive duties of a state in relation to a transsexual's right to personal identity but rather in determining whether or not there has been violation of Article 8 the ECtHR will decide the matter on the basis of 'fair balance'. In *Rees* v. *The United Kingdom* (1986) 9 EHRR 56 and *Cossey* v. *The United Kingdom* (1990) 13 EHRR 622, the ECtHR found that there was no violation of Article 8 for the United Kingdom's refusal to amend the applicants' birth certificate. Among the factors that influenced the findings include that in the United Kingdom, birth certificates have only limited use while the transsexuals are free to change their names and use that names in their official documents (*Rees* at 40). The 'fair balance' exercise to determine the extent of the United Kingdom's positive duties the majority found that results in the finding that it was not necessary to require the introduction of detailed legislation that would change the very nature of the register which was viewed as strictly historical record. However, unlike the position in the

United Kingdom, French register was not viewed as historical record and there was also refusal to allow a change of forename which in turn such refusal has great impact upon social and professional life of the transsexual, thus in *B* v. *France* (1993) 16 EHRR 1, the ECtHR held the failure to amend the register along with the consequential refusal to amend official identity documents used on an every day basis constituted a violation of Article 8. Not surprisingly, the English courts have also adopted the same attitude. In *R* v. *Registrar General of Births, Deaths and Marriages for England and Wales, ex parte P & G* [1996] 2 FLR 90 it was held that the birth register cannot be changed to accommodate gender reassignment surgery and that the English law determines an individual sex at the moment of birth and judged on biological criteria (*Corbett* v. *Corbett* [1970] 2 All E.R. 33). The ECtHR revisited the issue in *Sheffield and Horsham* v. *The United Kingdom* (1998) 27 EHRR 163 and yet found that the detriment suffered by transsexuals in the United Kingdom in certain context were not of sufficient seriousness to displace the conclusion found in earlier cased. That was the position until 11 July 2002 when the ECtHR delivered its judgments in the cases of *Goodwin* v. *The United Kingdom* (2002) 35 EHRR 18 and *I* v. *The United Kingdom* [2002] 2 FLR 518 where the ECtHR found that the United Kingdom had breached the Convention rights of these two transsexual people, under Article 8 (right to respect for private life) and Article 12 (right to marry). The judgments imply the right to a revised birth certificate in the transsexual person's new gender (the result of which entails complete recognition). In response to that, the United Kingdom Government on 13 December 2002 announced its intention to fulfil its obligation under international law to secure these Convention rights and freedoms for transsexual people. The Government introduced the Gender Recognition Bill in the House of Lords on 27 November 2003. The Bill allows transsexual people who have taken decisive steps to live fully and permanently in their acquired gender to gain legal recognition in that gender. Finally on 1 July 2004 the Gender Recognition Act 2004 that gives transsexual people the legal right to live in their acquired gender received its Royal Assent. For some details related to the Gender Recognition Act 2004, its legislative passage and background, see: the Department of Constitutional Affairs website at <http://www.dca.gov.uk/constitution/transsex/legs.htm> (last accessed on 22 July 2005). For further reading, see: Hogg, M.A., 'Attitudes to Sexual Identity and Practice: The Impact of Human Rights Law in the Scottish Courts', in Boyle, A., Himsworth, C., Loux, A., and MacQueen, H., (eds.), *Human Rights and Scots Law* (Hart Publishing, Oregon, 2002), pp. 226-33.

[128] See for examples the ECtHR's judgments in *Dudgeon* v. *The United Kingdom* (1981) 4 EHRR 149; *Norris* v. *Ireland* (1988) 13 EHRR 186; *Lustig-Prean and Beckett* v. *The United Kingdom* (1999) 13 EHRR 548; Sutherland v. *The United Kingdom* [1998] EHRLR 117. It shall be noted that sexual activity carried out in private involving more than two consenting adults does not necessarily fall outside the ambit of article 8(1). Thus, the prosecution and conviction of a man for

enganging in non-violent homosexual acts with up to four other men was held by the ECtHR to be in breach of Article 8 in *ADT* v. *The United Kingdom* [2000] 2 FLR 697. However, the mere fact that the sexual activity is carried out behind closed doors does not necessarily make such activity to fall within the ambit of Article 8. In *Laskey, Jaggard & Brown* v. *The United Kingdom* (1997) 24 EHRR 39 at para 36, the ECtHR by way of dictum observed that '... not every sexual activity carried out behind closed doors necessarily falls within the scope of Article 8 (art. 8). In the present case, the applicants were involved in consensual sado-masochistic activities for purposes of sexual gratification. There can be no doubt that sexual orientation and activity concern an intimate aspect of private life (see, mutatis mutandis, the *Dudgeon* v. *The United Kingdom* judgment of 22 October 1981, Series A no. 45, p. 21, para. 52). However, a considerable number of people were involved in the activities in question which included, inter alia, the recruitment of new members", the provision of several specially equipped "chambers", and the shooting of many videotapes which were distributed among the "members" .... It may thus be open to question whether the sexual activities of the applicants fell entirely within the notion of "private life" in the particular circumstances of the case.' This aspect has been extended further whereby the ECtHR has found the Austrian domestic law that criminalised homosexual acts of adult men with consenting adolescents between the ages of 14 and 18 amounted to discrimination and violated Articles 14 and 8 of the ECHR as was held in *H.G. and G.B.* v. *Austria* [2005] ECHR 356 (Application nos. 11084/02 and 15306/02); *Wolfmeyer* v. *Austria* [2005] ECHR 331 (Application no. 5263/03); *Ladner* v. *Austria*[2005] ECHR 57 (Application no. 18297/03); and *Woditschka and Wilfling* v. *Austria* [2004] ECHR 545 (Application nos 69756/01 and 6303/02).

[129] See for examples the European Commission of Human Rights' decisions in *Winer* v. *The United Kingdom* (1986) 48 DR 154 and *Steward-Brady* v. *The United Kingdom* (1997) 24 EHRR CD 38.

[130] See the European Commission of Human Rights' decision in *T.E.E.* v. *The United Kingdom* (1996) 21 EHRR CD 108 and *Young* v. *Ireland* (1996) 21 EHRR CD 91.

[131] Harris, D.J., OBoyle, M., and Warbrick, C., *Law of the European Convention on Human Rights*, at pp. 305 identified seven interests as falling within 'private life' namely personal identity; moral or physical integrity; private space; collection and use of information; sexual activities; and social life namely the enjoyment of personal relationships.

[132] See the ECtHR judgments in *Halford* v. *The United Kingdom* (1997) 24 EHRR 523 and *Amman* v. *Switzerland* (2000) 30 EHRR 843. In *Foxley* v. *The United Kingdom* (2001) 31 EHRR 25 the ECtHR accepted that enforcing bankruptcy proceedings, subject to strict limits, is a legitimate basis for intercepting communications. See also Starmer, *Blackstone's Human Rights Digest*, at pp 229-30.

[133] See for examples, *Leander* v. *Sweden* (1987) 9 EHRR 433; *Hewitt and Harman* v. *The United Kingdom* (1992) 12 EHRR 657; and *Gaskin* v. *The United Kingdom* (1989) 12 EHRR 36. In

Rotaru v. *Romania* (2000) 8 BHRC 449, the ECtHR was of the opinion that the processing of any information about an identifiable individual amounts to interference with Article 8(1) right when read together with the European Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data as well as if the public authority refuses an opportunity to refute information it is storing. See also Starmer, *Blackstone's Human Rights Digest*, at pp 232-3.

[134] (1981) 3 EHRR 244.

[135] *Ibid* at para 56.

[136] *Campbell*, per Lord Nicholls of Birkenhead at para 18.

[137] See the judgement of Lord Hoffmann at paras 49-51 and that of the Baroness Hale of Richmond at para 132.

[138] Among others Lord Hoffmann's dicta in *Wainwright*, at paras 51-2. See, however, Lord Scott of Foscote's judgment at para 63 that preferred to leave the matter until such a case arises and deemed it was not necessary to decide whether the conduct which was the subject of the complaint in that case would violate Article 3 or Article 8 of the ECHR.

[139] *Kaye*, *Wainwright*. See also Jay and Hamilton, *Data Protection: Law & Practice*, at p. 19. See: Lord Woolf CJ's judgment in *A v B plc* [2002] EWCA Civ 337, [2003] QB 195, 202, at para 4; Baroness Hale of Richmond's judgment in *Campbell* at para 132.

[140] 585 HL Official Report (5th series) col 755 (5 February 1998).

[141] *Supra* note 139.

[142] For the discussion on the matter see: J Wadham and H Mountfield, *Blackstone's Guide to the Human Rights Act 1998*, 2nd ed. (Blackstone, London, 2000), at p. 29; S Grosz, J Beatson and P Duffy, *Human Rights: The 1998 Act and the European Convention* (Sweet & Maxwell, London, 2000), at p. 9. While discussing the possibility of horizontal application of the HRA provision, Phillipson, G., in footnote 32 and the accompanying text of his paper 'Transforming Breach of Confidence? Towards a Common Law Right of Privacy under the Human Rights Act' [2003] 66:5 MLR 726 commented that '[Wade's] reading of the HRA does not appear to have been seriously argued in any of the decisions; it was rejected clearly by Butler-Sloss in Venables ... "in my view, the claimants in private law proceedings cannot rely upon a free-standing application under the Convention."' It shall be noted, however, despite that contention the judge expressed the view that '... the court, as a public authority, was obliged in such cases to act compatibly with Convention rights in adjudicating on common law causes of action' per Dame Elizabeth Butler-Sloss in *Venables and Thompson* v. *News Group Newpapers Ltd* [2001] Fam 430 at p. 446. Thus supporting the view for the horizontality of the HRA 1998.

[143] Macqueen, H.L., and Brodie, D., 'Private Rights, Private Law and the Private Domain', in Boyle, A., Himsworth, C., Loux, A., and MacQueen, H., (eds.),, *Human Rights and Scots Law* (Hart Publishing, Oregon, 2002), at pp. 143-71 argued that the ECHR has horizontal effect in relation to

private law either by virtue of sections 3 or 6; while noting that the horizontality under section 6 is of an indirect nature. Similar view was expressed in Lord Lester and Pannick, D., *Human Rights Law and Practise*, at p. 31-2; as well as Wade as he viewed section 6 HRA as giving rise to a form of direct, or full horizontal effect, Wade, H. W. R., 'Horizons of Horizontality' (2000) 116 LQR 217; Wade H. W. R., and Forsyth, C. F., *Administrative Law*, 8th ed (Oxford University Press, Oxford, 2000), Appendix 2. Another ground to support this view as that expressed in *Douglas* v. *Hello! Ltd* [2001] QB 967, 1003, para 133, where Sedley LJ held that section 12(4) of the Human Rights Act 1998 "puts beyond question the direct applicability of at least one article of the Convention as between one private party to litigation and another--in the jargon, its horizontal effect". The same approach was adopted by Dame Elizabeth Butler-Sloss in *Venables and Thompson* v. *News Group Newpapers Ltd* [2001] Fam 430. The matter is further discussed in Hare, I., Vertically Challenged: Private Parties, Privacy and the Human Rights Act [2001] 5 EHRLR 526-40.

[144] See supra note 103 and the accompanying texts.

[145] (1998) 27 EHRR 611Application number: (100/1997/884/1096).

[146] For further reading on the matter, see: Clayton, R. and Tomlinson, H., *The Law of Human Rights* (Oxford University Press, Oxford, 2000), at pp. 232-38; Hunt, M., 'The "Horizontal Effect" of the Human Rights Act' [1998] *PL* 423-43; Leigh, I., 'Horizontal Rights, the Human Rights Act and Privacy: Lessons from the Commonwealth' [1999] 48 ICLQ 57-87; Phillipson, G., 'The Human Rights Act, "Horizontal Effect" and the Common Law: A Bang or a Whimper?' [1999] 62 *MLR* 824-49; Raphael, T., 'The Problem of Horizontal Effect' [2000] *EHRLR* 493-511; Oliver, D., 'The Human Rights Act and Public Law/Private Law Divides' [2000] *EHRLR* 343-55; Du Plessis, M., and Ford, J., 'Developing the Common Law Progressively – Horizontality, the Human Rights Act and The South African Experience' E.H.R.L.R. 2004, 3, 286-313; and Brinktrine, R., The Horizontal Effect of Human Rights in German Constitutional Law: The British debate on horizontality and the possible role model of the German doctrine of mittelbare Drittwirkung der Grundrechte [2001] 4 EHRLR 421.

[147] (2004) 40 EHRR 1.

[148] See among others, *X and Y* v. *The Netherlands* (1985) 8 EHRR 235; *Costello-Roberts* v. *The United Kingdom* (1993) EHRR 112; *Young, James and Webster* v. *The United Kingdom* (1981) EHRR 38 where the ECtHR held inter alia the mere fact that a public authority is not directly responsible for a breach of an individual's convention right does not render the ECHR inapplicable. See also the ECtHR's observation in *A* v. *The United Kingdom* (1998) 27 EHRR 611 at para 22.

[149] *Ibid*, para 57. See also mutatis mutandis *X and Y* v. *The Netherlands* (1985) 8 EHRR 235. Lord Phillips of Worth Matravers MR cited both cases with approval in *Douglas and others* v. *Hello!*

Ltd and Others (No. 3) [2006] Q.B. 125 at para 47.

[150] As the then Lord Chancellor put it: 'I say as strongly as I can to the press: 'I understand your concerns, but let me assure you that press freedom will be in safe hands with our British judges and with the judges of the European Court'. I add this, 'You know that, regardless of incorporation, the judges are very likely to develop a common law right of privacy themselves. What I say is that any law of privacy will be a better law after incorporation, because the judges will have to balance Article 10 and Article 8, *giving Article 10 its due high value*'. (emphasis added). That his lordship said after quoting some judges who expressed the view on the importance of the freedom of the press. See: Lord Irvine of Lairg PC, QC, 'The Human Rights Bill, House of Lords 2nd Reading', in Lord Irvine of Lairg PC, QC, *Human Rights, Constitutional Law and the Development of the English Legal System*, at pp. 10-1. Similar view was expressed by Macqueen, H.L., and Brodie, D. in 'Private Rights, Private Law and the Private Domain, at p. 174.

[151] As well as Articles 9 and 11 of the ECHR.

[152] In addition to similar limitation provided in Article 8(2), Article 10(2) explicates that the exercise of the rights may be subject to such formalities, conditions, restrictions or penalties, it may be restricted in the interest of territorial integrity and for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary. The conclusion to similar effect was expressed by Grosz, S. in his article 'Legal Update – Human rights law --- the horizontal effect' (2001) LSG 98.09 (37) while analysing the case *Douglas* within the context of section 12 applicability he concluded: 'Section 12 of the Human Rights Act was introduced to safeguard press freedom against judicial incursion. On the evidence so far, its only real effect has been to give a greater impetus to the development of a common law right to privacy, while adding little more than lip-service to freedom of expression.'

[153] Those special provisions relate purely to procedural aspects that no relief shall be granted if the person against whom the application for relief is made is neither present nor represented unless the court is satisfied that the applicant has taken all practicable steps to notify the respondent or there are compelling reasons why the respondent should not be notified (s. 12(2)); that the restraint of publication before trial should not be granted unless the court is satisfied that the applicant is likely to establish that publication should not be allowed (s. 12(3)); and in relation to journalistic, literary or artistic material, the court must also have particular regard to the extent to which the material has or is about to become available to the public or it is or would be in the public interest for the material to be published and any relevant privacy code (s. 12(4)). Four main reasons were offered to show that except for those special provisions, section 12 does not add anything for the freedom of expression, namely that irrespective of the HRA 1998, judges were developing the

common law of breach of confidence to protect privacy; that the HRA 1998 will assist press freedom because judges will have a duty to recognise the fundamental right to freedom of expression; that the government did not intend, by section 12, to include in the HRA 1998 any provision which requires courts to do other than apply the principles set out in the ECHR; and that it would be pointless for the HRA 1998 to create special principles not found in the ECHR. See: David Pannick and Lord Lester, 'Human Rights Act 1998' in Lord Lester of Herne Hill and David Pannick (eds.), *Human Rights Law and Practice*, pp. 46-47. See also: Lord Reed and Murdoch, J., *A Guide to Human Rights Law in Scotland*, pp. 45-6.

[154] For the background of the insertion of this section, see Pannick, D., and Lord Lester , 'The Human Rights Act 1998' in *Human Rights Law and Practice* para 2.12 note 1, para 2.12.1 notes 2 and 3, para 2.12.2 notes 2, 3 and 4, para 2.12.3 note 2, para 2.12.4 notes 3 and 6 at pp 46-50.

[155] See Pannick, D., and Lord Lester, 'The Human Rights Act 1998' in *Human Rights Law and Practice* at pp. 46-7.

[156] See *Eriksson* v. *Sweden* (1989) 12 EHRR 183, *Olsson* v. *Sweden (No. 2)* (1992) 17 EHRR 134 and *Halford* v. *The United Kingdom* (1997) 24 EHRR 523. See also: D J Harris, M O'Boyle & C Warbrick, *Law of the European Convention on Human Rights*, pp. 285-9, and 338-44.

[157] See: D J Harris, M O'Boyle & C Warbrick, *Law of the European Convention on Human Rights*, pp. 289-90.

[158] See: *Handyside* v. *The United Kingdom* (1976) 1 EHRR 737, A 24 para 48, *Olsson* v. *Sweden (No. 1)* (1988) 11 EHRR 259, A 130 para 67. See also: D J Harris, M O'Boyle & C Warbrick, *Law of the European Convention on Human Rights*, pp. 290-301 and 344-53.

[159] See generally Article 14 of ECHR. See also *Marckx* v. *Belgium* (1979) 2 EHRR 330. See also: D J Harris, M O'Boyle & C Warbrick, *Law of the European Convention on Human Rights*, at pp. 462-88.

[160] [1999] EHRLR 101. In that case, the European Commission of Human Rights held at para 62 that 'there is no existing statutory system to regulate the use of covert listening devices, although the Police Act 1997 will provide a statutory framework if, and when, the relevant sections of the statute come into force. The Home Office Guidelines at the relevant time were neither legally binding nor were they publicly accessible.... There was, therefore, no domestic law regulating the use of covert listening devices at the relevant time.'

[161] (1983) 5 EHRR 347.

[162] (2001) 31 EHRR 45. In that case the ECtHR held at paras 27-8 that '[a]t the time of the events in the present case, there existed no statutory system to regulate the use of covert listening devices, although the Police Act 1997 now provides such a statutory framework. The Home Office Guidelines at the relevant time were neither legally binding nor were they directly publicly accessible... There was, therefore, no domestic law regulating the use of covert listening devices

at the relevant time. It follows that the interference in the present case cannot be considered to be "in accordance with the law", as required by Article 8(2) of the Convention. Accordingly, there has been a violation of Article 8.'

[163] [1998] ECHR 93.

[164] In *Sunday Times* v. *The United Kingdom* (1979) 2 EHRR 245 the ECtHR required for a rule to be regarded as a law that it must be adequately accessible and that it must be formulated with sufficient precision to enable the citizen to regulate his conduct.

[165] (2000) 30 EHRR 843.

[166] *Ibid* at para 55-6.

[167] (1998) 27 EHRR 91, para 53.

[168] *Amman* at para 56.

[169] Harshman and Harrup v. The United Kingdom (2000) 30 EHRR 241.

[170] See for example: *Steel and Others* v. *The United Kingdom* (1998) 28 EHRR 603 where the ECtHR found *inter alia* that the concept of breach of the peace was sufficiently clarified by the English court to satisfy the requirement of 'prescribed by law.' See also: *McLeod* v. *The United Kingdom* (1999) 27 EHRR 493.

[171] *Malone* v. *The United Kingdom* (1985) 7 E.H.R.R. 14. For concise discussion on the matter see: Spencer, M. and Spencer, J., *Nutcases: Human Rights* (Sweet Maxwell Ltd., London, 2002), at pp. 2-4.

[172] *Handyside* v. *The United Kingdom* (1976) 1 EHRR 737 at para 49.

[173] [2005] IRLR 167.

[174] *Ibid* at para 11.

[175] *Ibid* at para 13.

[176] *Ibid* at para 14, emphasis added.

[177] See for the analysis on the matter: D J Harris, M O'Boyle & C Warbrick, *Law of the European Convention on Human Rights*, at pp. 462-4.

[178] Hence in *Marckx* v. *Belgium* (1979) 2 EHRR 330 the ECtHR found there was a violation of Article 14 read together with Article 8 with regard the differences of treatment found in Belgian law between 'illegitimate' and 'legitimate' children. Similarly in *Salgueiro da Silva Mouta* v. *Portugal* [1999] ECHR 176 the refusal to grant custody of a daughter to the father who was living in homosexual relationship on the ground that such an environment could not be a healthy one in which to raise a child was found as the violation of Article 8 read together with Article 14 of the ECHR. See also *Sutherland* v. *The United Kingdom* (1997) 24 EHRR CD 22 where the different ages for homosexual and heterosexual consent in the United Kingdom was held to be a violation of Article 8 when considered with Article 14 of the ECHR. The case was eventually dropped by the applicants in March 2001 following the legislative equalization of the age of consent in the

United Kingdom.

[179] In *Inze* v. *Austria* (1987) 10 EHRR 394 the ECtHR allowed the claim against discrimination with regards to legitimate and illegitimate heirs in succession on the basis that such a matter falls within the ambit of Article 1 of the First Protocol. That was held as the test and not to see whether the claim relates to violation of the conventional rights.

[180] See for examples: *Airey* v. *Ireland* (1979-80) 2 EHRR 305 and *Dudgeon* v. *the United Kingdom* (1981) 4 EHRR 149.

[181] See the approach in *Marckx*. The same approach is labeled as 'reasonable relationship of opportunity' by D J Harris, M O'Boyle & C Warbrick, *Law of the European Convention on Human Rights*, p. 476. See *Ibid.* p. 476-483 for the elaboration of the point.

[182] For historical background of the statute, see: Palmer, S., Freedom of Information: The New Proposals in Beatson, J., and Cripps, Y. (eds.), Freedom of Expression and Freedom of Information (Oxford University Press, Oxford, 2000 reprinted 2002). For the analysis of rights to information in connection with privacy, see generally, Feldman, D., Information and Privacy in Beatson, J., and Cripps, Y. (eds.), Freedom of Expression and Freedom of Information (Oxford University Press, Oxford, 2000 reprinted 2002).

[183] Freedom of Information Act 2000 section 40(1) which provides that 'any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject'. That being the case, if an individual request for access to his personal data being held by a public authority, the authority would be exempt from any duties whatsoever as prescribed under the Act – thus, leaving the room for enabling the access only by virtue of the provisions of the DPA 1998.

[184] DPA 1998 section 1(1)(a)(b).

[185] DPA 1998 section 1(1) (c).

[186] DPA 1998 section 1(1)(d).

[187] Freedom of Information Act 2000 section 68(2).

[188] For further details on how the public authority may be justified in refusing to provide access to data, see, Wadham, J., Griffiths, J., and Rigby, B., *Blackstone's Guide to the Freedom of Information Act 2000* (Blackstone Press, London, 2001), at pp. 127-8.

[189] In *HRH The Prince of Wales* v. *Associated Newspapers Ltd* [2006] EWHC 522 although unsuccessful, the defendant attempted to avail from the Freedom of Information Act to justify his conduct, alleging that the plaintiff's rights have not been infringed as the information would have been otherwise obtainable for falling within the ambit of the Act. See paras 7 and 105.

[190] See Regulation 1 of the PECR.

[191] See Regulation 3 of the PECR.

[192] These aspects are explained in the PECR Guidance: Part I. Available online at: <http://www.ico.

gov.uk/documentUploads/Electronic%20Communications%20Guidance%20-20Part%202%20Ver%202.pdf>.

[193] Regulations 19 and 24 of the PECR.

[194] Regulations 21 and 24 of the PECR.

[195] Regulations 20 and 24 of the PECR.

[196] See the definition of 'electronic e-mail' as provided by Regulation 3 of the PECR.

[197] Regulations 22 and 23 of the PECR.

[198] Regulation 5 of the PECR.

[199] Available online at: <http://www.ico.gov.uk/documentUploads/Electronic%20Communications%20Guidance% 20-%20Part%202%20Ver%202.pdf>.

[200] Although it may be said that the United Kingdom Parliament had had such an initiative by the enactment of the Gender Recognition Act 2004; such 'initiative' was the result of the 'pressure' from the ECtHR on the matter.

[201] Article 160 of the Federal Constitution of Malaysia provides that: '"[l]aw" includes written law, the common law in so far as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law in the Federation or any part thereof.' For general discussion on this, see: Tun Mohamed Suffian, *An Introduction to The Legal System of Malaysia* at pp. 92-7; Wu, M.A., *An Introduction to The Malaysian Legal System,* revised 3rd ed. (Heinemann (Malaysia) Sdn Bhd, Kuala Lumpur, 1982), at pp 22-54; Lee, M.P., *General Principles of Malaysian Law*, 2nd ed. (Penerbit Fajar Bakti Sdn Bhd, Shah Alam, 1994), at pp. 10-34.

[202] The common law and rule of equity continue to apply in Malaysia by virtue of section 3(1) of the Civil Law Act 1956. However prominent legal jurists such as the late Tun Mohamed Suffian (former Lord President of Malaysia and the former member and honorary member of the International Commission of Jurists) and the late Professor Tan Sri Datuk Ahmad Ibrahim (for the concise account of his contribution to the Malaysian legal system, see: Tan Sri Harun Hashim, 'Memorial Notice: Professor Tan Sri Datuk Ahmad Mohamed Ibrahim (1916-1999)' [1993] 3 MLJ i) advocated for the total repeal of section 3 of the Civil Law Act 1956. The abolition of appeals to the Privy Council from Malaysia is seen as marking 'the dawn of a new ear of unprecedented freedom and responsibility for the Malaysian judiciary', see the articles as quoted by Rutter, M.F. in *The Applicable Law in Singapore and Malaysia* at pp. 468-70 and 560-2. See also pp 569-70 where the possibility of perpetuation of unsatisfactory rules as the result of the application of 'English law' is discussed.

[203] See the proviso to section 3 of the Malaysian Civil Law Act 1956.

[204] For general discussion on Article 5 of the Federal Constitution, see: Sheridan, L.A. and Groves, H.E., *The Constitution of Malaysia*, 4th ed. (Malayan Law Journal Pte Ltd., Singapore 1987), at pp. 41-51; Groves. H. E., 'Kebebasan Asasi Dalam Perlembagaan Persekutuan Malaysia, in

Suffian, M., Lee, H.P & Trinidade, F.A., .*Perlembagaan Malaysia Perkembangannya: 1957 – 1977* (Penerbit Fajar Bakti Sdn Bhd, Malaysia, 1983), at pp. 36-8; Jayakumar, S., *Constitutional Law Cases From Malaysia and Singapore,* 2nd ed. (Malayan Law Journal Pte Ltd, Singapore, 1976), at pp. 44-94.

[205] See among others: *Tee Yam @ Koo Tee Yam* v. *Timbalan Menteri, Menteri Keselamatan Dalam Negeri, Malaysia & Ors* [2005] 5 MLJ 645; *Rasid Bin Kulop Mohamad* v. *Timbalan Menteri Dalam Negeri & Ors* [2005] 2 MLJ 535; *Rajeshkanna A/L Marimuthu* v. *Tn Hj Abd Wahab Bin Hj Kassim (Pengarah Penjara, Johor Bahru, Johor)* [2004] 5 MLJ 155; *Zali Bin Shariff* v. *Timbalan Menteri Dalam Negeri, Malaysia & Anor* [2004] 1 MLJ 480; *Mohamad Ezam Bin Mohd Noor* v.. *Ketua Polis Negara & Other Appeals* [2002] 4 MLJ 449; *Madjai Bin Sanusi* v. *Pengarah Imigresen, Johor & Ors* [2000] 5 MLJ 116; *Ahmad Bashid Bin Abdul Malek & Ors* v. *Timbalan Menteri Dalam Negeri & Ors and Other Appeals* [1999] 3 MLJ 369; *Nallakaruppan A/L Solaimalai* v. *Ketua Pengarah Penjara, Malaysia & Ors* [1999] 1 MLJ 96; *Khoo Chee Peng* v.. *Menteri Hal Ehwal Dalam Negeri & Ors* [1998] 6 MLJ 646; *Gurcharan Singh A/L Bachittar Singh* v. *Penguasa, Tempat Tahanan Perlindungan Kamunting* [1997] 4 MLJ 123; *Morgan A/L Perumal* v. *Ketua Inspektor Hussein Bin Abdul Majid & Ors* [1996] 3 MLJ 281; *Baharuddin Bin Kamsin* v. *Pihak Berkuasa Sidang Panglima Armada Pengkalan TLDM Lumut* [1994] 1 MLJ 60; *Tan Hock Chan* v. *Menteri Dalam Negeri, Malaysia & Ors* [1994] 1 MLJ 60; *Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors* v. *Liau Nyun Fui* [1991] 1 MLJ 350, (High Court decision: [1990] 2 MLJ 240); *Haji Omar Din Bin Mawaidin* v. *Minister For Home Affairs, Malaysia & Anor* [1990] 3 MLJ 435; *Tan Hoon Seng* v. *Minister For Home Affairs, Malaysia & Anor And Another Appeal* [1990] 1 MLJ 171; *Yap Chin Hock* v. *Minister Of Home Affairs & Anor And Other Applications* [1989] 3 MLJ 423; *Zakaria Bin Jaafar* v. *Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors And Another Application* [1989] 3 MLJ 316; *Tuang Pik King* v. *Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor* [1989] 1 MLJ 301; *Public Prosecutor* v. *Koh Yoke Koon, Supreme Court* [1988] 2 MLJ 301 (High Court decision: [1988] 1 MLJ 45); *Che Ani bin Itam* v. *Public Prosecutor* [1984] 1 MLJ 113; *In Re Meenal W/O Muniyandi* [1980] 2 MLJ 299; *Government of Malaysia & Ors* v. *Loh Wai Kong* [1979] 2 MLJ 33; *Subramaniam* v. *Menteri Hal Ehwal Dalam Negeri & Ors* [1997] 1 MLJ 82; *Re Tan Boon Liat* [1977] 2 MLJ 108; *Karam Singh* v. *Menteri Hal Ehwal Dalam Negeri Malaysia* [1969] 2 MLJ 129. For general discussion on habeas corpus, see: Jain, M. P. 'Constitutional Remedies', in Trinidade, F.A., and Lee, H.P. (eds), The Constitution of Malaysia: Further Perspectives and Developments, 2nd ed. (Penerbit Fajar Bakti Sdn Bhd, Kuala Lumpur, 1988), at pp. 162 – 166.

[206] See, inter alia: *Public Prosecution* v. *Lau Kee Hoo* [1983] 1 MLJ 157; *Public Prosecutor* v. *Yee Kim Seng* [1983] 1 MLJ 252; *Jamaluddin bin Othman* v. *Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor* [1989] 1 MLJ 368; *Attorney General, Malaysia* v. *Chiow Thiam Guan* [1983] 1

MLJ 51, *Public Prosecutor* v. *Yee Kim Seng* [1983] 1 MLJ 252; *Juraimi Bin Husin* v. *Lembaga Pengampunan, Negeri Pahang & Ors* [2001] 3 MLJ 458.

[207] *Che Ani bin Itam* v. *Public Prosecutor* [1984] 1 MLJ 113.

[208] Government of Malaysia & Ors v. Loh Wai Kong [1979] 2 MLJ 33.

[209] See for examples: *Pihak Berkuasa Negeri Sabah* v. *Sugumar Balakrishnan & Another Appeal* [2002] 3 MLJ 72; *Harmenderpall Singh A/L Jagara Singh* v. *Public Prosecutor* [2005] 2 MLJ 542 at paras 12 and 13.

[210] *per* Gopal Sri Ram with whom Ahmad Fairuz J concurred In *Tan Tek Seng* v. *Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 2 CLJ 771 at p. 801. Chan, N.H., JCA who held the dissenting judgment in the case has abstained on giving any view on the matter as the appellant's claim was solely based on the right to be heard. Since Article 5 was never actually argued by and between the parties, the view on the matter is a mere dictum. That part of judgement however was subsequently referred with approval by Faiza Thamby Chik J in *Kanawagi Seperumaniam* v. *Penang Port Commission* [2002] 8 CLJ 503 at p. 536. This right for which the protection has been afforded in those two cases has been labelled as the right to livelihood. Wan Adnan Muhamad J in *Krishnan A/L Sinniah* Lwn *Ketua Pegarah Imigresen Malaysia Dan Satu Lagi* [2005] 3 MLJ 376 (reported in Malay) accorded recognition to this right of livelihood although he found that the plaintiff was not denied the right to livelihood as his dismissal was made in accordance with law. Interestingly despite that his lordship at para 13 expressed the view that Federal Court's definition of 'life' in *Sugumar Balakrisnan* annulled that of the Court of Appeal in *Tan Tek Seng*. See also: *Lembaga Tatatertib Perkhidmatan Awam, Hospital Besar Pulau Pinang* v. *Utra Badi A/L K Perumal* [2000] 3 MLJ 281 where at p. 295 Gopal Sri Ram JCA reiterated the point he expressed earlier in *Tan Tek Seng, i.e.,* to adopt the more flexible interpretation of the expression 'life' in Article 5(1) of the Federal Constitution saying that: '[t]he fundamental right to life which is the most precious human right and which forms the arc of all other rights must therefore be interpreted in a broad and expansive spirit so as to invest it with significance and vitality which may endure for years to come and enhance the dignity of the individual and the worth of the human person.'

[211] [1973] 1 MLJ 128. In this case the appeal brought against the sentence that was felt not to reflect the gravity of the offence (for having taken into consideration that the respondent was the prince of the Ruling House of Johore). The sentence was set aside and a more suitable sentence (severe) was imposed on the basis that regardless of one's social status, every one is equal before the law and thus, any sentence to be imposed in pursuance to the law is to reflect the gravity of the offence without taking into consideration the social status of the offender.

[212] *Ibid* at 129. Raja Azlan Shah at the material time was the prince of the State of Perak and currently is the King of the State of Perak.

[213] *per* Suffian LP delivering the judgment of the Federal Court in *Government of Malaysia & Ors* v.

Loh Wai Kong [1979] 1 LNS 22.

[214] See among others: *Yii Hung Siong* v. *Public Prosecutor* [2005] 6 MLJ 432 where Clement Skinner J held that the applicant ought to have demonstrated how the confiscation and suspension of his driving licence has deprived him of his livelihood in order he would exercise the revisionary power against the order for confiscation and suspension.

[215] *Re JG, JG* v. *Pengarah Jabatan Pendaftaran Negara* [2006] 1 MLJ 90 also reported in [2005] 4 CLJ 710. However earlier another court of concurrent jurisdiction has rejected an application of a similar kind. In *Wong Chiou Yong (p) v Pendaftar Besar/Ketua Pengarah Jabatan Pendaftaran Negara* [2005] 1 MLJ 551 (also reported in [2005] 1 CLJ 622) VT Singham J held at p. 646 c-d that although transsexuals cannot be left in legal limbo as to their status in gender, their remedy lies with Parliament and not the courts. Any fact to be changed in the respective registration in respect of their gender must be introduced by an Act of Parliament and cannot be made by judicial pronouncement. It is apparent that the different in the two judgment was influenced by only one factor, the readiness of the judge in *Re JG* to resort to equity, the very inherent power of the courts as encapsulated in the Specific Relief Act whereas the judge in *Wong Chiou Yong* preferred to leave the matter to the Parliament. As both cases decided by the court of concurrent jurisdiction, none will prevail over the other. Until ratio of either of the case is reversed by appellate court of higher jurisdiction, the precedent will remain as is, both the transsexual and the party who wishes to refuse the recognition each has one case to support their argument and it has not been tested if any of the two will prevail over the other.

[216] The issue was so argued in *Priyathaseny & Ors* v. *Pegawai Penguatkuasa Agama Jabatan Hal Ehwal Agama Islam Perak & Ors* [2003] 2 CLJ 221. However as Malaysia practices dual legal system, the High Court refuses to deal with the matter holding at p. 227 a-c that: 'It is this court's finding that the central and substantive issue is whether the first plaintiff remains a Muslim despite her so-called renunciation of the Islamic faith and professing now, the Hindu faith and practice. Pegged to this is also the issue of whether her husband, the second plaintiff, remains a Muslim in spite of the allegation that he was coerced into converting. This issue is the core subject matter of this application in spite of the various other declarations sought for. These are, as described by learned senior federal counsel, Dato' Abdul Aziz and with whom this court agrees, 'peripheral issues' that should not cloud the focal issue. Having said that, I am now guided by and bound by the pronouncement of our apex court in *Soon Singh* that the jurisdiction of this court is now ousted from determining the merits of this application. This central issue is clearly out of the bound of jurisdiction of the civil court as it is clearly a matter that can only be determined by the Syariah authorities.'

[217] [1987] 2 MLJ 459.

[218] [1971] 2 MLJ 115; [1971] 1 LNS 109.

[219] *Loh Wai Kong.*

[220] *Pavesich* v. *New England Life Insurance Co.* (1905) 50 SE 68.

[221] *Public Prosecutor* v. *Lee Sin Long* [1949] 1 MLJ 51 where Callow J stipulated that 'The privacy of a person in his home must be respected, and cannot be disturbed unless first shown to proper authority that reasonable cause for interference is warranted'; in *HMO Pacific Sdn Bhd* v. *Dr Johari bin Muhamad Yusup* [1997] 286 MLJU 1 REKHRAJ JC emphasised on the importance of the right to sanctity and sanctuary to a privacy of one's own home; and in *Electrical Industry Workers Union & Ors* v. *Makonka Electronics Sdn Bhd* [1996] 387 MLJU 1 Abdul Wahab JC states that strict compliance with the undertakings and terms are therefore essential when Anton Piller injunction to be granted interferes with the defendant's right to privacy. While privacy as a right is being accorded recognition in the respective context, no authority was offered to found the same.

[222] [2004] 5 CLJ 285.

[223] *Ibid* at 290 g-h.

[224] *Ibid* at 289 c-g.

[225] Article 4(1) of the Federal Constitution.

[226] *Government of the Federation of Malaya* v. *Surinder Singh Kanda* [1961] 1 MLJ 121; *Stephen Kalong Ningkan* v. *Government of Malaysia* [1968] 2 MLJ 238; *Dewan Undangan Negeri Kelantan & Anor* v. *Nordin bin Salleh & Anor* [1992] 1 MLJ 697; *Mohamed Habibullah bin Mahmood* v. *Faridah bte Dato Talib* [1992] 2 MLJ 793; *R Rama Chandran* v. *The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; *Sugumar Balakrishnan* v. *Pengarah Imigresen Negeri Sabah & Anor* [1998] 3 MLJ 289; *Dato' Seri Anwar bin Ibrahim* v. *Public Prosecutor* [2000] 2 MLJ 486; *Md Aris bin Zainal Abidin* v. *Suruhanjaya Pasukan Polis & Anor* [2002] 4 MLJ 105; *United Malacca Bhd* v. Pentadbir *Tanah Daerah Alor Gajah and Other Applications* [2003] 1 MLJ 465; *Danaharta Urus Sdn Bhd* v. *Kekatong Sdn Bhd (Attorney General Malaysia)* [2004] 2 MLJ 257.

[227] In Malaysia, the Federal Constitution is on the top level of the hierarchy of the sources of laws followed by the respective States' Constitutions; the Acts of Parliament (Federal Laws including, Ordinances as may be appropriate); the State Enactments; then cases laws duly decided by the superior courts (decision of courts of higher level binds the courts subordinate to it). Such tiers are binding upon the courts in Malaysia. For general discussion on the matter, see: Lee, M.P. *General Principles of Malaysian Law*, 3rd ed. (Penerbit Fajar Bakti Sdn Bhd, Shah Alam, 1997), at p. 10-34.

[228] See *Ultra Dimension* [2004] 5 CLJ 285 at pp. 287-8.

[229] *Tan Tek Seng* [1996] 1 MLJ 261 at p. 281.

[230] *Ibid* at 291 e-f.

[231] See among others: *Wood* v. *The United Kingdom* (1997) 24 EHRR CD 69, (Application no. 23414/02); *Grant* v. *The United Kingdom* [2006] ECHR 548 (Application no. 32570/03) (23 May 2006); *Connors* v. *The United Kingdom* [2004] ECHR 223 (Application no. 66746/01).

[232] In *Campbell*, except for Lord Carswell who did not express any opinion on the matter, all other judges both from those who held the majority and minority judgment agreed that Article 8 of the ECHR does provide the right to privacy.

[233] Article 5(1) of the Federal Constitution.

[234] See among others: *Lai Tai* v. *The Collector of Land Revenue* [1960] MLJ 82; *Comptroller – General of Inland Revenue* v. *NP* [1973] 1 MLJ 165; *S Kulasingam & Anor* v. *Commissioner of Lands, Federal Territories & Ors* [1982] 1 MLJ 204.

[235] For general discussion on the matter, see: Harding, A.J., 'Property Rights under the Malaysian Constitution', in Trinidade, F.A., and Lee, H.P. (eds), *The Constitution of Malaysia: Further Perspectives and Developments*, 2nd ed. (Penerbit Fajar Bakti Sdn Bhd, Kuala Lumpur, 1988), at pp. 59-75; Sheridan, L.A. and Groves, H.E., *The Constitution of Malaysia*, 4th ed. (Malayan Law Journal Pte Ltd., Singapore, 1987) at pp. 78-81, Jayakumar, S., *Constitutional Law Cases From Malaysia and Singapore*, 2nd ed. (Malayan Law Journal Pte Ltd, Singapore, 1976), at pp. 130-144.

[236] Section 2 of the Stamp Act 1949; s. 178 of the Companies Act 1965; s. 102 of the Law Reform (Marriage And Divorce) Act 1976; s. 106 of the Islamic Family Law (Federal Territories) Act 1984; s. 3 of the Trustee Act 1949; s. 2 of the Planters Loans Fund (Dissolution) Act 1981; s. 2 of the Perbadanan Pembangunan Bandar (Successor Company) Act 1996; s. 2 of the Probate And Administration Act 1959; s. 2 of the Lembaga Padi Dan Beras Negara (Successor Company) Act 1994; s. 2 of the Dangerous Drugs (Forfeiture Of Property) Act 1988; s. 2 of the Wills Act 1959; s. 2 of the Federal Lands Commissioner Act 1957; s. 2 of the Banking And Financial Institutions Act 1989; s. 2 of the Minister Of Finance (Incorporation) Act 1957; s. 2 of the Sale Of Goods Act 1957; s. 2 of the Married Women Act 1957; s. 2 of the Railways Act 1991; s. 2 of the Railways (Successor Company) Act 1991; s. 2 of the Postal Services (Successor Company) Act 1991; s. 2 of the Airport And Aviation Services (Operating Company) Act 1991; s. 124a of the Securities Commission Act 1993; s. 2 of the Futures Industry Act 1993; s. 52 of the Futures Industry Act 1993; s. 2 of the Bank Simpanan Nasional Berhad Act 1997; s. 2 of the Public Trust Corporation Act 1995; s. 2 of the Standards Of Malaysia Act 1996; s. 2 of the Insurance Act 1996; s. 2 of the Labuan Offshore Trusts Act 1996; s. 2 of the National Land Rehabilitation And Consolidation Authority (Succession And Dissolution) Act 1997; s. 2 of the Anti-Corruption Act 1997; s. 2 of the Pengurusan Danaharta Nasional Berhad Act 1998; s. 3 of the Anti-Money Laundering Act 2001; s. 3 of the Development Financial Institutions Act 2002; s. 2 of the Mutual Assistance In Criminal Matters Act 2002; s. 10 of the Employees Provident Fund (Conduct And Discipline) Rules 1993.

[237] See: *Station Hotels Bhd.* v. *Malayan Railway Administration* [1977] 1 MLJ 112 where it was held that a contractual right under the lease is not 'property' within Article 13; *Government of Malaysia & Anor* v. *Selangor Pilot Association (1946)*[1977] 1 MLJ 133 where among the issues raised was whether the goodwill was property. The Federal Court's decision is reported at [1975] 2 MLJ 66 where Suffian L.P expressed his agreement with a decision of the Supreme Court of India that defines property – within the context of the Constitution as: '...a bundle of rights exercisable by the owner in respect thereof and embracing within its purview both corporeal and incorporeal rights.' See also: *Pengarah Tanah dan Galian, Wilayah Persekutuan* v. *Sri Lempah Enterprise Sdn Bhd* [1979]1 MLJ 135. Professor Sheridan, L.A. in his article 'The Mysterious Case of the Disappearing Business: *Government of Malaysia and Anor.* v. *Selangor Pilot Association'* (1977) 1 JMCL 1 at p. 4 expressed the view that: '[i]n article 13 of the constitution of Malaysia the word "property" is not used in a special sense. It means what people can own, buy and sell, give as security for debts, use, wear out, improve, give away, destroy, settle on trust, leave by will or success to on intestacy.' Harding, J.A. in 'Property Rights under the Malaysian Constitution' at p. 66 after examining several cases where the issue of definition of property was brought concluded that 'the test of marketability has generally desirable result, and should be adopted as a general guide-line, though it should not necessarily be applied as a rigid rule...'

[238] [1975] 2 MLJ 66.

[239] (1954) SC AIR 119

[240] [1987] 2 MLJ 459.

[241] [1970] 1 QB 693.

[242] *Ibid* at 708.

[243] 1954 SC 300.

[244] [1949] 1 MLJ 51.

[245] Posner, R., *The Economics of Justice* (Harvard University Press, Cambridge, 1983) expressed similar proposition in a narrower context by suggesting that information privacy rights be defined in the context of personal property; and since all the personal information about an individual belongs to that person he should be free to protect or dispose of it as desired. See: Cronin, M.J., 'Privacy and Electronic Commerce' in Imparato, N. (ed.), *Public Policy and The Internet: Privacy Taxes, and Contract* (Hoover Institution Press, California, 2000), at p. 12.

[246] See Article 6(2) of the Federal Constitution.

[247] See Article 8(1) of the Federal Constitution.

[248] See Article 8(2) of the Federal Constitution.

[249] See Article 9 (2) of the Federal Constitution.

[250] However it is arguable that this right is only granted upon an individual that has attained the legal age of majority. That is due to the special right granted upon the parents or guardians with regard

to education of children as *per* Article 12(4) of the Federal Constitution. This matter is further discussed in Chapter III, 3.3.1 (i).

[251] See Article 11 (4) of the Federal Constitution.

[252] See Article 11 (5) of the Federal Constitution.

[253] While concentrating on freedom of speech, Shed Saleem Faruqi in his article 'Free Speech and the Constitution' [1992] 4 CLJ lxiv para 38 made the analogy that 'if the drafters of the Constitution had wished to confer on Parliament an unlimited power to restrict free speech, they would have ... chosen some other phraseology like 'No citizen shall be deprived of the right to freedom of speech and expression *save in accordance with law*.' (emphasis added) which would constrain the executive but leave Parliament free to pass any law it wishes in order to regulate the right.

[254] [1973] 1 MLJ 128. In this case the appeal brought against the sentence that was felt not to reflect the gravity of the offence (for having taken into consideration that the respondent was the prince of the Ruling House of Johore). The sentence was set aside and a more suitable sentence (severe) was imposed on the basis that regardless of one's social status, every one is equal before the law and thus, any sentence to be imposed in pursuance to the law is to reflect the gravity of the offence without taking into consideration the social status of the offender.

[255] *Ibid* at 129. Raja Azlan Shah at the material time was the prince of the State of Perak and currently is the King of the State of Perak.

[256] The term used within and throughout the Federal Constitution referring to the date Malaysia gained its independence from Britain on the 31 August 1957 as so defined in Article 160 of the Federal Constitution.

[257] See for examples the Federal Court's decision in *Mohd Amin bin Mohd Razali & Ors* v. *Public Prosecutor* [2003] 4 MLJ 129 where the argument that the imposition of death penalty breached Article 5 was dismissed as such penalty is provided for in section 121 of the Penal Code being one of the punishment imposable for offence of waging war against Yang Di Pertuan Agung.

[258] See among others: Assa Singh v. Mentri Besar Johore [1969] 2 MLJ 30; Ooi Ah Phua v. Officer-In-Charge Criminal Investigation, Kedah/Perlis [1975] 2 MLJ 198; Public Prosecutor v. Lau Kee Hoo [1983] 1 MLJ 157; Tee Yam @ Koo Tee Yam v. Timbalan Menteri, Menteri Keselamatan Dalam Negeri, Malaysia & Ors [2005] 5 MLJ 645. The detention becomes unlawful if any procedures failed to be observed while affecting detention, see: Re Tan Boon Liat [commat] Allen & Anor Et Al; Tan Boon Liat v. Menteri Hal Ehwal Dalam Negeri & Ors; Chuah Ah Mow v. Menteri Hal Ehwal Dalam Negeri & Ors; Subramaniam v. Menteri Hal Ehwal Dalam Negeri & Ors [1977] 2 MLJ 108. Detention is illegal if it is incapable of legal justification as it was so held by Salleh Abbas LP in Re Tan Sri Raja Khalid bin Raja Harun: Inspector General of Police v. Tan Sri Raja Khalid bin Raja Harun [1984] 1 MLJ 182 at p. 184.

[259] Thus if the facts as in *Kaye* to occur in Malaysia, it is arguable that such act of trespassing is a

violation of a patient's privacy.

[260] See: *Abu Hassan bin Abd Jamal* v. *Public Prosecutor* [1994] MLJU LEXIS 801 where the offence was committed through the conduct of the accused/appellant by exposing his genitals in the canteen of a girl's primary school in the presence of the school girls and the their teachers.

[261] An instance to such effect was recorded by the High Court in *Kong Lai Soo* v. *Ho Kean* [1973] 1 LNS 26 and also by the then Federal Court in *Ho Kean* v. *Kong Lai Soo* [1974] 2 LNS 49.

[262] For facts and some details discussion and analysis of the judgment see supra at pp. 111-7.

[263] As she so held in *Ultra Dimension* at p. 289 para g: '...that English Common Law does not recognise privacy rights and it therefore follows that invasion of privacy rights does not give rise to cause of action. As English Common Law is applicable in Malaysia pursuant to s. 3 of the Civil Law Act 1956, privacy rights which is not recognised under English Law is accordingly not recognised under Malaysian law.'

[264] Thus, for example, in *Karpal Singh & Anor* v. *Public Prosecutor* [1991] 2 MLJ 544 it was held that the English law cannot be applied in criminal procedure, which, in Malaysia, is governed by the Criminal Procedure Code (FMS Cap. 6). In *Jamil bin Harun* v. *Yang Kamsiah & Anor* [1984] 1 MLJ 217 the Privy Council held that is is for the courts in Malaysia to decide, subject always to the statute law of the Federation, whether to follow English law.

[265] Gopal Sri Ram JCA, delivering the judgment of the Court of Appeal, cautioned about applying the principles declared in recent foreign cases as he said: '[i]n our judgment, it would be quite wrong, and indeed wholly out of place, to decide a Malaysian case *solely* by reference to English or other Commonwealth decisions. Indeed, the more recent decisions of the English courts demonstrate that their concept of the doctrine and the relationships to which it may be extended do not accord to the standards of our society.' *Tengku Abdullah Ibni Sultan Abu Bakar & Ors* v. *Mohd Latiff Bin Shah Mohd & Ors And Other Appeals* [1996] 2 MLJ 265, at p. 309.

[266] In *Syarikat Batu Sinar Sdn. Bhd. & Ors.* V. *UMBC Finance Bhd. & Ors.* [1990] 3 MLJ 468 it was held to the effect that the practice in Peninsular Malaysia combined with local statutory provisions on the matter would constitute a distinctive local circumstances of the inhabitants of Peninsular Malaysia that the decisions in English cases on the matter should not be followed. There are several precedents where the law of England has not been applied in Malaysia as a symbol of recognition of local customs and religions most of which are totally different from those of the English such as *Chulas* v. *Kolson* [1867] Leic 462, *Khoo Tiang Bee* v. *Tan Beng Guat* [1877] 1 Ky 423, *Khoo Hooi Leong* v. *Khoo Cheng Yeok* [1930] AC 346, and *Chou Choon Neoh* v. *Spottiswoode* [1869] 1 Ky 216. In *Chou Choon Neoh* Maxwell CJ held that '[i]n this colony, so much of the law of England as was in existence when it was imported here, and as is of general (and not merely local) policy, and adapted to the condition and wants of the inhabitants, is the law of the land; and further, that law is subject, in its applications to the various alien races established

here, to such modifications as are necessary to prevent it from operating unjustly and oppressively on them.' While referring to personal life, specifically on the questions of marriage and divorce, Maxwell CJ went on to say that: 'it would be impossible to apply our law to Mohammedans, Hindoos, and Buddhists, without the most absurd and intolerable consequences, and it is therefore held inapplicable to them.'

[267] At the material time, contrary view was held by Sedley J in *Douglas* [2001] QB 967 and Morland J in *Campbell* [2002] EWHC 499.

[268] In *Prince Albert* v. *Strange* (1849) 1 Hall & Twells 1, the Lord Chancellor, Lord Cottenham quoted the case of *Wyatt* v. *Wilson* (1820) 1 Hall & Twells 25 which was interpreted in this manner: 'The King had not given any confidential information to the physician. But by publishing the diary, the physician would infringe the King's right of privacy... Lord Eldon would ... have granted an injunction to restrain the publisher.' And it was further opined: 'To bring it to modern times: Suppose a photographer with a long-distance lens took a picture of a prominent person in a loving embrace in his garden with a woman who was not his wife. Surely an injunction would be granted to stop it being published. The only cause of action, so far as I know, would be for infringement of privacy.' Lord Denning, *What Next in the Law* (Butterworths, London, 1982 reprinted 2004), at pp. 222-223.

[269] Among the cases where privacy was made as one of the issues but no reference was made to *Kaye* are these: *R.* v. *Brown (Gregory)*[1996] 2 Cr App R 72; *Regina* v. *Brown; Regina* v. *Lucas; Regina* v. *Jaggard; Regina* v. *Laskey; Regina* v. *Carter* (1993) 97 Cr App R 44; *Regina Respondent* v. *Preston (Stephen) Appellant; Regina Respondent* v. *Preston (Zena) Appellant; Regina Respondent* v. *Clarke Appellant; Regina Respondent* v. *Austen Appellant; Regina Respondent* v. *Salter Appellant* [1994] 2 AC 130; *Source Informatics Limited Application for Judicial Review* [1999] WL 1142624; *Marcel and Others* v. *Commissioner of Police of the Metropolis and Others* [1992] 2 WLR 50; *Re Page's Application* (1996) 71 P & CR 440.

[270] Lord Lester, 'History and Context' in Lord Lester and Pannick, D., (eds.), *Human Rights Law and Practice*, at p. 2. Lord Donaldson MR in the *Spycatcher* case stated that: 'the starting point of our domestic law is that every citizen has a right to do what he likes, unless restrained by the common law or by statute'. Lord Irvine of Lairg PC QC while quoting such a judgment commented that such liberty duly afforded upon the subject is therefore the negative right of what is left over when all the prohibitions have limited the area of lawful conduct. See: Lord Irvine of Lairg PC, QC, 'The Development of Human Rights in Britain under an Incorporated Convention on Human Rights', in Lord Irvine of Lairg PC, QC, *Human Rights, Constitutional Law and the Development of the English Legal System: Selected Essays* (Hart Publishing, Oxford, 2003), at p. 21.

