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CHANGING PRIVACY AND DATA PROTECTION IN JAPAN

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I. INTRODUCTION

If privacy is a universal human need and fundamental human right, why does it take such diverse forms? The concept of privacy differs from place to place, from time to time, and from person to person. Since privacy laws in each country aim to reflect the social practices and values of that culture, no privacy advocate can achieve cross-border privacy protection without recognizing the norms of each culture.

We have been discussing what privacy means for more than a century. While there is some consensus as to 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 also attempted to define the concept. Whereas Americans understand privacy to mean control over knowledge about oneself,³ a form of self-interested economic behavior,⁴ anti-totalitarian right,⁵ we in Japan think in terms of the protection of private life as well as the right to control information regarding oneself in the context of society.

When we carefully examine the cultural background to each meaning of privacy, we may understand something more about privacy. For example, as I mentioned earlier, one of the first men to use the expression was Louis Brandeis, a Boston lawyer who later served as a Supreme Court Justice. What is more, Brandeis was Jewish. Brandeis’s work on privacy was clearly influenced by Jewish culture and the concept of *tikkun olam*, the duty each of us has to heal a broken world.⁶

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

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’s Right to Privacy*, 45 BRANDEIS L. J. 643, 643 (2007).

The aim of this article is not to seek a universal definition of privacy, but rather to introduce the culture of privacy which exists in Japan today. I will demonstrate, from my personal perspective, the dynamic aspects of privacy and data protection in Japan which have been emerging from evolving social practices and values, by introducing the Act of 2003 and some important recent developments.

II. THE CULTURE OF PRIVACY IN JAPAN

(1) Privacy in a Communitarian Society

Privacy is traditionally regarded as a concept of Western culture, but careful analysis of the Western understanding of privacy reveals slight differences between the 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 *Katz v. United States*,⁹ social anxieties and ideals focus primarily on the police and other officials and around the ambition to secure the blessings of liberty, whereas the European privacy law we see today is the result of a centuries-long revolt against the style of status privileges, making Europeans more sensitive to matters of respect and personal dignity.

What about the Asian culture of privacy? In my view, Asian people formerly regarded privacy as a symbol of selfishness or self-centeredness. We have a long history of respecting and valuing the community and public. If privacy is understood to be based on individualism, then we did not have such a strong individualistic culture in Japan and therefore our awareness of privacy must have been relatively low. One famous motto of Japanese culture is “devoting oneself to the public, sacrificing one’s private interests” (*messhi-hoko*). We have a long tradition of sacrificing private interests for the public good. For example, there is the history of *Bushi-do* (the Way of the Warrior), under which *samurai* fight not for their own interest, but for that of the *Shogun* (General), the head of the community.¹⁰ “Devoting oneself to the public, sacrificing one’s private interests” is thus a virtue in Japanese culture. I would describe the Japanese culture of privacy as “privacy effected by the public.” The tradition of a communitarian culture once embodied the obligations set by the members of a community to one another and defined the substance and boundaries of the distinction between public and private.¹¹

(2) The Rebirth of Privacy

While Japan has no long tradition of privacy, we have seen a rapid development in technology with a corresponding increase in the desire to protect privacy. In a landmark judgment in 1964, the Tokyo District Court recognized the right to privacy as “the legal right and assurance that one’s private life will not be unreasonably disclosed to the public.”¹² Japan later enacted its first privacy Act in 1988, at a time when many Asian countries had no such legislation. The 1988 Act on the Protection of Computer-Processed Personal Information Held by Administrative Organs responded to the changing needs of society in the face of the rapid advancements in technology. Finally, as we shall see in the next part, new, comprehensive legislation for the protection of personal information was enacted in 2003.

Several cases regarding privacy protection have also been dealt with by the Supreme Court. For example, in 1967, the Court held that individuals have the right not to be photographed without permission, as a freedom of private life.¹³ The Court also held that personal information, such as name, address, and telephone number, is legally protected as information regarding privacy, and such

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 prohibiting the use of contraceptives violated the zones of privacy).

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 NITORE, BUSHIDO, THE SOUL OF JAPAN (1900). One interesting example mentioned by Nitobe 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 their dignity as *samurai*.

11 Some discussion on the 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.

13 Judgment of Supreme Court, December 24, 1967, *Keishū* Vol.23 No12 p.1625.

information cannot be transferred to a third party without the individual's consent.¹⁴ Furthermore, the Supreme Court considered the privacy issues associated with the traffic-tracing technology known as "N system," which can search and find stolen or speeding cars among the millions traveling on roadways,¹⁵ and the fingerprinting of foreign residents.¹⁶

Throughout the last half-century, Japan clearly embraced a culture of privacy and recognized privacy as both a right and interest, notwithstanding the fact that there was no explicit constitutional provision for the protection of privacy.

III. DATA PROTECTION IN JAPAN

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

On May 30, 2003, the Act on the Protection of Personal Information was finally enacted after a two-year controversy in the Diet, and entered into force in April 2005.¹⁷ As shown in the diagram below, the Act comprises two parts: Chapters 1 to 3 provide the basic ideals and principles covering both the public and private sectors, and Chapters 4 to 6 lay down the general obligations for the protection of personal information held by the private sector. The public sector is covered by the Act on the Protection of Personal Information Held by Administrative Organs enacted in 2003. These Acts are firmly rooted in the eight principles of the OECD Privacy Guidelines in 1980, supplemented by Basic Policy and 37 guidelines (as of April 2009) established by the relevant ministries.

