

CHANGING PRIVACY & DATA PROTECTION IN JAPAN

*Dr. Hiroshi Miyashita
Faculty of Law, Surugadai
University
Tokyo, Japan*



Copyright © 2009, The Sedona Conference®
and Dr. Hiroshi Miyashita. All rights reserved.

Changing Privacy and Data Protection in Japan

Hiroshi Miyashita¹

Introduction

1. A Culture of Privacy in Japan

(1) Privacy and Communitarian Society

(2) A New Birth of Privacy

2. Data Protection in Japan

(1) Act on the Protection of Personal Information in 2003

(2) Recent Developments

Conclusion

Introduction

If privacy is a universal human need that comes up fundamental human rights, why does it take such diverse form? Privacy differs from place to place, from time to time, and from person to person. Since privacy laws in each country aim to express social practices and values in each culture, any privacy advocate cannot achieve the cross-border privacy protection without recognizing the etiquette in each culture.

We have been discussing what privacy is for more than a century. In spite of the consensus of about the importance of privacy, the word “privacy” is currently used to describe a myriad of different things; information privacy, territorial privacy, and autonomy. In 1890, two lawyers from Boston, Samuel Warren and Louis Brandeis defined privacy as “the right to be let alone”². Since then many scholars and lawyers have been seeking the

¹ Lecturer, Faculty of Law, Surugadai University. PhD in law.

² Samuel D. Warren & Louis D. Braneis, *The Right to Privacy*, 4 HARV. L. REV. 193, 196 (1890).

meaning of privacy; control over knowledge about oneself³, a form of self-interested economic behavior⁴, anti-totalitarian right⁵ in the United States, whereas we understand the privacy as the protection of private life as well as the right to control the information of oneself in the social context in Japan.

When we carefully examine each meaning of privacy in terms of its background culture, we may understand something more about privacy; for example, the first man who used privacy, as I mentioned earlier, is Louis Brandies, a Boston lawyer and a Justice of Supreme Court. What is more, Brandies was a Jewish. Brandeis's work on privacy seems obviously to have been influenced by the Jewish culture and the concept of "tikkun olam"; the duty that each of us has to heal a broken world⁶.

The goal of this article does not seek the universal definition of privacy nor do I hope so. Rather, the goal of this article shows just "A" culture of privacy in Japan and its dynamic aspects of privacy which emerges from the evolving social practices and values. In this article, I will demonstrate the dynamic aspects of privacy and data protection in Japan from my personal viewpoint, introducing the Act of 2003 and the some important recent developments in Japan.

1. A culture of privacy in Japan

(1) Privacy and Communitarian Society

Privacy is traditionally understood as a Western culture. Yet, we carefully see their understanding of privacy, there seem to be a slight difference between European culture of privacy and that of America. At the conceptual core of privacy, "American privacy law is a body caught in the gravitational orbit of liberty values, while European law is caught in the orbit of dignity"⁷. In the United States, as recognized in *Griswold v. Connecticut*⁸ and

³ See e.g., ALAN WESTIN, *PRIVACY AND FREEDOM* 7 (1967), Charles Fried, *Privacy*, 77 YALE L. J. 475, 482-3 (1968).

⁴ See Richard A. Posner, *The Right of Privacy*, 12 GA. L. REV. 393, 409 (1978).

⁵ See Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 787 (1989).

⁶ Erwin Chemerinsky, *Rediscovering Brandeis' Right to Privacy*, 45 BRANDEIS L. J. 643, 643 (2007).

⁷ See James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L. J. 1151, 1163 (2004).

⁸ 381 U.S. 479 (1965) (The Court held that a state law that prohibited the use of contraceptives violates the zones of privacy).

*Katz v. United States*⁹, social anxieties and ideals focus principally on the police and other officials, and around the ambition to secure the blessings of liberty. While, what we see in European privacy law today is the result of a centuries-long revolt against the style of status privileges, so Europeans tend to take care of respect and personal dignity.

