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RESEARCH ARTICLE

Analysis of Image Rights Recognition in Malaysia: A Comparative Study with Selected Jurisdictions

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ABSTRACT

The trend of digitalisation and social media platforms has led to countless photos being captured, shared or used without the subject's consent. Nevertheless, image rights are not expressly recognised in most countries around the globe. This means that one can hardly seek any remedies if his image is exploited against his values or personal standing. The non-recognition of such rights in Malaysia raises the question of whether one has any other legal recourse available if his image rights were infringed. To address this issue, the authors adopted the doctrinal research method by analysing selected legislations and case laws in Malaysia surrounding the area of right to privacy. However, it was found that there are loopholes in the existing laws. Additionally, comparative studies with selected case laws in the European and Commonwealth jurisdictions will be conducted. It was found that the courts have impliedly upheld one's image rights, though not expressly mentioned. At this juncture, the courts in Malaysia have a limited role in upholding image rights as these types of cases are rarely brought before the court, especially the superior courts. Thus, it is recommended that Malaysia should expressly recognise image rights and provide statutory remedies to uphold the rights enshrined in Article 5 of the Federal Constitution.

1. INTRODUCTION

Image rights are personality rights that empower individuals to control the exploitation of their name or picture (*Proactive Sports Management Ltd v Rooney*, 2012). In this digital era, image rights are becoming increasingly significant as they could affect privacy rights and human rights on the internet. The absence of recognition of image rights implies that photographs, where people are the subject, on the internet are not protected. Internet users can easily upload and share photos on social media, such as Facebook and Instagram even without the subject's permission or knowledge. Once those photos are published online, they can be easily reshared and reused by other internet users and the subject of the photos can hardly have control over the use of his photos. It is also a common trend that photos are being turned into memes without the subject's consent. Nevertheless, there are limited rights and protection to the subject as the subject does not own the copyright that protects the interests of the creator of the photo instead of the subject (Georgiades, 2021). In light of the above-mentioned, this paper will place more emphasis on one's portrait rights, which are a facet of image rights. Personal images have to be protected from the point of view of fundamental human rights. Despite privacy rights being recognised as human rights in many jurisdictions, including Malaysia, legal protection against the infringement of such human rights is not afforded where image rights and the tort of invasion of privacy are not recognised.

2. MATERIALS AND METHODS

In light of the above, this paper analyses the issues of whether image rights are upholdable in Malaysia and whether the existing privacy laws in Malaysia are sufficient to afford protection to subjects of photographs if the photographs are used or disseminated without their consent or knowledge. The analysis is conducted using the doctrinal research method by analysing from the point of view of privacy law.

3. RESULTS

3.1 Limitations of Privacy Law in Malaysian Law

The main legislation covering the privacy law in Malaysia is the Personal Data Protection Act 2010 ('PDPA'). However, the PDPA is subject to limitation as it only applies to any personal data in the course of commercial transactions, as stipulated in section 2(1) of the PDPA. It is important to note that the PDPA does not confer any right of private action to the innocent party (*Navaneeth Perpakaran v. Sumita Manian & Anor*, 2021). This means that one is unable to seek remedies via the PDPA if the infringement is caused by an individual without any commercial relationship with him. In contrast, if the infringement is caused by one who has a commercial relationship with the innocent party, section 8 of the PDPA stipulates the general rule that there must be consent from the data subject in order for the personal data to be disclosed. Failure to obtain such consent would subject the data user to a fine not exceeding RM300,000, imprisonment not exceeding 2 years, or both under section 5(2) of the PDPA.

In *Ultra Dimension Sdn Bhd v Kook Wei Kuan* (2001), the High Court held that the cause of action only arises if the invasion of privacy falls within the boundaries of an existing and recognised tort. Due to the fact that privacy rights were not recognised under the English Common Law, such rights were not recognised under Malaysian law accordingly pursuant to section 3 of the Civil Law Act 1956. This means that the invasion of privacy *per se* is not a recognised cause of action, subject to the exception that the photographs are highly offensive and show a person in an embarrassing position or pose. The court also decided that privacy rights do not fall within the purview of Article 5(1) of the Federal Constitution. The court further held that there is no need to obtain the consent of the parents as there was never a contract between them and the photograph was taken at a public place (an open area outside a kindergarten which is open to the public).

