

## TECHNOLOGY AND THE DETERIORATION OF RIGHT TO PRIVACY

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### ABSTRACT

*The infringement of privacy is a rising phenomenon, which is only accelerated as technology advances. This article provides a critical review of the concept of right to privacy, the cases involving deterioration of privacy due to technology and the legal position in reference to its violation. It has become evident that at present, Malaysia's response to such infringements and violations is far from satisfactory and leaves much to be desired. This article argues that Malaysian law, with regard to privacy protection, is below the acceptable standard. This is in contrast to many developed, democratic countries such as the United States, which have placed more emphasis in developing their privacy laws and policies. It is hoped that this article can highlight the lacunae in Malaysian privacy law and put to the fore the consequences that will ensue as a result of the law's failure in safeguarding privacy. It concludes by emphasising the need to legislate better laws to adequately address the magnitude of problems concerning the derogation of privacy and providing suggestions as to the steps need to be taken in order to ensure that the right to privacy is protected and upheld.*

**Keywords:** technology, privacy, right, violation, law

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## INTRODUCTION

The debate on human rights issues has become a topic of the 21st century, so much so that it has been observed that human rights appears to be the new religion. With the atrocities committed during World War II, the consequence of the aftermath of the war was the uprising and recognition of natural justice, whereby laws were created to make possible the actionability of the individual for human rights violations.<sup>1</sup> The United Nations Charter is a prominent document that first attempted to legislate these human rights into a more concrete form.<sup>2</sup>

Since then, the protection of human rights has become of utmost importance to many countries such as the United States (U.S.), the United Kingdom (U.K.), Singapore and countries in the European Union, just to name a few. The right to privacy is amongst those these countries seek to protect, as enshrined in the United Nations Declaration of Human Rights,<sup>3</sup> the International Covenant on Civil and Political Rights, The European Convention on Human Rights<sup>4</sup> and in many other international and regional treaties. The preservation and protection of privacy is now considered a necessity as the right to privacy has been described as the very essence of a man's soul.<sup>5</sup>

The predicament with regard to protecting privacy has become even more challenging with the coming of modern technology. At present, we do most of our daily transactions and business through some kind of technological or electronic means. Our modern society cannot now function without the usage of the Internet or e-commerce to facilitate our everyday transactions,<sup>6</sup> so much so that we feel impotent and powerless if we are robbed of the ease and convenience that come from our use of the Internet.

Unfortunately, with the many benefits derived from the Internet and online transactions comes the abuse of such facility. Problems which our forefathers had never foreseen are occurring today, with the advancements

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<sup>1</sup> Steven S. Ratner and Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, 2nd ed. (New York: Oxford University Press, 2001), 6.

<sup>2</sup> Abdul Ghafur Hamid, *Public International Law: A Practical Approach* (Selangor, Malaysia: Prentice Hall, 2007), 345.

<sup>3</sup> Article 12, United Nations Declaration of Human Rights.

<sup>4</sup> Article 8, European Convention on Human Rights.

<sup>5</sup> Whitfield Diffie and Susan Landau, *Privacy on the Line: The Politics of Wiretapping and Encryption* (Cambridge, MA: The MIT Press, 1999), 126.

<sup>6</sup> *Ibid.*, 1.

in science and technology playing a significant part in causing them.<sup>7</sup> For instance, the address, exact location and even picture of one's home can be found simply by clicking a button. Recently, the rise in cases involving misuse of information and wiretapping and surveillance, in particular, has put the public on alarm,<sup>8</sup> as private information or images can be spread through the Internet and reach the public overnight, thus creating damage of catastrophic proportions. Garfinkel is of the opinion that privacy rights extend to the power of the people in determining the details of their lives they choose to reveal and to otherwise remain undisclosed. He has observed that currently, freedom and privacy are at stake even more due to threats such as government eavesdroppers, cunning businessmen and interfering.<sup>9</sup>

It has been observed by the writers that while many countries are attempting to legislate laws to protect privacy, the practical situation is undoubtedly disappointing when limits to privacy are placed. While the power given to the government which allows infringement on their privacy increases, the right of the public to be left alone appears deteriorating to the writers. It is alarming that even certain modern countries like the U.S., which is thought to be propounders of the human rights, have made some unsatisfactory attempts in ensuring that the individual's privacy is not violated. Even IF there is a law that purports to guarantee such right, it is usually restricted to "national security" or "public policy" concerns. The question is, do these modern, democratic countries like the U.S. really protect the individual's right to privacy? The individual's right to privacy must be enhanced and respected. Only in certain, and most importantly, exceptional circumstances, can the privacy of a person be violated. However, this exception must be exercised not arbitrarily but in accordance with the law. This logically means not just any "law" that was promulgated to secure the interests of one government, but in accordance to the law for the greater good of the community or country.

