
MYSEJAHTERA APP AND THE PRIVACY RIGHTS IN TIMES OF COVID 19: THE LEGAL AND SYARIAH PERSPECTIVES

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ABSTRACT

The year of 2020 marks the most challenging year when a global health crisis due to the outbreak of COVID-19 pandemic worldwide. In Malaysia, the government took an approach by developing a contact-tracing application, known as *MySejahtera* to assist the government in managing the outbreaks and to enable the Ministry of Health to slow down the spread of the virus. Nevertheless, the technology has raised the data privacy concern where the app requires various users' personal details to be inserted before the app can be used. Based on qualitative and doctrinal methods, this article examines whether the government can collect personal information of its citizens in times of pandemic, and to what extent such data should be protected. To do, this paper will be focusing on the invasion of the right to privacy by the government from the legal and Syariah perspectives. The finding suggests that in the time of pandemic COVID-19, it is legal for the government to collect confidential information of its citizens based on the concept of public interest (*Maslahah 'Ammah*) grounded from the *Syariah* principle. Alternatively, it is vital to set the timeline and the data should be destroyed at a certain period. It concludes that the contact tracing apps is inevitable and as an essential tool in combating the outbreaks amidst privacy invasion.

Keywords: *data privacy, COVID-19, MySejahtera app, technology*

Introduction

The year of 2020 marks the most challenging year when a global health crisis due to COVID-19 pandemic arises worldwide. It started when the novel severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2) pandemic outbreak emerged in December 2019 from Wuhan City, Hubei Province, China and spread to the rest of the world. As of 9 October 2020, a total of 36,754,006 cases of COVID-19; 1,066,856 cases of death, with 27,667,693 recovered cases have been reported worldwide. As far as Malaysia is concern, the numbers of reported cases relatively grew in Malaysia since early January 2020 and began to spread in March the same year. As of October 2020, it is reported by Bernama that the country is entering the third wave of COVID-19 pandemic with the cumulative number of cases up to 14,368 cases. (Bernama,2020)

This paper is divided into five parts, including the present part. The second part will analyse the privacy issues and legal challenges attached to the *MySejahtera* app This article will highlight the issue as to whether the government can collect personal information of citizens in times of pandemic, and to what extent such data should be protected. This is because the existing privacy legislation namely the Personal Data Protection Act 2010 does not govern the government in case of data leaking. In such a situation, the government will not be accountable for such negligence. The next part will examine privacy from *Syariah* Perspectives. The discussion will then focusing on the role of the government in

adopting Syariah principles of public interest (*Maslahah Ammah*) in formulating policies and decision-making related to privacy right in *MySejahtera* apps. Lastly the conclusion will conclude the preventive measures to ensure the data is well managed by the government.

***MySejahtera* app**

Taking into considerations of new cases every day around the world, it seems that the pandemic crisis is far from over. Hence, as in other countries, the government took an initiative to develop an application as a contact-tracing tool namely *MySejahtera*. Such a digital contact-tracing is considered as an essential tool for public health officials and local communities to fight the spread of novel virus, such as the COVID-19 pandemic (Nur Zarina 2020).

MySejahtera is owned and run by the Malaysian government, managed by the Ministry of Health and assisted by the National Security Council (NSC), the Malaysian Administrative Modernisation and Management Planning Unit (MAMPU) and the Malaysian Communication and Multimedia Commission (MCMC). It is a well-developed mechanism that structurally registers and manages the entry of visitors into a premise within this country which is aimed to guaranty public safety in managing the outbreak and the spread of COVID-19. Developed under the Prevention and Control of Infectious Disease Act 1988 [Act 342], the app provides its users with important information as a source of information during the COVID-19 outbreak, such as how and where to seek care if one is infected with COVID-19 with screening and treatment locations of the nearest hospitals and clinics (Hanissull Jalis, 2020).

MySejahtera has a number of features which includes to assist in the automated visitor registration process; to reduce congestion among visitors; preventing infection from spreading by increasing compliance with the new standards; and) ensures the confidentiality of data user. The Malaysian Health Director-General, Tan Sri Dr. Noor Hisham Abdullah mentioned that the app will allow its users to do health self-assessment themselves and their family. Besides, its function is to enable the Ministry of Health (MOH) to monitor users' health condition so that the MOH can take immediate action in providing necessary treatments to those in need (Nur Zarina 2020).