It is important to note that certain aspects of the decision in *Ultra Dimension Sdn Bhd v Kook Wei Kuan* may be considered outdated today. In *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* (2010), the Federal Court, in its *obiter dicta*, has expressly recognised privacy rights as a fundamental liberty protected under Article 5(1) of the Federal Constitution. However, to date, the right to privacy is still not well protected as the invasion of privacy still does not confer a valid cause of action against a private entity (*Pekat Solar Sdn Bhd v Suria dan Sonne Sdn Bhd & Anor*, 2024) (except in exceptional cases) and individuals cannot sue another private entity for infringing their constitutional right (*Beatrice a/p AT Fernandez v Sistem Penerbangan Malaysia & Ors*, 2005). This implies that despite privacy being acknowledged as a constitutional right, it is unable to fulfil its intended purpose due to the absence of existing laws to uphold such rights against private entities that infringe upon others' privacy rights. The Australian High Court provided insight that the refusal to recognise invasion of privacy lies in its lack of precision (Au*stralian Broadcasting Corp v Lenah Game Meats Pty Ltd*, 2001). However, it seems that there is no harm in recognising the tort of invasion of privacy, and its refusal in recognition is primarily due to the courts not being prepared to recognise it. Today, there must be some proactive measures taken to acknowledge the tort of invasion of privacy due to substantial digitalisation that has occurred in recent decades. Such invasion of privacy causes potential harm that can far exceed that of two decades ago in terms of the degree of invasion and the wider spread it can reach.

4. DISCUSSION

4.1 Right to be Forgotten under General Data Protection Regulation

The European General Data Protection Regulation ('GDPR') plays a significant role in upholding privacy rights, specifically the right to be forgotten. However, it is pertinent to note that GDPR is

subjected to limitations including its non-application on purely personal activities as noted in Article 2(2)(c) of GDPR.

The right to be forgotten is stipulated in Article 17 of GDPR where individuals have the right to request their personal data to be erased from a controller under specified grounds, including the data is no longer necessary or the consent has been withdrawn, as stated in Article 17(1). If the controller has made the personal data public, they shall take reasonable steps to inform the other controllers of the withdrawal of the consent pursuant to Article 17(2). However, Article 17(3) restricts the right to be forgotten in cases such as freedom of expression and public interests. This is similar to the decision of the Malaysia High Court in the case of *Toh See Wei v Teddric Jon Mohr & Anor* (2017) which held that public interest in the disclosure of iniquity will always outweigh public interest in the preservation of private and confidential information.

The exercise of balance between the right to be forgotten and the freedom of expression is illustrated in the case of *Hurbain v Belgium* (2021), where the European Court of Human Rights ('ECHR') ordered the newspaper to anonymise the identity of a rehabilitated offender in a newspaper's electronic archive as the online article did not have value in newsworthiness, did not enhance the public interest, and the person was not a public figure. Moreover, in *Biancardi v. Italy* (2021), the ECHR upheld the liability of an editor in a civil proceeding under the right to be forgotten due to the fact that the editor failed to de-index the sensitive information published concerning a criminal proceeding on a newspaper's website.

4.2 Privacy Rights as the Safeguard of Image Rights in Selected European and Commonwealth Cases

European Courts have moved forward to uphold privacy rights, thereby indirectly upholding image rights to a certain extent. In *Peck v The United Kingdom* (2003), the court stated that it is necessary to determine whether the images pertained to a private or public matter and whether their intended use was limited or likely to be disseminated to the general public. It was held that although the applicant was present in a public street, his presence was not associated with a public event, nor he was a public figure. The media's publication of the CCTV images greatly surpassed the exposure to the plaintiff, a passer-by or under security surveillance, and exceeded what the applicant could reasonably have foreseen. This means that the dissemination of those images has exceeded the applicant's reasonable expectation of the degree of public exposure to which he would be subjected. Importantly, such disclosure did not constitute a necessary interference in a democratic society.

Furthermore, in *ZXC v Bloomberg LP* (2022), the United Kingdom Supreme Court delineated a two-stage test for claims of misuse of private information: firstly, whether the claimant had a reasonable expectation of privacy regarding the information; and secondly, whether the claimant's right to privacy outweighed the defendant's right to freedom of expression based on an objective test.

