

Countering Online Radicalization - Legal Aspects & Implications -

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What are the measures available to countering Online Radicalization?

Countering Online Radicalization in America

National Security Program. Homeland Security Project, Bipartisan Policy
Centre
The USA

Online radicalization can be dealt with in three ways:

- ▶ *Approaches aimed at restricting freedom of speech and removing content from the Internet are not only the least desirable strategies, they are also the least effective.*
- ▶ *Instead, government should play a more energetic role in reducing the demand for radicalization and violent extremist messages—for example, by encouraging civic challenges to extremist narratives and by promoting awareness and education of young people.*
- ▶ *In the short term, the most promising way to deal with the presence of violent extremists and their propaganda on the Internet is to exploit, subject to lawful guidelines and appropriate review and safeguards, their online communications to gain intelligence and gather evidence in the most comprehensive and systematic fashion possible*

Countering Online Radicalization in America

National Security Program. Homeland Security Project, Bipartisan Policy Centre
The USA

Counter Measure of Online Radicalization:

1. Restricting freedom of speech and removing content from the Internet.
2. Reducing the demand for radicalization and violent extremist messages.
3. Exploiting online communications to gain intelligence and gather evidence in the most comprehensive and systematic fashion possible.

Legal Aspects & Implications of the Counter Measures

RESTRICTING FREEDOM OF SPEECH AND REMOVING CONTENT FROM THE INTERNET
EXPLOITING ONLINE COMMUNICATIONS TO GAIN INTELLIGENCE AND GATHER EVIDENCE

Legal Aspects & Implications

Constitutionality and Legality of the Counter Measures

THE ISSUES

Human Rights

- Freedom of Speech and Expression
- Freedom of Religion
- Privacy (Right to Personal Liberty)

Surveillance

- The Law
- The Power

Evidence

- The Law
- Admissability

Freedom of Speech and Expression, Freedom of Religion and Privacy (Right to Personal Liberty)

Constitutional and Legal Restrictions on the Rights

Constitutional Protection of Human Rights

Doctrine of Constitutional Supremacy Article 4(1)

Article 4. Supreme Law of the Federation.

(1) 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.

Freedom of Speech and Expression

Article 10(1)(a)

Article 10. Freedom of speech, assembly and association.

(1) Subject to Clauses (2), (3) and (4)—

(a) every citizen has the right to freedom of speech and expression;

Freedom of Speech and Expression

Universal Declaration of Human Rights

Article 19

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Freedom of Speech and Expression

International Covenant on Civil and Political Rights

Article 19

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

Freedom of Religion

Article 11(1) and (3)

Article 11. Freedom of religion

- (1) Every person has the right to profess and practise his religion and, subject to Clause (4), to propagate it.

- (3) Every religious group has the right—
 - (a) to manage its own religious affairs;
 - (b) to establish and maintain institutions for religious or charitable purposes; and
 - (c) to acquire and own property and hold and administer it in accordance with law.

Freedom of Religion

Universal Declaration of Human Rights

Article 18

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Freedom of Religion

International Covenant on Civil and Political Rights

Article 18

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Right to Personal Liberty

Article 5(1)

Article 5. Liberty of the person.

(1) No person shall be deprived of his life or personal liberty save in accordance with law.

Right to Personal Liberty

Universal Declaration of Human Rights

Article 3

Everyone has the right to life, liberty and security of person.

Article 12

No 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.