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<sup>7</sup> James Michael, *Privacy and Human Rights: An International and Comparative Study, with Special Reference to Developments in Information Technology* (Paris: Unesco Publishing, 1994), 7.

<sup>8</sup> Assafa Endeshaw, *Internet and E-commerce Law with a Focus on Asia-Pacific* (Singapore: Prentice Hall, 2001), 11.

<sup>9</sup> *Ibid.*, 12.

## DEFINING PRIVACY

The first, and arguably, the most difficult hurdle in trying to safeguard one's privacy is the fact that privacy is a word that is difficult to define comprehensively. A U.S. Supreme Court Justice described privacy as "the right to be left alone."<sup>10</sup> However, this definition is flawed in several respects. The glaring problem is that such a definition is too vague and does not encompass situations that would, to the reasonable person, amount to the invasion of one's privacy. What happens is that one may find himself to be in a position where his privacy is violated, but there is no effective legal protection afforded to him due to the indistinct concept of privacy.<sup>11</sup>

Take, for example, the hypothetical situation whereby a man with celebrity status is being followed by the press or paparazzi. The cameraman is cautious and ensures that he is never within the boundaries of the man being observed, hence not falling under the scope of trespass. But as soon as the man steps into view, pictures are taken with every press of the button and the following day, the man makes the headlines of tabloids all over the world. The man is technically being "left alone" following the definition of the U.S. court, as neither his property nor his person has been touched. By literal definition, this situation may not amount to a violation of privacy. But to the individual, this is deemed to be a gross infringement into his or her private life.

This predicament of arriving at a proper definition leads to the effect that the right to privacy is difficult to be legally enforced or upheld. That is why it is not surprising that it has even been described as "inconceivable" as a legal right. "It is sanctioned by society but clearly not enforceable by the government, as privacy itself is beyond the scope of law."<sup>12</sup>

Such is the disappointing state of affairs with regard to the individual's privacy that efforts have been made by legislators worldwide to define the elusive subject better. Now, privacy is also extended to include the protection of data as well as biological and genetic information. Regardless of the many and sometimes differing definitions of privacy and the ambiguity it brings, it can be seen that most countries have taken measures to legislate better laws for the purpose of privacy protection, whether it is guaranteed in the Constitution of that country or in other forms

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<sup>10</sup> Sulabh Jairam, *Emerging Threats to Individual Privacy* (New Delhi: Dominant Publishers, 2001), 3.

<sup>11</sup> Raymond Wacks, ed., *Privacy, The International Library of Essays in Law and Legal Theory* (England: Dartmouth Publishing Co. Ltd., 1993), xii.

<sup>12</sup> Richard F. Hixson, *Privacy in a Public Society: Human Rights in Conflict* (New York and Oxford: Oxford University Press, 1987), 98.

of law. However, it is observed by the writers that these legal provisions are more often than not out of date, barely keeping up with the technological advancements which allow easier invasion of one's privacy.<sup>13</sup> Thus, the laws that attempt to protect privacy leave many loopholes and in many instances, offer insignificant protection for the individual.<sup>14</sup>

There are countries that have answered the call for better, updated laws which have the effect of protecting privacy and tackling the issues that come with cyber or Internet related crimes and offences such as the UN Convention Against Transnational Organized Crime 2000 and Council of Europe Convention on Cybercrime 2001, to name a few. Despite this, many other countries are still lacking in their privacy laws. Hence, this situation calls for the reform of existing privacy and cyber laws, and the creation of such laws protecting privacy if none exists.