[271] Such a risk is obvious and imminent. It is not unnoticeable. In fact while addressing the House of Lords for the 2nd Reading of the Human Rights Bill, the then Lord Chancellor recapped the peril as

his lordship stated: '[t]he traditional freedom of the individual under an unwritten constitution to do himself what which is not prohibited by law gives no protection from misuse of power by the state, not any protection from acts or omissions of public bodies which harm individuals in a way that is incompatible with their human rights under the convention.' Before he went on to state the data that: '[o]ur legal system has been unable to protect people in the 50 cases in which the European Court had found a violation of the convention by the United Kingdom. That is more than any other country except Italy. The trend has been upwards. Over half the violations have been found since 1990...' and as such his lordship made it clear that it is an absurd proposition, enervating insularity and nonsense to hold that 'We have no need of a Bill of Rights because we have freedom.' See: Lord Irvine of Lairg PC, QC, 'The Human Rights Bill, House of Lords 2nd Reading", in Lord Irvine of Lairg PC, QC, *Human Rights, Constitutional Law and the Development of the English Legal System: Selected Essays*, at p. 8. See also: Boyle, A., 'Human Rights and Scots Law: Introduction' in Boyle, A., Himsworth, C., Loux, A., and MacQueen, H., (eds.), *Human Rights and Scots Law* (Hart Publishing, Oregon, 2002), at p. 2.

[272] *per* Lord Nolan in *R* v. *Khan* [1996] 2 Cr. App R 440 at p. 454.

[273] In *Malone* v. *Metropolitan Police* [1979] Ch 344, at p. 366E Meggarry VC expressed this opinion: '[a]s I have indicated, England is not a country where everything is forbidden except what is expressly permitted. One possible illustration is smoking. I inquired what positive authority was given by the law to permit people to smoke.'

[274] That point has been identified by Lord Irvine of Lairg who in a less straight forward sentence put that '[a] major change which the [Human Rights] Act will bring flows from the shift to a rights based system, under this system a citizen's right is asserted as a positive entitlement expressed in clear and principles terms.' *per* Lord Irvine of Lairg PC, QC, 'The Development of Human Rights in Britain under an Incorporated Convention on Human Rights', in Lord Irvine of Lairg PC, QC, *Human Rights, Constitutional Law and the Development of the English Legal System: Selected Essays*, (Hart Publishing, Oxford, 2003).

[275] Lord Lester, 'History and Context' in Lord Lester and Pannick, D., (eds.), *Human Rights Law and Practice*, at p. 2 (emphasis added). For further reading in more general concept, see: Spitz, D., (ed.), *John Stuart Mill On Liberty: Annoted text Sources And Background Criticism* (City University of New York, New York, 1975), Chapter III 'Of Individuality, as One of the Elements of Well Being", at pp. 53-69 and Chapter IV "Of the Limits to the Authority of Society over the Individual', at pp. 70-86.

[276] 'In the present case, the alleged right to hold a telephone conversation in the privacy of one's own home without molestation is wide and indefinite in its scope, and in any case does not seem to be very apt for covering the plaintiff's grievance. He was not "molested" in holding his telephone conversations: he held them without "molestation," but without their retaining the privacy that he

desired. If a man telephones from his own home, but an open window makes it possible for a near neighbour to overhear what is said, and the neighbour, remaining throughout on his own property, listens to the conversation, is he to be a tortfeasor? Is a person who overhears a telephone conversation by reason of a so-called "crossed line" to be liable in damages? What of an operator of a private switchboard who listens in? Why is the right that is claimed confined to a man's own home, so that it would not apply to private telephone conversations from offices, call boxes or the houses of others? If they were to be included, what of the greater opportunities for deliberate overhearing that they offer? In any case, why is the telephone to be subject to this special right of privacy when there is no general right? That is not all. Suppose that there is what for brevity I may call a right to telephonic privacy, sounding in tort. What exceptions to it, if any, would there be? Would it be a breach of the right if anyone listened to a telephone conversation in which some act of criminal violence or dishonesty was being planned? Should a listener be restrained by injunction from disclosing to the authorities a conversation that would lead to the release of someone who has been kidnapped? There are many, many questions that can, and should, be asked.' *per* Sir Robert Megarry VC in *Malone* at p. 373.

[277] [1913] 2 Ch 469.

[278] *Ibid* at 461, emphasis added. See also Tournier v. National Provincial and Union Bank of England [1924] 1 KB 461.

[279] [1984] 2 All ER 408.

[280] In *Spycatcher* Lord Goff of Chieveley went a step further saying that the duty of confidentiality will arise 'where an obviously confidential document is wafted by an electric fan out of a window into a crowded street, or when an obviously confidential document, such as a private diary, is dropped in a public place, and is then picked up by a passerby." [1988] 3 All ER 545, 658-659. See also: Clarke, L., *Confidentiality and the Law*, at pp. 72-3.

[281] Gutwirth, S., Privacy in the Information Age, translated by Raf Casert (Rowman & Littlefield Publisher Inc, United States of America, 2001), at p. 12.

[282] Michael, J. wrote in *Privacy and Human Rights: An International and Comparative Study, with Special Reference to Developments in Information Technology* (Darmouth Publication Co/UNESCO, Darmouth, 1994), at p. 15 that 'privacy issues can be traced as far back as 1361, when the Justices of the Peace Act in England provided for the arrest of peeping toms and eavesdroppers, establishing the first notion of behavioural, or media privacy'; Justices of the Peace Act, 1361 (Eng.), 34 Edw. 3, c.1. In 1765 in Entick v. Carrington (1558-1774) All ER 45, Lord Camden held that 'we can safely say there is no law in this country to justify the defendants in what they have done; if there was, it would destroy all the comforts of society, for papers are often the dearest property a man can have.' In 1763 in Speech in the House of Lords, in opposition to Excise Bill on perry and cider, William Pitt, the First Earl of Chatham, the Parliamentarian as he

then was expressed that: 'the poorest man may in his cottage bid defiance to all the force of the Crown, It may be frail; its roof may shake; the wind may blow through it; the storms may enter; the rain may enter – but the King of England cannot enter; all his forced dare not cross the threshold of the ruined tenement."

[283] The decision in *Kaye* was delivered on 23 February and 16 March 1990 and was reported in 1991 while the HRA 1998 came into force on 2 October 2000.

[284] See among others the Court of Appeal's judgments in *Khorasandjian* v. *Bush* [1993] Q.B. 727; *Marcel and Others* v. *Commissioner of Police of the Metropolis and Others* [1992] 2 WLR 50. See also Millett J.'s judgment *In Re Barlow Clowes Gilt Managers Ltd* [1992] 2 WLR 36.

[285] Although some historical documents, such as the Magna Carta (1215) which protect the rights of the community against the Crown; the Bill of Rights (1689) which extended the powers of Parliament; and the Reform Act (1832) which reformed the system of Parliamentary representation, might be argued as providing the basis for the provisions similar to most written constitution of many Commonwealth countries, the United Kingdom does not have a single document codifying and setting out the fundamental rights of its subjects and the limit of the power of the government or the Crown.

[286] As so expressed, *inter alia*, by Morison J in *A.* v. *B. ex parte. News Group Newspapers Ltd* [1998] ICR 55 at p. 72. See also Bingham LJ's pronouncement in *Kaye*, see supra n. 20 and the accompanying text thereto at p. 75.

[287] [2003] UKHL 53.

[288] [2004] UKHL 22 by majority judgment of 3:2 allowed the appeal brought by the supermodel that the defendant's publication constituted an infringement of her privacy. That seeds the hope that the English judiciary will finally sanction its recognition for the right to privacy. Prior to that, there has been a belief that the passing of the HRA 1998 (HRA) that gives legal effects to the bundles of rights encompassed in the European Convention of Human Rights (ECHR) including the right for respect of private life Schedule 1 of the HRA read together with Article 8 of the ECHR by the United Kingdom Parliament would mean that finally legal recognition is awarded for the notion of privacy. *Douglas and Zeta Jones and Ors* v. *Hello!* [2001] QB 967; see also Wade's contentious reading of section 6 HRA 1998 as giving rise to a form of direct, or full horizontal effect, Wade, H. W. R., 'Horizons of Horizontality' (2000) 116 LQR 217.

CHAPTER III

PRIVACY: THE CONCEPT REVISITED

Chapter Outline

Word Count (excluding endnotes): 23,742 Words

Each soul earneth only on its own account,

nor doth any laden bear another's load (6:164)

3.1 Introduction

The thesis was initiated with the belief that each and every individual has the right to determine and decide what is good or bad for himself. It is an individual himself who has to face the consequence of his conduct; he is not accountable except for what he has done and sometime omitted to do but definitely not for that of others. To a further degree, as it is he who shall decide how he would like to live his private life, he should have the power to determine whether or not to allow another's involvement and whether or not to keep any part of it private or make it public. Even if he were to choose to keep nothing exclusively to himself, to divulge everything to every one, or even to let others to decide for him, the bottom line is those factors are still the result of his choice; he chooses not to have the privacy on those matters and that was not done by force or against his will. He has exercised his privacy by choosing not to have it. Hence it becomes apparent that what is paramount is for the individual to have the freedom about his private life, to choose how it should be and to face the consequence of his choice and not that of others. That, I believe, is how the matter should be.

With regard to private life, an individual shall be the determinant, not the government or anybody else, no matter what the latter's position is in relation to that very individual. Although that underlines the notion of privacy, there are exceptions to every principle. There are circumstances where the principle will stand as a good one as there are situations where the principle has to be varied or even nullified. Those are among the most important issues associated with the notion of privacy which will be the subject matter of this Chapter. The concept of privacy and the scope it seeks to protect are the main topics here. To clarify those points the thesis proposes the definition of privacy and the touchstones that would draw the limit within which a claim of privacy should exist. The main objective of that is to explicate the notion while rectifying misunderstandings on the matters. The later part of this chapter discusses the situation where a claim of privacy will not exist or may be restricted and how this principle works with regard to any claim of privacy intrusion.

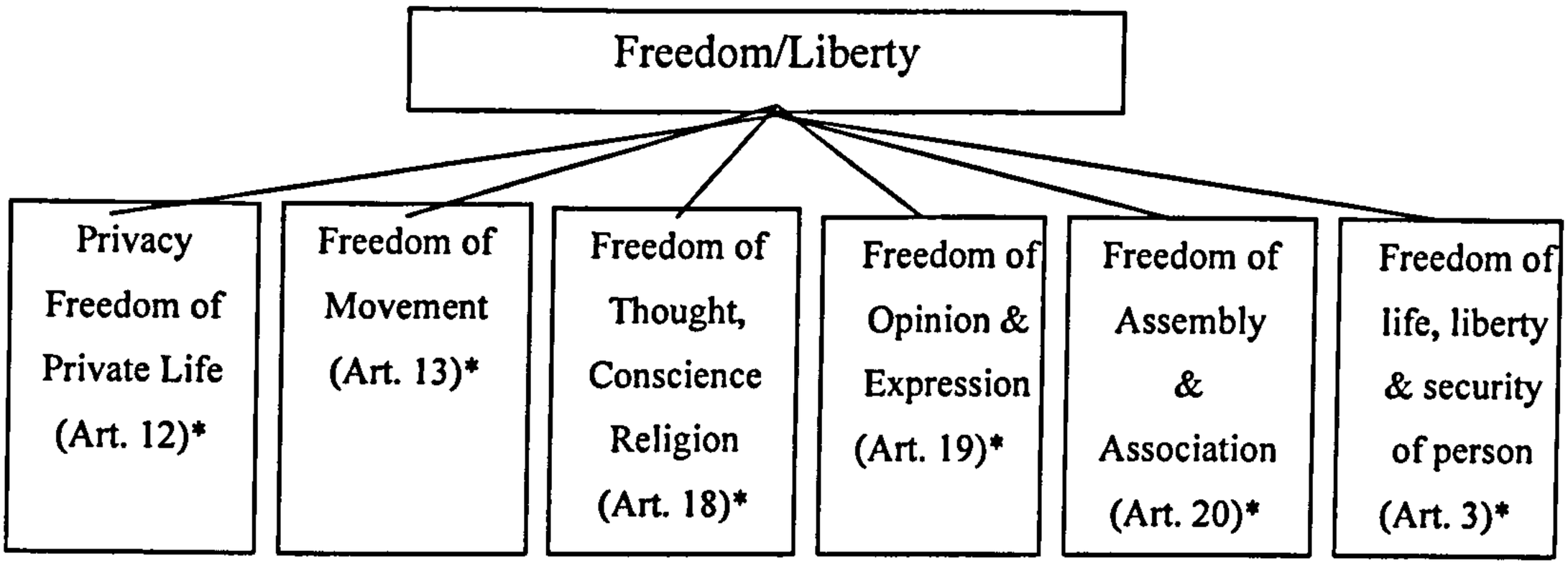
3.2 Definition of Privacy

One of the unsettled issues related to privacy is the problem with the definition. The problem with definition was one of the reasons the Younger Committee on privacy in the United Kingdom decided against recommending a general right to privacy.[1] Many attempts have been taken to define the term 'privacy' and yet the definitions that have been offered are either partial - hence restricting its scope to merely certain aspect of privacy, or too general so as to attract the doubt as to the existence of and the prospect for affording effective protection to privacy as a right.

These definitions are aspectual in nature: that the right to 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;'[2] 'the individual's ability to control the circulation of information relating to him,'[3] 'the condition of not having undocumented personal information about oneself known by others;'[4] or that 'is control over knowledge about oneself'[5] i.e. informational privacy. Thus it is not surprising if an able writer suggested that 'at the heart of the concern about 'privacy' lies the use and abuse of personal information about an individual.'[6]

Among those definitions the one offered by Westin who conceives privacy as the 'claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others'[7] has gained much popularity for it is thought to be the exhaustive or more suitable one.[8] However there are some problems with such a definition. Not only that definition is aspectual and thus partial, to regard privacy merely as a 'claim' would undermine the importance of the value of 'privacy' and impede its effective legal protection. First of all, as it is submitted throughout this thesis, the notion of privacy is not limited merely to the right to control personal information. The scope of privacy is wider than that as this Chapter elaborates in due course. At this stage it suffices to say that privacy shall include what Gutwirth described as '... a variable content which touches all aspects of life that linked to individual freedom'[9] within the parameter of one's private life. Secondly, it is inapt and undesirable to describe privacy as a kind of claim. For a claim to be afforded effective legal protection its amplitude needs to

be 'lucid' – which is almost, if not at all, an impossible task to do with regard to privacy as it is with other classes of freedom.[10] It is proposed that privacy is a class of freedom which is in the same level of hierarchy as other types of freedom such as freedom of religion, freedom of expression, etc which are among the classes to freedom as the chart below shows:



* Universal Declaration of Human Rights

Being a class of freedom and as with other classes of freedom, the notion of privacy does not demand an exhaustive definition that depicts its exact nature and it definitely is not a mere 'claim' albeit it may be legally restricted and is never absolute.[11] This aspect is further discussed at the later part of this Chapter.

Warren and Brandeis used the term 'right to privacy' to refer to the '... rights as against the world ..... the right of one who has remained a private individual, to prevent his public portraiture.'[12] That can be construed so as to limit the right to privacy as an individual's control upon the publication of his private matters. In order to support their proposition Warren and Brandeis attempted to trace the existence of the right to privacy from the very root of the common law principles that affords protection to an individual in person and in property. That definition, however, is restrictive in nature and could not have been intended to be exhaustive; thus, to supplement that, they borrowed the definition used by Judge Cooley who described privacy as 'the right to be let alone'.[13] The Oxford Concise English Dictionary defines the word privacy as a state in which one is not observed or

disturbed by others; or freedom from public attention. Privacy is commonly understood as the quality or condition of being secluded from the presence or view of others. Hence it is not inappropriate if Judge Cooley described privacy as the 'right to be let alone.' This 'right to be let alone' definition has met judicial approval in the United States of America[14] and has been adopted by many able writers.[15] That definition as it stands, however, may convey false impression as if privacy is the synonym of freedom.[16] That is unwarranted. While borrowing the term 'the right to be let alone' Warren & Brandeis related the concept with the idea of liberty, in the sense of an individual's liberty to choose whether or not to publish or allow the publication of facts about himself, and the argument centred on the notion that the expansion of the legal conception of property, relief that has been afforded on the basis of defamation, breach of confidence or implied contract are in reality the acknowledgment of individual's right to privacy. If one reads Warren and Brandeis' paper in the light of the facts that had driven the preparation of such a paper, it is explicable why the paper concentrates very much on establishing an individual's right of determination to publish facts about himself while failing to explore fully what the right to privacy is really about and the scope of such a right.[17] Therefore it was not unexpected that arguments were brought against the notion of privacy as proposed by Warren and Brandeis as it would be hard to swallow the idea that privacy is the synonym of individual's *absolute* right to determine the publication of his thoughts, sentiments, and emotions and the extent of the communication of any of those to others.[18] That is not the context within which the notion of privacy is being analysed and argued in this thesis.

While agreeing with Warren and Brandeis on the point that privacy is, in the widest sense, the right to be let alone, the notion of privacy within this thesis differs from that of Warren and Brandeis in two senses:

First: the scope of the right is not restricted merely to the right to determine extent of the publication (including the right to prevent publication) of individual's private facts (including thoughts, sentiments and emotions).[19] That right to information privacy is just an aspect of the wider scope of privacy; and

Second: the right does not exist in all circumstances; its existence is subject to the subsistence of the two touchstones as discussed in 3.3.1 (i) and (ii).

Thus, for example, while Warren and Brandeis generally argued that 'if you may not reproduce a woman's face photographically without her consent, how much less should be tolerated the reproduction of her face, her form, and her actions, by graphic descriptions colored to suit a gross and depraved imagination';[20] this thesis concurs on that if such reproduction relates to activities of such a woman while being in private sphere but this thesis does not agree with that in absolute term, not especially if the reproduction relates to non private matter(s) or any activities of such a woman while in public or even private property but the locality is such that it allows direct public gaze, e.g. within a room with widely open uncurtained windows situated adjacent to public road which will allow any bypasser to see what in it effortlessly by his naked eyes.

A person is said to have privacy when he is in the state of being free from unsanctioned intrusion. Such 'right to be let alone' encompasses an individual right of exclusivity upon his private life free from any interferences either affected directly or indirectly or against any intrusion – physical or otherwise. As such this thesis advocates the notion that an individual has to have the freedom and liberty to do or omit anything about his private life or personal matter as he may choose without any interference of others. That is what privacy really is; an individual's fundamental right resulting from its very nature as an individual, a human being, a person who lives.[21]

As such, privacy may be described as 'the right to be let alone' which connotes, as Warren and Brandeis argued, 'rights as against the world'[22] but not in its widest nor restrictive sense. This thesis concurs on that in the sense that what is commonly called as the right to privacy or 'the right to be let alone' shall encompass one's freedom – the rights as against the world;[23] however, it is just a class of freedom as stated earlier. It is not absolute and should not be equated with freedom simpliciter. Within the context of this thesis the freedom within privacy parameter is limited to

individual's aspects of private life.[24] Thus it is safe to say that the right to privacy is in essence very much the freedom of private or personal life.[25] By far such a concept offers the neatest approach that will cover almost all aspects of privacy; 'almost' in the sense that if it is to be literally interpreted, it may be argued that such a right to private life does not entail with it the right to die. However when the phrase 'the freedom of private or personal life' is broadly construed it includes within its scope an individual's right to privately or personally end his life. Whether or not the right to die is part of privacy warrants full analysis and examination thus shall be the subject of separate and exhaustive research which is not made part of this thesis. Despite that, the proposed definition would correctly describe the concept without misrepresenting privacy as a right too 'indefinite' in nature as may be unduly inferred from the term 'the right to be let alone' but neither is it a restrictive one so as to limit its scope merely to some aspect of privacy, such as information privacy or personal confidentiality simpliciter.

Although the term 'right' is used in conjunction with privacy it shall not be read, construed and interpreted within the restrictive connotations that the term 'right' may linguistically have: such as a claim, which usually is to be afforded the legal recognition when its latitude is precise; or a mere entitlement which is equated with a mere passive right. Here the word 'right' is used very much to refer to an individual's freedom – rather than a mere entitlement - to determine what to do or omit about his private life. It is not a passive right that an individual will only be able to exercise upon others' willingness to leave him alone; or merely given within the mind of certain classes of people or society; and most certainly not the claim that represents 'a wealthy, smug, exclusive, and self-centered upper-crust life which abhors publicity and public space.'[26] Furthermore as the right to privacy, right 'to be let alone' or more appropriately, the 'freedom of private life' connotes an individual freedom of self-determination for as long as the matter in issue is exclusively private in nature and achievable without 'disturbing' the public interest, such a right accommodates both the right to exclude and include others within the boundaries of such an individual's private life. It includes both the active and passive aspects of a right. It is an active 'right' that allows an individual to exclude others from the

sphere of his private life and the freedom to determine with whom he would like to share it and with whom he does not wish to share.[27] It also includes the passive rights which nevertheless entitle an individual to take action against unwarranted intrusion thereto. Consequently, the notion of privacy entitles an individual to bring a cause of action to ensure the perseverance of his privacy as well as to apply for an injunction or other available legal measures to restrain possible infringement of privacy and to claim for damages for its infringement – independent of any other cause of action or existence of actual loss.[28]

Despite all the above, if the exercise of one's right to privacy crosses the private sphere and enters the public sphere, one cannot claim that he has the exclusive right to privacy as the privacy right, which is exercisable merely within one's private sphere, ceases to exist. Due to that, it becomes important that the parameter for the scope of the right to privacy must be made clear and explicit. The scope of privacy as *per* the proposition will be analysed in more detail below. To close the discussion on definition it is submitted that privacy may appropriately be described as *an individual's freedom to do or omit what he chooses to his private life or about his personal matter without any interference of others*;[29] and not merely as a claim or power to control one's personal information nor as an absolute 'right to be let alone' which are respectively too narrow and too broad a concept. As a class of freedom, privacy entails the individuals with the autonomy which nevertheless is merely exercisable with regard to private activities within the limited scope of an individual's private sphere.

3.3 Scope of Privacy

Much has been written on what is deemed to fall within the scope of privacy and it has been argued, for example, that the scope of the rights to privacy includes some aspects of private life such as an individual's dignity or moral integrity,[30] the unauthorised circulation of portraits,[31] the control of personal information,[32] the establishment and development of emotional relationship with others,[33] autonomy, identity and intimacy,[34] etc.[35] None, however, has attempted to delineate the actual

scope or draw its boundary in doctrinal terms. This part of the thesis attempts to provide that 'missing link', by moving beyond a simple list of examples.

By its very nature, privacy includes the aspects of individual's private life, including what Warren and Brandeis said as'... the right of determining, ordinarily, to what extents his thoughts, sentiments, and emotions shall be communicated to others."[36] The 'right' comes from an individual's very existence as a private human entity: a person who lives.[37] It is the very value of the individual as a human being that entails him with the right to live his private life the way he wishes. At the same time the very fact that an individual does not live in a complete solitude with no presence of others requires such an individual to take into account the right of others. An attempt to specify what does and does not fall within the scope of privacy will result in both a non-comprehensive list and a futile exercise. That was the approach adopted in earlier referred publications. Predictably the 'scope' as proposed may either be incomprehensible or too rigid so as to cover merely those which are already protected under other branches of existing law.[38] On the other hand, there is a need to have the certainty to determine what falls and what does not fall within the ambit of privacy.

Here I invite you to see the matter from different perspective. Let's not attempt to specify what are and are not included as part of privacy. Instead of adopting the hypothetical approach, let us be clear of what privacy is (as proposed in 3.1 earlier) and when a particular situation is posed for consideration, all we need to do is to test and see if under the given circumstances the issue fits within the touchstones of privacy. For that purpose this thesis proposes two conjunctive touchstones that will draw the clear boundaries of the scope of the right to privacy. The proposed two conjunctive touchstones, which for easy reference referred as 'private matter' and 'private sphere', shall be deployed to limit the boundaries for the right to privacy; to point out whether a claim shall fall within or outside such a limit. The proposition here is that for as long as the two conjunctive touchstones are satisfied, an activity is prima facie within the scope that shall be afforded legal protection as an individual's privacy until it is proven otherwise.[39] In that regard how privacy intrusion may occur

will be discussed in 3.5 at the later part of this Chapter while here the concentration is to grasp the clear idea what these two conjunctive touchstones are, how they work, and why they are so proposed.

In relation to privacy issues, currently the courts in England have deployed either of the two tests, which for simplicity of reference identified as:

1) the reasonable expectation of privacy test; and
2) the offensive test

This thesis accepted the first test and adopted that too but not as the only criterion the fulfilment of which results in the assumption of privacy. The test is being adopted here as one of the two interdependent tests. As the explanation for that will be much comprehensible when coupled with clear understanding of the touchstones, it is discussed in 3.3.1(iii) at the later part of this Chapter where it is also shown that the underlying value for privacy is not met/served merely because one of the touchstones is satisfied.

The offensive test, on the other hand is not adopted in this thesis. The test has been considered as useful and has been adopted by the courts in England.[40] It was promulgated by Gleeson CJ in *Australian Broadcasting Corpn* v. *Lenah Game Meats Pty Ltd.*[41] In that case his lordship observed that while certain kinds of individual data are readily identifiable as private and some activities are understood – by applying contemporary standard of morals and behaviour – to be meant unobserved, but otherwise '[t]here is no bright line which can be drawn between what is private and what is not.'[42] To that his lordship added that: '[t]he requirement that disclosure or observation of information or conduct would be highly offensive to a reasonable person of ordinary sensibilities is in many circumstances a useful practical test of what is private.'[43]

That test, however, has been criticised by the judges of the House of Lords.[44] It is not being adopted by this thesis because although it was said that the test as formulated by Gleeson CJ was useful, its result is not always warranted.

What is considered 'highly offensive', even according to the reasonable person's standard' is not necessarily private in nature; whereas privacy should not be used to protect non-private matters no matter how offensive its disclosure or observation may be.

A reasonable man of ordinary sensibilities may find that disclosure of his potency problem is as highly offensive as publication of the facts that on several occasions he has been seen by the public over a pharmacy counter purchasing virility drugs; yet the privacy nature of the information may be argued in the former but probably not in the latter.

Similarly a reasonable woman of ordinary sensibilities may find that discreet record of her taken when she was picking her nose in the privacy of her office room is as highly offensive as such a record of her taken while she was leaning towards her house fence in the effort to pick the fruit of her neighbour's tree (without the consent either implied or express from such a neighbour). In both cases the woman did what she did thinking that no body was looking and not knowing that a hidden camera has been installed in the office and in the neighbour's garden respectively that actually recorded her activities. The publication of either of such incident will be highly offensive to a reasonable person of ordinary sensibilities, however only in the former situation such a woman may be able to show that the activity was private while most probably not in the latter.

For that reason and due to all considerations that drove the 'formulation' of the two conjunctive touchstones as proposed here, the submission in this thesis holds to the idea that the useful test of privacy will be to determine the existence of the two conjunctive touchstones. In this regard the thesis is submitting a straight forward proposal: the right to privacy only exists when the two conjunctive touchstones are met and the test for each touchstone is shown in the following table, which also provides the outline of the discussion to come:

Touchstone	Test	Instances
1. Private Matter(s)	'result test' → to whom the result of an activity is directed to. It is only private if the primary objective of an activity is directed to the person who claims the right to privacy	e.g.: personal preferences including choice of food, wardrobe, etc.; sexual intercourse; cosmetic surgery.
2. Private Sphere	'reasonable expectation of privacy' → whether by taking into account the surrounding circumstances it will be reasonable for a person to expect his privacy to be respected within such a sphere.	e.g.: home; hotel rooms; toilets – whether in public or private premises; private lounges; individual office space, etc.

The following discussion elaborates the two conjunctive touchstones of the right to privacy, namely that it only involves those relate to private matter(s) and that it is exercisable only within a private sphere.

3.3.1 The Touchstones of Privacy

(i) Private Matter

Privacy may only be asserted upon private matter. That is the first of the two conjunctive touchstones of privacy. It can take a form of either private activity or matter of private nature. Although the term 'activity' is used here, the gist of this element is to see the state or condition of the plaintiff during which an intrusion to privacy occurs and hence it is not necessarily constrained to active disposition as opposed to inactivity. The term 'activity' as used within this context may take the form of actions, omissions, combination of both or simply the plaintiff's conduct in any manner whatsoever. Matter of privacy nature includes 'private facts' as the context may appropriately require. What is most essential, in order to satisfy the element of this first touchstone, is to show that the plaintiff is in a state (read:

undertaking an activity or, in relation to facts, they relate or have been the result of an activity) which is of private or personal nature. That usually includes but is not necessarily limited to those activities that an individual does for and by himself on his personal account or that matter which are directly connected to himself. Thus ordinarily an individual act of breathing, thinking, crying, laughing, etc are the illustrations of private activities while personal preferences, personal details, personal secrets, etc are the instances of private matters.

Generally it is the nature of activities that make them of private matter. However that alone does not sufficiently qualify the privacy of the activities. Although the nature of the activity greatly counts to determine if an activity is private or otherwise, to whom such an activity is being directed is the factor that distinguishes private activities from non-private ones. Hence the test for the first touchstone, which is for simplicity called as 'the result test' simply probes to whom an activity is directed to. This test works on the basis of an assumption coupled with a caveat. There should be an assumption that an activity is private in nature if the result of the activity is directed merely to the doer himself. However if such an activity requires the involvement of other, the assumption is only valid if the other has consented for his involvement/participation. Thus a choice of wardrobe and whether or not to wear any or to be naked is assumed as a private matter; the choice whether one will take certain kinds of food or drink and not other kinds of food or drink is similarly considered a private matter; and even sexual intercourse between consenting parties. However these are assumptions; they may be negated as the outcome should depend on the circumstances of each case and/or the consequence of such activity (thus the result test). The assumption is negated for example if it is shown that an activity which otherwise of private nature is also directed to some other persons who have not or may not give their consents to be subjected to such a conduct. Thus if a person stands naked in his house and through the widely open window he starts calling any one passing by to have a look at his state of nakedness; he may not be allowed to claim that his privacy is intruded or not respected when he is being subjected to an order to discontinue such conduct. To similar end the privacy of an individual to choose what to consume and what not to consume is not being infringed when a

person refuses to provide or to dispose any food or drink as the former may request. If he pays for his request, or he pays the latter for such purpose he may have the cause of action against the latter based on contract or any other principle that may be applicable but not, at any rate, on the basis to preserve his right to privacy. The absence of consent of that other does not give rise to assumption of privacy of the matter. However the opposite situation, preventing a person from taking what he wishes to have, may squarely amount to an infringement of privacy (provided the second touchstone is also fulfilled).

Up to this point, it becomes clear that the test for this touchstone, the result test, is context dependant. There is a subjective element, in the judges' consideration, of whether the result test is satisfied in the circumstances of each case. In these first two instances although it is arguable that an individual preference is a private matter, the first touchstone is not completely satisfied as the 'result' of the activity has an impact on other(s), i.e., to require other(s) to have a look in the first instance and to ask other to provide or dispose the requested food or drink in the second one. The instances would only satisfy the first touchstone if the other party who would be affected by the conduct has given his consent for the same. Further example will be the act of forcing a sexual connection with a non-consenting person. Even if such activity is 'undertaken' in a totally secluded area, the activity will not come within the ambit of this first touchstone because even though the conduct was directed to the other as much as it is directed to the doer, that has been achieved without the consent of the participating party. Such absence of the consent negates the answer when the result test is deployed.

Let us now consider a rather unique example. Abortion has been declared as part of women's right to privacy in the United States of America.[45] Generally the courts in the United States adopt this tenet with regard to abortion: the first trimester of pregnancy, this decision may be effectuated free of state interference; after the first trimester, the state has a compelling interest in protecting the woman's health and may reasonably regulate abortion to promote that interest; and at the point of fetal viability (capacity for sustained survival outside the uterus), the state has a

compelling interest in protecting potential life and may ban abortion, except when necessary to preserve the woman's life or health.[46] The Abortion Act 1967 which applies to England, Scotland and Wales allows abortion up to 24 weeks on condition that, in the opinion of two doctors, continuing with the pregnancy involves a greater risk to the physical or mental health of the woman, or that of her children. After 24 weeks, abortion is only allowed if there is risk to the life of the woman or evidence of severe fetal abnormality, or risk of grave physical and mental injury to the woman. In addition to that, the abortion must be carried out by a doctor and in a government-approved hospital or clinic.[47] In Malaysia causing miscarriage or attempt to do so is declared as an offence; except if the abortion is being affected by a medical practitioner registered under the Medical Act 1971 who is of the opinion, formed in good faith, that the continuance of the pregnancy would involve risk to the life of the pregnant woman, or injury to the mental or physical health of the pregnant woman, greater than if the pregnancy were terminated.[48] The legislation also requires that private maternity hospitals undertaking abortion to record such fact and maintain the same in their register;[49] and every one is prohibited from taking part 'in the publication of any advertisement referring to any article, or articles of any description, in terms which are calculated to lead to the use of that article or articles of that description for procuring the miscarriage of women.'[50]

As the view varies from one legal system to another, the room for argument whether abortion is considered as part of privacy remains open. From the above it seems that the three jurisdictions are at least unanimous that the foetus has no soul during the first trimester. That being the case unless justified the law that restricts women's choice for abortion during the first trimester will interfere with women's right to privacy on the basis that up to that stage of pregnancy the decision to abort is a matter of choice for the pregnant woman as the abortion to be affected will not affect any body but herself; thus fulfilling the result test. As for the subsequent stages, the fact that the state would like to reserve certain power which otherwise would amount to privacy intrusion makes it uncertain if the same assumption, that the foetus does not have any right while he is in his mother's womb, applies. This issue is unique as although abortion very much relates to a woman's choice about what to be done to

her body it also involves the right of another individual, namely the foetus. It is said that the position in Malaysia is similar to that in England[51] that foetus does not have any legal right.[52] That being the case, any restrictions on the matter must be based on justifiable grounds without which it is arguable that the attempt to regulate the matter would interfere with individuals' right to privacy.

Still in the process of testing the proposed 'result test', the consideration moves to consider further examples of private activities such as the act of bathing, sitting, sleeping, cooking, eating, drinking, etc – when they are done in private.[53] That should not be understood to imply that an activity become private simply because it is not being done or undertaken in public. No claim of privacy shall be upheld with regard a person's conduct of throwing a stone from the privacy of his house to the neighbouring house regardless whatever intention that person has in mind prior or at the time he throws the stone. Although it may be alleged that the conduct in such instances is private in nature and that it has been done from or in the area where a person can expect to have his privacy respected, the result of the conduct is directed to a person other than the doer – thus negates the first touchstone of privacy as proposed in this thesis. Having said that, it is important to note that the fulfilment of the first touchstone alone does not guarantee an individual that he has the right to privacy. That because the two touchstones as proposed in this thesis are conjunctive and must be read together. They both must be satisfied for a cause of action based on privacy to stand.

Hence it can be said that private matters embraces anything that an individual can do or omit to himself, including but not limited to what one can do or omit about his identity, physical and psychological integrity,[54] and the authority over his body. Thus, unless proven otherwise and subject to the fulfilment of the second touchstone, the right to privacy shall entail an individual with the freedom to choose what to wear, what to put on or off his body, what to do with his hair or any other parts of his body. On the contrary, while some activities can be carried out totally in private but if it has direct effects on others the plea for privacy right will fail. Accordingly, any actions recognisable as torts or crimes will never fall within the boundary of the

scope of privacy as so proposed in this thesis for the unwarranted consequence the tortious acts or crimes cause to others (e.g. the victims) negates the result test.

To a broader effect, private activities also include those activities that a person can do to himself with the help or participation of other (s)[55] provided it is being carried on with the consent of the latter. Therefore cosmetic surgery, body tattooing or piercing are private matter(s) provided the person to whom such surgery or tattooing or piercing to be affected has consented to such activities and the person or persons duly affecting the surgery or tattooing or piercing were not coerced to do so. Similarly a sexual intercourse between consenting adults is considered a private matter.[56] Conversely rape, sexual harassment or any other kinds of conduct which has been subjected to a person without the consent of the latter are out of the boundaries of privacy. The person who forces the commission of such act against the freewill of the 'victim' shall not be allowed to use privacy as the defence. To the contrary, the acts of such an individual, i.e., forcing what he desires upon another person, may legitimately be construed as an intrusion to the latter's right to privacy.

Difficulties may arise when some consensual conduct of individuals have been described as a crime, such as, in Malaysia, pre, outside or extra marital consensual sexual intercourse involving a Muslim or carnal intercourse by introducing penis into the anus or mouth of the other person (regardless of whether the activity is heterosexual or homosexual); or both in Malaysia and the United Kingdom, incestuous sexual activity or consensual sex with a minor. When the activity in question is undertaken consensually by adults in private, it is arguable that such an activity will fall within such adults' privacy, as the present of consent fulfils the requirement of the result test. As such, the room is open for argument to challenge the legality of the provision that criminalised such activity.

In *Dudgeon* v. *The United Kingdom*[57] among the issues posed to the ECtHR was whether the existence of laws which have the effect of making certain homosexual acts between consenting adult males criminal offences interferes with the applicant's right to respect for his private life. It was answered in affirmative by the ECtHR as it

found, *inter alia* there was no '..."pressing social need" to make such acts criminal offences, there being no sufficient justification provided by the risk of harm to vulnerable sections of society requiring protection of by the effects on the public' while noting that '[a]lthough members of the public who regard homosexuality as immoral may be shocked, offended or disturbed by the commission by others of private homosexual acts, this cannot on its own warrant the application of penal sanctions when it is consenting adults alone who are involved.'[58] Up to this point it becomes clear that to criminalize sexual activities undertaken in private between consenting adults without pressing social need for the same will constitute intrusion of such individuals' privacy.

The ECtHR went further in *ADT* v. *The United Kingdom*[59] by holding that the conviction of a man engaging in non-violent consensual sexual acts between more than two men in private amounted to breach of Article 8 right. Then the ECtHR has gone further by holding *inter alia* in *H.G. and G.B.* v. *Austria*;[60] *Wolfmeyer* v. *Austria*;[61] *Ladner* v. *Austria*;[62] and *Woditschka and Wilfling* v. *Austria*[63] that the law that criminalises consensual homosexual relation between and adult and adolescent between the age of 14-18 does interfere with an individual's right to private life duly accorded by Article 8(1) of the ECHR. An argument for similar effect was put forward in *Dudgeon*, to which the ECtHR responded:

> The Court has already acknowledged the legitimate necessity in a democratic society for some degree of control over homosexual conduct notably in order to provide safeguards against the exploitation and corruption of those who are specially vulnerable by reason, for example, of their youth... However, it falls in the first instance to the national authorities to decide on the appropriate safeguards of this kind required for the defence of morals in their society and, in particular, to fix the age under which young people should have the protection of the criminal law

From the above it becomes clear that while the ECtHR is ready to find that any legislation that restricts non-violent consensual sex between adults with no 'pressing social need' for such a restriction will amount to interference of an individuals' right for respect of private life; the restrictions may be imposed on the basis of legitimate

necessity such as in order to protect young people against possible exploitation and corruption, which details is left to the national authorities who, borrowing the wordings of the ECtHR's judgment in *B* v. *The United Kingdom*,[64] 'are best placed to assess and respond to the needs of society.'[65] That does not explicate anything but the basic principle that while privacy as the freedom of private life includes an active right the exercise of which may go as far as against any restrictive existing law; it is not an absolute freedom and thus may be legitimately restricted on some acceptable grounds such as those set out in Article 8(2) of the ECHR.

As 'pressing social need' is taken as one of the factors to determine if any restriction imposed upon individuals' sexuality is legitimate or otherwise, until there is a change of value in the Malaysian society, it is unlikely that the above principle will find the room for application in Malaysia while at the same time any decision to be made on the matter will be very much influenced by the intention to 'deter a fall in the moral standards of our society.'[66]

In the broadest sense the privacy of an activity can also be extended to include such activities that a lawful and enforceable legislation or even lawfully acceptable custom may have afforded upon a person to be effected on another person, with or without the consent of the latter. By virtue of that, matters related with the way how adults choose to educate their minor children while at home, what they choose to put on or off their minor children, the choice of their education, etc, may be considered as purely private matters until proven otherwise. Although originally it is the children as individuals who have the full discretion (which arguably as part of the children's very right to privacy) to choose what to do about or to be done to themselves, when the local custom or acceptable usage empowers the parents with the right to decide for their minor children that entails the parents with the right to exclude interference of others on the basis that such decision is a private matter.[67] In Malaysia, for example, Article 12(4) of the Federal Constitution of Malaysia provides that '[f]or the purposes of Clause (3) the religion of a person under the age of eighteen years shall be decided by his parent or guardian'. Article 12(3) of the Federal Constitution states that: '[n]o person shall be required to receive instruction in or to take part in any

ceremony or act of worship of a religion other than his own.' When read together it is clear that the Constitution empowers the parents with the right to privacy in regard to the kind of instruction or ceremony or act of worship that their children may receive or do.

Unfortunately Article 12(4) has been given the scope wider than that expressly provided by the Federal Constitution. It has been interpreted to the effect that the religion of the minors is to be decided by the minors' parent or guardian until the minors reach the age of eighteen (18). On that basis, it is arguable for the parents that until their children reach the age of eighteen, no one but themselves can decide what religion their minor children can profess and any outside interference will amount to privacy intrusion.[68] It may be easier to accept the notion that the right to privacy confers the parents with the right to exclude outside's interference in matters related to their children's upbringing; but the matter is more complicated if it is the minor who chooses to profess the religion other than the religion of his parents. There is no outside interference here; it just involves the desire of the children to live according to what they believe, which is a matter of their freedom of thought, conscience and religion and within a narrower context their privacy albeit the parents' desire. In Malaysia context, that could be converted into these queries: will the parents' right as conferred by virtue of article 12(4) of the Federal Constitution prevail over their minor children's choice? Would not that infringe the minor children's very basic right to choose what to do about themselves, their thought, etc, the children's privacy? If it is said that the right of the parents to prevail over the choice of the children, would not that create a conjecture that minor children have rights less than any individual that has attained the age of majority. To put it crudely such a notion implies that any individual that has not attained the majority age is 'more constrained' than an individual that has attained the age of majority. The matter has received the most publication and public attention in the case pertaining *Maria Hertogh*.[69] The issue brought before the court dealt with the right of custody upon the then 13 years Dutch Maria Hubertina Hertogh that was claimed by her catholic biological parents against the first defendant, a Muslim woman whom the infant regarded as her mother and who had raised her since she was about 4. The infant,

Maria Hubertina Hertogh, had been brought up according to the Malay tradition, knew no language other than Malay, dressed like a Malay and used a Malay name Nadra. Nadra did not regard the plaintiffs as her parents. Nadra had made it clear that she wanted to stay with the defendant. She did not wish to be returned to her natural parents and had repeatedly requested the plaintiffs to leave her alone if they really loved her. The High Court judge, Brown J., however was of the view that the right to custody ought to be given to the plaintiffs even against the wishes of the minor. Although the minor's right to profess the religion of her choice was not brought as among the issues of the case, Brown J had this to say:

> And this Court must recognise his (Mr. Adrianus Petrus Hertogh's) legal right, as her father, to control the religion, education and general upbringing of his child. The Court may deprive him of his right, if he shews himself to be unfit to exercise it or has in some other way abrogated it. But until that is done it is a legal right which this Court must recognise."[70] (sic.)(Insertion added)

Upon the appeal, the judges unanimously expressed the view that the learned High Court judge was mistaken by applying Christian Marriage Ordinance to the case. However, neither of the judges had expressly defied or rejected the contention expressed in the High Court's judgment on the father's right to decide the religion for his minor child.[71] That was perhaps because the point was not raised as an issue by the parties. That was perceived by Abdul Malek J *In Re Susie Teoh; Teoh Eng Huat* v. *Kadhi of Pasir Mas Kelantan & Majlis Ugama Islam dan Adat Istiadat Melayu, Kelantan.*[72] Unlike *Maria Hertogh* this case arose after the enactment of the Federal Constitutions. However, it has similarity with *Maria Hertogh* as the High Court in this case discussed, *inter alia*, the minor's right to choose to profess a religion other than that of the parents or that as the parents may determine.[73] Susie Teoh, the daughter of the plaintiff, who was 17 years and eight months at the material time, worked as a clerk in Kuala Terengganu until she was discovered missing by her boyfriend. After several days of futile search and a police report had been lodged, the plaintiff's son in law telephoned the defendant to enquire if the plaintiff's daughter had converted to Islam which was answered in affirmative. Thus the action brought by the plaintiff seeking *inter alia* for a declaration that by virtue of

Article 12(4) of the Federal Constitution that the plaintiff as the lawful father and guardian of the infant has the right to decide Susie's religion, education and upbringing. In that case Abdul Malek J took the approach which led to the conclusion that Article 12(4) of the Federal Constitution is not applicable when an infant has chosen a religion other than that of the parents on her own free will.[74] That because, on the reading of the relevant provisions of the Federal Constitution, his lordship was of the view that the rights so conferred to the parents by virtue of Article 12(4) of the Federal Constitution is limited to the matter set out in Article 12(3) of the Federal Constitution.

That approach, unfortunately, was held to be erroneous by the Supreme Court upon the appeal.[75] It is rather peculiar that the Supreme Court adopted the approach that gives a wide unrestricted scope without any limitation the parental right to determine the religion of minor children on the basis of Article 12(4) while the provision reads: '[f]or the purposes of Clause (3) the religion of a person under the age of eighteen years shall be decided by his parent or guardian;[76] and clause 3 of Article 12 of the Federal Constitution is of restrictive scope to this effect: '[n]o person shall be required to receive instruction in or to take part in any ceremony or act of worship of a religion other than his own.' When clauses 3 and 4 of Article 12 are merged (and read together), this is how it would read: 'no minor shall be required to receive instruction in or to take part in any ceremony or act of worship of a religion other than the religion as decided by his parent or guardian.' Thus it is indeed desirable to interpret Article 12(4) so as to mean that 'no infant shall have the automatic right to receive instruction relating to any other religion than his own without the permission of the parent or guardian.'[77] That rather narrow scope is more appropriate and warranted. Such an interpretation gives the full meaning of each provision without 'infringing' Article 11(1) of the Federal Constitution that provides for the freedom of religion to every individual without distinguishing the individuals' age or maturity.

In contrast, it is superfluous to confer a scope wider than the express provision of Article 12(4) and justify such conferment on a mere ground that it would be what is intended when the provision is being read together with the provisions of the

Guardianship of Infants Act 1961[78] while such an interpretation could only be achieved at the expense of and which result is restricting what otherwise is a general provision for individuals' freedom of religion duly guaranteed by Article 11(1).[79] As a general rule, and so is provided by Article 4(1) of the Federal Constitution,[80] any legislation shall be read within the context of the Federal Constitution and if there is any inconsistency, the provision of the Federal Constitution is to prevail.[81] There is no inconsistency between Article 11(1) and Article 12(4) if each provision is to be construed, interpreted and duly conferred the scope within the express provisions of the respective article, i.e., Article 11(1) is of general application and Article 12(4) is only applicable within the limit of Article 12(3).[82] But when the latter is being conferred with a scope wider than its express provision with the assistance of a piece of legislation,[83] its effect would not only unjustifiably narrow down the scope of Article 11(1) but also cause a conflict between the two provisions[84] - which would not occur if only each provision is being interpreted within its own context. To do that is also against the supremacy of the Federal Constitution, i.e., to get the assistance of a piece of legislation which effect restricts the generality of Article 11(1) of the Federal Constitution in order to widen the scope of another provision, Article 11(4) which scope has been expressly limited by the Federal Constitution, i.e., for the purpose of its preceding clause (Art. 11(3)). If there is anything to be said about the supremacy of the Federal Constitution within this context, the outcome should be the reverse: if any provisions of the Guardianship of Infants Act 1961 are inconsistent with the provisions of the Federal Constitution (i.e., Article 11(1)), these provisions of the Act shall, up to the extent of its inconsistency with the provision of the Federal Constitution, be held null and void. Within this context the submission – what would have been intended by the express provisions of the Federal Constitutions – is as follow:

1. Each and every individual, without distinguishing or taking into account any difference in term of age or maturity of such an individual, has the right to profess and practise his religion (Article 11(1)); and
2. No person (either minor or otherwise) shall be required to receive instruction in or to take part in any ceremony or acts of worship of a religion other than his own (Article 12(3)), however the religion (within the context of Article

12(3) i.e. for the purpose of receiving instructions or taking part in any ceremony or acts of worship of a religion) of a person under the age of eighteen years shall be decided by his parents or guardian.

Nothing in the above would prevent a minor from professing any religion of his own choice including that which may differ from the religion of the parents/guardian although his right in receiving instructions or practising the religion of his choice may be limited and subject to that of the parents/guardian. At least within the context of privacy a minor shall have the full, unrestricted and peaceful freedom to hold the opinion about, to believe in, to profess and to practise any religion or faith as the minor wishes to do for as long as that is being undertaken within that minor's private sphere. Anything beyond that may be subject to the right of others and in this particular case, the right of the parents to require their minor children to receive instruction or to take part in any ceremony or act of worship of a religion as determined by the parents/guardian until the children attain the majority at the age of eighteen.[85]

Despite the argument set out above, the judgment in *Teoh Eng Huat* has far-reaching consequence and has been cited as the authority to interpret Article 12(4) of the Federal Constitution as granting parents/guardian with the right to decide the religion of their minor children. Unless and until such approach is overruled by any decision of the Court of Appeal or the Federal Court of Malaysia, the matter is seen as settled. What remains the issue within such provision is the method and manner how the rights as conferred upon the parents can lawfully be exercised.[86]

Although the United Kingdom did not locally have identical provision that generally affords the parents with the right to determine the religious education for their children, some provisions similar to that contained in Article 12(3) of the Federal Constitution are codified in the (English) Education Act 1996.[87] The provision, however, is restricted within the right with regard to having the transport arrangement for pupil, and thus, reliance on such right by parents has been within such a context.[88] However with the incorporation of the ECHR in the United

Kingdom through the HRA 1998, Article 2 of the Protocol No. 1 does require the state to respect the right of parents to ensure the education and teaching their children received are in conformity with their own religions and philosophical convictions.[89] It is peculiar that the ECHR confers such a right for parents without explicating if such a right merely exercisable upon minor children or even the children who have attained the legal age of majority.[90] The provision is also of wider effect for allowing not only the religious convictions of the parents but also their philosophical ones.[91] It is beyond the scope of this thesis to discuss further on the matter; it suffices here to say that unlike its counterpart in Malaysia, the ECHR provision has been invoked both at the its international level and domestically in the United Kingdom within its restrictive context – merely within the matter related to education and teaching to be afforded to the children.[92] It has yet to be tested if the provision will be invoked so as to empower a parent to decide the religion of a child even against the will of the child as it has been the case in Malaysia.[93] There has been no similar issue brought before the jurisdiction of the English courts, not on the issue relates to choice of one's faith or belief simpliciter. Even if the scenario were to be brought before the jurisdiction of the courts in England, it is unlikely that the outcome will be similar due to the very fact that nothing in the English legal system that confers full power to the parents or guardian of a minor to decide the religion for such minor while at the same time, the HRA 1998 when read together with Articles 14, 8 and 9 of the ECHR may be invoked to prohibit such kind of discrimination[94] on the basis that even the minor shall have its own right to privacy and freedom of religion duly afforded respectively by Articles 8 and 9[95] of the ECHR and nothing therein may be interpreted to oust the application of any provisions of the ECHR merely on the ground that such an individual has not reached the legal age of majority.[96]

On related matter, in the United Kingdom the State has the inherent power under the parens patriae jurisdiction – which accords the State with the legal role as the guardian to protect the interests of children who cannot take care of themselves. Under this principle, the State may, for example override the refusal of a minor to submit to assessment or medical examination or treatment, if it was in the minor's best interests.[97] It is yet to be seen if such a principle may be exerted so as to

empower the state to determine other matters private to a child, such as the religion of a minor, against his wish or that of his parents. Regardless the matter upon which it is being exercised, the principle provides the State with the power that works as a restriction to that which otherwise is the minor's right to privacy – i.e., to decide what is to be done or omitted about himself.

In a nutshell ordinarily an activity is considered private if it is directed solely to the doer himself; and when an involvement or participation of other person(s) is required, then it is only considered private if such an activity is being carried out with the consent of such other(s). Legislation on a lawful basis, however, may provide for provisions that negate such assumption or even to shift what otherwise is the privacy right of an individual to another person who is deemed to have the competency to look after the interest of the former. However as discussed earlier, the legal protection will not be afforded on the mere basis that the activity in issue is considered private; for no matter how private an activity may be, such an activity will not fall within the boundaries of privacy that warrant legal protection unless such activity has been carried out within the private sphere, the second touchstone which is discussed below.

(ii) Private Sphere

It is a well accepted principle that one shall have the privacy of his home.[98] The principle may emanate from the belief that a person's home is his castle and therefore he shall be the 'king' who shall have the full and complete authority over his 'kingdom' (read: home).[99] Such idea perhaps has also been supported by the facts that the walls of a house will prevent others from 'intruding' to the person's seclusion within his property.[100] However it is submitted that while one's home may be the easiest instance of a space within which one can reasonably expect to enjoy and have the private sphere; such an assumption is neither absolute nor conclusive. It is not absolute as the claim for privacy may not stand if the alleged intrusion has been a result of a passerby who has seen what otherwise is a private activity through uncurtained widely opened window or door or within a house made mainly by transparent glass with no privacy measures. Nor it is conclusive as home is not the

only place where private sphere may exist. In *National Panasonic (UK) Ltd* v. *Commission of the European Communities*[101] for example, the Advocate-General J-P Warner expressed his approval to the earlier judgment of the Court of Justice of the European Communities in the *Acciaieria di Brescia* case[102] to the effect that the right to privacy is extended to business premises, whether those of an individual or of a company.

While it may be accurate and correct to say that no person shall expect to have privacy respected while he is openly in the public area, it is not a requirement that in order to have privacy respected such an individual has to erect walls to keep out others nor it is necessary for him to own such property before he can 'eject' others when such other's presence is not welcome/desired. Although the existence of walls may inhibit the public gaze and the idea of ownership of a place entitles the owner to eject others from his property; those are not the factors that establish 'private sphere'. Generally private sphere can be legitimately assumed and one can reasonably expects that his privacy is being respected while he is within his house or property (bedroom, kitchen, dining area, living hall, etc),[103] a restroom, a hotel room, office room (when a person is designated with a room for his own use), a private dining area in restaurants, a private lounge in public premises, or even a public premises that has been hired for an exclusive private function,[104] etc.. Such assumption shall be presumed until proven otherwise. As a matter of fact some claims of privacy have been upheld when private matters were carried on 'open' places such as hotel swimming pool[105] or even a 'private island'[106] on the ground that given the circumstances that gave rise to the claim, the plaintiffs were entitled to have the reasonable expectation of privacy.

This 'reasonable expectation of privacy' test is not a newly invented test. This test has been deployed and given express recognition in England even by the House of Lords.[107] Although this test is not a new test, the context within which the test is proposed to be used in this thesis is different that that as currently used by the courts in England. Currently in England this test is deployed as the only test with regard to privacy.[108] That approach, however, may lead to incorrect result and thus the test is

being adopted in a rather different context here, as further discussed later in 3.3.1 (iii).

