

A COMPARATIVE LEGAL ANALYSIS ON CROSS-  
BORDER DATA TRANSFER IN SINGAPORE,  
PHILIPPINES, AND INDONESIA

BY

ANDI PRAMAWIJAYA SAR

A dissertation submitted in partial fulfilment of the  
requirement for the degree of Master of Comparative Laws

Ahmad Ibrahim Kulliyyah of Laws  
International Islamic University Malaysia

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## **ABSTRACT**

Development of the digital economy has impacted on the use of data in business processes. Today, cross-border data transfer becomes a necessity and high in demand in regional and international trade due to its low-cost, efficiency and effectiveness. Legislative and regulatory initiatives have been taken to encourage such development. Some regional organizations have created a framework to eliminate cross-border data transfer barriers such as APEC Cross-Border Privacy Rules and ASEAN Framework on Personal Data Protection. These frameworks aim to enhance the development of the digital economy and to control the use of data cross-border from misuse as well. In ASEAN, the readiness of ASEAN countries in facing the development of the digital economy through the application of cross-border data transfer mechanism varies between member countries. This is because there is a gap in legal development among them in terms of the protection of personal data. This condition may hamper the growth of the digital economy of ASEAN region. From this point of view, this research analyzes the legal issues and challenges on cross-border data transfer by examining the scope and structure of the law on cross-border data transfer in Singapore, the Philippines and Indonesia. It also assesses the similarities and differences of legal framework among the three countries. This research is qualitative and doctrinal, applying analytical, historical and comparative legal methods. In the end of this study, this research identifies the gap and provides a recommendation to find a common set of minimum requirements that can be adopted by the countries in ASEAN, making the three countries as specific case studies.

## ملخص البحث

قد أحدث تطور الاقتصاد الرقمي تأثيراً على استخدام البيانات في العمليات التجارية. واليوم، أصبح نقل البيانات عبر الحدود ضرورة تستخدم في كثير من الأحيان في التجارة الإقليمية والدولية بسبب انخفاض التكلفة والكفاءة والفعالية. وقد تم اتخاذ مبادرات تشريعية وتنظيمية لتشجيع مثل هذا التطور. أنشأ بعض المنظمات الإقليمية إطاراً لإزالة حواجز نقل البيانات عبر الحدود مثل قواعد الخصوصية عبر الحدود لمنظمة التعاون الاقتصادي لآسيا والمحيط الهادئ (APEC) وإطار عمل آسيان بشأن حماية البيانات الشخصية. تهدف هذه الأطر إلى تعزيز تطوير الاقتصاد الرقمي والتحكم في استخدام البيانات عبر الحدود من سوء الاستخدام أيضاً. في آسيان، يختلف استعدادهم في مواجهة تنمية الاقتصاد الرقمي من خلال تطبيق آلية نقل البيانات عبر الحدود بين الدول الأعضاء. هذا بسبب وجود فجوة في التطوير القانوني فيما بينها وما يتعلق بحماية البيانات الشخصية. قد يعيق هذا الشرط نمو الاقتصاد الرقمي في منطقة آسيان. وهذا البحث يحلل القضايا القانونية والتحديات المتعلقة بنقل البيانات عبر الحدود من خلال دراسة النطاق والدستور القانوني الخاص في دول آسيان، وخاصة سنغافورة والفلبين وإندونيسيا، وقيّم أوجه التشابه والاختلافات في الإطار القانوني بين تلك البلدان الثلاثة. والبحث نوعي وأصلي مع تطبيق منهجيات التحليلية القانونية والتاريخية والمقارنة. وفي الأخير، وجد هذا البحث الحواجز (gap) مع إمكانيات استخدامها في دول آسيان لتكون تلك الدول الثلاثة موقعة لدراسة وصفية.

## APPROVAL PAGE

I certify that I have supervised and read this study and that in my opinion, it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as dissertation for the degree of Master of Comparative Laws.



