The Right to Privacy in East Asian constitutionalism in comparative perspective: the case of China and Japan[1]

di Emma A. Imparato

Abstract: The data privacy framework in Asia has undergone an important transformation in the last years. In this article, starting from the definitional frame of reference in the field of privacy, I will propose a juridical-historical perspective, which I believe helps in understanding some East Asian legal systems, especially the fundamental differences between China and Japan. Notwithstanding the importance of cultural tradition that tends to associate privacy protection with a hierarchical system of moral outlook, the privacy regulation must also be understood as embedded in the political context of the aforesaid countries. In this light, while Chinese and Japanese laws share the same core data protection elements found in every privacy law in the world, they each have their own specific rules that differ from each other and from those in other regions. It will be interesting to see the evolution and differences in China and Japan as to privacy and data law protection and some important recent developments, focusing specifically on protected interests and the control of information, considering also the active role of courts. In this framework neither traditional vision nor modern legal structures are static, being both continually transforming, and accommodating to dynamic local, regional, and global pressures, while China, unlike Japan, is showing its own attitude: indeed, China follows a trend towards "substantive" constitutionalism and finally towards the rule of law.

Keywords: data privacy, right to privacy, breach notification

1. Introduction

The data privacy framework in Asia has undergone an important transformation in the last years. Around 20 countries in the Region, including Japan and China as well, enacted data privacy laws.

In this paper, we will take into consideration some laws belonging to the same legal family – i.e. Romano-Germanic – such as the Japanese one, significantly amended in 2015. This was the only country in Asia – in addition to New Zealand in Oceania - to be granted adequacy status by the European

[1] Part of this article was presented at the *9th Asian Constitutional Law Forum*, organized by Academia Sinica, Taiwan and National University of Singapore on May 13-14, 2022 in Taipei (Taiwan). I am thankful to the participants of this event for their valuable contributions and to Jasna Geric for editing.

DPCE online
ISSN: 2037-6677

Commission with a decision adopted in 2019. At the same time, we want to analyze China's first comprehensive data privacy law, which came into effect on November 1st 2021.

Notwithstanding the importance of cultural tradition that tends to associate privacy protection with a hierarchical system of moral outlook, privacy regulation must also be understood as embedded in the political context of the aforesaid countries.

This is happening particularly in China, where the government in power, through a «more law-oriented» [2] approach, over the past five years, and the privacy law, is in a position to exert a social level of control, upholding its political and moral authority. Moreover, for this purpose the Chinese state uses the trump card of preserving public security, or national security or state security, terms used interchangeably[3]: for Chinese lawmakers, cyber security is indeed an important aspect of public security[4]. Consequently, the latter is considered to be an overarching value in Internet governance. Indeed, «meeting the needs of state security (…) or (…) public security», according to art. 40 of the Constitution, permitted a lot of infringement greatly on freedom, privacy, and censorship. But, while unbounded surveillance may be a useful tool for keeping control of political subdivisions, it can be very bad for business and economic development. China government has put considerable efforts into going to reconcile these two competing interests, i.e. extensively monitor the communication of its citizens, and further developing its financial industries, its high-tech innovation capabilities, and its global role in the "knowledge economy".

This approach seems to be different in Japan.

From the Japanese perspective, «the concept of information privacy, allowing consistent social guidelines for the availability of and `right to process' private information, is common to Japan and other societies»[5]. It has shaped its culture for a considerable time, unlike "puraibashii", a new categorical concept[6],

[2] T. Zhang, T. Ginsburg, *Legality in Contemporary Chinese Politics*, in *Virginia Journal of International Law*, 3 (2018). Available at SSRN: ssrn.com/abstract=3250948

[3] The supremacy of public security has provided sufficient legitimacy for its governance since the outbreak of the 1989 Tiananmen Square Protests. See C. Feng, *'Preserving stability and rights protection: conflicts or coherence?*, in *J Curr Chin Aff*, 42, 22-34 (2013).

[4] For the purpose of improving cyber security and creating a more uniform cyberspace, China has enacted a number of administrative laws and regulations to eliminate threats to public security. Chinese lawmaker has adopted laws and regulations on comprehensive real-name registration system and social credit system with the aim of creating a "harmonious society" by limiting cyberspace anonymity. Consequently, China has enacted local and national laws requiring Internet users, especially bloggers and micro bloggers, to sign up by using their real name and personal information with various ISPs that directly provide users with Internet access or services.

[5] See, A.A. Adams, K. Murata, Y. Orito, *The Japanese Sense of Information Privacy*, in *Ai & Society Rev.*, August 19, 328 (2009).

[6] In general, on the linguistic gap reflecting a conceptual lack, see E. Bertolini, *Japan: Linguistic Transitions as a Condition for the Introduction of a Western Legal System*, in T. Groppi, V. Piergigli, A. Rinella (Eds.), *Asian Constitutionalism in Transition. A Comparative*

which still now evolves, above all, to take account of changes in the world. Developing then from the year 1964, when the "right to privacy" appeared for the first time in a court decision, to 2003, during which time foreign law has been transplanted, privacy protection is now high on the political agenda in Japan, in order to strengthen not only the economic development process. Indeed, Japan, unlike China, does not resort to legality and the right to privacy to increase control but to improve, with international trade relations, also the functioning of constitutional democracy.

In this light, while Chinese and Japanese laws share the same core data protection elements found in every privacy law in the world, they each have their own specific rules that differ from each other and from those in other regions. It will be interesting to see the evolution and differences in China and Japan as to privacy and data law protection and some important recent developments, focusing specifically on protected interests and the control of information, considering also the active role of courts.

Interestingly, in both cases, the right to privacy has generally been protected by courts when damage is sustained, as a consequence of tort, even if the general principles or the basic rights of constitutions do not guarantee this right. This fact shows a more direct role of jurisprudence in the Constitution. Mostly associating the right to privacy with the right to reputation and dignity, the courts are in a position to draw upon constitutional principles while passing judgments and protecting rights, and even interpreting the law while constitutional jurisprudence evolves, also through scholarly research, dealing with issues relating to constitutional government.

In short, notwithstanding a good convergence with the formal institutions of Western constitutions, beyond a shadow of a doubt, Japan, China, and definitely Asia still reflect, at least in their deep structure, the region's long tradition of political thought: indeed, the different ideas about the organization and restraint of public power echo several different religious and legal traditions[7]. However, in this framework neither traditional vision nor modern legal structures are static, being both continually transforming, and accommodating to dynamic local, regional, and global pressures, while China, unlike Japan, is showing its own attitude: China follows a trend towards "substantive" constitutionalism and finally towards the rule of law[8].

1.1 Methodology and objectives

In this article, starting from the definitional frame of reference in the field of

Perspective, Milano, 2008, 145-159. The A. points out, particularly regarding the Meiji period, «a double transplant: the first was linguistic, in order to make up for the linguistic gap with the West and be able to translate the Western legal concepts; the second one a was a conceptual one, answering to the need to give meaning to the new words just introduced», 154.

[7] T. Ginsburg, *Constitutionalism in Asia in the Early Twenty-First Century*, in A. HY Chen (Eds), *East Asian constitutionalism in comparative perspective*, Cambridge, 2014, 32-51.

[8] T. Ginsburg, *Ibidem*.

DPCE online
ISSN: 2037-6677

privacy, I will propose a juridical-historical perspective, which I believe helps in understanding some East Asian legal systems, especially the fundamental differences between China and Japan. From this last point of view, one may wonder about the opportunity/usefulness to compare privacy-related laws of two different countries (an authoritarian State, on one side, and a Western-style democracy, on the other). Instead, in my opinion, comparing these countries can be very interesting.

As a matter of fact, even if the Japanese and Chinese legal systems have undergone different developments in terms of the form of state, they both have an underlying foundation of Confucian philosophy and both, more importantly, have developed a private law system[9]. In this perspective, both China and Japan have adopted Western-style legal codes, with some common law characteristics, to foster economic growth and international trade[10]: in both cases, the civil codes, based on Roman law, are understood as an important element of society in which the decisions of individuals govern activities and can provide the social stability necessary for the economic development. In this light, data privacy becomes so crucial. Indeed, relatively recent is the emergence of the issue in both countries.

Another element common to the tradition of both countries is then the predominance, over its single members, of the community organization, which in turn, is characterized by a considerable tendency towards solidarity. In China and ancient Japan, people tended to pay more attention to family than to individuals. However, China has developed a particular form of authority-directed orientation while retaining a strong sense of individuality. Japan, on the other hand, has developed a different pattern of peer-group orientation by virtue of its different social and historical circumstances[11]. Thus, despite being a collective-oriented society, like, for example, China and India, the Japanese do develop a significant sense of self-hood, «albeit one which is tempered by an awareness about the position of that self within a more dynamic group unlike the individual-oriented society, like, for example, the USA»[12].

