

# LAW & PRACTICE

## Critical Analysis and Legal Reasoning

SYLVIA KIERKEGAARD (ed.)

# **Law & Practice**

**Critical Analysis and Legal Reasoning**

**Sylvia Kierkegaard (ed)**

Law & Practice: Critical Analysis and Legal Reasoning  
ISBN: 978-87-994854-3-7

# **Law & Practice**

## **Critical Analysis and Legal Reasoning**

**Sylvia Kierkegaard**  
(Editor)

*Patrick Kierkegaard*  
(Associate Editor)

*Mikael Kierkegaard*  
(Associate Editor)

# Law & Practice: Critical Analysis and Legal Reasoning

Editor: Sylvia Mercado Kierkegaard

Associate eds.: *Patrick Kierkegaard and Mikael Kierkegaard*

ISBN: 978-87-994854-3-7

©2013 International Association of IT Lawyers (IAITL) <http://www.iaitl.org/>

All rights reserved. No part of this publication may be reproduced, stored in retrieval system, or transmitted in any form or by means, without the prior permission from the publisher, or as expressly permitted by law.

## Copyright License

The submission of the paper implies and warrants that the article submitted are the author(s)' own work and it does not infringe or violate the rights of anyone else. The author grants the International Association of IT Lawyers (IAITL) the non-exclusive rights to reproduce and distribute in whole or in part, the work submitted to the Conference (Intl. Private Law, International Public Law, Legal security and privacy issues, and International Trade Law Conference) for publication and *until* further written notice by the Licensor, a perpetual licence covering all future submissions by the Licensor to the IAIT Conferences.

The non-exclusive right include the material in all media including electronic and microfilm and to use the material in conjunction with computer-based electronic information retrieval systems, to grant permissions for photocopying, reproductions and reprints from this book, and to authorize document delivery and abstracting and indexing services provided that any such copy reproduces the AUTHOR's and the Licensor's name and, if inserted by the Licensor, the appropriate copyright notice to run in conjunction with the copyright notice representing the publisher's limited rights.

The Licensor warrants that, as far as it is aware, the material does not and/or will not contain libellous or other unlawful statements and does and/or will not infringe the intellectual property rights of others.

Furthermore, the author(s) understands that it is their sole responsibility to obtain written permission to include any copyrighted materials in his/their article. In addition, all trademark use within the manuscript must be credited to its owner, or written permission to use the name must be granted. The author(s) will hold the publisher harmless from any unlawful matter contained in his submitted work. The author(s) in consideration of the publication of the above named manuscript understand and agree that:

♣ Copyright in the article will remain jointly with the owner of the copyright. and the Publisher. By submitting an article to the conference, the owner of the copyright grants the publishers with a license to publish the article.

♣ The Author(s) warrants that he is the owner of all rights of copyright in the article. Where the author subsequently publishes the article, the author is requested to acknowledge the article appeared in the book of proceedings.

♣ The Author(s) will indemnify and defend the Publisher against any claim, demand or recovery against the Publisher by reason of any violation of any proprietary right or copyright, or because of any libellous or scandalous matter contained in the Manuscript.

♣ The Publisher will have the right to edit the work for the original edition and for any revision, provided that the meaning of the text is not materially altered.

♣ This Agreement represents the entire understanding between the parties hereto with respect to the subject matter hereof and this Agreement supersedes all previous representations, understandings of agreements, oral or written, between the parties with respect to subject matter hereof and cannot be modified except by a written instrument signed by the parties hereto.

# Table of Contents

## Critical Analysis & Legal Reasoning

The Province of Jurisprudence Unbound: Re-conceptualizing Law in a World of Normative Diversity, Interaction and Conflict .....	1
<i>Zhong Xing Tan</i>	