Right to Personal Liberty

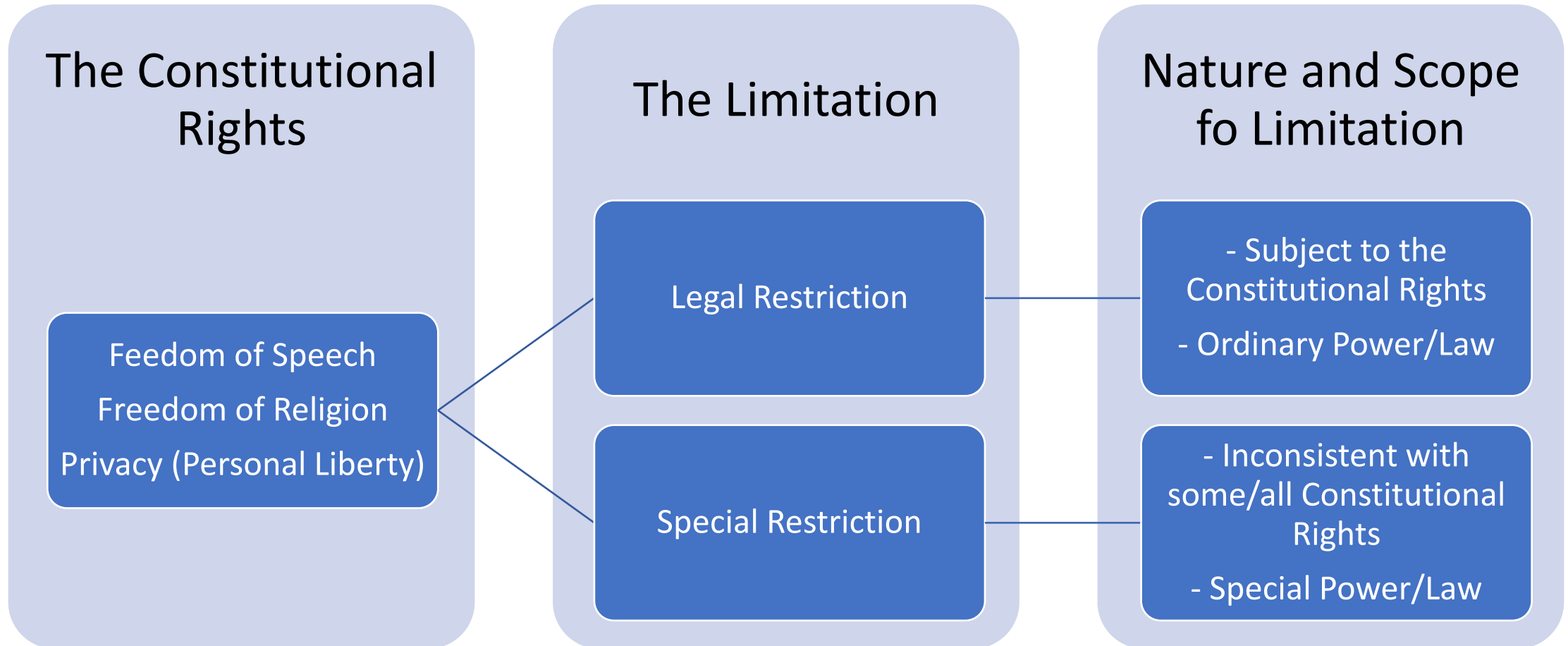
International Covenant on Civil and Political Rights

Article 17

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.

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Legal Restriction

Freedom of Speech and Expression

Article 10(2)(a) and (4)

Article 10. Freedom of speech, assembly and association.

(2) Parliament may by law impose—

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

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

Legal Restriction

Freedom of Speech and Expression

Article 4(2)(b)

Article 4. Supreme Law of the Federation.

(2) The validity of any **law shall not be questioned** on the ground that—

(b) it imposes such restrictions as are mentioned in Article 10(2) but those restrictions were not deemed necessary or expedient by Parliament for the purposes mentioned in that Article.

Legal Restriction

Freedom of Speech and Expression

International Covenant on Civil and Political Rights

Article 19

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
- (a) For respect of the rights or reputations of others;
 - (b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 20

1. Any propaganda for war shall be prohibited by law.
2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Legal Restriction

Freedom of Religion

Article 11(4) and (5)

Article 11

(4) State law and in respect of the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, federal law may control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam.

(5) This Article does not authorize any act contrary to any general law relating to public order, public health or morality.

Legal Restriction Freedom of Religion

International Covenant on Civil and Political Rights

Article 18

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.



Legal Restriction

Right to Personal Liberty

Article 5(1)

Article 5. Liberty of the person.