---

Sonny Zulhuda  
Supervisor

I certify that I have read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as dissertation for the degree of Master of Comparative Laws.

---

Mahyuddin Daud  
Examiner

I certify that I have read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as dissertation for the degree of Master of Comparative Laws.

---

Juriah Abd. Jalil  
Examiner

This dissertation was submitted to the Department of Civil Law and is accepted as a partial fulfillment of the requirements for the degree of Master of Comparative Laws.

---

Nor Hafizah Mohd Badrol Afandi  
Head, Department of Civil Law

This dissertation was submitted to the Kulliyah of Laws and is accepted as a partial fulfillment of the requirements for the degree of Master of Comparative Laws.

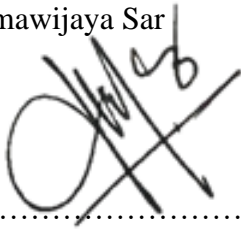
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## DECLARATION

I hereby declare that this thesis is the result of my own investigation, except where otherwise stated. I also declare that it has not been previously or concurrently submitted as a whole for any other degree at IIUM or other institutions.

Andi Pramawijaya Sar

A handwritten signature in black ink, appearing to be 'Andi Pramawijaya Sar', written over a dotted line. The signature is stylized and somewhat illegible.

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Date.....

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DATA TRANSFER IN SINGAPORE, PHILIPPINES, AND  
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*Management Corporation Strata Title Plan No. 4436* [2018] SGPDPC 18

*Habitat for Humanity Singapore Ltd* [2018] SGPDPC 9

*Social Market Pte Ltd* [2017] SGPDPC 17

*Spize Concept Pte Ltd* [2019] SGPDPC 22

## LIST OF ABBREVIATIONS

ASEAN	:Association of Southeast Asian Nations
APEC	:Asia-Pacific Economic Cooperation
AEC	:ASEAN Economic Community
APJII	:Association for Indonesia Internet Service Provider
AMS	:ASEAN Member States
APSC	:ASEAN Political-Security Community
ASCC	:ASEAN Social-Cultural Community
BCR	:Binding Corporate Rules
BRICS	:Brazil, Russia, India, and China
CBPR	:Cross-Border Privacy Rules
CC	:Cloud Computing
CPEA	:Cross-border Privacy Enforcement Arrangement
CCTV	:Closed-Circuit Television
DNC	:Do Not Call Registry
DPA	:Data Privacy Act
DPIA	:Data Protection Impact Assessment
DPO	:Data Protection Controller
EIT	:Electronic Information and Transaction
EU	:European Union
GDPR	:General Data Protection Regulation
GDP	:Gross Domestic Product
ICT	:Information and Communication Technology
IMDA	:Info-communications Media Development Authority
INP	:Indonesian National Police
ITC	:International Trade Commission

IT-BPO	:Information Technology Business Processing Outsourcing
IRR	:Implementing Rules and Regulations
LDCs	:Least Developed Countries
LIBE	:European Parliament’s Civil Liberties
MCIT	:Minister of Communication and Information Technology
NIAC	:National Internet Advisory Committee
NLRV	:National List of Registered Voters
NSA	:National Security Agency
NPC	:National Privacy Commission
OECD	:Organization Economic Cooperation Development
PDP	:Personal Data Protection
PDPA	:Personal Data Protection Act
PDPC	:Personal Data Protection Commission
PEA	:Privacy Enforcement Authority
PRP	:Privacy Recognition for Processor
PSA	:Philippines Statistic Authority
SSC	:Standard Contractual Clauses
TELMIN	:Telecommunication and Information Technology Minister Meeting
TPP	:Trans-Pacific Partnership Agreement
VRS	:Voter Registration System
WTO	:World Trade Organisation