## TECHNOLOGY'S INVASION OF PRIVACY

With the threats to an individual's privacy emerging ever so swiftly, the need to have proper legislations that protect these rights is imperative. The advancements in technology, in particular, is a main culprit, as everything computerised raises the risk of the personal information of citizens being leaked or hacked by anyone with skills in computer applications. The usage of closed-circuit television (CCTV) in restaurants, public spaces and especially, changing rooms brings about the concern that the images might be leaked onto the Internet for public viewing, as can be evidenced by many Malaysian cases. For example, the case of a local artiste, Nasha Aziz, can be used to illustrate the point that technology assists in the violation of privacy. In this particular case, she found out that she had been a victim of a perverted peeping tom who had installed spy cameras in her house and videotaped her going about her daily routine, which included footage of the artiste undressing.<sup>15</sup> Another case involves the former Member of Parliament for Gombak, Datuk Rahman Ismail, who was also taped in a hotel room with a fellow parliament member who was not his wife, although he subsequently denied it was him in the camera footage. Similarly, in December 2007, Dr. Chua Soi Lek admitted to his extra-marital affair after

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<sup>13</sup> Daniel J. Solove, *The Digital Person: Technology and Privacy in the Information Age* (New York: New York University Press, 2004), 56.

<sup>14</sup> Sulabh Jairam, 28.

<sup>15</sup> Bernama, "Nasha Spy Camera Case: Supervisor Loses Appeal," *The Star*, 6 October, 2008, <http://thestar.com.my/news/story.asp?file=/2008/10/6/nation/20081006161935&sec=nation> (accessed 20 August, 2010).

he was videotaped having sex with a woman. Technology allowed the video footages to be uploaded onto the Internet in a matter of minutes, and it was soon after the release of the video that the Malaysian population became aware of his indiscretions. The controversy that arose, and the negative comments from the conservative and reserved Malaysian public inevitably led to his resignation.<sup>16</sup>

Renowned lawyer, Karpal Singh, called on the legislature to enact better laws to ensure that the privacy of individuals would be protected, especially in light of the intrusion of privacy suffered by Bukit Lanjan assemblywoman, Elizabeth Wong, when intimate pictures of her and her lover were revealed to the public.<sup>17</sup> He also called on the Attorney General's Chambers to impose heftier fines and deterrent sentences to those guilty of this violation; a step that is not at all unwelcome, considering the slew of shocking cases, which prove that the individual's right to privacy in Malaysia is at stake. The point to be submitted is that the advancement of technology is apparently accelerating the infringement of the individual's privacy not only in Malaysia, but also around the globe as this has now become a worldwide dilemma.

## **PROTECTING PRIVACY OR INVADING PRIVACY?**

Many countries, especially the first world countries, press for the right to privacy. However, it is interesting to note that some of these countries have, in certain instances, enacted laws that inadvertently leave room for trespass against individual's privacy.

The U.S., surprisingly, does not expressly provide protection of privacy in the Constitution, although it has been argued that the right is implied through the wordings of the Constitution.<sup>18</sup> There was an attempt to remedy this situation through amendments contained in the Bill of Rights; in particular, Amendments 1 to 9. However, upon further inspection, these amendments are not comprehensive; nor are they adequate. The Ninth Amendment, which states that the "enumeration of certain rights" in the Bill of Rights shall not be construed to deny or disparage other rights retained by the people was interpreted by some, including Justice Goldberg in *Griswold*

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<sup>16</sup> "Dr. Chua Soi Lek Admits to Being Man in Sex DVD," *The Star*, 2 January, 2008, <http://thestar.com.my/news/story.asp?file=/2008/1/2/nation/19898249&sec=nation> (accessed 15 October, 2010).

<sup>17</sup> "Get Tough on Invasion of Privacy, Says Karpal," *The Star*, 23 February, 2009.

<sup>18</sup> W. Diffie and S. Landau, 128.

v. Connecticut, as justification for broadly reading the Bill of Rights to protect privacy in ways not specifically provided in the first eight amendments.<sup>19</sup>

Also, in the U.S., the Federal Bureau of Investigation (FBI) has developed a program called Carnivore that would target emails of individuals who potentially pose threats to "national security." However, concerns arose, especially among civil libertarians, as the FBI can receive information such as email headers without obtaining a wiretap warrant, an act which was later made legal by the coming-into-force USA Patriot Act 2001.<sup>20</sup> The FBI Director, Louis Freeh, even went as far as to disallow any encryption program that would be a bar to the attempts of the government or authority from hacking into the emails or personal information of individuals.<sup>21</sup>

