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Jane Kim

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ARTICLES

JAPANESE AND AMERICAN PRIVACY LAWS, COMPARATIVE ANALYSIS

JANE KIM*

To understand the laws of a foreign nation, one must first understand that nation's culture. Its people and their customs will provide insight into the proper interpretation and application of such laws. For those reasons, this commentary commences with cursory background on Japanese people, followed by a brief comparative analysis of Health Insurance Portability and Accountability Act ("HIPAA") (enacted in 1996) and its Japanese counterpart, the Act on the Protection of Personal Information ("APPI") (enacted in 2003). The Japanese have borrowed a lot of American concepts of privacy laws. This paper will explore how these imported privacy concepts may not have translated well into Japanese culture and, in fact, a question is raised as to whether these privacy laws carry any meaning at all in Japan.

I. THE JAPANESE

*"To understand the Japanese,
we must know the why's behind the what's,
we must know the values driving the culture."*¹

Japan is "a society that did not abandon feudalism until the mid-nineteenth century, where the vast majority of the Japanese lacked a

* Jane Kim received her undergraduate degree at the School of the Art Institute of Chicago and her JD degree at John Marshall Law School of Chicago. A practicing lawyer with a litigation background including healthcare and compliance areas, Ms. Kim has handled matters at all levels in federal and state court systems. She is currently completing her LLM in Health Law degree at Loyola University Chicago School of Law and is a law partner at KYZ Law P.C.

1. Thomas Kasulis, *Intimacy: A General Orientation in Japanese Religious Values*, PHILOSOPHY EAST AND WEST, UNDERSTANDING JAPANESE VALUES, Vol. 40, No. 4, 434 (Oct. 1990), available at <http://buddhism.lib.ntu.edu.tw/FULLTEXT/JR-PHIL/kasulis2.htm>.

family name until the 1870s, [...] [where] the boundaries between state and divinity, and **society and self...** were never differentiated.”²

In the aftermath of devastating World War II, Japan achieved a remarkable economic recovery, with their national prosperity often attributed to “group-enforced social harmony.”³ As Michael Zielenziger, a former Tokyo-based reporter reflected, this group mentality transcends generations and, despite the technological advancements and limited globalization in Japan, the Japanese have not experienced expected political and social change.⁴

The first woman elected to Japan’s parliament in 1946, Shizue Kato, was asked in the early 1990s: “What is this thing they call human rights?” Even in this prominent university they simply did not understand. They did not understand concepts of democracy, or human rights, or **privacy**- they had not heard of them.”⁵ She insisted that, “true democracy has never taken hold in her nation [...] Japanese men had not changed their behavior in her lifetime. They remain samurai - only now camouflaged in business suits.”⁶ Shizue Kato was born in 1897 and died in 2001.⁷

From birth, the Japanese are taught by rote learning and critical thinking is not respected.⁸ They are taught to suppress their own ideas and opinions.⁹ As a result, “entrepreneurial activity in Japan is among the lowest in the developed world,”¹⁰ below Russia and Poland. Naturally, the group mentality affects people on an individual level, too. For instance, the term “self-esteem” does not exist in the Japanese language;¹¹ rather, they have “group esteem.”¹²

An individual cannot function in a Japanese society without explicit membership in and, responsibility to, some group in his/her professional and vocational life.¹³ Those who fail to meet obligations or who become

2. Michael Zielenziger, *Shutting Out The Sun: How Japan Created Its Own Lost Generation*, 61 (Nan A. Talese, 1st ed. 2007) (citing Robert N. Bellah, *Imagining Japan: The Japanese Tradition And Its Modern Interpretation* (Univ. of CA. Press, 2003)) (Emphasis added).

3. *Id.* at 3.

4. *Id.* at 20.

5. *Id.* at 122 (Emphasis added).

6. *Id.*

7. Carmen Blacker, *Shizue Kato*, THE GUARDIAN, available at <http://www.theguardian.com/news/2002/feb/01/guardianobituaries.socialsciences>

8. *Id.* at 20.

