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**PROTECTION OF PRIVACY AND THE  
PERSONAL DATA IN THE INFORMATION AGE:  
MALAYSIAN APPROACH**

**BY**

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for the degree of Doctor of Philosophy in Law**

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## **ABSTRACT**

The profound changes brought by the development of information technology in the past decade have posed challenges to existing legal concepts. Particularly, a breach of privacy right is taken as new dimension in cyberspace, where the processing of personal data is becoming the norm in cyberspace transactions. The question is whether the existing legal framework is able to meet the challenges of new technology which appears to threaten the privacy of individuals. The present study is aimed at assessing how the threat to privacy takes place in cyberspace and how these threats can be dealt under the existing legal framework pertaining to the protection of privacy. The study mainly used library research to analyse the privacy legal framework in Malaysia and making comparisons with other selected jurisdiction. It is found from this study that the existing laws in Malaysia are not adequate to meet the challenges of new technology to privacy interest. In order to provide an answer, the study provides an analysis of various approaches which have been adopted by the EU, the United States and other common law countries to address privacy issues posed by ICT. The thesis demonstrates that there is no comprehensive solution to the privacy issues and each approach has its own advantages and disadvantages. In suggesting solutions, this thesis recommends the relevant Malaysian authorities to choose an optimal data protection model which takes into consideration the specific local factors. The study recommends that a transaction cost theory should be adopted to assess the advantages and disadvantages of each model. By applying this theory, this study demonstrates that a comprehensive data protection (legislative) regime is not suitable for Malaysia. Hence, the thesis recommends the Malaysian government to formulate its own personal data protection regime which is cost-efficient and effective since the issue is global in nature.

## ملخص البحث

إن التغيرات الجذرية التي صاحبت التطور في مجال تكنولوجيا المعلومات في العقد الأخير قد أثارت تحديات للمفاهيم القانونية الموجودة. وخاصة أن انتهاك حق الخصوصية قد أخذ مسارا جديدا في شبكة المعلوماتية، حيث أصبحت معالجة البيانات الشخصية معيارا لمعاملات شبكة المعلوماتية في يومنا هذا. والسؤال هنا هو هل أن الاطار القانوني الموجود حاليا قادر على مواجهة تحديات التكنولوجيا الحديثة والتي تهدد خصوصية الفرد. ومن ثم فإن هذه الدراسة تهدف إلى تقييم الخطر الذي يهدد الخصوصية في مجال شبكة المعلوماتية، ومدى إمكانية التعامل مع هذا الخطر من خلال الاطار القانوني الموجود والمتعلق بحماية الخصوصية. واستخدم الباحث منهجية البحث المكتبي لتحليل الاطار القانوني للخصوصية في ماليزيا بالمقارنة مع أطر قانونية أخرى. وتبين من خلال الدراسة أن القوانين الموجودة في ماليزيا غير ملائمة لمواجهة تحديات التكنولوجيا الحديثة ولغايات حماية الخصوصية. وللوقوف على هذه المسألة تقدم الدراسة تحليلا لمختلف الأساليب والطرق التي اعتمدها الإتحاد الأوروبي، والولايات المتحدة وبعض دول القانون العام الأخرى، لمعالجة القضايا المتعلقة بالخصوصية والتي طرحتها الـ(ICT). وتظهر الدراسة أنه لا يوجد حل حاسم لمسائل الخصوصية وأن لكل أسلوب مزاياه ومضاره. وبهدف التوصل إلى حل، فإن الدراسة توصي السلطات الماليزية بأن تختار نموذج حماية بيانات أفضل آخذة بعين الاعتبار عوامل محلية محددة. وتقتراح الدراسة تبني نظرية تكلفة المعاملة لغايات تقييم فوائد ومضار كل نموذج. ومن خلال تطبيق هذه النظرية، تظهر الدراسة أن نظام الحماية التشريعية الشاملة للبيانات غير مناسب لماليزيا. ومن هنا، فإن الدراسة تقترح على الحكومة الماليزية صياغة نظام خاص بها لحماية البيانات الشخصية بحيث يكون فعالا ومعقول التكلفة إذ أن المسألة عالمية بطبيعتها.