This reasonable expectation of privacy test is objective in nature. To see whether or not in a given situation the plaintiff may have the reasonable expectation of privacy, the hard-working reasonable person will be placed in the plaintiff's situation and his view will be sought to see whether such an ordinary person with ordinary standard of reasonableness will have the same expectation as that the plaintiff has. The test is answered in affirmative if the court is satisfied that the reasonable person will have the same expectation as that of the plaintiff. The application of this touchstone to depict the parameter of privacy is straight forward, after it is shown that the first touchstone is satisfied, the plaintiff needs to show that such private matter is kept within private sphere – the situation upon which it is reasonable for him to expect the sanctity of his privacy will be safeguarded.

The test works vice versa. By bringing any aspect which is otherwise private into the public sphere, an individual will lose his privacy.[109] Accordingly while nudity is perfectly an aspect of one's privacy, one cannot claim so for being nude in a public place. Likewise no privacy claim would be allowed for personal secrets being blatantly communicated in public. Hence despite the flaws in the ratio for the decision in *Ultra Dimension*, it would be appropriate to find that the plaintiff did not have the reasonable expectation of privacy regarding the picture of a group of kindergarten's pupils, including that of the plaintiff, that was not taken for private use and while the subjects were in public place, at an open area outside the kindergarten. Here a similar conclusion to that found by the judge would be reached if the fact were to be tested against the two touchstones of privacy as proposed here. The report did not elaborate the facts or activities undertaken by the plaintiff during which the picture was taken. However even if it is assumed that it involved private matter it was not undertaken within private sphere; in the given circumstances at the particular scene it might not be reasonable for the plaintiff to expect to have her privacy respected. The mere fact that the picture was taken without the knowledge nor the consent of the plaintiff's parents did not change the fact that the claim was brought

against the picture which 'records' a fact occurred in public. For that reason this thesis concurs with the finding of the judge in the *Ultra Dimension* despite criticizing the approach that was adopted thereto which made the judgment *per incurium* as discussed in Chapter II earlier.

That point, however, must be read with caveats. First, although a person will generally lose the reasonable expectation of privacy when in public, privacy may resume once such a person enters the zone within which privacy can be reasonably expected, e.g., when one enters the public toilet cubicle. Secondly and most importantly for the purpose of this second touchstone, the factor that draws the line of the sphere between one which is private and the other which is public is not necessarily limited to that in term of physical space. What matters the most is to consider by taking into account all surrounding circumstances whether it is reasonable for a person to have the expectation of privacy. A claim for privacy would not stand even if an activity that otherwise private is carried in a 'closed' area if such activity is being carried in the circumstances that a reasonable person cannot expect to have his privacy respected. Thus the ECtHR in *Laskey, Jaggard and Brown* v. *The United Kingdom*[110] noted that while there can be no doubt that sexual orientation and activity concern an intimate aspect of private life, it also observed that:

> ... a considerable number of people were involved in the activities in question which included, inter alia, the recruitment of new "members", the provision of several specially equipped "chambers", and the shooting of many videotapes which were distributed among the "members" ... It may thus be open to question whether the sexual activities of the applicants fell entirely within the notion of "private life" in the particular circumstances of the case.[111]

Number is not the only factor that will substantiate the expectation of privacy although it may be counted towards establishing the reasonableness of privacy expectation.[112] For instance: it will be very hard to expect a claim for privacy to be upheld upon a secret being disclosed openly during a party in the presence of many guests compared to the same secret being told in person to one's best friend. In other words, the more persons involved the higher the burden of proving the

reasonableness of privacy expectation will be. In such situation the precautions adopted to ensure privacy will be considered. Thus, information can be private although shared with as many as hundreds people if those people have agreed to keep the information private; while it is not necessarily so although it is meant to be shared only with one person if for instance the information is so communicated by way of unencrypted e-mail or through a post card.

In *Laskey* it was not disputed that the conduct upon which the claim was based was within the notion of private life thus the ECtHR has not analysed that matter; however the facts that the actions were brought against the applicants based on a number of video films which were made during sado-masochistic encounters involving the applicants and as many as forty-four other homosexual men, the recruitment of new 'members', the provision of several specially equipped 'chambers', and the shooting of many videotapes which were distributed among the 'members' contributed to the conclusion that privacy could not be reasonably expected in such circumstances. On the contrary in *Douglas* v. *Hello! Ltd (No. 5)* there was more than 300 guests invited to the wedding reception of the Mr and Mrs Douglas. Although Lindsay LJ indicated that in that case the court declined to 'construct a law of privacy' his lordship did find that given the circumstances of the case the couple were entitled to have had the reasonable expectation of privacy. Although arguably it would be hard to establish how such expectation of privacy would be held reasonable where more than 300 people attended the wedding reception and when it has been made public that the couple has, in consideration for the payment of one million Pounds Sterling, granted the right to publish the couple's photographs of the wedding and reception to OK! Magazine; these facts overwhelm such argument and justify the reasonable expectation of privacy, at least with regard to the wedding pictures upon which the claim was brought against the defendants:

- that the couple required most companies providing services at the wedding and their employees to enter into confidentiality agreements;
- that the couple informed all suppliers and potential suppliers that the wedding plans were confidential; that guests were requested not to take photographs or videos;

- that both guests and employees were checked to ensure they were not carrying cameras;
- that security personnel looked for anyone carrying cameras during the wedding reception and confiscated six cameras or more;
- that security measures were taken to prevent unauthorised persons attending the wedding; and
- that other steps were taken to ensure no media coverage other than that of the OK! magazine took place.

If at all those factors had proven anything, they have corroborated that the couple had taken the necessary measures to exert their control over the information (in particular of any pictures taken during the wedding reception). That is further strengthened with the agreement between the couple and the OK! Magazine that the couple have the right to approve material for publication and the identity of any publications in which material was to be published. Until and unless the information, i.e., the wedding photographs were made public in a manner as the couple would have consented, the level of control that the couple was determined to exercise upon the private function of their wedding would justify that at the least the wedding photographs were to be kept private. The matter might have been more complicated if the right were to be exercised upon any information, recollections or data relating to the wedding reception, especially so since there were more than 300 guests each of whom would have its own opinion and views about the event; to which each individual would have the right of his own; against which the couple's expectation of privacy does not necessarily prevail.

It shall be further noted that the notion of private sphere and its amplitude is not determined solely on the basis of an individual's location or whereabouts. The mere fact that an individual is in a public area does not automatically and utterly negates individuals' right to privacy. Private sphere can be established depending the way how an individual preserves private facts.[113] For example, regardless of an individual's locality, private sphere is established for those parts of his body that one tries to cover, that he does not want the public to look at. Therefore, if a person has

carefully worn a hat so as not to allow the public to see his head, he might argue that his private sphere has been intruded by a person who has used force in order to remove the former's hat from his head against his consent. The same applies if a person has intentionally used force to reveal any part of the body of another that the latter has carefully covered by his clothes or any other material to ensure that such part of the latter's body is not revealed to the public.

On the other hand, it may be rude to stare at a woman's chest but that alone does not amount to invasion of privacy especially not if such a woman, while knowing that she will go into public places, has herself divulged that part of her body by wearing clothes that reveals her chest. Her privacy will not be invaded by a mere fact any person makes a record about the revelation of that woman's chest or even takes her picture while she is in public. That part of her body is not kept within private sphere and thus loses the element of privacy. The use of additional device, e.g. telescope, to allow a person to look at that woman's chest from a distance does not make any difference; so long that woman is not within an area where she can reasonably have the expectation of privacy, as in such situation this case the same result may be achieved by anyone within that woman's vicinity even without the use of telescope.[114] In other words it does not matter whether or not any equipment has been deployed in such situation as the matter in issue has lost its privacy anyway. The mere fact that a technology has been deployed in such situation will not confer the 'privacy' value upon a matter that has lost it at the first place.

That shall be distinguished from a situation where a woman has dignitary worn a modest dress that covers most part of her body and yet another person has deployed an x-ray device to allow such a person to see her chest. In the latter example, the use of a device to reveal or take a photograph of what otherwise is not obvious or seen by naked eyes should amount to intrusion of privacy, regardless of the whereabouts of such a woman (i.e., even if she is in public) as the precaution that such a woman has taken by modestly covering her chest creates the private sphere for the covered part of her body. In short, there is invasion of privacy if a special device has been employed to allow the prints to reveal what cannot be seen by ordinary eyes. The

same principle will be applicable for a man who covers his face that had been badly disfigured in fire or a celebrity who wears disguises to evade public recognition and yet such covert becomes meaningless when the technology is deployed to reveal what lies behind the cover or disguises.[115] If the intruder were to bring a defence that there has been no intrusion for privacy on the ground that the claimant was in a public area where privacy cannot be reasonably expected, such a defence shall fail. Physically the claimant might have left the premises that would entail him with the reasonable expectation of privacy and entered into a public area where privacy should usually not be expected, however the very fact that the plaintiff has tried to create some private sphere upon his body by wearing the clothes that would not allow individuals to see beyond the clothes – not with the naked eyes and without the 'assistance' of some sort of device to achieve such purpose – shall bring to the result that his physical presence in a public area will not subside his right of privacy upon those parts of the body that he tries to protect. The mere physical presence in public area does not diminish the private sphere than such an individual has taken the effort to create upon his body. In such circumstances the 'private sphere' remains even when such individual is literally in public area.

In a nutshell it is proposed in this thesis that the scope of privacy should be drawn and limited by deploying the two conjunctive touchstones. In that regard the submission in this thesis is straight forward: for as long as the two conjunctive touchstones of privacy are present, the right to privacy provides an individual with the freedom to decide about his private matters as he may desire without any outside interference. If any interference, either physical or otherwise, is being affected upon the privacy of an individual, such an individual has the right to bring legal action either for damages, injunction or both to compensate him for the privacy infringement and/or to deter the recurrence of the same intrusion. Injunction shall also be made available to prevent the threat of privacy intrusion. It shall also be noted that although the word 'interference' has been used, it is not necessary that the conduct of the defendant which the plaintiff is complaining as a breach of the plaintiff's right to privacy involves a form of physical contact (interference) with the plaintiff. That mainly because the issue whether or not the interference has been

affected directly or indirectly, with or without the need of the physical presence of the defendant is irrelevant; as what matters the most is to see whether or not the plaintiff's privacy has been interfered with and thus, even a distance monitoring being affected on the plaintiff will be construed as interference of privacy. The analysis of the aspects of privacy in 3.3.2 below will elaborate the point further.

(iii) Interdependency of the two touchstones

This thesis introduces the concept of the two conjunctive touchstones of privacy in order to draw the scope of privacy. The test for each touchstone, which for convenience is referred to as 'private matter' and 'private sphere', is the result test and the reasonable expectation of privacy test. The question that may be posed in relation to that is why do we need to have the two tests if currently the courts in England have adopted the latter without expressing the need to have any supplementary test.

The main reason for proposing the two touchstones and thus the result test in addition to the reasonable expectation of private test is this: the right to privacy should not arise merely because given the circumstances in issue it is reasonable for an individual to expect to have his privacy respected; not especially if the matter in question is not of private nature. Thus in the case of *Malone* for example, Megarry VC would have acted correctly in rejecting the claim of privacy, if the police had obtained evidence that incriminated the plaintiff and the tapping were done based on that evidence. That because although the circumstances might warrant 'reasonable expectation of privacy' as the telephone conversation was done in the privacy of the plaintiff's house, but the subject of the conversation related to the handling of stolen property – the subject matter which is not of private nature thus falls short of the first touchstone if the 'result test' is deployed. The absence of the first touchstone here would negate the privacy of the activity. Similarly although generally the act of installing a listening device in an individual's premise interferes with the latter's private life, privacy would not act as a sword nor shield to an individual, such as the plaintiff in *Khan* if the device was installed based on incriminating evidence about arrangement for drugs importation involving himself which created the necessity for

the installation of the listening device. If a conduct which otherwise would amount to privacy intrusion has been affected with a knowledge that the activities to be observed are not private in nature, such a conduct does not amount to privacy intrusion for the absence of the first touchstone, although other legal principles may still be available, e.g., trespass to property, etc. It must be noted here that for such a conduct not to amount to privacy intrusion it must have been affected with the knowledge that the interference to be affected does not relate to private matters. It thus becomes necessary to distinguish the act that otherwise amount to privacy intrusion that has been affected based on evidence – thus being exercised with the knowledge (even if it may turn out to be mistaken) that what a person does or will do in private is not a private matter which must be respected as opposed to the same being exercised based on a mere suspicion with the purpose of gathering evidence which will not justify the transgression to individuals' private life. By way of analogy, the former will be similar to a search being affected by the authority based on warrant to obtain the evidence which the authority believes to be present in the suspect's premise while the latter will be similar to a search being affected without proper basis and in the absence of any prior evidence with a mere hope that the authority will be able to obtain something that will incriminate the suspect.

That is from procedural point of view. From privacy perspective – we need to test the situation against the two conjunctive touchstones. If the proposal would be accepted that the two conjunctive touchstones are to be deployed as the method to limit the scope of privacy we will reach the same conclusion. Let's now see if the first touchstone is satisfied. Although due to the circumstances it was reasonable for the plaintiff in both cases to have the expectation of privacy, thus fulfilling the second touchstone or the only test as currently being deployed by the courts in England, whether or not the right to privacy exists does not, as this thesis proposes, depend solely on that. In addition to having satisfied the reasonable expectation of privacy test we need to see whether or not the issue relates to private matter. If it is, any interference will amount to conduct that disrespects such an individual's private life; if it is not, then privacy will not assist inequity. As suggested earlier, the test for this is the result test, to see to whom the activity is directed to or facts related to. It was

also suggested that the test works based on the assumption that unless proven otherwise private activities are assumed to be private matters.[116]

In *Malone* the issue related to an allegation of him handling of stolen property while in *Khan* the plaintiff was accused of being a party to importation of drugs found in the possession of his cousin. In both cases the evidence brought against them was obtained by intruding their privacy and there were no prior evidence that might incriminate them so as to justify the surveillance being affected on them. To see whether or not the first touchstone is satisfied, we need to examine the plaintiffs' activity during which the intrusion complained of occurred. In *Malone* the intrusion was affected to his telephone conversation while in *Khan* it related to private conversation took place in a friend's premise.[117] Telephone conversation and conversation between friends are private activities which, unless proven otherwise, are private matters. If the result test is to be deployed, in the absence of any incriminating evidence, the plaintiffs' conducts were assumed to have been directed to themselves and the other party who consented to having such conversation; hence the matters are *per se* assumed to be private. Any interference to that may only be legitimately affected in a proportionate manner prescribed by law that legitimately restricted what otherwise is an aspect of individual's privacy. Therefore the ECtHR was right by pronouncing that the United Kingdom government failed to respect the individuals' private life by allowing and having affected telephone interception in the former and installation of listening device in the latter without having the proper law that govern such interference with individuals' right to have their private life respected. Mere suspicion will not found justification to affect surveillance on the subject; intrusion to privacy should not be allowed. That goes to the very principle that every one is assumed to be innocent until proven otherwise. However it is different if the evidence exists and shows that a tort or crime is or has been committed from the privacy of one's place; it is incorrect and unwarranted to allow the claim for privacy to be used to allow inequity or to cover up crimes. Thus if the authority has actually tapped the telephone or installed the listening device after obtaining the evidence that incriminates the respective plaintiff, no interference to private life would have occurred as in such circumstances the surveillance will be

directed towards non-private activities of the plaintiff – as handling stolen property and importing drugs are not private matters when the result test is deployed as the result of such conduct is affecting individuals other than the doers.

Through this thesis I attempt to introduce the notion of privacy as a concept which shall rightfully provide the protection covering all aspects of private life where genuine needs for protection exist; yet the concept should be inapplicable where it is sought to cover up tortuous, unlawful or illegal conducts, it does not exist in cases of inequity. With that paramount consideration, the idea to have the two conjunctive touchstones is being invented and not without a good basis. As we are talking about privacy, we are basically discussing about private matters or private activities that fulfilled the first touchstone as proposed here. We are not merely talking about what one has done in private. Let me put it this way: it would be universally accepted that when a person, say Mr. A, has murdered his wife in their bedroom no one with the right mind would allow him to use privacy as a defence merely on the ground that he had the reasonable expectation of privacy for his conduct while within his bedroom. Similar sentiment will arise if say Mr. B, who felt dissatisfied about his life and thought that his misery was partially caused by his neighbour's refusal to befriend with him, decided to end his life by planting a bomb in his bathroom which is adjacent to that of his neighbour so that he could 'take' his neighbour with him. Let us soften the illustrations, and as the tone is made softer some doubt may arise. Suppose Mr. C has forced his partner to have sexual intercourse with him against the latter's wish or in a manner not acceptable by the latter. The incident took place in Mr C's apartment. Suppose Mr D does not like his boss. So he anonymously wrote on the Internet from the privacy of his bedroom and using his own laptop something about his boss including the fact that his boss is having some intimate relationship with a person named so and so. Lastly suppose Mr E who does not like and cannot stand the smell of aromatherapy oil that his new roommate burns every evening took charge of the matter by disposing of oil and the oil burner while his roommate was not around. Unlike the first two illustrations, some hesitation may arise with regard to the last three illustrations. For examples, one may want to argue that although what Mr. C did was not right but it is his private matter anyway; that D has done

nothing but expressing himself; and that E has the right to do something what causes nuisance to him. Although the degree of intensity becomes lesser following the sequence of the illustrations, all illustrations have two things in common: the actions are undertaken in private but each has impact on others.

There are of course other legal principles that are applicable in each illustration. That is not our concern here and accordingly will not be discussed. The concern here is this: if we were to set aside the nature of the matter and rely simply on the reasonable expectation of privacy, it is arguable that Mr. A, B, C, D and E should have the right to have their private life respected even in those circumstances. Now consider this: supposedly the wife of Mr. A and the partner of Mr. C cried for help and a stranger upon hearing that intruded to their premise in order to stop what Mr. A and Mr. C were about to do; a stranger through the bathroom window of Mr. B saw Mr. B was preparing the explosives notified 911 to stop what Mr. B has planned to do; being served with a warrant, the internet service provide discloses that it was Mr. D who wrote the facts about his boss; and another roommate saw what Mr. E was about to do told Mr. E not to do what he wanted to do. If we were to say that the existence of reasonable expectation of privacy is sufficient to afford Mr. A, B, C, D and E with the right to privacy, then the stranger who interferes with Mr. A, B and C's conduct, the internet service provider and that other roommate of Mr. E had all interfered with the privacy of the respective party. Such inference is unwarranted and undesirable. The notion of privacy has been resisted, *inter alia*, due to the fear that privacy would be used as a shield for inequity, torts or crimes. However, the notion of privacy as advanced by this thesis would not pose such a peril. In those given scenarios Mr. A, B, C, D and E would not be allowed to use privacy as a shield albeit the circumstances might give them the expectation of privacy. Although in the given circumstances each of Mr. A, B, C, D and E may prove that they where within their private sphere, thus fulfilling the second touchstone 'the reasonable expectation of privacy test'; their conducts have impacts on others who have not consented to such a conduct being directed to them which fall short of the 'result test' for the first touchstone of privacy. These straight forward illustrations clearly show how the result will differ when we emphasise solely on the reasonable expectation of privacy

test without taking into account the privacy of the matter the nature of which is within the first touchstone of the privacy as proposed in this thesis.

The outcome would differ if, Mr A instead had attempted to kill himself; if Mr. B had planted the bomb knowing that the explosion would only destroy his bathroom and anything in it; if Mr. C instead had sexual gratification through self-stimulation; if Mr. D wrote about himself; and Mr. E was about to throw what is his. Any attempt to stop what they are attempting to do will amount to interference with their private life and thus an intrusion to privacy as those conducts are undertaken within private sphere and were each directed to the doers themselves and thus their private matters. As the two conjunctive touchstones are satisfied in these situations, their right to have their private life respected shall prevail.

Having said the above, it is reiterated that the two touchstones are interdependent. So far we have discussed the situation where the second touchstone was fulfilled without the first one. The reverse will bring about the same result. No privacy claim shall stand, no matter how private a matter may be, if it has been undertaken outside the private sphere. Hence although the act of sleeping is prima facie a private activity, the claim for the right to privacy may not stand if such an act is being carried in public; that may even amount to nuisance. Neither should any claim for privacy stand if the act of cooking is being carried in a public space. Similarly while the act of sitting or standing is purely private, the claim for privacy will not stand if such an act is being conducted on other's property against the will of the owner of such a property; that will amount to trespass to such other's property. In all these instances although it might be argued that the activities in question are very much private in nature as the consequence or the result of the act is meant to be directed to the doer himself, the second touchstone has not been satisfied and thus such activities fall outside the boundary of privacy. As a matter of fact, even the result test will not be satisfied in all those instances because even though the doer may mean to direct the result of his conduct merely to himself, the very fact that the result of his conduct does have the direct effects upon others, the conduct falls within the second limb of

the result test and thus in the absence of the consent of those others the result test is not satisfied.

When the propositions are being tested against a given scenario such at that in *Manola* v. *Stevens*[118] the result would be different. In that case the New York Supreme Court allowed recovery upon the independent basis of the right to privacy upon the publication of the picture of an actress who appeared upon the stage in tights and was snapped by the defendant from a box. While the publication was prevented in that case on the basis of the right to privacy, the context within which the notion of privacy is being solicited through this thesis restricts the availability of privacy claim only when the two conjunctive touchstones of privacy exist, namely, that the plaintiff's activities, during which the intrusion has occurred, are private and they have been conducted within a private sphere. In *Manola* one of the touchstone is not satisfied because even if the actress would be allowed to claim that the choice of what she'd like to wear is a private matter, the fact that she has brought herself into the public sphere would estop her from claiming that her privacy was infringed when the defendant snapped her picture while she was in public. The same principle shall apply to the facts in *Ultra Dimension* as discussed earlier in 3.3.1 (ii); thus the submission that albeit judge's mistaken application of the common law principle and total disregard to the Federal Constitution, it was justified on the basis of the facts that gave rise to the claim in *Ultra Dimension* to hold that the plaintiff was not in a place where an individual could reasonably expect her privacy to be respected – the factor that negates the second touchstone of privacy.

3.3.2 Aspects of Privacy

This thesis is proposing that privacy really is the synonym of freedom of private life. As with other classes of freedom, privacy does not demand that a rigid definition with strictly lucid scope must exist before it would be afforded with legal protection. Notwithstanding that submission, it will be useful to have a guideline to identify the type of claims that may legitimately come within the notion of privacy protection. That is especially true since the starting point to establish the claim on the basis of privacy is to show that the plaintiff was in the circumstances that would have

allowed him to expect his privacy being respected. Thus it is necessary to see what kind of activities, either in term of actions, omissions or otherwise would fall squarely within the claim for privacy. For that purpose the aspects of privacy may be classified into two categories namely the physical and non-physical aspects. However this classification is not meticulous; an activity may be of the quality that satisfies both, and in fact in most instances both aspects present at the same time, if not at least one will be the factor that influences the other. This discussion shall be read with a caveat that the classification shall be used merely as a barometer, to assist in ascertaining if certain types of claims should legitimately be protected as part of privacy. It is not meant to divide the privacy rights nor limit the scope of the rights protected on the basis of privacy.

(i) Physical Aspect

The physical aspect of privacy mainly emphasizes an individual's freedom to do or omit whatever he chooses to himself – his body. This will vary from one's choice how to live his private life and/or arguably to end his life, to have cosmetic surgery, to have sexual intercourse, to use contraception, to have body piercing, etc. to what one decides to put on or off his body or to let into or out of his body. As an aspect of privacy, such right only exists when the two conjunctive touchstones as discussed earlier are satisfied; thus for instance a claim for privacy will not provide any defence if the result of a private conduct causes infringement to others' right; that despite the fact that the conduct in issue may be otherwise of private nature and carried out in the total seclusion from others. That point is very much within the parameter of the first touchstone as discussed in 3.3.1(i) earlier. Accordingly one cannot claim that since sexual intercourse is a private matter he has the right to force his spouse over the way how and when they should have sex, if the latter declines that. Neither has an individual any right to force any other to have sex with any one against the latter's wish. Secondly, the freedom is only exercisable within the private sphere of such an individual. Therefore, while the right to nudity (omission to put anything on a person's body) will generally come within the ambit of one's freedom to choose what to omit about oneself and thus is purely a private matter, such an individual cannot insist upon being afforded the same extent of freedom to be nude

in public areas where it is unreasonable for an individual to expect his privacy to be given the same respect as it would within his private sphere.

In earlier discussion most of the illustrations given deal with the physical aspect of privacy. In addition to the points that have been elaborated earlier, the right to privacy as submitted in this thesis includes an individual's power and control over himself. Thus, it is part of the right to privacy and it is wholly an individual's right to choose to refuse to have a public gaze upon him or to have his picture taken, provided he keeps himself within his private sphere. Otherwise, it is unlikely that the claim for privacy will afford him with the right to 'instruct' others not to look or stare at him or not to take his picture while in public.[119]

To sum up, the physical aspects of privacy include any private matter(s) being carried out within a private sphere that an individual opts to do or omit physically to himself, and if such activity involves or requires other's participation there shall be reciprocal consent of such person involved, provided always that the two conjunctive touchstones of privacy are satisfied.

(ii) Non Physical Aspect

The non physical aspect of privacy refers to one's liberty to do anything for his private life and likewise to omit anything from his private life which either relates to his private facts or any other aspects that are not physical in nature. In other words, it includes all aspects of private life except the physical aspect of it, including but not limited to secrecy, sexual orientation, political preference, etc and freedom to make choices about one's behaviour in respect of his private matters.

As stated earlier, the classification of the aspects of privacy is not meant to segregate the scope of privacy into two aspects, not especially since both the physical and non physical aspects of privacy usually go hand in hand. So, for examples, one's choice of wardrobe will influence the way how one gets dressed; one's choice of meal will determine, when one has the choice, what food he will consume; one's life orientation will affect and very much win over how he manages his day to day

activities; one's sexual preference will be among the driven factor in his sexual behaviour or relationship and so on and so forth. Sometimes one's faith may also be the reason for a person to take or omit some kind of food or drink. For examples both the Old Testament[120] and Al Qur'an[121] explicate that swine are unclean and must not be consumed.[122] Consequently and also as part of individuals' privacy some individuals may choose to refrain from consuming pork. In practice, however, it is up to individuals to choose and it is an individual's choice that influences the real act of eating or drinking or omitting to eat or drink and religious injunction may be ignored. If any individual disregarded such a clear provision for any reason, it's safe to say that it is such an individual who has exercised his privacy right, i.e., to think and decide what to do or omit for himself. The religion shall not be held responsible for the disobedience of its followers. Any moral or other consequence for such disobedience is a matter beyond the scope of this thesis to discuss but it will suffice to say that it is for such an individual to bear any consequence of its own action done out of his own free-will.

However not every non-physical aspect of privacy is necessarily coupled with the consequential physical aspect of it. Informational privacy will be one of the best examples for that. One's sentiments or thought will also make good instances of this category – including for example, one's belief or view on some matters which such a person does not necessarily do or omit from his very own life. Thus, one may support the idea for freedom of individual's sexual preference including the choice to lead a gay or lesbian lifestyle and/or to afford legal recognition for marriages between adults of the same gender. Such a person's thought or view over the matter is his private matter and shall be respected even if such a person is in reality a heterosexual who does not practise any kind of homo-sexual activities. Similarly an individual may believe that consuming some kind of food is not good for health and holds the view that such kind of food should not be consumed. Such a thought or view is a private matter that shall be respected even if such an individual does in reality consume such kind of food himself. Such an act that shows the contrary of an individual's belief shall not negate such an individual's right to hold onto such an opinion or view.

In the same way as the physical aspect of privacy, the non-physical aspect is not exercisable in situations where personal preference legitimately and legally collides with that of other's. Thus, while a person has the freedom to choose whether or not to express his sentiments, once he chooses to express as such, he cannot force another to listen to him or to accept his opinion. Similarly one's choice of food and the right to eat what he likes is not extendable so as to include the right to direct others to prepare such a food. Conversely one's choice to omit from taking something other than vegetables, for example, does not give that person the right to prevent others from taking non-vegetables or vice versa - to force others to take vegetables.

Secondly, the non-physical aspects of privacy are subjected to its exercise within the private sphere, thus, no claim for infringement of privacy will stand if the complaint relates to some private facts that a person has publicly published or personal secrets that he had intentionally disclosed to the public or if he has consented to their publication as such.[123] It is true and within the ambit of the argument in this thesis that even the choice to impart some private information will amount to the exercise of right to privacy, the right to decide what one likes to do or be done about his private life, which includes the right, power and control an individual has upon his private facts or information. Thus, the right to privacy does not diminish by a mere reason that some private facts or information have been imparted to others. For as long as the private facts or information have been imparted in such a way that they have not left the private sphere, for instance if they have been imparted on the condition of confidence or some other conditions so as to allow the owner of such private facts to retain the control over such facts, the right to privacy over such facts or information shall remain. Consequently, any unlawful and/or unwarranted disclosure or impartation of such facts will amount to a clear infringement of the right to privacy of the owner of such facts or information in addition to any other rights the person may have under the existing legislation and/or common law principles. That has to be clearly differentiated from a public disclosure made by the

data subject upon which the 'owner' of the private facts will lose the control over the flow of such facts and thus diminishing the right to privacy which otherwise exists.

Third, as with any other type of freedom, the right to the non-physical aspects of privacy is not absolute. This aspect of privacy is exercisable subject to the relevant existing laws and/or regulations. Therefore, although it is purely a private matter of an individual to think and believe in whatever he chooses to, that right alone does not afford an individual with the right to put across his idea or opinion unto others, let alone forcing others to accept the same if any legislation has prohibited that.[124] For the same reason, in some legal jurisdiction such as Malaysia and Indonesia where communism has been prohibited, individuals' choice of political orientation in such legal jurisdiction does not include the choice to be a communist.

To sum up, the non physical aspect of privacy includes every aspect of private life except those which are directed to one's body. While non-physical aspects of privacy can be exclusive, most of the physical aspects of privacy will come with it the non-physical ones. For example, one's sexual life is closely linked with and influenced by that person's sexual orientation and sometimes one's faith; one's choice on method of contraception will influence one's decision in the use of the contraception; commission of suicide shall be accompanied with the decision to end life; and anything that one eats or drinks usually is determined with the person's choice of food or drink.[125] Indeed in many situations the classification is superfluous, including, for instance situation involving production, dissemination or commercialization or depictions of individuals. Therefore, as mentioned earlier, the classification is only to be used as a yardstick to determine if an aspect of life may be protected as part of privacy or otherwise and not for the purpose of grouping or segregation. There is another reason for that. The classification is suggested on a purpose: that is as a reminder that privacy is not only about secrecy or data protection but it should be given recognition and legal protection to cover wider aspect of private life.

3.4 Limitations of Privacy

For the purpose of discussion within this part 3.4, it must be borne in mind that privacy exists for as long as the two conjunctive touchstones are satisfied. Broadly speaking the two conjunctive touchstones draw the boundary of the scope of privacy. Thus, if there is anything that may traverse the limit of privacy; that will include anything that falls short the two conjunctive touchstones. If at all that matter needs to be categorised under some more general headings, it might be said that the limitations for privacy take forms of the following situations:

1. Where the exercise of privacy interferes with the right of others; and
2. Where the exercise of privacy crosses into public sphere.

These will be elaborated in due course. However as it will be shown, the presence of either of these two basically directly or indirectly negates any of the two conjunctive touchstones. As such it is reiterated that the scope of privacy is drawn by the two conjunctive touchstones which clearly draws the line what is included and what is excluded of the claim of privacy.

In addition to the above two, there are other factors that may be construed so as to limit individuals' right to privacy. That is:

3. Where the exercise of privacy is against the public interest; and
4. Where the exercise of privacy is restricted by law.

The above, however, in substance are not a limitation as such. Unlike the earlier two, in the third and fourth category the right to privacy still exists, it does not per se cancel out privacy. However, as privacy is not an absolute 'right'; it may be subjected to some restrictions, i.e. these two grounds. The restrictions, however, must meet some conditions to make the restrictions lawful; otherwise an attempt to impose such restriction and/or the restriction itself would amount to privacy intrusion. The below explains each of the above points.

3.4.1 Privacy v. Right of Others

Among the main concerns for affording the legal recognition to privacy, which mistakenly believed as the absolute claim of individual about what he does in private, is that the notion will allow tortfeasors or criminals to use it as a 'shield' to let them escape the civil or criminal liabilities. However, in reality privacy within the context as this thesis advances will never allow its use to justify interference with rights of others. By its very nature a conduct that interferes with other's right will not fall within the scope of privacy; as such interference negates the privacy nature of the conduct.

Even the ECHR requires that the exercise of the right being afforded by Article 8(1) is subject to the other provisions of the ECHR and must be balanced with the respective rights of others when the respective rights contest each other or become rivals. As the ECtHR has repeatedly said: '[t]he concept of 'respect' [in Article 8] is not precisely defined. In order to determine whether such [positive] obligations exist, regard must be had to the fair balance that has to be struck between the general interest and the interest of the individual.'[126] That is so especially because privacy is not merely about the right to exclude others from one's private life. The right also encompasses the choice to include others within that circle. Such very fact dictates that the exercise of this qualified freedom of private life shall subject to that other's rights as well. For example as every individual has the right to privacy, its exercise shall not transgress the privacy of other. When the exercise of one's privacy collides with that of other's, then any other relevant factors are to be taken into account, such as whether or not there exists any other right(s) that when read together with the privacy outweigh that right of the other. Hence, for example when the privacy right of parents collide with that of their children, some examples of which have been discussed earlier in 3.3.1(i), the existence of a legal provision that empowers parents to decide for their children in a particular matter will make the right of parents to prevail over that of the children.

Public interest is one of other factors which may be taken into consideration while weighing the competing interest between the parties. In *A* v. *B Plc and Another*,[127] the

claimant, a married professional footballer was granted an injunction to prevent the first defendant from disclosing or publishing any information concerning the sexual relationship that he had had with the second defendant and another woman and to restrain any disclosure by those women to anyone with a view to such information being published in the media. On the appeal, while acknowledging that the courts had to recognise and give appropriate weight to the extensive range of relationship which now existed and that, the claimant was entitled to some extent the protection for the confidential information, C's competing right of freedom of expression coupled with the public interest for the existence of free press defeated the claimant's right.

But when the colliding rights are equal, no body has the right to claim that his privacy is to prevail over that of the other's. In such a situation the right to privacy simply cannot be exercised. As an example privacy confers the right to an individual to choose with whom one would like to engage in sexual relationship. Here that 'chosen' person's participation and consent is required for the commission of the intended 'private activity' to be lawful. It is only exercisable as the privacy right of the former when the latter has consented as such. A person's right to privacy will not prevail over the right of that other who may choose not to have such kind of relationship with such a person. Privacy will not provide any means to exert one's desire upon the other without the latter's consent. That will be tantamount to assault, battery, any more severe torts or even a crime as the law may prescribe. That illustrates the first situation where the right to privacy may be limited. However if one carefully examines the matter, it is apparent that it is not just a matter of limiting one's right to privacy but rather a claim of privacy will not arise at the first place for the absence of consent of that other negates the fulfilment of the first touchstone of privacy.

In short, when the exercise of privacy will result in interference with the right of other(s), the claim of privacy will only stand if such exercise is carried out with the consent of such other(s). Without such consent of others, privacy will not be available as defence for the absence of the consent negates the result test.

3.4.2 Privacy Restrictions in Public

As the name suggest, the right to privacy is only available for activities done in private or facts which are kept private. In 3.3.1 (ii) it was explained that the concept of private sphere, however, is not determined solely on the basis of an individual's locality or whereabouts. There it was stated that private sphere can be created even when one literally is in public area. The proposition, however, should not be interpreted so at to implicate the existence of the right to privacy without any boundary to it. The right simply does not exist within public sphere. Thus if one has deliberately made his private data available in public domain, while he has exercised his right to privacy by choosing to do so, he loses the further right to have exclusive control upon those facts. Right to choose to smoke, for example, is also an aspect of one's private life, the choice of what one would like to have for himself. The right, however, does not exist in public spaces if the owner or management of such premise prohibits smoking within its premise. Sometimes the right is being limited, i.e., if such public place has some designated smoking area making the choice to smoke is only exercisable within such designated area. However as with the first category, the careful analysis of the illustration shows that in such illustration, the second touchstone is not satisfied for such a person has brought himself out of his private sphere. That may be distinguished from a situation where one smokes in the privacy of his own house

3.4.3 Privacy v. Public Interest

The third limitation involves the situation where the exercise of privacy affects the interest of the public. Thus for instance even though choice of one's attire is entirely a private matter, it is arguable that no damages would be payable to a person who has been arrested and/or interrogated for having dressed in the enemy soldiers' uniform during the war period. This ground also becomes available if the right is being argued so as to be used as a shield against the commission of crime by a plaintiff. This can be seen in *Rumping* v. *Director of Public Prosecutions*[128] where the House of Lords upheld the admissibility of a letter written by the appellant to his wife – amounted to a confession of murder. The letter was written on the day of the killing

and was handed in a closed envelope to a member of the crew who has been requested to post it as soon as the ship arrived at a port outside England. The appellant, however, was arrested when the ship reached Liverpool, the letter was handed to the captain of the ship who handed it over to the police. The appellant argued that the letter was wrongly admitted in evidence. The House of Lords held that the letter was admissible in evidence. In this regard Lord Morris said:

> Had occasion arisen in the past for debate as to whether on grounds of public policy some such rule as that contended for was desirable it seems to me that there would have been competing and diverging aspects of public policy to be weighed; but so is respect due to the ascertainment of the truth. Marital accord is to be preserved: but so is public security.[129]

3.4.4 Privacy Restrictions by Law

Privacy is not an absolute right. It is a qualified freedom that individuals have over their private life. Thus it is possible to restrict the right for some acceptable reasons and provided that the conditions allowing the restriction are met. The right as articulated in Article 8(1) of the ECHR and Article 5(1) and Article 13(1) of the Federal Constitution provides that the right may be restricted. The very subsequent provision of ECHR, i.e., Art. 8(2) spells out the situations where the intrusion to private life may be justified; while the Federal Constitution in the very provision itself it reserves the rights are guaranteed 'save in accordance with law'.

It is lawful to introduce some restrictions to activities that otherwise are private in order to protect legitimate interest of the public. Thus, a claim for privacy shall fail if a lawful legislation meant to protect the interests of minors exists to make a sexual intercourse with a minor as an offence even if it took place with the consent of such minor. That, however, should not be confused with the ECtHR's decisions that found local law that criminalised consensual homo-sexual relation with adolescent discriminated the treatment given to the adolescent and interferes with the adolescent right to privacy. Unlike the former, in the latter the adolescent are assumed to have had the maturity to decide for himself; and thus such law discriminates them without just and proper basis.

Another example is this: privacy shall not provide any defence for a person who has assisted in the commission of suicide or abortion if there exists the legislation that makes such act of assistance as offence. Such commission is an offence and the plea that the acts have been committed with the consents of all parties involved will not matter for the lawful legislation would negate the privacy nature of such activities. The same applies to criminal matters. One cannot claim that a sexual intercourse with a girl below the age of sixteen is virtuously his privacy, even when such intercourse was based on a mutual consent, because the existing law prohibits that. The law also prohibits sex without consent, i.e., rape and paedophile sex and as such, in neither case can the defence of privacy be used to escape criminal liability.

Further examples would include local prohibitions against alcohol consumption and/or an attempt co commit suicide. Some states in Malaysia and the Middle East countries declared that liquor is prohibited to Muslims and thus for Muslim subjects of such countries the right to drink liquor is not part of their privacy. Legislation that makes the attempt to commit suicide as an offence is another example of lawful exclusion of what otherwise may amount to individuals' privacy. To declare 'suicide as an offence' will be a futile attempt as no effective punishment can be efficiently imposed on the 'so called offender' anyway. However, in order to discourage the commission of suicide, the legislation of some countries provides that an attempt to commit suicide is an offence.[130] The result is hilarious: while it is an individual privacy to decide whether or not to end his life, once one has decided to end his life he has to make sure that his attempt must be successful in order to avoid any punishment for committing an attempt to commit suicide. To argue that such an aspect is wholly a private matter will be of no use as the legislation has restricted individual's privacy in such an aspect. Furthermore the legislature may also legitimately - for the preservation of public interest - declare that the assistance to the commission of suicide as an offence and thus, even if it was undertaken by consenting adults, privacy will not afford protection as such.[131]

And finally, as with other classes of freedom the right to privacy or freedom of private life is not an absolute right. That applies to all sorts of private matter(s),

including eating, drinking, smoking, sleeping, and so on and so forth. If there is a rule that, in order to preserve the interest of the public, has restricted some activities which otherwise is wholly a private matter for an individual to decide, the claim that such rule has interfered with an individual's right to privacy will not stand. Thus if the act of eating, drinking or smoking has been restricted in some public areas, privacy shall not afford any protection nor any defence for the violation of such a restriction. Likewise while the choice of what to wear is one's personal matter, the right to privacy has not been infringed if an individual is restricted, by the contract of employment which he has accepted, to wear only a uniform while working during office hours. His agreement to accept such a term of the contract of employment shall prevent him from arguing that such a restriction is a violation of his right to privacy, unless if such contractual provision has been judicially declared to be void. Another example is the mandatory use of a motorcycle helmet and safety belts that legitimately restrict individual's choice of what to use or not to use and yet unless the law has been modified to the contrary effect privacy will not afford any legal protection for failure to abide by such a law.

That is so even if the activities which are the subject of those charges have been undertaken or attempted to be done in total privacy of the accused.

3.5 Intrusion of Privacy

Having submitted that as a class of freedom it is not necessary that the definition of privacy aka the freedom of private life has to be precisely fixed and its scope must be made rigidly predetermined before a legal protection can be accordingly afforded, it shall be clear that unless solicited, any interference to such a freedom will amount to an intrusion of privacy. At this point, I would be tempted to include the word 'unjustified' within that phrase but I have intentionally excluded that for the reason that will be stated shortly.

Before the thesis will elaborate on the point how any acts or omissions may amount to privacy intrusion, it shall be noted that this thesis advances the argument that right to privacy entails an individual, as part of his privacy right, with both the positive

and negative rights e.g., the right to exclude others and the right not to be interfered as one may wish. For that the key principle is for as long as the two conjunctive touchstones exist an individual is free, as a matter of privacy, to choose to act or not to act within such a parameter. On the other hand, the right to privacy originally does not impose upon others any obligations beyond a mere negative one, i.e., the obligation to abstain from interfering with, and thereby to respect, the privacy of another – an individual's right to private life. It does not usually impose positive obligations that is to say that it does not necessitate a person(s) to take action in order to secure the privacy upon another.[132]

However there are circumstances within which the obligation 'not to interfere' with an individual's right to privacy requires some positive actions to be adopted. First will be the situation when a person's positive action either intentionally or negligently interferes with the privacy of another. Such action and the failure to rectify such an action will amount to privacy intrusion.[133] The action will be interpreted as a privacy intrusion for it amounts to such a person's failure to abstain from interfering with the right of privacy of others. The second limb, failure to rectify privacy intrusion, may look as though it 'imposes' positive obligations. Careful analysis of the situation, however, will establish that such positive action is required simply in order to 'reinstate' the person to the situation where he should have been at the first place, i.e., the position before his action that has interfered with one's right to private life has taken place.[134] The more flexible extension of such a principle will require the 'rectification' of not only active intrusion but also a passive one, an omission that leads to an act that does not demonstrate the respect of an individual's right to private life.[135]

It is common that when a right has been infringed, the plaintiff in the cause of action for an infringement of such a right needs to establish how the conduct of the defendant has infringed the plaintiff's right. However since privacy is not a right *per se* but rather the freedom of private life that is a fundamental right of every individual, the starting point shall start at the existence of the freedom at the material time. In other words, instead of putting the emphasis on proving the *actus reus* and

mens rea on the part of the defendant, what matters more will be to see if the two conjunctive touchstones are satisfied and if the answer is affirmative, the only further task a plaintiff needs to show to support the claim for privacy intrusion is that the defendant had intruded into such a privacy.

The below elucidates the elements required for a cause of action of intrusion of privacy:

1. that activity/ies that the plaintiff was undertaking at the material time is/are private;
2. taking into account the surrounding circumstances, the material fact/s was/were within the private sphere;

} Together these elements create privacy (see 3.3.)

3. the defendant has intruded into such privacy
4. the 'intrusion' is unsolicited

All that the plaintiff needs to show, after establishing his privacy (that the matter was private and it took place within the circumstances it would be reasonable for him to have the expectation of privacy), is that there was an intrusion to such privacy and that he did not consent for such an intrusion to be affected to him. The term 'unjustified' is intentionally excluded from the description because it is not a plaintiff's duty to prove that such an intrusion to privacy has been done by the defendant without any acceptable justification. Whatever may be the *mens rea* of the defendant at the material time is not a matter the burden of proof of which is upon the plaintiff. Rather after the plaintiff submits to the court the facts establishing his privacy and that the defendant has – without the plaintiff's consent –intruded to such a privacy, the burden is shifted to the defendant to show if there is any justification or defences to such intrusion of plaintiff's privacy.

Having said that it is not the duty of the plaintiff's to establish the defendant's *mens rea* for the intrusion,[136] intrusion of privacy does not give rise to a strict liability. *Mens rea* does count especially for the purpose of calculating the quantum of damages. It is one thing if a defendant has accidentally stepped into a sphere within

which the plaintiff could reasonably expect his privacy to be respected, but it is entirely another if the defendant has actually disclosed or made the publicity of the plaintiff's private facts that he saw while 'accidentally' stepped into the plaintiff's privacy. While the defendant's 'guilt' may not be that serious in the former, he might not be excused for having done the latter and therefore the quantum of damages should be greater in the latter. Either way the defendant shall be made liable for his conduct that amounts to privacy intrusion for at least two reasons: namely, to deter the defendant and others from committing the same or similar conduct (or to be more prudent and not to simply act negligently in the former situation) and secondly to compensate the plaintiff for any damage that might have been caused by the defendant's intrusion to the plaintiff's privacy.

Consequently the possible scenario that a defendant in privacy intrusion has to face is that once the plaintiff has established the elements as set out above, the burden will shift to the defendant to either disprove any of those elements or to establish a justification or defence for the intrusion in question.[137] If none of the elements has been refuted and there exists no acceptable justification or defence for such an intrusion, then the plaintiff's claim for intrusion of privacy should succeed and accordingly an award for damages should be made to compensate the plaintiff and to deter the defendant and any other person from doing similar intrusion in the future and/or injunction to prohibit further intrusion as the case may be.[138]

The above shall clearly rule out much confusion that has been thrown in to refute the notion of privacy. For example, Thomson has thrown some kind of doubt for the notion of privacy as the right to be let alone by giving among others these illustrations: there is intrusion of privacy if one is being monitored by deploying a special x-ray machine from a distance without touching such a person at all but there is none when one is actually being hit by a brick while in the former such an individual has been completely 'left alone' but not in the latter.[139] I do agree with the writer in the sense that most probably there was intrusion of privacy in the first illustration but I do not agree with her that the individual in such illustration has been 'let alone'. How an individual can be said to have been let alone if his every single

movement, every single word he says or hears and every single thing he does or sees is being monitored and/or recorded by others. It is true that such a person has not been physically restrained or even touched but the idea of being let alone is not restricted merely to that sense. The idea of 'let alone' is meant to guarantee the freedom of private life upon an individual; the complete control upon what can be done and what cannot be done about his private life; the liberty to exclusively determine whether to include or exclude others from his private life. That cannot be achieved by merely allowing an individual to be in seclusion - by not causing any physical interference to him in spite of the fact that his every single movement is being monitored and/or recorded from a distance. A person has not been let alone, i.e., having his privacy respected, when he has not been given the right to exclude others from his private life; had he known that he is being observed, he would have objected to that and he would want that not to be affected on him.

Coming back to one of Thomson's illustrations; the suggestion that there has been no intrusion of privacy if one is being hit by a brick thus it is confusing to hold privacy as the right to be let alone. In that respect, I do not totally agree or disagree with her. Most important of all, I am holding to the same opinion I have been expressing throughout this thesis, i.e., what is known as the right to privacy really is the freedom of private life; and for as long as the two touchstones exist and the intruder does not have the justification or defence for the intrusion, privacy shall prevail. Other rights may be present hand-in-hand with privacy but that alone does not diminish the existence of privacy. Thus, if A is being hit by a brick, although obviously that will become a case of assault or battery, whether privacy has been infringed depends on whether or not the elements for the cause of action based on intrusion of privacy exist. If a person was sitting on his sofa in his hall, reading a book or watching television and suddenly an intruder came and hit him by a brick, the whole chains of such action will amount to privacy intrusion, every single one of them. In such an example, there will be several other causes of actions exist, trespassing and assault or battery to name a few, but above these two the unsolicited intrusion to such a person's solitude and affecting the hit upon his person while he was doing private matter(s) within his private sphere are obvious illustrations of privacy intrusions.

There shall also be privacy intrusion if one has actually thrown a brick to a public toilet cubicle with the knowledge that it was – at the material time – occupied. The premises – public toilet – may be a public space but the cubicle creates the sphere private to whoever occupies such a cubicle. A reasonable person would expect that his privacy while within the cubicle will be respected. Hence the act of throwing a brick into that cubicle or (worst) intruding to such a cubicle to hit the person inside it with a brick shall amount to intrusion of privacy. That shall be distinguished from the act of hitting someone by a brick while that someone is in public, in which case although the cause of action for assault or battery may be present such action does not give rise to any claim of intrusion of privacy.

Henceforth what matters the most in determining whether an interference will amount to intrusion of privacy is whether or not such interference has been directed to any matter(s) or activities which otherwise are private. That shall not be confused by reading the end result of the act which may give the unfavourable impression that any existing principle other than privacy can more appropriately be applied to the given fact. Thus, although the act of hitting a person with a brick is definitely a battery or assault (until proven otherwise) the circumstances surrounding the act of hitting may also reveal that such act amounts to intrusion of privacy as well.

The below illustrates and summarises the above points:

A hits B → not intrusion of privacy (Thomson)
A hits B → ? privacy intrusion?
↺ i.e., starting point is to see whether or not what A has done amount to privacy intrusion ⟺
1. A has hit B
2. The hit intrudes privacy?

But the starting point of view is not that as the above, it should be:
B was hit by A → whether that amounts to intrusion of B's privacy?
↺ i.e., starting point is to see whether or not B's privacy has been intruded by A ⟺
1. Whether B was doing private matter(s)
2. Whether B was within private sphere
3. Whether A interferes* with the above
4. Whether B consented to such interference

* the word 'interferes' here should not be limited to physical interference but rather it includes non-physical as well and it also covers any actions and/or omissions that is directed or meant to be directed to impede the privacy of other/s.

3.6 Conclusion

To put briefly the whole discussion on the definition and scope of privacy, it is submitted that privacy is an individual's freedom about his private life and thus, the right to privacy simply refers to an individual's right to do or omit what he likes or chooses about his private life. It is not an absolute right and subject always to the existing law in force and when its exercise collides with the rights of others or that of the public, it should be exercised warily to ensure that such right of others or the public is not arbitrarily infringed. Privacy includes the possession of the right to control personal information but that is not all it is about. Rather it encompasses **all aspects of individual's private life and activities within the private sphere.** The legal protection on privacy diminishes if the individual had freely and/or voluntarily chosen to reveal parts or any aspects of his private life or activities to the public. Conversely, the protection does not diminish if the intrusion occurs due to an external factor of such an individual. Therefore an individual's right to control his personal information, for example, does not end just because the information is made available or has been disclosed to the public for as long as such publication is not made by himself or with his consent and consequently such an individual shall be entitled to damages for the unwarranted disclosure of his private facts.

The concept as proposed here, when correctly construed and applied, will provide for the proper protection in circumstances where other legal principles fail to afford. These would be among the situations where none of the existing principles would provide protection as comprehensive as privacy would: surveillance wireless cameras hidden in a button of clothes marketed and sold to the people of certain locality; Trojan horses covered by and within free software which once installed by any user (voluntarily) could be activated from other end and allows the person having the control over the software to monitor every single activities used with the computer including read e-mails, etc; publication of private ordinary family activities undertaken in one house, e.g., the family was having breakfast, which was recorded by deploying a video recorder that was zoomed from a distance (thus no trespassing and no defamation or passing off – for it shows the truth and no breach of confidentiality if the activities were of short that is not of confidential nature);

surveillance affected on a person which has never been published; a hidden camera installed on the office partition directed to the screen of some one's pc thus captures the image of every single word typed using the computer, every single e-mail or news being read and every single site visited by the user of that computer; wireless voice transporters disguised in a form of pins or key chains given by an individual to others as gifts; a camera concealed by a guests of a hotel room in such a position that any activities on the bed will be recorded and automatically transmitted to a receiver machine located somewhere else (no trespass here as the guess had the legal right to access the hotel room. He just 'left something behind' when he checked out from the hotel room); and so on and so forth, which will be an endless list. The point is this: for as long as the publication is not defaming, the action for defamation does not apply; even if it does, if the published statement is true, such truth will provide the defence against the action for defamation (which does not apply in action for infringement of privacy); if the private facts have been captured or being subjected to surveillance or monitoring without in any way involving physical encroachment to the claimant's territory, it is unlikely that an action for trespassing will succeed (e.g., the facts in *Malone*); unless the published facts or materials meet some qualities to qualify as one of the types of intellectual property, the intellectual property laws will not afford any protection no matter how private the facts or materials are; and no matter how gross a private life of individual has been intruded, the law of confidence will not come into play unless there is publication or an attempt to do so. Whereas in all those instances an affirmative answer to a simple two tiers test of privacy, to check if the matters are private and kept within private sphere, will allow individuals to have the respect of the private life he deserves to get. In *R* v. *Brown*[140] Lord Hoffmann, who refused to accept the notion of privacy in Wainwright, stated this:

> My Lords, one of the less welcome consequences of the information technology revolution has been the ease with which it has become possible to invade the privacy of the individual. No longer is it necessary to peep trough keyholes or listen under the eaves. Instead, more reliable information can be obtained in greater comfort and safety by using the concealed surveillance camera, the telephoto lens, the hidden microphone and the telephone bug. No longer is it necessary to open letters, pry into files or conduct elaborate inquiries to discover the intimate details of a person's

> business or financial affairs, his health, family, leisure interests or dealings with central or local government. Vast amounts of information about everyone are stored on computers, capable of instant transmission anywhere in the world and accessible at the touch of a keyboard. The right to keep oneself to oneself, to tell other people that certain things are none of their business, is under technological threat.[141]

If such a fear has been expressed more than a decade ago by such a great judge, the technology currently available and that will be made available in near future does not only pose more imminent threat or risks; they have been abused and misused too to a great extent and worst, without the subject ever knowing of such surveillance. The concept has been submitted here, the manner how it works has been described too. All it takes is for the authority to grasp the idea how important privacy is to the development of humanity and we should learn from the mistake of others, we should not wait until adverse events to occur before we would finally sanction to the notion that will afford protection to the sanctity of individual's very basic element, his private life.

Endnotes – Chapter III:

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[1] Cmnd. 5092, paras 57-73; 665. See also: Michael J., Privacy and Human Rights: An International And Comparative Study, With Special Reference to Developments in Information Technology (UNESCO Publishing, Dartmouth Publishing Company, Hampshire, 1994), at p. 1.

[2] Westin, A.F., *Privacy and Freedom*, (The Bodley Head Ltd., London, 1970), at 7.

[3] Miller, A.R., *Assault on Privacy: Computer, Data Banks and Dossier* (University of Michigan Press, Michigan, 1971), at 40.