What about Asian culture of privacy? In my view, Asian people used to regard privacy as the symbol of selfishness. We have long history of respecting and valuing community and the public. If privacy is understood on the base of individualism, we did not have such a strong individualistic culture in Japan, and therefore our awareness of privacy relatively small. One famous word of Japanese culture is that "devoting oneself to the public, sacrificing one's private (*messhi-boko*)". We have a long tradition of respecting the public and giving up private interests. We have a history of *Bushi-do*; *Samurai* fight not for their own interest, but for their *Syo-gun*, the head of the community¹⁰. "Devoting oneself to the public, sacrificing one's private" is the virtue of a Japanese culture. If I am allowed to illustrate a Japanese culture of privacy, I would say "privacy effected by the public". The tradition of communitarian culture used to embody the obligations set by members of a community to one another, and defined the substance and boundaries of public-private distinction¹¹.

(2) A New Birth of Privacy

Although our country has no long tradition of privacy, we have seen rapid growth of technology in Japan. Thanks to the rapid developing technology in Japan, our desire to protect privacy was growing as the same speed of the technology advance. The first case in which privacy was endorsed is 1964; the Tokyo District Court held the "the right to privacy is recognized as the legal or protection or the right not to be disclosed of private life"¹². Then, though many Asian countries had no privacy legislations in 1980s, Japan had the first privacy act in 1988. The Act of 1988 is the Protection of Computer

⁹ 389 U.S. 347 (1967) (The Court held that the police needed a warrant under the Fourth Amendment to wiretap.).

¹⁰ For an eloquent work of Bushido, see INAZO NITOBÉ, BUSHIDO, THE SOUL OF JAPAN (1900). One interesting example Nitobe mentioned is that "American husbands kiss their wives in public and beat them in private; the Japanese beat theirs in public and kiss them in private", which stands for the dignity as a Samurai.

¹¹ The discussion on communitarian aspect of privacy can be seen in the United States. See e.g., Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CAL. L. REV. 957 (1989).

¹² Judgment of Tokyo District Court, September 28, 1964, *Hanrei-jihō* Vol.385 p.12.

Processed Personal Information Retained by Administrative Organs, which was a reaction of technology advancement for the purpose of protecting personal information among administrative organs. Finally, as we will see in the next chapter, the new, comprehensive, legislation of protecting personal information was created in 2003.

We also have seen several cases regarding privacy protection by the Supreme Court. For example, in 1967, the Supreme Court held that one has a freedom of not being taken by camera without his or her permission as a freedom of private life¹³. The Court also held that the personal information such as name, address, phone number is legally protected as the information regarding privacy, and this kind of personal information cannot be transferred to the third party without his or her consent¹⁴. Furthermore, the Supreme Court considered the privacy issues for the traffic tracing technology known as “N system” which can search for and find stolen or speeding cars, despite the millions of them on the roadways¹⁵, and the fingerprinting issues for the immigrants¹⁶.

Throughout the half century, Japan clearly embraced the privacy culture and the privacy as a right and interest in spite of there being no explicit provision of privacy.

2. Data Protection in Japan

(1) Act on the Protection of Personal Information in 2003

On May 30, 2003, the Act of the Protection of Personal Information was finally enacted after two-year controversy in the Diet, and it came into full effect in April 2005¹⁷. As I indicated in the picture, the Act has two parts; Chapter 1 to 3 provides the basic ideals and principles that will cover both the public and private sector, and Chapter 4 to 6 contains the general obligations on the protection of personal information in private sector. As for the public sector, the Act of 1988 was in place of the new Act the protection of personal information for Administrative Organs in 2003 and the relevant public institutions. These

¹³ Judgment of Supreme Court, December 24, 1967, *Keishu* Vol.23 No.12 p.1625.