9. Michael Zielenziger, *Shutting Out The Sun: How Japan Created Its Own Lost Generation*, 54 (Nan A. Talese, 1st ed. 2007).

10. *Id.* at 31.

11. *Id.* at 11.

12. *Id.* at 156.

13. George DeVos, *Socialization for Achievement: Essays on the Cultural Psycholo-*

too independent become totally alienated;¹⁴ they become *hikikomoris*.¹⁵ A *hikikomori* once said: “To survive in Japan you have to kill off your own original voice.”¹⁶ A mother of a *hikikomori* believes that, “a person who challenges or makes a mistake, or thinks for himself, either leaves Japan or becomes a *hikikomori*.”¹⁷ Hayao Kawai, Japan’s most eminent clinical psychologist believes that a Japanese “appreciation of individualism remains quite shallow.”¹⁸

So, it is astounding to see that Japan, on its face, has comprehensive laws to protect *individuals’ privacy*. The laws may be well-developed on paper, but I challenge that they do not afford protections to the individuals as they may first seem to an outsider, in that the Japanese do not grasp what democracy, individualism and privacy mean, at least in the American or Western sense of such concepts. Japanese “dogma suggests that everyone is the same and shares identical thoughts and values.”¹⁹ More importantly, a Japanese individual will not enforce his individual rights simply because it is socially intolerable to do so.

II. JAPANESE CONSTITUTION

Article 13 of the Japanese Constitution:

“All of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs.”²⁰

The Global Privacy & Security Law text states that “an individual’s

gy of the Japanese, 35 (Berkeley: University of California Press 1973).

14. *Id.*

15. *Hikikomoris* is an acute social withdrawal disorder found *only* within the Japanese culture. These people, who are predominantly male, are not depressive or psychotic. They are highly intelligent, stimulating and open. It is believed the disorder developed due to the Japanese societal inability to accept humans as individuals. Sarah Michael, *Pictured: Sufferers of the bizarre condition causing almost a million Japanese men to lock themselves inside for YEARS, surfing the internet and reading manga*, DAILY MAIL AUSTRALIA, <http://www.dailymail.co.uk/news/article-3154180/Pictured-sufferers-bizarre-condition-s-forcing-one-MILLION-Japanese-people-lock-inside-years-surfing-internet-reading-manga.html>; See Zielenziger, *supra* note 2, at 71.

16. See Zielenziger, *supra* note 2 at 55.

17. *Id.* at 18.

18. *Id.* at 68.

19. *Id.* at 52.

20. Const. of Japan, Ch. III, Art. 13 (1946), *available at* http://japan.kantei.go.jp/constitution_and_government_of_japan/constitution_e.html.

right to privacy resides within Article 13 of the Constitution of Japan.”²¹ However, “Japan constantly borrows foreign concepts, digesting and re-processing their essential ingredients, these often come out ‘different’, somehow genuinely ‘Japanese’, once the repackaging is complete,” first woman elected to Parliament, Shizue Kato, said.²²

This is especially evident in the short excerpt from Article 13 of the Japanese Constitution that was established in 1946: “right to life, liberty, and the pursuit of happiness” sounds very American-like until the next phrase, “to the extent that it does not interfere with the public welfare.”²³ What the latter phrase really means is - to the extent that the life, liberty and the pursuit of happiness do not interfere with *group harmony*. And if one understands the Japanese, one understands that virtually *everything* in the culture is focused on group harmony.

III. DATA PROTECTION LAW

The Act on the Protection of Personal Information (“APPI”) was enacted in 2003 and “constitutes Japan’s omnibus data protection law provisions.”²⁴ APPI’s purpose was to protect individual rights and interests while taking into consideration the usefulness of personal information in today’s advanced information and communication society.²⁵ This law does not have a focus on any particular industry; it purports to encompass every industry.