[9] J. O. Haley, *Law and Culture in China and Japan: A Framework for Analysis*, in 27 *Mich. Journal. Int. L.*, 895-916, 911 (2006). Available at: repository.law.umich.edu/mjil/vol27/iss3/6

[10] See, P.R. Luney, *Traditions and Foreign Influences: Systems of Law in China and Japan*, in 52 *Law and Contemporary Problems*, 129-150 (1989). Available at: scholarship.law.duke.edu/lcp/vol52/iss2/7.

[11] See, D. Shu-fang Dien, *Chinese Authority-Directed Orientation and Japanese Peer-Group Orientation: Questioning the Notion of Collectivism*, in *Review Gen. Psyc.*, Vol. 3, No. 4, 1999, 372. Moreover, Triandis, that proposed and defined the notion of collectivism versus individualism, has contended that Japan used to be a «vertical collectivist» culture and is now moving toward «horizontal collectivism» and «individualism» and «that Chinese culture is more vertical than horizontal». See, H. C. Triandis, *Individualism and collectivism*, San Francisco, 1995.

[12] A.A. Adams, K. Murata, Y. Orito, *The Japanese Sense of Information Privacy*, cit., 329 and M. Mizutani, J. Dorsey, J.H. Moor, *The internet and Japanese conception of privacy*, in *Ethics and Information Technology*, 6121-128 (2004). See also, the «cultural environment within East Asian countries such as China oriented to promote a predominance of individuals who

From this perspective, if in general, the right to privacy derives from the balance between individuals and society enabling individuals «to enjoy the peace of their inner world»[13], only in the Japanese case, privacy law seems to overcome its culture of respecting the community and the public in favor of private interests and individual fundamental rights. In truth, this result was facilitated in Japan by the presence of the concept of self-awareness imported from Europe, particularly within Japanese society following the Meiji Restoration, where individualism means that respecting others leads to respecting ourselves[14]. China instead reflecting the broader political aims of the country, which enforces them through the Privacy law, seems to give importance basically to public interest linked to national security or also, in some cases, state secrets that compress, acting as an «all-encompassing limit»[15], the freedom of expression. They appear in this way interesting cases, being able to testify how, despite having common elements, are distinguished on the basis of actual Western European conditioning, and thus showing on one side – the Japanese case - is actually open to the Western vision whereas, on the other - the Chinese case - seems to be such just in appearance.

Indeed, the contact with the Eurocentric and legal experience in addition to "contaminating" the pre-existing conception of law, eventually attributing predominance to Western European systems, has led to the modification of several original characteristics: here above all the community vision of society seems influenced by the individualistic one, based on the idea of freedom, as is in the case of privacy, understood as a value of Western culture. However, in China, the public seems to continue to prevail though in form of social control, also facilitated by the imposed regime.

In consideration of different protected interests in these laws, the goal of this article is not to analyze every aspect of privacy, but to examine the culture of privacy, which exists in Japan and China, showing different purposes.

For the present purposes, this article is divided into three parts.

The first part sets forth some definitional propositions intended for a more general analysis, such as the concept of individual right and freedom, legality, rule

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are more oriented toward collectivist perceptions such that they may be more willing to relinquish some degree of individual privacy in order to increase overall organizational security», A.C. Johnston, M. Warkentin, X. Luo, *National Culture and Information Privacy: The Influential Effects of Individualism and Collectivism on Privacy Concerns and Organizational Commitment*, in *IFIP TC 8 International Workshop on Information Systems Security Research*, 89 (2009).

[13] C. Jingchun, *Protecting the Right to Privacy in China*, in *36 Victoria U. Wellington L. Rev.*, 645, 646 (2005).

[14] See, N. Sōseki, *Watashino Kojin Shugi [My Individualism]*, in *Theory Of Literature And Other Critical Writings*, 242–264 (2010).

[15] As a matter of fact, art. 2 of the State Secrets Protection Act provides that «State secrets are all issues relating to the security and interests of the nation, determined in accordance with legally defined procedures, the knowledge of which is restricted to a defined scope of personnel for a defined length of time». See, E. Bertolini, *Internet Governance and Terrorism in the Context of the Chinese Compression of Fundamental Rights and Freedoms*, in *Global Jurist*, vol. 18, no. 1, 4 (2018).

DPCE online
ISSN: 2037-6677

of law, and the general jurisprudence role in constitutional review. In the present part, the right to privacy and personal information protection is examined as well, starting from the Constitutions: you will see here already that if in Japan is important to separate the public from the private – excluded in cases when it is utilized, in an exceptional way, concepts-clauses - in China it doesn't seem to be the case. At the end of this part, we will analyze and compare the privacy protection regimes in the EU and the US. We believe, as it will be seen, that these regimes may have influenced on the Chinese and Japanese protection systems. Instead, the second part comprises an introduction to the evolution of legislative frameworks followed by the analysis of some pronunciations adopted by courts, which show in both countries, a more direct role of jurisprudence in the Constitution, aimed at protecting the right to privacy.

The last part evaluates some elements, which are deemed fundamental - such as personal information and their processing with the exemption clauses - to understand better the transposition and development of Western law and likewise the different conceptions of the right to information privacy. Based on these elements, the effectiveness of the right to information privacy in the Japanese and Chinese legal context is examined and the opportunity to rethink this concept has been discussed, particularly in China where the public security clause, being a public interest, has a predominant role: in fact, the Chinese government, turning towards legality, rather «against law»[16], establishes in its privacy law a general no-consent control clause - within the "public interest" within a reasonable scope, such as, in the case of news reporting - unlike the Japanese act on the protection of personal information, which dates back to 2003, which strictly limits the use of personal data without consent. In this light, finally, a revised conception of the state sovereignty is suggested right through the right to privacy: in this way, China remains a strong state in which the government in difficulty, has undergone a series of legal rules restricting its freedom to choose and democracy.

Part I

2. Constitutional systems in comparison with formal and substantial legality

From the point of view of the legal families[17], since both China and

[16] C. f. Minzner, *China's Turn Against Law*, in *Amer. Journal of comp. law*, 935 (2011). The A. considers that if legal reforms in the 1980s emphasized law, litigation, and courts as institutions for resolving civil disputes between citizens and administrative grievances against the state, subsequently, at the beginning of the 2000s, Chinese authorities have drastically altered their course, de-emphasizing the role of formal law and court adjudication.

[17] K. Zweigert, H. Konrad, *Einführung in die Rechtsvergleichung*, 2. ed., vol. I-II, Tübingen 1984, 3. ed., 1996.

Japan[18] have been influenced by continental European study, it can be argued that they belong to the civil law tradition. From this viewpoint, these countries have a written constitution and code system while case law has no precedential value and the judges do not have law-making power. However, they have also some elements of the common law system, since both countries have been impacted by American constitutionalism.

As a matter of fact, the Japanese legal system, as a result of the American-dominated Allied occupation after the Second World War (1945–1952)[19], is characterized by a constitutional review generally considered, also by the same highest judicial organ of Japan – namely, the Supreme Court[20] - as operating following the US example, according to Article 81 of the Constitution[21], even though there is no statutory doctrine of *stare decisis* here[22], and each judge can rule independently[23]. However, the legal system provides that a higher court, especially the Supreme Court, controls a lower court, giving it a central role: indeed the Supreme Court, among other things, decides also the appointments and judges' career paths[24].

On the other hand, also China, in recent years with the trend to incorporate common law[25] elements into both legislation and judicial practice,

[18] Some scholars consider instead Japan «mixed» legal system or a system in which elements of continental civil law and Anglo-American common law co-exist. *See* I. Giraudou, *Le Japon: une «figure du droit comparé»* in P. Brunet, H. Yamamoto (Eds.), *Transferts des concepts juridiques en droit public*, 2013. Colombo regards Japan as a victim of comparative law and stereotypes based on "legal orientalism". For more information, see G. F. Colombo, *Japan as a Victim of comparative Law*, in *22 Mich. St. Int'l L. Rev.*, 731 (2013).

[19] H. Oda, *Japanese Law*, 12, OUP, 4rd edition, 2021.

[20] See, Japan Supreme Court, *Suzuki v State*, 10-08-1952, Minshū Vol.6, No.9, at 783. See, for a comment, N. L. Nathanson, *Constitutional Adjudication in Japan*, in *Am. Journal Comp. Law*, vol. 7, n. 2, 195 (1958). According to this A., in this case the Supreme Court of Japan has indeed adopted the «same fundamental approach to its exercise of the power of judicial review as that adopted by the United States Supreme Court despite the absence of the words 'case or controversy' in the Japanese Constitution, and the presence there of an explicit grant of power pass on constitutionality».