# LIST OF STATUTES

## **International Documents**

APEC Cross-Border Privacy Enforcement Arrangement

Asia-Pacific Economic Cooperation Cross-Border Privacy Rules

ASEAN Framework on Personal Data Protection

ASEAN Framework on Digital Data Governance

Convention for the Protection of Individuals with regard to Automatic Processing  
Personal of Data

EU Directive 95/46/EC on the Protection of Individual with Regard to the Processing of  
Personal Data and on the Free Movement of such Data 1995

EU General Data Protection Regulation

Organisation Economic Co-operation Development (OECD) Guidelines on the Protection  
of Privacy and Transborder Flows of Personal Data

Osaka Declaration on Digital Economy

Trans-Pacific Partnership Agreement

## **Indonesia**

Constitution 1945 of the Republic of Indonesia

Government Regulation No. 82 of 2012 that has been amended by Government Regulation  
No. 71 of 2019 on Electronic System and Transaction Operation

Law No. 11 of 2008 that has been amended by Law No. 19 of 2016 on Electronic  
Information and Transaction

Law No. 24 of 2013 on Civil Administration

Ministry of Communication and Informatics Regulation No. 20 of 2016 on Personal Data  
Protection in Electronic System

**Singapore**

Personal Data Protection Act 2012

The Advisory Guidelines on Key Concepts in the Personal Data Protection Act

**The Philippines**

Civil Code of the Philippines

Republic Act No. 10173 or known as Data Privacy Act 2012

The Constitution of the Philippines 1987

# CHAPTER ONE

## INTRODUCTION

### 1.1 BACKGROUND

The growth of the Internet has had an important effect on the global economy's expansion. The emergence of the Internet has influenced the global economy's growth from USD 11.1 trillion to USD 73.5 trillion since 1980.<sup>1</sup> Furthermore, the growth of the economy today cannot be separated from the cross-border digital data flow problem.<sup>2</sup> It is because technological development affects the global economy that triggers the need for new technologies to increase the growth of the economy itself. Kuner argues that today's significant shift towards globalization of the world economy is being influenced by the massive development of the digital age, such as the digital economy, the production of data through the internet and the sharing of cross-border data, which is driving the improvement of economic growth.<sup>3</sup> Nowadays, in many areas of human activities, including corporate, social, political and economic terms, cross-border data transfer has taken place. Cross-border data transfer is expected to have contributed USD 2.8 trillion to the global economy based on data in 2014 and to hit USD 11 trillion by 2025.<sup>4</sup>

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<sup>1</sup> International Monetary Fund, (2015), World Economy Outlook Database, 2015 Edition, retrieved February 20, 2019, <https://www.imf.org/external/pubs/ft/weo/2015/02/weodata/index.aspx>.

<sup>2</sup> Pepper, R., Garrity, J., & LaSalle, C. (2016). Cross-Border Data Flows, Digital Innovation, and Economic Growth. *Global Information Technology Report*, 39-47.

<sup>3</sup> Kuner, C. (2010). Regulation of transborder data flows under data protection and privacy law: past, present, and future. *TILT Law & Technology Working Paper*, (016).

<sup>4</sup> Meltzer, J. P., & Lovelock, P. (2018). Regulating for a digital economy: Understanding the importance of cross-border data flows in Asia. *Global Economy and Development Working Paper*, 113.



Cross-border data transfer was introduced under the Organization Economic Co-operation Development (OECD) Guidelines on the Protection of Privacy and Transborder Flows of Personal Data in 1980. This guideline provides information about the exchange of personal data across a national border.<sup>5</sup> In 1981, the need to protect personal data of individuals was emerging. That was when the Council of Europe promulgated the Convention for the Protection of Individuals with regard to Automatic Processing Personal of Data.<sup>6</sup> This Convention is the first binding international instrument that protects the individual against abuses of collection and processing of personal data and pursues to regulate the transfrontier personal data transfer. The Convention also imposes certain limitations on the transfer of cross-border data to a country which does not provide commensurate protection.<sup>7</sup>