[4] Parent. W.A., 'A New Definition of Privacy for the Law', (1983) 2 Law and Philosophy, 305-338 at 306.

[5] Fried, C., 'Privacy' (1968) 77 *Yale Law Journal* 475.

[6] Wacks, R., *Privacy and Press Freedom* (Blackstone Press Limited, London, 1995), at p. 23

[7] Westin, *Privacy and Freedom*, p. 7. Further analysis of the book indicates, however, that Westin did not intend to limit the notion of privacy merely within such a context – the right to control the publication about one's facts. He highlighted that there are four main functions of privacy which conveniently referred to as the personal autonomy, emotional release, self-evaluation and limited and protected communication. His elaboration on that matter clearly shows that informational privacy is just an aspect of privacy beside the others. See: Westin, *Privacy and Freedom,* pp. 32-9. For similar observation with respect to privacy and groups life, to what he referred as 'organizational privacy' see: Westin, *Privacy and Freedom,* pp. 42-51.

[8] As so acknowledged by Wacks, R., in *Personal Information: Privacy and the Law* (Clarendon Press, Oxford, 1989), at p. 14. The definition has also been adopted, among others, by Garfinkel, S., with Spafford, G., *Web Security, Privacy & Commerce*, 2nd ed. (O'Reilly & Associates Inc., Sebastopol, 2002), at p. 205. Michael, J., in his book *Privacy and Human Rights*, supra note 1 at p. 2, thought that Westin's definition is useful but not conclusive.

[9] Gutwirth, S., *Privacy and the Information Age*, translated by Casert, R., (Rowman & Littlefield Publishers Inc, The USA, 2001), at p. 34. This study supports such proposition but in a narrower context, i.e., unlike the general proposition that equalize privacy with freedom in general, the proposition in this thesis is that privacy really is freedom of private life.

[10] McCormick, D.N., 'Privacy: A Problem of Definition', (1974) 1 British Journal of Law and Society 75.

[11] Some guidelines to be used in drawing the law to restrict individual's privacy, including, for example, the safeguards provided by Article 8(2) ECHR that such restriction must be directed towards a legitimate aim and that such restriction is necessary in a democratic society. For further discussion on this, see: Taylor, N., 'Policing, Privacy, and Proportionality', EHRLR 2003 (Special Issue: Privacy 2003), 86-100.

[12] Warren and Brandeis, at p. 213, paras 1 and 3.

[13] Cooley, T.M., *A Treatise on the Law of Torts* 29 (2d ed. 1888). This definition is not without a problem. As it is, such a definition entails a scope too broad so as to leave open the doubt if such a right does exist at all. That was held to be so in *Malone* where Sir Robert Megarry V-C said at p. 373 that: 'One of the factors that must be relevant in such a case is the degree of particularity in the right that is claimed. *The wider and more indefinite the right claimed, the greater the undesirability of holding that such a right exists. Wide and indefinite rights, while conferring an advantage on those who have them, may well gravely impair the position of those who are subject to the rights. To create a right for one person, you have to impose a corresponding duty on another.*' (emphasis added).

[14] In *Wheaton* v. *Peters* (1834)33 U.S. 591, 634, the U.S. Supreme Court mentioned that a 'defendant asks nothing — wants nothing, but to be let alone until it can be shown that he has violated the rights of another.' Brandeis also used the phrase 'the right to be let alone' in his dissent in *Olmstead v. U.S.* (1928) 277 U.S. 438, 478.

[15] *inter alia*, Lloyd, I.J., *Information Technology Law*, 3rd ed. (Butterworths, London, 2000), at para 3.3, at p. 33; Cavoukian, A., and Tapscott, D., *Who Knows: Safeguarding Your Privacy in a Networked World* (McGraw-Hill, New York, 1996), at p. 11-2; Madgwick, D., and Smythe, T., *The Invasion of Privacy* (Pitman Publishing, New York, 1974), at p. 1; Long, E.V., *The Intruders: The Invasion of Privacy by Government and Industry*, third printing (Frederick A. Praeger Inc Publishers, New York, 1967), at pp. 21-47.

[16] For the discussion on the general notion of freedom see: McLean, G. F., 'Meanings of Freedom and Choice' in Magliola, R., and Farrelly, J. (eds.), *Freedom and Choice in A Democracy Volume I: Meanings of Freedom*, (The Council for Research in Values and Philosophy, USA, 2004) at p. 7-35.

[17] Bloustein, the Professor of Law at New York University School of Law, as he then was, had observed such a short-coming in Warren & Brandeis' article, as he noted: 'Unfortunately, the learned authors [Warren & Brandeis] were not as successful in describing the interest violated by publicity concerning private life as in saying what it was not." Bloustein, E.J., 'Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser', (1964) 39 *New York University Law Review*, 962 at 970.

[18] Some writings that reject Warren & Brandeis' arguments are usually attacking that aspect of the article. See for examples: Kalven, H. Jr., 'Privacy in Tort Law – Were Warren and Brandeis Wrong?', *Law and Contemporary Problems*, 326-341.

[19] Warren & Brandeis, 'Right to Privacy', pp. 195, 198, 199, 201, 205, 211 and 213.

[20] Warren & Brandeis, 'Right to Privacy', p. 214.

[21] Young, L., in his book *Life Among the Giants* (McGraw-Hill, New York, 1966) noted that 'without privacy there is no individuality. There are only types. Who can know what he thinks and feels if he never has the opportunity to be alone with his thoughts and feelings?"

[22] Warren & Brandeis, 'Right to Privacy' at p. 213.

[23] Westin identified this as one of the various states of privacy by referring to is at personal autonomy; see Westin, *Privacy and Freedom*, pp 33-4. Its importance is put this way: 'Privacy is a special kind of independence, which can be understood as an attempt to secure autonomy in at least a few personal and spiritual concerns, ... The free man is the private man, the man who still keeps some of his thoughts and judgments entirely to himself, who feels no over-riding compulsion to share everything of value with others, not even those he loves and trusts.' Without in any way expressing the concurrence on the whole notion in such a statement (which has some restrictive effect as per within the meaning of privacy proposed by Westin), the importance of one's liberty as the aspect of privacy has been duly accorded. See: Rossiter, C., 'The Pattern of Liberty' in Konvitz and Rossiter (eds.), *Aspects of Liberty* (Ithaca, New York, 1958), pp.15-17.

[24] The term private life within this context must be given its literal and natural meaning. In *Bensaid* v. *UK* (2001) 11 BHRC 297 at p. 310 (para 47), the ECtHR expressed that: 'Private life is a broad term not susceptible to exhaustive definition . . . Mental health must also be regarded as a crucial part of private life associated with the aspect of moral integrity. Article 8 protects a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world. The preservation of mental stability is in that context an indispensable precondition to effective enjoyment of the right to respect for private life.'

[25] There are some support for this view, see for examples Feldman, D., *Civil Liberties and Human Rights in England and Wales*, (Clarendon Press, Oxford, 1993), Chapter 8; Barendt, E., 'Privacy as a Constitutional Right and Value' in Markesinis, B. (ed.), *Protecting Privacy*, (Oxford University Press, Oxford, 1999) as cited by Clayton, R., and Tomlinson, H., *Privacy and Freedom of Expression*, (Oxford University Press, Oxford, 2001), at p. 2. Similarly it was noted in Rehof, L.A., 'Article 12' in Eide and others, eds., *The Universal Declaration of Human Rights: A Commentary*, (Scandinavian University Press, Oslo, 1992), at p. 193 that '[a]ccording to the classical ideology of individual freedom, it is a fundamental right for the individual to have his private life respected: to have acceptance of a private sphere which the government or private individuals cannot touch or interfere with unless there exist well founded reasons for it, or, in some other cases, consent has been given by the person affected.'

[26] As described by Gutwirth, S., 'Privacy and the Information Age', translated by Casert, R., (Rowman & Littlefield Publishers Inc, The USA, 2001), at p. 51.

[27] And thus, it is meticulous to define privacy as the right to be let alone but it is inappropriate to refer to privacy as the right to be left alone. The word 'let' implies the existence of that individual's freedom and ability to exclude others. Individual's right to be let alone provides that person the positive right to ensure the seclusion and the freedom from unsanctioned interference or surveillance. Consequently, the right to be let alone does not require positive acts of others but rather that others should be passive, i.e. not to do anything in breach of such right. So for example, if a couple have a fight and shout at each other loudly, a passer-by who stops to listen does not invade the couple's privacy. However if that passer-by goes further by telling the press the private

facts the couple fought about, that arguably is in breach of that person's privacy. The word 'left' on the other hand requires positive act of others, i.e., the right it exercisable subject to the cooperation of others by leaving such a person in seclusion. So, if a special device has been used from a far distance to see one's movement within his home or to hear all his communication - while leaving him strictly 'alone', such act would amount to invasion of privacy as the right to be let alone, requires others not to do anything i.e., to be passive, so as not to invade one's privacy whereas if the word 'left' is used, such person may argue that while he has used the special device for surveillance yet he has 'left' the plaintiff completely alone.

[28] Warren and Brandeis suggested that among remedies for an invasion of the fight or privacy includes 'an action of tort for damages in all cases. Even in the absence of special damages, substantial compensation could be allowed for injury to feelings as in the action of slander and libel.' Harvard Law Review at p. 219. Thus, the United States of America Supreme Court had struck several states legislation that may interfere with individual's privacy – see earlier discussion in Chapter I, 1.4.2, at pp. 33-6.

[29] In 1974 California, USA introduced an additional constitutional provision to the effect that privacy is one of inalienable rights of individuals who are free and independent by nature. Among the arguments appearing on the official state ballot in the 1974 election, in favour of proposition, was prepared by Kenneth Cory who was then the Assemblyman 69th District and State Senator, 10th District stated as follow: 'The right of privacy is the right to be left alone. It is a fundamental and compelling interest. It protects our homes, our families, our thoughts, our emotions, our expressions, our personalities, our freedom of communion, and our freedom to associate with the people we choose. It prevents government and business interests from collecting and stockpiling unnecessary information about us and from misusing information gathered for one purpose in order to serve other purposes or to embarrass us.' as quoted in Shattuck, J., *Rights of Privacy*, (National Text Book Company, Illinois, 1977), at pp. 195-6.

[30] *Botta* v. *Italy* (1998) 26 EHRR 241 at para.32; Inness, J.C., *Privacy, Intimacy and Isolation*, (Oxford University Press, Oxford, 1984); Stoljar, S., 'A Re-examination of Privacy' (1984) 4 LS 67; Feldman, D., 'Secrecy, Dignity or Autonomy? Views of Privacy as a Social Value' (1994) 47 CLP 41; Bloustein, 'Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser', (1964) 39 N.Y.U.L.Rev. 962 at p. 1005 states that privacy involves the 'interest in preserving human dignity and individuality.'

[31] Warren and Brandeis at p. 195.

[32] Westin, A., *Privacy and Freedom*, (the Bodley Head, London, 1970), at p. 7; Wacks R, *The Protection of Privacy*, (Sweet & Maxwell, London, 1980); Posner, R., *The Economics of Justice* (Harvard University Press, Cambridge, 1983); Flaherty, D.H., *Protecting Privacy in Two-Way Electronic Services* (Mansell Publishing Limited, London, 1985), at 5-6; Moor, J., 'Towards a Theory of Privacy in the Information Age', Computers and Society, September 1997, at 27-32.

[33] *X* v. *Iceland* (1976) 5 DR 86, EComm HR.

[34] Gerety, T., 'Redefining Privacy', (1977) 12 Harv. C.R.-C.L.L. Rev. 233. See also: Schoeman, F.D., *Privacy and Social Freedom* (Cambridge University Press, Cambridge, 1992), at p. 13.

[35] For more efforts to define privacy, see: Parker, R., 'A Definition of Privacy', (1974) 27 Rutgers L. Rev. 275; Konvits, M., 'Privacy and the Law', (1966) 31 L. & Contemp. Prob. 272; Bazelon, 'Probing Privacy', (1977) 12 Gonz. L. Rev. 587; Comment, 'A Taxonomy of Privacy: Repose, Sanctuary, and Intimate Decision', (1976) 64 Calif. L. Rev. 1447; Note, Roe and Paris, 'Does Privacy Have a Principle?', (1974) 26 Stan. L. Rev. 1161.

[36] Warren and Brandeis, at p. 198 citing the judgment on Yates, J., in *Millar* v. *Taylor*, (1769) 4 Burr. 2303, at p. 2379 that: 'It is certain every man has a right to keep his own sentiments, if he pleases. He has certainly a right to judge whether he will make them public, or commit them only to the sight of his friend.'

[37] Sedley LJ in *Douglas* at 1001 stated that 'privacy ... as a legal principle [is] drawn from the fundamental value of personal autonomy.' and "... private life ... includes a person's physical and psychological integrity" per in *Botta* v. *Italy* (1998) 26 EHRR 241 at para32.

[38] Thus the attack against the notion of privacy as argues in the publication detailed in Chapter I, 1.1, note 4.

[39] As one's privacy can be negated by the existence of stronger and more substantial right of another or that of the public. Thus, no damages may be awarded for an intrusion when it is proven that such an intrusion is necessary for the protection of national security, etc.

[40] The Court of Appeal in *A* v. *B Plc and Another* [2003] Q.B. 195 at p. 206 had quoted this test with approval.

[41] (2001) 185 ALR 1.

[42] *Ibid* at p. 13 para 42.

[43] *Id.*

[44] See among others the judgment of Lord Nicholls of Birkenhead in *Campbell* at para 22; Lord Hope of Craighead at para 94; and the Baroness Hale of Richmond, at para 135.

[45] See among others: *Roe* v. *Wade* (410 U.S. 113); *Doe v. Bolton* (410 U.S. 179); *Planned Parenthood of Central Missouri v. Danforth* (428 U.S. 52).

[46] Roe v. *Wade.*

[47] Section 1 of the Abortion Act of 1967.

[48] Sections 312-4 of the Penal Code (Act 574).

[49] Section 17(2)(a) of the Private Hospitals Regulations 1973 (PU(A) 384/1973).

[50] Section 4 of the Medicines (Advertisement and Sale) Act 1956 (Act 290).

[51] It is interesting to note that while abortion is not a matter of right for a woman as Abortion Act 1967 leaves the matter to the medical practitioners to certify whether or not conditions of the Act have been met; the court in *Kelly* v. *Kelly* [1997] SLT 896 also refuses to recognize that foetus has any legal right whatsoever while it remained in the womb.

[52] See: Rashid, S.K., 'Legal Protection of The Unborn Child: A Comparative Perspective' [1996]4 CLJ xvi.

[53] The requirement that general conduct of an individual is considered private when it is so done in private is the subject matter of the subsequent discussion on the second touchstone of privacy: see *infra* Chapter III, 3.3.1 (ii).

[54] It was held in *Botta* v. *Italy* (1998) 26 EHRR 241 at para.32, that '... private life ... includes a person's physical and psychological integrity.'

[55] In *Niemietz* v *Germany* (1992) 16 EHRR. 97 at para.29. the ECtHR stated: 'it would be too restrictive to limit the notion to an 'inner circle' in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings. There appears, furthermore, to be no reason of principle why this understanding of the notion of 'private life' should be taken to exclude activities of a professional or business nature since it is, after all, in the course of their working lives that the majority of people have a significant, if not the greatest opportunity of developing relationships with the outside world.'

[56] The ECtHR has gone further by holding *inter alia* in *H.G. and G.B.* v. *Austria* (Application nos. 11084/02 and 15306/02); *Wolfmeyer* v. *Austria* (Application no. 5263/03); *Ladner* v. *Austria* (Application no. 18297/03); and *Woditschka and Wilfling* v. *Austria* (Application nos 69756/01 and 6303/02) that the law that criminalises consensual homosexual relation between and adult and adolescent between the age of 14-18 does interfere with an individual's right to private life duly accorded by Article 8(1) of the ECHR.

[57] (1981) 4 EHRR 149.

[58] *Ibid* at para 60.

[59] (2001) 31 EHRR 33.

[60] [2005] ECHR 356.

[61] [2005] ECHR 331.

[62] [2005] ECHR 57.

[63] [2004] ECHR 545.

[64] (2006) 42 EHRR 11.

[65] *Ibid* at para 36.

[66] *per* Gopal Sri Ram JCA delivering the judgment of the Court of Appeal, *Ibid.*, p. 310.

[67] As so argued in Re Susie Teoh; Teoh Eng Huat v. Kadhi of Pasir Mas Kelantan & Majlis Ugama Islam dan Adat Istiadat Melayu, Kelantan [1986] 2 MLJ 228 and upheld by the then Supreme Court in Teoh Eng Huat v. Kadhi, Pasir Mas & Anor [1990] 2 MLJ 300.

[68] Although the existence of such constitutional right on the matter makes it unnecessary for any parents to resort to the right to privacy in order to exert their right on the matter, the point is of relevancy with the discussion on hand to show that although originally the result test concerns

merely with the question whether a conduct is directed solely to oneself, such implication equally applies when the conduct is directed upon others but the law equip the former to exert its right upon the latter.

[69] *Re Maria Huberdina Hertogh; Adrianus Petrus Hertogh & Anor* v. *Aminah bte Mohamed & Ors* [1951] MLJ 12 – High Court and *Re Maria Huberdina Hertogh; Inche Mansor Adabi* v. *Adrianus Petrus Hertogh & Anor* [1951] MLJ 164 – the Court of Appeal. The case was the sequel of the earlier 'battle' where orders were made by the Honourable the Chief Justice of Singapore that Maria Huberdina Hertogh be delivered to the custody of the Social Welfare Department, Singapore, and subsequently to the custody of the Consul-General for the Netherlands. However in the appeal brought against the orders, it was found that that the proceedings were, by reason of the non-service of necessary parties, a nullity and the orders made thereon must therefore be set aside, see: In *The Matter of Maria Huberdina Hertogh, An Infant; Amina Binte Mohamed* v. *The Consul-General for The Netherlands* [1950] 1 MLJ 214. This Nadra's case has been linked and said as the trigger for the worst riot ever witnessed in Singapore thus known as Maria Hertogh riots. For a fuller account of the events, see Maideen, H., The Nadra Tragedy, (Pelanduk Publications, Malaysia, 1989). See also http://www.moe.gov.sg/ne/sgstory/mariahertogh.htm (both sites were last visited on 9 November 2005).

[70] *Ibid* at 16.

[71] *Re Maria Huberdina Hertogh; Inche Mansor Adabi* v. *Adrianus Petrus Hertogh & Anor* [1951] MLJ 164. See the judgment of Foster Sutton, CJ on the last paragraph at p. 166 and continued at p. 167 which led him to this conclusion: 'In the face of the evidence and the opinion expressed by the learned trial Judge, I am unable to agree with the proposition that on the 1st August, 1950, the infant should be deemed to be "a person professing the Christian religion", within the meaning of the Christian Marriage Ordinance, 1940. It follows, therefore, that, in my view, the Ordinance in question is not applicable to the present case; and I do not think that the cases cited, in which totally different issues arose for determination, are of any real relevance to the issue before us.' Spenser-Wilkinson, J at p. 171 had this to say: 'It was argued by Mr. Seth on behalf of the respondents that the infant was in fact a Christian at the time of the marriage so that the marriage was void under the Christian Marriage Ordinance. The numerous cases cited before us on this point were nearly all decisions as to how the infant should in future be brought up. The only case cited in which the question of the actual existing religion of an infant was discussed was *Eggar v May* (1917) 2 Ch 126. In that case the infant, who was 11 years of age, was held not to be a Roman Catholic at the material date although he had been baptized and brought up in the faith by his father who desired that he should continue in that faith. That decision, however, turned upon the construction of a will and depended upon the intention of the testator, and it was held that the testator meant the infant to exercise a choice, which he could not do until he reached the age of 21.... Whilst it may be arguable that an infant can only profess a religion through the mouth of its parent or guardian I should find it difficult to hold that the infant in the present case, who had been

brought up as a practising Mohammedan from the age of about 4 until the age of nearly 13, was at the time of the marriage a professing Christian. I do not think that the legal right of the father to bring up his child in a particular religion can affect this question. However this may be, it appears to me unnecessary to decide whether the infant was in law a Christian or a Mohammedan or neither, for whatever the infant's religion may have been at the time the alleged marriage was contracted, her capacity must, in my view, be governed by the law of her domicile." Wilson J had followed the step chosen by his fellow learned judges by avoiding to express the view on the matter by merely stating this at p. 173: 'It has been urged by counsel for the respondents that the 2nd defendant was a Christian in as much as not having reached the age of discretion it was not open to her to change her religion by professing the Moslem religion, and, therefore, under section 3 of the Christian Marriages Ordinance, any marriage contracted by her other than under the Christian Marriages Ordinance, or the Civil Marriages Ordinance, is null and void. With this contention I cannot agree. The definition of "a Christian" in the Christian Marriages Ordinance is "a person who professes the Christian religion". A number of cases have been cited, with a view to showing that an infant cannot adopt a religion other than the religion in which the father wishes her to be instructed. That seems to me to be immaterial in this case. The infant, according to the evidence, is the daughter of two members of the Roman Catholic Church. She was born on the 24th day of March, 1937, and is a Dutch subject. She was baptised on the 10th April, 1937, by a member of the Roman Catholic Church. She herself says that since going to live with the 1st defendant and her husband, she was brought up as their own child, and brought up as a Moslem. She states that, since she was given over to the 1st defendant, she has faithfully followed and adhered to the Moslem religion and is a true believer of Islam, that she has voluntarily adopted the Moslem faith, and will follow that faith to the end of her life. Whatever may be the restriction on an infant adopting a religion contrary to her father's wishes, I find it impossible to find that she herself within the meaning of the Christian Marriages Ordinance professes herself to be a Christian. For this reason, I am satisfied that she was not debarred by reason of section 3 of the Christian Marriages Ordinance from contracting a marriage other than one under the Christian Marriages Ordinance, or the Civil Marriages Ordinance. For reasons which I shall explain later I do not think it is necessary to come to a conclusion whether or no in the circumtances she was entitled, without her father's consent, to become a Moslem, and profess the Moslem religion, and in my view, it is not necessary to consider those authorities which have been cited, with a view to showing that, as an infant she was unable to adopt a faith, which is one of which her father does not approve and without his consent.' (sic.)

[72] [1986] 2 MLJ 228.

[73] While noting that *Maria Hertogh* decided six years before the enactment of Articles 11 and 12 of the Federal Constitution [and therefore will not be of much value in the interpretation of those two provisions of the Federal Constitution and the decision therefore should not form a binding precedent for the issue brought before him], Abdul Malek J was of the opinion that nothing in that

case shall prevent him to uphold the decision which he made as he held at 235 that: 'The effect of that case was that although the Christian parents were given custody and the Muslim marriage between the infant and the appellant was held to be illegal and void and of no effect and although all three judges (and the trial judge) agreed that the infant was a Muslim at the time of the marriage, they elected not to make any decision on whether the infant had the right to choose her own religion.'

[74] *Ibid* at p. 232, as regards the interpretation of Articles 11 and 12 of the Federal Constitution, Abdul Malek J held that: 'I would say that that depends on the age of that person -- if he is eighteen years or above, he decides for himself and if he was under the age of eighteen, then it will be decided by his parent or guardian. It is also pertinent to emphasise here that in view of the words "For the purposes of Clause (3)" in Clause (4) of Article 12, the said Clause (4) can only apply to Clause (3) and not generally. In the result, the constitutional principle enunciated in Clause (4) that the religion of a person under the age of eighteen years shall be decided by his parent or guardian can be applied only to the situation envisaged in Clause (3) of that Article and not to any other situation.'

[75] *Teoh Eng Huat* v. *Kadhi, Pasir Mas & Anor* [1990] 2 MLJ 300 at 302 Abdul Hamid LP delivering the judgment of the court held that: '[i] t is our view that under normal circumstances, a parent or guardian (non-Muslim) has the right to decide the choice of various issues affecting an infant's life until he reaches the age of majority. Our view is fortified by the provisions of the Guardianship of Infants Act 1961, which incorporates the rights, liabilities of infants and regulate the relationship between infants and parents. We do not find favour with the learned judge's view that the rights relating to religion is not covered by the Act on the ground that the word 'religion' is not clearly spelt out in the law. In our view, religious practice is one of the rights of the infant, exercised by the guardian on his behalf until he becomes major.' In that case his lordship went on further to say that although Islam is declared by the Federal Constitution as the religion of the Federation but it was made clear during the drafting process that '[t]here was universal agreement that if any such provision were inserted it must be made clear that it would not in any way affect the civil rights of non-Muslims."(see Ibid., last para p. at 301). However the judgment of the Supreme Court reflects as though his lordship's primary concern with the approach adopted by Abdul Malek J is the likelihood of affording too much influence of Islam upon such provision of the Federal Constitution to the prejudice of those professing other religion and thus the argument: 'the religion of Malaysia shall be Islam. The observance of this principle shall not impose any disability on non-Muslim nationals professing and practising their own religions and shall not imply the State is not a secular State..... It was on the above basis that our Constitution was drafted and promulgated.' (see Ibid., at p. 302). With due respect, the fundamental rights duly guaranteed by the Federal Constitution, except when otherwise expressly provided, are meant to be afforded to every person because all persons are equal before the law and entitled to the equal protection of the law (Article 8(1) of the Federal Constitution). Therefore regardless of whatever approach is to

be adopted for the interpretation of Article 12(4), that approach should have universal application and shall not be formulated merely to achieve the desirable outcome of one particular case (and in that particular case any decision would not make any difference anyway as the daughter had by then reached the age of majority). The freedom of religion enshrined in the article covers all religion alike. It is very unfortunate that an aspectual approach was preferred by the court as it was said: 'we hold that a person under 18 does not have that right [i.e., freedom of religion] and in the case of non Muslims, the parent or guardian normally has the choice of the minor's religion.' Would the then Supreme Court hold the same opinion if the action were taken by a Muslim parent who was asking for a similar declaration regarding his minor child who has converted to any religion other than Islam? If that were the case; the basis for the Supreme Court's decision in that case would collapse altogether which indicates nothing but inimitability of the Supreme Court's approach in that case. It shall be noted that although the appeal was allowed in this case, no declaration was made by the Supreme Court because by then the plaintiff/appellant's daughter has reached the majority age of 18 years and thus the parental right duly conferred by article 12(4) has ceased to exist. Perhaps that was among the factor why it seems that not much thought was given of the possible effect of such judgment as it has no more than academic 'value' in that particular case. It is just so unfortunate that similar issue has not been brought before the Court of Appeal or the Federal Court, making the judgment as precedent over any high court in Malaysia.

[76] Article 12(4) of the Federal Constitution.

[77] *Teoh Eng Huat* at 302. In fact, this is the context within which Article 12(4) of the Federal Constitution should have been interpreted.

[78] As his lordship held at 302 that '[o]ur view is fortified by the provisions of the Guardianship of Infants Act 1961, which incorporates the rights, liabilities of infants and regulate the relationship between infants and parents.'

[79] Article 11(1) the freedom of the profession or practice of religions is absolute and unqualified because although that clause 1 is linked with clause 4 of the same Article, the qualification is only applicable with regard to the right of 'propagation' of a religion. In *Minister for Home Affairs & Anor* v. *Jamaluddin bin Othman* [1989] 1 MLJ 418 the respondent was detained on the grounds of his involvement in a plan or programme for the dissemination of Christianity among Malays. However the Supreme Court while upholding the decision of the High Court observed that the grounds for such detention do not state that any actions have been done by the respondent except participation in meetings and seminars and the allegation that he had converted into Christianity six Malays. In that regard Hashim Yeop Sani CJ (delivering the judgment of the Supreme Court) held that '[w]e do not think that mere participation in meetings and seminars can make a person a threat to the security of the country. As regards the alleged conversions of six Malays, even if it was true, it cannot in our opinion by itself be regarded as a threat to the security of the country.....The guarantee provided by art 11 of the Constitution, i.e., the freedom to profess and practice one's religion, must be given effect unless actions of a person go well beyond what can

normally be regarded as professing and practicing one's religion." By virtue of Article 11(1) of the Federal Constitution, an individual has the freedom to profess or practice any religion of his choice. Such a freedom includes the right to change from one religion to another as one may believe. The right to privacy will also secure to an individual to right believe, profess and practice any faith or religion or even change the faith or belief as one may choose for himself as long as any activities related thereto are kept within such individual's private sphere. There is nothing in the Federal Constitution that restricts an individual of majority age and sound-mind from choosing any religion of his personal choice and thus, even a Muslim can change his faith as he may choose – it is not at all subject of challenge in any court of law (see *inter alia*: *Jamaluddin* above, *Re: The Detention of Leonard Teoh Hooi Leong* [1998] 1 CLJ 857). There will be no issue of jurisdiction arise if the conversion is from and to any religions other than Islam – as the jurisdiction on personal laws of people professing any religion other than Islam is vested in the civil courts anyway. The jurisdictional issue will only arise when the conversion is either from or to the religion of Islam. In order to ascertain whether or not there was really an act of conversion (e.g., issue of legality, capacity, etc), such an issue must be brought before the court that has the jurisdiction to deal with the religion prior to such a conversion, i.e., the syariah courts for conversion out of Islam and the civil courts for conversion to Islam as it is so desired by art. 121(1A) of the Constitution, see among others *Soon Singh a/l Bikar Singh v. Pertubuhan Kebajikan Islam Malaysia* [1999] 2 CLJ 5, *Dalip Kaur v. Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor* [1991] 3 CLJ 2768; [1991] 1 CLJ (Rep) 77, *Md Hakim Lee v. Majlis Agama Islam Wilayah Persekutuan, Kuala Lumpur* [1997] 4 CLJ Supp 419, *Abdul Shaik bin Md Ibrahim & Anor v. Hussein bin Ibrahim & 2 Ors* [1999] 3 CLJ 539. See also *Mohamed Habibullah bin Mahmood v. Faridah bte Dato' Talib* [1993] 1 CLJ 264, where it was held by Gunn Chit Tuan SCJ (as he then was) that the Syariah Court is the only forum qualified to answer whether a Muslim has renounced Islam. Taking the matter a step further in *Kamariah bte Ali lwn. Kerajaan Negeri Kelantan* [2002] 3 CLJ 766, the Court of Appeal held that the issue of whether an individual is an apostate or not is one of Islamic law, and that the civil court has no jurisdiction to decide on that issue; and from a different perspective, in *Ng Siew Pian v. Abd Wahid Abu Hassan, Kadi Daerah Bukit Mertajam & Anor* [1993] 1 CLJ 391 it was held that the religious court's power, in the same vein similarly cannot be invoked against non- Muslims. For further reading, see Shuaib, F.S., Bustami, T.A.A., & Mohd Kamal, M.H., *Administration of Islamic Law in Malaysia Text & Material* (Malayan Law Journal, Kuala Lumpur, 2001), at p. 123; Mohamad, A. H., 'Civil and Syariah Courts in Malaysia: Conflict of Jurisdictions' JCA [2002] 1 MLJ cxxx,at p. cxxxviii. It shall also be noted that the court would not readily accept a person's request to apply the personal law of the religion that such a person said has just professed especially if the submission of conversion would in one way or another furnish such a person with an opportunity to skip a penalty or liability which otherwise would be imposed on him by virtue of him staying in the religion that he was before the application to the courts, see: *Public Prosecutor v. David John*

White @ Abdul Rahman [1940] MLJ 214 the accused was the husband of a Christian lady he married in 1918 according to the rites and ceremonies of the Church of England. In 1936 while his wife was still alive, the accused married another Christian lady according to Mohammedan law after they had been converted to the Mohammedan religion. Horne J found the accused was guilty of bigamy. From different perspective, see *Daud bin Mamat & 3 Ors v. Majlis Agama/Adat Istiadat Melayu, Kelantan & Anor* [2001] 2 CLJ 161, where the plaintiffs pronounced their conversion from Islam during which the charge for heresy (observing and practicing deviant teachings and practices inconsistent with Islamic teachings) was pending against them. The appeal was dismissed upon the appeal to the Court of Appeal and the Federal Court finally disposed the matter and upheld the High Court's decision (Federal Court judgment was in Malay and reported in this style: *Kamariah Ali & Yang Lain* Lwn. *Kerajaan Negeri Kelantan & Satu Lagi* [2004] 3 CLJ 409). There Ahmad Fairuz KHN held that '[t]aking the purposive approach, the material time for deciding whether the appellants were practising Muslims was that in which the appellants committed the offence under the Council of Islamic Religion and Malay Custom, Kelantan, Enactment 1966. Therefore, although the appellants declared that they were apostates in 1998, they were rightly brought before the Syariah Court in 2000 because it was in relation to an offence committed when the appellants were still Muslims. If the purposive approach were not to be taken, Muslims that are charged in the Syariah Court could conveniently raise the defence that they are not practicing Muslims and thus not subject to the jurisdiction of the Syariah Court. Such a situation would affect the administration of Islamic law in Malaysia and perhaps even the laws of other religions. From the reasoning and approach taken, it was clear that the issue of whether the appellants had the right to convert out of Islam was irrelevant.' Similarly, the court that has original jurisdiction upon the marriage that has been entered prior to conversion has the jurisdiction to dissolve such a marriage if only one of such married couple converted to another religion, see *Ng Siew Pian* cited above. In a nutshell, except for the jurisdictional issues discussed earlier, in Malaysia not only there is no legal restriction on an individual to choose, profess, and practice any religion as one may believe or opt to believe, that is also guaranteed by Article 11(1) of the Federal Constitution, thus guaranteeing such a freedom either on the basis of freedom of religion simpliciter or as part of right to privacy – when the elements for that do exist.

[80] Article 4(1) of the Federal Constitution reads: 'This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.'

[81] Raja Azlan Shah Ag. LP in *Dato Menteri Othman bin Baginda & Anor* v. *Dato Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29 at p. 32 said that in interpreting a constitution two points must be borne in mind: first, judicial precedent plays a lesser part than is normal in matters of statutory interpretation; and secondly, a constitution being a living piece of legislation, its provisions must be construed broadly and not in a pedantic way 'with less rigidity and more generosity that other Acts.'

[82] See: Sheridan, L.A. and Groves, H.E, *The Constitution of Malaysia*, 4th ed., (Malayan Law Journal Pte Ltd, Singapore, 1987), at p 78.

[83] That is the Guardianship of Infant Act 1961.

[84] As well as the possible conflict with Article 8(1) of the Federal Constitution which guarantees that '[a]ll persons are equal before the law and entitled to the equal protection of the law'.

[85] See section 2 of the Age of Majority Act 1971.

[86] Hence, while it is regarded as settled that parents have the right to determine the religion of their minor children, it still remains unsettled whether such right must be exercised by unanimous decision of the parents – if both parents of the minor are living or if decision of either of the parent will suffice. In *Chang Ah Mee v Jabatan Hal Ehwal Agama Islam, Majlis Ugama Islam Sabah & Ors* [2003] 5 MLJ 106 Ian Chin J held that: '[t]he Federal Constitution does not discriminate against the sexes and since the father and the mother have equal rights over the person and property of an infant, the term 'parent' in art 12(4) must necessarily mean both the father and mother if both are living.' His Lordship opined that to allow just the father and mother to choose the religion would invariably mean depriving the other of the constitutional right under art 12(4) and consequently it was held, inter alia, that the plaintiff had a right to custody of her infant which right included deciding on the religious education of the infant. That right had been violated by the husband when he gave permission for the infant to be converted. In *Shamala Sathiyaseelan* v. *Dr Jeyaganesh C Mogarajah & Anor* [2004] 2 MLJ 648 however the contrary view was expressed as Faiza Tamby Chik, J held that 'the consent of a single parent is enough to validate the conversion of a minor. Any other interpretation would give an unjust result.' Although it is unsettled whether both parents have to unanimously exercise their rights or that of each of parent will suffice, it was at least seen that such parental right is exercisable regardless whether Islam or any other religion was in issue. However that position became unclear since the decision in *Mohamed Habibullah bin Mahmood* v. *Faridah bte Dato Talib* [1992] 2 MLJ 793 and following the amendment to the Federal Constitution (the new Article 121 (1A)) as Civil Court in Malaysia had been more cautious not to decide on a matter which may otherwise fall within the jurisdiction of Syariah Court. Thus in *Genga Devi A/P Chelliah* Lwn *Santanam A/L Damodaram* [2001] 1 MLJ 526 (the judgment was written in Malay) while noting that the defendant is the natural father of the infant and thus has the right to determine the religion of the infant as much as the right of the plaintiff (the mother of the infant), Rahmah Hussain J held that the high court is powerless to make *inter alia* a declaration that the order granted by the Syariah Court in relation to the rights of child custody to be struck off and was invalid as such matter is within the jurisdiction of the Syariah Court.

[87] In particular section 509(4) provides that in considering whether or not they are required by sub-section (1) ... to make arrangements in relation to a particular person, a local education authority shall have regard (amongst other things) -- (a) to the age of the person and the nature of the route or alternative routes, which he could reasonably be expected to take; and (b) to any wish of his

parent for him to be provided with education at a school or institution in which the religious education or training provided is that of the religion or denomination to which his parent adheres.

[88] See for example: *The Queen on the Application of R and Others* v. *Leeds City Council/Education Leeds* [2005] EWHC 2495.

[89] This right is so granted upon the parents of a child not upon a child itself or to any school or religious association. See: *Erikkson* v. *Sweden* (1989) 12 EHRR 183, A 156, para 93 and *Jordebo Foundation of Christian Schools and Jordebo* v. *Sweden* (1987) DR 51, 125. It is also interesting to note that this right, due to pluralism in education, guaranteed the right to exist of fee paying independent schools but did not entail the right to obtain from public authorities the creation of a particular kind of educational establishment, as it was so held in *Dove* v. *The Scottish Ministers* [2002] S.L.T. 1296, p. 1305A-B. In that case Lord Cameron of Lochbroom who delivered the judgment of the court held that 'the parents' role as governors of the school was not within the scope of the right of parents in relation to the right to education' (p. 1307A-B) and 'that even if the petitioners' beliefs had amounted to philosophical convictions under art 2 it was open to them to opt for a private and independently governed school' (p. 1307C).

[90] It would be inquisitive to picture a parent who relies on such a provision in order to prevent his child who is studying at a university from taking a religious subject other than that of his parent's.

[91] Does it mean that the court has to weigh and balance the right of a sufficiently mature child to profess a religion as he believes which otherwise guaranteed by Article 9 of ECHR with that of the child's atheist parent, as respect for his philosophical conviction, not to have his child being subjected either by a stranger or the child himself to any religious teaching or education? Lilian Edwards had expressed similar concern of such a possible conflict. However interestingly she linked the issue of the child's freedom of religion with the parents' right to 'insist that a child is brought up in the family creed' which may be seen as part of the right to respect for family life. See: Edwards, L., 'Incorporation of the European Convention on Human Rights: What Will it Mean for Scotland's Children?' in Boyle, A., Himsworth, C., Loux, A., and MacQueen, H., (eds), *Human Rights and Scots Law* (Hart Publishing, Oregon, 2002), at p. 205. She also argued, at pp. 201-208 that the United Nations Convention on the Rights of the Child, in particular article 12 that guarantees the child a participatory voice in decision affecting his interest and Article 5 which provides that whilst parents has responsibility for the direction and guidance of their children, it must be provided in a manner consistent with the evolving capacity of children, may be utilised to advance the interests and the rights of children although it 'lacks teeth in term of domestical enforceability".

[92] See for examples: *Coster* v. *The United Kingdom* (2001) 33 EHRR 20 (Application No. 24876/94); *Lee* v. *The United Kingdom* (2001) 33 EHRR 29 (Application No. 25289/94); *Jane Smith* v. *The United Kingdom* (2001) 33 EHRR 30 (Application No. 25154/94). See also the *Campbell and Cosans* v. *The United Kingdom* (1982) 4 EHRR 293 (Application No. 511/76; 7743/76) where the ECtHR found that the applicants' right as guaranteed by Protocol 1 Article 2 was violated as the

school failed to accept the parents' request to have the children being exempted from or not to be subjected to the corporal punishment practised by the schools. For further discussion generally and within the Scottish legal system, see: Lord Reed and Jim Murdoch, *A Guide to Human Rights Law in Scotland,* pp. 424-8.

[93] In *Hoffmann* v. *Austria* (1993) 17 EHRR 293 (Application No. 12875/87) the children who are Roman catholics were taken by their mother who had since left the Roman Catholics church to become a Jehovah's witness. About two years later the parents got a divorce. The mother submitted that the Austrian Supreme Court had awarded parental rights over the children to their father in preference to the mother, because she was a member of the religious community of Jehovah's Witnesses, amounting to the infringement of her right under Protocol 1 Article 2 of the ECHR, the right to determine the religion of her children. This would be the closest incident where the issue would have been discussed by the ECtHR. However, the complaint was not pursued during the court's proceedings and thus was not examined.

[94] Issue of discrimination is beyond the scope of this paper. However for discussion on the matter, see: Ewing, W.C., 'Discrimination in Great Britain' in Veenhoven, W.A., and Ewing, W.C., (eds.), *Case Studies on Human Rights and Fundamental Freedoms: A World Survey*, vol. 1 (Martinus Nijhoff, the Hague, 1975), pp. 511-578.

[95] Although not exactly within the context, in *R (SB)* v. *Governors of Denbigh High School* [2005] 1 W.L.R. 3372 the Court of Appeal reversed the High Court judge's decision and declared that the school had interfered with the 'child's right' as guaranteed by Article 9(1) of the ECHR by not admitting her to school while wearing the jilbab. It was also held, *per curiam*, that it would be possible for the school, on a structured reconsideration of the relevant issues, to justify its uniform policy. If the school could justify its stance on the school uniform policy under article 9(2) there would be no breach of the article 9(1) right (paras 81, 87, 92). That was not the case in *R (SB)*, thus the Court of Appeal made the declaration as sought. This case does accord the judiciary's recognition of a child's qualified right to religion; although it has not been tested yet whether such a right will prevail over the right of the parent to decide for the children. The rights of children were also upheld in *S (Children)* [2004] EWCA Civ 1257. In this case the application was brought by the mother of the children, a daughter who is now ten and a son nearly nine, for permission for both to become practising members of the Islamic faith and for her son to be circumcised. Lord Justice Thorpe agreed with the High Court's decision that since the children are of a mixed heritage they 'should be allowed to decide for themselves which, if any, religion they wish to follow.' and to rule out circumcision as 'it should be for the son to make his own informed decision when he was Gillick competent.' (paras 5 and 6 respectively); Lord Justice Clarke has also affirmed the High Court's decision.

[96] Although not exactly within the same context, the ECtHR had indeed expressed that different treatment to be afforded as between adults and adolescents amount to discrimination which is prohibited by Article 14 of the ECHR. See supra note 56 for the list of cases where the ECtHR

found the Austrian law that criminalised the homosexual act to consenting adolescent infringes both Articles 8 and 14 of the ECHR.

[97] See among others: *Re S (A Minor) (Consent to Medical Treatment)* [1994] 2 FLR 1065, In *Re W. (A Minor) (Medical Treatment: Court's Jurisdiction)*, [1993] Fam 64, *A Metropolitan Borough Council v. DB*, [1997] 1 FLR 767, *Re C (Mental Patient: Contact)* [1993] 1 FLR 940, *R* v. *Secretary of State for Health, Ex Parte Barratt,* 21 BMLR 54, *Re C (Detention: Medical Treatment)* [1997] 2 FLR 180, *Gillick* v. *West Norfolk And Wisbech Area Health Authority and Another* [1982 G. No. 2278] [1984] QB 581, *South Glamorgan County Council* v. *W And B* [1993] 1 FLR 574, *Re Kr (A Minor)* [2005] NIQB 17, *Re R (A Minor) (Wardship: Medical Treatment)* [1992] Fam 11, *In Re R. (A Minor) (Wardship: Consent To Treatment)* [1992] Fam 11, *Gillick v. West Norfolk And Wisbech Area Health Authority And Another* [1984] FLR 249, *In Re J. (A Minor) (Child In Care: Medical Treatment)* [1993] Fam 15, Houston, applicant, Sheriff Court, 32 BMLR 93. For further reading on the matter, see: Laurie, G.,'Medical Law and Human Rights: Passing the Parcel back to the Profession?' in Boyle, A., Himsworth, C., Loux, A., and MacQueen, H., (eds), *Human Rights and Scots Law* (Hart Publishing, Oregon, 2002), pp. 245-274. For a discussion of the *parens patriae* jurisdiction of the courts in Scotland, see *Law Hospital NHS Trust v. Lord Advocate* [1996] SLT 848.

[98] *per* Lord Keith of Kinkel, Lord Scarman and Lord Roskill in *Morris* v. *Beardmore* [1980] 2 All ER 753. In 1763 William Pitt, the first Earl of Catham wrote, '[t]he poorest man may in his cottage bid defiance to all the force of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storms may enter; the rain may enter – but the King of England cannot enter; all his forces dare not cross the threshold of the ruined tenement.' That has been quoted with approval in *Southam* v. *Smout* [1964] 1 QB 308, per Lord Denning MR at p. 320 and also in *The Queen (On the Application of Agnes Bempoa)* v. *The London Borough of Southwark* [2002] EWHC 153, per Munby J at para 12.

[99] *Semayne* v. *Gresham*, (K.B. 1604) 5 Co. Rep. 91a, 93a, 77 Eng. Rep. 194, 198, was quoted by Munby J in *R (on the application of Bempoa)* v. *Southwark London Borough Council* [2002] EWHC 153 where at para 11 his lordship said: '[t]hat an Englishman's home is his castle was an aphorism of our law as long ago as the reign of the first Elizabeth: see Sendil's case [1585] 7 Co Rep 6a. It is now almost four hundred years since the principle received its classic formulation in Semayne's case [1604] 5 Co Rep 91a at 91b: "The house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose."" The proverb has been traced back 'Stage of Popish Toys' (1581)... First attested in the United States in 'Will and Doom' (1692). In England, the word 'Englishman' often replaces man.' See: Titelman, G. Y, in *Random House Dictionary of Popular Proverbs and Sayings* (Random House, New York, 1996). as cited at <http://www.phrases.org.uk/bulletin_board/32/messages/665.html>.

[100] In 'Beyond Four Walls and a Door: Understanding Privacy in the Office' that perception is being analysed within the context of office privacy, available at: <http://www.mtaoffice.com/pdf/wp_Beyond%204% 20Walls.pdf> (last accessed on 10 December 2005).

[101] (Case 136/79) [1980] 3 C.M.L.R. 169. See p. 179.

[102] [1960] ECR 71 at p. 90.

[103] In *Beckham* v. *MGN* (unreported), on 28 June 2001 Eady J granted injunction to prevent the publication of photographs of the Beckham's home.

[104] See: *Douglas*.

[105] *Holden* v. *Express Newspapers Ltd* (QBD), 7 June 2001 (unreported).

[106] Sara Cox was awarded £50,000 in damages and the defendants were to pay that and the legal cost for having published, without her knowledge, the naked pictures of Sara Cox and her husband while sunbathing on their honeymoon. See: Guardian 7 June 2003. Available at <http://www.guardian.co.uk/uk_news/story/0,3604,9724 72,00.html> (last visited 9 June 2004).

[107] See for examples: *Campbell*, *A* v. *B and PLC*.

[108] Blackburne J adopted the test in *HRH The Prince of Wales* v. *Associated Newspapers Ltd* [2006] EWHC 522 as discussed throughout paragraphs 99-116. However it is apparent that the Mr. Justice Blackburne interchanged the aspect of expectation of privacy with that of expectation of confidentiality. As such, he placed much emphasis on the fact that the information in issue was not generally available to others in coming to the affirmative conclusion while deploying the test.

[109] In *Hosking* v. *Runting* [2003] 3 N.Z.L.R. 385 a well- known television presenter objected to the proposed publication of photographs taken of his two young children in a public place whilst out shopping with their mother, without her knowledge. Randerson J declined to grant a remedy to prevent disclosure of photographs of children because - *inter alia* - the pictures were taken in a public place. The same was among the reasons the Court of Appeal affirmed the judgment and dismissed the appeal.

[110] (1997) 24 EHRR 39.

[111] *Ibid*, in para 36 at pages 56-57. However in this case the Court did not examine the point on its own because the point has not been disputed by the parties to the case.

[112] Thus for example in *ADT* v. *The United Kingdom* [2000] 2 FLR 697 (31 July 2000) at paras 37-39 the ECtHR observed the facts that 'the applicant was involved in sexual activities with a restricted number of friends in circumstances in which it was most unlikely that others would become aware of what was going on. It is true that the activities were recorded on videotape, but the Court notes that the applicant was prosecuted for the activities themselves, and not for the recording, or for any risk of it entering the public domain. The activities were herefore genuinely "private", and the approach of the Court must be to adopt the same narrow margin of appreciation as it found applicable in other cases involving intimate aspects of private life (as, for example, in the Dudgeon judgment...)... Given the narrow margin of appreciation afforded to the national authorities in the case, the absence of any public-health considerations and the purely private

nature of the behaviour in the present case, the Court finds that the reasons submitted for the maintenance in force of legislation criminalising homosexual acts between men in private, and *a fortiori* the prosecution and conviction in the present case, are not sufficient to justify the legislation and the prosecution' and thus held that: '[t] here has therefore been a violation of Article 8 of the Convention.'

[113] Rehof, L.A., 'Article 12' in Eide and others, eds., *The Universal Declaration of Human Rights: A Commentary*, (Scandinavian University Press, Oslo, 1992), at 188 suggested that there '[o]ne may distinguish between three different spheres of privacy: (i) physical integrity; (ii) mental integrity; and (iii) a sphere of intimate relationship... A fourth aspect could be the need for privacy protection in the workplace and other places (e.g., when sub-bathing on the beach). These three for four spheres of privacy are not necessarily located to specific places, *but may 'follow' the individual.*' (emphasis added)

[114] In *Douglas* v. *Hello! Ltd (No. 5)* [2003] E.M.L.R. 31, 641 at p. 647 para 23 Lindsay L.J. in commenting the applicability of the PCC Code in the matter his lordship made this remarks: "..., there was an intrusion into individuals' private life without consent which was known or was to be taken to have been known to the first three defendants. That intrusion was not justified. The very same principle in the Code which provides that use of long lenses to take pictures of people in private places without heir consent was unacceptable must also make the surreptitious use of short lenses to take pictures of people in private places without their consent equally unacceptable."

[115] In January 2006 it was reported that Michael Jackson worn Abaya, the arab's traditional female attire to evade publicity. The story and picture was published by several news agencies including BBC (available at: http://news.bbc.co.uk/2/hi/entertainment/4650420.stm (last accessed on 7 May 2006)). Within the context of this thesis, such a story does not infringe Michael Jackson's right to privacy because despite covering almost the whole part of himself, he was recognised without in any way infringing the private sphere he tried to create by wearing such attire; neither any special device was used to uncover or see what was beyond such a cover. Even the picture taken showing what could be seen by naked eyes. As the picture was taken in public, revealing what public can see from the outset, and was related to an activity that was undertaken in public, the two touchstones of private are not satisfied. That shall be distinguished from the argument in this thesis that asserts there is privacy intrusion if one uses special device to see what otherwise could not be seen by naked eyes because in such situation the private sphere is created by placing the cover, hence fulfilling the second touchstone; while the first touchstone is fulfilled as the intrusion relates to seeing facts about a person which is covered and thus private in nature.

[116] See earlier 3.3.1(i).

[117] Both were found to amount to privacy intrusion by the ECtHR. See: *Malone* v. *The United Kingdom* (Application no. 8691/79) and *Khan* v. *The United Kingdom* (2001) 31 EHRR 45 (Application no. 35394/97).

[118] (N.Y. Sup. Ct. 1890), in N.Y. Times, June 15, 18, 21, 1890. Prosser opined that *Manola* was one of the immediate effect that Warren and Brandeis' paper has upon the law. Further immediate effect of Warren and Brandeis' paper, Prosser argued, can be seen in the case of *Mackenzie* v. *Soden Mineral Springs Co.*, (1891) 27 Abb N. Cas. 402, 18 N.Y.C. 240 (Sup. Ct.) (use of name of physician in advertising patent medicine enjoined); *Marks* v. *Jaffa*, (1893) 6 Misc. 290, 26 N.Y.S. 908 (Super. Ct. N. Y. city) (entering actor in embarrassing popularity contest); *Schuyler* v. *Curtis*, (1895) 147 N.Y. 434, 42 N.E. 22 (erection of statue as memorial to deceased; relief denied only because he was dead); and *Corliss* v. *E.W. Walker Co.*, (1894) 64 Fed. 280 (D. Mass.) (portrait to be inserted in biographical sketch of plaintiff; relief denied because he was a public figure). See: Prosser, W. L., 'Privacy' (1960) 48 California Law Review 383 at 384 - 385. Within the context of this thesis, the use of a plaintiff's name, picture, portrait, etc will not *per se* amount to privacy intrusion if those data (name, picture, portrait, etc) have not been obtained in any manner that amounts to privacy intrusion. In the absence of that, privacy as argued in this thesis will not afford any protection as it has been afforded in those cases. There may be other remedy available to the plaintiff in the respective case, but not on the basis of infringement of right to privacy. For further discussion on the matter, see: Pinckaers, J. C.S., *From Privacy Toward A New Intellectual Property Right in Persona: The Right of Publicity (United States) and Potrait Law (Netherlands) Balanced With Freedom of Speech and Free Trade Principles* (Kluwer Law International, the Hague, 1996).

[119] *Hosking* v. *Runting* [2003] 3 N.Z.L.R. 385 and in Malaysia the case of *Ultra Dimension*. If however the picture may cause false inferences about the plaintiff in the public eyes, the plaintiff may have the cause of action for defamation. For detail analysis and constructive arguments on the point, see Pinckaers, J.C.S., *From Privacy toward A New Intellectual Property Right in Persona* (Kluwer Law International, the Hague, 1996).

[120] See: Leviticus 11: 7-8 and Deuteronomy 14:8. See also Isaiah 26:17 within the context of the new heaven and the new earth Isaiah 26: 1 – 24.

[121] See: Al-Qur'an 2:172, 5:3, 6:145, and 16:115.

[122] The same shall apply to similar extent even to Christians on the basis that nothing in the New Testament that has superseded the prohibitions in the Old Testament and that Jesus Christ (PBUH) in Mathew 5:17 declared that he did not come to abolish the law and the prophets but to fulfil them. Similarly in Mark 5:11 – 13 it is narrated that Jesus Christ (PBUH) permitted the unclean spirits to left the body they possessed and entered into the swine.

[123] Warren and Brandeis 218.

[124] For example, article 11 (4) of the Federal Constitution of Malaysia allows any federal law or state laws, as the case may be, to control or restrict the propagation of any religious doctrine or belief among Muslims.

[125] The table below show some examples of the physical and non-physical aspects of privacy, how they interlink and that some non-physical aspects of privacy may be exclusive:

Physical Aspect	Non-Physical Aspect
To Eat/Drink	Choice of Food/Drink
Commission of Suicide	Decision to end life
One's Outfit/Nudity	Choice what to put on one's body (nudity – choice to put nothing on one's body)
Body Piercing, Cosmetic Surgeries	One's choice how to beautify himself
Sexual Behaviour	Sexual Preference
Use of Contraceptives	Choice/Decision to use some method of contraception
Transsexuality	Choice of a new identity
-	Informational privacy
-	Political Orientation

[126] *Botta* v. *Italy* (1998) 26 E.H.R.R. 241, at para 33.

[127] [2003] Q.B. 195.

[128] [1964] A.C. 814.