As I discuss below, the language used in Japanese privacy laws appears to be modeled on its American counterpart- HIPAA. However, HIPAA’s primary goal is considerably narrower than APPI’s. HIPAA was promulgated “to make it easier for people to keep health insurance, protect the confidentiality and security of healthcare information and help the healthcare industry control administrative costs.”²⁶ The recent amendments to HIPAA are further viewed as a tool to facilitate the proper *sharing* of health information rather than the protection of same.

Both APPI and HIPAA establish national standards to protect individuals’ information. In America, however, such individual information is focused on “*medical* records and other personal *health* infor-

21. Françoise Gilbert, 2 GLOBAL PRIVACY & SECURITY LAW 38-6 (Aspen 2009).

22. Michael Zielenziger, *Shutting Out The Sun: How Japan Created Its Own Lost Generation*, 122-23 (Nan A. Talese, 1st ed. 2007).

23. Zielenziger, *supra* note 2 at 122.

24. Gilbert, *supra* note 22.

25. Act on the Protection of Personal Information, Act No. 57 of 2003, ch.1, Art. 1 (Japan).

26. *Health Insurance Portability Accountability Act*, TENNESSEE DEPARTMENT OF HEALTH, <http://tn.gov/health/topic/hipaa> (last visited Aug. 22, 2015).

mation and applies to health plans, health care clearinghouses, and those health care providers that conduct certain health care transactions electronically. The [HIPAA] requires appropriate safeguards to protect the privacy of personal *health* information, and sets limits and conditions on the uses and disclosures that may be made of such information without patient authorization.”²⁷

IV. PERSONAL INFORMATION

Protected health information (“PHI”) under HIPAA means individually identifiable health information.²⁸ APPI defines “personal information” as “information about a living individual” that includes any individual irrespective of citizenship and does not include corporate entities and children.²⁹ Unlike HIPAA, APPI does not extend privacy protection to children.³⁰

The fact that an individual in Japan is protected irrespective of citizenship is curious; Japan is considered a homogenous society consisting of 98.5% of Japanese citizens by ethnic background, 1.7% are foreign born, and immigration laws are so strict it is believed that Japan created Gulags for new immigrants.³¹ It is an example of borrowed concepts that do not necessarily translate meaningfully into the Japanese society.

Further, individual identifiers or examples of “personal information” reveal stark differences between HIPAA and APPI. Under HIPAA, information that people tend to regard as private in their day-to-day life, such as social security numbers, account numbers, health diagnosis and treatment, and other unique identifiers, are protected.³² In Japan, APPI protects not only similarly private information, but also readily available public information, such as: “official gazette, telephone directory, and employee records **that have been made public [...]**, images captured by security cameras [...], [and] business card information.”³³

As mentioned, in Japan even business cards constitute protected personal information. Of course, this is such an illogical application of APPI, in that business cards are exchanged widely by all Japanese in

27. *The Privacy Rule*, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, <http://www.hhs.gov/ocr/privacy/hipaa/administrative/privacyrule/index.html> (last visited Aug. 22, 2015)(Emphasis added).

28. 45 C.F.R. § 160.103 (2014).

29. Act No. 57 of 2003, ch. 1, art. 2(1).

30. 45 C.F.R. §160.103 (2014); Gilbert, *supra* note 22, at 38-29.

31. K.N.C, *Gulag for gaijin*, THE ECONOMIST (Jan. 18, 2012, 12:29 PM), <http://www.economist.com/blogs/banyan/2012/01/japans-immigration-control>.

32. 45 C.F.R. §164.514 (2013).

33. Gilbert, *supra* note 22 at 38-9 & 38-10 (Emphasis added).

business life any time there is an introduction on a person-to-person level. There is absolutely nothing private about business cards. People extend their business cards with both hands, bow properly according to their seniority level, and speak an introduction in a precise manner: “I am a Toyota manager Bob Smith.” Note that the primary identifier in this example is the *company* where the person is employed, not the person’s name.