(1) No person shall be deprived of his life or personal liberty **save in accordance with law.**

Special Restriction

Article 149

PART XI - SPECIAL POWERS AGAINST SUBVERSION, ORGANIZED VIOLENCE, AND ACTS AND CRIMES PREJUDICIAL TO THE PUBLIC AND EMERGENCY POWERS

Article 149. Legislation against subversion, action prejudicial to public order, etc.

(1) If an Act of Parliament recites that action has been taken or threatened by any substantial body of persons, whether inside or outside the Federation—

- (a) to cause, or to cause a substantial number of citizens to fear, **organized violence** against persons or property; or
 - (b) to **excite disaffection** against the Yang di-Pertuan Agong or any Government in the Federation; or
 - (c) to promote feelings of **ill-will and hostility** between different races or other classes of the population likely to cause violence; or
 - (d) to procure the **alteration**, otherwise than by lawful means, of anything by law established; or
 - (e) which is prejudicial to the maintenance or the functioning of any supply or service to the public or any class of the public in the Federation or any part thereof; or
 - (f) which is prejudicial to **public order** in, or the **security** of, the Federation or any part thereof,
- any provision of that law designed to stop or prevent that action is **valid notwithstanding** that it is **inconsistent with** any of the provisions of **Article 5, 9, 10 or 13**, or would apart from this Article be outside the legislative power of Parliament; and Article 79 shall not apply to a Bill for such an Act or any amendment to such a Bill.

Special Restrictions

Article 150

PART XI - SPECIAL POWERS AGAINST SUBVERSION, ORGANIZED VIOLENCE, AND ACTS AND CRIMES PREJUDICIAL TO THE PUBLIC AND EMERGENCY POWERS

Article 150. Proclamation of emergency.

(1) If the Yang di-Pertuan Agong is satisfied that a grave emergency exists whereby the security, or the economic life, or public order in the Federation or any part thereof is threatened, he may issue a Proclamation of Emergency making therein a declaration to that effect.

(6) Subject to Clause (6A), no provision of any ordinance promulgated under this Article, and no provision of any Act of Parliament which is passed while a Proclamation of Emergency is in force and which declares that the law appears to Parliament to be required by reason of the emergency, shall be invalid on the ground of inconsistency with any provision of this Constitution.

The Constitutional Rights

Freedom of Speech
Freedom of Religion
Privacy (Personal Liberty)

The Limitation

Legal Restriction

Special Restriction

Article 149

Article 150

Nature and Scope for Limitation

- Subject to the Constitutional Rights
- Ordinary Power/Law

- Inconsistent with some/all Constitutional Rights
- Special Power/Law

The Constitutional Rights

Freedom of Speech
Freedom of Religion
Privacy (Personal Liberty)

The Limitation -Nature and Scope for Limitation-

Legal Restriction
- Subject to the Constitutional Rights
- Ordinary Power/Law

The Laws

Penal Code
Criminal Procedure Code
Communication and Multimedia Act
State Syariah Enactment

The Constitutional Rights

Freedom of Speech
Privacy (Personal Liberty)

The Limitation -Nature and Scope fo Limitation-

Special Restriction
Article 149
- Inconsistent with some Constitutional Rights – **Art. 5, 9, 10 & 13-**
- Special Power/Law

The Laws

SOSMA
POCA
POTA



THE COMMUNICATION AND MULTIMEDIA ACT 1998

Legal Restriction

The Communication and Multimedia Act 1998

Section 6. Interpretation.

“communications” means any communication, whether between persons and persons, things and things, or persons and things, in the form of sound, data, text, visual images, signals or any other form or any combination of those forms;

Section 265. Network interception capability.

(1) The Minister may determine that a licensee or class of licensees shall implement the capability to

allow authorised interception of communications.

(2) A determination, under subsection (1), may specify the technical requirements for authorised interception capability.

The Communication and Multimedia Act 1998

Section 266. Special powers in emergency.