The Patriot Act generated much criticism as it aims at suspected terrorists and gives the Federal authorities unfettered powers in monitoring Internet activities. This Act was promulgated as a consequence of and in response to the September 11 attacks, and gives law enforcement officials the authority and power to intercept and track communications of Internet trespassers,<sup>22</sup> among other things. The Americans are worried that this would allow the government to collect the private information of individuals under the all too commonly used pretext of investigations.<sup>23</sup>

The Carnivore program and the Patriot Act, among others, present an enormous threat to the privacy of the U.S. citizens and other citizens worldwide, and raise more questions. Who can guarantee that the Carnivore program and the power under the Patriot Act would only be used in cases that warrant such intrusion? Is the Carnivore program so accurate that it would only limit itself to monitor the Internet activities of the alleged suspect, and not other Internet users?<sup>24</sup> What situations justify the violation of one's privacy? These are the questions that understandably raise concerns and need to be addressed. If, and when the privacy of persons are to be

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<sup>19</sup> See *Griswold v. Connecticut*, 381 U.S. 479 [1965].

<sup>20</sup> Kevin Poulsen, "FBI Retires its Carnivore," *Security Focus*, 14 January, 2005, <http://www.securityfocus.com/news/10307> (accessed 12 October, 2010).

<sup>21</sup> Charles R. Smith, "Invasion of Your Privacy Has Just Begun," *NewsMax*, 6 March, 2001, <http://archive.newsmax.com/archives/articles/2001/3/5/220402.shtml> (accessed 5 March, 2010).

<sup>22</sup> Marcia S. Smith, Jeffrey W. Seifert, Glenn J. McLoughlin and John Dimitri Moteff, "The Internet and the USA Patriot Act: Potential Implications for Electronic Privacy, Security, Commerce and Government," CRS Report for Congress, 4 March, 2002, 2.

<sup>23</sup> Stefanie Olsen, "Patriot Act Draws Privacy Concerns," *CNet News*, 26 October, 2001, <http://news.cnet.com/2100-1023-275026.html> (accessed 12 October, 2010).

<sup>24</sup> Marcia S. Smith, Jeffrey W. Seifert, Glenn J. McLoughlin and John Dimitri Moteff, "The Internet and the USA Patriot Act: Potential Implications for Electronic Privacy, Security, Commerce and Government," CRS Report for Congress, 4 March, 2002, 19.

invaded under the grounds of public policy, the definition of what constitutes public policy concerns must be properly defined instead of being given a general description. A policy that is described as being too generic would potentially open the window of opportunity for abuse.

It would seem that these countries, despite implementing laws specifically aimed at protecting privacy, oftentimes fail to practice the fundamental principles they developed and vehemently preach. When the infamous excuse of "national security" is misused in certain situations, what can the individual do in such times except to watch helplessly as their privacy is being stripped away in front of their very own eyes? When one quotes the words "national security" or "public interest," it is similar to casting a blanket over the issue as not much can be argued over the matter. It is submitted that upon closer observation, the Constitutions, legislations and policies of most countries do not afford satisfactory protection of one's privacy. The situation will remain so as long as governments are more interested in securing their own interests and liberally intruding into the privacy of others for the "country's interest" instead of prioritising the interest of its citizens.

## **PRIVACY PROTECTION LAWS IN MALAYSIA**

Malaysia, by virtue of its written Constitution, submits to the doctrine of Constitutional Supremacy. The principles enshrined in the Constitution have precedence over other matters and must be respected, save for a few exceptions. In the event that a state or subsidiary legislation is in conflict with the values guaranteed by the Constitution, the law in conflict will cease to operate.<sup>25</sup> Currently, the position in Malaysia, similar to that of the United States, is that the Federal Constitution does not afford direct protection of one's privacy. However, Article 5 states:

- 1) No person shall be deprived of his life or personal liberty, save in accordance with law.
- 2) Where complaint is made to a High court or any judge thereof that a person is being unlawfully detained the court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the court and release him.

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<sup>25</sup> Abdul Aziz Bari, *Malaysian Constitution: A Critical Introduction* (Kuala Lumpur, The Other Press, 2003), 38.