The differences in HIPAA’s and APPI’s definitions and applications of private personal information reveal Japanese dissonance with what an American would view as private to an individual, and what is public information that cannot carry any privacy protections in the first place.

V. COVERED ENTITY AND BUSINESS ASSOCIATES

In the U.S., a covered entity under HIPAA is defined as a health plan, a health care clearinghouse, and a healthcare provider.³⁴ An entity is covered under HIPAA if it “creates, receives, maintains, or transmits protected health information.”³⁵

In Japan, APPI excludes from compliance with privacy laws any state and local government entities, independent administrative agencies, news agencies, academic institutions, religious organizations, and “[e]ntities specified by a Cabinet Order as having a little likelihood to harm the rights and interests of individuals.”³⁶ Further, Japan has universal healthcare with the government providing public health insurance to all Japanese. Therefore, in Japan, health plans and hospitals that store tremendous amounts of personal and private information, entities that HIPAA is specifically designed to cover, are excluded from compliance with privacy laws under APPI.

APPI further excludes from coverage any entity under 5,000 individuals.³⁷ But note, in Japan, 99.3 percent of all business establishments are small businesses;³⁸ therefore, once Japanese privacy laws exclude small business, government, government-related businesses and anyone else that would “have little likelihood to harm the rights and interests of individuals,” the law may have a very small footprint remain-

34. 45 C.F.R. §160.103 (2014).

35. *Id.*

36. Act on the Protection of Personal Information, Act No. 57 of 2003, ch. 1, art. 2(3)(v) & ch. 5, art. 50-55 (Japan).

37. Gilbert, *supra* note 22 at 38-10.

38. This is data from 1999. Since then, Japan has experienced the “lost decade(s)” and has encountered a significant increase of unemployment and the national economy has been in crisis. Joost Van Acht, Et. Al., *Business Ownership and Unemployment In Japan*, MAX PLANCK INST. FOR RESEARCH INTO ECON. SYS. GROUP ENTREPRENEURS GROWTH AND PUB. POL’Y, (2004), *available at* <https://papers.econ.mpg.de/egp/discussionpapers/2004-09.pdf>.

ing indeed.

It is further unclear how APPI laws interpret the extent of the Japanese government involvement with private businesses, in that they are so inextricably financially-linked that the Japanese government is called Japan, Inc. Does it mean APPI laws further exclude all private businesses that receive financial support or contracts from the government, which would exclude the majority of Japanese large businesses as well?

Finally, APPI and HIPAA, provide for a covered entity to be ultimately responsible for their business associates. APPI adopted the American concept of relationship between covered entities and their business associates, as follows: “necessary and appropriate supervision includes proper selection of the contractor [...] [with] an agreement that contains compliance with security management measures, [...] and [the] remaining informed of the status of handling of personal data entrusted to the contract.”³⁹

VI. AUTHORIZATION AND CONSENT

HIPAA permits a physician or a covered entity to share PHI with a third party for the sole purpose “to carry out treatment, payment, or health care operations.”⁴⁰ Authorization to share PHI is required, however, if it is shared outside its permitted use (e.g., marketing).⁴¹

In Japan, when a covered entity receives personal information, it shall simultaneously specify the “purpose of utilization” of such personal information.⁴² Prior consent is not necessary if personal information is used within the scope and purpose of use originally specified.⁴³ A covered entity in Japan must obtain consent only if disclosure exceeds the original contemplated purpose for collection of such information, and such consent is not subject to exclusions. APPI excludes prior consent requirement if “information is [e]specially necessary for improving public health or promoting the sound growth of children.”⁴⁴ Culturally, many things are considered within the purview of public health in Japan, and therefore, prior consent is simply not required in many situations even if they exceed the original purpose of utilization.

39. Gilbert, *supra* note 22 at 38-15.

40. Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, §164.506, 110 Stat. 26 (1996).

41. Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, §164.508 & 510, 110 Stat. 26 (1996).

42. Act on the Protection of Personal Information, Act No. 57 of 2003, ch. 4, sec.1, art. 15 (Japan).

43. *Id.* at ch. 4, sec.1, art. 16 (Japan).

44. *Id.* at ch. 4, sec.1, art. 16(3)(iii)(Japan).

Additionally, APPI allows employers to obtain health information on its employees and further exchange health information with medical institutions.⁴⁵ Likewise, a health insurer may request copies of health records of an insured from his or her employer.⁴⁶ Such interaction between employer and health care providers and health plans is prohibited under HIPAA, and it is further prohibited under the Patient Protection and Affordable Care Act.⁴⁷ It is unclear for what purpose Japanese insurance companies would need individual health information if Japan provides universal health care.

Curiously, APPI requires consent from a parent to share information of a minor child wherein a “minor” is defined between the ages of 12 and 15.⁴⁸ APPI does not appear to extend protection of information of newborn children to 12 years old.

Finally, both countries’ laws have exceptions to consent and authorization in cases of emergency. In Japan, the language reads, “for the protection of the life, body or property of an individual.”⁴⁹ In America, protection of *property*, whether in the context of health care or not, is rarely deemed an emergency.

VII. ADDITIONAL SAFEGUARDS

HIPAA contains limited provisions pertinent to electronically stored information. With the proliferation of PHI being stored and shared electronically, and instead of extending or amending HIPAA, the U.S. government promulgated the Health Information Technology for Economic and Clinical Health (HITECH) Act. It was enacted as part of the American Recovery and Reinvestment Act of 2009 (the stimulus package to respond to the recent economic depression). The HITECH Act’s primary focus is “to promote the adoption and meaningful use of health information technology,” and “Subtitle D of the HITECH Act addresses the privacy and security concerns associated with the electronic transmission of health information.”⁵⁰

One similar trend to protect personal information is that both governments, Japanese and American alike, reinforce compliance with the

45. Gilbert, *supra* note 22 at 38-28.

46. *Id.*

47. 42 U.S.C.A. §300gg-3 (West 2011); 42 U.S.C.A. §18001(West 2010); and Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

48. Gilbert, *supra* note 22 at 38-29.

49. *Id.* at 38-15.

50. *HITECH Act Enforcement Interim Final Rule*, U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES, (last visited Sept. 19, 2015), <http://www.hhs.gov/ocr/privacy/hipaa/administrative/enforcementrule/hitechenforcementif r.html> 45 C.F.R. §160.101 (2013), et seq.; and, 45 C.F.R. §164.400, et seq (2009).

laws through monitoring programs. Pursuant to HIPAA, covered entities and business associates are required to maintain certain administrative safeguards, such as the risk analysis, risk management, sanction policy and information system activity review.⁵¹ Although, it is required to implement administrative safeguards, having a compliance plan is not required under HIPAA. However, should a breach occur, a well-implemented compliance plan “provides evidence that any mistakes were inadvertent [...] and is one significant factor” in determining whether a health care entity has made reasonable efforts to prevent wrongdoing.⁵²

Compliance programs in Japan are governed by the APPI and are mandatory for all covered entities. Japanese compliance programs appear to be more specific and targets not only internal compliance issues but *physical* security measures, such as the management of the office entrance and exit points, and the physical security of equipment and devices.⁵³

Comparable laws relative to reporting requirements in the event of security breaches exist under HIPAA, HITECH Act and APPI. All relevant hereto laws have requirements to publicize incidents as well as to notify appropriate government officials and the affected individuals.⁵⁴ Under the HITECH Act, if notification is required, it prescribes the timeliness, content, and methods of providing the breach notifications.⁵⁵

VIII. ENFORCEMENT

Although Japan has provisions to enforce its privacy laws on the books, they are not typically enforced.⁵⁶ The Japanese “disdain litigiousness, the process of going public with criticism would be certain to damage ‘group harmony.’”⁵⁷

Enforcement of APPI in Japan is overseen by Japan’s Government Consumer Affairs Agency, which delegates the enforcement function to private entities that are deemed authorized personal information pro-

51. Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-101, §164.308(a)(a)(ii)(A-D).