Today, since the introduction of the EU Directive 95/46/EC on the protection of natural person with regard to the processing of personal data and the free flow of such data, the European Union (EU) has played a leading role in governing cross-border data transfer. However, the Directive has been replaced with the EU General Data Protection Regulation (GDPR).<sup>8</sup> The application of the GDPR is “to increase legal certainty, reduce the administrative burden and cost of compliance for organizations that are active in the

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<sup>5</sup> Banisar, D., & Davies, S. (1999). Global trends in privacy protection: An international survey of privacy, data protection, and surveillance laws and developments. *J. Marshall J. Computer & Info. L.*, 18, 1.

<sup>6</sup> Bu-Pasha, S. (2017). Cross-border issues under EU data protection law with regards to personal data protection. *Information & Communications Technology Law*, 26(3), 213-228.

<sup>7</sup> Council of Europe, Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, retrieved February 20, 2019, <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/108>.

<sup>8</sup> The European General Data Protection Regulation 2016/679.

multiple EU Member States...”<sup>9</sup> In Chapter V on Transfer of Personal Data to third countries or other International Organization, Article 44 mentions that:

“Any transfer of personal data which are undergoing processing or are intended for processing after transfer to a third country or to an international organization shall take place only if, subject to the other provisions of this Regulation, the conditions laid down in this Chapter are complied with by the controller and processor, including for onward transfers of personal data from the third country or an international organization to another third country or another international organization. All provisions in this Chapter shall be applied in order to ensure that the level of protection of natural persons guaranteed by this Regulation is not undermined”.<sup>10</sup>

Under this law, the safety of a natural individual is a priority. Therefore, it might not be easy for the controller to move data to a third country or a foreign agency under its jurisdiction, and it must be subject to all requirements of the GDPR. The provision of cross-border data flows in compliance with the GDPR establishes a level of protection for the transfer of data to a third country. By doing this, at least the data receiving country from the EU must comply with sufficient data protection, if it is not possible to do this, then the data transfer process will be cancelled.

At the ASEAN<sup>11</sup> level, the commitment to the protection of personal data can be seen from the implementation of the Regional Declaration on Privacy through the ASEAN 2012 Declaration on Human Rights. In this instrument, Article 21 states that:

“Every person has the right to be free from arbitrary interference with his or her privacy, family, home or correspondence including personal data, or to attacks upon

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<sup>9</sup> Albrecht, J. P. (2016). How the GDPR will change the world. *Eur. Data Prot. L. Rev.*, 2, 287.

<sup>10</sup> General Data Protection Regulation, Art.44

<sup>11</sup> The Association of Southeast Asian Nation or ASEAN is a regional organization in Asia that was established on 8<sup>th</sup> August 1967 in Bangkok, Thailand, with the signing of the ASEAN Declaration (Bangkok Declaration) by the Founding Fathers of ASEAN, namely Indonesia, Malaysia, Philippines, Singapore, and Thailand.

that person's honour and reputation. Every person has the right to the protection of the law against such interference or attacks."<sup>12</sup>

This commitment led to the establishment in 2016 of the ASEAN Framework for Personal Data Protection (Framework), decided at the 15th meeting of ASEAN Telecommunication and Information Technology Minister Meeting (TELMIN) in Vietnam. The framework lays down data protection principles to guide the ASEAN Member States in their consideration and application of the principles under their domestic laws. The aim of the framework is to reinforce the rules on the security of personal data by promoting joint activities that can generate good cooperation and collaboration between ASEAN countries. This collaboration and cooperation include the sharing and exchanging of information, seminars and other capacity-building events, and joint research in areas of mutual interest.<sup>13</sup>

Under the principle of Framework, data transfer to overseas requires the entity to obtain individual consent and takes appropriate measures to ensure that the receiving organization is consistently protecting that data.<sup>14</sup> For ASEAN countries, the implementation of the principle under the Framework will be an issue because certain ASEAN countries have yet to prepare their data regulation. Different level of maturity of regulating personal data will create an obstacle to achieve the objective of the Framework especially the issue of transferring data across the ASEAN region.