- 3) Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.<sup>26</sup>

One's right to privacy can be argued to be guaranteed by the inferred consequence of this article. In order to respect the liberty of another, one must also respect the privacy of the individual. Much to the dismay of Malaysians, Malaysia is a little conventional in its adoption of laws protecting the privacy of individuals. Little has been done with regard to privacy laws per se, and in 2007, the country ranked very poorly in the international arena on the issue of privacy protection,<sup>27</sup> giving the impression that the government is not too perturbed in combating privacy violations. The former President of the Malaysian Bar Council, Dato' Ambiga Sreenevasan, intimated that Malaysia's laws are inadequate with regard to the battle of safeguarding privacy<sup>28</sup> and demanded that the necessary changes be made with regard to the law in order to reflect the changes in technology and the dire need for privacy protection.

There are many cases whereby the lewd or drunken antics of individuals are uploaded onto social networking sites without the person's knowledge. These situations were not as rampant in the past as the technology back then did not make it convenient for the spread of videos and footage of people in their intimate moments. The consequences of the publishing of such videos would inevitably result in humiliation and social stigma, and in extreme cases, suicides, as in the case of Tyler Clementi of Rutgers University.<sup>29</sup> A video of him having intercourse with another man was secretly recorded with a webcam and streamed live on the internet by his roommate, who even *tweeted* his network, inviting them to watch. The embarrassment led Tyler to post a goodbye message in his Facebook page before jumping off a bridge to his death. Two students were subsequently charged for violation of policy.

<sup>26</sup> See Article 5 of The Federal Constitution (Act 000).

<sup>27</sup> "Poor Privacy Protection in Malaysia, says Privacy International," *Bangkit*, 17 January, 2008, <http://www.bangkit.net/2008/01/17/poor-privacy-protection-in-malaysia-says-privacy-international/> (accessed 25 October, 2010).

<sup>28</sup> Joanna Loy, "Privacy: Does it Exist in Malaysia? Is it Time to legislate?" *The Malaysian Bar*, 11 March, 2009, [http://www.malaysianbar.org.my/human\\_rights/privacy\\_does\\_it\\_exist\\_in\\_malaysia\\_is\\_it\\_time\\_to\\_legislate\\_.html](http://www.malaysianbar.org.my/human_rights/privacy_does_it_exist_in_malaysia_is_it_time_to_legislate_.html) (accessed 10 October, 2010).

<sup>29</sup> Emily Friedman, "Victim of Secret Dorm Sex Tape Posts Facebook Goodbye, Jumps to his Death," ABC News, 29 September, 2010, <http://abcnews.go.com/US/victim-secret-dorm-sex-tape-commits-suicide/story?id=11758716> (accessed 23 October, 2010).

The difference between Malaysia, Singapore and the U.S. is that, in the U.S., those who were responsible for posting the video could, and have been charged under violation of privacy laws, specifically for using the camera to view and transmit a live image. The most serious charge under the New Jersey privacy laws would mean a term of imprisonment for up to 5 years.<sup>30</sup> In this regard, American laws have met the challenge of enacting laws specifically aimed at countering such problems of technology's invasion of privacy. An information technology lawyer from Singapore, Bryan Tan, commented that breach of privacy in Singapore could only occur when there is a trespass element, i.e., when someone enters your house, or when negligence can be established; for example, the negative consequences that ensue from the violation of one's privacy—such as humiliation—by the posting of private videos.<sup>31</sup> Thus, it can be seen that both Malaysia and Singapore have yet to legislate adequate laws to protect our privacy and avoid situations like Tylers' in the future.

Previously, attempts to safeguard the privacy of citizens in Malaysia can be seen with legislations such as the Computer Crimes Act 1997 and the Communications and Multimedia (Licensing) Regulations 1999. There is also an offence under Section 14 of the Minor Offences Act 1955<sup>32</sup> that carries a penalty of a fine not exceeding RM100, but this tragically fails in emphasising the importance of privacy and does little to deter others from violating it.<sup>33</sup>

In Malaysia, if one is fortunate, a conduct complained of could be categorised as an offence or violation in accordance with the Penal Code, Multimedia and Communications Act, or the law of confidence.<sup>34</sup> The consequences of inadequacy of privacy laws would result in infringement of privacy without proper legal remedies; or worse, offences that go unpunished. Unless the conduct falls under recognised causes of action according to Malaysian law such as trespass; under tort such as defamation; or constitute a crime under the Penal Code, such as the sale or distribution of obscene materials,<sup>35</sup> and gestures that intrude upon the privacy of

<sup>30</sup> Lisa W. Foderaro, "Private Moment Made Public, then a Fatal Jump," *The New York Times*, 29 September, 2010, <http://www.nytimes.com/2010/09/30/nyregion/30suicide.html> (accessed 23 October, 2010).