Three distinctive features can be observed from the Japanese Act. First, the Act is effectively enforced by the relevant competent Ministers. Every Minister may collect reports from businesses, provide advice to them, or make recommendations and issue orders in the event of a data breach. In fiscal year 2007-08, there were 848 cases of unauthorized disclosure.¹⁸ The Cabinet Office further announced, after collecting reports from every ministry, that there were 83 cases concerning the collection of reports from business entities and no cases of recommendations or orders.¹⁹ Every case of data breach is judged by the competent Minister, who can carefully examine each field of business using his or her technical knowledge and experience.

Secondly, many ministries have authorized private business entities, which are called "authorized personal information protection organizations." The number of authorized organizations was 37 as of March 2009, and their role is to instruct and support protecting 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 the PrivacyMark system, which is widely used in Japan for proving proper handling of personal information.

Finally, it is interesting to note, from the viewpoint of Japanese culture, that when a business leaks a large amount of personal information, the harm suffered is not the loss of control of personal information, but rather the disruption in its relationship with customers and the community. As we have a culture of apology, businesses which have leaked customers' information tend to apologize in advertisements placed in newspapers, and they are often willing to compensate without court orders.²⁰

In this way, we have seen autonomous efforts by businesses in the context of their relationship with society even after the Act entered into force.

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 held that the N system did not violate the right to privacy).

¹⁶ Judgment of Supreme Court, December 15, 1995, *Keishu* Vol. 49, no. 10, p. 842 (The Court held that a person has the right not to be forced to provide his or her fingerprints, but the government had a legitimate interest in fingerprinting immigrants for the purpose of administering their residence).

¹⁷ Further details are available at the homepage of the Office of Personal Information Protection, Cabinet Office

http://www5.cao.go.jp/seikatsu/kojin/index_en.html (last visited May 15, 2009).

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 cases of unauthorized disclosure 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 FY 2006.

²⁰ For example, Mitsubishi UFJ Securities leaked the information of about 50,000 customers in April 2009. They apologized in five newspapers and offered each customer JPY 10,000 (\$100) in compensation for mental distress.

(2) Recent Developments

Since the Act entered into force, we have seen several developments in privacy protection in Japan. I will introduce two recent developments in privacy protection: international obligations and the emergence of new technology.

As for international obligations, Japan is an active member of both the OECD and APEC, and the Government of Japan has been consistently working with these international organizations regarding privacy protection. In April 2008, the Government of Japan revised its Basic Policy in response to demands for the international harmonization of data protection, mentioning its support of the OECD recommendation on Cross-Border Cooperation in the Enforcement of Laws Protecting Privacy in 2007²¹ and the progress made in APEC and the EU. In particular, APEC launched the Data Privacy Pathfinder Project²² 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 the benefits of electronic commerce.²³ Of the nine projects, Japan has supported all but two of them (Project 4 & 8), which has not been substantially started as of December 2008, making use of the experience of the autonomous approach by businesses in Japan. We expect that the new projects of OECD and APEC will serve as an experiment for the cross-border protection and global flow of personal information.

Secondly, Japan has created many new technologies giving rise to privacy threats, including biometrics, RFID, surveillance, and other privacy-related technologies. For example, mobile phones can be used to access the Internet, pay rail and bus fares, and execute payments at some shops. Passports and driver's licenses contain IC chips, which enable the remote control of personal information. PINs are no longer needed for withdrawing cash from ATMs or entering rooms with restricted access at companies; instead, biometric checks serve to identify the individual. Recently, in terms of consumer protection, we have seen several protests against the Google Street View service by some local governments because Street View itself compromises privacy in the community. Both the national and local governments are seeking proper measures by setting some guidelines or voluntary rules regarding the use of new technology to ensure harmony and consistency with the Japanese culture of privacy.

IV. CONCLUSION

The main issue for privacy is the definitions of "self" and "other" in the particular culture.²⁴ In this paper, I have examined some special aspects of the Japanese culture of privacy from my personal perspective. We have seen that there have been some successful transplants of "privacy" from Western culture to Japanese business activities and the right to privacy is widely supported in citizens' everyday lives. On the other hand, its form may be somewhat different from its birth in Western culture, as seen from the reaction to cases of unauthorized disclosure, where social relationships are still of great importance.

Information flows across cultures, but privacy is deeply rooted in individual cultures. The task of creating rules for cross-border privacy is hard, but must be realized in the age of a global information community. Our task is not to realize the universal values of privacy which persist in every society, but rather to tolerate the differences between cultures 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 cultural background.

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

22 The nine projects of APEC Data Privacy Pathfinder Project are (1) self-assessment guidelines for organizations, (2) private and public sector accountability agent recognition criteria, (3) compliance review process of CBPRs, (4) directories of compliant organizations and contact information of organizations and accountability agents for use by consumers, (5) contact directories for data protection authorities and privacy contact officers within economies, as well as with accountability agents, (6) templates for enforcement cooperation arrangements, (7) templates for cross-border complaint handling forms, (8) scope and governance of the CBPR system, and (9) a pilot program that can test and implement the results of the projects leading to the testing of a complete system.

23 The latest information regarding the Data Privacy Pathfinder Project is available at http://aimp.apec.org/Documents/2009/ECESG/SEM1/09_ecsg_sem1_027.doc (last visited May 15, 2009).

24 For an excellent empirical study of the 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).