## **APPROVAL PAGE**

The thesis of Nurbek Kenjebaev has been approved by the following:.

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## DECLARATION

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

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Signature .....

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**PROTECTION OF PRIVACY AND THE PERSONAL DATA IN THE  
INFORMATION AGE: THE MALAYSIAN APPROACH**

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I dedicate this work for my late mother for her confidence in me and she will be a source of inspiration for years to come and my wife for her patience and encouragement.

As for my daughter, Maryam I will write another book, InsyAllah.

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Consumer Protection Act 1999  
Penal Code

### **United Kingdom (UK)**

Access Rights to Medical Records Act 1988  
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Data Protection Act 1998  
Human Rights Act 1998

### **United States (US)**

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Cable Communication Protection Act 1984  
Video Privacy Protection Act 1988  
Telephone Consumer Protection Act 1991  
Fair Credit Reporting Act 1970  
Computer Fraud and Abuse Act 1970  
Electronic Communication Privacy Act 1986  
Health Insurance Portability Assurance Act (HIPAA)  
Gram-Leach-Bliley Act

### **Australia**

Privacy Act 1988

### **New Zealand**

New Zealand Privacy Act 1993



**Canada**

Charter of Human Rights and Freedoms 1982

Personal Information Protection and Electronic Documents Act 2002

## LIST OF ABBREVIATIONS

All ER	: All England Report
AC	: Appeal Cases
APEC	: Asia Pacific Economic Cooperation
ARPANET	: Advanced Research Projects Agency Network
Art.	: Article
AWSJ	: Asian Wall Street Journal
CDT	: Centre for Democracy and Technology
COE	: Council of Europe
CLJ	: Current Law Journal
CLR	: Commonwealth law Reports
DPA	: Data Protection Act
DLR	: Dominion Law Reports
EC	: European Community
E-commerce	: Electronic commerce
EEA	: European Economic Area
E-mail	: Electronic mail
EU	: European Union
FTC	: Federal Trade Commission
ICT	: Information and Communication Technology
ISP	: Internet Service Provider
IT	: Information Technology
KB	: King's Bench Division
MECM	: Ministry of Energy, Communication and Multimedia
MSC	: Multimedia Super Corridor
MLJ	: Malayan Law Journal
NZLR	: New Zealand Law Report
OECD	: Organization of Economic Cooperation and Development
PDP Bill	: Personal Data Protection Bill
QBD	: Queen's Bench Division
S./sec.	: section
UDHR	: UN Declaration of Human Rights
UK	: United Kingdom
UN	: United Nation
US	: United States
DPO	: Domestic Privacy Officer
FDA	: Food and Drug Administration
CDRH	: Center for Devices and Radiological Health
USD	: United States Dollar
GBP	: Great Britain Pound
RM	: Ringgit Malaysia
HRA	: Human Rights Act
PIPEDA	: Personal Information Protection and Electronic Documents Act
HIPAA	: Health Insurance Portability and Accountability Act
UKHLC	: United Kingdom House of Lords Cases
WLR	: Weekly Law Reports

# CHAPTER 1

## PROTECTION OF PRIVACY AND PERSONAL DATA IN THE INFORMATION AGE: THE MALAYSIAN APPROACH

### 1.1 INTRODUCTION

The wide application of Information and Communication Technology (ICT) has brought benefits as well as challenges. The benefits include among others cheap and fast delivery of data and information, convenience and customisation to meet the needs of clients and customers for businesses. It allows easy collection, processing and use of data for marketing purposes, where these used to be the privilege of only a few big corporations decades ago. The widespread use of ICT in e-commerce has resulted in the loss of privacy for individuals who transact on the Internet. This is due to the emergence of sophisticated technologies and software that facilitates the collection of data on internet users without their consent. These data can be manipulated and profiled and may be used for any purposes without the individual's consent.