## Cyber Law

Identity crisis: global challenges of identity protection in a networked world .....	13
<i>Steve Saxby and Alison Knight</i>	
Civilian Uses of Unnamed Aerial Vehicle and the Threat to the Right to Privacy – The Israeli Case Study .....	30
<i>Uri Volovelsky</i>	
‘Clouding the Issue: Digital Identity and the International Regulation of Cross Border Data in the era of Cloud Computing’ .....	50
<i>Clare Sullivan</i>	
Fighting Cyberterrorism with Legislative Bullet: Are We Really Ready? .....	65
<i>Sonny Zulhuda &amp; Ida Madieha Azmi</i>	
A common law position for a choice of law in internet defamation – the case for Hong Kong .....	80
<i>Poomintr Sooksripaisarnkit</i>	
Group Defamation in the Age of Cultural and Technological Changes .....	91
<i>Tamar Gidron</i>	
Electronic signature, completing e-forms, click wrap and matters of acceptance via online contracts: the past, present and future .....	107
<i>David Newlyn</i>	
E-Discovery of Electronically Stored Information in Commercial Litigation.....	120
<i>Kah Leng Ter</i>	
For Privacy’s Sake: Consumer “Opt Outs” for Smart Meters .....	134
<i>Nancy J. King and Pernille W. Jessen</i>	
Preliminary Injunctions against Internet Service Providers for Trademark and Copyright Infringement .....	147
<i>Katja Weckström</i>	
Quo Vadis Information Society? Notification of Draft Rules on E-Services in the EU .....	161
<i>P. P. Polanski</i>	

## Table of Contents

Data Protection for Privacy Intrusions: The Case in Hong Kong .....	174
<i>Jojo Mo</i>	
Private Law and State Paternalism: Too Much Legal Regulation of Private Life? .....	185
<i>Carlos A. Rohrmann and Cristiane Rego</i>	
Protecting Privacy and Control of Online Personal Information .....	198
<i>M.A Mthembu</i>	
Privacy Risk Area Assessment Tool for Audio Monitoring – from legal complexity to practical applications .....	209
<i>Sébastien Ziegler &amp; Papa Moustapha Kémo Sonko</i>	
Integrating information security policies into domestic legislation: The Malaysian experience .....	221
<i>Ida Madieha Azmi and Sonny Zulhuda</i>	
Personal Data Privacy: Legal Protection and Model Regulation in Indonesia .....	236
<i>Sinta Dewi</i>	
The Regulation of Electronic Money Institutions in the SADC Region: Some Lessons from the EU .....	249
<i>Maphuti D. Tuba</i>	
SPAM: An Overview of South African Legislative Developments .....	266
<i>Sebo Tladi</i>	
Toward Understanding Social Engineering .....	279
<i>Abdullah Algarni, Yue Xu, Taizan Chan, Yu-Chu Tian</i>	
 <b>Competition Law</b>	
EU competition law on electricity sector liberalization .....	301
<i>Pornchai Wisuttisak</i>	
Competition Law in Malaysia: Issues and Challenges in regulating market behaviour .....	317
<i>Mushera Ambaras Khan, Nasarudin Abdul Rahman, Rokiah Alavi , Haniff Ahamat</i>	
Regulating Competition in the Malaysian Telecommunication Sector: A Need for a New Approach? .....	329
<i>Nasarudin Abdul Rahman, Dr Juriah Abd Jalil, Dr Haniff Ahamat, Safinaz Mohd Hussein</i>	

## Table of Contents

### Company Law

Business rescue in South Africa: A reasonable prospect for success? .....	344
<i>WJC Swart</i>	
“Shari ‘ah Corporation”: The Legal Entity of Corporation from the Malaysian Law and Shari‘ah Perspective .....	359
<i>Zuhairah Ariff Abd Ghadas, Nasarudin Abdul Rahman and Halyani Hassan</i>	

### Contract Law

Flaws’ in Public Procurement not Synonymous with ‘irregularities’: A Guide to Determining Irregularities that are Sufficient to Invalidate a Contract .....	373
<i>Moses Retselisitsoe Phooko</i>	

### Criminal Law

Shedding the Hearsay Rule of its Technical Shackles .....	385
<i>Mohd Akram Shair Mohamed</i>	
Criminal Law Ontology for Identifying Possible Sentences from Specific Legal Elements .....	398
<i>Sotarath Thammaboosadee and Bunthit Watanapa</i>	
Sexual Misconduct in Academic Setting: Domestic law and Practice in Malaysia .....	409
<i>Ashgar Ali Ali Mohamed</i>	

### Dispute Resolution

Finding the balance point in deciding the scope of the communications ombudsman scheme .....	423
<i>Grace Li</i>	
The Shift of Indonesian Government Response to Investor-State Arbitration Claim in Public Interest-Related Cases .....	435
<i>Iman Prihandono</i>	
The Enforcement of Foreign Arbitral Award Merged with Foreign Judgement under the United Arab Emirate Civil Procedure Law .....	450
<i>Lafi Daradkeh</i>	