Privacy Issue and Legal Challenge in *MySejahtera* apps

Privacy is vital in every aspect of life. The concept of privacy has been discussed for centuries by philosophers, anthropologists, sociologists, and legal scholars as it is the most difficult to define (Rengel, 2014). The famous interpretation of privacy was given by Warren & Brandeis (1980) which is the individual's right to be left alone. Privacy is a qualified, fundamental human right which is recognised by international instruments such as the Universal Declaration of Human Rights (Art.12 UDHR), the International Covenant on Civil and Political Rights (Art 17 ICCPR), Universal Islamic Declaration of Human Rights (Art. 9 UIDHR) and other regional human rights instruments.

Article 12 of the UDHR and Article 17 of the ICCPR provides that; "*no one shall be subjected to arbitrary interference with his family, home, or correspondence, nor to attach upon his honour and reputation*". Meanwhile, Article 9 of the UIDHR prescribed that every person is entitled to the protection of privacy. Based on such provision, Abbas observed that such declaration refers to the duty of Islamic government to support private right of everyone (Abbas Khajeh Piri 2012). He added that, "all human beings have the right of independence in their own lives special affairs about housing, family, communication and possessions. Any kind of inspection, surveillance and disgracing or defaming of people is not permitted. It is obliged to the society and government to support any human being against unjustifiable inference in his life while following precepts of Islam"(Abbas Khajeh Piri 2012).

Despite the government's best approach to respond to the pandemic by tracking and tracing cases of COVID-19 using *MySejahtera* apps, data security experts have raised concerns about the intrusion of government's surveillance which affect privacy right of citizen (Ainaa Aiman 2020). There are important privacy implications of the existence of such contact-tracing app where it requires various users' personal details to be included, such as their contact number, email address, full name, identity card (IC) number, age, gender, ethnicity and home address. The principal Research Fellow Mamello Thinyane mentioned that there are two key challenges associated with digital privacy and cyber freedom in the COVID-19 world; "One is the challenge of protecting citizens' privacy and freedom in the data technologies that are being deployed to fight the pandemic. The second is restoring citizen's privacy and freedom in cases where there were 'inevitable' encroachments after the pandemic" (Cornish,2020)

Privacy law in Malaysia – A Legal Perspective

To date, there is no specific legislation on privacy law that protects the privacy of citizen in Malaysia. The Federal Constitution also does not expressly recognise the right to privacy. The only legislation related to privacy in Malaysia is the Personal Data Protection Act 2010 [Act 709] ("PDPA"), which regulates the processing of personal data in commercial transactions. The PDPA deals with personal data rather than individual privacy itself. The PDPA contains provisions which allow personal data to be collected, processed and used by data user when dealing with the personal data of its staff, suppliers and consumers.

The question arises as to whether the government will be accountable for any data leaked in *MySejahtera* apps due to negligence by the government itself? Section 3(1) mentions that the PDPA does not govern the Federal and State Governments. Therefore, there will be no action can be taken against the government of Malaysia in case of any leaked data. Nevertheless, despite not subject to the PDPA, the Department of Personal Data Protection (JPDP) guarantees that action will be taken against any officer-in-charge if any misuse of data or data leak occurred. Any mishandled will be charged under the Official Secret Act 1972 [Act 88] under section 8(1)(iv) and the Public Officers (Conduct and Discipline) Regulations 1993 (Qishin Tariq, 2020). Hence, although the protection of the privacy accorded under the PDPA is inadequate as to ensure accountability due to data breaches involving either the Federal or States' governments, the Cybersecurity Specialist Fong Choong Fook said that the government would need to be more transparent with the data management. (Qishin Tariq, 2020)

Privacy from Syariah Perspective

The right to privacy is considered as one of the basic human rights which has been granted by Allah (S.W.T.) to all humankind. According to Hashim Kamali, "the right to personal privacy is the immunity of the person, and the right to safeguard and protect what is private and confidential against detention, surveillance and the interference of others, including his friends and relatives and the state, without his consent, and his entitlement to defend [his privacy] against intrusion" (Hashim Kamali, 2008). What an individual dislikes to share with others is called privacy.

Privacy in Islam covers all aspect of privacy such as personal correspondence, the confidentiality of one's private activities, personal conversations and the modern idea of surveillance (Vidushi Marda 2014). It is evident that the concept of privacy in Islam has been expressly mentioned in the Quran a few times. The general protection of privacy is based on the principle of obtaining permission before entering one's house (An-Nur 24: 27-29). This principle has been supported by the *hadith* of the Prophet (PBUH) that "asking permission (is only allowed up) three times; if it is not granted to you, you must return. (Mukhtasar Sahih Muslim,374, *hadith* No. 1421).