The wide proliferation of Internet usage has particularly posed many challenges to the existing legal system and concepts that were construed and meant for the protection of values and interests that were intended for physical or offline environment. For instance, it is estimated that there are more than eleven million users in Malaysia, making it the biggest internet population in South East Asia.<sup>1</sup> This shows that there is an urgent need to address privacy issues in cyberspace which is a concept that does not recognise borders and where communication can be done anonymously.

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<sup>1</sup> Malaysian Communication and Multimedia Commission statistics:  
<[http://www.mcmc.gov.my/facts\\_figures/stats/index.asp](http://www.mcmc.gov.my/facts_figures/stats/index.asp)> (accessed 03 January, 2008).

Rapid developments of technology which facilitate the collection, processing of personal data and surveillance have created new threats to the privacy of citizens which were not possible before. In the past, some of these data were stored in the archives of various departments of the government and it was nearly impossible to combine and manipulate them for whatever purpose. For instance, with the help of sophisticated software technologies, these data can be converted into digital form. It has been revealed in surveys that consumers tend to provide false information when asked about their personal data. This in turn will have negative effects on the development of electronic commerce, since trust and integrity in e-commerce is being compromised.

The aim of this thesis is to examine the existing legislation and common law principles on privacy in Malaysia and see whether the existing legal infrastructure is capable of withstanding the challenges brought by new technologies. A particular focus will be whether the existing legal infrastructure is able to provide legal protection of privacy to individuals on the internet.

In Malaysia, in the past few years, the number of complaints regarding abuse of personal data is on the rise. To date, there is no legislation whereby individuals can seek remedy in cases of violation of his or her privacy. Some may cite common law principles of trespass or nuisance or for that matter law of defamation. It is submitted that the principles developed in common law warrants a thorough study to see its effectiveness in the context of the internet. Attempts to stretch the existing common law principles of confidentiality will not only achieve the desired objective but also distort the aim of the principles which were to protect confidential information. This will be discussed in detail in the forthcoming chapters. This is one of the most pressing issues policymakers and judges today have to wrestle. The stake is very high,

that is, the loss of confidence among consumers in the electronic market. The research will also look at other jurisdictions on the approaches they have adopted to date to address the issue.

Firstly, the internet does not recognise national borders and there have been interesting developments in other jurisdictions in terms of the approaches that have been taken to address the problem.

Secondly, there have been attempts to harmonise cyber space-related legislation at regional and global levels to give more effective tools to law enforcement officers around the globe to achieve their objectives. For instance, Cyber Crime Convention 2001 is touted to be the model law for other countries.

Thirdly, by studying critically the various approaches taken by other jurisdictions, Malaysia has an advantage of the learning curve to develop its own approach to deal with issues of abuse of personal data. The research was carried out to assess the impact of the proposed Personal Data Protection Bill 1998 and its impact on the economy. It is submitted that all available mechanisms have to be studied to regulate market activities before the passing of a legislation. It is further submitted that this is crucial to matters involving cross-border implications such as the online marketplace.

## **1.2 SUMMARY OF THE THESIS**

This thesis was carried to provide an analysis of the current legal framework dealing with the protection of personal data and privacy. The need for this research has arisen due to increase use of emerging technologies in the society and their implications on the rights of individuals. Suffice to say, the same new technologies have contributed to the erosion of privacy of individuals which was rare a few decades back. For

instance, today, proliferation of digital cameras makes the job of spying simple and surreptitious. Special software programmes allow in particular combining the various available personal data of individuals so that it creates the individual in digital form. The same database can be used by others for various purposes from granting loans, employment and other lawful activities without the person's consent. This can be sometimes prejudicial to the person as the decision is based on a database.

There has been a public outcry over the sale of students' data by certain groups without their consent. The most recent controversial "CTOS" affairs generated a lot of interest from society as to the availability of legal remedies for persons affected by it.<sup>2</sup> In Malaysia, there is no statutory legislation for the protection of privacy. They are in patchy forms, like common law principle of protection against unlawful intrusion. This includes trespass to property or body. Or else, one needs to bring the action under other available torts such as equitable principle of confidentiality or trespass.