[129] *Ibid* 860.

[130] For example, Malaysian Penal Code section 309 declares that 'Whoever attempts to commit suicide, and does any act towards the commission of such offence, shall be punished with imprisonment for a term which may extend to one year, or with fine, or with both.'

[131] As provided in section 306 of the Malaysian Penal Code. Similarly, it is also an offence to abet the commission of suicide by any person under eighteen years of age, any insane person, any delirious person, any idiot, or any person in a state of intoxication (s. 305).

[132] Hence, for instance, a person does not have to construct a wall on his land adjacent to that of his neighbour in order to secure upon such a neighbour the right to privacy. Similarly a person does not have to 'shut' his ears while walking on a pedestrian zone in front of an individual house so as to ensure that he does not overhear any private conversation within such a premise.

[133] Hence, for instance, if one who has negligently entered the hotel room that was occupied by other, such act of entering the room will amount to privacy intrusion. His failure to leave the room at once after he realizes that he has entered the wrong room will also amount to privacy intrusion. If privacy is recognised as a legal right, the intruder's action and subsequent inaction amount to 'tort' a recognised civil wrong both in England and in Malaysia that will give rise to actionable cause of action for the plaintiff. Within the context of the law in Scotland, such action and subsequent inaction, either done deliberately or negligently, will give rise to delictual liability. Delict has been described as a civil wrong committed by a person in deliberate of negligent breach of a legal duty from which liability to make reparation for any consequential loss or injury may arise (see: Bubsy, N., Clark, B., and others, *Scots Law: A Student Guide*, 2nd ed. (Lexis Nexis, Edinburgh, 2003), p. 139). As per maxim *damnum injuria datum* for as long as the plaintiff can prove that he has

suffered legally recognised form of loss as a result of the privacy intrusion by the defendant and/or the defendant subsequent's inaction, the plaintiff shall be entitled to get the compensation for the injury so caused by the defendant to him.

[134] In *Marckx* v. *Belgium* (1979) 2 EHRR 330 the failure of the Belgian family law to recognize a child born out of wedlock as a member of the mother's family was held to be infringement of Article 8. There it was held at para 31 that Article 8 '... does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective "respect" for family life. This means, amongst other things, that *when the State determines in its domestic legal system the régime applicable to certain family ties such as those between an unmarried mother and her child, it must act in a manner calculated to allow those concerned to lead a normal family life.* As envisaged by Article 8, respect for family life implies in particular, in the Court's view, the existence in domestic law of legal safeguards that render possible as from the moment of birth the child's integration in his family. In this connection, the State has a choice of various means, but a law that fails to satisfy this requirement violates paragraph 1 of Article 8 (art. 8-1) without there being any call to examine it under paragraph 2 (art. 8-2).'(emphasis added) Then in *Young, James and Webster* v. *The United Kingdom* (1981) 4 EHRR 38, A 44, the applicants were dismissed from their employment for their refusal to join a trade union as required by a closed shop agreement. It was found that '[a]n individual does not enjoy the right to freedom of association if in reality the freedom of action or choice which remains available to him is either non-existent or so reduced as to be of no practical value ...', para 56. earlier at para 55 'However, a threat of dismissal involving loss of livelihood is a most serious form of compulsion and, in the present instance, it was directed against persons engaged by British Rail before the introduction of any obligation to join a particular trade union. In the Court's opinion, such a form of compulsion, in the circumstances of the case, strikes at the very substance of the freedom guaranteed by Article 11.' At para 49 the ECtHR held that: 'Although the proximate cause of the events giving rise to this case was the 1975 agreement between British Rail and the railway unions, *it was the domestic law in force at the relevant time that made lawful the treatment of which the applicants complained.* The responsibility of the respondent State for any resultant breach of the Convention is thus engaged on this basis.' (Emphasis added). In that case, the ECtHR found it unnecessary to consider whether British Rail, a public corporation, was a public or a private employer as it was of the opinion that either way there was liability on the part of the State. The case could also be construed as a precedent to the effect that a state has the responsibility to control the conduct of private employers, thus stretching the applicability of the ECHR provisions even in the sphere of the relations of individual themselves. That was held so in *X and Y* v. *The Netherlands* briefly discussed in the subsequent note below.

[135] That, in a way, creates positive obligations. In *X and Y* v. *The Netherlands* (1985) 8 EHRR 235, A 91 the ECtHR found that the State was held liable for its failure to provide a means to enable a

criminal prosecution to be brought against a sexual assault upon a mentally handicapped young person. In that regard, it was held at para 23 that: 'The Court recalls that although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life (see the Airey judgment of 9 October 1979, Series A no. 32, p. 17, para. 32). These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves.' Similar approach was applied in *Plattform 'Arzte für das Leben'* v. *Austria* (1988) 13 EHRR 204, A 139.

[136] Except when the privacy intrusion amounts to or is treated as a criminal act for which the culpability must be based on both the actus reus and mens rea as per the maxim *actus non facit reum nisi mens sit rea.*

[137] The justifications and defences available in relation to privacy are discussed by Price, J., Bate., S., and Mansoori, S., 'Justifications and Defences' in Tugendhat, M., and Christie, I., *The Law of Privacy and the Media* (Oxford University Press, Oxford, 2004), at pp. 329-88.

[138] Price, J., Christie, I., Sherborne, D., and Dean., J., 'Remedies' in Tugendhat, M., and Christie, I., *The Law of Privacy and the Media* (Oxford University Press, Oxford, 2004), at pp. 391-447 put forward among the remedies available in privacy related claims. See also generally: Amos, M., 'Damages for Breach of the Human Rights Act 1998' [1999] 2 EHRLR 178; Feldman, D., 'Remedies for Violations of Convention Rights under the Human Rights Act' [1998] 6 EHRLR 691.

[139] Thomson, J.J., 'The Right to Privacy', (1975) Philosophy & Public Affairs 4(4) (Summer) 295 – 314, at p. 295.

[140] [1996] 2 Cr. App. R. 72.

[141] *Ibid*, at p. 85.

CHAPTER IV

LAW OF CONFIDENCE: THE EXAMINATION OF ITS SUITABILITY TO PROTECT PRIVACY

Chapter Outline

Word Count (excluding endnotes): 18,027 Words

Ubi jus ibi remedium

..nor be unfaithful to your trusts while you know (8:27)

4.1 Introduction

The law of property is among the oldest doctrines for which legal protection has been afforded. It is perhaps as old as the common law itself.[1] The idea of legal protection for one's property is straight forward. The property is mine, as the owner I should have the sole right to enjoy such property and no other, no other at all except myself may enjoy the property, except perhaps those others for whom I would give my consent to enjoy the property. So for example, if this chocolate bar is mine, I would be the only person who has the legal right to do anything with it, keep it, put it for display, eat it or even throw it away. It is also within my absolute discretion if I would like to share it with some other person or would like to give it away. The principle is as simple as the idea that the owner should have absolute (or almost absolute) right upon what is his.[2]

Over time, the idea of ownership has become more complex. Things have become of more variety too. It had become necessary that title of ownership has to be made to include those things which are not necessarily of physical presence. The legal protection being afforded upon a property, however, is meant to afford protection upon something of tangible form - those that can be felt using human senses – that can be seen, read, heard (from a record), etc but not a mere idea. Thus, while the common law then the legislature have extended the notion for protection over property so as to include intellectual property, such doctrine limits its application and the legal protection afforded therefrom to idea that has been 'recorded' or materialized in a physical form. Although the protection as being afforded upon intellectual property is meant to protect the idea beyond the materialization or creation of such intellectual property the law does not, however, protect the idea *per se*. In other words, an idea, no matter how creative it may be, is not by itself legally protected as property unless it has been put into a tangible form. To overcome this shortcoming, the law of confidential information has been introduced so as to provide a protection wider than that affordable by the traditional intellectual property law.[3] Based on such line of reasoning it has been suggested that the idea of confidential information is no more but the extension of the application of common law principle of property.[4] Earlier precedents that often quoted as to found the

principle of confidence; cases such as *Tuck & Sons* v. *Priester*,[5] *Gee* v. *Pritchard*,[6] *Prince Albert* v. *Strange*,[7] *Morison* v. *Moat*,[8] to name but a few; have been referred and applied as the support for the proposition.[9] In *Wyatt* v. *Wilson*[10] and *Prince Albert* for examples, the prohibition against the publication of the information was held on the basis that such information originated from the plaintiff thus warranted for protection regardless the type of medium upon which it has been recorded or reproduced or whether the defendant owned such medium. In that manner, one's confidential information is equated as a property – although without physical form.[11] It is beyond the scope of this thesis to further examine the strength and the limitation of each of the concept of property and the confidentiality. It is sufficient to say here that the principle of confidentiality differs from the idea of property at least in two senses: first that the former does not have to be in a tangible form, the confidentiality of information is protected whether it is in a form of information *per se* or has been recorded on a more tangible form; and secondly, while in relation to right to property one may acquire certain right merely by virtue of passage of the possession upon the property, no matter how limited that can be, no right in any kind whatsoever arise when confidential information is being passed to another. Without the consent of the 'owner' of the information, the recipient of the confidential information cannot in any manner benefit from such confidential information in breach of duty of confidentiality even sometime after the information has been made public.[12] To that Roxburgh, J. in *Terrapin* v. *Builders Supply Co. (Hayes)*[13] said:

> As I understand it the essence of this branch of the law, whatever the origin of it may be, is that a person who has obtained information in confidence is not allowed to use it as a springboard for activities detrimental to the person who made the confidential communication, and springboard it remains even when all the features have been published or can be ascertained by actual inspection by any member of the public.[14]

Up to this point is becomes clear that the law of confidence allows the protection of idea per se – when such idea is communicated in a manner implying the duty of confidentiality. The basis of the principle is discussed in 4.2 and as the discussion advances it will become apparent that it is not the property law that provides the

basis of the law of confidence as it is insufficient to give adequate protection to ideas – for which reason the principle of confidence was developed.

However, the matter does not stop there. Society has become more and more heterogeneous; relationship between individuals has developed to embrace a more complex situation too. Before the technology advances and reaches the stage where it is today, an individual would have been able to ensure his privacy, thus ensuring the freedom of his private life, by doing the private activities in an area beyond the public gaze. Since the law requires material cornerstone for affording the protection, the idea used was this: because the house is his, such owner should be afforded the legal right to do whatever he likes within his property.[15] The situation and available technology by then would also afford a person with 'autonomy' while he was by himself in his own house. To affect any interference with that would require physical encroachment upon one's property and that could easily be held unlawful as trespassing. The advance of technology, however, makes it possible and effortless to 'observe' a person in some far distance without a need to involve physical encroachment anywhere nearby the person being observed. The technology has enabled surveillance even when the person being 'observed' or 'watched' is within a secluded area which otherwise is free from the public gaze. The use of telescopic zoom allows the user to observe and take pictures of any object in a distance far beyond the sight of normal eyes thus enabling surveillance or intrusion of privacy without the need to be in close proximity to such object being observed. The subject of the 'observation' will not realise that he is being subjected to such surveillance – thus, the subject will continue acting naturally and do what he does including those which he would not have done had he know about the surveillance. Further with the help of satellite supported system the observer may deploy equipment to allow such observer to hear and/or record any sound made by the subject which normal ears are not capable to perceive due to the distance. Such advance of technology has made possible to a person that deploys appropriate equipment or tools to hear, see or know what is supposed to be a secret whispered in confidence and/or activities done in private.

While the common law (or more appropriately the equity[16]) has been deliberated by giving express recognition to the law of confidential information – thus safeguarding the unwarranted disclosure of a secret, such principle is not broad enough to protect what should be a fundamental human right about the freedom of private life. In England, this common law principle on confidential information has been extended in several occasions so as to protect what otherwise would be called the right to privacy, although to enable that the principle has been extended to such a degree that arguably has gone beyond the actual scope of the law of confidence.[17] In any case it is submitted that no matter how far its flexibility may be extended, the principle is not and was never intended to afford the far wider aspects of freedom of private life.

In Malaysia, the law of confidence found its way through the application of the English common law and rules of equity by virtue of section 3 of the Civil Law Act 1956. Unless there is a local law in the same matter, section 3(1) of the Civil Law Act 1956 authorises the courts in Malaysia to apply the common law of England and the rules of Equity as administered in England up to the 7th day of April 1956 in West Malaysia, the 1st day of December 1951 in Sabah and the 12th day of December 1949 in Sarawak.[18] Although academically the law of confidence is seen very much as one aspect of legal protection upon intellectual properties, in several occasions, the principle has also been applied, on the basis of equity, in order to prevent unjust disclosure of information that has been communicated in confidence.[19] Recently the principle has been resorted to as a ground to provide the remedy to a situation that was also claimed to amount to privacy intrusion.[20] Hence, while more English cases are available and being discussed as compared to the Malaysian cases unless otherwise stated the principle being discussed in this Chapter is applicable in Malaysia to the same extent as that in England.

In this chapter the basic elements to establish the cause of action for breach of confidence are being examined. Its extended application is also being analysed to see the broader scope for which this principle has been applied by the courts of law. Throughout such discussion each element is being tested against the notion of privacy. Soon it will be seen that while the principle has been very useful to protect –

to a certain degree – the informational aspect of privacy, the principle has never been intended to be the broad umbrella to afford protection upon individual's right to privacy, i.e., individuals' freedom of private life. In Chapter III the aspects of privacy have been discussed and one of the purposes of the analysis is to show that privacy does not deal merely with data. There are two aspects of privacy; the physical aspect of it would definitely fall outside the ambit of the scope of the common law principle of confidence.[21] Aside to the fact that not every aspect of private life solely involves data and even those private data are not necessarily confidential, it will not be appropriate to apply the elements required for the common law of confidence as established by the Court of Appeal in *Saltman Engineering Co. Ltd.* v. *Campbell Engineering Co. Ltd.*,[22] and were summarised by Megarry J., in *Coco* v. *A. N. Clark (Engineers) Ltd.*[23] to any claim brought for breach of privacy.[24]

It is well established that for a claim based on breach of confidence to succeed the three elements for such cause of action must be satisfied, namely that the information itself must 'have the necessary quality of confidence about it'; that information must have been imparted in circumstances importing an obligation of confidence; and that there must be an unauthorised use of that information to the detriment of the party communicating it.[25] To impose the fulfilment of these three elements for breach of confidence cases to breach of privacy cases is not desirable for the reasons given during the discussion of the respective elements.

4.2 Elements of Law of Confidence

Originally there are three elements that must be satisfied in order to succeed in an action for breach of confidence in England and Malaysia alike. These elements need to be proven before the plaintiff's application for injunction will be granted to prohibit disclosure of confidential information or to be awarded damages as compensation when such disclosure has occurred. The Court of Appeal, in *Saltman Engineering Co. Ltd.* v. *Campbell Engineering Co. Ltd.*[26] laid down the three requirements that have to be satisfied when the law of confidence is used as the cause of action.

Those elements are being summarised by Megarry J. in *Coco* v. *A. N. Clark (Engineers) Ltd.*[27] as follow:

1. the information itself must 'have the necessary quality of confidence about it;
2. the information must have been imparted in circumstances importing an obligation of confidence; and
3. there must be an unauthorised use of that information to the detriment of the party communicating it.

Each element will be discussed below in sequence of order.

4.2.1 Confidential Information

The first element dictates that only confidential information will be protected by the law.[28] Despite numerous cases have been decided on the basis that the information for which the legal protection was sought was confidential, the courts in England have not formulated a clear definition for the term 'confidential information'. Both Lord Greene in *Saltman*[29] and Lord Denning in *Woodward* v. *Hutchins*[30] offered the negative definition for the confidential information: that it should not be in the public domain. Although not exhaustive and connotative in nature, definition in positive sense was offered in *Electro Cad Australia Pty Ltd & 2 Ors* v. *Mejati RCS Sdn Bhd & Ors*[31] as this: information which is the object of an obligation of confidence and is used to cover all information of a confidential character.[32] Unless assisted by some relevancy test, that definition is not really of assistance.

While there are some tests have been offered, the confidentiality of a matter may be deduced from some factors. In *Argyll* the information was considered confidential because of the nature of the information itself. Citing Atkin L.J's famous passage in *Balfour* v. *Balfour*[33] at common law in respect of promises between husband and wife '... each house is a domain into which the King's writ does not seek to run, and to which his officers do not seek to be admitted',[34] Ungoed-Thomas J held that: '...the protection of confidential communications between husband and wife is not designed to intrude into this domain but to protect it, not to break their confidential relationship but to encourage and preserve it'[35] and that 'such communications are not limited to business matters.'[36] In that case, it was held that marital conversation is

by itself confidential in nature. Thus, the law would not allow the publication of information obtained by a person about his spouse while it was conveyed during the marital life. In Malaysia the same principle should apply. Although there has been no case law brought on the issue directly, the courts in Malaysia repeatedly acknowledged the confidentiality of marital relationship although found that such confidential relationship does not necessarily, in modern time, give rise to presumption of undue influence.[37] Another manifestation of this phenomenon is the rule permitting a spouse in the witness box to refuse to answer questions about matrimonial communications.[38]

Information related to one's sexual life is also regarded as confidential. In *Stephens* v. *Avery and Others*,[39] the court dismissed the application to strike out the plaintiff's cause of action for breach of confidence. The relevant information disclosed by the plaintiff to the first defendant was related to sexual conduct of the plaintiff, in particular, a lesbian relationship between the plaintiff and one Mrs. Telling. In this regards Sir Nicolas Browne-Wilkinson V. C. in *Stephens* held that:

> To most people the details of their sexual lives are high on their list of those matters which they regard as confidential. The mere fact that two people know as secret does not mean that it is not confidential. If in fact information is secret, then in my judgment it is capable of being kept secret by the imposition of a duty of confidence on any person to whom it is communicated. Information only ceases to be capable of protection as confidential when it is in fact known to a substantial number of people.[40]

It has yet to be tested if the courts in Malaysia would extend similar protection if situation analogous to that in *Stephens* would be brought before them. No doubt sexual relationship is considered as personal matter and the likelihood thus is to recognise it as confidential information.[41] However if the matters relate to homosexual conducts, such conducts, even consensual ones, would amount to an offence of 'carnal intercourse against the order of nature' as described by section 377A[42] of the Penal Code and punishable under section 377B[43]or 377C.[44] In civil matters, homosexuality of the husband will provide the wife with a ground for judicial separation[45] or even divorce.[46] If section 377A of the Penal Code is to be

given literal interpretation, then conducts of lesbian nature will not fall within such a provision.[47] Nevertheless, in 1996 the Malaysian Court of Appeal expressed the view rejecting the notion to afford legal protection to non marital cohabitees, heterosexual or homosexual, to the same extent as that for the marital one.[48] Taking all those factors into consideration it is unlikely that similar protection as that given in *Stephen* will be afforded in Malaysia; and also because any decision to be made on the matter will be very much influenced by the intention to 'deter a fall in the moral standards of our society.'[49]

In situation where the information is not *per se* regarded as confidential, the approach has been adopted is to expel from the scope those data or information which are not regarded as confidential. Since the protection is to be afforded upon confidential information, this principle, conversely, will not afford legal protection over common knowledge,[50] data or information available in the public domain[51] and/or non confidential information or any information that lacks of quality of confidence. 'The information, to be confidential, must, ... apart from contract, have the necessary quality of confidence about it, namely, it must not be something which is public property and public knowledge.'[52] This 'quality of confidence' test, as offered by Lord Greene, is useful and appropriate. By virtue of that, in order to be regarded confidential, the information must have the quality of confidence; and whether or not information has the quality of confidence, '[t]he answer will depend upon the circumstances of the case'.[53] Thus, '... it is perfectly possible to have a confidential document, be it a formula, a plan, a sketch, or something of that kind, which is the result of work done by the maker on materials which may be available for the use of anybody; but what makes it confidential is the fact that the maker of the document has used his brain and thus produced a result which can only be produced by somebody who goes through the same process'.[54]

Close analysis of the case law reveals several factors that contribute towards establishing the quality of confidence of information. It has been suggested, for example, that the law of confidence will not protect 'trivial tittle-tattle'[55] or useless information[56] or information that is vague[57] no matter how confidential any of such

information has been kept. Furthermore under the principle of law of confidence, the number of people to whom the information has been made available may also be one of the determining factors whether or not such information has the necessary quality of confidence about it,[58] although that is not conclusive.[59] Sir John Donaldson M.R. in *Attorney-General* v. *Guardian Newspapers Ltd. (No. 2)*[60] said that:

> As a general proposition, that which has no character of confidentiality because it has already been communicated to the world, i.e., made generally available to the relevant public, cannot thereafter be subjected to a right of confidentiality... However, this will not necessarily be the case if the information has previously only been disclosed to a limited part of that public. It is a question of degree.[61]

The 'relative secrecy' of the principle can be seen in the case of *Prince Albert* where the confidentiality of the information was not seen destroyed despite the facts that Prince Albert had disclosed details of his engravings to friend and relatives. Similarly in *Attorney General* v. *Turnaround Distributors*[62] it was held that the publication of book in Ireland did not render it unarguable that the book was confidential in the UK. While the principle seems to be a sound and reasonable proposition, its usability may now remain academic; especially when the information is being disseminated on the Internet. In view of the advance of technology, once information has been made available on the Internet, for instance, the same will be available to any walk of people from any part of the world.[63]

Recently a rather interesting factor was considered by a high court judge in Kuala Lumpur in determining whether or not the information in question has the necessary confidentiality quality. In that case, although the judge mainly relied on a work that analysed the position in England, she nevertheless held that the photograph was not confidential as the said photograph was produced by the appellant, the defendant in the case.[64] Although her ladyship sought to distinguish the issue brought before her with the principles applied in *Pollard* v. *Photographic Company* on these basis: that there was an agreement of contract entered into between Mrs. Pollard and the photographer, especially pertaining to the terms of usage of the photograph, which is not the case in *Ultra Dimension*; that in *Pollard* there was a breach of contract –

which again is not the case in *Ultra Dimension* for the absence of contractual relationship between the appellant and the respondent; and that in *Pollard* there was a photographer-customer relationship between the photographer and Mrs. Pollard which creates the understanding that the photograph of Mrs. Pollard can only be taken for Mrs. Pollard's own personal use only – which again is not the case in *Ultra Dimension*,[65] the judge did not cite any authority nor provide any support for the proposition. It is erroneous to say that information cannot be considered confidential merely because it was the defendant who has recorded the data. In considering the confidentiality of the information the analysis shall focus on the nature of the information, i.e., to examine whether or not it has the quality of confidentiality. It is not necessary within that context to see who has 'documented' the data. If information is held to be confidential, the mere fact that the data have been documented by any person other than the plaintiffs does not negate its confidentiality. Thus as the House of Lords found in *Douglas* that the photographs which were the subject of the plaintiffs' claim were of confidential nature, it was not seen as material who captured and produced the photographs in issue.

As an alternative to the 'quality of confidence' test, it is possible to check if the information may come within any of the categories of information which are regarded as confidential. The analysis of case law indicates that confidential information can be generally classified into four main categories,[66] namely personal information,[67] trade or business secret,[68] governmental secret[69] and artistic and literary information.[70] If any data or information fit into any of these categories, there is a likelihood that such information is to be considered confidential unless there is any factor that negates such presumption.

This analysis of the first element for the cause of action based on the common law principle of confidence explicates that the law of confidence is not catering for privacy protection nor is it the substitute for the same. For obvious reasons, facts that have been protected as confidential in cases like *Coco, Seager* v. *Copydex,* and *Saltman Engineering Co* will not attract the issue of privacy. To a further extent, although it may be argued that the information which is regarded as confidential

mainly relates to personal information and thus the subject matter of privacy; the 'quality of confidence' test does not limit its applicability merely to matters of personal nature. Even if we were to analyse the four categories of the confidential information, we will find that only the first category, the personal information that was the subject matter for the cause of action in cases like *Argyll* and *Stephen*, has the commonness with the notion of privacy. If we concentrate on such a category and disregard others, then it is inevitable that one may have a mistaken impression as though the scope of the law of confidence is similar as that sought for as privacy. That, however, is the only aspect where the scope of the two principles overlaps. The three other categories which are equally protected by the law of confidence are not within the ambience of privacy.

In this regard it is worth noting that the 'privacy' of the information is not the determining factor that makes information confidential; although secrecy is. There are several factors that may turn information into confidential and thus warrant the protection under the law of confidence and yet such information may not be private. The parameter is that such information is not available to public. Thus, no matter how simple (but not trivial) the information may be, if it is kept as a secret and needs to remain so to protect one's interest, business or personal, it would be worthy of protection under the law of confidence. Not all confidential information is necessarily about an individual's private life – thus part of such an individual's privacy. For example, it is very well established that trade secrets are protected as part of the common law of confidence,[71] yet these data unmistakably are not part of individual's private or personal life. In *Campbell* v. *MGN Limited*, Lord Hoffmann affirmed that '[m]any of the cases on breach of confidence are concerned with the communication of commercially valuable information to trade rivals and not with anything that could be described as a violation of privacy.'[72] Similarly, some corporate information, some of which do not form as part of trade secrets, may be qualified as confidential information. Despite of that for as long as such confidential information or data do not relate specifically to an individual, such information shall not form part of informational privacy. Conversation during a meeting and reasons in deciding the award of some projects, funding or scholarships may be confidential yet

those communication per se will not legitimately form part of privacy except with regard to those part which would be described as private matters. Privacy may arise with regard personal beliefs, personal views, personal thoughts or anything related to personal matters that may be expressed as part of the communication; however, other factors either of commercial nature or otherwise would not come within the ambit of privacy. That does not mean such kinds of communication are not protected, they are not protected within the notion of privacy but the law of confidence and numerous principles relating secrecy would be available to protect them. Privileges are another factor that may afford confidentiality upon information – regardless whether the information is private or otherwise thus the cases *R* v. *Lewes JJ*;[73] *D* v. *NSPCC*;[74] *Science Research Council* v. *Nasse* and *Leyland Cars Ltd* v *Vyas*;[75] *Burmah Oil Co* v. *Bank of England*;[76] and *Neilson* v. *Laugharne*,[77] to mention but a few, are the instances where information were considered to be confidential and their confidentiality were upheld although the information was not of private nature.

Under the law of confidence, confidential secrets will lose their characteristic of 'confidentiality' once such information becomes known to the public or made available in the public domain, regardless the manner how and by whom the information is being disseminated. That this is the law is shown by the passages in the judgments of the Court of Appeal in *Attorney-General* v. *Guardian Newspapers Ltd. (No. 2)*[78] known as the *Spycatcher* case, where Sir John Donaldson M.R. said: '[a]s a general proposition, that which has no character of confidentiality because it has already been communicated to the world, i.e., made generally available to the relevant public, cannot thereafter be subjected to a right of confidentiality...'[79] To the same effect, Bingham L.J. said that:

> The information must not be 'public knowledge' (*Seager* v. *Copydex Ltd.* [1967] 1 W.L.R. 923, 931G *per* Lord Denning M.R.), nor in the public domain: Woodward v. Hutchins [1977] 1 W.L.R. 760, 764D *per* Lord Denning M.R. To be confidential information must have what Francis Gurry recently called the basic attribute of inaccessibility: see *Gurry, Breach of Confidence* (1984), at p. 70.[80]

On the contrary personal secrets are always regarded as private matters so long the owner of such secret has not personally revealed them to the public or consented to the public disclosure of his private facts. This hypothetical example shall illustrate the difference. Say, if A, on his own accord, submitted some private facts to B who was supposed to hold such information in confidence. In breach of such duty of confidentiality, B disclosed the information to C who subsequently made the information available at one website on the Internet (in order not to complicate this hypothetical example let's take it that the Internet is a public sphere and anything that is made available on the Internet is assumed to have been made available in public domain). The public, including D then accessed such information from the Internet. In that example, the information loses its value of 'confidentiality' when it has been made available to the public. Consequently any cause of action for breach of confidence, if at all exists, can only be brought against B who received the information in confidence and perhaps C if he has notice of the duty of confidentiality. A will not have any cause of action against D or any person being in a position similar to that of D. The information still retained its confidentiality characteristic when it reached B and C and that would satisfy the first element for the cause of action against B and C. As for D, he 'accessed' the information after the information has lost its confidentiality nature and thus the common law cause of action for breach of confidence cannot subsist. Even if subsequently such facts have been removed from the website but D continued making reference to or use of such information, it is dubious that such action would amount to breach of confidence – for the very reason that the information has already lost its confidentiality characteristic when it was made available to the public. Notwithstanding that D may have notice or even actual knowledge that the information has been made available on the Internet in breach of confidence, no claim for breach of confidence shall stand as against D for, among other things, the first element for such cause of action would not be satisfied. Any subsequent use, narration or reference to the information that has been made available on the Internet would not amount to the use, narration or reference to confidential information.

If, however, the cause of action is based on infringement of privacy, it is submitted that it may bring out a slightly different result. It will be similar to the principle of confidence in the sense that A will have the cause of action against B for the disclosure is in disregard of A's right to privacy, i.e., A's right to control and determine what to be done with A's private facts; and B has deliberately disregarded A's wishes for non-disclosure of the information. As against C, A will only have the cause of action if it is proven that C has the knowledge of A's wish for non-disclosure of the information – which in turn keeps the private matters within the private sphere, the circumstances where it would be reasonable for A to expect the private aspect of his life to be respected. It is in relation to D, any use after the facts disclosed to public or made available in public domain, that privacy differs from the law of confidence. Generally it is expected that the end result would be the same under either one of those if D is an innocent party who does not have any notice that the private facts were disclosed in breach of confidence or contrary to A's instructions with regard to its privacy – D will not be held liable for making reference to the information made available on the Internet. There is, however, a difference between the two concepts and the difference becomes apparent in two situations. Namely where D has notice of the unauthorised disclosure; and secondly even if D had no notice of breach of privacy at the time D accessed the information, A's right to privacy may be used to prevent further use by D upon receiving the notice of A's privacy and the control A determines to keep.

In the former situation, if D has used the information with notice or knowledge that the information has been obtained in breach of privacy and/or continued using with such notice or knowledge, it is arguable that such acts and/or omissions will amount to breach of privacy. Such a notice or knowledge of D is irrelevant for the principle of confidence as the facts have lost their confidential nature anyway for having been made available in public domain.

The same principles apply to the second situation. With regard to privacy, although initial use or reference was innocent as it was done without any notice or knowledge of breach of A's privacy, once D is made aware of A's privacy upon the matter he

will assume the duty to respect A's privacy. In such situation the facts that C has made the facts available to the public is irrelevant. To afford the proper protection to the right of privacy, the law should not cease its protection upon private aspects of individual when a disclosure is made in breach of one's privacy merely on the basis that the breach has made the information available in the public domain.[81] In Chapter III the thesis introduces the two conjunctive touchstones of privacy. If both are satisfied, any interference to that will amount to privacy intrusion. In our hypothetical example, the issue relates to A's private matters thus fulfilling the first touchstone. By communicating to B that the private facts are subject to privacy assurance A has created private sphere with regard to his private matters. When B breached A's privacy by disclosing A's private facts to C disregarding the privacy assurance he (B) gave to A, the private sphere around the private facts is not destroyed; although its confidentiality might have been affected. The same applies when A's private facts come to the knowledge of D. It becomes obvious that despite the breach of A's privacy, the two conjunctive touchstones, from A's view point, are kept in tact and thus entitling him to have and retain the power to control and determine the dissemination of his private facts (i.e. informational privacy). That being so, the duty to respect A's privacy will arise once any of the parties involved is made aware that A has taken the reasonable effort to keep the private sphere upon his private matters. As opposed to the common law of confidence that ceases to be exercisable with regard to any confidential information which has been made available to the public, the right to privacy does not diminish if the unwarranted disclosure to the public has been affected by a party in breach of the right itself. Hence when B then C breached A's privacy, A's right of control over A's private facts does not cease to exist on a mere ground that C, in breach of A's privacy, has made such private facts available to the public but rather A retains such a control and upon notifying others about A's right to privacy (and the infringement made thereto by B and/or C), A's right to privacy empowers A with the control over such information and entails A with the right to stop others from using the information against A's wills. Any acts or omissions contrary to A's wish will amount to a breach of A's privacy.

In short, presumably all the necessary elements for the respective cause of action are satisfied, A will have the cause of action for both the breach of confidence and intrusion of privacy as against B and C. However as against D, A will only have the cause of action for intrusion of privacy if D either had the notice or knowledge that A's private facts have been made available in breach of A's privacy or if D continued to use or failed to stop using the information at any time after D has the notice that the information was made available in breach of A's right to privacy or after being advised of the same, but not for breach of confidence.

Similar effects can be seen, for example, with regard to the information or data about matrimonial proceedings in a court of law involving an adult or those of an individual's direct relatives such as parents or siblings are not considered as confidential as those information or data are readily available by consulting the court records or legal reports. Although the person whose personal data have been documented in a public record may have lost the right of confidentiality upon the matter,[82] the relative of such person may still be allowed to argue that such information is private and thus, for example, a person may legitimately be granted an injunction preventing others to tell the whole neighbourhood that the former, the new comer in the neighbourhood, has got his parents divorce because of his father's adultery. The facts similar with the given hypothetical situation can be found in the case of *Re S (A Child) (Identification: Restriction of Publication)*.[83] In that case, the Court of Appeal had to strike the balance; on the one hand the private and family life of a little boy who had had his whole world turned upside down by the death of his older brother allegedly at the hands of his mother; and on the other hand was the public interest in the free reporting of murder trials. The Family Division made an order *inter alia* prohibiting any publication that might lead to the identification of the boy.[84] Subsequently the order was varied upon the application of several newspaper groups to the effect that the prohibition of publication only to apply on those particulars of or information relating to the proceeding of a court sitting in private. The issues raised on the appeal were: first, whether as a matter of principle the inherent jurisdiction of the court could be used to prohibit identification of the defendant in a criminal trial for the sake of a child to whom section 39 did not apply;

and secondly, if such a jurisdiction was exercisable, what was the proper approach to be taken on the competing interests of the child under Article 8 of the ECHR and the press under Article 10, and whether the judge had adopted the correct approach. Before the Court of Appeal, it was shown that without the order prohibiting such publication, the boy would have to live and go to school with daily publicity about the intimate details of his family life for as long as his mother was being tried for his brother's murder. Not only such publicity would allow the identification of the boy, there was also psychiatric evidence that shows the likelihood of the boy to suffer from mental illness and that might also harm the boy's relationship with his mother – which was important to his continuing health and development. Although the appeal was dismissed on the reason that the boy's right to privacy was outweighed by the freedom of expression and freedom to receive information and that the publicity was also seen as essential in a fair trial and in securing that justice is done in the open and not in secret so that the public can have confidence in the court system in general and in the particular case, the Court of Appeal acknowledged that Hedley J was right in concluding that the jurisdiction to grant injunction existed and could be exercised in this case.[85]

If we were to test the facts in that case against both principle of confidence and privacy the difference in consequence is obvious. Within the context of confidentiality, once the information is made public, the boy would not have any cause of action to prevent the publication of such information or the repetitive publication of the same. On the contrary privacy would be of assistance. The request for injunction was made with regard to information that leads to the identification of the boy and thus his private matter. That private matter was not made part of the proceedings; thus it has not crossed the border of private sphere and come into the public sphere. Although earlier publication in the newspapers might have revealed the information, the boy's privacy in the matter does not cease to exist for such disclosure has not been made by him nor in any way that might imply the waiver of the boy's privacy. As such, if the question were to relate solely to the boy's right and/or the publication of the boy's private facts; the injunction would have had to stay. Nevertheless there were two competing interests involved. Privacy needs to be

weighed against that interest of others. Furthermore there was another factor that outweighed the boy's request for injunction. That factor distinguishes the fact in *Re S* to the given hypothetical example: that is in the *Re S* the injunction as requested on the appeal would not serve the purpose of such injunction anyway as the restriction as requested did not offer the real hope of proper isolation of the boy[86] while on the other hand, in the given hypothetical example, the injunction may serve the purpose for which it is being sought for as long as no media publicity given to such facts as the community where the individual has just moved in may not be aware of the divorce proceedings of that individual's parents.

On the other hand, some matters are considered private, though it may not be a confidential information, for example, individual's personal data such as a person's name, address, phone number are not confidential, at least, not to the people who habitually deal with such an individual and/or because such information will be readily obtainable by consulting the local telephone directory, and nowadays, from the Internet. The recent injunction granted in favour of Maxinne Carr that was meant for her safety, in effect prohibits *inter alia* the journalist to publish about some of her new personal data. That provides a good example that while some personal data may not be confidential in the sense that such data may be easily collectable by one means or another, its publication may be restricted. Although the judgment does not cite privacy as the reason for the award of such injunction, the very essence of the injunction does provide the protection against the disclosure of personal data or data relate to an individual's private life. Such prohibition upon the journalist to make the publication of Maxinne Carr's data would squarely fall within the ambit of privacy – although its objective was to ensure her safety rather than merely affording her with the respect of her private life.

If we were to take the hypothetical example given earlier at pages 144-5 to a further extent, if in the information that A has submitted to B consists of A's personal data such as name, address or telephone number or any other kind of personal data that would readily be made available by consulting telephone directory, etc, then A might not even have any cause of action for breach of confidence against any one at all, not

B, C or D if it is found that those data are lacking of confidential characteristic. However as those are personal data, for as long as such data have been communicated with privacy assurance, the two conjunctive touchstones of privacy are satisfied and thus the data subject has privacy upon the matter. Those shall illustrate the submission that it is inapt to 'throw upon' privacy the elements that are considered necessary in breach of confidence claims.

Furthermore privacy is not merely about protection of personal data. Thomson argues that 'if we use an X-ray device to look at a man in order to get personal information about him, then we violate his right to privacy. Indeed we violate his right to privacy whether the information we want is personal or impersonal. We might be spying on him in order to find out what he does all alone in his kitchen at midnight; or we might be spying on him in order to find out how to make puff pastry, which we already know he does in the kitchen all alone at midnight; either way his right to privacy is violated.'[87]

In a nutshell, when all the factors discussed earlier put together, it is apparent that the emphasis, the weight and the gist of the issue in the respective principles differ from their very respective roots. The notion of privacy covers solely the private aspects or personal matters of individuals without putting too much emphasis on the confidentiality of such private aspects or personal matters. On the contrary the principle of confidence concentrates on the confidentiality of data or information without distinguishing as to whether the confidential data are of private nature or otherwise.

4.2.2 Confidential Relationship

The second element is that information should be imparted in the manner implying the confidentiality of the information. The typical defence brought against this second element in an action for breach of confidence, as argued in early days precedents, is that the defendant was not bound by the duty of confidentiality and/or that such duty of confidentiality did not arise in the absence of contractual relationship between the parties; or express contract of confidentiality; or any other

provision that expressly provided for such duty of confidentiality. In *Stephens* v. *Avery*, in rejecting the argument that no duty of confidentiality would arise in the absence of either a legally enforceable contract or a pre-existing relationship, Sir Nicolas Browne-Wilkinson V.C. held that:

> The basis of equitable intervention to protect confidentiality is that it is unconscionable for a person who has received information on the basis that it is confidential subsequently to reveal that information. Although the relationship between the parties is often important in cases where it is said there is an implied as opposed to express obligation of confidence, the relationship between the parties is not the determining factor. It is the acceptance of the information on the basis that it will be kept secret that affects the conscience of the recipient of the information.[88]

As the relationship of confidentiality can be express, e.g., by entering into a contractual relationship to that effect, and implied, i.e., such duty of confidentiality is understood between the parties before or during the communication of the information in issue, having the relationship between the parties is not the determining factor. 'It is the acceptance of the information on the basis that it will be kept secret that affects the conscience of the recipient of the information.'[89] In other words, the jurisdiction is based not so much on property or on contract as on the duty to act in a good faith,[90] as Bingham L.J. in the *Spycatcher* case, said:

> The cases show that the duty of confidence does not depend on any contract, express or implied, between the parties. If it did, it would follow on ordinary principles that strangers to the contract would not be bound. But the duty depends on the broad principle of equity that he who has received information in confidence shall not take unfair advantage of it.[91]

On that topic, in *Duchess of Argyll* v. *Duke of Argyll and Others*[92] Ungoed-Thomas J formulated the followings:

1. that a contract or obligation of confidence need not be expressed but can be implied;
2. that a breach of confidence or trust or faith can arise independently of any right of property or contract other, of course, than any contract which the

imparting of the confidence in the relevant circumstances may itself create; and

3. that the court in the exercise of its equitable jurisdiction will restrain a breach of confidence independently of any right at law.[93]

Hence it can be deduced that having an agreement for confidentiality is not the pre-requisite for the creation of the duty of confidentiality upon the defendant. What is important is to see whether the circumstances during which the confidential information being communicated do – in the mind of the reasonable person – make it plain that the recipient of such information should keep its confidentiality. If that exists, it is presumed that such information has been conveyed in a manner that imparts the duty of confidentiality[94] and thus, the second element for the law of confidence is satisfied. That was indeed explicated by Megarry J in *Coco* where his lordship said:

> It may be that hard-worked creature, the reasonable man, may be pressed into service one more; for I do not see why he should not labour in equity as well as law. It seems to me that if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information *was being given to him in confidence*, then this should suffice to impose upon him the equitable duty of confidence.[95] (Emphasis added)

Traditionally this second element consists of two limbs: that the plaintiff has communicated the information to the defendant; and that the communication takes place in such circumstances that impose the obligation of confidentiality upon the defendant. In most instances the two limbs have not been discussed in segregation; what is made paramount is to analyse the existence of the duty of confidentiality. In *Coco* v. *Clark*, the plaintiff did not expressly indicate that the defendants owed him the obligation to keep the information confidential. However, it was reasonably understood that the information was imparted with confidence due to the fact that it was shared with the defendant with a view to enter into business relationship in developing the product that was the fruit of the plaintiff's idea. Even though no business relationship had been entered by the parties, the nature and manner how the

information was communicated to defendants would have made it clear to the mind of a reasonable person that the plaintiff would not want the defendants to disseminate or to use the information without his consent.

As stated earlier, segregating the two limbs of this second element for the breach of confidence claim is not necessary, especially since the early precedents proceeded from the circumstances where the first limb had always been satisfied. However as the law of confidence is being developed and its scope is being extended, this becomes an issue: whether it is part of the requirement of the cause of action to show that the defendant has received the confidential information which has been imparted by the plaintiff either through a direct or indirect connection. The facts in *Coco* were straight forward and did fulfil that requirement. So were the facts in *Stephens*, *Saltman*, etc. Within this context the issue arises as to whether the same duty as owed by the original recipient of the confidential information may be imposed on a third party. The answer to that is not as straight forward as the question. At least three situations need to be considered: first a third party who receives the information from the original recipient knowing that the disclosure has been made in breach of the duty of confidentiality; second where such a third party does not have any notice of the breach of such a duty; and third if the information has gone to a stranger, a person who does not receive the information through the original recipient.

On the surface of the issue, this may seem to be the answer: as the duty acts on the conscience of the recipient of the confidential information, such a duty may only be passed to the subsequent recipient of the data who has been informed of the confidentiality of the matter – thus negating the imposition of the duty for the last two situations for the absence of 'impartation' of the duty to such a third party and stranger respectively. However, the principle has been developed, as so discussed in 4.3 of this Chapter, on the basis that since the key element for the duty of confidentiality is the conscience of the defendant it has become arguable that what is paramount is whether the third party, be it a recipient of the information or a complete stranger, has any notice of the confidentiality of the matter. In that sense, whether or not the information and/or the duty have been imparted from the original

recipient to a third party or a stranger becomes immaterial. The more detailed examination of all the three situations will be discussed in turn in the next paragraphs following the concise discussion on the second limb of this second element for the principle of confidence.

The second limb, that the information must be imparted in confidence, requires the confidentiality in the manner of communicating the information. This limb has been given more emphasis than the first one. As a matter of fact, as the scope of the law of confidence is being broadened, the first limb has been disregarded and the weight is rested solely on this second limb – though at the further extent even the fulfilment of the second limb has also been relaxed.[96] As the emphasis of the second element is the obligation of confidence that comes with the impartation of the information to the original recipient, the duty thus can be extended on the same basis to the subsequent recipient of the information. When A communicates confidential information to B in confidence and B communicates the same to C, it is very likely that C will be found to owe the duty of confidence as much as B does towards A based on the doctrine that it is equitable fraud in a third party knowingly to assist in a breach of trust, confidence or contract by another.[97] That however only applies when the subsequent recipient is aware or becomes aware of the obligation of confidence owed by the original recipient to the confider. That was also in order not to allow a party to take advantage of a person's breach of confidence.[98] That provides the answer for the first of the three situations. At this point it shall be noted that constructive knowledge will be acceptable here, as Lord Hoffmann held:

> Breach of confidence was an equitable remedy and equity traditionally fastens on the conscience of one party to enforce equitable duties which arise out of his relationship with the other. So the action did not depend upon the personal nature of the information or the extent of publication but upon whether a confidential relationship existed between the person who imparted the information and the person who received it. Equity imposed an obligation of confidentiality upon the latter and (by a familiar process of extension) upon anyone who received the information with actual or constructive knowledge of the duty of confidentiality.[99]

This paragraph highlights that the issue relates to the second of the three situations. In line with the above argument, since the principle works on the conscience, a person who receives the information from the original recipient of the confidential information is unlikely to owe any duty of confidentiality if he does not know that the information so imparted is confidential and that he does not know that such information has been imparted to his source of information under the duty of confidentiality.[100] Such lack of knowledge will not impose any duty upon such a third party and thus, he will not be liable for damages in case of disclosure. In spite of that the duty will arise as soon as he becomes aware or 'notices' that the information is confidential and that it has been so imparted under the duty of confidentiality.[101] At that point, injunction can be brought against such an innocent third party to prevent him from divulging or using the information for his benefit as a result of breach of confidence by the person who makes the information available to him.[102]

The line of argument thus far is that the basis of duty of confidentiality imparted on the third party is merely the extension of the same duty owned by the original recipient. Now let's consider the third situation, where the information has come to the hand of a stranger. The rigid reading of the two limbs of the second element will result in this: that such a duty does not arise with regard to a stranger, a person who has not received the information in confidence. That is only natural for both reasons; that the information was not received in a circumstances that requires him to be bound by the obligation of confidentiality and secondly, such a duty has not been transferred to him through any person who originally has undertaken the duty of confidentiality. Having said earlier that the formal or contractual relationship is not necessary to establish the duty of confidentiality, it is still essential for the plaintiff in a breach of confidence claim to prove that the information has been communicated to the defendants in confidence. It follows that such an element will restrict the scope for the application of the duty of confidence merely to a person to whom the information has been imparted and not upon a stranger who was never meant to be the recipient of such information or who inadvertently overhears secret conversation or to whom the information has been mistakenly or unintentionally disclosed. Either way, it is arguable that the circumstances do not impart an obligation of confidence,

and thus, the duty of confidence does not arise. That is because the basis of equitable intervention to protect confidentiality, that it is unconscionable for a person who has received information in confidence to subsequently reveal that information, does not exist in cases involving a stranger.

That, however, will lead to iniquity; placing the duty on a person who properly (lawfully) receives the confidential information but not on a person who has received the information by accident or surreptitiously. The more flexible interpretation on the matter may lead to a more desirable result. Since the argument has thus far been based on the idea that the principle works on conscience, the manner as to how the information comes into the possession of the third party or a stranger although relevant should not be the sole criterion to affix the duty of confidentiality upon the conscience of such a stranger.[103] Formality shall not defeat equity; even a stranger can be found to owe such a duty of confidence if he has notice or knows that the information is of confidential nature.[104] Thus it has been said that the duty will arise where 'an *obviously confidential document* is wafted by an electric fan out of a window into a crowded street, or where *an obviously confidential document*, such as a private diary, is dropped in a public place, and is then picked up by a passer-by.'[105] This more flexible reading of the principle has been adopted in many recent judgments especially when breach of confidence is asserted by celebrities against the journalist that intends to publish or has published any facts that the relevant celebrities do not wish to make public.[106] Notice, however, the emphasis there is that the data must be of 'obviously confidential' nature.

Although this element has been very much 'ignored' in more recent cases on law of confidence as further discussed in Chapter 4.3 of this thesis, if we were to go with the original requirements of the law of confidence and attempt to precipitate this element for the law of confidence within the notion of privacy, the result will be both unacceptable and detrimental. Supposedly F was wandering around in a hotel where F has hired a suite then by mistake F, thinking that it was the suite that F has hired, entered another suite in that hotel which is being occupied by G and G's spouse, H. When F realised that it was not the suite that F has hired, F decided to leave.

However as F was about to leave the suite, F saw through the door of the suite bedroom that was not completely closed that G and H were engaging in some intimate relationship in the bedroom of such suite. F decided not to leave immediately but rather F stood quietly to see everything that G and H were doing. Neither G nor H realised about F's presence in their suite. Here, should F decide to tell others about what F has seen or even to 'sell' the story to an interested journalist, the principle of law of confidence may provide neither G nor H with any cause of action against F for neither of them has communicated any confidential information to F. Similarly, no confidential information has been imparted to F in confidence and that negates the second element which originally is essential for the cause of action on breach of confidence to succeed. That is unless the more flexible approach is being applied. In any case, there will be no action for breach of confidence against F if F keeps the facts to himself.

However, there was an intrusion of privacy the very moment that F entered the mistaken hotel suite. The fact that F did not leave immediately after realising the mistake and rather stood quietly to see what G and H were doing would clearly amount to further intrusion of privacy – for it was a private activity of G and H and was done within a private sphere.[107] Any act in furtherance to that will also amount to privacy intrusion, thus, the cause of action for breach of privacy will equally apply to the act of F in telling others about the private facts that F had witnessed in breach of G and H's right to privacy. It is even arguable that the cause of action for breach of privacy may be extended to the publication of the story by the journalist who has bought the story from F if it is reasonably apparent, taking into account the circumstances of the particular case, that such story has been obtained by F in breach of G and H's right to privacy and furthermore G and H have not given their consent to the publication of such story. That demonstrates that the imposition of the conditions for the cause of action based on breach of confidence to the cases involving privacy intrusion will be devastating.

In *Wainwright* Lord Hoffmann went on explicating that the existence of prior confidential relationship between the plaintiff and the defendant is no longer required

in cases involving breach of confidence.[108] Prior to *Wainwright*, similar pronouncement was made in *Venables*[109] and *Mills*.[110] Although sensible such an interpretation thwarts the very disposition of the law of confidence: that the duty of confidentiality is imposed by the law because the recipient has received the information in confidence. Imagine this: one finds a piece of paper on the street containing chocolate cake recipe, goes home, tries the recipe and upon finding that the cake is good, includes the recipe on the recipe book that he is about to publish or simply make the recipe available on his internet site. Few days later he has been notified that a cause of action has been taken against him for breach of confidence – because the recipe turns out to be the secret recipe of one established bakery in town. Supposedly instead of a paper containing chocolate recipe the man has found a picture of Catherine Zeta Jones and Michael Douglas taken during their wedding reception. Following the greed of human nature he puts up this picture on his internet sites, offering to anyone to view the picture on payment of some cash. Surely he is not an angel for his action was driven by the desire to make economic gain, but there is nothing illegal about that.[111] How is this man supposed to know if the couple has made any special arrangement that only one journal entity has the exclusive right to first publish their wedding pictures? How would he know that those invited to the wedding have to undertake the duty of confidentiality if he had never been invited himself? How would he know if the picture was at all confidential or otherwise? Unlike a diary or confidential document which carries the 'confidential' stamp on it, one may assume that a document or data are not confidential by the very facts (as one may reasonably assumed) that they have been thrown away without being torn or shredded or that they have not been kept as confidential documents would. Injunction will not be the appropriate remedy in the given scenarios, nor may damages or account of profit be appropriately awarded against an innocent third party for he cannot, by any stretch of imagination, be held liable for breach of confidence. The information was confidential, it was a trade secret; but he did not know that. It was not a type of information which was, using the words of Lord Goff in *Spycatcher*, 'obviously' confidential in nature.[112] Without the 'relationship of confidence' all information, except that of private nature of private individuals, will seem to an innocent third party as any other kind of information: readily available and may be

utilised freely and for free. To impose the duty of confidence upon such an innocent party as suggested by Lord Hoffmann in *Wainwright* will unreasonably impose the burden on individual to undertake some 'research' to ensure that his action does not breach any duty of confidence which he may not be aware of. It is not justifiable to affect such unnecessary restriction of individuals' freedom; not especially since in the end, to dispense with the requirement of relationship of confidence in order to stretch the scope of the law of confidence will only add to the existing principle the protection which otherwise is part of the right to privacy.

Aside to that, it has also been suggested that a duty of confidence will arise whenever the party subject to the duty is in a situation where he either knows or ought to know that the person imparting the information can reasonably expect his privacy to be protected.[113] As such, in *Campbell*, Lord Nicholls of Birkenhead had aptly made this remark:

> This cause of action has now firmly shaken off the limiting constraints of the need for an initial confidential relationship. In doing so it has changed it s nature.....Now the law imposes a 'duty of confidence' whenever a person receives information he knows or ought to know is fairly and reasonably to be regarded as confidential. Even this formulation is awkward. The continuing use of the phrase 'duty of confidence' and the description of the information as 'confidential' is not altogether comfortable. Information about an individual's private life would not, in ordinary usage, be called 'confidential'. The more natural description to day is that such information is private. The essence of the tort is better encapsulated now as misuse of private information.[114]

And it is submitted here if the principle which is labelled as law of confidence has been established for it aims to provide protection over confidential information has been stretched to the extent that it is no longer the confidential information which will be the subject of protection but rather the private information, should not the label accordingly be adjusted to reflect the very gist of the matter being protected therein, i.e., privacy. In Chapter 4.3 this matter is further discussed in light of the development of the law of confidence. However the final submission at this point is

that it is inapt and frivolous if this very fundamental requirement of law of confidence is being dispensed with in order to allow the use of existing principle to afford what otherwise is not available and yet required to accord the respect of individual's private life as required by Article 8(1) of the ECHR.