It must be noted that every individual and the government play an important role in protecting and safeguarding one's privacy from any interference as it is sinful and illegal to do so. Islam prohibits any act related to privacy invasions, such as investigations into others' privacy by entering their houses

without permission, eavesdropping people's conversation, suspicion and mistrust of others, illegal look in people's privacy and correspondences, gossiping, sarcasm, fault finding and offending people's reputations (Abbas Khajeh Piri, 2012).

The application of Syariah Principle of *Maslahah Ammah* in times of COVID19.

Islam gives great importance to the fundamental human right to privacy. Nevertheless, as in other human rights, the protection of privacy is not absolute. To a certain extent, the invasion of one's privacy by the government is permissible if it is done for the sake of public interest (*Maslahah Ammah*) (Hashim Kamali 2008). Al-Ghazali states that; "*maslahah* is the consideration which secures a benefit or prevents harm and is, at the same time, harmonious with the aims and objectives of Syariah (Al-Ghazali, 1997). The objectives or the principle of *Maqasid Syariah* consists of protecting the five essential values, namely religion, life, intellect, lineage and property. Al-Raysuni defines the *Maqasid Syari'ah* as the objectives which are determined by Islamic law and need to be achieved for the benefit of humankind (Al-Raysuni, 1995).

According to Al-Ghazali, the basis for establishing *Maslahah* are (Al-Ghazali, 1997):

1. *Maslahah* must be under the aims and objectives of Syariah, namely, protecting religion, life, intellect, lineage, and property.
2. *Maslahah* must not conflict with al-Qur'an, as-Sunnah, and Ijma'
3. *Maslahah* must be at the *daruriyah* (primary) or *hajiyah* (secondary) level, which is equal to *daruriyah*.
4. *Maslahah* must be *qath'i* or *zhanni* that is close to *qath'i*.
5. In some cases, conditions are needed; must be *qat'iyah*, *daruriyah*, and *kulliyah*.

As far as the pandemic of COVID-19 is concern, it affects the life of citizen that need to be protected although it requires one's privacy to be invaded. In this situation, the application of *Maslahah Ammah* (public interest) is also based on two Islamic maxims; "*specific harm may be accepted to prevent general one*" and "*one of which permits one to pursue of the lesser of two evils*". Al-Mawardi mentions in his argument that "espionage and intruding into the privacy of others was not permissible unless it is a matter of saving life or preventing imminent attack on the lives and properties of others" (Al-Mawardi, Ahkam, 1386 AH).

Hence, it is submitted that the principles enshrined in *Maqasid Syariah* play a vital role in matters relating to the temporal administration of a country, such as during the time pandemic of COVID-19. In line with Al-Ghazali as well as Al-Mawardi's opinion, interference of citizen's privacy by developing tracing tool such as *MySejahtera* is permissible as the pandemic of COVID-19 is within the category of *Al-Daruriyat*. The approach taken by the government is in parallel with one of the main methods of Islamic jurisprudence, namely "*management of people's affairs by leaders based on maslahah*" (Cik Wan Roslili 2015).

Conclusion

As Malaysia is currently facing the third wave of the COVID-19 pandemic, the use of *MySejahtera* app for contact-tracing is compulsory and therefore is inevitable for the sake of public interest (*maslahah ammah*). To ensure that any data from leaking, the government should consider a few preventive measures in handling sensitive information of citizen;

- i) The government must ensure that the data collected is utilized and only be used to support public health goals.
- ii) The data collected must be kept for contact-tracing and related use only. It can only be collected and kept if the crisis continues.

- iii) A timeline for any data to be destroyed after the pandemic ends must be set. For instance, the data will be abolished after 6 months of the crisis ended.
- iv) Alternatively, the government should allow the user of the app to delete all the data manually when it is no longer needed after the crisis comes to an end.
- v) Create public awareness on the benefits of the app without having to be worried about privacy invasion.

As discussed above, the pandemic of COVID-19 has been continuously spreading all over the world for almost one year and it is far from over. It is undeniable that the pandemic has transformed the lives of people to adapt quickly to a new norm. The government's effort in adopting Syariah principles of public interest (*Maslahah Ammah*) will help in formulating policies and decision-making. Hence, the use of *MySejahtera* app as a mandatory measure in battling the pandemic for the sake of public interest is one of the good policy-decision-making within the crisis, amidst privacy invasion.

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