(1) On the occurrence of any public emergency or in the interest of public safety, the Yang di-Pertuan Agong or the Minister authorised by him in that behalf may —

(a) suspend the licence of any licensee, take temporary control of any network facilities, network service, applications service and/or content applications service owned or provided by a licensee in any manner as he deems fit;

(b) withdraw either totally or partially the use of any network facilities, network service, applications service and/or content applications service from any licensee, person or the general public;

(c) order that any communication or class of communications to or from any licensee, person or the general public relating to any specified subject shall not be communicated or shall be intercepted or detained, or that any such communication or its records shall be disclosed to an authorised officer mentioned in the order; or

(d) order the taking of possession of any customer equipment.

(2) If any doubt arises as to the existence of a public emergency or whether any act done under subsection (1) was in the interest of public safety, a certificate signed by the Yang di-Pertuan Agong and exhibited at such places as the Minister deems fit shall be conclusive proof on the point.

SECURITY OFFENCES (SPECIAL MEASURES) ACT 2012

Special Law

Made under Article 149

Overrides Article 5, 9 10 and 11 of the Federal Constitution

Security Offences (Special Measures) Act 2012

Preamble

An Act to provide for special measures relating to security offences for the purpose of maintaining public order and security and for connected matters.

WHEREAS action has been taken and further action is threatened by a substantial body of persons both inside and outside Malaysia—

(1) to cause, or to cause a substantial number of citizens to fear, organized violence against persons or property;

(2) to excite disaffection against the Yang di-Pertuan Agong;

(3) which is prejudicial to public order in, or the security of, the Federation or any part thereof; or

(4) to procure the alteration, otherwise than by lawful means, of anything by law established;

AND WHEREAS Parliament considers it necessary to stop such action;

NOW, THEREFORE, pursuant to Article 149 of the Federal Constitution IT IS **ENACTED** by the Parliament of Malaysia as follows:

Security Offences (Special Measures) Act 2012

Section 2. Application.

This Act shall apply to security offences.

Section 3. Interpretation.

“security offences” means the offences specified in the First Schedule;

FIRST SCHEDULE (Section 3) SECURITY OFFENCES

Penal Code [Act 574]:

- (i) Offences under Chapter VI
- (ii) Offences under Chapter VIA
- (iii) Offences under Chapter VIB

Penal Code

CHAPTER VI - OFFENCES AGAINST THE STATE

CHAPTER VIA - OFFENCES RELATING TO TERRORISM

Suppression of terrorist acts and support for terrorist acts

Suppression of financing of terrorist acts

CHAPTER VIB - ORGANIZED CRIME

Security Offences (Special Measures) Act 2012

PART II - SPECIAL POWERS FOR SECURITY OFFENCES

Section 6. Power to intercept communication.

(1) Notwithstanding any other written law, the Public Prosecutor, if he considers that it is likely to contain any information relating to the commission of a security offence, may authorize any police officer or any other person—

- (a) to intercept, detain and open any postal article in the course of transmission by post;
- (b) to intercept any message transmitted or received by any communication; or
- (c) to intercept or listen to any conversation by any communication.

(2) The Public Prosecutor, if he considers that it is likely to contain any information relating to the communication of a security offence, may—

(a) require a communications service provider to intercept and retain a specified communication or communications of a specified description received or transmitted, or about to be received or transmitted by that communications service provider; or

(b) authorize a police officer to enter any premises and to install on such premises, any device for the interception and retention of a specified communication or communications of a specified description and to remove and retain such evidence

Security Offences (Special Measures) Act 2012

PART II - SPECIAL POWERS FOR SECURITY OFFENCES

Section 6. Power to intercept communication.

(3) Notwithstanding subsection (1), a police officer not below the rank of Superintendent of Police may—

(a) intercept, detain and open any postal article in the course of transmission by post;

(b) intercept any message transmitted or received by any communication; or

(c) intercept or listen to any conversation by any communication,

without authorization of the Public Prosecutor in urgent and sudden cases where immediate action is required leaving no moment of deliberation.

Security Offences (Special Measures) Act 2012

PART II - SPECIAL POWERS FOR SECURITY OFFENCES

Section 6. Power to intercept communication.

(4) If a police officer has acted under subsection (3), he shall immediately inform the Public Prosecutor of his action and he shall then be deemed to have acted under the authorization of the Public Prosecutor.

(5) The court shall take cognizance of any authorization by the Public Prosecutor under this section.