<sup>31</sup> Sandra Leong and Tham Yuen-C, "When Online Pranks Get Out of Line," *The Star*, 3 October, 2010, 30.

<sup>32</sup> See S. 14 of the Minor Offences Act 1955 (Act 336).

<sup>33</sup> "Get Tough on Invasion of Privacy, Says Karpal," *The Star*, February 23, 2009, <http://thestar.com.my/news/story.asp?file=/2009/2/23/nation/3325456&sec=nation> (accessed 8 March, 2010).

<sup>34</sup> J. Loy.

<sup>35</sup> Section 292 of the Penal Code, Revised 1997 (Act 574).

another<sup>36</sup> and the like, one would be frustrated to find that situations of infringement of privacy would go unprosecuted or no liability can be attached. It is submitted that due to the coming of advanced technology, the privacy of a person can be violated without transgressing the limits of the written law. For example, while it is true that the law of defamation can protect privacy, it could only do so IF the violating act fulfils the elements of defamation, that includes the intentional purpose of lowering the esteem or reputation of a person in the eyes of the society.<sup>37</sup> The problem occurs when an act of privacy infringement occurs that does not fall within the scope of defamation. If a photographer is continuously taking pictures of a famous person while being careful to stay within the boundary of the law as not to be trespassing, there may not be any viable cause of action against the photographer unless the nature of the pictures raises claim of defamation or the act of taking the pictures involves trespass. In many cases, privacy is infringed without elements of trespass or defamation. What would then be the protection afforded to the individual? As the honourable Harmindar Singh Dhaliwal JC expressed, although defamation law may, to some extent, protect privacy, its protection is best served by having specific privacy legislation rather than relying on defamation law.<sup>38</sup> Even if the privacy violation constitutes a specific crime—which can be proven—usually the sentence is not serious enough to reflect the gravity of the crime. For example, under Section 509 of the Penal Code,<sup>39</sup> which is the offence of insulting the modesty of a person by words or gestures, and which intrudes upon the privacy of such person, the accused may only be sentenced up to 5 years, or fined, or both.

Although the laws of Malaysia have attempted to address the various problems of cyber crime, and that some of these laws may consequently protect privacy, there has been a startling lack of emphasis on privacy protection in particular. However, recently, a breakthrough in the area of cyber law and the preservation of privacy has been made with the promulgation of the Personal Data Protection Act (PDPA) 2010, which gives greater right to the individual with regard to their personal data and how it is handled or transmitted. This Act has yet to have an enforcement date; nevertheless it is hoped that it would bring about change in terms of providing more security and privacy for the handling of information, and

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<sup>36</sup> Section 509 of the Penal Code, Revised 1997 (Act 574).

<sup>37</sup> *Tun Datuk Patinggi Haji Abdul-Rahman Ya'kub v. Bre Sdn Bhd & Ors*, 1 LNS 304 (1995); *JB Jeyaretnam v. Goh Chok Thong*, 1 LNS 139 (1984).

ultimately lead to more secure, trustworthy electronic surroundings.<sup>40</sup> Companies and institutions should not sit idly waiting for the Act to be enforced. Rather, they should take active measures from now on to update their policies and ensure compliance with the Act's principles<sup>41</sup> as this is not a process that can be done overnight. It requires the revision and modification of the company's policies.

The Act governs all those who possess control and authority in the processing of one's personal data. While the definition of processing is extensive, only commercial data processing is applicable in the Act.<sup>42</sup> The word commercial connotes matters with regard to the exchange or supply of services or goods, banking, investments, agency, insurance, financing and the like.<sup>43</sup> The drawback of this Act is that it only applies to banks and other corporate bodies that collect data.<sup>44</sup> It does not cover persons who abuse the personal data of individuals, save for the fact that the data were in relation to commercial transactions, as explained in Section 2(1) of the Act.<sup>45</sup> It seems, to the writers, that those who abuse the personal data of others for no particular purpose, or for sport, would not be subject to this Act.