## Table of Contents

### Environmental Law

The Trials and Tribulations of Gaining World Heritage Listing for Australia's only Tropical Rainforest .....	457
<i>Patricia Blazey</i>	

### Education Law

Lessons for Private Colleges that Offer Non-Accredited Courses: <i>EMIS v Health Professions Council of SA</i> [2013] ZASCA 87 .....	469
<i>Moses Retselisitsoe Phooko</i>	

### Governance & Public Administration

Transparency in the Energy Law sector: Learning from the EU and the US .....	477
<i>Alessia Vacca</i>	
The Changing Paradigm on Governance: The Case of Indonesia.....	491
<i>Susi Dwi Harijanti</i>	
Judicial Review of Internal Legislative Proceedings: The Nigerian Experience .....	505
<i>Abdulfatai O. Sambo and Hunud Abia Kadouf</i>	

### Human Rights

The Constitutionality of Search and Seizure Powers of Customs and Excise officials .....	519
<i>Henk Kloppers</i>	
Sterilization of children and young people with disabilities: Back to our roots or forward to the courts? .....	531
<i>Trynie Boezaart</i>	
Minority Right to Freedom of Religion in International Legal Instruments and the Shari'ah .....	544
<i>Hunud Abia Kadouf &amp; Abdulfatai O. Sambo</i>	

## Table of Contents

### Insurance Law and Liability

Who's Fault Is It Anyway? On Outsourcing and Liability towards Third Parties .....	559
<i>Daleen Millard and Monray Marsellus Botha</i>	
Title Insurance as a Viable Option for the South African Property Registration System .....	586
<i>Edith Mbiriri &amp; Maphuti Tuba</i>	
An Analysis of a South African Court's Acceptability of Gender Discrimination in Motor-Vehicle Insurance .....	601
<i>Anthea N Wagener</i>	

### Intellectual Property Rights

What's Mine is Mine and What's Yours is Mine Too: Converging U.S. Intellectual Property Exhaustion Doctrines .....	611
<i>Johanna K.P. Dennis</i>	
The Philosophy behind Fair Use: Another Step towards Utilitarianism .....	626
<i>Giovanni Tamburrini and Sergey Butakov</i>	
Fighting counterfeiting: Importance of enforcement of intellectual property rights .....	643
<i>Khadijah Mohamed and Ratnaria Wahid</i>	
A Cobweb of Exception to Copyright Law for Research Purposes .....	652
<i>Ratnaria Wahid and Khadijah Mohamed</i>	
Comparative Legal Study of Intangible Cultural Heritage in the UK and China .....	663
<i>Fang Zhou</i>	
The Insecurity of Patents: The Perspective from the Small Firm .....	678
<i>Dr Helen Gubby</i>	
South African Patent Law and Access to Medicines .....	687
<i>Lonias Ndlovu</i>	
Improving Patent Quality through Pre-Grant Opposition in Thailand .....	697
<i>Wanwipar Pwasiri</i>	
Can SHARP become the New Liquid Cristal Panel IGZO leader? Observations from patent information analysis .....	712
<i>Shihori Saito and Yoshitoshi Tanaka</i>	

## Table of Contents

Study of blocking patents and many patents strategy by Japanese big companies <i>Yoshifumi Okuda and Yoshitoshi Tanaka</i>	725
Defining the technical roadmap in filtering technology for hydraulic Excavators using customers' patent information <i>Yoshinori Tsurusaki and Yoshitoshi Tanaka</i>	738
A Comparative Study of in-house R&D and joint R&D using patent information analysis <i>Toshio Hashimoto and Yoshitoshi Tanaka</i>	753
 <b>International Trade and Investment Laws</b>	
Most-Favoured Creditor Clauses in Sovereign Debt Restructurings: the ICSID Experience <i>Gabriel Lochagin</i>	767
Sustainable Development and International Trade under WTO Regime <i>Kristianto P H</i>	772
The Weighted Average Price Determination in Anti-Dumping in South Africa: Is there Fowl Play? <i>Omphemetse S. Sibanda</i>	784
Divestment Policy on Mining Sectors: The Challenge and Implications for Foreign Direct Investment in Indonesia <i>Mas Rahmah and Muchammad Zaidun</i>	799
Trade liberalisation and its impact on food security in Sub-Saharan Africa: The Case for the Agricultural Sector Play? <i>Omphemetse S. Sibanda</i>	813
The Application and Impact of the Public Interest Provisions in the Malaysian Anti-Dumping Law <i>Haniff Ahamat</i>	828
The Role of Multinational Corporations in Indonesian Economic Development through Foreign Direct Investment and International Trade <i>An An Chandrawulan</i>	839
Brazil and International Conflict Resolution in e-commerce: Analysis of Conflict Resolution based on CISG <i>Arnaldo Sobrinho de Moraes Neto, Harrison Alexander Targino and Thalysor Mota Vidal Nobrega</i>	851