To determine if there is a reasonable expectation, it is an objective question that needs to consider the '*Murray* factors', which encompass the attributes of the claimant; nature of the activity in which the claimant was engaged; location; nature and purpose of the intrusion; absence of consent, and whether such absence was known or inferable; the impact on the claimant; and circumstances and purposes for which the information came into the possession of the publisher (p. 15). It was further affirmed that certain categories of information commonly give rise to a reasonable expectation of privacy. These categories include but are not limited to:

"*the state of a person's physical or mental health or condition; a person's physical characteristics (nudity); a person's racial or ethnic characteristics; a person's emotional state (in particular in the context of distress, injury or bereavement); the generality of personal and family relationships; a person's sexual orientation; the intimate details of personal relationships; information conveyed in the course of personal relationships; a person's political opinions and affiliations; a person's religious commitment; personal financial and tax related information; personal communications and correspondence; matters pertaining to the home; past involvement in criminal behaviour; involvement in civil litigation concerning private affairs; and involvement in crime as a victim or a witness*." (p. 16)

In contrast, there is generally no reasonable expectation of privacy regarding a person's physical location, involvement in ongoing criminal activity, and a person's failure to fulfil duties associated with a public role (p. 16).

As for stage two, there is a need to balance the claimant's right to privacy and the publisher's right to freedom of expression. Despite the press or media having to play their vital role as "public watchdog", there are certain boundaries that they should not overstep, such as the protection of reputation and rights of others (p. 17). The boundaries are determined by the public interest test, considering the factors below:

"*how well-known is the person concerned and what is the subject of the report; the prior conduct of the person concerned; the method of obtaining the information and its veracity; the content, form and consequences of publication; and the severity of the restriction or interference and its proportionality with the exercise of the freedom of expression*." (p. 18)

Furthermore, in *Stoute and another v News Group Newspapers Ltd* (2024), the United Kingdom Court of Appeal affirmed that photographs require special consideration as they allow viewers to observe the depicted scene as spectators. The court acknowledged photographs as an intrusive medium capable of infringing upon privacy rights. It was asserted that individuals maintain a reasonable expectation of privacy when photographs are taken by paparazzi or from a distance using telephoto lenses. However, in this case, the court found that the claimants failed to establish such an expectation as their appearance or actions indicated a willingness to be in public despite the covert nature of the photography.

The issue of misuse of photos on private social media accounts was addressed in *Hussain and others v Rahman and others* (2024). The first claimant sued the defendants for the misuse of her pictures from her private Instagram account. The United Kingdom King's Bench Division held that the first claimant had a reasonable expectation of privacy in the pictures she created of her social life that went against her parents' cultural expectations, such as her clothing choices and romantic relationships. Despite the anonymous message threatening to publish the private photos being held to have breached the first claimant's reasonable expectation of privacy, the defendants were not liable as they were not proved to have directly linked to that message.

Laws safeguarding privacy have encountered legal challenges in court by invoking freedom of expression. In *Re Byansi (Fond)* (2023), the Supreme Court of Rwanda balanced the right to privacy with freedom of expression with the aim to respect one's right without eliminating the obligation to respect another's right to determine the constitutionality of the impugned law. It was held that eavesdropping, recording audio or video, or publishing personal photos or videos of others without consent violate individuals' privacy rights, even for journalists invoking freedom of press. This is subject to exceptions including the subject consented, aware but did not object, or it is in the general public interest. For publication regarding public figures, journalists shall consider if violating privacy serves a legitimate public interest or just to cater for curiosity. It was emphasised that the impugned law does not prohibit all undercover journalism but only breaches of privacy and acting in bad faith.

5. CONCLUSION

To date, Malaysia has not recognised the tort of invasion of privacy despite recognising privacy rights as a fundamental liberty under Article 5 of the Federal Constitution. The victims of image rights infringement can hardly rely on court proceedings due to the doctrine of stare decisis whereby lower courts are bound to follow superior courts that have expressly rejected the tort of invasion of privacy. Thus, a possible remedy is for the legislature to statutorily recognise image rights by revising section 8 of the PDPA (disclosure principle) to remove the limitations on its application to commercial transactions. Section 39 of the PDPA (extent of disclosure of personal data), read together with section 8, balances freedom of speech and image rights to a certain extent. The two-stage test in *ZXC v Bloomberg LP* can be referred to and utilised to further harmonise these rights.

AUTHORS' CONTRIBUTIONS

All authors contributed to the study design, data collection, data analysis, writing and editing.

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