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<sup>12</sup> Renshaw, Catherine Shanahan. "The ASEAN human rights declaration 2012." *Human Rights Law Review* 13, no. 3 (2013): 557-579.

<sup>13</sup> Gie Dela Cruz, Privacy and Data Protection Laws in Southeast Asia, retrieved February 21, 2019, <http://ateneo.edu/udpo/article/Privacy-and-data-protection-laws-southeast-asia>.

<sup>14</sup> Section 6(f) of the ASEAN Framework on Personal Data Protection.

Singapore is one of the ASEAN countries that has established the personal data protection regulation in the form of Personal Data Protection Act (PDPA) 2012. This regulation comprehensively sets on how to transfer personal data outside Singapore. In Article 26 of the PDPA, an organization is not allowed to transfer any individual's data outside of Singapore except it fulfils the requirements as prescribed by the Act. An organization also must ensure to provide a standard protection to personal data which is equivalent to the PDPA. Furthermore, to support and facilitate better international data transfer, Singapore has engaged with the Asia-Pacific Economic Cooperation (APEC) Cross-Border Privacy Rules (CBPR) system<sup>15</sup> and the APEC Privacy Recognition for Processor (PRP) System in 2017.<sup>16</sup> Singapore made the effort because international data transfer is an important factor in nurturing the economy of Singapore and retaining Singapore's role as a trusted data center.

In the Philippines, the government of the Philippines have passed the Data Privacy Act (DPA) 2012 and its Implementing Rules and Regulation (IRR) in 2016. The purpose of creating the Act is to protect the fundamental human right of privacy and to ensure a free flow of information to promote innovation and growth within the country.<sup>17</sup> Cross-border data transfer is discussed in the Act under the accountability section for the transfer of personal information. Under the DPA, to transfer data, whether domestically or internationally, the controller of personal information shall be responsible for any

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<sup>15</sup> The APEC CBPR System requires participating business to implement data policies consistent with the APEC Privacy Framework and helps to bridge differing national privacy laws within the APEC region, reducing barrier to the flow of information for global trade

<sup>16</sup> APEC Privacy Recognition for Processor System, retrieved July 7, 2019, <https://www.apec.org> › Groups › ECSG › APEC PRP Rules and Guidelines.

<sup>17</sup> Section 2 of Data Privacy Act 2012.

information under his control which has been outsourced or transferred to any processor of personal information or to a third party for processing personal data. Then, the data processing conducted by the personal information controller is subjected to cross-border arrangement and cooperation.<sup>18</sup> In addition, the DPA also requires the controller, by contractual or other means, to provide a comparable level of protection for the processing of personal data. The contractual clauses are intended to provide security measures for the data to be transferred to a third party. The acceleration on notion for cross-border data transfer in the Philippines, the National Privacy Commission (NPC) submitted the letter of intent to join the APEC CBPR system.<sup>19</sup>

Meanwhile, Indonesia does not have comprehensive personal data protection regulation to protect the privacy and personal data of citizens. However, the regulations for protecting personal data in Indonesia can be found in various sectoral regulations. It is noticed that more than 30 regulations are dealing with personal data such as health, finance, population, telecommunication, and human rights. In general, Indonesia has created regulations on personal data under the Law No. 11 of 2008 (Law No. 11/08) on Electronic Information and Transaction and Government Regulation No. 82 of 2012 (Regulation No. 82/12) on the Implementing of Electronic System and Information. However, Regulation 82/2012 has been revised by Law No. 71 of 2019 (Regulation No. 71/19) with the same subjects with more additional points. Also, Ministerial Regulation No 20 of 2016 (Ministerial Regulation No. 20/2016) on Personal Data Protection on Electronic System as the implementing regulations. Today, the Indonesian Government through the Ministry of

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<sup>18</sup> Section 21 of Data Privacy Act 2012.