52. Ronald L. Eisenberg, *Radiology and the Law: Malpractice and Other Issues*, SPRINGER SCIENCE & BUSINESS MEDIA, 232 (2004).

53. Gilbert, *supra* note 22 at 38-14.

54. Gilbert, *supra* note 22 at 38-14; 45 C.F.R. §164.400, et seq (2009); and 45 C.F.R. Parts 160 and 164.

55. 45 C.F.R. §160.101 (2013), et seq., 45 C.F.R. §164.102 (2013), et seq., and H.I.P.A.A., Pub. L. No. 104-191, §164.406-500(a-c)(1996), §164.406-500(a-c)(1996).

56. Act on the Protection of Personal Information, Act No. 57 of 2003, ch.6 (Japan).

57. Zielensziger, *supra* note 2, at 101.

tection organizations.⁵⁸ In the U.S., government agencies are assigned exclusive duty to enforce civil and criminal remedies under HIPAA. HHS Office for Civil Rights (OCR) under the Office of Inspector General (OIG) and the Department of Justice (DOJ) are responsible for HIPAA enforcement.

Additionally, there is no private right of action under HIPAA. By contrast, APPI allows for a private right of action further allowing for recovery of damages for emotional distress. Recovery for emotional distress in the U.S. is limited to intentional torts only and is not allowed under HIPAA. Violations of APPI and HIPAA both carry stiff monetary penalties as well as criminal penalties.⁵⁹

IX. WHISTLEBLOWERS

On its face, both countries appear to provide protection for whistleblowers. In America, the whistleblower actions are called *qui tam* and have a much narrower focus than in Japan.⁶⁰ Further, under HIPAA, when a whistleblower makes disclosure of PHI to a public health authority or an attorney because the whistleblower “believes in good faith that the covered entity has engaged in conduct that is unlawful [...] or the care [...] potentially endangers [...] [a] patient,” then such disclosure is not in violation of HIPAA.⁶¹

Japan purportedly does this through its Whistleblower Protection Act, which covers all sorts of industries (e.g., agriculture, sanitation, food, air pollution).⁶² However, it is astounding to consider, then, the Japanese experience with their whistleblower laws. “[T]he few ‘whistleblowers’ who try to document wrongdoing or injustice in Japanese society invariably find themselves bullied or punished... People who try to blow the whistle on corporate malfeasance or government scandal are often punished, without recourse to the courts.”⁶³

For instance, Kei Sugaoka, an American of Japanese descent, thought he was performing his job duty as a safety inspector when he warned of “safety violations at a nuclear reactor in Fukushima. Sugaoka said he watched his supervisors carefully erase videotapes showing cracks in a critical component of the reactor. [...] [Kei’s] name was

58. Act No. 57 of 2003, ch.6.

59. Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, §§160.400, 160.402, 160.404, 110 Stat. 26 (1996) ; Public Health and Welfare, 42 U.S.C.A 1320d-5 (2010).

60. False Claims Act, 31 U.S.C. §3729 (2009).

61. Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, §164.502, 110 Stat. 26 (1996).

62. Gilbert, *supra* note 22, at 38-4.

63. Zielenziger, *supra* note 2, at 118.

improperly disclosed to the utility and his employer,” and he was dismissed from his employment.⁶⁴ Shortly after, there was a Fukushima Daiichi nuclear disaster.⁶⁵

No one individual was identified or punished for the Fukushima nuclear disaster.⁶⁶ Japanese Prime Minister Noda said that everyone was responsible collectively as a group for the Fukushima’s blow-up, including the academics.⁶⁷ It may sound odd but this illustrates that when there is a disaster or a wrongdoing in Japan, it brings shame on everyone; there is no individual responsibility for group misbehavior under the law. In Japan, those that feel shame for their failure to carry proper individual responsibility may resort to committing suicide or *seppuku* instead.⁶⁸ In America, individual responsibility may be enforced through the Responsible Corporate Officer Doctrine.