4.2.3 Unauthorised Use Causing Detriment to Plaintiff

Finally, and perhaps the 'least popular' element for the cause of action based on breach of confidence is that the unauthorized use of confidential information causes the detriment to the plaintiff. This element has been ignored on many occasions: Lord Keith in *Spycatcher* did not consider that as part of the element for the cause of action based on breach of confidentiality;[115] Megarry J in *Coco* made the observation on the matter and articulated the doubt he had as to such a requirement;[116] in several cases no reference was made to the issue of detriment;[117] and many academics hold such a view that when they discuss the elements for the law of confidence they simply did not include the topic within such a discussion.[118]

In most business related cases or where the relationship between the parties is of commercial nature, this element may not be difficult to prove as the use of information in developing a product will diminish the plaintiff's chance to commercially benefit from such information unless injunction is granted to prohibit the defendant from further using the information. When that is no longer practicable, damages will be awarded to compensate the plaintiff for his loss - past, current and future. This principle has been deployed as early as in the case of *Tuck* v. *Priester*.[119] In that case, the plaintiffs were the unregistered owners of the copyright in a picture, and employed the defendant to make a certain number of copies for them. The defendant did so, and he also made a number of other copies for himself, and offered them for sale in England at a lower price. The plaintiffs subsequently registered their copyright and then brought an action against the defendant for an injunction and for penalties and damages. The Lords Justices differed as to the application of the Copyright Acts to the case, but held unanimously that 'independently of those Acts, the plaintiffs were entitled to an injunction and damages for breach of contract.[120] Even though breach of confidence was not the cause of action in that case; the

underlying principle applied was similar as can be seen in the judgment of Lindley L.J. as his lordship held that:

> ... the relation between the plaintiffs and the defendant was such that, whether the plaintiffs had any copyright or not, the defendant has done that which renders him liable to an injunction. He was employed by the plaintiffs to make a certain number of copies of the picture and that employment carried with it the necessary implication that the defendant was not to make more copies for himself, or to sell the additional copies in this country in competition with his employer. Such conduct on his part is a gross breach of contract and a gross breach of faith, and in my judgment, clearly entitles the plaintiffs to an injunction, whether they have a copyright in the picture on nor.[121]

In *Saltman Engineering Co* v. *Campbell Engineering Co*[122] the Court of Appeal held that where confidential information supplied to the defendants by the plaintiffs to enable the defendants to manufacture machine tools under a contract between the plaintiffs and the defendants was misused by the defendants in that they employed the machine tools in the manufacture of leather punches on their own behalf, the plaintiffs were entitled to damages for breach of confidence. There, Lord Greene the then Master of the Rolls said that: '[i]f a defendant is proved to have used confidential information directly or indirectly obtained from the plaintiff, without the consent, express or implied, of the plaintiff, he will be guilty of an infringement of the plaintiffs' rights".[123] Similar principle was applied in *Coco* v. *Clark* where – based on the information communicated by the plaintiff to the defendants the latter produced and marketed the product which though innocently thought by the latter to be their invention – but in reality such invention was not possible without the information being supplied by the plaintiffs, and thus it was held that the products were produced in breach of duty of confidence. In such manner the use of such information was indeed to the detriment of the plaintiff for otherwise the plaintiff would have been able to benefit from the commercialisation of his ideas.

This third element may lead to a debate where no commercial loss has been caused.[124] If the disclosure may lead to personal embarrassment, then perhaps the

requirement for detriment can be extended so as to consider such embarrassment as the possible detriment to the plaintiff. Thus, the court has prevented the publication of marital communication in *Argyll* v. *Argyll* and communication related to sexual life of the plaintiff which has been communicated in confidence to the first defendant in *Stephens*.

In more recent cases, this element seems to have been conveniently ignored. In *Douglas*, for instance, both Mr and Mrs Douglas might not have suffered anything out of the disclosure, not commercially nor in term of personal embarrassment.[125] If there were any loss that might have been incurred due to the unauthorized disclosure, the same is suffered not by the plaintiff but rather by the OK! Magazine. While formulating the respective decisions, the courts hearing the case had conveniently omitted any discussion on the matter.

Similar situation occurred in *Campbell*. There the House of Lords took the liberty to apply and allowed Ms Campbell's appeal on the basis of breach of confidence. The first two elements of the cause of action for breach of confidence were discussed while nothing has been mentioned regarding the third element. It is true that the information might have caused personal embarrassment in its totality. However it has been accepted on behalf of the plaintiff that the defendants were justified to publish the fact that the plaintiff has drug addictions problem because she had earlier brought the false light by telling the public that she did not use drugs. Since that is the case, it would be difficult to see how in the circumstances particular to that case further information relating the same facts would cause any detriment (at least of a legally recognisable nature) to the plaintiff. The end result is the same, the public are still being informed about Naomi's effort to recover from her drugs problem by attending Narcotics Anonymous – and there is no additional embarrassment caused by adding the picture or publishing the subsequent article – upon which the cause of action was based. While the publication of objected items lead to more profit to the defendants; that did not necessarily cause further detriment to the plaintiff.[126]

Such failure to see if the third element is missing does not come as a surprise. Lord Goff of Chieveley in so holding stated this view:

> I would also, like Megarry J in *Coco* v. *A N Clark (Engineers) Ltd* [1969] RPC 41 at 48, wish to keep open the question whether detriment to the plaintiff is an essential ingredient of an action for breach of confidence. Obviously, detriment or potential detriment to the plaintiff will nearly always form part of his case but this may not always be necessary. Some possible cases where there need be no detriment are mentioned in the judgment of Megarry J in Coco's case (at 48) to which I have just referred, and in Gurry Breach of Confidence (1984) pp 407--408. In the present case, the point is immaterial, since it is established that in cases of government secrets the Crown has to establish not only that the information is confidential, but also to its 'detriment' in the sense that the public interest requires that it should not be published. That the word 'detriment' should be extended so far as to include such a case perhaps indicates that everything depends on how wide a meaning can be given to the word 'detriment' in this context.[127]

However, the view as expressed by Lord Goff of Chieveley was a mere dictum as his lordship noted: '... it is tempting in this case to embark on an exegesis of the law relating to breach of confidence. That temptation must, however, in my opinion, be resisted, if only because, as I see the case, subject to one important and difficult point (which, to my mind unfortunately, does not seem to have been the subject of argument in the courts below), the applicable principles of law appear to me to be relatively straightforward and non-controversial.'[128]

Despite the above, assuming that this third element is required for the action on basis of breach of confidence, this will not fit the notion of privacy. The classical cases of breach of confidence mainly deal with the situation where the recipient of an idea had benefited from the commercial use of an idea depriving the actual owner of the idea of any profit or business opportunity that he otherwise can generate from the use of such an idea.[129] As submitted earlier, privacy as cause of action shall stand regardless of the presence or absence of loss or damages to the plaintiff. In *Prince Albert* it was stated:

The question, however, does not turn upon the form of amount of mischief or advantage, loss or gain. The author of a manuscripts, whether he is famous or obscure, low or high, has a right to say of them, if innocent, that whether interesting or dull, light or heavy, saleable or unsaleable, they shall not, without his consent , be published; and I think, as I have said, that to use a dishonest knowledge of them for the purpose of composing and publishing, and so to compose and publish a catalogue of them, amounts to a publication of them within the principle of the rule.

Consequently the notion of privacy shall not be affected by the fact whether or not there is any loss might be suffered by the plaintiff or benefit that the defendant might have gained from the intrusion of the plaintiff's privacy. Having said so, any monetary gain to the defendant may be taken into consideration in deciding the quantum of damages to be awarded to the plaintiff. Applying this to the earlier given examples, A, G and H shall be entitled to injunction and/or the damages whether or not the unwarranted disclosure of A, G and H's personal facts have caused A, G or H any financial loss or otherwise and whether or not it has caused A, G or H any personal, professional or any kind of embarrassment. Similarly, in deciding whether or not the claim for intrusion of privacy shall be allowed, the issue whether or not B, C, D, E or F has financially gained anything out of such disclosure is wholly irrelevant. However, once it has been found that the complained acts or omissions were in breach of the right to privacy of A, G and H respectively, the damages to be awarded may be higher if such unwarranted disclosure was maliciously made to allow the defendant to earn some financial gains. Besides affording A, G and H with the legal protection that they deserve as their right to privacy, the award of damages will also serve the purpose as the deterrence against any privacy intrusion in the future.

To the further extent, even if no actual loss or damage required for the cause of action based on breach of confidence, the notion of privacy will still differ on this aspect. The angle for the view in the matter is whether or not the absence of legal protection prejudices the personal autonomy that the plaintiff lawfully and reasonably sought to be respected and not merely whether or not the defendant's

action is causing any detriment to the plaintiff (read: the third element for actions based on breach of confidence causes). That being the case, no action will be successful on the basis of law of confidence for as long as the defendant does not publish or is about to publish the private facts of the plaintiff. If a person employs the necessary equipment to observe and record the activity of another who lives in the opposite apartment, for example, and the former uses the record merely for his own use or enjoyment, can the latter apply for any legal remedy so as to prohibit the former from monitoring his every movement – which was observed and recorded from an area out of his private sphere but relates to private activities carried out wholly within his private premises? Say if the latter has deployed anything he can reasonably think in order to restrict the former from observing him but the technology still allows the former to make such a record of the latter's movement or voices/sounds – would the law provide him with any remedy as regards such invasion of personal autonomy? In the first place, why would such person have to undertake the extra precaution in safe-guarding his personal autonomy while the former can still – due to the technology advance – invade the latter's personal autonomy effortlessly? What will be the basis for an individual to sue someone who has recorded the former's activities using a long lens video-camera if that someone never discloses the information? Wrong is already committed but what about remedy? Respect to individual's freedom of private life can provide answers to all these. Affording legal recognition to such freedom of private life (which in this thesis is referred to as privacy) means any actions or omissions that intrude to personal autonomy of an individual will not be acceptable – consequently it is for the defendant to justify and explain such intrusion; and not as how the situation today whereas it is for the plaintiff to prove why he is entitled to his personal freedom (in the context of law of confidence this is the gist of the first and the second elements) and why the defendant should not have invaded the plaintiff's personal autonomy (in the context of law of confidence, this is the essence of the third element) albeit the plaintiff's effort to deploy all reasonably possible ways to ensure no intrusion should have occurred in the first place.

4.3 Development of Law of Confidence

The case of *Prince Albert* v. *Strange*[130] is probably the earliest reported English case which is often quoted and/or used as a precedent for cases where breach of confidence has been submitted as one of the causes of action. Such reliance is not necessarily appropriate as the court in granting the injunction in favour of the plaintiff, held *inter alia* that '...[the owner] has a right to interposition of this court to prevent any use being made of it; that is to say, he is entitled to be protected in the exclusive use and enjoyment of that which is exclusively his own..... *where the privacy is the right invaded*, the postponing of the injunction would be the equivalent of denying it altogether.'[131] [emphasis added].

Initially driven by the idea that extended the right of ownership so as to include the exclusive right of use or enjoyment, the law of confidence has evolved so as to require the recipient of confidential information to act in good faith and not to disclose the confidential information, still on the same basis, i.e., in order to prevent or prohibit unjust treatment to the plaintiff who shared the information in confidence.[132] Having such a basis, the law of confidence exists in relationship of beneficiary nature between the plaintiff and the defendant. The existence of the duty of confidentiality is fundamental; although it does not have to be based on contractual relationship neither has it to be made express.[133] The nature of relationship between the parties may give rise to an implied duty of confidentiality, e.g., marital relationship. It is also important to note that the restriction of disclosure of the confidential information can be directed either as between and/or among the couple itself (*Duchess of Argyll* v. *Duke of Argyll and Another*) or to a party outside the marital relationship (*Prince Albert* v. *Strange*) when the circumstances warrant that. Traditionally, marital relationship has been seen as the kind of relationship which its very nature warrants the imposition of duty of confidentiality. Later on, the context within which the confidentiality principle may be applicable has been broadened. Thus in *Stephens* v. *Avery and Others* the claim for breach of confidence has been successful although the subject of the protection was the information relating to a relationship of lesbian nature. It shall be noted, however, although the assumption exists in both marital and non-marital relationship, the degree of duty of

confidentiality may differ. This can be seen in *A* v. *B Plc and Another*,[134] where the court has expressly held to the following effects:

> In situations where the parties are not married (when they are, special considerations may arise) the fact that the confidence was a shared confidence which only one of the parties wishes to preserve does not extinguish the other party's right to have the confidence respected, but it does undermine that right. While recognising the special status of a lawful marriage under our law, the courts, for present purposes, have to recognise and give appropriate weight to the extensive range of relationships which now exist. Obviously, the more stable the relationship, the greater will be the significance which is attached to it.[135]

It shall be noted, however, that the mere fact that an activity is of sexual nature, does not, by itself, make the information related thereto – de-facto – confidential. In *Theakston* v. *MGN Limited*, the claimant, the then presenter of the television programme 'Top of the Pops' and of a weekly radio programme visited a brothel after a night out. He engaged in sexual activity and was in a room with not less than three prostitutes. One of the prostitutes, after trying to get some payment from the claimant which was refused, sold the story and some photographs to the defendant. The claimant argued, *inter alia*, that the article which the defendant proposed to publish is in breach of the duty of confidentiality owed to him. That claim has been rejected. In his judgment Ouseley J neatly summarised the range within which sexual activity may occur as follow:

> There is a whole range of relationships in human life in which sexual activity may occur, from marital relationships to unmarried but long-term partnerships, to extra-marital relationships long and short term, from one night stands to yet more fleeting encounters with prostitutes. Indeed it may well be that the very concept of a relationship for the purposes of confidentiality is simply inapplicable to such transitory or commercial sexual relationships. Sexual activities which can be intimate, private and personal and which might attract confidentiality can fall far short of full sexual intercourse; a passionate embrace could have all those qualities. Intimate physical relations can occur in a range of places from a private

> house to a hotel bedroom, to a car in a secluded spot, to a nightclub or indeed to a brothel.[136]

To that he added this: 'Sexual relations within marriage at home would be at one end of the range or matrix of circumstances to be protected from most forms of disclosure; a one night stand with a recent aquaintance in a hotel bedroom might very well be protected from press publicity. A transitory engagement in a brothel is yet further away.' (*sic*)[137] Within his argument he distinguished the facts in *A* v. *B* on the ground that in *A* v. *B* 'the relationship endured longer than the short period of time necessary for sexual activity to be undertaken, and the more intimate physical relations took place in a hotel bedroom;'[138] while in the case brought before him, the sexual activity took place in a brothel. The claimant's face is apparently well known and could attract some degree of interest. He could have been seen going in and coming out of the brothel by anyone passing by who could have made simple inquiry as to what the place was. A brothel is a place for the most transitory of sexual relations based on the payment of money for sexual services. It was likely that other customers and a number of prostitutes and staff will see who comes and goes. Furthermore there was more than one prostitute involved. 'The relationship, if it can indeed be called a relationship without stretching the word to the point of depriving it of meaning, lasted no longer than was necessary for the sexual activity to be undertaken with an allowance for necessary and ancillary matters.'[139] Therefore it was held that '[t]he relationship between a prostitute in a brothel and the customer is not confidential of its nature and the fact that they participate in sexual activity does not in my judgment constitute a sufficient basis by itself for the attribution to the relationship, if such it be, of confidentiality.'[140] Up to this point in can be concluded that as the scope for the law of confidence has been broadened so as to cover not merely that of marital relationships but also to cover non marital or extra marital ones, sexual intimacy does not necessarily transform what otherwise non-confidential facts due to the prevailing circumstances to one of confidential nature as was held in *Theakston.* The courts in England have not been ready to extend the protection upon such circumstances because to 'invest' confidentiality to a sexual activity in what was labelled as 'a fleeting relationship' within such a location would

cause the concept of confidentiality to embrace for all physical intimacy unless either some artificial line is to be drawn in relation to particular types of sexual act or unless those acts were undertaken under the public gaze.[141] It has yet to be tested if this development of the scope of confidence in England will be applied within the context of the Malaysian legal system. However as sexual activities of non marital or extra marital nature are offences in Malaysia, either of criminal[142] and civil nature,[143] it is unlikely that such a principle will find any room for application in Malaysia, not at least within the near future because any argument to that effect will bring more harms than good as it will amount to admission or confession and can be used against the 'prospective' plaintiff.

The above shows how the scope has been broadened with regard to the range of relationship upon which confidentiality may be assumed. Despite that, it has always been seen as necessary that there had to be a confidential relationship between the two parties even though it does have to be express. That such element is a requirement has been so affirmed by the Lord Nicholls of Birkenhead as he stated that: '[t]o attract protection the information had to be of a confidential nature. But the gist of the cause of action was that information of this character had been disclosed by one person to another in circumstances 'importing an obligation of confidence' even though no contract of non-disclosure existed.'[144] To similar effect, Lord Hoffmann viewed that: '...the action did not depend upon the personal nature of the information or extent of publication but upon whether a confidential relationship existed between the person who imparted the information and the person who received it.'[145] That however has been relaxed thus allowing the application of the principle in a wider and more flexible situation. Lord Goff of Chieveley in *Attorney-general* v. *Guardian Newspapers Ltd (No. 2)* formulated the principle as being that 'a duty of confidence arises when confidential information comes to the knowledge of a person...in circumstances where he has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others.'[146] Up to this point it has been considered as settled that the requirement of a prior commercial or other relationship is omitted from the current English law.[147] In

Douglas, the principle of confidentiality was extended to a situation where the access to such information has been securely guarded, with limited access to some pre-approved people, and only such information that has been pre-approved by the couple might be published. Thus, when the defendant published some data which otherwise would not be made available to the public until such data as agreed by and between the plaintiffs, it was held there was a breach of confidence.

A more liberal interpretation was adopted by the House of Lords recently in *Campbell* v. *MGN Limited*.[148] The facts are notorious. The supermodel Naomi Campbell brought an action against the defendant for *inter alia* breach of confidence and/or unlawful intrusion of privacy regarding the further publication about her attendance to Narcotics Anonymous and the publication of the picture of her allegedly taken when she was about to attend a session of Narcotics Anonymous. All the five Lords were unanimous that the fact of an individual's drug dependency is a personal matter which publication is a matter for herself to decide.[149] However, the unusual contribution to the facts, that the plaintiff is a supermodel whose business is depending on the publicity about her private life and most importantly, the fact of her earlier denial of drug dependency – made the decision to split: two were in favour of giving the prevalence to the freedom of expression as guaranteed by article 10 of the ECHR; while three others rejected the press' defence and allowed the plaintiff's appeal, finding that in the given circumstances Naomi's Article 8(1) right should prevail over the defendant's Article 10 right. In that case the plaintiff conceded that the defendant has the right to publish the first story about her drugs dependency to rectify the previous falsehood she gave, however it was contended that further publicity on the matter was unnecessary and neither was the publication of the pictures which were coupled with inaccurate captions. The case, however, was not decided solely upon the issue of confidentiality. Although Lord Nicholls of Birkenhead started his judgment by analysing the principle of confidence, his judgment was mainly based on the right for the respect of private life.[150] Similar approach was adopted by Lord Hope of Craighead. His lordship in his analysis of the issue proceeded from the basis that '[t]he underlying question in all cases where it is alleged that there has been a breach of the duty of confidence is whether the

information that was disclosed was private and not public.'[151] Upon such basis his lordship continued to analyse if the information was private which if found so will confer upon an individual the reasonable expectation that his privacy is to be respected.[152] As a whole, it is apparent that his judgment was rested on the examination of the Article 8 right which he rightly labelled as the right to privacy.[153] Similarly, Lord Carswell, whose conclusion together with Lord Hope and Lady Hale formed the majority opinion of the House of Lords, rested his analysis on whether the publication constitute an intrusion to the appellant's privacy.[154] It was only Lord Hoffmann and the Baroness Hale of Richmond who analysed the case on the basis of confidence – within the context of Article 8 of the ECHR.

Having accepted that the first major development in the principle was that as promulgated by Lord Goff of Chieveley in *Attorney General* v. *Guardian Newspapers Ltd (No 2)* as discussed above which omitted the requirement of a prior relationship for the cause of action on breach of confidence, Lord Hoffmann suggested that the second development has been the result of the introduction of the Article 8 of the ECHR in the United Kingdom by virtue of the HRA 1998.[155] His lordship suggested that as the result of these developments, there has been a shift in the centre of gravity of the action for breach of confidence. Thus, '[i]nstead of the cause of action being based upon the duty of good faith applicable to confidential information and trade secrets alike, it focuses upon the protection of human autonomy and dignity – the right to control the dissemination of information about one's private life and the right to the esteem and respect of other people.'[156]

Likewise the Baroness Hale of Richmond in her judgment also concentrates on the scope of the action for breach of confidence while accommodating the Article 8 rights of individuals;[157] while quite interestingly she applied the 'reasonable expectation of privacy' test in her judgment.[158] Both Lord Hoffmann and the Baroness Hale of Richmond insisted that Article 8 does not create any new cause of action between private persons and thus to require the public authority to act compatibly such a claim must be substantiated by relevant cause of action,[159] 'the relevant vehicle will usually be the action for breach of confidence.'[160]

As with the other judges, both of them found drug dependency is a private matter that is for the subject to decide whether to have the matter published or otherwise.[161] Despite similarities in their approach, Lord Hoffmann reached the conclusion which differed from that of the Baroness Hale of Richmond. He viewed that since the plaintiff has chosen to make what otherwise her private matter public by making false claim about her drug dependency, she is deprived from what is otherwise a matter of her privacy.[162] On the other hand, weighing Naomi's right to confidentiality against the press' claim for freedom of expression coupled with the public interest to know, Baroness Hale of Richmond found for the former. Such a conclusion, however, was also motivated and influenced by the public interest consideration because to sanction the publication of information of such a nature would discourage other/s from attending the program as an alternative method of seeking the assistance to get over the drugs problems.[163]

All in all it becomes apparent that the concept of the principle of confidence that was once based on the existence of the confidentiality relationship, hence the name, has been extended to the degree that such kind of relationship is no longer required for as long as the defendant ought to have reasonably noticed that the information is of confidential nature. Albeit the absence of non-binding effect, for this view was expressed by merely two judges one of whose view constitutes the minority view, the local introduction of the ECHR expands the principle of confidence and allows it to encroach on what otherwise is the subject matter within the notion of privacy. The House of Lords' decision in *Campbell* has been considered as the modern starting point in a claim in confidence;[164] though such assumption might not be accurate as the other three judges based their decision mainly within the context of the Article 8 right, the right to privacy,[165] despite the fact that the claimant has brought the complain on the basis of breach of confidence and not for intrusion of privacy.

It is yet to be tested if such development to the principle of confidence is applicable in Malaysia. The common attitude of the courts in Malaysia is to examine if all the three elements as in *Coco* v. *Clark* are satisfied and since the Civil Law Act makes the older cases binding but not the more recent cases, it is very likely that in

Malaysia, all the three requirements are still required,[166] with some reservation with regard to the third element.[167] In *Electro Cad Australia Pty Ltd & Ors* v. *Mejati RCS Sdn Bhd* Kamalanathan Ratnam J accepted that an agreement for confidentiality is not the pre-requisite for the cause of action but it is necessary that the defendant owes 'an equitable obligation' to the plaintiff. In *The Attorney General of Hong Kong* albeit obiter, Gopal Sri Ram JCA, while referring to *Coco*, expresses that 'the doctrine protects the use or publications of one's personal or trade secrets obtained in consequence of a confidential relationship whether arising from or independent of contract.' However it is interesting to note that his lordship also stated that 'the doctrine extends even to strangers who come upon such confidential information' while quoting Clauson J's judgment in *Rex Co.* v. *Muirhead*[168] to support such proposition. That obiter dictum seems to suggest that in Malaysia, the law on this aspect is similar to its English's counterpart. However in the most recent Malaysian case where principle of confidence was argued *Ultra Dimension*, the High Court judge emphasised on the importance of having prior relationship between the plaintiff and the defendant.[169] She even went to the extent that because the picture which was the subject of complaint was shot and produced by the defendant, such picture could not constitute confidential information.[170] In effects, while the principle of confidence has been developed in England from the basis of contractual relationship to one based on confidence with or without the existence of any contract for that purpose until finally it is suggested that such prior relationship is no longer seen as necessary; it is safe to say that in Malaysia such a matter remains an issue which is yet to be settled. The assumption stands that the courts in Malaysia will first analyse if the elements for the cause of action as enunciated in *Saltman* and summarised in *Coco* are fulfilled before it will find if there is a breach of confidence.

4.4 Conclusion

It has been argued that the idea of confidential information is no more than the extension of the application of common law principle of property.[171] Earlier precedents that often quoted as to found the principle of confidence; cases such as *Gee* v. *Pritchard*,[172] *Prince Albert* v. *Strange*,[173] *Morison* v. *Moat*,[174] to name but a few; have been referred and applied as the support for the proposition.[175] In those

early precedents usually the prohibition against the publication of the information was held on the basis that such information originated from the plaintiff thus warranted for protection regardless the type of medium upon which it has been recorded or reproduced or whether the defendant owned such medium. Those precedents gave an impression as though one's confidential information is equivalent to *that* person's property – though with no physical form.[176] When one exercises his right by imparting this confidential information to others with intention to share the information to that person and no other, the law of confidence dictates that such person should comply with the intention of the information owner. It is inequitable to allow the recipient of such information to breach the confidence moreover to cause any detriment to the person who imparted the information on the belief that such information will be kept confidential. The law on this subject does not depend on any contract. It depends on the broad principle of equity that he who has received information in confidence shall not take unfair advantage of it. He must not make use of it to the prejudice of him who gave it without obtaining his consent.[177]

Traditionally the principle was recognised with the three elements as the basis for the cause of action. During its development process, the principle has evolved in a way that so long as all the three elements exist the duty of confidentiality will arise – regardless of the existence or absence of any other relationship between the parties. However the recent interpretation of the principle has brought its concept beyond its actual context. How could such a principle be given label as the law of confidential information if it is no longer necessary that the information must be confidential and rather it extends to the private information? How could the principle of confidence label remain being used if the existence of the duty of confidentiality has been dispensed with and replaced by the test of reasonable expectation of privacy? If the principle acts on the conscience as opposed to safeguarding the plaintiff's right, how could there be any cause of action if albeit the infringement of the right (i.e., breach of privacy), no loss has been caused to the plaintiff? Would the conscience of the defendant be affected if his action does not cause the plaintiff to suffer any loss recognisable by the law? If the genuine needs for protection of individual's private information or for any aspects of individual's private life has become more intense

than before even in the absence of any prior relationship or any relationship at all between such private individual and the person who intrudes upon the aspect of the former's private life, why do we have to extend the principle which was meant for something else to protect what is genuinely an individual's right under the pretence of such principle while in order to do so we have to dispense with all necessary elements that found the basis of such principle and transform such a principle to something else, something it was not meant to be?

By way of analogy, why has one to go about asking for an entitlement under a trust if he has the right under the law of property? Asking the defendant to stop acting against the principle of good conscience is one thing but making the defendant to rectify his action that infringes the plaintiff's right is quite another. As submitted earlier in Chapter III, the facts of recent cases which have been brought as the claim for breach of confidence did not fall within the actual ambit of the principle of confidence. The courts in England have been willing to relax the principle by having it read within the context of the right safeguarded by Article 8 of the ECHR. Such an approach has turned the principle into something else. Furthermore nothing in the HRA 1998 or the ECHR which requires that the rights duly safeguarded therein to be interpreted within any principle already established in a particular legal system. As such it has been submitted that the courts are to give Article 8 provision the scope it is really intended and cease to require a plaintiff whose privacy has been intruded to bring his claim on the basis of breach of confidence.

In the Malaysian context, despite acknowledged as existing, the principle has not been fully developed within the local context. The three principles summarised in *Coco* have always been deemed to be necessary. That being the case it is very likely that unless the claim also relates to confidential information any claim of privacy intrusion has to be brought under the basic human right notion of privacy arguably within the provision of Article 5(1) of the Federal Constitution. When the intrusion involves interference with an individual's autonomy upon his property, the claim may also be brought for infringement of Article 13(1) right.

Hence this thesis has been submitting that no matter how far the principle of confidence is being relaxed it cannot provide the comprehensive protection required to safeguard individuals' fundamental right to privacy. In the next chapter, the principle of confidence and the notion of privacy will be closely examined within the broad umbrella of human rights.

Endnotes – Chapter IV:

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[1] or even earlier as Henry Maine in Chapter 3 on 'Law of Nature and Equity' and Chapter 4 on 'The Modern History of the Law of Nature' of his book, Ancient Law,' narrated some property related concept as had been the practice and part of the Rome law and even concluded that 'Tradition, therefore, being in all probability the only common ingredient in the modes of conveyance which the jurisconsults had the means of observing, was set down as an institution *Juris Gentium*, or rule of the Law common to all Nations' para 4 of Chapter 3. The discussion on the concept, although within the narrow one, went further in Chapter 4 where he stated, inter alia, at para 15: '... it is astonishing, ... how small a proportion the additions made to international Law since Grotius's day bear to the ingredients which have been simply taken from the most ancient stratum of the Roman Jus Gentium. ..... and the result is that those parts of the international system which refer to dominion, its nature, its limitations, the modes of acquiring and securing it, are pure Roman Property Law -- so much, that is to say, of the Roman Law of Property as the Antonine jurisconsults imagined to exhibit a certain congruity with the natural state.' Maine, Henry Sumner. *Ancient Law: Its Connection With the Early History of Society, and Its Relation to Modern Ideas* (John Murray, London, 1861). Also available on the Internet at: <http://www.yale.edu/lawweb/avalon/econ/maineaco.htm> (last accessed on 26 April 2006). For further analysis on the origins of the Western idea of property see: Nicholas, B., *An Introduction to Roman Law* (Oxford University Press, Oxford, 1962, reprinted 1987), in particular Chapter III of the book. See also: Buckland, W.W., *A Text-Book of Roman Law from Augustus to Justinian*, 3rd ed., rev. by Peter Stein (Cambridge University Press, Cambridge, 1963, reprinted 1975); Pollock, F., and Maitland, F.W., *The History of English Law Before the Time of Edward I*, 2nd ed., 2 vol. (Cambridge University Press, Cambridge, 1898, reissued with a new introduction by S.F.C. Milsom, 1968).

[2] The concept of property in general and idea of ownership are discussed *in Blackstone's Commentaries on the Laws of England Book the Second - Chapter the First : Of Property in General* available at <http://www.yale.edu/lawweb/avalon/blackstone/ bk2ch1.htm>.

[3] Thus able writers will include confidential information as one of the categories of intellectual property right. See among others: Bently, L., and Sherman, B., *Intellectual Property Law*, 2nd ed. (University of Oxford Press, Oxford, 2004), pp. 993-1051; Halstead, R.R., *Protecting Intellectual Property*, 2nd ed. (ICSA Publishing Limited, Hertfordshire, 1996), pp. 58-61; Groves, P.J., *Intellectual Property Rights and Their Valuation* (Gresham Books, Cambridge, 1997), pp. 105-125; See also Bainbridge, D., *Software Copyright Law*, 3rd ed. (Butterworths, Edinburgh, 1997), pp. 31-34.

[4] See: Jalil, J.A., *Confidential Information Law in Malaysia: Cases and Commentaries* (Sweet & Maxwell, Kuala Lumpur, 2003), pp. 65-67. For general discussion on the concept of property, see Friedman, D., *The Machinery of Freedom: Guide to A Radical Capitalism* (Open Court, Illinois, 1989), pp. 1-11.

[5] [1887] L.R. 19 Q.B.D. 629. Affirmed by the court of appeal – *Tuck & Sons* v. *Priester* (1887) 19 Q.B.D. 629.

[6] (1818) 2 Swans. 402.

[7] (1849) 2 De G & Sm 293; 1 Mac & G 25.

[8] (1851) 9 Hare. 241.

[9] For more discussion on the historical counts of the principle, see: Toulson, R.G., and Phipps, C.M., *Confidentiality* (Sweet & Maxwell, London, 1996), pp. 3-18.

[10] (1820) 1 Hall & Twells 25.

[11] That is an issue that has been debated as early as in *Millar* v. *Taylor* (1769) 4 Bur. 2303. For the conflicting views on the matter, see Toulson, R.G., and Phipps, C.M., *Confidentiality*, pp. 20-22 and pp. 26-31; and also Palmer, N., 'Information as Property', in Clarke, L., (Ed.), *Confidentiality and the Law* (Lloyd's of London Press Ltd, London, 1990), at pp. 83-107.

[12] This principle is known as the spring board doctrine.

[13] [1960] R.P.C. 128 at 130.

[14] The judgment has been adopted as correct by Roskill, J. in *Crainleigh Engineering Co.* v. *Bryant and Anor.*, [1965] 1 W.L.R. 1293; [1966] R.P.C. 81 at 96 and quoted by Lord Denning in *Seager* v. *Copydex* [1967] F.S.R. 211 at 220. In *Electro Cad Australia Pty Ltd & 2 Ors* v. *Mejati RCS Sdn Bhd & Ors* [1998] 3 CLJ Supp 196 the high court in Malaysia was invited to consider the application of the spring-board rule which it did yet ruled that due to the facts of the case the principle was not of any assistance.

[15] As William Pit put it: 'the poorest man may in his cottage bid defiance to all the force of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter – but the King of England cannot enter; all his forced dare not cross the threshold of the ruined tenement'. See also the famous pronouncement of Atkin LJ in *Balfour* v. *Balfour*. See infra, notes 33-4 and the main text for those notes at p. 139.

[16] As so held in cases such as: *Seager* v. *Copydex Ltd.* [1967] 1 W.L.R. 923, *Fraser* v. *Evans* [1969] 1 Q.B. 349, *Duchess of Argyll* v. *Duke of Argyll and others* [1967] Ch. 302, *Coco* v. *Clark* and as so acknowledged by Lord Hoffmann in *Campbell* v. *MGN Limited* [2004] UKHL 22. It was so argued by several able writers such as Davis, J, in *Intellectual Property Law*, 2nd ed. (Butterworths, UK, 2003), at p. 319; Thompson, M., 'Breach of Confidence and Privacy', in Clarke, L., (Ed.), *Confidentiality and the Law* (Lloyd's of London Press Ltd, London, 1990), p. 66. In Malaysian context, Gopal Sri Ram JCA in *The Attorney General of Hong Kong* v. *Zauyah Wan Chik & Ors & Another Appeal* [1995] 2 AMR 1955 held that '[t]he duty to keep confidences whether or a personal or commercial nature is essentially part of equity jurisprudence, although more recent authority supports the foundation of the doctrine on the wider concept of public interest'. See also: Jalil, J.A. *Confidential Information Law in Malaysia: Cases and Commentaries* (Malaysia, Sweet & Maxwell, 2003), pp. 67-71. This thesis concurs with the authors in that aspect.

[17] Most notably in situation where no prior confidential relationship exists between the parties such as the facts in *Douglas & Campbell.* For the analysis of the principle and its relation to privacy, see: Warby, M., Bate, S., Busuttil, G., and Speker, A., 'Privacy and Confidentiality' in Tugendhat, M., and Christie, I., *The Law of Privacy and the Media* (Oxford University Press, Oxford, 2004), at pp. 195-270.

[18] Section 3 (1) (a) (b) and (c) respectively.

[19] See among others: *Electro Cad Australia Pty Ltd & Ors* v. *Mejati RCS Sdn Bhd & Ors* [1998] 3 CLJ 196; *The Attorney General of Hong Kong* v. *Zauyah Wan Chik & Ors & Another Appeal* [1995] 3 CLJ 35.

[20] See *Ultra Dimension* as discussed in Chapter II, 2.3.1 at pp 111-117 and 2.3.5 at pp 125-127.

[21] For further discussion on this matter, see Chapter III, 3.3.2(i) at pp. 210-211.

[22] (1948) 65 R.P.C. 203.

[23] [1969] R.P.C. 41.

[24] Sims, A., '"A Shift in The Centre of Gravity": The Dangers of Protecting Privacy Through Breach of Confidence' (2005) Intellectual Property Quarterly, 29-51.

[25] [1969] R.P.C. 41 at p. 47.

[26] (1948) 65 R.P.C. 203.

[27] [1969] R.P.C. 41.

[28] Interestingly, this element has been construed as the want of capability to be protected, see: Bently, L. and Sherman, B., *Intellectual Property Law*, (Oxford University Press, Oxford, 2004), at p. 999.

[29] [1948] R.P.C. 208.

[30] [1977] 1 W.L.R. 760.

[31] [1998] 3 CLJ Supp 196.

[32] *Ibid, per* Kamalanathan Ratman J, at p. 212, para d.

[33] [1919] 2 K.B. 571.

[34] *Ibid* at p. 579.

[35] *Argyll* at p. 330.

[36] *Argyll* at p. 329.

[37] See: *Southern Bank Bhd* v. *Abdul Raof Bin Rakinan & Anor* [2000] 4 MLJ 719 and *Ganesan A/L Singaram* v. *Setiausaha Suruhanjaya Pasukan Polis & Ors* [1998] 1 MLJ 240.

[38] The marital communications privilege originated at common law. It was made formal in the English Evidence Amendment Act of 1853, which said that neither husbands nor wives could be forced to disclose any communication made to the other during the marriage. The adverse effect of the privilege was that at common law, the spouse of a party was not a competent witness. After 1853 this was no longer the case with civil proceedings but remained so in criminal proceedings until 1898 when the spouse became a competent and compellable witness for the defence as a result of s.1 Criminal Evidence Act. But the spouse was still generally not a competent witness for

the prosecution, subject to a range of common law and statutory exceptions. The unsatisfactory state of the law was compounded with decisions such as *Hoskyn* v. *Motropolitan Police Commissioner* [1979] AC 474 in which the House of Lords held that, even where the husband was charged with an offence of violence against her, the wife, while a competent witness against the husband, was still not compellable. Significant changes were brought about by section 80 of the Police and Criminal Evidence Act 1984 – as amended by para 13 Schedule 4 of the Youth Justice and Criminal Evidence Act 1999. Husbands and wives are now like other witnesses, competent for the prosecution in any case and compellable in some. It is necessary to note that 'husband or wife' is narrowly interpreted and limited to those who are *de jure* married to the defendant. In England at this time, the spouse is always competent for the prosecution but has a choice whether to testify or not, unless the offence falls under s. 80(3). For the defence, the spouse is always competent and compellable save for the situation under s. 80(4) where they are jointly charged with the same offence. In such cases the spouse is still competent. For a co-accused The spouse is always competent under s. 80(1)(b) but is only compellable in the circumstances of s. 80(3), even where this is necessary to prove the innocence of an accused. Where the spouse has the choice whether to testify or not, any failure to testify cannot be made the subject of comment by the prosecution under s. 80(8). The Scotland equivalent is provided in section 264 of the Criminal Procedure (Scotland) Act 1995. Similar principle is applicable in Malaysia by virtue of section 122 of the Evidence Act 1950 which reads: 'No person who is or has been married shall be compelled to disclose any communication made to him during marriage by any person to whom he is or has been married; nor shall he be permitted to disclose any such communication unless the person who made it or his representative in interest consents, except in suits between married persons or proceedings in which one married person is prosecuted for any crime committed against the other.'

[39] [1988] Ch. 449 – in this case, Sir Nicholas Browne-Wilkinson V-C made it clear that the implied duty of confidentiality could be extended to other relationships apart from that between husband and wife, though it would not necessarily apply in the same way.

[40] [1988] Ch. 449 at p. 454.

[41] See *Saraswathy Devi Nadchatiram v. Vijayalakshmi Devi Nadchatiram* [1998] 1 CLJ 1035 where the sexual relationship were given as an instance of personal relationship. Further appeal was allowed by the Federal Court (*Vijayalakshmi Devi Nadchatiram* v. *Saraswathy Devi Nadchatiram* [2000] 4 CLJ 870) that applied a broader definition of 'personal relation'.

[42] Section 377A of the Penal Code reads: Any person who has sexual connection with another person by the introduction of the penis into the anus or mouth of the other person is said to commit carnal intercourse against the order of nature. That applies regardless whether the person to whom the conduct is subjected to is a male or a female. See: *Chang Wan Chuan v. PP* [2003] 4 CLJ 647.

[43] Section 377B of the Penal Code reads: '[w]hoever voluntarily commits carnal intercourse against the order of nature shall be punished with imprisonment for a term which may extend to twenty

years, and shall also be liable to whipping.' In *Rex* v. *Captain Douglas Marr* [1946] 1 MLJ 77, the respondent was charged of gross indecency under Section 377A of the Penal Code for the consensual same gender sex he had with a young male prostitute who earlier pleaded guilty to the same charge. See also: *Kesavan Senderan v. PP* [1999] 1 CLJ 343. The same charges were brought against the former deputy prime minister of Malaysia in *PP* v. *Dato' Seri Anwar Ibrahim & Anor* [2001] 3 CLJ 313 whose appeal to the Court of Appeal was dismissed (*Dato' Seri Anwar Ibrahim* v. *PP & Another Appeal* [2003] 4 CLJ 409) but the Federal Court, by majority, allowed the appeal on the basis, *inter alia*, the only witness to the accusation, i.e. the complainant, is not wholly reliable and credible and truthful witness. It was found that some parts of the complainant's evidence were doubtful, inconsistent and even contradicting; thus in the absence of corroborative evidence it was unsafe to convict on his evidence alone since the offence was sexual in nature (*Dato' Seri Anwar Ibrahim* v. *PP & Another Appeal* [2004] 3 CLJ 737, paras 57, 195 and 199).

[44] Section 377C of the Penal Code reads: Whoever voluntarily commits carnal intercourse against the order of nature on another person without the consent, or against the will, of the other person, or by putting the other person in fear of death or hurt to the person or any other person, shall be punished with imprisonment for a term of not less than five years and not more than twenty years, and shall also be liable to whipping. See: *Chang Wan Chuan v. PP* [2003] 4 CLJ 647.

[45] *N v. C* [1997] 4 CLJ Supp 258.

[46] *Lim Hui Lian* v. *C M Huddlestan* [1977] 1 LNS 63.

[47] It is, however, being criminalised upon Muslim women. See: section 26 of the Syariah Criminal Offences (Federal Territories) Act 1997.

[48] See: *Tengku Abdullah Ibni Sultan Abu Bakar & Ors* v. *Mohd Latiff Bin Shah Mohd & Ors And Other Appeals* [1996] 2 MLJ 265, p. 309-310.

[49] *per* Gopal Sri Ram JCA delivering the judgment of the Court of Appeal, *Ibid.*, p. 310.

[50] *per* Megarry J in *Coco.*

[51] *per* Lord Denning M.R. in *Woodward* v. *Hutchins* [1977] 1 W.L.R. 760 at 764D.

[52] *per* Lord Greene, M.R in *Saltman Engineering Co., Ltd. and Others* v. *Campbell Engineering Co., Ltd.* [1963] 3 All ER 413, 65 RPC 203 at 215. See also: *Seager* v. *Copydex Ltd.* [1967] 1 W.L.R. 923 at 931G *per* Lord Denning M.R.

[53] *per* Scott J in *Attorney General* v. *Guardian Newspaper* [1990] 1 AC 109 at p. 150.

[54] *per* Lord Greene, M.R. in *Saltman.*

[55] See *Coco*, cross referenced: *Mills* v. *News Group Newspapers* [2001] EMLR 957 where the court afforded protection over the address of Heather Mills despite the relatively trivial character of the information. In *Stephens*, Sir Nicolas Browne-Wilkinson V.C. observed that: '[s]ince the Coco case was exlcusively concerned with information which was of industrial value, those remarks were plainly obiter dicta. ... Again, although it is true that the passage I have quoted occurs in that part of the judgment which deals with the nature of information which can be protected, it is to be

noted that the judge appeared to be considering when equity would give a remedy, not dealing with the fundamental nature of the legal right. If, as I think he was, Megarry J. was saying that the discretion to grant an injunction or to award damages would not be exercised in a case which was merely trivial, I agree." (*sic.*) It shall also be noted that the triviality of the matter will not be applied on government information as it is impossible for the court to determine whether such information is important or not (*Attorney General* v. *Guardian Newspapers* [1990] AC 109 per Lord Griffiths at p. 269).

[56] See *McNicol* v. *Sportman's BookStores* 1930 [1928–1935] MacG Cop Cas 116 where the court has refused to afford protection upon a betting system based on the age of the moon.

[57] See for examples: *De Maudsley* v. *Palumbo* [1996] FSR 477; *Secton Pty* v. *Delawood Pty* (1991) 21 IPR 136; *Intelsec Systems* v. *Grechi-Cini* [1999] 4 All ER 11.

[58] Sir Nicolas Browne-Wilkinson VC in *Stephens* [1988] Ch. 449 at 454 expressed this: 'Information only ceases to be capable of protection as confidential when it is in fact known to a substantial number of people.'

[59] Recently the pronouncement to that effect was made by Blackburne J in *HRH The Prince of Wales* v. *Associated Newspapers Ltd* [2006] EWHC 522, where at para 74 he held that '[a]s to the number of people to whom journals were circulated, the point is only relevant if it can be said that the distribution of the journals was so widespread that it could not be supposed that there was any expectation that their contents would be kept confidential...'

[60] [1988] 2 WLR 805.

[61] *Ibid* at 868.

[62] [1989] FSR 169.

[63] In *Attorney General* v. *Guardian Newspaper* [1987] 1 WLR 1248 Browne Wilkinson VC at p. 1269 stated that '[t]he truth of the matter is that in the contemporary world of electronics and jumbo jets news anywhere is news everywhere'.

[64] *Ultra Dimension*, at p. 292 f.

[65] *Ultra Dimension*, at p. at 295 c.

[66] See: in Malaysian context, see: *Electro Cad Australia Pty Ltd & 2 Ors* v. *Mejati RCS Sdn Bhd & Ors* [1998] 3 CLJ Supp 196, at p. 212, paras d-e. See also: Jalil, J.A., *Confidential Information Law in Malaysia* (Malaysia: Sweet & Maxwell Asia, 2003), p. 1.

[67] *Argyll v. Argyll* [1967] Ch 302 (marital information); *Duke of Argyll v. Duchess of Argyll & Anor* (1962) SLT 333; *Michael Barrymore* v. *News Group News paper Ltd* [1997] FSR 600 (details of sexual relationship).

[68] *Robb* v. *Green* [1895] 2 QB 1; *Amber Size & Chemical Co* v. *Menzel* [1913] 2 CH 239; *Littlewoods Organisation Ltd* v. *Harris* [1978] 1 All ER 1026.

[69] See the judgments in *Attorney General* v. *Jonathan Cape & Ors* [1976] 1 QB 752 and *Attorney General* v. *Guardian Newspaper [No. 2]*[1990] 2 AC 109. Nevertheless the applications for injunction were refused in both cases on the ground that the information contained in the diary of a

deceased member of parliament had occurred ten years before the cause of action arose in the former and the information has been in public domain and all over the world even before the injunction was applied for in the latter.

[70] *Gilbert* v. *Star Newspaper Co (Ltd)* (1894) 11 TLR 4 (literary confidence); *Floydd v. Cheney* [1970] 1 All ER 446 (artistic confidence).

[71] See for examples *Robb* v. *Green* [1895] 2 QB 1; *Amber Size & Chemical Co* v. *Menzel* [1913] 2 Ch 239; *Faccenda Chicken Ltd* v. *Fowler* [1985] 1 All ER 724; and *Lansing Linde Ltd* v. *Kerr* [1991] 1 WLR 251. In fact it has been stated that most of the cases in which the court have laid down the principles of the equitable duty of confidence concern trade secrets and industrial designs, see: Garnett, K., Davies, G., and Harbottle, G., (eds.), *Copinger and Skone James* on *Copyright* (Sweet & Maxwell, United Kingdom, 1998) at para 20-08.For general observation as to how TRIPs will affect the protection of trade secret, see: Maskus, K.E., *Intellectual Property Rights in the Global Economy* (Institute for International Economics, Washington DC, 2000), pp. 22-23 and pp 64-65.

[72] [2004] UKHL 22 at para 45.

[73] [1973] AC 388. In this case, confidentiality was upheld upon the contents of a police's letter sent to the Gaming Board reporting unfavourably about Mr. Rogers, the person who instituted the criminal proceedings for criminal libel.

[74] [1978] AC 171. In this case, the House of Lords held that NSPCC does not need to disclose the name of the informant.

[75] [1979] 1 QB 144, [1980] AC 1028. In these cases the courts upheld the confidentiality of reports pertaining the interview selection in the former and the transfer application in the latter.

[76] [1979] 1 WLR 473, [1980] AC 1090.

[77] [1981] 1 WLR 537. In this case the plaintiff's solicitor demanded to see all the statements made to the Complaints Board which the Court of Appeal refused to allow.

[78] [1988] 2 W.L.R. 805.

[79] *Ibid* at 868. It shall be noted however in this case it was held that the information in issue has previously only been disclosed to a limited part of that public to the degree that it has not be 'made' public.

[80] *Ibid* at 903.

[81] A remedy to this effect was sought for by Prince Charles with regard to his Hong Kong journal. See: *HRH Prince of Wales* v. *Associated Newspapers Ltd* [2006] E.C.D.R. 20.

[82] The proposition to similar effect was made by Parent, W.A. who argues that privacy is to 'be defined as the condition of not having undocumented personal information about oneself known by others ..... personal facts belonging to the public record as documented', Parent. W.A., 'A New Definition of Privacy for the Law', (1983) 2 Law and Philosophy, 305-338 at 306 and 308. See also Restatement of Torts (Second), Tentative Draft No. 13,, section 652D, comment C, at 114; Prosser's Handbook on the Law of Torts, 4th ed., 1971, section 116 at 810-811; and *Cox*

Broadcasting Corp. v. *Cohn* (1975) 420 U.S. 469 at para 19. While this study affirmed such contention with regard the people whose personal details are documented in public records and consequently those people would have lost their privacy in that aspect, the same cannot be said with regard to their family or relatives whose personal information are not so documented in the public records.

[83] [2003] 3 WLR 1425.

[84] Prior to that an order was made in the criminal proceedings against the mother under s 39 [a] (Section 39, so far as material, is set out at [21], below) of the Children and Young Persons Act 1933, prohibiting the publication of information calculated to lead to the identification of the child. That order was discharged on the application of a newspaper, on the ground that s 39 of the 1933 Act was inapplicable to the case because the child was not 'a child concerned in the proceedings, either as being the person by or against or in respect of whom the proceedings were taken, or as being a witness therein.

[85] See [2003] 3 WLR 1425 at para 40 of Hale LJ and paras 75 and 77 of Latham LJ. In fact, Hale LJ at para 60 did indicate that her ladyship was of the opinion that appeal should be allowed for the failure of the judge to consider article 8 and article 10 independently and consequently he failed to conduct the balancing exercise between the press freedom and the right of the boy. Although Lord Phillips of Worth Matravers MR and Latham LJ agreed with Hale LJ's analysis of the law, their lordship considered that Hedley J was entitled to reach the conclusion he did in this case and that his decision should not be disturbed. That finding was affirmed by the House of Lords. See: *Re S (a child) (identification: restriction on publication)* [2004] UKHL 47, [2004] 4 All ER 683.

[86] Hedley LJ as cited by Lord Phillips of Worth Matravers MR in *Re S* [2003] 3 WLR 1425 at para 111. See also: para 77 of Latham LJ. Lord Steyn in *Re S (FC) (A Child) (Appellant)* [2004] UKHL 47 at part XI para 32-6 outlines in details the consequences of the grant of the proposed injunctions which justify his refusal to allow the appeal.

[87] Thomson, J. 'The Right to Privacy', *Philosophy & Public Affairs*, 4 (1975), 295 at p. 307.

[88] *Stephens* at p. 456.

[89] *per* Lord Denning MR in *Seager* v. *Copydex Ltd.* [1967] 1 W.L.R. 923, at p. 931.

[90] *per* Lord Denning MR in *Fraser* v. *Evans* [1969] 1 Q.B. 349, at p. 361.

[91] *Attorney-General* v. *Guardian Newspapers Ltd (No. 2)* [1990] 1 AC 109, at p. 94.

[92] [1967] Ch. 302.

[93] *Ibid*, at p. 322.

[94] The same applies in Malaysia. In *Electro Cad Australia Pty Ltd & 2 Ors* v. *Mejati RCS Sdn Bhd & Ors* [1998] 3 CLJ Supp 196 at p. 212a, RK Nathan J expressed the view that even in the absence of agreement, the disclosed facts showed that there was equitable obligation owed with regard the confidential information.

[95] *Coco*, at p. 420. It has been said that the most common application of the objective test is be found in what is known as limited purpose test. By virtue of this test, the court will see, in determining

the existence of duty of confidentiality, whether or not the information has been given for certain limited purpose. In *Saltman*, for instance, the plaintiffs gave the information for the defendants to manufacture some tools for the plaintiffs and thus the information should be used solely for that purpose and the defendants were under the duty of confidentiality within that context. Similarly in *Ackroyds (London)* v. *Islington Plastics Ltd* [1962] R.P.C. 97 the information and equipment were provided to the defendants to manufacture some sticks for the plaintiffs and thus, there was the duty of confidentiality upon the defendants within that context and the defendants breached that duty of confidentiality by making their own sticks that were supplied to the plaintiff's customers, as it was so held. In *CarflowProducts (UK) Ltd* v. *Linwood Securities (Birmingham) Ltd* [1996] FSR 424. Jacob J suggested that although the objective test would have led to the same result as the subjective test that his lordship has applied in that case, the objective test might be more appropriate for finding a contractual obligation of confidence or where the information was given for limited purpose but not when the issue related to equitable obligation of confidence, as that was the case. That was so because equity looks at the conscience of the individual. However in the later case of *Mars UK Ltd* v *Teknowledge Ltd* [2000] FSR 138 Jacob J had 'returned' to the objective test. For further discussion on the matter, see: Davis, J., Intellectual Property Law, 2nd ed, at pp. 331-3.

[96] See also the discussion in 4.3.

[97] *Abernethy* v. *Hutchinson* (1824) 3 L.J.Ch. 209; *Prince Albert* v. *Strange* (1848) 1 Mac & G. 25; *Lord Ashburton* v. *Pape* [1913] 2 Ch 469. See also Toulson, R.G., and Phipps, C.M., *Confidentiality* (Sweet & Maxwell, London, 1996), at p. 92 and Clarke, L., *Confidentiality and the Law* (Lloyd's of London Press Ltd, London, 1990), at p. 71.

[98] *per* Lord Denning in *Schering Chemicals Ltd* v. *Falkman Ltd* [1981] 2 All ER 321.

[99] *Campbell* at para 44.

[100] *per* Hirst J in *Fraser & Others* v. *Thames Television Ltd and Others* [1984] 1 QB 44 .

[101] *English & American* v. *Herbert Smith* [1988] FSR 232.

[102] See *Prince Albert* v. *Strange* (1850) 1 MacN and G 25 and *Printers & Finishers Ltd* v. *Holloway & Ors* [1965] RPC 239. In *Malone* Sir Robert Megarry elaborated that: 'if *A* makes a confidential communication to *B*, then *A* may not only restrain *B* from divulging or using the confidence, but also may restrain *C* from divulging or using it if *C* has acquired it from *B*, even if he acquired it without notice of impropriety'. See also: *Valeo Vision Société Anonyme* v. *Flexible Lamps* [1995] RPC 205.

[103] Analogously a stranger does not owe any duty of confidence for nothing has been imparted to him in circumstances imparting such a duty, thus in *Malone* for example, the police was not held to owe any duty of confidence towards the plaintiff and thus was not held liable for having tapped the plaintiff's telephone line. However in *Francome* v. *Mirror Group Newspapers* [1984] 1 WLR 892 Court of Appeal awarded an interim injunction to prevent the disclosure of telephone conversation that was illegally tapped by a private investigator as it was satisfied that the

circumstances of the case gave rise to a serious question to be tried. The facts were distinguished from those in *Malone* where the tapping was authorized whereas in *Francome* the issue arose from illegal tapping by private persons.

[104] 'It is a general rule of law that a third party who comes into possession of confidential information which he knows to be such, may come under a duty not to pass it on to anyone else.' *per* Lord Keith in *Spycacther* [1990] 1. A.C. 109, p. 261. Similarly Lord Woolf in *A* v. *B* [2003] QB 195, p. 207 said that a duty of confidence will arise 'whenever the party subject to the duty is in a situation where he either knows or ought to know that the person can reasonably expect his privacy to be protected. This could be express or inferred. It can arise where there is intrusion, bugging of the use of surveillance techniques'. See also: *Hellewell* v. *Chief Constable of Derbyshire* [1995] 1 WLR 804.

[105] *per* Lord Goff in *Spycacther* [1990] 1. A.C. 109, pp. 281-2 (emphasis added).