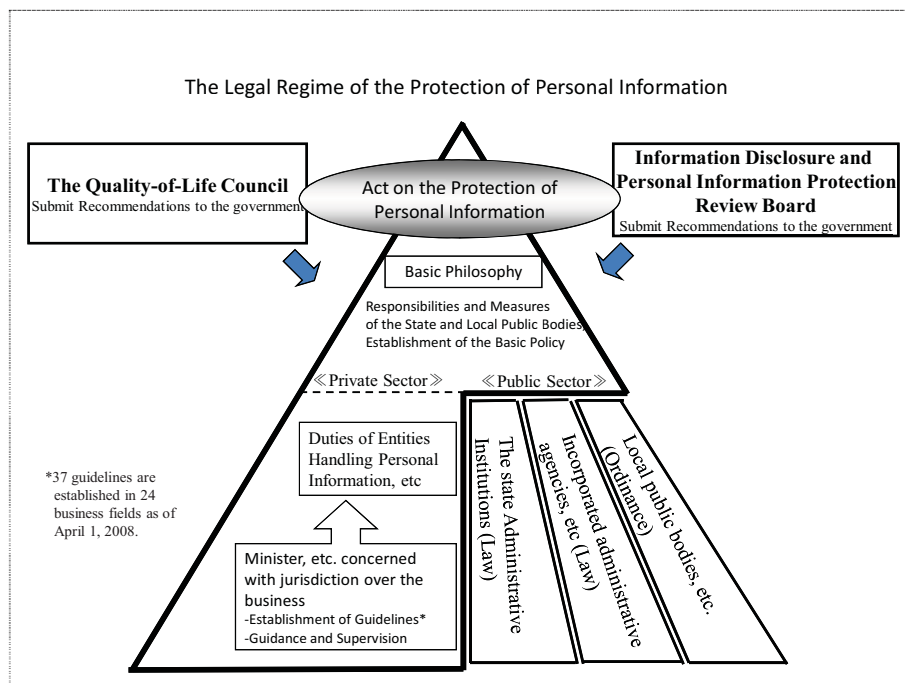
¹⁴ Judgment of Supreme Court, September 11, 2003, *Minshu* Vol.57 No.8 p.973.

¹⁵ Judgment of Supreme Court, February 14, 1986, *Keishu* Vol. 40 No.1 p. 48 (The Court did not hold the N system does not violate the right to privacy.)

¹⁶ Judgment of Supreme Court, December 15, 1995, *Keishu* Vol. 49 No.10 p.842 (The Court admitted that one has a right not to be forced to be taken his or her fingerprints, but the government had a legitimate interest in taking fingerprints of immigrants for residential control.)

¹⁷ Further details are available at homepage of Office of Personal Information Protection, Cabinet Office (http://www5.cao.go.jp/seikatsu/kojin/index_en.html) (last visited May 15, 2009)).

Acts are firmly rooted in the 8 principles of OECD Privacy Guidelines, supplemented by the Basic Policy and the guidelines established by the relevant Ministries.



Three distinctive features can be observed from the Japanese Act. Firstly, the Act is effectively enforced by the relevant competent Ministers; every Minister can collect reports from the businesses, give advice to them, or recommend and order its entity if they had data breach. In fiscal year 2007-08, there were 848 leakage cases¹⁸. And, the Cabinet Office announced, after collecting the report from every Ministry, that there were 83 cases concerning the collecting of report from business entities, and no case of recommendation or order¹⁹. Every case of data breach is judged by each Minister who can make careful examinations on each business field by using their technical knowledge and experiences.

Secondly, many ministries have authorized private business entities, which are called “authorized personal information protection organizations”. The number of authorized organizations is 37 as of March 2009, whose role is to instruct and support protecting

¹⁸ See Cabinet Office, *Summary Report on the Implementation Status of Act on the Protection of Personal Information in FY 2007* (September, 2008) at 10. There were 893 leakage cases in FY 2006, and 1556 in FY 2005.