X. PROPOSED PRIVACY REGULATIONS IN JAPAN

Japan’s reluctance to develop and enforce privacy laws coupled with a series of high profile damaging data breaches may lead to disapproving global perceptions of Japanese data protection and negatively impact a view of Japan as a foreign investment-friendly environment.⁶⁹ These concerns may have prompted the Japanese government to place on its agenda the development of new, more robust and, at first glance, ambitious privacy laws.

Accordingly, on June 24, 2014, Japan's Strategic Headquarters for the Promotion of an Advanced Information and Telecommunication Network Society within the Cabinet Office (IT Strategic Headquarters) announced its "Policy Outline of the Institutional Revision for Utilization of Personal Data."⁷⁰ The Policy lists issues to be addressed, some of

64. *Id.* at 119.

65. Hiroko Tabuchi, *Japanese Prime Minister Says Government Shares Blame for Nuclear Disaster*, THE NEW YORK TIMES (March 3, 2012), http://www.nytimes.com/2012/03/04/world/asia/japans-premier-says-government-shares-blame-for-fukushima-disaster.html?_r=0.

66. *Id.*

67. *Id.*

68. *Seppuku* is stomach-cutting or abdomen-cutting, which is a form of Japanese ritual suicide by disembowelment when one feels he brought shame to himself, his family or his group. *Seppuku* was still practiced in the twentieth century. Zielenziger, *supra* note 2, at 198.

69. Mark Parsons and Peter Colegate, *2015: The Turning Point for Data Privacy Regulation in Asia?*, HOGAN LOVELLS CHRONICAL OF DATA PROTECTION (Feb. 18, 2105), <http://www.hldataprotection.com/2015/02/articles/international-eu-privacy/2015-the-turning-point-for-data-privacy-regulation-in-asia/>.

70. Policy Outline of the Institutional Revision for Utilization of Personal Data (June 24, 2014), accessed at http://japan.kantei.go.jp/policy/it/20140715_2.pdf.

which are:

- (a) “*To remove the barrier to the utilization of personal data.*” This section is more akin to a HIPAA provision that should facilitate the sharing of information rather than the protection of same. Without additional guidelines on how to protect personal information, this proposed Policy fails to establish trust in the protection of personal data;
- (b) “*To prevent the violation of personal rights and interests.*” Interestingly, the Policy refers to personal rights as a “gray area.” This will remain a “gray area” so long as the custom and culture remain unaddressed and misaligned with the modern interests;
- (c) “*Ensuring the system enforcement.*” This is perhaps the most vital area that may lead to robust and effective laws. However, the Japanese seek to remedy the widespread enforcement issue with strengthening “non-governmental voluntary efforts.” Their approach to strengthen enforcement is disappointing;
- (d) “*International harmonization of the system.*” This is an issue of Japan’s inability to effectively globalize their business and come out of a very long recession. It is being addressed with a view of “sharing” information with foreign businesses and “considering the discussion on the protection of personal information and privacy in foreign countries.”⁷¹

The Policy proceeds to recognize that “it is currently not clear to businesses whether or not they are among those protected as [to their] personal data.”⁷² The Japanese government seeks to expand its definition of “personal data” to include biometric information such as fingerprint recognition data and face recognition data.⁷³ Interestingly, the Japanese government recognizes, at least on its face, the need to eliminate social discrimination by further defining “information of the race, creed, social status, criminal record, past record, and others that may cause social discrimination as Sensitive Information.”⁷⁴

Additionally, the IT Strategic Headquarters sets forth an ambitious Declaration to be the World’s Most Advanced IT Nation in 2014.⁷⁵ The Declaration seeks to encourage “business environments that are compatible with the protection of personal information and privacy will be

71. *Id.* at 9.