(6) This section shall have effect notwithstanding anything inconsistent with Article 5 of the Federal Constitution.

(7) For the purpose of this section—

“communication” means a communication received or transmitted by post or a telegraphic, telephonic or other communication received or transmitted by electricity, magnetism or other means;

“communications service provider” means a person who provides services for the transmission

Security Offences (Special Measures) Act 2012

PART VII - EVIDENCE

Section 17. Inconsistency with the Evidence Act 1950.

This Part shall have effect notwithstanding anything inconsistent with the Evidence Act 1950 [Act 56].

Security Offences (Special Measures) Act 2012

Section 24. Admissibility of intercepted communication and monitoring, tracking or surveillance information.

Criminal Procedure Code ACT 593

Section 2. Interpretation.

(1) In this Code-

“communication” means a communication received or transmitted by post or a telegraphic, telephonic or other communication received or transmitted by electricity, magnetism or other means;

“communications service provider” means a person who provides services for the transmission or reception of communications;

Security Offences (Special Measures) Act 2012

Section 24. Admissibility of intercepted communication and monitoring, tracking or surveillance information.

(1) Where a person is charged for a security offence, any information obtained through an interception of communication under section 6 whether before or after such person is charged shall, subject to subsection (2), be admissible at his trial in evidence.

(2) The information obtained through an interception of communication under section 6 shall only be admissible where tendered under a certificate by the Public Prosecutor stating that the information so obtained had been authorized by the Public Prosecutor.

(3) A certificate by the Public Prosecutor issued under subsection (2) together with any document or thing that may be exhibited or annexed to the certificate shall be conclusive evidence that the interception of communication had been so authorized, and such certificate shall be admissible in evidence without proof of signature of the Public Prosecutor.

Security Offences (Special Measures) Act 2012

Section 24. Admissibility of intercepted communication and monitoring, tracking or surveillance information.

(4) No person or police officer shall be under any duty, obligation or liability or be in any manner compelled to disclose in any proceedings the procedure, method, manner or the means or devices used with regard to—

(a) anything done under section 6; and

(b) any matter relating to the monitoring, tracking or surveillance of any person.

(5) The information obtained through an intercepted communication under section 6 may be in narrative or verbatim form whether in the original language or as a translation into the national language or the English language.

Section 25. Admissibility of documents produced by computers and of statements contained therein.

Any documents produced by computers and statements contained therein shall be admissible as evidence.

RIGHT TO PRIVACY (PERSONAL LIBERTY)

International Perspectives and Trend

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RIGHT TO PRIVACY (PERSONAL LIBERTY)

International Perspectives and Trend

The Canadian Supreme Court in *R v Dymont* [1988] 2 SCR 417 had categorized right to privacy into three.

The three broad types of privacy:

1. Territorial
2. Personal
3. Informational.

All three aspects are complementary and overlapping.

Right to Privacy (Personal Liberty)

International Perspectives and Trend

Territorial Privacy

Private property.

The concept of territorial privacy however is not limited to immovable property.

Protected property included correspondence. Unlike a house, letters are more vulnerable to intrusion.

In 1877, the US Supreme Court in *Ex parte Jackson* affirmed that sealed parcels were constitutionally protected despite being handed over to the post office.

Right to Privacy (Personal Liberty)

International Perspectives and Trend

Personal Privacy

Binnie J in *R v Tessling* [2004] 3 SCR 432:

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

Egregious examples of violations of personal privacy include warrantless strip searches and non-consensual taking of bodily samples.

The European Court of Human Rights has expanded the protective ambit of the ‘right to private life’ under the European Convention on Human Rights to encompass moral and psychological integrity.

In 2005, the UK House of Lords in *Campbell v MGN* [2004] UKHL 22 recognised ‘private information as something worth protecting as an aspect of human autonomy and dignity.’

Right to Privacy (Personal Liberty)

International Perspectives and Trend

Informational Privacy

The advent of digital technologies in the 21st century brings forth new privacy concerns. As early as 1967, Westin was already perturbed by modern surveillance technology enabling the 'reproducibility of communication' for anyone to 'obtain a permanent pictorial and sound recordings of subjects without their knowledge'.