[106] *Beckham* v. *MGN*, 28 June 2001, Eady J (unreported); *Jaqueline A* v. *The London Borough of Newham* (2001) WL 1612596; *Venables*; *Douglas*; *Campbell.*

[107] Although not exactly within the context, in *Spring* v. *Guardian Assurance Plc. And others* [1995] 2 A.C. 296 the majority decisions of the House of Lords found that an employer who gave a reference in respect of a former employee owed that employee a duty to take reasonable care in its preparation and would be liable to him in negligence if he failed to do so. By way of analogy, a hotel guess owes the duty of care so as not to infringe the right of others during his stay in the hotel. By negligently entering a suite that was not hired by a person and failed to leave as soon as the person realises the mistake, such a person has infringed the right of the hotel guess who has hired the room in issue.

[108] In interpreting the judgment of Sedley L.J. in Campbell, Lord Hoffman said that: '...the common law of breach of confidence has reached the point at which a confidential relationship has become unnecessary', *Wainwright* at para 29.

[109] *Venables* v. *News Group Newspapers* [2001] 2 WLR 1038, pp. 1064-5 where Butler-Sloss P said at paras 80 that 'the duty of confidence may arise in equity independently of a transaction or relationship between the parties.'

[110] *Mills* v. *MGN* [2001] EWHC Ch 412 where it is stated at para 26 that 'it is no longer a necessary element of the cause of the action that the information arises from a confidential relationship.'

[111] The stranger in the given scenario has neither conducted himself in any manner which is illegal, not has he any knowledge if the information was confidential. That shall be distinguished from the facts in *Shelley Films* v. *Rex Features* [1994] EMLR 134 as the photograph was taken by a photographer who – on the facts of the case – ought to have knowledge that the claimant considered the images to be confidential.

[112] *per* Lord Goff of Chieveley in *Spycacther* case: *Attorney-General* v. *Guardian Newspapers Ltd (No. 2)* [1990], at pp. 281-282 (emphasis added).

[113] *Ibid*, at p. 281.

[114] *Campbell* v. *MGN Limited* [2004] UKHL 22 at para 14.

[115] [1990] 1 A.C. 109 at pp. 255-256. See similar reservation on the matter by Lord Goff at p. 281-282. However, Lord Griffiths considered detriment or possible detriment as an essential element for the cause of action, see p. 270.

[116] [1969] R.P.C. 41 at p. 48.

[117] Such as *Lion Laboratories* v. *Evans* [1984] 2 All ER; *Schering Chemicals Ltd* v. *Falkman Ltd* [1981] 2 All ER 321; and *British Steel Corporation* v. *Granada Television Ltd* [1981] 1 All ER 417.

[118] See among others: Thompson, M., 'Breach of Confidence and Privacy', in Clarke, L., (Ed.), *Confidentiality and the Law,* at pp. 67 and 68-74; and R.G. Toulson & C.M. Phipps, *Confidentiality*, pp. 38 and 39-55.

[119] (1887) 19 QBD 629.

[120] *Ibid*, at p. 638.

[121] (1887) QBD 629 at pp. 638-639.

[122] (1948) 65 RPC 203.

[123] The same principle will be applicable in Malaysia by virtue of section 3 of the Civil Law Act 1956.

[124] In *O'Neill* v. *Department of Health And Social Services (No 2)*, [1986] NI 290, Carswell J, while dealing with the issue if there is a common law tort of breach of confidence giving rise to a claim for damages, expressed that: 'Our law has until now developed no such specific tort, although it has given remedies to persons affected in various way by breaches of confidence, and it may be argued that a claim for damages in tort for breach of confidence should in some circumstances be recognised. If it is established that there is such a tort, and the defendant has committed a tortious breach of duty, then the plaintiff might have a cause of action for the distress caused to her, even in the absence of financial loss or nervous shock amounting to a positive psychiatric illness.'

[125] At initial stage, Mrs Douglas claimed to have suffered serious distress from the defendants' conduct. That however was not insisted upon in the later stages of the litigation, nor the judges hearing the claims and appeals discussed it.

[126] This was among the reason for Lord Nicholls of Birkenhead's and Lord Hoffmann's refusal to allow her appeal. See *Campbell* at paras 22-7, 60 respectively.

[127] *Attorney-General* v. *Observer Ltd. and Others* [1990] 1 A.C. 109 at pp. 281-2.

[128] *Ibid* at p. 280.

[129] See for examples: *Terrapin, Ltd.* v. *Builders' Supply Co. (Hayes), Ltd., Taylor Woodrow, Ltd. & Seiftplan, Ltd.* [1960] R.P.C. 130; *Saltman Engineering Co., Ltd.* v. *Campbell Engineering Co., Ltd.* [1963] 3 All ER 414; *Seager* v. *Copydex, Ltd.* [1967] 2 All ER 415; *Coco* v. *A.N. Clark (Engineers) Ltd.* [1969] RPC 41.

[130] (1849) 2 De G & Sm 293; 1 Mac & G 25.

[131] *Ibid* at p. 25.

[132] See earlier discussion Chapter IV, 4.2.2 and cases cited herein.

[133] This point has been discussed in more detail earlier at Chapter IV, 4.2.2.

[134] [2003] QB 195.

[135] *Ibid*, at p. 207.

[136] *Ibid* at p. 418 para 57.

[137] *Ibid* at p. 418, para 60.

[138] *Ibid* at p. 419, para 61.

[139] *Ibid* at p. 419, para 62.

[140] *Ibid* at p. 419, para 64.

[141] *Ibid* at p. 419, para 63.

[142] The Syariah Criminal Offences (Federal Territories) Act 1997 provides that the following conducts are criminal offences, punishable with the terms set out in the respective provisions: section 20, incest; section 21, any one who becomes prostitute or makes his wife or daughter as prostitute; section 22, anyone who acts as 'muncikari' (the person who accommodates the practise of prostitution); section 23, any sexual intercourse out of wedlock (including the presumption of such conduct with regard to a non-married woman who becomes pregnant or a married woman who gave birth within a period less than 6 full qamariah months); section 24, an act preparatory to sexual intercourse out of wedlock; section 25, liwat (anal intercourse); section 26, musahaqah – sexual activity of lesbian nature – note however, sections 25 and 26 are gender specific and thus, it is arguable that the provisions do not cover similar conduct being affected by people of different gender, e.g., anal intercourse by a man affected on a woman. The Statue goes on further by criminalises 'khalwat', i.e.., when any man or woman is found together with one or more of the opposite gender in in any secluded place or in a house or room under circumstances which may give rise to suspicion that they were engaged in immoral acts (section 27) as much as it provides penalty and/or term of imprisonment for any male wears a woman's attire and poses as a woman for immoral purposes (section 28) and not less, section 29 provides that any person who, contrary to Islamic Law, acts or behaves in an indecent manner in any public place shall be guilty of an offence and shall on conviction be liable to a fine not exceeding one thousand ringgit or to imprisonment for a term not exceeding six months or to both. For offences for which sexual activities would have taken place such as those provided in sections 20-23 and 25-6, in addition to fine and imprisonment, whipping is made one of the possible penalties for such offences. This being so, it is very unlikely for any Muslim to claim any right to confidentiality for any matters relate to indecency for that would be construed as a confession that may be used against him.

[143] Extra-martial relationship by a non-Muslim is a civil wrong that will entitle the non-adulterous to file petition for divorce (see sections 53 read together with section 54(1)(a) of the Law Reform (Marriage & Divorce) Act 1976 and make the adulterous spouse's partner in adultery liable in damages to the non-adulterous spouse. See sections 58 and 59 of the Law Reform (Marriage and Divorce) Act 1976.

[144] *Campbell* at para 13.

[145] *Campbell* at para 44.

[146] [1990] 1 AC 109 at 281.

[147] *Earl Spencer* v. *The United Kingdom* (1998) 25 EHRR CD 105 and subsequently applied by the Court of Appeal in *A* v. *B Plc and Another* [2003] QB 195 at 207. In *Hosking* v. *Runting* [2003] 3 NZLR 385, at p 403 para 83, Randerson J summed up that: '[The English Courts] have chosen to develop the claim for breach of confidence on a case by case basis. In doing so, it has been recognized that no pre-existing relationship is required in order to establish a cause of action and that an obligation of confidence may arise from the nature of the material of may be inferred from the circumstances in which it has been obtained.'

[148] [2004] UKHL 22.

[149] See for examples the indication in the Lord Nicholls of Birkenhead at para 24; the judgment of Lord Hoffmann at para 53.

[150] See *Campbell*, see para 20-35.

[151] *per* Lord Hope of Craighead in *Campbell* at para 92.

[152] *Ibid*, para 96.

[153] See *Ibid*, para 125.

[154] *per* Lord Carswell in Campbell at para 169.

[155] See *Campbell* para 46-49.

[156] Per Lord Hoffmann, *Campbell* at para 51.

[157] The Baroness Hale of Richmond, Campbell, at para 134. see also Ibid at paras 132-3.

[158] *Ibid* at paras 135, 137.

[159] *per* Lord Hoffmann, *Campbell*, at paras 49-50 and the Baroness Hale of Richmond, *Campbell*, at para 132.

[160] The Baroness Hale of Richmond, Campbell, at para 132.

[161] Campbell, per Lord Hoffmann, at para 53; and per the Baroness Hale of Richmond, at para 145

[162] Lord Hoffmann, *Campbell*, see paras 66-71. See also paras 53-5.

[163] *per* the Baroness Hale of Richmond, *Campbell*, at para 157. See also: para 158. The concern to that effect was expressed by Lord Carswell, commenting on the publication of the details of Naomi's course of treatment at Narcotics Anonymous, stated that: '...it tended to deter her from continuing the treatment which was in her interest and also to inhibit other persons attending the course from staying with it, when they might be concerned that their participation might become public knowledge.' See *Campbell* at para 165. At para 169, his lordship further noted that: '[i]t seems to me clear, however, that the publication of the article did create a risk of causing a significant setback to her recovery.'

[164] See the judgment of Blackburne J in *HRH The Prince of Wales* v. *Associated Newspapers Ltd* [2006] EWHC 522 at para 85.

[165] the three judges do consider the right as privacy while making reference to article 8(1) of the ECHR: see Lord Nicholls of Birkenhead's judgment at para 15; Lord of Craighead at para 99, paras 103-11 and para 120; and Lord Carswell at para 171.

[166] *Schmidt Sdn Bhd* v. *Ong Han Suan & Ors* [1998] 1 CLJ 685. See also: *Electro Cad Australia Pty Ltd & Ors* v. *Mejati RCS Sdn Bhd & Ors* [1998] 3 CLJ 196; *The Attorney General of Hong Kong* v. *Zauyah Wan Chik & Ors & Another Appeal* [1995] 3 CLJ 35.

[167] See Jalil, J.A., *Confidential Information Law in Malaysia,* at p. 96.

[168] [1926] 136 LT 568 at p. 573.

[169] *Ultra Dimension Sdn Bhd* v. *Kook Wei Kuan* [2004]5 CLJ 285 at p. 295.

[170] *Ibid* at p. 292, para e.

[171] See: Jalil, J.A., *Confidential Information Law in Malaysia: Cases and Commentaries* (Malaysia, Sweet & Maxwell, 2003), pp. 65-67. For general discussion on the concept of property, see Friedman, D., *The Machinery of Freedom: Guide to A Radical Capitalism* (Open Court, Illinois, 1989), at pp. 1-11.

[172] (1818) 2 Swans. 402.

[173] (1849) 2 De G & Sm 293; 1 Mac & G 25.

[174] (1851) 9 Hare. 241.

[175] For more discussion on the historical counts of the principle, see: Toulson, R.G., and Phipps, C.M., *Confidentiality* (Sweet & Maxwell, London, 1996), at pp. 3-18.

[176] That is an issue that has been debated as early as in *Millar* v. *Taylor* (1769) 4 Bur. 2303. For the conflicting views on the matter, see Toulson, R.G., and Phipps, C.M., *Confidentiality*, pp. 20-22 and pp. 26-31; and also Palmer, N., 'Information as Property', in Clarke, L., (Ed.), *Confidentiality and the Law* (Lloyd's of London Press Ltd, London, 1990) , at pp. 83-107.

[177] *per* Lord Denning in *Seager* v. *Copydex* at p. 220.

CHAPTER V

PRIVACY, CONFIDENTIALITY AND HUMAN RIGHTS

Chapter Outline

Word Count (excluding endnotes): 8,816 Words

O ye who believe! Let not some men among you laugh at others:
It may be that the (latter) are better than the (former):
Nor let some women laugh at others:
It may be that the (latter are better than the (former):
Nor defame nor be sarcastic to each other,
nor call each other by (offensive) nicknames:
Ill-seeming is a name connoting wickedness,
(to be used of one) after he has believed:
And those who do not desist are (indeed) doing wrong.

O ye who believe! Avoid suspicion as much (as possible):
for suspicion in some cases is a sin:
And spy not on each other behind their backs.
Would any of you like to eat the flesh of his dead brother?
Nay, ye would abhor it.
But fear Allah:
For Allah is Oft-Returning, Most Merciful.
(49:11-12)

"He does not believe
whose neighbours are not safe
from his injurious conduct."
(Mohammed PBUH)

5.1 Introduction

This chapter is dedicated exclusively to have the bigger picture that critically compares and examines the two concepts, the law of confidence and privacy. Earlier in chapter IV I have examined the common law principle of confidence. The emphasis in that chapter was to evaluate the elements for the cause of action and, during that process, to test those elements against the notion of privacy. In this chapter I go beyond that. It has been reiterated that the law of confidence will not exhaustively cater for the needs of privacy and it is not meant to be its substitute either. After submitting it is unacceptable to impose the requirements that otherwise applied for the former in order to protect the latter; I proceed here with examining the principle of confidence in its broadest scope by applying the most flexible interpretation of the principle up to the most allowable extent. Even so, the principle cannot provide the comprehensive protection that the notion of privacy has to offer. At the later part of this Chapter, the discussion goes deeper so as to unveil that the difference between the two goes to the very root of and basis for the respective principles. The duty of confidentiality arises on and rested upon the conscience of the person receiving or unto whose hand the confidential information has come. The right to privacy, on the other hand, is individuals' right that exists independent of any duty being created upon others. Privacy is a fundamental human right which naturally comes with human's very nature as a person who lives.

5.2 Privacy and Law of Confidence Compared

Having discussed the notion of privacy in Chapter III and the law of confidentiality in Chapter IV, it becomes paramount that we have a look at the two concepts within their respective general context to fully comprehend the very nature of both doctrines. In any discussion covering either of the two, the earliest precedent cited to support the respective doctrine is the *Prince Albert* case where reference has been made to even earlier case of *Wyatt* v. *Wilson*. In order to expel the possible inclination towards either of the two concepts, let's focus on the examination of the cases without attributing any label to any case at this stage. In *Prince Albert* v. *Strange*[1] Queen Victoria and the plaintiff had made drawings and etchings of their

children and other subjects of interest to the family. Impressions of them had come into the hands of the defendants who proposed to exhibit and publish copies of them and make and publish a catalogue of them. The plaintiff successfully applied to the court for an injunction to restrain the defendants from doing so. Lord Cottenham L.C., referring to the case *Wyatt* v. *Wilson*[2] said: '[i]n that case, as in this case, the matter or thing of which the party had obtained knowledge being the exclusive property of the owner, he has a right to the interposition of this court to prevent any use being made of it; that is to say, *he is entitled to be protected in the exclusive use and enjoyment of that which is exclusively his own.*'[3] [emphasis added] Still referring to the case of *Wyatt* v. *Wilson*, the Lord Chancellor continued:

> This was the opinion of Lord Eldon, expressed in the case of Wyatt v. Wilson, in the year 1820, respecting an engraving of George III, during his illness; in which, according to a note with which I have been furnished by Mr. Cooper, he said, 'If one of the late King's physicians had kept a diary of what he had heard and seen, this court would not in the King's lifetime, have permitted him to print or publish it.'

That was subsequently interpreted by Ungoed-Thomas J in *Argyll* in this sense:

> The diary there was the physician's and the only thing which in any sense as the property of the King was the information it contained and to which the physician was given the access. If such information can be regarded as within the protection afforded to property then similar confidential information communicated by a wife to her husband could also be regarded.[4]

Such an interpretation may provide the support for the argument that the basis for the duty that restrains the defendant from disclosing the information against the will of the plaintiff – whatever label should be attached to such a right – was originally founded on the extension of the law of property – i.e., the person who recorded that which otherwise owned by [read: originates from] the plaintiff is not allowed to use the same in any manner that may prejudice the plaintiff or contrary to the plaintiff's wish. To say so will require a very loose interpretation of doctrine of property. While making an analogy to the statement of Lord Eldon that prohibits the printing or

publication of the diary of the king's physician, Lord Cottenham L.C. would not have in mind the doctrine of property in its strict sense. The diary would belong to the physician. Anything he might have written therein would represent nothing more than the expression he might have on any subject matter including that which might relate to the King. Even in *Prince Albert* the defendant was restrained from exhibiting and publishing the copies of impression of the plaintiff's drawings and etchings and making and publishing a catalogue of them; the defendant was restrained to exhibit and publish which in legal sense were his own property and not those that belonged to the plaintiff. Although Lord Cottenham L.C. used the term 'his'; the use of such a term could not have been meant merely to refer to a tangible property that belongs to someone in its strict sense. Rather it would have been intended to include within the given context what exclusively belongs to a person, thus a property in its very loose sense. It concentrates on the idea of exclusivity upon what one keeps private; a thing which one would like to have the exclusive control upon the matter and no one else would have a claim upon it as such. The right, whatever label would be attached to it, includes the exclusive use and enjoyment of anything which an individual exclusively owns be it real, personal, tangible, intangible, or even himself and his life. It thus concentrates on the idea of having the control upon such matters. In the broadest sense the matters which exclusively belong to a person would be such a person's private matters – the aspects of his private life. The right to property *simpliciter* in its ordinary meaning could not have been intended to be the basis for such right. To subject such a right with principles associated with property right would impose unnecessary restrictions or even 'destroy' the right itself. For example, when a person has recorded what had been produced by another, be it in form of a speech, song, etc, in any medium owned by the former; the right to property *simpliciter* will entitle the former as the owner of such medium to use the record in any manner he wishes depriving the latter from any claim, let alone the title or ownership, upon the matter. Such a result would not have been intended; thus the illustration quoted was about the physician's diary that recorded whatever heard or seen of King George III. It did not talk about any object which would come within the property claim of King George III as per the concept of property such as the King's diary, stationeries, etc. If we were to apply the

doctrine of property to that situation, it would be the physician, not the King, to be regarded as the owner of the property (the diary). Consequently it was the physician who would have had the right to determine what to do with or be done about his diary. The diary was his; the modern copyright law would entitle him to the copyright upon what he wrote therein; and whether or not the King had any property claim upon any part of the diary or medium that was used to write on the diary was not even considered as facts material to the issue at hand. Accordingly, if the concept of right to property were to be strictly applied to such a scenario, the result would have been the opposite: any order that restrained the physician from printing or publishing his diary as he might wish to do would amount to interference with his right to property; his right to do and determine what to be done about his diary and whatever written therein.

In *Argyll* Ungoed-Thomas J opined that if there was anything to be described as the property of the King that would be the information contained in the diary. Note however that the prohibition as expressed by Lord Eldon in *Wyatt* v. *Wilson* was to include both what was heard from or seen about the King. While Ungoed-Thomas J's opinion might be applicable with regard to the former on a basis that such information contained those which were produced by the King; such rationale would not be applicable with regard to the latter. What the physician wrote in his diary as regards the conducts or conditions of the King would be the physician's reflection or thought of what he perceived: it denoted nothing more than the perception he had about the situation. The mere fact that the physician might include in his writing some details related to or describing the condition of the King would not bestow upon the King what otherwise was the physician's property or his right as the owner of the diary. As what the physician wrote was merely the fruit of his opinion; if the right to property within the context proposed by Ungoed-Thomas J was made the basis for the argument, there would be nothing to restrain the physician from publishing those contents of his diary which were the product of what the physician had seen of the King. On the contrary as the owner of the property he would have the right to deal with his diary in any way he might wish to. As such, the right to property within the context proposed by Ungoed-Thomas J is not and could not have

been intended to be the basis of the duty that restrain the physician from publishing what he has seen of the King. It was explicated that the duty was imposed in order to secure upon the plaintiff *the exclusive use and enjoyment of that which is exclusively his own.* Hence it becomes apparent that an individual's right on this aspect is not restricted to the doctrine of property and its scope is not limited merely to cover information. It is a right as fundamental as the right to property itself but on a different facet. If at all there was anything that might bestow any basis for such prohibition, it ought to relate to the prohibition to publish any matters which were private to the King, i.e., the prohibition of interference with the King's private life.

The right was further clarified. In a situation where the plaintiff had given the defendant some access to what otherwise is private to the plaintiff and allowed some private facts duly recorded for some specific purposes, the courts would prohibit and restrain the defendant from dealing with such private facts for purposes other than that for which the access has been allowed. That applied even when such private facts of the plaintiff have been recorded on any medium either owned by the defendant or to which the defendant has the lawful right to possess. The illustration for that can be seen in the case of *Pollard* v. *Photographic Company*[5] where the use of the lawful property of the defendant was restrained on the basis that it sought to employ it in a manner that was in breach of confidentiality between the parties. Here the photographer, who had taken a negative likeness of a lady to supply her with copies for money, was restrained from selling or exhibiting copies. North J, in that case held that: '[i]t may be said in the present case the property in the glass negative is in the defendant, and that he is only using his own property for a lawful purpose. But it is not a lawful purpose to employ it either in breach of faith, or in breach of contract'[6] as '... it is well known that a student may not publish a lecture to which he has been admitted, even though by his own skill he has taken a copy of it in shorthand; and the receiver of a letter may not publish it without the writer's consent, though the property in the paper and writing is in him.' While the breach of faith or breach of contract argument might suit the particular facts in *Pollard*, the same argument might not squarely apply to the other two illustrations quoted therein: the shorthand copy of a lecture and the content of a letter, in the absence of any special

arrangement or prior agreement between the parties for the preparation of the shorthand or the receipt of the letter. However in all three situations there is one factor common to all: that is, while the plaintiff may choose to share with others some facts private to him, when he does, his fundamental rights entitle him with the power to determine, in the words of Westin, 'to what extent information about them is communicated to others.' Thus, in *Abernethy* v. *Hutchinson*[7] the injunction was granted in favour of the plaintiff, a distinguished surgeon, who sought to restrain the publication in the 'Lancet' of unpublished lectures which he had delivered at St. Bartholomew's Hospital in London. In that case Lord Eldon doubted whether there could be property in lectures which had not been reduced to writing, but he held the view that 'when persons were admitted as pupils or otherwise, to hear these lectures, although they were orally delivered, and although the parties might go to the extent, if they were able to do so, of putting down the whole by means of short-hand, yet they could do that only for the purposes of their own information, and could not publish, for profit, that which they had not obtained the right of selling.'

The law on this matter has again been elucidated a step further so as to prohibit disclosure even when the plaintiff has given his consent for the other to have what is otherwise the plaintiff's. If such right was given on the understanding that the recipient should not publish the same without the plaintiff's permission, the duty of respecting the plaintiff's desire will pass to any other person to whom the original recipient has transferred what causes the duty to have arisen in the first place. Thus, in *Duke of Queensberry* v. *Shebbeare*[8] the defendant was restrained from publishing a work of the Earl of Clarendon, although a person had been expressly allowed by the owner to make and retain as his own a copy of the manuscript, which copy he had sold to the defendant. There was an agreement or condition that the manuscript should not be published and when the manuscript passed to the defendant the duty passed to him along with the transfer of the manuscript.

As more and more principle of laws have been introduced and gained acceptance with the passage of time, some of the circumstances described above might well be described as being protected under the more recent principles of laws be it

intellectual property laws or otherwise. If, however, we analyse the circumstances of the cases within their respective context and time, it is obvious that the duty as imposed by the courts in those cases arose because what the defendants did or attempted to do would only be possible when there was access to what otherwise confined solely within the autonomy of the plaintiff's, e.g., the plaintiffs' private facts, ideas, behaviour, likeness, etc. As such the defendants had to have regard to the wish of the plaintiffs of how the defendants could deal with such private facts, ideas, behaviour, likeness, etc of the plaintiffs, even when they had been duly recorded or reproduced by the defendants by employing any equipment that did not belong to the plaintiffs. Hence there would be an infringement of the plaintiffs' right for as long as the use or proposed use is not within which the plaintiffs had been given the permission or access to defendants.

Before proceeding further, it is most important to note that until the 1940's this non-absolute duty of non-disclosure had not been particularly labelled as such. Prior to that, there were few incidents where such term has been deployed; but merely as a matter of argument[9] or within its literal context in association with a more established principle which was the real issue of the case[10] and not specifically within the context how the principle became recognised in the modern time.[11] It had been associated with basic principles more widely accepted such as the extension of the right of property,[12] as part of fiduciary duty,[13] as an implied undertaking of a contract,[14] etc. Lord Justice Turner in his judgment in *Morison* v. *Moat* affirmed:

> That the Court has exercised jurisdiction in cases of this nature does not, I think, admit of any question. Different grounds have indeed been assigned for the exercise of that jurisdiction. In some cases it has been referred to property, in others to contract, and in others, again, it has been treated as founded upon trust or confidence -- meaning, as I conceive, that the Court fastens the obligation on the conscience of the party, and enforces it against him in the same manner as it enforces against a party to whom a benefit is given, the obligation of performing a promise on the faith of which the benefit has been conferred; but upon whatever grounds the jurisdiction is founded, the authorities leave no doubt as to the exercise of it.[15]

In *M'Ewan* v. *Watson*[16] Lord Trayner expressed the opinion that breach of confidence is not an independent cause of action by itself holding that:

> But I cannot say that every breach of confidence is actionable. A medical man called in to advise a patient is well advised when he declines to say even that he has been consulted, but it depends on what he says whether his statement is actionable or not. It may be indiscreet, but not actionable. For example, if a medical man said to A. that he had been called in to see B., and on being asked by A. what was the matter with B., he replied that he was labouring under a severe cold -- that would not be actionable; on the other hand, if he stated that B. was labouring under some malady, the consequence of misconduct, that would or might be actionable. In the present case, if you exclude the part of the defender's statement, which as innuendoed is slanderous, there is nothing in it which can be regarded as an actionable breach of confidence.[17]

In addition to all the above, it must also be noted that the underlying duty in all those cases had not been restricted so as to be applied merely in circumstances where there is the cause of action for what later on was termed and known as breach of confidence. As a matter of fact it can be said that the breach of confidence as how the principle has been applied for the past few decades has only been 'introduced' in 1940's when the courts in England promulgated and accepted the elements for the principle of confidence and started to treat it as a distinct cause of action quite independent of the existence of any contract, trust, fiduciary duty or any other legal basis.[18]

Despite the conferment of such a label, the cases did not explicate anything that ousted the broader principle of right to privacy as the likely basis for the protection afforded in the earlier precedents as discussed in the beginning of this Chapter. As a matter of fact, careful analysis of those cases would clarify that it is not completely accurate to restrict the interpretation of the principles duly applied in those cases within the principle of confidence. In *Prince Albert* for example, how the impressions of the plaintiff's drawings and etchings came to the possession of the defendant was not made as an issue. There was no express or implied relationship of

confidentiality between the two whether directly or indirectly. To insist that there was a kind of duty owed by the defendant to the plaintiff in the given circumstances would inevitably lead to only one point: that the defendant was under a duty not to disclose or publish what was otherwise private to the plaintiff without the plaintiff's consent to such disclosure or publication. Similar result would be found in the situation noted in *Wyatt*. No reasonable person would construe anything written by the physician of what he saw about the King as amounting to anything that has been communicated by the King to the physician in confidence. The physician merely expressed his opinion describing what he saw of the King and nothing more. If there was any principle that would prohibit him from disclosing moreover publishing such information; that would not be a duty of confidentiality. The physician could not be bound by a duty of confidentiality with regard to the wordings that he wrote in his diary which represented his own thoughts and interpretation of what he saw or thought of the King. Such 'duty of non-disclosure' would have arisen from the duty to respect the privacy of the King; the duty not to divulge the King's private life without the King's consent, regardless of the means or manner as to how such aspects were expressed or recorded.

If we were to carefully examine these cases and attempt to identify the possible basis for the restraint being imposed against the defendant in the respective case, the analysis would bring to the results which are summarised as below:

Case	Facts or Illustrations	Reasons given	Privacy	Confidence	Notes
Prince Albert	Drawings & etchings of the plaintiff's children and other subjects of interest to the family	Right to exclusive use and enjoyment of that which is exclusively his own	✓ private facts kept within private sphere	X No duty of confidentiality exists	No prior relationship between the parties; and the data are not of 'obviously' confidential nature. Privacy

					would be the only probable ground to afford protection.
Wyatt	Engraving of George III, during his illness	-	✓ private facts kept within private sphere. Access given with implied assurance as to privacy	✓ / X Duty of confidentiality might be argued with regard to what the King said but not about what was observed from the King	'The King had not given any confidential information to the physician. But by publishing the diary, the physician would infringe the King's right of privacy.' (Lord Denning)
Pollard	a negative likeness of a lady taken on pursuance to an agreement to supply her with copies for money	an implied contract not to use the negative for other purposes	✓ (if kept within private sphere) right to determine the extent of publication to be given	✓ contractual relationship and that based on faith imposed the duty of confidentiality	This is among the situation where the scope of both privacy and law of confidence overlaps each other

			to one's personal data, i.e., likeness		
	the receiver of a letter may not publish it without the writer's consent, though the property in the paper and writing is in him	-	✓ (if kept within private sphere) right to determine the extent of publication to be given to one's personal expression	✓ if the letter was sent in confidence	This is among the situation where the scope of both privacy and law of confidence overlaps each other
Abernethy	Publication in the "Lancet" of unpublished lectures which he had delivered at St. Bartholomew 's Hospital in London	Breach of confidence	✓/X (if kept within private sphere) right to determine the extent of publication to be given to one's personal expression however, no privacy if the	✓/X if the attendees were aware of the duty of confidentiality but if the lecture was open to public, it would be unlikely that the duty of confidentiality would arise and in any case the principle could not be invoked	This is an illustration of grey area, the zone within which it must be analysed carefully if each and every element required for either of the cause of action is satisfied

			matter discussed was not of private nature or did not represent personal opinion	if the information has been made available to public	
Tuck	Offer for sale in England at lower price the copies of the plaintiffs' pictures in breach of contract	Breach of contract	✓/X right to determine the extent of publication to be given to one's personal facts/matters that were kept private however there is no privacy if the pictures were not of private nature or were not among the private collection of the plaintiffs at the time the	✓/X the prior contractual relationship gave rise to the duty of confidentiality however if the pictures are already made available in the public before the defendant offered the copies for sale, then the principle of confidence would not apply	This is an illustration of grey area, the zone within which it must be analysed carefully if each and every element required for either of the cause of action is satisfied. It must also be noted that while both privacy and law of confidence might not be of

			defendant was allowed the access to the pictures		assistance, the cause of action for breach of contract would remain.
Duke of Queensberry	publishing a work of the Earl of Clarendon, although a person had been expressly allowed by the owner to make and retain as his own a copy of the manuscript	Breach of implied condition of non publication	✓ right to determine the extent of publication to be given to one's personal expression for as long as the private sphere existed	✓/X yes if the circumstances allowed for the implication of duty of confidentiality on such other. However no such duty would arise if the manuscript was made available to public	
Argyll	Marital communication between a husband and his wife	Breach of confidence	✓ private matters kept within private sphere	✓ duty of confidentiality assumed based on the nature of relationship	This is the area where both privacy and law of confidence overlaps each other

The above table explicates that the principle of confidence was not the sole basis for which the protection had been afforded in those early cases. That would be so even when the principle of confidence were to be applied in the most flexible interpretation without requiring in each of the above cases the satisfaction of all the

elements for the principle of confidence as discussed in Chapter IV. As discussed earlier, it might be argued that the duty of confidentiality might have not arisen at all from the circumstances in *Prince Albert*. Rather it ought to be the right to have one's private life being respected, being given the sanctity it deserves, and being free from any intrusion that underlined the decisions in those early precedents.

Beside the above and the discussion earlier elaborated in Chapter IV, there are several other reasons why it is submitted throughout this thesis that the principle of confidence cannot and has never been intended to substitute the notion of privacy. Set aside the difficulty to require the satisfaction of the three traditional elements for the law of confidence, even the most flexible reading of the principle of law of confidence requires for such a principle to be applicable that *the information* must *not be public knowledge or available in public domain*. That alone ousts the broader scope of privacy in two aspects:

1. it excludes the non-informational aspect of privacy; and
2. it excludes completely the protection over private information available in public domain.

As the focus of the principle of confidence is to restrain the misuse of information or data conveyed by the plaintiff in confidence, the principle of non-confidentiality is simply not applicable when the invasion of privacy relates to non-informational aspect of it, such as that which was subject of complaints in *Wainwright*. In *Kaye* while the publication of his condition while he was hospitalised might constitute information (but the issue of breach of confidence was not argued in the case), the act of the journalist by intruding upon him while he was in the hospital room would not come within the ambit of the principle of confidence. Similar scenario would apply to *Douglas*; while the wedding pictures might constitute information, the unauthorised access of the unknown photographer to the couple's wedding would not come within the ambit of the principle of confidence. In any event, the cases of *Kaye* and *Wainwright* are clear illustration of how the concept of confidence failed to afford its protection where the invasion of privacy is not per se informational

whereas the plaintiffs in both cases genuinely deserved to have their personal autonomy respected and the circumstances warranted that too.

As for the second aspect, it is a settled principle that the law of confidence does not protect any information available in the public domain.[19] The reason for that is obvious, any information available in the public domain is not confidential and as such does not warrant the protection for the absence of the quality of confidentiality.[20] For the same reason the protection upon confidential information will also cease to exist once what is otherwise confidential information is made available to the public, regardless the number of people who have actual knowledge of the matter.[21] Even though it is arguable that such wrongful disclosure will not allow the 'wrongdoer' to benefit from his wrongful disclosure under the spring-board doctrine,[22] the information would lose its confidentiality nature anyway by a mere fact it has been made available in public domain and consequently the information would be available for use by every one else and any order sought to restrain its publication would be refused.[23] Unlike the principle of confidence, the notion of privacy focuses on the issue of ensuring the private life of an individual is being safeguarded, or within the context of the United Kingdom, respected. As such the protection afforded therein would not diminish by a mere reason that some private facts or data are made available in public domain. For as long as the owner of such private facts or data has taken reasonable measure for the privacy of such private facts or data, the disclosure against his wish will not diminish the privacy of such private facts or data, i.e., the fulfilment of the two conjunctive touchstones. To a further extent, if one has disclosed the facts or data private to him to another person with assurance of privacy, such duty of privacy will not diminish by a mere reason that such facts or data may be gathered by consulting some documents available in public. On the same footing, if the privacy assurance is breached, the former should be able to bring an action for privacy infringement against the latter or even for an injunction to restrain further infringement of privacy in that respect. Before we move to the next point, consider this. Hypothetically, if only the defendants in *Douglas* sought to publish the unauthorised pictures of the Douglas couple's wedding just a second after the same have been published by the OK!, would the principle of

confidence be applicable to the Douglas couple? Would not privacy provide them with the protection that the law of confidence would not be able to afford? Such difference in effect can also be seen in *Kaye*. Although the plaintiff's private sphere was unjustifiably invaded while he was in the hospital room, his application for injunction to restrain the publication of the facts collected by way of such an intrusion failed. Supposedly the same incident was affected while he was in his home or a premise which he either owned or rented, the outcome would have been difference as prior to that in *Morris* v. *Beardmore* the House of Lords unanimously allowed the appeal by the plaintiff which in effects upheld the autonomy the plaintiff has upon his home.[24] In that case Lord Edmund-Davies expressed the opinion that although a decision in favour of the plaintiff could place considerable difficulties in the way of the forces of law and order, his lordship gave more weight to the plaintiff's right by declaring the unlawfulness of the action of the police who entered the plaintiff's house in order to get the specimen of his breath for a breath test against the plaintiff's wish and thus 'forcibly invades his privacy'.[25] Lord Keith of Kinkel also allowed the appeal noting that 'when the Parliament enacted the provisions which are now to be found in sections 8 and 9 of the Road Traffic Act 1972, it authorised serious invasions of the individual citizen's right to liberty and *personal privacy*..." and continued holding that '[t]here are no grounds for extending the scope of *the invasion of privacy* authorised by section 8(2) beyond the strict terms of what is enacted.'[26] Lord Scarman went further by holding that '[t]he present appeal is concerned exclusively with the suspect's right to the privacy of his home'[27] while acknowledging that 'the right of privacy as 'fundamental'[28] and thus he found that such a conduct of the constable should not be allowed in order 'to pay to the fundamental right of privacy in one's home, which has for centuries been recognised by the common law.'[29] Lord Roskill interestingly formulated the issue as 'the right of the ordinary citizen not to have his property, and thus his privacy, invaded against his will, save where such invasion is directly authorised by law'[30] and found that the conduct of the constable did not fall within that ambit of what is authorised by law and thus he allowed the appeal. But for the fact that the sanctity of one's home is an established principle which is not a subject of challenge, it would be intriguing to ponder why couldn't Kaye be afforded with similar protection as that afforded to

Beardmore merely because the former was in a hospital room as opposed to the later who sought 'sanctuary' of his home while on the other hand, in the former situation the intrusion was affected by mere busy-body journalist who ignored notices prohibiting such entry as opposed to the same was affected by pursuing police officer in uniform who had reasonable cause to believe that the appellant was driving a motor car at the time when an accident occurred and that was in order to get the supply of a specimen of breath for a breath test.

Let's go a step further by comparing the case of *Kaye* and that of *Douglas.* In that regard it would be interesting to ask why Kaye could not be afforded with the same right as was afforded to the Douglas couple. In both instances 'private matters', i.e., recovery from accident in the former and the wedding of the latter, took place in public premises which were used for private purposes, i.e., at the material time the hospital room was occupied exclusively by the plaintiff in the former and the ballroom was exclusively rented by the couple for their wedding reception in the latter. As in both instances the complaints were directed to what were otherwise private facts of the plaintiffs; it was peculiar the facts that the court did not agree with Kaye's expectation to have his private matters respected and being kept to himself just because he was in the hospital room in the condition that did not leave him with any power to restrict the access to him or to prevent the defendant's agents from getting access to him while the court allow the Douglases' claim on the ground that the couple had taken necessary steps to restrict the access to what otherwise the public premise and ensure the confidentiality of their private event. That and the fact that no authority has been cited to support the proposition nor any cases that provided protection to confidential information have been referred to in the judgment leads to reasonable inference that the case of *Kaye* had been wrongly decided.[31]

On related matter, the further effect of wrongful disclosure has been discussed earlier in Chapter IV, 4.2.2 where it becomes apparent how the two principles differ from each other in that respect.

There is another aspect of disclosure which will set privacy apart from the principle of confidence. There is an intrusion of privacy for as long as an invasion, either physical or otherwise, has been affected to the private sphere of the plaintiff. On the other hand, no matter how far or detrimental an intrusion has been affected to the confidential information of a person, the law of confidence will not come into picture until there is a breach of such confidence, i.e., disclosure of confidential information, or an attempt to do so. If one has been entrusted with personal data of the plaintiff and used the data for any purpose other than that for which the data have been entrusted to him, such a person may be liable for breach of confidence, intrusion of privacy and other sets of the existing legal principles including breach of contract, breach of data subject's rights under the regime of the data protection principles. The same applies if such a person has attempted to disclose or has disclosed the personal data without the consent of the data subject. However if a person affects surveillance upon his neighbour by deploying some equipment or tool that allows him to monitor the movements and/or to listen to conversations which take place in his neighbour's house, that surveillance would have amounted to privacy intrusion and yet the law of confidence has not been broken. The rigid reading of the principle of confidence will absent its application for nothing has been communicated to the former in circumstances imparting the duty of confidentiality. Even when the principle is to be construed to its most relaxed context, without requiring the satisfaction of all the three elements as summarised in *Coco*, the principle would still remain inapplicable not until the surveillant discloses any information about his neighbour to another person or in any manner make it available to the public or has taken a step towards either of those.

As the technology advances, almost every individual's data particularly those of demographic nature are made readily available in public domain such as the Internet. A simple search on the Internet using the Internet search engine will allow one to know any information that has been made available on the Internet or any equipment connected to the Internet, either due to voluntary submission of the data by the data subject or simply because some private facts of the data subject have been recorded by the computers, manually or automatically, with or without the knowledge let

alone the consent of the data subject. The result of such search can easily be crossed-checked with the existing yellow/white pages system that will allow the tracking of an individual telephone number or house address and so on and so forth. If a person has an interest in a particular individual, the technology would facilitate him to track the whereabout of the latter. Say he then installs a wireless camera just outside the latter's house that sends and records any images of the latter and that of any other individuals within the house and any activities take place therein, does not the former need to be stopped? Can the law of confidence be applied in such situation? Would anybody like the idea of being observed 24x7 in every place at all time and with no clear notice as to the purpose of such observation? Whilst the technology can be easily deployed to enable such monitoring activities, the prevention of such surveillance is far more difficult to achieve. Does not an individual have the right to be let alone? Does not it become obvious that the requirement that the legal protection is restricted within and will only be afforded upon confidential information is no longer sufficient within the context of today's life and society?

5.3 Human Rights, Privacy and Law of Confidence

Equity in English law is the root for the law of confidence. This was explicated by Lord Woolf CJ who said that: '... the equitable origins of the action for breach of confidence mean that historically the remedy for breach of confidence will only be granted when it is equitable for this to happen.'[32] Earlier in chapter IV, 4.3 it has been discussed how the principle has since developed and how the principle has been applied in Malaysia.

After the decision in *Kaye* it was seen as settled that the English common law does not recognise the right to privacy.[33] As the substitute, the courts offered the law of confidence and required either a cause of action is brought under such umbrella or any other principle already recognised by the courts of law but not on the basis of the right to privacy.[34] Then the ECHR was brought to the United Kingdom by the commencement of the HRA 1998. By virtue of that, the ECHR provisions become legally enforceable in the local courts and the judges in the United Kingdom must not only take cognisance of the ECHR but also apply the provisions within the

context of the HRA 1998 as was held in *Douglas*[35] and *Venables*.[36] Nonetheless in both cases while the courts did not go so far as to create a new cause of action for breach of privacy rights, they did not rule out the development of such an action either. In *Campbell*, however, Lord Hoffmann and Lady Baroness Hale of Richmond were of the view that the defendant's conduct infringed the plaintiff's right to confidentiality which was her conventional right of respect for her private life.[37] Based on that line of argument the introduction of the HRA 1998 would be seen as a factor that would play an important role in the development of the law of confidence. The statute gives effect to the provisions of the ECHR; Article 8(1) of the ECHR requires that individual's private and family's life must be respected. Within such a context, the 'move' has been seen and argued as the evolvement of the common law principle of confidence so as to embrace within its scope the protection of individuals' private life and to expand its scope to provide remedies for unjustifiable intrusion of individuals' private life even when the remedy being sought would not fall within the ambit of the principle of confidence prior to the commencement of the HRA 1998.[38]

It has been accepted that Article 8 of the ECHR ensures the protection of one's privacy,[39] but whether the scope of its application under the HRA 1998's regime shall be limited within the context of the law of confidence or otherwise is still a subject of argument. Sedley LJ opines in *Douglas* that application of Article 8 of ECHR affords protection to privacy. On the other hand, in *A* v. *B Plc and Another*[40] – while Lord Woolf CJ admitted that Article 8 is meant to provide protection for privacy – yet he said 'Article 8 operates so as to extend the areas in which an action for breach of confidence can provide protection for privacy.'[41] To the same effect the Baroness Hale of Richmond in *Campbell* expressed that:

> The action for breach of confidence is not the only relevant cause of action: the inherent jurisdiction of the High Court to protect the children for whom it is responsible is another example: see *In re S (a child) (identification: restrictions on publication)*[2003] EWCA Civ 963 [2003] 3 WLR 1425. But the courts will not invent a new cause of action to cover types of activity which were not previously covered: see *Wainwright* v *Home Office* [2003] 3 WLR 1137. Mrs Wainwright and her disabled son suffered a gross invasion

of their privacy when they were strip-searched before visiting another son in prison. The common law in this country is powerless to protect them. As they suffered at the hands of a public authority, the Human Rights Act would have given them a remedy if it had been in force at the time, but it was not. That case indicates that our law cannot, even if it wanted to, develop a general tort of invasion of privacy. But where existing remedies are available, the court not only can but must balance the competing Convention rights of the parties.[42]

Despite the courts' resistance to accept the fact that eventually they will have to sanction the protection upon the right they said of late as did not exist,[43] the HRA 1998 in particular sections 2 and 6 when read together with Article 8(1) of the ECHR and the ECtHR decisions on the matter will inevitably lead the courts to open their doors to give way to privacy, afford protection against its intrusion, remedies any unjustified intervention with privacy, and 'welcome' the principle that was once applied in cases such as *Prince Albert, Wyatt, etc* back to England. 'Privacy is finding its way home' It is stated so because the principle is not actually a new one; it has always been part of the law in England as duly applied in *Prince Albert*, *Wyatt*, etc.

That is the position in England. Whereas in Malaysia, as argued in Chapter II, the 'door' for privacy is available by virtue of the Federal Constitution – in particular as those fundamental rights safeguarded by Articles 5 and 13 of the Federal Constitution as appropriate and within the respective context.

This chapter does not intend to re-discuss the scope of Article 8(1) of the ECHR, which has been discussed earlier in Chapter II of this thesis. The point is being reiterated for this reason, unlike the principle of confidence, which regularly cited as a common law principle although essentially is based on equity; the notion of privacy, in contrast, has the genesis from individuals' fundamental rights for being humans. Privacy is a human right to which an individual is ordinarily entitled to have against others. The right to confidentiality works on the conscience of the recipient of confidential data, to prevent the recipient from acting unconscionably, to benefit

himself or cause detriment to the plaintiff by way of disclosing what the plaintiff has conveyed in confidence. As Lord Hoffmann put it: '[b]reach of confidence was an equitable remedy and equity traditionally fastens on the conscience of one party to enforce equitable duties which arise out of his relationship with the other.'[44] What is stressed in such a principle is the obligation on the part of the recipient. Hence Sir Nicolas Browne-Wilkinson VC emphasised that: '[t]he basis of equitable intervention to protect confidentiality is that it is unconscionable for a person who has received information on the basis that it is confidential subsequently to reveal that information. ... It is the acceptance of the information on the basis that it will be kept secret that affects the conscience of the recipient of the information.[45] On the contrary, the right to privacy exists for a mere reason that an individual has kept his private facts/matters within his private sphere. Its existence does not depend on the conscience of others and whether or not such others have breached what has earlier been entrusted to them or at very least what the conscience tells them that such matter is confidential, e.g., one's diary. Roughly, while the duty of confidence is based on the notion that it is 'unfair' to allow the defendant to breach the plaintiff's confidence, the right to privacy focuses on protecting the sanctity of the plaintiff's rights and within such a context per se, the defendant's conscience is not of material consideration.

Such the basis of privacy has met official international and regional recognition. The right to privacy has been sanctioned the express recognition in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and in many other international and regional human treaties as discussed in Chapter II earlier. As argued, the same is also being provided by virtue of Article 8(1) of the ECHR which is applicable in the United Kingdom by virtue of the HRA 1998 and in Malaysia, Article 5(1) and, when appropriate, Article 13(1) of the Federal Constitutions provide for the safeguards for privacy. Those prove that privacy is a fundamental human right and not a mere cause of action being conferred upon a plaintiff to prevent the unconscionable conduct of the defendant.

It is remarkable to require any plaintiff in England, in order to secure his right to privacy, to state his cause of action as breach of confidence while the clear wording of Article 8 of the ECHR – *inter alia* provides for an individual's right to have his private life being respected. Why would the judges in England remain persistent on having to interpret that conventional right as brought home by the HRA 1998 within the context of law of confidence merely because after *Kaye* it was assumed that the English law does not recognise privacy as a right. Even Lord Hoffmann recognised that: '[b]reach of confidence was an equitable remedy... So the action did not depend upon the personal nature of the information or the extent of publication but upon whether a confidential relationship existed between the person who imparted the information and the person who received it';[46] the two principles do not deal on the same matter nor do they stand on the same footing. Aside to earlier stated argument that privacy has been the actual basis for protection afforded in early cases such as *Prince Albert*, *Wyatt*, etc., the wording of Article 8(1) of the ECHR is clear and unequivocal. As part of the task to find the satisfactory statutory definition of privacy, the Calcutt Committee in the United Kingdom adopted this definition: 'the right of the individual to be protected against intrusion into his personal life or affairs, or those of his family, by direct physical means or by publication of information.'[47] Although the definition is not as comprehensive as one would expect to cover the scope of privacy, it does affirm that the right to privacy is very much the right of individual upon his personal life or affairs. Although the wording being used therein is not identical with the phrase used in Article 8(1) of the ECHR, they are very much similar.

In a nutshell the principle of confidence and right to privacy do not share the same root or basis. While the principle of confidence rooted in privacy which was later on developed and accepted as part of the common law, the right to privacy goes to the very fundamental issue of human rights. As such, the two should not be treated and given the effect as the substitute for one another.[48] Rather each should be construed within its proper scope and context so as to allow the proper protection of the aspects of each the principle of confidence and fundamental right to privacy.

Endnotes – Chapter V:

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[1] (1849) 1 H. & T. 1; 1 Mac. & G. 25.

[2] (1820) 1 Hall & Twells 25.

[3] *Ibid.*

[4] *Duchess of Argyll* v. *Duke of Argyll and Others* [1967] Ch. 302, at p. 320.

[5] (1889) 40 Ch D 345.

[6] *Ibid* at 351.

[7] (1825) 3 L J Ch 209.

[8] (1758) 2 Eden 329.

[9] Several attempts had been made invited the courts to make the declaration to that effect. See among others: *Hopkinson* v. *Lord Burghley* (1866-67) LR 2 Ch. App. 447; *Heard* v. *Pilley* (1868-69) L.R. 4 Ch App 548.

[10] See among others: *Noyes* v. *Crawley* (1878-79) LR 10 Ch D 31 (partnership and demurrer); *Kennedy* v. *Lyell* (1883) L.R. 23 Ch D 387 (privileged communications); *Boston Deep Sea Fishing and Ice Company* v. *Ansell* [1888] L.R. 39 Ch D 339 (master and servant or principal and agent relationship); *Blank* v. *Footman, Pretty, & Co.* [1888] L.R. 39 Ch D 678 (design); *Mechanical and General Inventions Company, Limited, and Lehwess* v. *Austin and the Austin Motor Company, Limited* [1935] A.C. 346 (breach of contract); *In Re Dickens* [1935] Ch 267 (construction of will); *British Oxygen Company, Limited* v. *Liquid Air, Limited* [1925] Ch 383 (copyright).

[11] There were, however, few cases where the point as argued, although based on some other principle, would resemble the facts of modern cases, such as: *Lamb* v. *Evans* [1893] 1 Ch. 218; *Morison* v. *Moat* 9 Hare, 241.

[12] See among others: *Prince Albert* v. *Strange*; *Wyatt* v. *Wilson*; *Pope* v. *Curl* (1741) 2 Atk 342; *Duke of Queensberry* v. *Shebbeare* (1758) 2 Eden 329; *Philip* v. *Pennell* [1907] 2 Ch 577.

[13] For general observation on the matter, see *Hardy* v. *Veasey and Others* (1867-68) LR 3 Ex. 107; Lord *Ashburton* v. *Pape* [1913] 2 Ch 469.

[14] See among others: *Pollard* v. *Photographic Company* [1889] LR 40 Ch D 345; *Merryweather* v. *Moore* [1892] 2 Ch 518; *Easton* v. *Hitchcock* [1912] 1 KB 535; *Robb* v. *Green* [1895] 2 QB 315. See also the Court of Appeal's observation on the matter in *Sir W. C. Leng & Co., Limited* v. *Andrews* [1909] 1 Ch 763.

[15] 9 Hare, 241, at p. 255.

[16] (1904) 12 SLT 599.

[17] *Ibid*, at p. 603.

[18] The first case where the elements for the cause of action was promulgated was the case of *Saltman Engineering Co* v. *Campbell Engineering Co* (1948) 65 RPC 203. In *Nichrotherm Electrical Coy. Ld., A. G. Cox, A. E. Drew and L. E. G. Francis* v. *J. R. Percy And G. A. Harvey & Coy. (London)*

Ld. [1956] RPC 272 Harman J observed that the case of *Saltman* is the authority to say that breach of confidence may arise whether or no the parties are in contractual relations.

[19] *per* Lord Denning MR in *Woodward* v. *Hutchins* [1977] 1 WLR 760 at 764D. The matter has been discussed earlier, see generally Chapter IV, 4.2.1 at pages 259-272.

[20] *per* Lord Greene, M.R in *Saltman Engineering Co., Ltd. and Others* v. *Campbell Engineering Co., Ltd.* [1963] 3 All ER 413, (1948) 65 RPC 203 at 215. See also: *Seager* v. *Copydex Ltd.* [1967] 1 WLR 923 at 931G *per* Lord Denning MR.

[21] See the judgment of Sir Nicolas Browne-Wilkinson VC in *Stephens* [1988] 1 Ch 449 at p. 454 where he expressed this: 'Information only ceases to be capable of protection as confidential when it is in fact known to a substantial number of people.' Recently the pronouncement to that effect was made by Blackburne J in *HRH The Prince of Wales* v. *Associated Newspapers Ltd* [2006] EWHC 522, where at para 74 he held that '[a]s to the number of people to whom journals were circulated, the point is only relevant if it can be said that the distribution of the journals was so widespread that it could not be supposed that there was any expectation that their contents would be kept confidential..." However see also the judgment of Sir John Donaldson MR in *Attorney-General* v. *Guardian Newspapers Ltd. (No. 2)* [1988] 2 W.L.R. 805 where it was held that the emphasis is whether the disclosure has been made to certain relevant public, the relative secrecy doctrine.

[22] See the judgment of Roxburgh, J. in *Terrapin* v. *Builders Supply Co. (Hayes)* [1960] RPC 128 at p. 130. The judgment has been adopted as correct by Roskill, J. in *Crainleigh Engineering Co.* v. *Bryant and Anor.*, [1965] 1 WLR 1293; [1966] RPC 81 at 96 and quoted by Lord Denning in *Seager* v. *Copydex* [1967] FSR 211 at 220. In *Electro Cad Australia Pty Ltd & 2 Ors* v. *Mejati RCS Sdn Bhd & Ors* [1998] 3 CLJ Supp 196 the high court in Malaysia was invited to consider the application of the spring-board rule which it did yet ruled that due to the facts of the case the principle was not of any assistance.

[23] See for example the *Spycatcher* case.

[24] [1981] A.C. 446.

[25] *per* Lord Edmund –Davies, *ibid*, at p. 461.

[26] *per* Lord Keith of Kinkel, *ibid* at p. 462. Emphasised added.

[27] *per* Lord Scarman, *ibid* at p. 465.

[28] *Ibid* at 464.

[29] *Ibid* at 465.

[30] *per* Lord Roskill, *ibid*, at p. 465.

[31] Similar view has been expressed by Scott, R, 'Confidentiality' in Beatson, J., and Cripps, Y. (eds.), *Freedom of Expression and Freedom of Information* (Oxford University Press, Oxford, 2000 reprinted 2002), at p. 268.

[32] *A* v. *B Plc and Another* [2003] Q.B. 195 at p. 202 – para 4 of the judgment.