[21] On the subject of the system of judicial review, Article 81 states that: «The Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act».

[22] See H. Itoh, *The Role of Precedent at Japan's Supreme Court*, in 88 *Wash. U. L. Rev.*, 1633 (2011). Available at: openscholarship.wustl.edu/law_lawreview/vol88/iss6/

[23] Indeed, the Constitution of Japan guarantees that «all judges shall be independent in the exercise of their conscience and shall be bound only by this constitution and the Laws» (Article 76).

[24] In compliance with article 80 of the Constitution that provides «judges of the inferior courts shall be appointed by the Cabinet from a list of persons nominated by the Supreme Court«», a convention established that the cabinet appoints all persons recommended by the Supreme Court. Regarding appointments from among career judges, the Supreme Court prepares a list of candidates from which the cabinet chooses. See, Y. Hasebe, *The Supreme Court of Japan, one step forward (but only discreetly)*, in *International Journal of Constitutional Law*, Volume 16, Issue 2, 680 (2018).

[25] See, M. Jia, *Chinese Common Law? Guiding Cases and Judicial Reform*, in *Harvard Law Review*, Vol. 129, No. 8, June 10, 2213 (2016). Available at

DPCE online
ISSN: 2037-6677

has seen the Supreme People's Court - the highest court of the nation also in Chinese case[26] - take as an example the judicial review of the U.S. Supreme Court[27], which has undergone an important transformation: as a matter of fact, it began by means of the issue of opinions, embarking on a guiding case system in the judiciary[28], by shifting the focus from political regime to judicial review characterized by the Court-centered[29] and finally to «political constitutionalism with Chinese characteristics»[30]. These opinions, by setting new legal rules, signal an evolution of judicial policy where the Supreme People's Court directs the lower courts while, at the same time, «making law», supports government initiatives[31].

This "opening" to another system that places, into the framework judicial system, the Supreme Court at the center with a guiding role, is present in China more than in Japan, and it is due also to the complex history of both countries.

Indeed, if every constitutional system has a rich history, this is particularly the case of the Constitution of Japan and China, which are tied indissolubly to cultural identity and social norms, the latter respecting, among other things, a hierarchical vision of society, common in China and Japan. The Japanese[32] and

SSRN: ssrn.com/abstract=2793857.

[26] The Supreme People's Court of the People's Republic of China is legally responsible for adjudging various lawsuits that have material effects nationwide or are subject to its adjudication in compliance with the law, formulating judicial interpretations, supervising and guiding the judicial work of local people's courts at different levels and special people's courts.

[27] See, H. Liu, *Regime-Centered and Court-Centered Understandings: the Reception of American Constitutional Law in Contemporary China*, in *Am. Journal Comp. law* (2020). Available at SRN: ssrn.com/abstract=2858253.

[28] On November 26th, 2010, the SPC's Adjudication Committee issued, «the Provisions of the Supreme People's Court Concerning Work on Case Guidance» (Provisions), while later, in 2015, the SPC issued clarifying regulations (Rules): according to this document, the ultimate goal of the use of guiding cases is to make attainable «the uniformity of application of law» – with compulsory reference - and the «achievement of judicial justice». See eg P. Yu, S. Gurgel, *Stare Decisis in China? The Newly Enacted Guiding Case System* in M. Wan, (Eds), *Reading the Legal Case: Cross-Currents between Law and the Humanities*, 2012, 142; M. Zhang, *Pushing the Envelope: Application of Guiding Cases in Chinese Courts and Development of Case Law in China*, in *26 Wash. Int'l L.J.*, 269 (2017). Available at: digitalcommons.law.uw.edu/wilj/vol26/iss2/5

[29] See, H. Liu, cit.

[30] A. H.Y. Chen, *The Discourse of Political Constitutionalism in Contemporary China: Gao Quanxi's Studies on China's Political Constitution*, in *China Review*, vol. 14, no. 2, 183–214 (2014).

[31] So, S. Finder, *How the Supreme People's Court Serves National Strategy and 'Makes Law': The Pilot FTZ Opinion and its Implications*, in J. Chaisse, J. Hu, (Eds), *International Economic Law and the Challenges of the Free Zones Kluwer Law International*, April 19, 2019, 296, Available at SSRN: ssrn.com/abstract=3374958.

[32] The codification 1871 *Shinritsu kōryō* during the Meiji Restoration was adopted primarily under the influence of the Chinese legal tradition. See P. Ch'en, *The formation of the early Meiji legal order: The Japanese code of 1871 and its Chinese foundation*, OUP 1981, 1. However, all subsequent Meiji codifications were based on the European-Continental model. Undeniably Confucianism, for more than 1500 years, has played a major role in shaping

Chinese[33] legal systems continue deeply to be influenced by Confucianism[34] and to be based on the ancient theoretical foundations and ideas that they considered morality and social order never completely eradicated[35]: according to Confucianism, the maintenance of the harmony and economic well-being of the whole society, coming before an individual person, also depends on the respect for the hierarchy that morally justifies the position of the superiority of some social actors over others. Especially in China, maintenance of hierarchical order is guaranteed through the rite, understood in a «broad sense as behavior that conforms to the rules of correctness»[36].

In this perspective, from the "formal" constitutional point of view, it is, in particular, the Japanese legal system, which shows, despite having undergone a profound transformation from the mid-nineteenth century onwards after exposure to modern Western civilization, mainly to the German civil laws, later enforced by the occupation of the U.S., this link to its constitutional past, revealing, unlike China, a certain "constitutional continuity": the current constitution was promulgated, in November 1946, by Emperor Hirohito (who ruled from 1926 to his death in 1989), according to the constitutional amendment provisions provided for by the 1889 Meiji Constitution. In this light, the new Constitution maintains the institution of the emperor, although

Japanese history: from the formation of the first Japanese states during the first millennium AD, spanning much of Japan's modernization in the nineteenth century, to World War II. Moreover, it has left still unresolved legacies across East Asia today. In general, on the subject, see K. Paramore, *Japanese Confucianism: A Cultural History*, Cambridge, 2016. Japan, despite having undergone a process of transformation, which was carried out in two phases (during the first one, the Meiji period spanned from 1868, and the second one, the American occupation in 1945), its transformation is still ongoing «given that the Japanese legal tradition is still alive and coexist with the imported, Western one». See also E. Bertolini, *Japan: Linguistic Transitions as a Condition for the Introduction of a Western Legal System*, cit., 158.

[33] In China, from 1200 B.C. to 1911 A.D., legal codes adopted Confucian philosophy with varying degrees of success. Under legal codes, the function of law was social harmony and social order took precedence over individual rights. These codes «created no rights for citizens, no general legal framework independent of the state and no body of civil law as distinguished from criminal law». In the Confucian vision, indeed, «the morally superior person guided by *li* ('correct' behavior protecting the social order, involving moral propriety through ritual) will be ready to adjust his conception of his rights to the needs and demands of others. He will avoid hostile confrontation and prove his moral superiority by being prepared to yield». A.E.S. Tay, *The Struggle for Law in China*, in *University of British Columbia Law Review* 21, 561 (1987).

[34] Confucian philosophy is a personal and social morality which defines the natural order of things. However, Confucianism cannot be regarded as merely a philosophical tradition, but it can however be sustained that it is in possession of key elements of a philosophy of ethics, which have time and again been able to transcend both the tradition's historical as well cultural bounds.

[35] R David and J. Brierley, *Major legal systems in the world today*, 20, London, 1968.

[36] See, A. Roth, *A hierarchical vision of order: Understanding China's diplomacy toward Asia*, Bristol University, 2022, 2.

DPCE online
ISSN: 2037-6677

this institution was «radically transformed together with the basic principles of the Constitution and the political system»[37].

On the other hand, from the "substantive" constitutional point of view, while Japan wants to make a complete break with the past, China shows a certain "ideological continuity".

Indeed, although formally adopted as an amendment of the Meiji Constitution, the preamble to the new Japanese Constitution «contrasts sharply»[38] with that of the Meiji Constitution. On the contrary, the current Chinese Constitution, adopted in 1982, while deciding to discard the 1978 constitution[39], preserved Mao's thought interpreting the complex doctrine of Marxism with Chinese characteristics. Moreover, this orientation has been recently reinforced with the latest constitutional amendments dating back to 2018. Amended several times[40], unlike the Japanese constitution, which has never been changed[41], the Chinese constitution in force has enshrined the name of Xi Jinping in its contents, putting him in a very strong position, being a leader above the leaders[42].