In 1987, Cannataci, the UN Special Rapporteur on the right to privacy, expressed fears that information technology renders an individual 'transparent and therefore manipulable [...] at the mercy of those who control the information' concerning them.

Arguably, the essential component of privacy is information itself. As aptly put by Westin:

'Privacy is the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others.'

Right to Privacy (Personal Liberty)

International Perspectives and Trend

Informational Privacy

Informational privacy is intertwined with the concepts of secrecy, confidentiality, and anonymity. Recently, both the Canadian Supreme Court and European Court of Human Rights recognised that individuals enjoy a reasonable expectation of privacy over their online activities and IP addresses.

Anonymity complements other fundamental rights, especially freedom of expression, as observed by La Rue, the former UN Special Rapporteur on freedom of expression:

The right to privacy is essential for individuals to express themselves freely. Indeed, throughout history, people's willingness to engage in debate on controversial subjects in the public sphere has always been linked to the possibility of doing so anonymously.

Further, there is a close connection between privacy and personal data protection, as affirmed by the European Court of Human Rights Grand Chamber in *Satakunnan Markkinapörssi Oy v Finland* in 2017.

Viewed in tandem, informational privacy embodies the right to informational self-determination, which grants individuals full autonomy to decide how their private information is to be collected, processed, and disseminated.

Right to Privacy in Malaysia

Right to Privacy in Malaysia

Question:

In Malaysia, do all (3) aspects of right to privacy are constitutionally covered.

-No

Right to Privacy in Malaysia

Question:

Is there right to privacy under the Constitution.

-No BUT privacy is protected to a certain extent.

Right to Privacy in Malaysia

Question:

Which aspect of privacy is protected?

-The protection depends on existing laws and legislation, not as ‘independent right’ or not based on any constitutional provision.

The protection is in the form of

1. Law of Tort – Private property and right of an individual (private right). In this regards, ‘Territorial Privacy’ is protected.
2. ‘Personal Liberty’ (as in article 5(1) of the Federal Constitution) relating to body which is protected under criminal law (crime against body), tort (personal injury, negligence). In this regards, ‘Personal Privacy’ is protected.

NOT protected is ‘Information Privacy’. However, if personal information/data is covered by any law, such as ‘Data Protection Act’, then personal/private information and details of individual are protected under the law.

Right to Privacy in Malaysia

Question:

How about

i. Article 5(1)

ii. *Sivarasa Rasiah* which states that “[i]t is patently clear from a review of the authorities that “personal liberty” in art 5(1) [of the Federal Constitution] includes within its compass other rights such as the right to privacy.

Can these legal authorities become legal/constitutional basis for right to privacy in Malaysia?

Right to Privacy in Malaysia

-No.

The reasons are as follows:

Definition of personal liberty (Right to Personal Liberty) which is binding interpretation is as in *Loh Wai Kong*, affirmed in *Sugumar Balakrishnan* and reaffirmed recently in *Maria Chin Abdullah v Ketua Pengarah Imigresen*. (Ratio Decidendi Binding Precedent).

Only confined to ‘physical aspect’ of the body of individual.

Non-physical such as information is not covered.

Sivarasa Rasiah only dictum (obiter dicta) – Not binding interpretation

Right to Privacy in Malaysia

Government of Malaysia v Loh Wai Kong [1979] 2 MLJ 33

“Personal liberty means a personal right not to be subjected to imprisonment, arrest or physical coercion in any manner that does not admit legal justification”

‘In construing 'personal liberty' in art 5(1) one must look at the other clauses of the article, and in doing the court is convinced that the article only guarantees a person, citizen or otherwise, except any 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’

CONCLUSION

- Right to Privacy does not reside in Article 5(1) which protects Right to Personal Liberty.
- Right to Privacy is not constitutionally recognized and covered in Malaysia.
- It is not an independent right.
- Law which is inconsistent with ‘informational privacy’ is not in violation of any constitutional right in Malaysia, and is not inconsistent with any provision of the Federal constitution. Thus, such law is not unconstitutional/illegal, and exercise of power pursuant to such law is not unlawful.