¹⁹ *Id.* at 3. There were 60 cases of collection of reports and 4 cases of recommendation in FY2006.

personal information for small businesses, ensure proper handling of personal information, and handle complaints in their own business sectors. For example, one of the organizations invented privacy mark system, which is widely used in Japan for proving proper handling of personal information.

Finally, interestingly enough, from the viewpoint of the Japanese culture, when the business leaked a large amount of personal information, the harm is not the loss of control of personal information but rather the disruption in relationship with customers and community. Thus, once the business leaks the customer's information, they apologize for their fault in the newspapers as an advertisement because we have a culture of apology, and they are often willing to compensate without court orders²⁰.

In this way, we have seen the autonomous efforts by the businesses in the context of social relationship even after the Act came into full effect.

(2) Recent Developments

After the Act was fully in effect, we have seen several developments of privacy protection in Japan. I will introduce two issues of the recent developments of privacy protection; international obligation and the emergence of new technology.

As for the international obligation, Japan is a member of both OECD and APEC, and the government of Japan has been consistently worked with these international organizations regarding privacy protection. In April 2008, the Government of Japan revised its Basic Policy in order to meet the demand of international harmonization of data protection, mentioning its support of OECD recommendation on Cross-Border Cooperation in the Enforcement of Laws Protecting Privacy in 2007²¹ and the progresses in APEC and EU. Especially, APEC launched Data Privacy Pathfinder Project in June 2007, whose goal is to develop a system in the APEC region that ensures accountable cross-border flows of personal information for the protection of consumers while facilitating business access to

²⁰ For example, Mitsubishi UFJ Securities leaked the information of about 50,000 customers in April 2009. They apologized in 5 newspapers and compensated JPY10,000 (\$100) for every psychologically injured.

²¹ Available at <http://www.oecd.org/dataoecd/43/28/38770483.pdf> (last visited May 15, 2009).

the benefits of electronic commerce²². Among 9 projects, Japan has been supporting all the projects except for one (project 4), which has not substantially started as of December 2009, making use of the experiences of autonomous approach by the businesses in Japan. We expect that the new projects of OECD and APEC will work as an experiment for the cross-border protection and global flow of personal information.

Secondly, Japan created many new technology which gives rise to privacy threats including biometrics, RFID, surveillance and the other privacy related technologies. For example, the mobile phones can be used for internet and payment of the railways and buses, and some shops in the stations and airports. Our passport and driver's licenses contain IC chips, which enable the remote control of one's personal information. PIN number is no longer needed for withdrawing cash from ATM or entering the secret rooms in the company; the biometric check works for identifying the person. Recently, we have seen several protests against the Google streetview service in some local government because the streetview itself stimulates the intimacy in the community. The national and local government seeks the proper measures by setting some guidelines or voluntary rules regarding the new technology so as to be consistent with the Japanese culture of privacy.

Conclusion

What is at issue about privacy is the very definition of self and other in its culture²³. I examined something special about a Japanese culture of privacy from my personal viewpoint. We have seen that some successful aspects of transplants of "privacy" from Western culture for business efforts; and the right to privacy is widely supported among the Japanese life. On the other hand, its form may be somewhat different from its birth in Western culture when we see the reaction of leakage cases, where the social relationships are still of great importance.

Information flows across culture, but privacy is deeply rooted in its culture. The task of creating cross-border privacy rule is hard but has to be realized in an age of the global

²² See the latest information of Data Privacy Pathfinder Project is available at http://aimp.apec.org/Documents/2009/ECSG/SEM1/09_ecsg_sem1_027.doc (last visited May 15, 2009).

²³ For an excellent empirical study of Japanese culture of privacy, see Dan Rosen, *Private Lives and Public Eyes: Privacy in the United States and Japan*, 6 FL. J. INT'L L. 141 (1990).

information community. Our task is not to realize the universal values of privacy which persists in every society. Our task is to tolerate the difference of culture of privacy in the process of developing cross-border privacy rules. We will be able to complete the task by recognizing the essence of privacy and its background culture.