The Federal Constitution as the supreme law of the land is silent over matters concerning privacy. However, there are provisions in some other legislation which may be indirectly related to the protection of privacy. For instance, there are specific measures to be observed by the police who conduct a search seizure under Criminal Procedure Code.<sup>3</sup> This is premised on the principle of immunity of the human body from unlawful intrusion. It can also be in the form of a criminal offence, like assault and battery, that is provided in the Penal Code.<sup>4</sup> There are other forms of common law principles which provide protection against unauthorized disclosure of confidential information or trade secrets with a view to secure trust among business partners,

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<sup>2</sup> Mageswari, "Date set for decision on CTOS joint-trial," *The Star*, 5 September, 2007

<sup>3</sup> Section 20A of the Criminal Procedure Code, (Act No. 593).

<sup>4</sup> Sections 350, 351 of Penal Code, (Act No. 574).

employers and employees and it traces its origin from the case of *Saltman Engineering*<sup>5</sup> which is adopted in Malaysia.

However, the emergence of the Internet poses new challenges to the existing legal structure of protection of privacy of individuals. Though there are other types of technologies emerging which may threaten the privacy of individuals,<sup>6</sup> this paper will solely concentrate on the privacy on the Internet. For example, consider a typical situation in which an individual purchases airline tickets and makes hotel reservation over the telephone, or uses online banking to pay bills from his computer. The customer is interested in knowing and controlling who has access to the data and the purpose for which the data will be used. The individual may be unaware that personal information, such as details of the purchase, name and address, and the previous website visited, has been retained or would be used again later, perhaps even by third parties.<sup>7</sup> Other groups of individuals, including employees, patients and citizens, have similar concerns. Unlike other forms of privacy, this concept as aptly termed by Raymond Wack as “informational privacy” encompasses many areas of contemporary life—from health care, to credit reports and detailed consumer behaviour online.

The increased penetration of information and communication technologies (ICTs) in all aspects of life and the regulation of ICTs pose new dilemmas for policy makers to balance between conflicting interests: that is of business that is eager to exploit and individuals who lost control over their personal information. To boost confidence in the electronic marketplace and obtaining consumer confidence is a precondition that has to be fulfilled. In order to address consumer privacy concerns and the implications for the success of the Multimedia Super Corridor project, the

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<sup>5</sup> See *Saltman Engineering Co Ltd v Campell Engineering Co Ltd* [1948] 65 RPC 203.

<sup>6</sup> Such as contact less photo camera and mobile phones which have camera devices.

<sup>7</sup> Simson Garfinkel, *Database Nation: The Death of Privacy in the 21 Century*, (California: O’reilly & Associates, 2001), pp 16-19

Malaysian government is considering passing a comprehensive Protection of Personal Data (PDP) Bill which will be tabled at the beginning of 2008 in parliament.<sup>8</sup> This thesis details an examination of the present legal structure dealing with the protection of privacy and effectiveness in the context of informational privacy on the Internet. It will focus on the impact of the PDP Bill on businesses in Malaysia if it is implemented. This is done by analysing developments in other jurisdictions, namely in the United States and European Union who are the main trading partners of the country. It provides some recommendation for the policy makers to consider such as competitiveness viz .neighboring countries which will assist them in drafting and implementing privacy protection measures.

### **1.3 STATEMENT OF THE PROBLEM**

The advent of information technology and its wide application in all aspects of daily life have revolutionized the way we communicate and carry out transactions. The main locomotive behind the rapid spread of Information Technology (IT) is innovations which increase business efficiency. For instance, we already experience the replacement of human beings with automatic telephone answering machines in corporations. Despite the dot com stock market crash in early 2000, the online business is steadily increasing. As long as the Internet offers cost-saving solutions for the corporations, then e-commerce will stay.

The new technologies have challenged rules and regulation which were adopted to regulate human activities in the physical space. This has been illuminated in a book written by Lawrence Lessig, “The Code and Other Laws of Cyberspace.” In his book, he described “the architecture” which is being built and shaped by profit-

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<sup>8</sup> *The Star*, “Act to keep personal data private,” 6 November, 2007