[37] See A. H. Y. Chen, *Pathways of Western liberal constitutional development in Asia: A comparative study of five major nations*, in *International Journal of Constitutional Law*, vol. 8, n. 4, 854 (2010).
[38] A. H. Y. Chen, *Ibidem*.
[39] So, H. Chiu, *China's Legal Reforms*, in *Current History*, vol. 84, no. 503, 269 (1985).
[40] The 1982 constitution has undergone four previous amendments, making a total of 31 articles. Indeed, on 11th March 2018, 14 years after the last constitution amendment, China adopted the fifth batch of amendments to the Constitution which, however, unlike all previous amendments, which had very positive comments, have generally been criticised by scholars in mainland China and overseas. Among these 20 constitutional amendments, particularly three have been the object of attention: the first is the incorporation of the leadership of the Chinese Communist Party (CCP) into Article 1 of the Constitution as «the defining feature of socialism with Chinese characteristics». The second is the constitutional abolition of term limits on the President of State. The third is the creation of a new constitutional organ called the "supervisory commission" to consolidate certain functions of the CCP's Discipline and Inspection Commissions (DICs), the people's procuratorates, and the Ministry of Supervision under the State Council. For these three constitutional amendments having «sent out a bad signal», L. Feng, *The 2018 Constitutional Amendments*, in *China Perspectives*, no. 1, 11 (2019).
[41] Japan has by far the oldest written constitution, which has never been amended. In these terms, K. Mori McElwain, C.G. Winkler, *What's Unique about the Japanese Constitution? A Comparative and Historical Analysis*, in *The Journal of Japanese Studies*, vol. 41, no. 2, 249 (2015). Regarding reasons for constitutional stability in Japan and the difficulty of amending the constitution due to procedural issues and other factors, see S. Yokodaido, *Constitutional stability in japan not due to popular approval*, in *German Law Journal*, 20(2), 263-283 (2019). *Available at www.cambridge.org/core/journals/german-law-journal/article/constitutional-stability-in-japan-not-due-to-popular-approval*
[42] The 2018 amendment, considering "Xi Jinping thought" as one of the state's guiding ideologies, has added, in the preamble, to "Marxism-Leninism, Mao Zedong Thought, Deng Xiaoping Theory, and the important thought of Three Represents" the phrase "the Scientific Outlook on Development and Xi Jinping Thought on Socialism with Chinese Characteristics for a New Era".

In any case, in these legal systems, the Constitution, as a source of law, is formally considered to be the highest law of the legal system.

Indeed, the Japanese Constitution has provided expressly in art. 98 that «this Constitution shall be the supreme law of the nation and no law, decree, imperial rescript or other act of government, or part thereof, contrary to the provisions hereof, shall have legal force or validity». Also, the Constitution of the People's Republic of China, stressing the importance of law, provides that «No law or administrative or local rules and regulations shall contravene the constitution» (art. 5). The idea of the Constitution as the supreme source is then consolidated by the subsequent statement that «All state organs, the armed forces, all political parties and public organizations and all enterprises and undertakings must abide by the Constitution and the law». However here, the intent, accompanied by the drafting of various laws[43], seems, above all, to facilitate international trade. To a certain extent, if this fact is somewhat reminiscent of the Meiji era in Japan, when the Japanese drafted a constitution and legal codes which facilitated economic development and commercial activities with the Western world[44], a major difference with the current Japanese Constitution can be noticed, as outlined in the next paragraph, at the "substantive level", in particular as to the constitutional review. The gap between formal data and reality in China, unlike in Japan, poses a chronic problem. Formal rules and legal procedures are present in the Chinese Constitution, but they seem to be lacking an important element that Western ideals take as essential in a legal system for the purpose of respecting the hierarchy of sources of law and therefore of rule of law, namely the need to control procedural regularity and political discretion in decision-making, in compliance with the constitutional norms. Party-state if it is moving towards legality[45], also if this is not substantively: from a formal point of view, the law is adopted more often and more rigorously obeyed and enforced, affording greater political respect but it doesn't shift to the rule of law, not being the exercise of regular political power at all levels «effectively constrained and regulated by law, or to some sort of substantive checks-and-balances constitutionalism»[46].

Moreover, also the "configuration" of the rights in the two Constitutions appears to be different.

While in Japan this is similar to that of Western countries' constitutions - considering the Japanese Constitution the protection of human rights as a

[43] Between 1979 and 1987, 57 new laws, 29 of which govern economic affairs, were established and a new constitution was adopted by the National People's Congress. See T. Hsia, W. Zeldin, *Recent Developments in the People's Republic of China*, in *28 Harv. Int. law Journal*, 250 (1987).

[44] P.R. Luney Jr., *Traditions and Foreign Influences*, cit., 197.

[45] «Ruling the country according to law» ("yifa zhiguo") is Xi Jinping's main slogan regarding the connection between the Party's political leadership and legality. S. Trevaskes, *A Law unto Itself: Chinese Communist Party Leadership and Yifa Zhiguo in the Xi Era*, in 44 *Mod. China*, 347 (2018).

[46] T. Zhang and T. Ginsburg, *Legality in Contemporary Chinese Politics*, cit.

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fundamental principle together with the sovereignty of the people and pacifism – on the other hand, in China the conception of rights seems to be different. If some Japanese constitutional studies demonstrate how the duty provisions in the current Constitution qualify the restriction of human rights protections as the exception, not the principle[47], in China, constitutional provisions on the rights seem also to recall often obligations, which consider them to be their limits.

Indeed, the Chinese Constitution is not only regarded as a kind of contract between the government and the people, which limits the government, listing its powers and duties, like in Japan, but it seems to emphasize obligations upon the citizens[48] even when it recognizes the general exercise of the rights and freedom: the constitution not only specifically underlines that the rights of citizens are inseparable from their duties (Article 33) but provides also that «the exercise of freedom and rights of the citizens of the People's Republic of China may not infringe upon *the interests of the state, of society and the community*, or upon the lawful freedoms and rights of other citizens» (Article 51). Added then to the list of citizen's duties - including the obligation to work (Article 42) and to receive education (Article 46) - it safeguards «state secrets» (Article 54)[49]. These phrased provisions, phrased vaguely, can be invoked at the discretion of the authorities to restrict constitutional citizen freedoms and rights[50]. In this last way, the Chinese constitution, unlike the Japanese Constitution, makes it possible for an individual to become the one who violates the Constitution. However, here we have two kinds of problems. First of all, the Chinese constitutional text is too concise and abstract, without penalties for obligations, consequently, the basic rights of individuals regulated in the Constitution can be ambiguous. Then, the other problem is linked to the idea of scholars but also in jurisprudential discussions, that the Constitution can be deprived of its dignity as the highest law and lowered to the same level as the other legal statutes if it is applied to every civil case directly without need[51].

2.1 The judicial system and the rule of law: the differences between China and Japan

The Chinese legal system reveals some other critical points[52]: under China's current constitutional framework, the courts are subject to the supervision of the legislative branch[53] and they do not have the power to apply the

[47] H. Hata, G. Nakagawa, *Constitutional law of Japan*, in *Kluwer law International*, 56, 23-25 (1997).
[48] See, A. Rinella, *Costituzione e economia in Cina: intersezioni*, in L. Scaffardi (Eds.), *BRICS: Paesi emergenti nel prima del diritto comparato*, Torino, 2012, 94.
[49] H. Chiu, *China's Legal Reforms*, cit, 269.
[50] H. Chiu, *Ibidem*.
[51] See, X. Li, *Imports or Made-in-China: Comparison of Two Constitutional Cases in China and the United States*, in *LLM Theses and Essays*, 84 (2007). *Available at:* digitalcommons.law.uga.edu/stu_llm/84
[52] According to the scholarship, «it appears to be an empty envelope». See, Pegoraro L., Rinella A., *Sistemi costituzionali comparati*, Torino, 2017, 78.
[53] Chris X. Lin, *A Quiet Revolution: An Overview of China's Judicial Reform*, in *Asian-Pacific*

Constitution in individual cases[54]. This goes for the Supreme people's court as well, definitely not supreme.

Unlike the Japanese Constitution, China's Constitutional text expressly provides that all power is unified in the National People's Congress which supervises the Supreme People's Court, the Supreme People's Procuratorate, and the State Council (the executive)[55]. In this light, we can say that Chinese "legal formalism" mentioned in the previous paragraph, buttressed by positivism, appears to emphasize the legislature as the sole source of law and thus limit the role of courts. Moreover, the legislature is strongly conditioned by the dominant Party. Law and policy remain linked, and legality is in effect inevitably weak[56] whereas current Chinese laws[57] demand only limited respect for the constitutional principle of judicial independence[58] because "the laws do not explicitly exclude interferences by the [CCP], from the legislative organs, or higher courts"[59].

law & Policy journal, vol. 4, no. 2, 275 (2003). Indeed, as argued by Li, the relationship between courts and people's congresses can be summarized by the fact that "people's congresses appoint and dismiss presidents and judges of courts at the corresponding level; and they supervise the implementation of law by courts". See, also, Y. Li, *Judicial Independence in China: An Attainable Principle?*, Eleven International Publishing, 2012, 24.