There are also jurisdictional issues involved as the Act does not apply to data processed entirely outside of Malaysia.<sup>46</sup> Hence, this would suggest that the Act does not cover Internet-based data gatherers, unless the personal data is used or intended for use in Malaysia.<sup>47</sup> This jurisdictional problem is far-reaching, as almost all data gatherers are Internet-based. In such situations, which country then would have jurisdiction over the breach of privacy or abuse of data processing?

Additionally, the Federal and State Governments are not subject to this law.<sup>48</sup> The writers observe this as defeating the purpose of the law enactment, as much information and data are being held and processed by the Federal and State Governments. According to a survey conducted by Privacy International, Malaysia was criticised for circumscribing laws that

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<sup>40</sup> "Cyber Privacy Law on the Net," *CyberSecurity Malaysia*, 18 November, 2000, [http://www.cybersecurity.my/en/knowledge\\_bank/news/2000/main/detail/871/index.html](http://www.cybersecurity.my/en/knowledge_bank/news/2000/main/detail/871/index.html) (accessed 15 October, 2010).

<sup>41</sup> K. Singh, "Net value: Getting to grips with the Personal Data Protection Act," *The Edge*, 2 August, 2010, <http://www.lexisnexis.com> (accessed 24 August, 2010).

<sup>42</sup> See S. 2(1) of the Personal Data Protection Act 2010 (Act 709).

<sup>43</sup> Abu Bakar Munir, "Insight into the PDP Act: Applicability of the Personal Data Protection Act," *The Edge*, 16 August, 2010, <http://www.lexisnexis.com> (accessed 24 August, 2010).

<sup>44</sup> J. Loy.

<sup>45</sup> Section 2(1) Personal Data Protection Act, 2010 (Act No. 709).

<sup>46</sup> See Section 3(2) of the Personal Data Protection Act 2010 (Act No.709).

<sup>47</sup> Abu Bakar Munir.

<sup>48</sup> Section 3(1) Personal Data Protection Act 2010 (Act No. 709).

help protect privacy under the pretext of anti-terrorism.<sup>49</sup> Although the Act is deemed to be well planned by experts from other countries that enact similar laws on data protection, the effectiveness is dependent upon the way the laws are enforced and how seriously organisations, institutions, and those covered by this Act take their responsibilities and duties.<sup>50</sup> It is submitted that although the action taken by the Parliament in enacting better laws such as the PDPA for the preservation of our privacy is applauded, the restrictions, non-limitations and exceptions practiced would bring about the same result, which is the non-preservation of privacy. Furthermore, the Act only covers the privacy of personal data; how it is to be collected and processed. It does not serve to address all privacy infringement concerns, such as the privacy infringement of personal data for non-commercial purposes. Therefore, it is incumbent upon the legislature to enact a more specific and comprehensive Act that would serve to protect all privacy violations, which would include informational and physical transgressions of privacy.

## RECOMMENDATIONS

In Malaysia, it is submitted that the situation concerning violation of privacy must, and can be improved by:

1. Incorporating the right to privacy as a fundamental right in the Federal Constitution to emphasise the importance of its observance. Changes to the Constitution can and should be made only when necessary, as in the situation with regards to violation of privacy. Amendments to the Constitution are at times unavoidable<sup>51</sup> as the Constitution is a living document which must protect the interest of the society. Once privacy rights are guaranteed by the Constitution, the right has a far greater chance of being respected and observed, for the doctrine of Constitutional Supremacy is the law of the land and connotes that all rights in the Constitution are to be assured at all costs, and all other inconsistent laws are not to be practiced.

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<sup>49</sup> Privacy International, Report no. PHR2004, 16 November, 2004, [http://www.privacyinternational.org/article.shtml?cmd\[347\]=x-347-83539](http://www.privacyinternational.org/article.shtml?cmd[347]=x-347-83539) (accessed 15 October, 2010).

<sup>50</sup> K. Singh.

<sup>51</sup> Abdul Aziz Bari, 167.