72. *Id.* at 14.

73. *Id.* at 15.

74. POLICY OUTLINE OF THE INSTITUTIONAL REVISION FOR UTILIZATION OF PERSONAL DATA, 15 (June 24, 2014), available at http://japan.kantei.go.jp/policy/it/20140715_2.pdf.

75. *Declaration to be the World’s Most Advanced IT Nation*, STRATEGIC HEADQUARTERS FOR THE PROMOTION OF AN ADVANCED INFORMATION AND TELECOMMUNICATIONS NETWORK SOCIETY (June 13, 2014), available at http://japan.kantei.go.jp/policy/it/2013/0614_declaration.pdf.

created to facilitate the efficient use of big data with respect to the handling of personal data including information concerning *individual conduct and status*.⁷⁶ This statement may be more focused on marketing tools rather than representing actual protections of the privacy of individuals. The focus in the Declaration appears to be on “the sale of data” including “the sharing and use of information by numerous operators including small-scale farmers to raise profitability,” rather than on protecting personal information.⁷⁷

The proposed Policy was opened for Comment, with the goal of promulgating the Policy into law in January 2015. There has not been any reported activity on the policy since 2014.⁷⁸

XI. CONCLUSION

It may be that Japan “constantly borrows foreign concepts,” including privacy laws.⁷⁹ However, the privacy protection afforded by such laws in Japan may differ from those found in the U.S., due to the cultural background in Japan, where there is a high value placed on group loyalty over rights of individuals.

Should the Japanese Policy and its Declaration become law, there remains the open question of enforcement provisions that may be promulgated to further the policy's stated goal of protecting the personal information of individuals, and the response to such policy in view of the group loyalty fostered and valued by Japanese employers and employees.

By comparison, in the U.S., if a measure of how effective HIPAA has been is how much the government has been able to recoup from those violating the law, then the law has been shown to have teeth and be effective. HIPAA established a national Health Care Fraud and Abuse Control Program (HCFAC) allocating \$1,557,366,861 in 2014 to the HHS and DOJ to oversee the efforts of combating fraud and abuse within the health care industry.⁸⁰ The U.S. government realizes an almost seven-to-one return on every dollar invested in HCFAC; for every \$1 spent on the HCFAC Program, an average of \$6.80 has been re-

76. *Id.* at 9 (emphasis added) (internal quotations omitted).

77. *Id.* at 10.

78. *IT Strategic Headquarters*, PRIME MINISTER OF JAPAN AND HIS CABINET, http://japan.kantei.go.jp/policy/it/index_e.html (accessed on July 28, 2015).

79. Zielenziger, *supra* note 2, at 122.

80. *Health Care Fraud Act and Abuse Control Program FY 2014*, U.S. DEPT. OF JUSTICE, ANNUAL REPORT OF THE DEPT. OF HEALTH AND HUMAN SERVICES AND JUSTICE, 90 (March 19, 2015), available at <https://oig.hhs.gov/publications/docs/hcfac/FY2014-hcfac.pdf>.

turned to the Government.⁸¹ Finally, the HCFAC account has returned over \$27.8 billion to the Medicare Trust Funds since the inception of the Program in 1997.⁸²

81. Improving Efforts to Combat Health Care Fraud: Hearing Before the Comm. on Ways and Means, Subcomm. on Oversight, 112th Cong. (Mar. 2, 2011) (statement of Lewis Morris, Chief Counsel, Office of the Inspector General, Dep't of Health and Human Services), *available at* <http://www.hhs.gov/asl/testify/2011/03/t20110302h.html>.

82. *Annual Report of the Departments of Health and Human Services and Justice*, U.S. DEPARTMENT OF JUSTICE (March 19, 2015), *available at* <http://www.hhs.gov/news/press/2015pres/03/20150319a.html>.