[54] *Ibidem*

[55] Article 67 provides that «The Standing Committee of the National People's Congress exercises the following functions and powers: (6) to supervise the work of the State Council, the Central Military Commission, the Supreme People's Court and the Supreme People's Procuratorate».

[56] See, S. Lubman, *Studying Contemporary Chinese Law: Limits, Possibilities and Strategy*, in *Amer. Journal Comp. Law*, vol. 39, 317 (1991). As noted by Peerenboom, the Communist Chinese Party "influences the courts in various ways and through various channels". Moreover, the Chinese Communist Party can have a direct interference in the courts' handling of specific cases also through the Central Political and Legal Affairs Commission of the Communist Party of China, the organization under the Central Committee of the Chinese Communist Party (CCP) responsible for political and legal affairs. In practice the organization oversees all legal enforcement authorities, including the police force. See, R. Peerenboom, *Judicial Independence in China: Common Myths and Unfounded Assumptions*, in A. Peerenboom (Eds.), *Judicial Independence in China*, n 12, 2008, 79.

[57] More details are contained in the Judges Law of China enacted in 1995 and amended in 2001. The full text of the Judges Law is available at www.npc.gov.cn/englishnpc/c23934/202012/9c82d5dbefbc4ffa98f3dd815af62dfb.shtml.

[58] They have minimum protection of judicial independence in the Constitution, of which Article 126 provides that "[T]he people's courts shall, in accordance with the law, exercise judicial power independently and are not subject to interference by administrative organs, public organizations or individuals". For the relationship between de jure and de facto judicial independence, see J. Melton, T. Ginsburg, *Does De Jure Judicial Independence Really Matter? A Reevaluation of Explanations for Judicial Independence*, in *2(2) Journal of Law and Courts*, 187 (2014). According to these authors, article 126 only states that adjudication cannot be interfered with by administrative organs, public organizations and individuals and it is silent on whether the Chinese communist Party organs, the people's congresses, and the procuracy can interfere with adjudication.

[59] See Y Li, *Judicial Independence: Applying International Minimum Standards to Chinese Law and Practice*, in 15 *China Information*, 15 (2001).

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Finally, if the Chinese Constitution says that it is itself supreme, on the pragmatic level, it does not show itself to be such since it cannot be defended, lacking limits on governmental power imposed by law to exclude its arbitrary exercise.

This framework shows a significant difference from Japan where the Constitution is, undoubtedly, a supreme source and where the Supreme Court, albeit with the limits that we will see shortly, has the power to control the constitutionality of a law. Indeed, Chinese Courts, despite considerable achievements at empowering them against other state and Party entities[60], encounter difficulties to control and interpret the Constitution to rule statutes unconstitutional. According to the conventional understanding of the constitutional system, cannot invoke the Constitution in examined cases while the Supreme People's Court, even if it is in theory possible that it could overturn law on the basis of it being contrary to the Constitution, the aforesaid Court has never done it. In this situation, some legal scholars believe that the efforts of China to enable the Chinese courts to fulfill their functions in achieving justice have not sufficed[61]. The Chinese judicial system, which is rooted in an administrative governance society, although undergoing economic, political, and legal transformation, remains plagued by many "pervasive shortcomings"[62]. If China with the reforms of Xi Jinping and 2018 amendments to the Constitution, seems to be pursuing a legalism path, bringing, inter alias, political powers that were formerly the exclusive possession of the Party under legal rule[63], however, at a substantial level, has centralized power and control to an almost unprecedented level. This result has been possible through «harnessing the organizational and legitimizing capacities of law, rather than circumventing it»[64] and so, as seen, also through the Supreme Court which supports government politics.

In the other words, in the Chinese case, unlike the Japanese one, where the Constitution is an important tool for enforcement of not central control but rights, the latest constitutional reform has produced simply "legalism", namely: «stronger compliance with written legal rules, even as the rules, on their own terms, fail to constrain the Party leadership in any substantial way», continuing the latter to operate above the law and, at the same time, failing to build a true «rule of law»[65]. As the judiciary remains a «tool» of

[60] Chinese literature on achievements in Chinese judicial reform over three decades is most abundant.

[61] See C. Ruihua, S. Quan De Xingzhi, [Nature of the Judicial Power], *Beijing daxue fazhi zhi lu luntan [Peking university forum on road toward rule of law]*, 367-369 (2002).

[62] G. Weixia, *The Judiciary in Economic and Political Transformation: Quo Vadis Chinese Courts?*, 2013.

[63] T. Zhang and T. Ginsburg, cit., 1.

[64] T. Zhang and T. Ginsburg, *Ibidem.*

[65] See, also, K. J. Hand, *Constitutional Supervision in China after the 2018 Amendment of the Constitution: Refining the Narrative of Constitutional Supremacy in a Socialist Legal System*, in *Asian-Pacific Law & Policy Journal*, vol. 23, no. 2 UC, Hastings College of the Law Legal Studies Research Paper Series (2022). Available at SSRN: ssrn.com/abstract=3431293. For this A. «The Constitution may be important in Xi's China, but as an instrument of central

the Party-State[66], the implementation of this principle, which can be realized only through the judicial process, enters into crisis. Notwithstanding it is difficult to define the meaning of the Rule of Law briefly and exactly, certainly we can say that the essence of this fundamental principle is judiciary control of the State's acts to safeguard the fundamental rights and freedom of the citizens, both in substance and in the procedure[67]. Different observations have to be made, as we mentioned earlier, for Japan.

Indeed, in the latter, the Rule of Law – 'Ho no Shihai' - although it does not appear in the text of the Constitution and we can find only indirect references in Article 98[68] and Article 81, conceptually forms the basis of the Constitution of Japan. The latter, while rejecting the rule of the person(s) or rule of power, evidence, concretely, of the respect to and reliance on the Judiciary, protection of fundamental human rights, and the supremacy of the Constitution over all other statutes, leads to a general view in Japanese jurisprudence that the basic principle of the 1947 Constitution is the Rule of Law, as distinguished from the German principle Rechtsstaat of the Meiji Constitution[69]. Understood as part of the Japanese nation, Japan's Constitution has been realized in recent years in practice, primarily through legislation, subsequently also through jurisprudence that cites it to prevent that the government exercises arbitrary power, making the law 'effectively' superior to governmental power. In this way, here the Constitution represents, without doubt, supreme law.

However, also in Japan like in China, albeit for other reasons than Chinese ones, the power of judicial review is exercised with extreme restraint, particularly, by the Supreme Court, seeing instead more judicial activism of the inferior judges than in China and also, according to some authors, the American federal judiciary has done in the American society[70]. Indeed, at the level of the

control, not as a tool for rights enforcement. As one scholar remarked in assessing the impact of Poland's constitutional tribunal prior to 1989, the reform presents 'the illusion of constitutional legality without challenging [the system's] most fundamental assumptions'».

[66] T. V. Mourik, *Judicial Independence and the Media in China: An Exercise in Modelling Interfering Relationships as A Means of Assessment*, in *SOAS Journal law*, 3 (2015).

[67] X. Yang, *Lun Xianfa Quanwei*, Fazhi Ribao, Dec. 4, 2002.

[68] Article 98 provides that «no law, ordinance, imperial rescript or other act of government, or part thereof, contrary to the provisions hereof, shall have legal force or validity». According to *Urabe* «As long as Article 98 is construed as stating that all governmental actions should be ruled by the Constitution, one could say that this provision alone reflects the idea of the supremacy of law or the Rule of Law. But Article 98 says nothing about the substantive contents of the law that is to be the rule. A similar provision would make any constitution the Rule of Law, whether it protected rights or not». N. Urabe, *Rule of Law and Due Process: A Comparative View of the United States and Japan*, in 53 *Law and Contemporary Problems*, 61-78, 64 (1990).

[69] N. Urabe, *Ibidem.*

[70] F. K. Upham, *Stealth Activism: Norm Formation by Japanese Courts*, in 88 *Wash. U. L. Rev*, 1493 (2011). According to this A. American courts, with some exceptions, «are reluctant to change norms openly, especially if those norms have been legislatively created».

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judicial enforcement of constitutional limits on government, the Supreme Court of Japan shows little boldness in its judgments of constitutionality[71] not only because disappointed by the Diet's inaction in response to its rulings. In truth, this applies also to political influence as the composition of the Court itself[72] and for a cautious «conservatism»[73], moreover, common also to inferior judges who show a certain «reluctance to regard the Constitution as a source of positive law to be enforced by the judiciary»[74], also due to the fact that they do not try to be the catalysts of social change, believing in democratic institutions[75].