2. Enacting a privacy act per se, so as to properly address all the new circumstances of violation of privacy brought about and made easy by the use of modern technology. Those specialised in the field of science, technology, e-commerce and the related fields should be invited for a more active role in giving opinions on the issues the laws need to counter. Not many legislators are technocrats; they are not capable of fully anticipating and understanding all the problems that could arise due to the advancements of technology. Hence, experts in the field should have a more significant role when such legislations are being created<sup>52</sup> to ensure that the laws enacted are thorough, comprehensive and up to date.
3. Creating stiffer criminal sanctions and privacy laws that should be followed by stricter penalties to ensure adherence to the law; as the possibility of incarceration for invading someone's privacy would have the effect of discouraging people from engaging in such offences. This is in accordance to the well-accepted theories by jurisprudence scholars such as Beccaria and Bentham. According to their General Deterrence Theory, man is driven by pleasure. Their act of engaging in crime is in accordance with the pleasure they derive from their action and the minimum risk it carries. Hence, an action that attracts a hefty or severe punishment would result in a reduction of crimes as it sends a warning to the society at large the extent of punishment awaiting them should they transgress the bounds of the law.<sup>53</sup>
4. Incorporating the topic of privacy and ethics into the subject of Islamic and Moral studies, which are made compulsory in schools. Many instances of invasion of privacy involve the young, who are more adept with the latest gadgets and technological advancements than adults. By instilling ethics, a sense of respect among the young concerning the observance of the privacy of others will be generated. It is also hoped that this would deter the violation of privacy cases in the future.
5. Organising talks and seminars on the significance of respecting privacy and the legal as well as moral consequences for its violation. This is to be done to instil legal awareness amongst the public and enhance social responsibility in the hope that the public would act ethically and

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<sup>52</sup> Kevin J. Connolly, *Law of Internet Security and Privacy* (Aspen: Aspen Publishers Inc., 2004), 35.

<sup>53</sup> Gennaro F. Vito, Jeffrey R. Maahs and Ronald M. Holmes, *Criminology: Theory, Research and Policy* (Massachusetts: Jones and Bartlett Publishers, 2007), 56.

responsibly in their daily affairs and abstain from acts of privacy violation.

6. Improving the Personal Data Protection Act (PDPA) to cover data processing not only for commercial, but for personal purposes as well. Internet-based data gatherers should also be subject to this Act to overcome the jurisdictional issue. Similarly, the Federal and State Governments should be subject to the PDPA; being the bodies that collect, process and hold most of the personal data of Malaysians. Once the setbacks and loopholes in the PDPA are addressed, better enforcement of the law with regard to the right of the individual's privacy can be done.

## **CONCLUSION**

With the coming of globalisation and improved education of people, more and more are becoming aware of their rights and are not afraid to claim or fight for them. Be that as it may, invasion of privacy is still a common occurrence, even more so with the advances and sophistication of information and communications technology. With a click of a button, one can know the financial standing of another or one's medical records or academic achievements. The abuse of technology has led to the display and distribution of activities that individuals do in the privacy of their own homes. Now, more than ever, a person's "right to be left alone" seems a distant dream.

It is imperative that the legislatures of countries worldwide address the issue of violation of privacy, as failure to do so would only cause the offenders to grow in number, as their actions go unpunished and unprosecuted in many countries. Even if there are punishments for their offences, the amount of fines imposed would do little to deter them from continuing transgressing into the private lives of others. The charges should come with harsher punishments, to drive home the point that transgressing the privacy of another is not only a grave crime, but an immoral act as well. Only with proper and deterrent sentences can we hope for this problem to be curbed and for the privacy of individuals to be restored.

With the advances in technology, violations of privacy become easier, and the consequences are more gargantuan; with the help of the Internet, the spread of personal information can become very difficult to control. Hence, a more urgent move to develop privacy laws which cover violations of privacy per se—aimed to meet the needs of society and protect their rights

to privacy—is suggested. Active participation of technocrats must be more welcome as it is important to have their inputs in order to enact effective laws that properly address issues related to privacy, technology and cyber crimes.

Lastly, society itself must play a pivotal role in deterring the violation of privacy and stopping the spread of information by refusing to participate in, look at, and distribute the personal images and data of others. The moral and societal conscience of the people must be enhanced, as there is no purpose of creating laws to protect the people when the people do not protect themselves and each other. Only with proper and adequate laws, along with societal responsibility, can the problem of violation of privacy be addressed.