<sup>19</sup> National Privacy Commission, PH joins APEC Privacy System, retrieved August 10, 2020, <https://www.privacy.gov.ph/2019/09/ph-joins-apec-privacy-system/>

Communication and Information Technology (MCIT) is drafting the bill of Indonesian Personal Data Protection Act (draft bill of PDPA). It has been proposed to the Parliament to put the draft bill into National Legislation Programme. Once the bill has been passed as a law, it would be an umbrella law covering all regulations dealing with personal data. Under the existing regulation, the issue of cross-border data transfer is only governed in Article 22 of the Ministerial Regulation 20/2016 and it is merely regulated on an electronic form. The provision regarding the data transfer across border instructs for Electronic System Provider (ESPs) either in public or private sectors in transferring personal data which needs to coordinate with the Ministry, any officials or organizations who is given the authority to manage citizens' data.<sup>20</sup> However, this provision will be a matter of concern due to the applicability of the data localization where the ESPs are ordered to place data inside Indonesia for the data center and the disaster recovery centre. Meanwhile, the draft bill refers to the way in which personal data are transferred across borders with certain requirements that must be met.

The above description informs us that cross-border data transfer is an essential factor in the exponential growth in IT network and communication technology for those three countries mentioned above.<sup>21</sup> Cross-border data transfer is also a key part of international trade, trade and the global economy that is used not only by businesses but also by government and personal users.<sup>22</sup> Many countries are therefore encouraged to

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<sup>20</sup> Article 22 of Ministerial Regulation No. 20 of 2016.

<sup>21</sup> Lee, I., & Keh, J. S. (2017). Cross-Border Transfers of Personal Data and Practical Implications. *J. Korean L.*, 17, 33.

<sup>22</sup> Coalition of Service Industries, Cross-Border Data Flow, retrieved February 21, 2019, <https://servicescoalition.org/services-issues/digital-issues/cross-border-data-flows>

improve their regulations on personal data in order to control and process data when it is transferred outside the country.

This research deals with the issue of law on cross-border data transfer which is relevant in today's condition. The three countries were chosen by the researcher because they are among the three big economies in ASEAN region. This study is especially important for Indonesia because the country is still developing its law, so the researcher seeks to contribute for the PDP law development in Indonesia.

As a conclusion, this study will propose some recommendations on finding a common set of minimum requirements that can be adopted by the countries in ASEAN, using Singapore, the Philippines and Indonesia as specific case studies.

## **1.2 STATEMENT OF PROBLEM**

Based on the description above, it has been explained that international data transfer plays a key role in digital transformation today. However, the main challenge between the three countries is the legal regime of cross border data transfer are still different. As result, it will impede international data transfer and cannot facilitate better trade between the three countries and ASEAN countries in general. The problem because there is a gap in legal development between different countries. This study is to look into this gap and to attempt for recommending improvements to the legal regime.

### **1.3 HYPOTHESIS**

Based on the preceding discussion, it is possible to hypothesize that the legal framework for cross-border data transfer in Singapore, the Philippines, and Indonesia remains distinct from the application. As a result, there is a need to develop a common set of minimum requirements that ASEAN countries can adopt, with Singapore, the Philippines, and Indonesia serving as case studies. As a result of having such sets of requirements, the gap affecting international data transfer will be bridged.

### **1.4 OBJECTIVE OF STUDY**

This study has the following objectives to achieve:

1. To identify the legal issues and challenges surrounding the cross-border transfer of personal data.
2. To examine the scope of the law on cross-border data transfer of Singapore, the Philippines, and Indonesia.
3. To analyse the strength and gaps of the legal framework in those three countries to facilitate intra-ASEAN and international data transfer.
4. To recommend a common set of minimum requirements that can be adopted by the three countries.