However, not only Japanese courts, as pointed out, have played an 'activist role' sometimes by boldly misusing policy, the general clauses of the Civil Code - this more direct role being perhaps due to the willingness to allow the political process to operate after «judicial announcement of the law»[76] – but it seems that the Supreme Court, in recent times, is changing attitude towards constitutional review, showing to differ widely from the timid and conservative court of the twentieth century[77].

On the other hand, also China's constitution begins to have a more direct role in jurisprudence: Chinese courts, as it will be shown, are gaining more power to apply the constitution in individual cases embracing judicial flexibility[78], in this way protecting individual rights against government encroachment.

3. The right to privacy in Constitutions

Neither Chinese nor Japanese Constitutions establish an express constitutional general right to privacy. Some provisions provide only limited protection which can serve as a legal foundation for further developments.

Articles 38 and 39 of the Chinese Constitution, for example, provide that personal dignity and the homes of citizens are inviolable while Article 40 sets

[71] The Supreme Court has approved of statutes being enacted by parliament declared unconstitutional in only ten cases since its establishment in 1947.
[72] D. S. Law, *Why Has Judicial Review Failed in Japan?*, in 88 *Wash. U. L. Rev*, 1425 (2011). Available at: openscholarship.wustl.edu/law_lawreview/vol88/iss6/3.
[73] Considered «apparent» by some Actors. So, J. Owen Haley, *Constitutional Adjudication in Japan: Context, Structures, and Values*, in *Washington University Law Review*, 1467 (2011). Available at SSRN: ssrn.com/abstract=2629335. For this A., «Neither case supports the claim that, in like cases, the Japanese Supreme Court is more conservative than its U.S. or European counterparts». In opposite sense, speaking of «very conservative» where «judges are conservative in their nature, especially in civil-law countries», S. Matsui, *Why is the Japanese Supreme Court so conservative?*, in *Washington University Law Review* , vol. 88, no. 6, 1422 (2011).
[74] S. Matsui, cit., 1376.
[75] J. Owen Haley, cit, 1491.
[76] See F. K. Upham, *Stealth Activism: Norm Formation by Japanese Courts*, in 88 *Wash. U. L. Rev.*, 1498 (2011).
[77] Y. Hasebe, *The Supreme Court of Japan*, cit., 673.
[78] See S. Kui, Y. Liu, *Is it the Beginning or the End of the Era of the Rule of the Constitution? Reinterpreting China's First Constitutional Case*, in 12 *Pac. Rim L. & Pol'Y J.*, 216 (2003).

forth «the freedom and privacy of correspondence of citizens» (art. 40). However, this last article goes on to state that «Except in cases necessary for national security or criminal investigation, when public security organs or procuratorial organs examine correspondence in compliance with the procedures prescribed by law, no organization or individual shall infringe on a citizen's freedom and confidentiality of correspondence for any reason». In this way, through the 'exceptional' case of national security, restrictions on human rights are allowed. On the other hand, the constitution of Japan has fewer protection provisions: it guarantees only the rights of «all the people» to «life, liberty, and the pursuit of happiness» (Article 13) while article 35 of the Constitution provides for the right of all persons to be secure in their homes, papers and effects against entries, searches and seizures. Also here, no explicit legal provision about the right to privacy has been included.

Traditionally, Japanese constitutional norm has been interpreted, also by the courts[79], as a guarantee of the right to privacy for individuals while their right to life, liberty, and pursuit of happiness «shall (…) be the supreme consideration in legislation and in other governmental affairs». But this doesn't go down without limits. According to the Constitution, it is possible to protect life, liberty, and pursuit of happiness «to the extent that it does not interfere with the public welfare» (art. 13). In this way, in the Japanese case, this constitutional provision safeguards directly the space and relationship between the state and the individual, providing freedom from government interference until this is possible: indeed, using the «vague and open-ended» expression of public welfare[80], the Supreme Court[81] often declared constitutional some acts

[79] In particular, with a ruling dated March 6th, the Supreme Court ruled that the so-called 'Juki Net' (national resident registry network) was constitutional, and that it does not violate the right to privacy. The Court recognized that protection did exist in the case of «the freedom not to disclose one's personal information to a third party without good reason and not to be made public under Article 13 of the Constitution». The Court held, however, that «Juki-Net has no defects both in a technical and legal sense so that there is no concrete risk that identification information would be disclosed or made public without the legal ground and regulations or beyond the legitimate administrative purpose (…). Thereby, the storage and use of identification information of the appellees as residents operated by the administrative organs do not disclose personal information to a third party nor make it public, which does not constitute a violation of freedom guaranteed by Article 13 of the Constitution, even in the absence of the consent of the individuals». Japan Supreme Court, 2007 (O) 403, 6-03-2008, Minshū, vol. 62, no. 3. See, H. Miyashita, *The evolving concept of data privacy in Japanese law*, *International Data Privacy Law*, vol. 1, no. 4, 237 (2011).

[80] The term «public welfare» is found in Articles 12, 13, 22, and 29 of the Constitution.

[81] See, for example, at the current Constitution's outset, a 1953 decision in which the Court permitted wide governmental intervention in the name of Article 13's public welfare clause, approving a broad restriction of the labor rights of public officials by interpreting public welfare widely. Japan Supreme Court, 8-04-1953, Showa 24 (re) no. 685, 7(4) Saikō Saibansho Keiji Hanreishu [Keishu] 775. In general, regarding the interpretation of Article 13 by judiciary, see Y. Tsuji, *Reflection of Public Interest in the Japanese Constitution: Constitutional Amendment*, in *Denver Journal of International Law & Policy*, vol. 46. no. 2, 171 (2018).

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permitting restrictions and exceeding those permissible under, for instance, the International Covenant on Civil and Political Rights[82]. The interpretation of this term tends to allow the Japanese government, like in China, to restrict human rights under general provisions in Articles 12 and 13[83]. However, broadly speaking, we can say that in Japan the Constitution, unlike in China, is based on pluralism made up of separate and distinct public and private spheres[84], as emerged in some analysis of judicial review about the application of public welfare and its justification in the current Constitution[85]. This conception constitutes an important difference with respect the previous Meiji constitution that emphasized moral values to the detriment of individual virtues for the greater Japanese communities, permitting societal interests, as superior values[86], to infringe on the rights of individuals in the name of moral and family values. On the other hand, the actual Constitution provides that individuals have their own values and secures thus due respect of their rights and human dignity[87]. Consequently, in this light, pursuant to Article 35 of the Constitution, the right of all persons to be secure in their homes shall not be impaired except in the event of a warrant issued for 'adequate cause' and particularly describing the place to be searched and things to be seized. In these cases, the right to Japanese privacy is, in the end, shaped up to be freedom from the State, namely as negative freedom.

In the Chinese hypothesis, instead, the protection of the right to privacy, while it isn't guaranteed without limits, it does not seem to point out a distinct public and private sphere. As we have seen, under Article 40, an organization or individual cannot, «on any ground, infringe upon the freedom and privacy of citizens' correspondence», allowing an action by the state called to intervene to verify infringement unless there are exceptions. In this light, the exceptions/limits related to public security or procuratorial organs allow for the ban on correspondence, following procedures prescribed by law, «in cases in which the needs of state security or investigation of criminal offenses are to be met».

In the light of these constitutional provisions, we can say, at first, that the concept of privacy in the USA is based on the concept of liberty, while in the

[82] See, Human Rights Committee, *United Nations Human Rights*, CCPR/C/JPN/CO/6, 20th August 2014. In this document the Human Rights Committee examined Japan's 6th periodic report on the measures taken to implement its obligations under the International Covenant on Civil and Political Rights and pointed to this vagueness.
[83] H. Hata, G. Nakagawa, cit., 108–09.
[84] Y. Hasebe, *Constitutional Borrowing and Political Theory*, in *Int'l J. Of Const. L.*, 224, 237 (2003).
[85] See, generally, S. Matsui, *The Constitution Of Japan: A Contextual Analysis* (2011).
[86] Y. Tsujii, cit. 172.
[87] N. Kawagishi, *The Birth of Judicial Review in Japan*, in *5 International Journal of Constitutional Law*, 312 (2007). For this A. «Although the Meiji constitution had a kind of bill of rights, the rights declared were not viewed as inherent in human beings. Rather, they were considered as gifts to the subjects from a benevolent emperor. The framers of the Meiji constitution believed that a modern constitution needed a declaration of rights of some sort, but that they should not be so powerful as to trump national policy».

EU the same concept is more related to personal dignity. On the other hand, in Japan, it sets forth, particularly under Article 13, the boundaries of the distinction between the public and private spheres, and it, therefore, protects 'reputation' while in China, by means of the communitarian values, it justifies, as we will see later in my paper, the prioritization of public interests over individual rights, designed basically to be a social control tool.