## Table of Contents

### Labour and Employment Law

A two pronged approach: analysis of leave arising from the contract of Employment in South Africa .....	862
<i>Clarence I Tshoose and Themba Kunene</i>	
Globalisation: “A Nightmare for the Working Class”? .....	872
<i>Mpakwana Annastacia Mthembu and Mpfari Budeli</i>	

### Land Law and Cultural Disputes

Land disputes and the ongoing development of the substantive rule of law .....	882
in Myanmar (Burma)	
<i>Nathan Willis</i>	
An Ethnic Enclave Transformed into Enclave Tourism under Globalization in Taiwan .....	897
<i>Wei-Cheng Lin</i>	

### Taxation

The Income Tax Implications for Individuals Involved in the 2010 FIFA Soccer World Cup in South Africa compared to the 2012 Olympic Games – Lessons from London? .....	906
<i>Liesel G Classen</i>	

### Territorial Principle

The International Aspect of Arbitration under Indonesian Arbitration Law .....	921
<i>Huala Adolf</i>	

## Integrating information security policies into domestic legislation: the Malaysian experience

**Ida Madieha Azmi**

International Islamic University Malaysia  
imadieha@iiu.edu.my

**Sonny Zulhuda**

sonny@iiu.edu.my

**Abstract.** In 2006, Malaysia launched its National Cyber Security Policy ("NCSP") which is described as a blueprint of national strategies against cyber-attacks and warfare. This paper examines the NCSP and other related national policies on information security to determine the approach taken. It then conducts an analysis of all the related laws on the ten sectors that constitute the National Critical Information Infrastructure and considers whether the principles of CIA (confidentiality, integrity and availability) have been sufficiently addressed. The paper concludes by suggesting that despite all the idealistic strategies and milestones set under these policies, they have not been translated into hard legal obligations in most of the ten sectors.

### 1. Introduction

Malaysia has just completed her 13th general election which oversees a wave of malicious cyber-attacks targeting in particular, social media<sup>1</sup>. The pinnacle of the attack is the bogus resignation letter of the Malaysian premier, Datuk Seri Najib Tun Razak planted on the web site of the Prime Minister's Office<sup>2</sup>. Prior to that hackers defaced several web sites over an on-going territorial dispute between Malaysia and Philippines which have led to the invasion of Sulu gang-men into Sabah, which belongs to Malaysia.<sup>3</sup> These series of cyber-attacks raise concerns over the security of the national critical information infrastructure (NCII). This article traces the process of integrating information security into the realm of national policies. It sets to examine whether the policy directions and milestones set under these national policies have been reflected fully in the domestic legislations governing the ten sectors. This paper is divided into two parts. Part A dwells into the various national policies on information security. It seeks to examine the policy directions set under these policies with respect to information security. Part B of the paper chronicles around the legislation governing the

<sup>1</sup> 'Cyber security in Malaysia under control, New Straits Times, Tuesday, June 11, 2013, available at <http://www.nst.com.my/latest/cyber-security-in-malaysia-under-control-1.271287> (viewed 10th June 2013).

<sup>2</sup> 'Najib 'resigns' on the Information Department website', msn news, Mon, 18 Feb 2013, available at <http://news.malaysia.msn.com/regional/najib-resigns-on-the-information-department-website> (viewed 10th June, 2013)

<sup>3</sup> 'Malacanang website hacked over alleged abuse of Sabah Filipinos', the Malaysian Insider, Tue 11 June 2013, available at <http://www.themalaysianinsider.com/malaysia/article/malacanang-website-hacked-over-alleged-abuse-of-sabah-filipinos> (viewed 10 June 2013)