[33] As so affirmed in *Khorasandjian* v. *Bush* [1993] 3 W.L.R. 476; in *R* v. *Khan* [1996] 2 Cr. App R. 440, while three judges, namely Lord Slynn of Hadley, who found that privacy was not the key issue and thus found it was unnecessary to decide on the matter, Lord Browne-Wilkinson who explicated that until the need arises he did not wish to hold any view on whether or not the right to privacy exists, and Lord Nicholls of Birkenhead, while agreeing with Lord Nolan preferred to express no on the matter, exclude the consideration of issue of privacy in that case; Lord Nolan, with whom Lord Keith of Kinkel expressed his agreement, at p. 454 affirmed the point holding that 'under English law, there is in general nothing unlawful about a breach of privacy.' See also the House of Lords judgment in *Wainwright*.

[34] See the judgment of Glidewell L.J in *Kaye* at 66.

[35] See the judgment of Lindsay J in *Douglas* v. *Hello! Ltd (No.5)* [2003] EWHC 786. For brief discussion on the facts of the case see Chapter III, at p. 199-200.

[36] *Venables* v. *News Group Newspapers Ltd and Others*; *Thompson* v. *News Group Newspapers Ltd and Others* [2001] Fam. 430. In this case Dame Elizabeth Butler-Sloss P awarded injunction to prohibit the disclosure of the new identities of the claimants who at the age of 11 were convicted of murder of a young child. In reading the ECHR within the context of the HRA 1998 it was held at p. 445-6 that 'It is clear that, although operating in the public domain and fulfilling a public service, the defendant newspapers cannot sensibly be said to come within the definition of public authority in section 6(1) of the Human Rights Act 1998. Consequently, Convention rights are not directly enforceable against the defendants: see section 7(1) and section 8 of the 1998 Act. That is not, however, the end of the matter, since the court is a public authority (see section 6(3)) and must itself act in a way compatible with the Convention (see section 6(1)) and have regard to European jurisprudence: see section 2.'

[37] See as discussed earlier in Chapter IV, 4.3, at pp 292-293.

[38] See the dictum of Sedley LJ in *Douglas*.

[39] See earlier discussion in Chapter II, 2.2.4 (i) at pp. 93-101.

[40] [2003] QB 195.

[41] *Ibid* at 203 – para 6 of the judgment.

[42] *Campbell*, at para 133.

[43] For examples in *Kaye* and *Wainwright*.

[44] *Campbell* at para 44.

[45] *Stephens* at 456.

[46] *Campbell* at para 44.

[47] Report on the Committee on Privacy and Related Matters, Chairman David Calcutt QC, 1990, Cmnd. 1102, London: HMSO, at 7.

[48] For undesirable effects of forcing the application of principle of confidence to privacy cases see Sims, A., '"A Shift in The Centre of Gravity": The Dangers of Protecting Privacy Through Breach of Confidence' (2005) Intellectual Property Quarterly, 29-51.

CHAPTER VI

CONCLUDING CHAPTER

Chapter Outline

Word Count (excluding endnotes): 7,626 Words

Every man has a right
to keep his own sentiments,
if he pleases.
He has certainly a right to judge
whether he will make them public
or commit them only to the sight of his friends.[1]

That no bearer of burden shall bear the burden of another-
And that man shall have nothing but what he strives for (53:38-9)

6.1 Privacy in a Nutshell

Privacy is an issue that has attracted many attentions from almost all walks of life. The concern has started more than a century ago and yet it has not been settled. Historically it would be understood that more emphasis was given to the informational aspect of privacy, mainly because that was an aspect of privacy that was most difficult to safeguard at all times, but with such a huge and flagrant disparity in early times. Back in the early 1900's the physical aspects were not of much concern as one could easily maintain and retain the privacy by safeguarding oneself from the public gaze. One would feel secure and would be free from any possible intrusion merely by placing oneself within a place secluded from the public gaze, an effort which would not be difficult to accomplish due to the extent of technology available then. Perhaps it was for that reason that during such early period many definitions offered for the term 'privacy' relate in one way or another to the right over one's personal information. That perhaps also contributed to the mistaken belief that privacy is about secrecy and that within the context of the common law of England, the principle that may be invoked to protect one's privacy is by founding the cause of action on breach of confidence.

However, as this thesis submitted in Chapter III, privacy is not the synonym of secrecy and consequently the principle of law of confidence will not provide for the proper remedy in cases involving privacy intrusion. Unlike those early periods, other aspects of privacy have become as difficult to safeguard as the informational privacy due to the technology advancement which may be deployed to facilitate surveillance or affect privacy intrusion. A simple key stroke, confirming a search for 'surveillance tools' on an Internet search engine, will bring to millions of sites where all sorts of tools that can be used effortlessly to affect surveillance are offered for affordable prices. The advance of technology has enhanced tools/equipment that the surveillance can be affected from distance, through walls, in the dark, etc. Many are wireless and some are so sophisticated that their presence is unnoticeable. That emphasises the importance of affording the legal protection over privacy as a comprehensive protection over an individual's private life.[2] After all, as how the word privacy originates, it concerns an individual's control over the private aspects

of his life – those that one chooses not to make public. Its genesis is from the very fact that such an individual lives; with life comes some fundamental rights including the right to retain the freedom upon one's private life.

One of the issues explored within the thesis is whether there is anything within the existing legal system that provides for the protection the notion of privacy seeks to offer. Within this thesis the scope of analysis in quest for the answer to that query, however, is limited to two legal systems: namely that of England and Malaysia. In England in 1991 for the first time all the presiding judges in the Court of Appeal unanimously assumed the absence of such right in the English law.[3] The same suggestion made explicit later on by two members (one concurring upon another) of the House of Lords, while other explicated their hesitation to rule on the non-existence of such right,[4] and finally in *Wainwright* Lord Hoffmann, with whom all members of the House of Lords expressed their agreement, pronounced that 'I would reject the invitation to declare that since at the latest 1950 there has been a previously unknown tort of invasion of privacy.'[5] It is interesting to note the obiter in *Wainwright* where Lord Hoffmann said that:

> [In *Douglas* v. *Hello! Ltd* [2001] QB 967] Sedley LJ drew attention to the way in which the development of the law of confidence had attenuated the need for a relationship of confidence between the recipient of the confidential information and the person from whom it was obtained - a development which enabled the United Kingdom Government to persuade the European Human Rights Commission in *Earl Spencer* v. *The United Kingdom* (1998) 25 EHRR CD 105 that English law of confidence provided an adequate remedy to restrain the publication of private information about the applicants' marriage and medical condition and photographs taken with a telephoto lens. These developments showed that the basic value protected by the law in such cases was privacy..... I read these remarks as suggesting that, in relation to the publication of personal information obtained by intrusion, the common law of breach of confidence has reached the point at which a confidential relationship has become unnecessary. As the underlying value protected is privacy, the action might as well be renamed invasion of privacy. "To say this" said Sedley LJ, at p 1001, para 125, "is in my belief to say little, save by way of a label, that our courts have not said

already over the years." I do not understand Sedley LJ to have been advocating the creation of a high-level principle of invasion of privacy. His observations are in my opinion no more (although certainly no less) than a plea for the extension and possibly renaming of the old action for breach of confidence. As Buxton LJ pointed out in this case in the Court of Appeal, at [2002] QB 1334, 1361-1362, paras 96-99, such an extension would go further than any English court has yet gone and would be contrary to some cases (such as Kaye v Robertson [1991] FSR 62) in which it positively declined to do so. The question must wait for another day. But Sedley LJ's dictum does not support a principle of privacy so abstract as to include the circumstances of the present case.[6]

With due respect, the plain reading of the Sedley LJ's judgment – while discussing the effect of Article 8 of ECHR is far from what was contended by Lord Hoffmann in *Wainwright*, thus it is being quoted here:

> What a concept of privacy does, however, is accord recognition to the fact that the law has to protect not only those people whose trust has been abused but those who simply find themselves subjected to an unwanted intrusion into their personal lives. The law no longer needs to construct an artificial relationship of confidentiality between intruder and victim: it can recognise privacy itself as a legal principle drawn from the fundamental value of personal autonomy.[7]

In earlier part, Sedley LJ pronounced that '[w]e have reached a point at which it can be said with confidence that the law recognises and will appropriately protect a right of personal privacy',[8] thus strengthening the fact that in making such pronouncement, his lordship did not intend to convey the message as one contended by Lord Hoffmann in *Wainwright*. Quite interestingly, in a matter of less than a year the House of Lords in *Campbell* did not follow the ratio in *Wainwright*.

Despite the issue whether or not the common law of England does recognise the right to privacy, it has been identified that there exists the written law upon which the right to privacy is to be afforded the legal protection it entitles to get, both in the United Kingdom and Malaysia. In the United Kingdom, the HRA 1998 explicates the

applicability of individuals' rights as per the ECHR in the United Kingdom thus extending *inter alia* the express legal recognition for the right to private life: to have one's private life being respected. Until recently there has been some tendency towards treating Article 8 of the ECHR not as affirming privacy but rather a mere extension of what is commonly known as principle of confidence. However Article 8(1) expressly provides that it is private life which is the gist of such a provision and not the secrecy or confidentiality which is the subject matter of the principle of confidence. Hence it is safe to say that the notion of privacy as this thesis advances has its legal basis in the United Kingdom.

While the main problem in England relates to the latitude of privacy as a right, a similar but not identical problem is faced in Malaysia. It could be said, however, the gravity of the problem for recognition in Malaysia is not as deep as that in England. Among the reasons for that is because first of all, the right to privacy can be inferred from what is said as the protection of 'personal liberty' duly safeguarded by the Federal Constitution of Malaysia, namely by virtue of Article 5. It is better than the position in England in two senses. First as it is duly safeguarded by the Federal Constitution, any other laws to the contrary will become void. Secondly, unlike the applicability of Article 8(1) of the ECHR in the United Kingdom by virtue of the HRA 1998 which has been argued to limit the scope of the application of the ECHR provisions merely as against public authorities while it is silent with regard to privacy intrusion by private entity, the Federal Constitution is of general application with no provision that imposes similar limitation. The right duly conferred is available and consequently the cause of action can be brought for infringement by public authorities and non-public authorities (including individuals) alike. Despite that, however, this provision has been heavily relied upon for issues associated with the rights of individuals that relate to physical liberty: the right to be free from imprisonment against individuals' free will and other rights directly associated with such freedom.[9] There is no a single precedent or case where the article has been carefully examined and analysed to see the actual scope of the right to 'personal liberty'. In fact, until recently there has been no case law that has dealt with the issue of privacy as the basis of claim under the Article 5 right. By far that was the only

occasion during which the issue of privacy has been brought up and argued as constitutional right and it was so unfortunate that the High Court failed to take up the matter cautiously and simply dismissed the Article 5 right argument without properly analysing such a notion, in particular the provision of the Federal Constitution in such care as the provision really deserved, as discussed throughout Chapter III of the thesis.

To sum up, while it is argued that common law does accord protection for privacy in early precedents, the prevailing post *Kaye* approach rejected any of such claim as finally confirmed in *Wainwright*. The twist to that was brought by Sedley LJ in *Douglas* and some variant were also expressed in *Campbell*. In Malaysia, the principle of *Kaye* was applied in *Ultra Dimension*. The case, however, did not pay particular attention to the Federal Constitution, in particular the scope of Article 5 right as put forward on behalf of the plaintiff. Academically, in either of the jurisdiction privacy has found its basis legislatively in the Federal Constitution of Malaysia and for the United Kingdom, by virtue of the enforcement of the HRA 1998. What remains the issue, *inter alia*, is to gain the express recognition from the court to that effect.

6.2 Research Findings

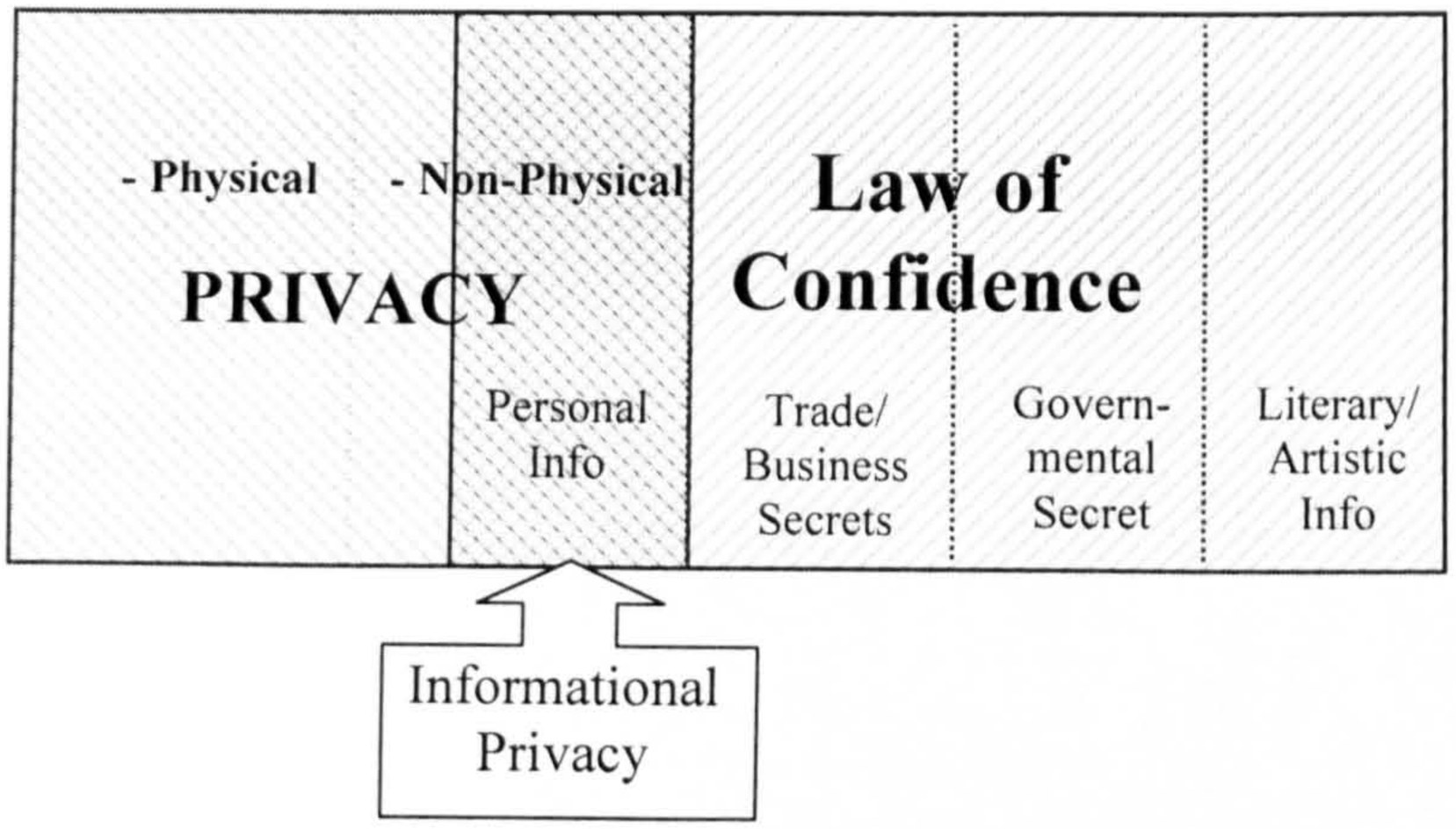
Two hypotheses initiated the thesis. The first hypothesis poses the possibility if the law recognizes the right to privacy and if there is, whether its scope will be similar as the scope of the law of confidence. With that in mind the research began with analyzing documents where privacy has been recorded and given recognition. Holy books and international instruments recognize privacy as a right. It has also gained legislative and judicial recognition in the United States of America although respectively on aspectual and case by case basis. In England, however, the common although mistaken opinion tends towards viewing privacy as the synonym of secrecy. Aside to that, generally the position of privacy in England was similar with and had once been adopted in Malaysia. As part of the background study the existing laws in both jurisdiction, England and Malaysia were analysed as elaborated in Chapter II. Such an analysis pointed out a compelling finding that albeit some problems with

applicability and interpretation, there is an express legislative provision in the respective legal system that accords protection for privacy within the context proposed in the thesis, which necessitated the discussion on the topic elaborated in Chapter III.

The second hypothesis stresses on the law of confidential information, its scope and necessary elements. At the initial stage of the study it was necessary to leave open all possibilities, thus the hypothesis was put forward on the assumption the right to privacy does not exist. The hypothesis was not formulated without reason: the Court of Appeal's decision in *Kaye* and the post *Kaye* era favoured such a view. Similar reasoning applies with regard to the situation in Malaysia as the High Court in *Ultra Dimension* has wrongly applied the principle in *Kaye* in disregard of the availability for personal liberty guarantee in Article 5(1) of the Federal Constitution.

As the analysis and examination advanced towards the preparation of Chapter II, it has become apparent that the first hypothesis is answered in affirmative, hence negates the assumption that founds the second hypothesis – making further analysis on the second hypothesis unnecessary. Nevertheless there are some judicial insistence that the right to privacy as per Article 8(1) of the ECHR that became available through the enforcement of the HRA 1998 is to be read within the scope of any legal principles that have been established independent of the ECHR, most notably that of the law of confidence. Thus in Chapter IV the principle was analysed. That was also seen necessary as part of the first hypothesis that aims to establish that the scope of privacy is not identical with that of the law of confidence. Subsequently the thesis has centered around the proposition that the notion of privacy is not the same as the law of confidence and that they are not meant to be the substitute for one another either.

If we were to put the relationship or connection between the notion of privacy and the principle of confidence, the following diagram represents and provides summary for that:



The diagram clearly shows that the only aspect where the scope of the two overlaps each other would be the area which may be described as informational privacy. As such the principle of confidence cannot be the substitute of privacy. The analysis and findings as submitted in Chapter IV and further reiterated in Chapter V affirm such point and thus it has been submitted that each principle is to be given its own meaning and to be applied within its respective scope and context.

With regard the law in England it has been submitted that the attitudes and approaches adopted by the courts on the matter may be categorized into three rather distinct and separate periods, namely the pre-*Kaye* era, the Post *Kaye* era but prior to the HRA 1998, and the post HRA 1998 era. In Malaysia even though the Federal Constitution has been in existence, until recently, the position in Malaysia was similar to that in England the pre-Kaye era. During such period privacy has been assumed and treated as existed and was also afforded necessary protections without even bothering to express the basis for such protection. Nor was the genesis of the right ever discussed. The right was taken as existing and was accordingly afforded judicial protection.[10]

Following the Court of Appeal's decision in *Kaye*, as of 1990 the position in Malaysia with regard to privacy should differ from that in England, because Malaysia has the Federal Constitution, the supreme law of the land that guarantees

the fundamental freedoms of its subjects. On the other hand, at that material time, the United Kingdom did not any written constitution that safeguarded the fundamental rights of its subjects. For that reason it did not come as a surprise that the Court of Appeal found that no matter how harsh the conduct of the defendant was towards the plaintiff and that the plaintiff's solitude has been grossly interfered with, those alone did not provide any cause of action against the defendants and such infringement, to be actionable, ought to be based on any other principles already recognised by the courts of law. Regrettably in her unprecedented judgment, the High Court judge in *Ultra Dimension* has adopted the principle in *Kaye* and frustrated the very existence of the Federal Constitution of Malaysia which, in particular Articles 5(1) and 13(1), provides the basis for the protection of privacy.

Then the HRA 1998 was introduced. It is submitted that ultimately the courts in England will have to give effect to the provision of Article 8(1) of the ECHR to its fullest effect. It has been unanimously viewed so as to impose such a duty upon the courts with regard to any claim of interference by public authorities; but opinions still vary with regard to that by other than public-authority.[11] The effects the HRA 1998 aims to provide would make it as the United Kingdom legislation with the closest similarity – although merely in human rights aspects – with that of the Malaysian Federal Constitution. As such after the 2 October 2000 the position in Malaysia should be similar as that in the United Kingdom but without any barrier as to whether claim of infringement has been brought against individuals or any private bodies as opposed to the public authorities.

6.3 Suggestions/Recommendations

The problem of definition has remained the debatable point when privacy is the issue put on the table. With regard to that, this thesis submitted that privacy is a class of individuals' fundamental freedom. As with other classes of freedom, a definition that depicts its exact scope is not necessary. However it was submitted in Chapter III that privacy in essence is very much the freedom of private or personal life which may

appropriately be described as *an individual's freedom to do or omit what he chooses to his private life or about his personal matters without any interference of others.*

The thesis submitted that despite the generality of the definition, the scope of privacy is measured against the two conjunctive touchstones, private matters (including facts/activities) and private sphere. That is to say in order to determine whether or not an individual's claim to privacy shall stand depends on whether or not the issue relates to private matters and that such private matters are kept within private sphere. If an intrusion has been affected towards the plaintiff's private activities then for privacy claim to stand it has to be shown that such activities were carried within a private sphere. The same applies if a publication of one's private fact(s) made without such a person's consent. Despite that, the thesis has also elucidated that, as with other classes of freedom, privacy is not an absolute right: it may be restricted as well as overridden – the point that was elaborated in Chapter III 3.4.

The thesis further submitted that privacy finds the legislative recognition in the United Kingdom through the local application of the ECHR (in particular Article 8) by virtue of the HRA 1998 while in Malaysia privacy founds its basis in Article 5(1) of the Federal Constitution and to some degree by virtue of Article 13(1) of the same. As the right to privacy has been dealt with under both common law regime and the legislation, the suggestions for each legal system are also of two–fold, one that relates to the common law position and the other is of legislative nature.

With regard to the first, it is submitted that the pronouncement in *Kaye*, that the English law does not recognise the right to privacy, is an exaggeration. [12] It was not properly based and the outcome was contrary to the spirit that the principle applied in early precedents aimed to provide, i.e., the protection of the private aspects of an individual.[13] Although the principle in *Kaye* received the ultimate approval in *Wainwright* the principle remains merely of academic importance now that the courts by virtue of section 6 of the HRA 1998 is bound to give effect to the conventions rights including the Article 8(1) of the ECHR that requires the respect to be given to individual's private life.[14] As the cause of action in *Wainwright* arose prior to the

commencement of the HRA 1998, it is submitted that the case ceases to and will not have any binding effects upon any cases where the cause of action arises after the HRA 1998 came into force. In view of the most recent House of Lords' decision in *Campbell*, albeit obiter, the judges were unanimous that section 6 of the HRA 1998 sanctions the right to privacy against interference or intrusion by public authorities. It is submitted that despite non-binding effect of such obiter dicta in *Campbell* when the opportunity comes where the issue of privacy is properly argued within the context, such a view is to be preferred and applied.

As for the cause of action on interference or intrusion of private life by individual(s) or private entity(ies), it is submitted that the ultimate solution to that problem is to allow the general availability of the Article 8(1) right without distinguishing whether the intruder is a public authority or private entity. That aspect is discussed in the paragraphs below. Beside or while waiting for the court to finally adopt such an approach, it is submitted that as against a 'non public authority' defendant, the right to privacy does exist as such principle was the basis for the remedies awarded in the early precedents.[15]

The HRA 1998 gives effect to the ECHR provisions and made the convention rights enforceable in the local courts. Section 6 of the HRA 1998 requires the public authorities to act in a way compatible with the Convention rights – which, as section 1 expresses, include that of Article 8 of the ECHR. That being the case it shall be considered settled that the right to privacy has met the legislative recognition in the United Kingdom by virtue of the enforcement and within the scope of the HRA 1998.[16] Such a view has met unanimous judicial affirmation in *Campbell*[17] at least with regard to its application against public authorities.[18] Lord Hoffmann, the very same judge that upheld the absence of legal right to privacy in English law in *Wainwright*, conceded that the introduction of the HRA 1998 has this effect as he stated, and I quote, that:

> Until the Human Rights Act 1998 came into force, there was no equivalent in English domestic law of article 8 the European Convention or the equivalent articles in other international human rights instruments which guarantee rights of privacy. So the courts in the United Kingdom did not

> have to decide what such guarantees meant. Even now that the equivalent of article 8 has been enacted as part of English law, it is not directly concerned with the protection of privacy against private persons or corporations. It is, by virtue of section 6 of the 1998 Act, *a guarantee of privacy* only against public authorities.[19]

What remains and needs to be seen to be done is to broaden the aspect of the statute so as not to limit its applicability merely against the acts or omissions of public authorities in regard to the rights of individuals as per the section 6 of the HRA 1998.[20]

The literal reading of section 6 leads to inference that the whole statute is intended to limit the enforceability of any ECHR principles that become available in the United Kingdom by virtue of the HRA 1998 merely for acts or omissions by public authorities. Consequently in the absence of precedence, it is still open for the courts to hold such a view and disregard the provisions of the ECHR when any claims or causes of actions have been brought against any non-public entities or individuals. As a result, in the absence of any other common law principles or statutory protections, infringement of human rights that ECHR seeks to safeguard is not actionable in the courts in Britain except as against its infringement by public authorities.[21] That opens the room for this to happen: an individual who suffers from such a gap in the law (breach of his privacy right by non public entity or by individual) will have to exhaust his efforts by bringing the claim in the local courts, knowing and in expectation of loosing the battle locally in order to enable him to bring similar action against the United Kingdom in the ECtHR on the basis of the court's failure to give recognition to such an individual's right that has been infringed by a non-public entity or individual evidences the absence of a pertinent legislation needed to ensure the state fulfil its obligation to preserve the convention rights.[22]

As a matter of fact, argument has been put forward so as to interpret that the HRA 1998 gives local effect to the convention rights as per the ECHR even against individuals' wrongs. It is argued that although the structure of the HRA 1998 appears

to be directed at restraining the violations of conventions rights by state actors, the Act's definition of public authorities expressly includes courts and tribunals. Along the line of that argument, Sir William Wade, among others, rationalized that although the initial violation of convention rights perpetrated by a private individual, the court itself must now provide protection in the exercise of its judicial function as 'a court cannot lawfully give judgment in any case in which convention rights are in issue except in accordance with those rights as set out in Schedule 1 of the [HRA].'[23] Such a view was affirmed in *Campbell* where two of the judges expressed the applicability of the Article 8(1) of the ECHR to protect individuals' privacy even as against non public authorities.[24]

In addition to the above issue, as regards the scope of Article 8 of the ECHR it is also necessary that the courts in England are to give the provision the latitude it entitles to get and not to restrict what otherwise expressly provided merely on the supposition of the absence of local precedent that recognises privacy as a right in England. The wording of article 8(1) of the ECHR is plain – the respects are required among other things for that of one's private life. To restrict such a clear provision and limit its aspect merely within the context of the existing principles that previously have been recognised by the courts in England, mainly on the basis of law of confidence, is arbitrary. That especially so as it has been submitted earlier that it is not wholly justified to hold that the English law does not at all recognise privacy as a right. That has not been so held until after the mid of twentieth century in total disregard of earlier precedents that had the tendency of protecting the principle that but for the label is privacy in nature.

In a nutshell what are required to give the full-fledge protection of privacy as it deserves to get in England is two-fold:

1. to change the courts' attitude towards privacy: to stop seeing it simply as an alleged right that does not have any room for recognition under the common law principles and to plant the idea that privacy really is a kind of freedom, the very fundamental right of individual to have the protection over his private life; and

2. to get the Parliament to amend the provision of the HRA 1998 so as not to limit its applicability merely upon the acts or omissions by the public authority.

After all it is a 'tease' to recognise one matter as human right as against its breach by public authority and to disregard the same when the infringement has been affected by others. There is really no need to have a brand new law for privacy to find its place in England. The express provision has been there, it is, within such a context as drawn by the HRA 1998 that privacy is to be given legal recognition in England. If and only if the two propositions as above are satisfied, then privacy is given the ultimate recognition as fundamental right of individual – the position it truly deserves to get.

Similar steps are also suggested with regard to privacy in Malaysia. Until the case of *Ultra Dimension*, the courts in Malaysia refrained from making any express pronouncement as to whether the right to personal liberty as per the Article 5(1) embodies the principle that protects privacy. In *Ultra Dimension*, however, the judgment was made without the proper regard to and the due examination of the possible application of Article 5 of the Federal Constitution. The judge had opted to decide the issue solely by relying on the principle set out in *Kaye* the position as that in England which, even at the time such a decision was made, did not reflect the most current position in England. Therefore the case *Ultra Dimension* is to be declared and seen as a judgment made *per incurium*, i.e., without paying the necessary regards to the provision of local statutes which was the Federal Constitution, the supreme law of the land. If similar issue is to be brought before any appellate courts, the decision is to be overruled and in any case to be treated at all time as *per incurium* and rather the opportunity is to be utilised to its maximum to explore the aspect of one's right to personal liberty.

6.4 What's Next

Up to this point, all the questions posed within this thesis as so formulated within the hypotheses have been answered. During the process of exploring matters which are

relevant and of importance to the thesis several issues have been identified. These issues fall outside the context of the thesis. As such some of them have been discussed within the thesis although not in great details while some others were just noted. These are the matters which shall have effect upon the development of the notion of privacy.

First would be the right to suicide, would that fall within the ambit of privacy? If we go with the strict interpretation of privacy as the right to do or omit something about one's private life, that shall also include the right to commit suicide, as the right to terminate one's private life and vice versa, the right to omit to continue living the private life. This aspect, however, warrants a full and far deeper analysis and is not within or made part of this thesis.[25]

Second is the issue relates to the right to one's persona or image while in public in its relation to the right to privacy, i.e, 'the right to own image'. In this thesis, it has been indicated that, if the two conjunctive touchstones are to be applied, such picture taken in public is not within the ambit of privacy protection[26] and that when appropriate; the right may have been afforded protection instead under the proper branch of the intellectual property law. This issue is not a new one. It has been the subject of several publications.[27] Nevertheless in light of the ECtHR's judgment in *Von Hannover* v. *Germany*[28] it becomes appropriate to analyse if the decisions such as that in *Hosking* v. *Runting*[29] that was deemed to represent the correct application of the existing law will remain a good one. In *Von Hannover* the ECtHR considered that the decisive factor in balancing the protection of private life against freedom of expression should lie in the contribution that the published photos and articles make to a debate of general interest before it held, *inter alia*, that the publication violated her Article 8 right because the photos made no such contribution as the applicant exercises no official function and the photos and articles related exclusively to details of her private life and as the 'public does not have a legitimate interest in knowing where the applicant is and how she behaves generally in her private life even if she appears in places that cannot always be described as secluded and despite the fact that she is well known to the public'. Thus the issue warrants a careful analysis, the

one that takes the new approach by taking into consideration the effects the HRA 1998 has introduced or will introduce to such matter. That especially after the more relaxed principle has been adopted both in *Douglas* and *Campbell*.[30]

Then comes the issue of abortion. Following the United States Supreme Court's decision in *Roe* v. *Wade*[31] it has been considered settled in the United States of America that the right to abortion is part and parcel of women's right to privacy.[32] The matter, however, is not a straight forward one. Although on the surface it seems that the right relates to the pregnant woman's right to have an abortion process being affected to her body, thus a private matter; such a conduct will result in the termination of the pregnancy and thus affecting the foetus. As noted earlier in Chapter III, 3.3.1 at pages 183-184 there are legislative provisions that regulate the matter such as the United Kingdom Abortion Act 1967 and the Malaysia Medical Act 1971; while at the same time in Malaysia the Penal Code criminalised any act of or attempt to affect abortion. As the conduct indeed affects the right of some other individual directly the foetus and indirectly and when relevant also the father of the foetus, the issue arises as to whether the enforcement of the HRA 1998 may result or cause any difference to the current approach. The issue has yet to be tested although the contrary situation has been dealt by the local courts and tested and has been brought all the way to the jurisdiction of the ECtHR.[33] Due to the prevailing view at the present it is unlikely that in the near future any sort of human rights protection will be afforded upon foetus, especially at the early stage of pregnancy. Nevertheless it needs to be seen if such an attitude will be extended towards the later stage of pregnancy and if such Article 8 right of women will prevail over presumably Article 12 right of such pregnant woman's partner or spouse, the right to found a family.

In the most direct manner, the issue whether the HRA 1998 may be applied so as to have the horizontal application is a matter that still needs to be considered. As noted earlier, many academic analysis have been offered,[34] one of which has been doubted lately by the judiciary.[35] Although it has been submitted that it is just a matter of time before the courts in the United Kingdom will be bound by a principle that extends the application of the ECHR provisions to individuals or private entities and remove the

restriction as to its application merely to the public authorities, until such a day comes to reality the matter is still developing and it is yet to be seen if it will go as suggested.

Another aspect which is arising and warrants further research on the matter is the issue of admissibility of evidence that has been gathered through infringement of privacy particularly by taking into consideration the effects hat the HRA 1998 may have upon the matter. Earlier in *Khan*[36] the courts had taken the liberty to allow the admissibility of such evidence. In *Hans-Constantin Paulssen* v. *The Queen*[37] it was held that:

> Thirdly even if I assume for the present that in relation to count the undercover operation activities were contrary to the rights of privacy of the applicant under Article 8 of the ECHR, I would conclude that it does not follow that the prosecution founded on evidence obtained in breach of Article 8 rights is an abuse of process. In R v Mason [[2002] 2 Cr App R 38] Lord Woolf CJ stated that evidence that is obtained in breach of Article 8 can still be admitted in a criminal trial. The breach of Article 8 is a matter that the judge must consider when exercising his discretion under S78 of the PACE 1984 in deciding whether or not to admit such evidence. If the discretion is correctly exercised, then there is no breach of the right of the defendant to have a fair trial under Article 6: (see paragraphs 65-67 of the judgment)[38]

Such an approach has been adopted in criminal cases.[39] A more flexible one has been applied in civil cases.[40] Fortunately, in both criminal and civil proceedings, courts can now adopt a less rigid approach. It has been suggested that the current position in criminal proceedings is that when evidence is wrongly obtained the court will consider whether it adversely affects the fairness of the proceedings and, if it does, may exclude the evidence: section 78 of the Police and Criminal Evidence Act 1984, the applicable statute for English law. In an extreme case, the court will even consider whether there has been an abuse of process of a gravity which requires the prosecution to be brought to a halt.[41]

Those are amongst the points for future research in relation to the notion of privacy and its development particularly in the United Kingdom. In Malaysia the first and the third issue as noted above will not come within the ambit of issue of privacy unless the Penal Code is being amended. That is because except when an abortion is compliance with that as laid down in Medical Act 1971, having or causing an abortion or an attempt to cause or have one is criminalised. This is just the same as in England. The Offences Against the Person Act 1861 criminalises abortion and the 1967 Act provides defences. Nonetheless due to the introduction of the HRA 1998, there is now a need to examine if such legislation interferes with women's right to privacy – an argument which is unlikely to find its ground in Malaysia in near future due to the culture, moral value and general public attitude in Malaysia including the strong influence of Islamic teachings in the country. Even to talk about abortion is still regarded as a taboo, while the position is quite the opposite in the United Kingdom whereby, for example, the United Kingdom government gives both political and financial support for the International Planned Parenthood Federation which, among others, strive to educate the public against 'unsafe abortion' and in 2005, the United Kingdom government's policy facilitate the referral by nurses in all primary and secondary schools for secret abortions across the nation.

The fourth issue will not have any relevancy to the Malaysian legal system as the Federal Constitution does not restrict its enforceability merely against the conduct of the public authorities unlike that as found in the HRA 1998.

As for the second one, in view of the decision in *Ultra Dimension* it is unlikely that the courts will recognise any right to one's persona while in public in its relation to the issue of privacy. Nevertheless it is not inapt if a careful analysis is to be taken on such matter to examine whether the ratio as applied in *Ultra Dimension* provides good basis for the principle or otherwise. Similarly future research needs to be undertaken to examine the issue of admissibility within the context of Malaysia, including whether the recent approach as adopted by the courts in England is to be given local recognition. However what is most paramount, within the context of the Malaysian legal system, is to establish that Article 5(1) of the Federal Constitution

does safeguard the individuals' fundamental freedom of private life aka privacy. Once that has been established, a study to analyse the available remedies for privacy infringement needs to be undertaken. It is submitted that unless otherwise excluded by any enforceable laws, the remedies to be afforded to protect privacy may take any form(s) of remedies including those which are of compensatory, punitive and preventive nature. As the notion of privacy is also developing in the United Kingdom, research on this point within the context of the United Kingdom legal systems will also become necessary.

6.5 Final Remarks

It is interesting the fact that from the time of *Prince Albert*[42] until the period of *Prince Charles*[43] the issue of privacy is yet to be settled. It is astonishing how this fundamental right of individuals' has been refused the legal recognition on the grounds some of which are no more than matter of inconveniences, such as the problem with its definition and the clarity of its scope. The fact that the concept has also been mistaken to be similar as the aspect that the principle of confidence seeks to protect has resulted in nothing but further diminution to the notion of privacy. It is poignant how the notion of privacy has been given less and less recognition until finally it has been rejected altogether[44] while at the same time the technology advances to the stage that privacy intrusion can be affected effortlessly[45] and in variety of manners some of which are beyond the range that any other principles may offer the protection.[46]

The proposal is straight forward, for as long as what one intends to do or omit within a private sphere does not interfere with the right of other individuals or of the public he should have the freedom on such a matter. After all such a matter lies solely within his private life; it is his private activities and/or private matters which will be affected by his conduct or omission. No one shall bear the burden of another, nor shall his conduct be dictated directly by others or indirectly as he knows others are 'watching' and as such he has to behave in accordance with norm. No one has to live to satisfy others; one does not have to adjust his conduct accordingly just in order to

fit others' perception or expectation. It is his private life, his private matter that we are talking about. In *Pavesich* v. *New England Life Insurance Co.*[47] it has been argued that the idea of privacy:

> ...had been carried into the common law, and appears from time to time in various places, a conspicuous instance being in the case of private nuisances resulting from noise which interferes with one's enjoyment of his home, and this too where the noise is the result of the carrying on of a lawful occupation. Even in such cases where the noise is unnecessary, or is made at such times that one would have a right to quiet, the courts have interfered in behalf of the person complaining. It is true that these cases are generally based upon the ground that the noise is an invasion of a property right, but there is really no injury to the property, and the gist of the wrong is that the individual is disturbed in his right to have quiet.[48]

It is interesting to note that the effects that the House of Lords' majority judgment has in *Campbell* would be analogous to the important factor that the Georgia Supreme Court sought to protect in the case of *Pavesich*[49] exactly one century ago as it pronounced that:

> The truth may be spoken, written, or printed about all matters of a public nature, as well as matters of a private nature in which the public has a legitimate interest.... But there may arise cases where the speaking or printing of the truth might be considered an abuse of the liberty of speech and of the press; as, in a case where matters of purely private concern, wholly foreign to a legitimate expression of opinion of the subject under discussion, are injected into the discussion for no other purpose and with no other motive than to annoy and harass the individual referred to. Such cases might be of rare occurrence; but if such should arise, the party aggrieved may not be without a remedy.

In the end, no one can live alone. Man is a social animal, we need to socialise and be part of the society. Nevertheless, there are bound to be aspects of life that every individual will prefer to keep private. Every individual deserves to have the private aspect of his life being respected and the law can provide for such a protection to 'make' individual a human. As nobody is responsible except for his own conducts or

omissions and that for as long as what one does or omits to himself does not affect others or the public, there is nothing that should dictate to him how he should bring himself in that regard and accordingly, he should also not be subjected to monitoring or surveillance which will influence his freewill. If the exercise of the right or the prohibition against interference with any private matters does not cause any effects except to the person himself, what then should hold him from having the right to be let alone?

Endnotes – Chapter VI:

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[1] See: *Prince Albert* v. *Strange and Others* (1849) 1 Hall & Twells 1.

[2] Similar concern has been expressed in an article entitled 'Is the U.S. turning into a surveillance Society?' published by the American Civil Liberties Union, available at: <http://www.aclu.org/privacy/gen/index.htmlv> (last visited: 28 Jul 2006). There it is reported that Barry Steinhardt, Director of the ACLU?s Technology and Liberty Program expressed this uneasiness: 'Given the capabilities of today?s technology, the only thing protecting us from a full-fledged surveillance society are the legal and political institutions we have inherited as Americans'.

[3] *Kaye* v. *Robertson* [1991] FSR 62.

[4] *R* v. *Khan* [1997] AC 558.

[5] Wainwright and Another v. Home Office [2003] UKHL 53 para 35.

[6] *per* Lord Hoffmann in *Wainwright* at para 28-30.

[7] *per* Sedley LJ in *Douglas* at p 1001, para 126.

[8] In *Douglas* [2001] Q.B. 967, 997. In the recent final judgment on the case, Lindsay J declined to make any finding that English law now recognised a right to privacy [2003] EWHC 786, Ch. Para 226. Phillipson, G., concluded that '[n]o new tort of invasion of privacy has yet been established; the excitement generated by Sedley's LJ ... has faded somewhat, given the lack of judicial use since then of Sedley's LJ's bold dicta', see Phillipson, G., 'Judicial Reasoning in Breach of Confidence Cases under the Human Rights Act: Not Taking Privacy Seriously', (2003) EHRLR (Special Issue: Privacy 2003) 54.

[9] Similar approach was shared several decades ago by Edwin S. Newman in his book *Civil Liberty and Civil Rights*, 6th ed. (Oceana Publication Inc, New York, 1979), where at p. 47 as he saw protection of individual against arbitrary action by government as a mean to safeguard individuals personal liberty. He elaborated the points further at pp 47-70.

[10] For the discussion on the matter, see Chapter II, 2.3.1 at pp 110-111 and see also 2.3.5 at pp 125-127. For the position in England, see: Chapter II, 2.5 at pp 131-135. See also Chapter II, 2.2.1 at pp. 77-87.

[11] See the House of Lords judgment in *Campbell* v. *MGN Limited* [2004] UKHL 22.

[12] No concrete case has been cited to support the proposition. For further discussion on that, see Chapter II, 2.2.1, at p. 131-135.

[13] But for the missing label, early precedents afforded protection to individuals' aspect of privacy. See for examples *Prince Albert*, *Wyatt*, *Pollard*, etc. The cases were discussed earlier, see: Chapter V, 5.2 at pp. 315-323.

[14] In *Theakston* v. *MGN Limited* [2002] EMLR 22 at p. 410 expressed this: 'It does not to me to be necessary to find that the tort of breach of privacy does or does not exist in order for the effect of section 12(1), (3) and (4) to be that the Convention right of privacy must be taken into account.'

[15] See the observation made throughout Chapter V at pp. 315-337.

[16] Although the express provision of Article 8 literally states 'private life' as opposed to 'privacy'; within the context of this thesis the distinction between the two is immaterial for privacy is freedom of private life. Furthermore in Chapter II, 2.2.4 (i) it has been clarified that the notion of private life as proposed in this thesis is narrower in scope as compared to the wider scope of private life as adopted by the ECtHR. Furthermore in Campbell, it has been conceded that article 8 indeed confers the right to privacy. see Lord Nicholls of Birkenhead's judgment at para 15; Lord of Craighead at para 99, paras 103-11 and para 120; and Lord Carswell at 171. Lord Hoffmann and Baroness Hale of Richmond, while stating that the claim to privacy must be substantiated on existing legal principle in action against non-public authorities; they accepted that Article 8 does confer right to privacy, see Lord Hoffmann's judgment at para 49 – although to him it is only applicable against public authorities. Similar view was shared by Lady Baroness as to her, the HRA 1998 does not create a new cause of action as between private persons – para 132 but she proceeded with the 'reasonable expectation of privacy' test in examining the provision of Article 8 – para 137.

[17] See the House of Lords' judgment in *Campbell* [2004] UKHL 22: the judgment of Lord Nicholls of Birkenhead at para 15; Lord Hope of Craighead at para 99, paras 103-11 and para 120; and that of Lord Carswell at para 171.

[18] Lord Hoffmann and Baroness Hale of Richmond, while viewing that the HRA 1998 does not create a new cause of action as between private persons, accepted that Article 8(1) of the ECHR obligates the public authorities to respect individuals' private life. See the end note text and the main body text for the endnote 18 below for the Lord Hoffmann's view on the matter. Lady Baroness examined the merit of the case on the basis of principle of confidentiality as that was the ground put forward by the plaintiff. Nevertheless in analysing the provision of Article 8 of the ECHR – which she took as applicable and provide the basis for the plaintiff's cause of action, she chose to adopt the 'reasonable expectation of privacy' test. See *Ibid*, para 137.

[19] *Ibid*, per Lord Hoffmann at para 49. Emphasis added.

[20] Within such context, Lord Hoffmann noted, *Ibid* at the end of para 49, that 'Although the Convention, as an international instrument, may impose upon the United Kingdom an obligation to take some steps (whether by statute or otherwise) to protect rights of privacy against invasion by private individuals, it does not follow that such an obligation would have any counterpart in domestic law.'

[21] As so viewed by Lord Hoffmann and the Baroness Hale of Richmond. See earlier discussion at Chapter II, 2.2.1 at pp. 83-86. See also the text for the accompanying note 78 therein.

[22] See *Von Hannover* v. *Germany* (2004) 40 EHRR 1, discussed earlier in Chapter II, at pp. 99-100. See also mutatis mutandis *X and Y* v. *The Netherlands* (1985) 8 EHRR 235. Although not exactly on the same footing, an argument of that nature has been put forward in *Tolstoy Miloslavsky* v. *The United Kingdom* (1995) 20 EHRR 442, 8/1994/455/536 where the ECtHR considered if some

convention rights including that of Article 10 had been breached by the United Kingdom through the act and decision of the court in the libel suit brought by Lord Aldington against the applicant.

[23] Wade, W., 'Human Rights and the Judiciary' in Cambridge Centre for Public Law, *Constitutional Reform in the United Kingdom: Practice and Principles* (Hart Publishing, Oxford, 1998), at pp. 524-5.

[24] As so viewed by the Lord Hope of Craighead and Lord Nicholls of Birkenhead. See the discussion at Chapter II, 2.2.1 at pp. 85-86.

[25] See general observation by Sloan, I.J., *Laws of Privacy in a Technological Society* (Oceana Publications Inc, New York, 1986), at pp. 117-19.

[26] See earlier discussion at Chapter III, 3.3.1 (ii) at pages 195-203.

[27] See among others: Pinckaers, J. C.S., From Privacy Toward A New Intellectual Property Right in Persona: The Right of Publicity (United States) and Potrait Law (Netherlands) Balanced With Freedom of Speech and Free Trade Principles (Kluwer Law International, the Hague, 1996); Tomlinson, H., 'The struggle between privacy and freedom', Euro. Law. 2004, 42, 70-71; Thomas, I., and Greaney, N., 'Wither Wednesbury?', N.L.J. 2003, 153(7082), 829-830; Mahendra, B., 'Clarifying confidentiality', NLJ 2002, 152(7053), 1585; Moreham, N.A., 'Recognising privacy in England and New Zealand', CLJ 2004, 63(3), 555-558.

[28] [2004] 40 EHRR 1.

[29] [2003] 3 NZLR 385.

[30] In *McKennitt* v. *Ash* [2005] EWHC 3003 Eady J noted with approval the principle as laid in *Von Hannover* v *Germany* [2004] 40 EHRR 1, see the judgment at para 90.

[31] (1973) 410 U.S. 113.

[32] As mentioned earlier in Chapter I, 1.4.2, at p 34.

[33] See *Evans* v. *The United Kingdom* (Application No. 6339/05) (available at: <http://cmiskp.echr.coe.int/tkp197/view.asp?item=4&portal=hbkm&action=html&highlight=%22THE%20UNITED%20KINGDOM%22%20%7C%208&sessionid=8093204&skin=hudoc-en> last visited on 16 August 2006). In that case the Fourth Section of the ECtHR held that it was not contrary to the requirements of Article 8 of the Convention for a State to adopt legislation governing important aspects of private life which did not allow for the weighing of competing interests in the circumstances of each individual case and as in this case the ECtHR observed that the legislation at issue in the present case was the culmination of an exceptionally detailed examination of the social, ethical and legal implications of developments in the field of human fertilisation and embryology and that while the pressing nature of the applicant's medical condition required that she and J reach a decision about the fertilisation of her eggs without as much time for reflection and advice as might ordinarily be desired, it is undisputed that it was explained to them both that either was free to withdraw consent at any time before any resulting embryo was implanted in the applicant's uterus. This case was referred to the grand chamber. It shall be noted however, in early stage of the proceedings for the case Wall J in *Evans* v. *Amicus*

Healthcare Ltd and others [2003] EWHC 2161 (Fam) affirmed the view that an embryo was not a person with rights protected under the Convention, and as such the applicant's right to respect for family life was not engaged. The Court of Appeal further refused leave to appeal against Wall J's finding that the embryos were not entitled to protection under Article 2, since under domestic law a foetus prior to the moment of birth, much less so an embryo, had no independent rights or interests (for the court of appeals' decision, see: *Evans* v. *Amicus Healthcare Ltd*, [2004] EWCA Civ 727). the House of Lords refused the applicant leave to appeal against the Court of Appeal's judgment on 29 November 2004 thus the case before the ECtHR.

[34] See earlier discussion in Chapter II, 2.2.4 (i) at pp 97-100. Among the publications where the matter has been discussed are: Wadham, J., and Mountfield, H., *Blackstone's Guide to the Human Rights Act 1998*, 2nd ed. (Blackstone, London, 2000), p. 29; Grosz, S., Beatson, J., and Duffy, P., *Human Rights: The 1998 Act and the European Convention* (Sweet & Maxwell, London, 2000); Clayton, R., and Tomlinson, H., *The Law of Human Rights* (Oxford University Press, Oxford, 2000), pp. 232-38; Phillipson, G., in 'Transforming Breach of Confidence? Towards a Common Law Right of Privacy under the Human Rights Act', [2003] MLR 726; M Hunt, 'The "Horizontal Effect" of the Human Rights Act' [1998] *PL* 423-43; Leigh, I., 'Horizontal Rights, the Human Rights Act and Privacy: Lessons from the Commonwealth' [1999] 48 ICLQ 57-87; Phillipson, G., 'The Human Rights Act, "Horizontal Effect" and the Common Law: A Bang or a Whimper?' [1999] 62 *MLR* 824-49; T Raphael, 'The Problem of Horizontal Effect' [2000] *EHRLR* 493-511; Oliver, D., 'The Human Rights Act and Public Law/Private Law Divides' [2000] *EHRLR* 343-55; and Plessis, M.D., and Ford, J., 'Developing the Common Law Progressively – Horizontality, the Human Rights Act and The South African Experience' EHRLR 2004, 3, 286-313.

[35] As so expressed by Lord Phillips of Worth Matravers MR in *Douglas and Others* v. *Hello! Ltd and Others (No 3)* [2005] EWCA Civ 595 at para 47 that: 'We are not the first to acknowledge the assistance to be derived from Gavin Phillipson's lucid article, "Transforming Breach of Confidence? Towards a Common Law Right of Privacy under the Human Rights Act" (2003) 66 MLR 726. He observes, at p 729, that the Strasbourg jurisprudence provides no definite answer to the question of whether the Convention *requires* states to provide a privacy remedy against private actors. That is no longer the case. In *Von Hannover* v *Germany* [2004] 40 EHRR 1 the European Court of Human Rights gave judgment in respect of a series of complaints by Princess Caroline of Monaco. They all related to press photographs of her that had been taken in public places. She contended that these infringed her privacy and had sought a remedy in a series of actions in the German courts, which had been unsuccessful. She alleged that these decisions of the German courts infringed her article 8 right to respect for her private and family life. The European court agreed.'

[36] Although the judges were not unanimous as to the applicability of the issue of privacy, it was found that albeit the evidence constituted a breach of Article 8 of the ECHR, the invasion of privacy with the attendant trespass and damage was outweighed by the public interest in the

detection of crime, and could not be regarded as having such an adverse effect on the fairness of the proceedings. See: *Regina Respondent* v. *Khan (Sultan) Appellant* [1997] AC 558 at pp. 570H-571A, 572C-D, 581G-582C.

[37] [2003] EWCA Crim 3109.

[38] *Ibid* at para 19.

[39] See also *Kuruma* v. *The Queen* [1955] AC 197; *R* v. *Sang* [1980] AC 402; and *R* v. *Khan (Sultan)* [1997] AC 558.

[40] *Ibid*, where it has been held that: 'the overriding objective in a civil case tried in England is that court should deal with a case justly.' See also: *McNally* v. *RG Manufacturing* [2001] Lloyds Reports 379, where it was stated that if a party is making 'an inflated, exaggerated or unjustified claim, then he is seeking other peoples' money to which he is not entitled. It is clearly both just and fair that he should be prevented from succeeding in this. In order to uncover this deception steps may have to be taken which involve him being misled or his privacy being infringed. Misleading him may be the only practical means of showing that he himself is misleading other people.' See also *Rall* v. *Hume* [2001] 3 All ER 248 where Potter LJ stated, at p. 254, that: 'In principle ... the starting point on any application of this kind must be that, where video evidence is available which, according to the defendant, undermines the case of the claimant to an extent that would substantially reduce the award of damages to which she is entitled, it will usually be in the overall interests of justice to require that the defendant should be permitted to cross-examine the claimant and her medical advisers upon it ...' See also: Lord Woolf CJ in *Jones* v. *University of Warwick* [2003] 1 WLR 954.

[41] See *R* v. *Loveridge* [2001] 2 Cr App R 591 and *R* v. *Mason* [2002] 2 Cr App R 628 (paras 50, 68 and 76).

[42] See the case of *Prince Albert* v. *Strange* (1849) 1 Hall & Twells 1.

[43] See the case of HRH Prince of Wales v. Associated Newspapers Ltd [2006] ECDR 20.

[44] The House of Lords' judgment in *Wainwright*, see in particular the judgment of Lord Hoffmann, [2003] UKHL 53 at paras 15-35.

[45] As a matter of fact, Lord Hoffmann himself had admitted such facts about a decade earlier in *R* v. *Brown* [1996] 2 Cr. App. R. 72 where he said at p. 85: 'My Lords, one of the less welcome consequences of the information technology revolution has been the ease with which it has become possible to invade the privacy of the individual. No longer is it necessary to peep trough keyholes or listen under the eaves. Instead, more reliable information can be obtained in greater comfort and safety by using the concealed surveillance camera, the telephoto lens, the hidden microphone and the telephone bug. No longer is it necessary to open letters, pry into files or conduct elaborate inquiries to discover the intimate details of a person's business or financial affairs, his health, family, leisure interests or dealings with central or local government. Vast amounts of information about everyone are stored on computers, capable of instant transmission anywhere in the world and accessible at the touch of a keyboard. The right to keep oneself to

oneself, to tell other people that certain things are none of their business, is under technological threat.' For the discussion on the privacy threats posed by the Internet, see: Cranor, L.F., *Web Privacy with P3P* (O'Reilly, California, 2002), at pp. 12-22. See also Garfinkel, S., with Spafford, G., *Web Security, Privacy and Commerce*, 2nd ed. (O'Reilly, California, 2002), at pp. 203-29. See also: Kotz, D., 'Technological Implications for Privacy' available at: <http://www.cs.dartmouth.edu/~dfk/privacy/paper.html> (last accessed on 5 August 2006); El Islamy, H., 'Privacy and Technology' available at: <http://www.bileta.ac.uk/Document%20Library/1/Privacy%20and%20Technology.pdf#search=%22el%20islamy%20privacy%20and%20technology%22> (last accessed on 5 August 2006).

[46] See for examples the illustrations given in Chapter III, 3.6 at pp. 227-229.

[47] (1905) Co.50 SE.68.

[48] For the commentary on the case, see Ernst, M.L., and Schwartz, A.U., *Privacy: The Right To Be Let Alone*, (MacGibbon and Kee, London, 1968), at pp. 130-48.

[49] (1905) Co 50 SE 68.

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