4. Drawing a comparison between the EU and US privacy regimes

Both privacy and data protection in the EU, unlike in the US, are protected since they represent a 'fundamental right' under the European Union's Charter of Fundamental Rights[88]. Given this, in May 2018, the EU implemented, following years of intense negotiations and an abundance of proposed amendments[89], the General Data Protection Regulation (GDPR), namely the new legal backbone of data protection and privacy, which covers many areas of the digital sphere. Applied to every EU Member State, these standards are used to police the use of personal information, which is spread online by major companies and organizations. The strategy for data protection focuses on putting human dignity first in developing technology, and defending and promoting European values and rights in the digital world.

However, unlike the EU, which has an all-encompassing data protection framework applied across every Member State, across all sectors, and across all types of data, the US has no direct comprehensive data protection legislation. The US Constitution contains no express right to privacy, it has chosen to implement privacy and data protection regulations, designed to deal with specific risks - for example, the collection of child's data online is regulated under the Children's Online Privacy Protection Act of 1998 (COPPA) - or sector-specific rules - like, for example, the Health Insurance Portability and Accountability Act of 1996 (HIPAA)[90] and the Gramm-Leach-Bliley Act (GLB Act or GLBA[91] - and so working together with state laws[92] regarding often four types of interests

[88] Article 7 of the Charter recognizes general privacy protection for individuals by granting all Europeans «the right to respect their private and family life, home and communication». Article 8 expressly sets forth the right to protection of personal data, stating that, «[D]ata must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis prescribed by law».

[89] J. Powle, *The G.D.P.R., Europe's New Privacy Law, and the Future of the Global Data Economy*, in *New Yorker* (2018). Available at: www.newyorker.com/tech/elements/thegdpr-europes-new-privacy-law-and-the-future-of-the-global-data-economy.

[90] The Privacy Rule, or *Standards for Privacy of Individually Identifiable Health Information*, establishes a national set of security standards for protecting certain health information that is stored or transferred in electronic form.

[91] Also known as the Financial Modernization Act of 1999, this law seeks to protect the personal information of consumers stored by financial institutions.

[92] Indeed, every state can have its law (but not all states have one): California, according to its constitution that also protects individuals' right to privacy, has for example the Online

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ISSN: 2037-6677

protected by a person's right to privacy[93]. On treatment by federal agencies, we have taken a look at the Privacy Act of 1974, as amended, which provides for a code of fair information practices governing the collection, maintenance, use, and dissemination of information about individuals that is kept in the federal records[94]. Finally, among others, other interesting acts, both dating back to 2014, are the Federal Information Security Modernization Act[95] and the Cybersecurity Enhancement Act[96]. This approach if it is likely to appear more detailed, since it focuses on the radius of the risk in a specific sector, as opposed to Europe's one-size-fits-all approach to data privacy, however, it leaves Americans with significant gaps in data protection coverage of every sector[97]. On the other hand, the US and EU have, in general, different notions of what personal data include[98] and quite different regimes: if the GDPR, unlike US law, defines and regulates in a strict sense, the kind of data, including sensitive data, 'data processing', etc, the U.S. privacy law imposes «fewer restrictions on how much personal data may be collected, how such data may be used, and how long

Privacy Protection Act, namely a security breach notification law, in place since as early as 2002.

[93] In accordance with the articles 652B, 652C, 652D and 652E of Restatement (Second) Of Torts § 652b (Am. Law Inst. 1977), we have: (1) unreasonable intrusions upon the seclusion of another, (2) appropriation of the other's name or likeness, (3) unreasonable publicity given to the other's private life, and (4) publicity that unreasonably places the other in a false light before the public. The Supreme Court has rendered several decisions on invasion of the right of privacy involving these last two articles. The case of Cox Broadcasting Co. holds that under the First Amendment there can be no recovery for disclosure of and publicity to facts that are a matter of public record. The case leaves open the question of whether liability can constitutionally be imposed for other private facts that would be highly offensive to a reasonable person and that are not of legitimate concern. Supreme Court U.S., *Cox Broadcasting Co. v. Cohn* 420 U.S. 46 (1975). See, for the common law torts, *How U.S. State Law Quietly Leads the Way in Privacy Protection*, Privacilla.Org (2002), Available at www.privacilla.org/

[94] This is an Act, enacted December 31, 1974, to amend title 5, United States Code, by adding a section 552a, to safeguard individual privacy from the misuse of Federal records, to provide that individuals be granted access to records concerning them which are maintained by Federal agencies, to establish a Privacy Protection Study Commission, and for other purposes.

[95] This Act amends the Federal Information Security Management Act of 2002 (FISMA) to: (1) reestablish the oversight authority of the Director of the Office of Management and Budget (OMB) with respect to agency information security policies and practices, and (2) set forth the office of the Secretary of Homeland Security (DHS) to administer the implementation of such policies and practices aimed at information systems.

[96] This is an act to «provide for an ongoing, voluntary public-private partnership to improve cybersecurity, and to strengthen cybersecurity research and development, workforce development and education, and public awareness and preparedness, and for other purposes».

[97] M. L. Rustad, T. H. Koe, *Towards a global data privacy standard*, in *Florida Law Review*, vol. 71, iss. 2, 381 (2019).

[98] E. Linn, *A Look into the Data Privacy Crystal Ball: A Survey of Possible Outcomes for the EU-U.S. Privacy Shield Agreement*, in 50 *Vanderbilt Law Review*, 1311, 1315 (2017).

that data may be stored»[99]. Moreover, if we consider the relationship between state surveillance and data protection, where the law and practices of the US offer no real protection of personal data against the US state surveillance[100], the Court of Justice of the European Union held that the U.S. does not offer a level of data protection equivalent to the level of protection in place in the EU. In particular, the Court found that the access enjoyed by the US intelligence services to the transferred data interferes with the right to respect for private life and the right to protection of EU citizens' personal data both guaranteed under the EU Charter[101]. As regards a level of protection essentially equivalent to the fundamental rights and freedoms guaranteed within the EU, the Court finds «that, under EU law, legislation is not limited to what is strictly necessary in the event it authorises, on a generalized basis, storage of all the personal data of all the persons whose data is transferred from the EU to the United States without any differentiation, limitation or exception being made in the light of the objective pursued and without an objective criterion being laid down for determining the limits of the access of the public authorities to the data and its subsequent use». Probably owing to less stringent protection, most of the countries in the world have followed the EU model and enacted EU-style 'data protection' laws[102].

Finally, we can observe that if EU privacy law and so Continental privacy aim to protect the personal honor and dignity of ordinary Europeans, American law takes a very different approach, protecting primarily the right to freedom[103].

Indeed, 'human dignity' is the expression that appears in Article 88 of GDPR[104] and it is the concept that provides the framework within which to interpret what the GDPR—and more generally European culture and

[99] F. Bignami, G. Resta, *Transatlantic Privacy Regulation: Conflict and Cooperation*, in 78 *Law & Contemp. Probs.*, 231, 236 (2015).

[100] M. Škrinjar Vidović, *Schrems v Data Protection Commissioner (Case C-362/14): Empowering National Data Protection*, in *CYELP* 11, 262 (2015).

[101] CJEU, *Maximillian Schrems v. Data Protection Commissioner*, Case C-362/14, 6-10-2015. In its ruling the Court invalidated the *Safe Harbour* arrangement, which governs data transfers between the EU and the US. While the decision does not automatically put an end to data transfers from Europe to the United States, it allows each country's national regulators to suspend transfers, if the company in the United States does not adequately protect user data. See, generally, M. Škrinjar Vidović, *Schrems v Data Protection Commissioner (Case C-362/14)*, cit., 259-275.

[102] P. Schwartz, *The EU-U.S. Privacy Collision: A Turn to Institutions and Procedures*, in *126 Harv.L. Rev.*, 1966, 1967 (2013).

[103] J. Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*. Available at SSRN: ssrn.com/abstract=476041.

[104] Article 88 states that the rules of law, human rights, and freedoms in respect of the processing of personal data in the employment contexts, shall include suitable and specific measures «to safeguard the data subject's human dignity, legitimate interests and fundamental rights».

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jurisdiction[105] — means by informational privacy[106]. In light of this, the EU Court of Justice lays down that individual privacy rights 'override' Internet users' right to free expression and access to true, public information[107]. The principle is that the data subject rights override the interests of Internet users at large: protection of personal data trumps access to information – even true, public information that is published legally online.

