

JUR 5630 – 2010
Lecture 10
Data protection law outside Europe, with particular focus on Asia-Pacific
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1. Disposition

- US law
- Australian law
- Japanese law
- Chinese law

2. US law

- Large amount of case law on right to privacy
- Two main types:
 1. Constitution
 2. Tort
- Constitution: Landmark cases =
 1. *Griswold v. Connecticut*, 381 US 479 (1965) (accepting Constitutional right to “marital” privacy)
 2. *Katz v. United States*, 389 US 347 (1967) (holding that FBI placement of microphone in public telephone booth in order to bug telephone conversations breached Fourth Amendment)
 3. *Roe v. Wade*, 410 US 113 (1973) (accepting privacy claim for woman’s decision whether or not to have abortion)
 4. *Whalen v. Roe*, 429 US 589 (1977) (holding that compulsory disclosure of patients’ medical records does not necessarily constitute invasion of Constitutional right to privacy)
- There appear to be 3 types of “privacy” interests protected by Constitution:
 1. freedom from govt. surveillance and intrusion (4th Amendment)
 - Hinges on “reasonable expectation of privacy”
 - Controversial: see, e.g., *Smith v. Maryland*, 442 US 735 (1979) (deciding that “legitimate expectation of privacy” does not exist with regard to telephone numbers dialed from private home); *United States v. Knotts*, 460 US 276 (1983) (holding that “person travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements”).
 - “[T]he Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence”: *United States v. Miller*, 425 US 435 (1976) at 443.
 - placed in the third party will not be betrayed.
 2. avoiding disclosure of personal matters (14th Amendment)
 3. independence in making important personal decisions (primarily 14th and 9th Amendments)
- What about interest in informational self-determination?
 - See, e.g., seminal analysis in P.M. Schwartz, “The Computer in German and American Constitutional Law: Towards an American Right of Informational

Self-Determination”, American Journal of Comparative Law, 1989, vol. 37, pp. 675–701.

- Interest is likely to come up for review by Supreme Court with respect to Ninth Circuit decision in *NASA v. Nelson* (20.06.2008): see Supreme Court’s announcement of 08.03.2010.
- Tort: 4 species identified
 1. intrusion into person’s private affairs
 2. public disclosure of embarrassing facts
 3. publicity putting individual in false light
 4. misappropriation of person’s name or likeness
 - See W.L. Prosser, “Privacy”, *California Law Review*, 1960, vol. 48, p. 338–423.
- Legislation: no general data protection legislation; sectoral approach pertains. See, e.g., ...
 1. Fair Credit Reporting Act (1970)
 2. Privacy Act (1974)
 3. Cable Communications Privacy Act (1984)
 4. Video Privacy Protection Act (1988)
 5. Electronic Communications Privacy Act (1986)
 6. Children’s Online Privacy Protection Act (1998)
 7. Financial Services Modernization Act (1999) (Gramm-Leach-Bliley)
- Overall comparative assessment:

Flaherty: “the United States carries out data protection differently than other countries, and on the whole does it less well” (D.H. Flaherty, *Protecting Privacy in Surveillance Societies* (Chapel Hill / London: University of North Carolina Press, 1989), p. 305). See also P.M. Schwartz & J.R. Reidenberg, *Data Privacy Law: A Study of United States Data Protection* (Charlottesville: Michie Law Publishers, 1996), pp. 379–96.

 - A major concern = lack of federal privacy commission(er); piecemeal legislative regulation of private sector

3. Australia

- No recognition by major court of right to privacy at common law
- No right to privacy in Constitution
- Fairly extensive data privacy legislation at federal level
- Principal legislation = Privacy Act 1988
 - Now covers both public and private sector but some large gaps re latter remain
 - (i) employee records
 - (ii) small businesses
- Uneven regulation at state level
- Cp. Victoria and NSW with WA and SA.
- Cp. New Zealand’s comprehensive Privacy Act 1993 – regarded as “probably the most effectively enforced law in the region” (Greenleaf), with relatively extensive body of case law. Main weakness in EU terms is lack of data export restriction.

4. Japan

- Act on the Protection of Personal Information held by Administrative Organs of 1988 – public sector coverage only;
- supplemented by Act on the Protection of Personal Information of 2003 covering private sector, albeit with exemptions for, i.a., mass media and small businesses (latter defined not in terms of annual turnover but numbers of data subjects in their databases).
- No central DPA.

- Act covering private sector does not create private right of action before judiciary; reliance instead on enforcement by relevant Ministries.

5. China

- Recognition of privacy-related interests in Constitution – Art. 38 (personal dignity); Art. 39 (illegal searches of or intrusion into private homes); Art. 40 (freedom and privacy of correspondence) – see <<http://english.people.com.cn/constitution/constitution.html>>.
- Protection of individual’s reputation under Art. 101 of General Principles of the Civil Law of PRC: see <<http://en.chinacourt.org/public/detail.php?id=2696>>.
- International commitments? ICCPR signed but not ratified; APEC Privacy Framework has hitherto had little real purchase
- No general privacy/data protection legislation; some sectoral protections
 - E.g., Shanghai Municipal Interim Measures on Administration of the Collection of Personal Credits (regulating credit reporting)
- Proposal for Personal Information Protection Act, but final form and implementation unclear. See, e.g., “Law on ‘personal info ‘next year’”, China Economic Net, 6.08.2007, <http://en.ce.cn/National/Politics/200708/06/t20070806_12435867.shtml>.
- PRC Tort Liability Law, adopted 26.12.2009 (in effect 01.07.2010): imposes liability in tort for infringement and damage of a wide range of “civil rights and interests”, including privacy (隐私权); evidently establishes private rights of action in data subjects for mishandling of personal data
- PRC Criminal Liability Law – amended in 2009 to prohibit breaches of data security and illegal dissemination of personal data.
- “By not having a single conceptual underpinning to justify and shape a law that protects personal information, China today appears embarked on a path of establishing an uncoordinated patchwork of laws, each of which touches on personal information protection in its own distinct way, in its own context and with its own particular objectives. This could make management of personal information protection issues in China a complicated affair”: Hunton & Williams Client Alert, January 2010.
- Cf. Hong Kong (SAR) – Personal Data (Privacy) Ordinance 1996
- Cf. Macau (SAR) Personal Data Protection Act 2006 (based closely on EU Directive)
- Cultural challenges in assimilating Western notion of privacy
 - Compare, e.g., newly introduced notions of “privacy” (隐私) and “privacy rights” (隐私权) as opposed to traditional Chinese notion of “hidden facts” (隐情), which pertains to criminal or immoral behaviour that is damaging to the public interest.

Further reading:

James B. Rule & Graham Greenleaf (eds.), *Global Privacy Protection: The First Generation* (Cheltenham: Edward Elgar, 2008).