On the other hand, the U.S. Courts while they have largely been disinclined to stretch the tort of privacy to online surveillance and other Internet-related intrusions, applying thus the «reasonable expectation of privacy» test set forth in the Fourth Amendment context[108], they generally consider the right to privacy to be liberty. This is understood as the right to «define one's own concept of existence, of meaning, of the universe, and of the mystery of human life»[109] attributable, in this light, to the respect for private life. Reaffirming in broad terms the Constitution's protection for privacy where autonomy is «central to the liberty protected by the Fourteenth Amendment», the Supreme Court, stated that the U.S. Constitution provides, even though it is not explicitly enumerated[110], the right to privacy, it also observed that «it is a promise of the Constitution that there is a realm of personal liberty which the government may not enter»[111].

[105] O. Lynskey, *The foundations of EU data protection law*, Oxford, 2015. A. De Hingh, *Some Reflections on Dignity as an Alternative Legal Concept in Data Protection Regulation*, in *German Law Journal*, 19 (2018).

[106] L. Floridi, *On Human Dignity as a Foundation for the Right of Privacy*, in 29 *Philos. Tech.*, 307 (2016).

[107] CJEU, (Grand Chamber), *Google Spain SL, Google Inc v. Agencia Española de Protección de Datos (AEPD), Mario Costeja González*, Case C-131/12, 13-03-2014. The CJEU ruling against Google has required Google to comply with the Data Protection Directive 95/46 as a controller on the territory of a member state, in order to «remove from the list of results displayed following a search made on the basis of a person's name links to web pages, published by third parties and containing information relating to that person, also in a case where that name or information is not erased beforehand or simultaneously from those web pages, and even, as the case may be, when its publication in itself on those pages is lawful» (CJEU, 2014). R. Radou and J. M. Chenou, *Data Control and Digital Regulatory Space(s): Towards a New European Approach*, in *Journal on Internet Regulation*, vol. 4, 1 (2015).

[108] According to this Text, the primary locus of one's «reasonable expectation of privacy» is, undoubtedly, at home, and persons outside home have correspondingly less privacy protections. See, U.S. Supreme Court, *O'Connor v. Ortega*, 480 U.S. 709 (1987).

[109] U.S. Supreme Court, *Lawrence v. Texas*, 539 U.S. 558 (2003). The Supreme Court, overruling an earlier decision, ruled that Texas violated the liberty clause of two gay men when it enforced against them a state law prohibiting homosexual sodomy.

[110] U.S. Supreme Court, *Roe v. Wade*, 410 U.S. 113 (1973). On January 22nd, 1973, the Supreme Court issued a 7–2 ruling pronouncing that the Due Process Clause of the Fourteenth Amendment to the United States Constitution provides a fundamental 'right to privacy', which protects a pregnant woman's right to abortion. The Court also held that the right to abortion is not absolute and must be balanced against the government's interests in protecting women's health and prenatal life.

[111] U.S. Supreme Court, *Lawrence*, cit.

Part II

5. The development of the right to privacy into a legislative framework

In the above-mentioned framework, protection of the right to privacy was upheld not as a constitutional right, but through a statutory system and also, as more clearly set forth in the next paragraph, case-law developments.

For instance, in Japan, courts supplant the legislature as the institution responsible for establishing fundamental norms, and turn to general rules having a deep impact on the evolution of rules, upholding rights relating to personality such as privacy not expressly regulated in the Civil Code or the Penal Code or other statutes.

Indeed, the act on the General Rules of Application of Laws, originally enacted in 1998 and comprehensively revised in 2006, which provides Japanese courts with the basic rules for identifying the applicable law, for instance, in contracts, property, torts, regulates only the injury to honor or reputation, particularly pursuant to Article 22. Article 19[112], however, is also applicable mutatis mutandis to other rights relating to personality, although remedies not accepted under Japanese law are excluded under Article 22. In this context, although there is no explicit reference to the right to privacy in the Application of Laws Act or other statutes, the courts held that general rules relating to injury to honor or reputation cover also such topics as the right to privacy. Indeed, in some cases, when freedom of expression conflicts with the protection of reputation, Japanese courts tend to protect privacy more rigorously than their Chinese counterparts. For instance, the Supreme Court of Japan, taking a similar position to European law and Court as seen, held that an injunction to delete a search result is available when the interest of privacy apparently outweighs the freedom of expression and information.

On the other hand, also in China judicial activism has been vibrant.

The evolving concept of the right to privacy in the Chinese legal system is a typical example, upheld by courts when damages arise as a consequence of tort. Indeed, even if the General Principles of the Civil Law, promulgated in 1986 (and revised in 2009), that protected human dignity and interests through

[112] «Notwithstanding Article 17, the formation and effect of claims arising from the tort of defamation of a third party shall be governed by the law of the injured person's habitual residence (i.e., the law of its principal place of business where the injured party is a legal person or other corporate association)». This is the Japanese set phrase «meiyo matawa shin'yô no kison», literally translated as «injury to honor or reputation». The injury to honor portion is regulated by Articles 710 and 723 of the Minpô Civil Code] and by Articles 230 to 232 of the Keihô [Penal Code], and the injury of reputation aspect is regulated by Article 233 of the Penal Code. Injury to honor concerns the honor of an individual, and injury to reputation concerns the reputation of an enterprise with regards to business. See K. Anderson and Y. Okuda, *Translation of Japanese Private International Law: Act on the General Rules of Application of Laws*, in *Asian-Pacific Law & Policy Journal*, vol.8, issue.1, 138-160 (2006). For a general knowledge about this Act, see K. Takahashi, *A Major Reform of Japanese Private International Law*, in *Journal of Private International Law*, vol.2, no.2, 311-338 (2006).

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the enumeration of specific rights, have not included the right to freedom, only mentioning 'personal dignity' (the same term enshrined in the constitution), courts used non-doctrinaire approach to respond to various claims in civil litigation to recognize the new protection demands including the right to privacy. The potential infringement of the right to 'reputation' according to Article 101[113] (and of the other individual's rights as that of personal name, portrait, and honor, protected by Articles 99, 100, and 102, respectively) has been used by courts to treat various forms of disclosure of personal information, in this way facilitating the adaption to rapidly changing economic and social conditions[114]. According to the judicial interpretations made by the Supreme People's Court since 1988, a breach of privacy may be considered defamation. In particular, the Supreme Court of China has emphasized the importance of Article 101, which provides for the protection of 'reputation rights', often invoked in business litigation, in two judicial interpretations, one in 1993 and another in 1998[115]. However, only until 2009 had the Chinese national legislature neglected to regulate the 'right to privacy' as a standalone basis for a tort claim. As provided for specifically in the Act on Tort Liability of 2009, the protection of privacy, falls within the definition of 'civil rights and interests' together with the right to reputation and the right to honor: consequently, anyone who infringes on the civil rights and interests of another person, is under obligation to bear tort liability[116]. In 2013 the Guidelines relating to computer networks[117] entered into force, requiring that personal information be processed only for specific and reasonable purposes and that owners be notified of the purpose and scope of use before their personal information is processed. Subsequently, also thanks to academic and jurisprudential discussions as to what exactly a constitutional right to personal

[113] «Citizens and legal persons shall exercise the right to reputation. The personality of citizens shall be protected by law, and the use of insults, libel or other means of ruining the reputation of citizens or legal persons shall be prohibited».

[114] *Ibidem.*

[115] See Interpretation of the Supreme People's Court on Several Issues About the Trial of Cases Concerning the Right to Reputation (promulgated by Judicial Interpretation No. 26, July 14th, 1998, in force since Sept. 15th, 1998) (Lawinfochina) (China), available at www.lawinfochina.com/display.aspx?lib=law&id=6673 (discussing the Answers to Some Problems with the Trial of Cases Concerning the Right to Reputation judicial interpretation in 1993).

[116] Article 2 of this Act provides that «those who infringe upon civil rights and interests shall be subject to the tort liability according to this Act. 'Civil rights and interests' used in this Act shall include», between the others, «the right to name, the right to reputation, the right to honor, right to portrait, right of privacy (…) and other personal and property rights and interests».

[117] Lacking in the force of law, the guidelines are entitled *Information Security Technology — Guidelines for Personal Information Protection Within Public and Commercial Services Information Systems* (信息安全技术公共及商用服务信息系统个人信息保护指南) ('Guidelines'). See A. Bartow, *Privacy Laws and Privacy Levers: Online Surveillance versus Economic Development in the People's Republic of China*, in *Ohio State Law Journal*, vol. 74, no. 6, 863 (2013). Available at SSRN: ssrn.com/abstract=2368530.

dignity includes, the constitutional term 'personal dignity' under the 2009 General Principles of Civil Law has been evolved by the national legislature into the right to 'privacy' under the 2017 General Rules of Civil (Article 110)[118].

However, unlike in Japan, the Chinese legislator has been slow to adopt the law on personal data protection.

Indeed, the first Japan's personal information protection law was enacted as early as 1988, even if only for the public sector. Then, in 2003[119], in response to «external pressure from the international community»[120], Japan enforced an Act on the protection of personal information (APPI). Based on the OECD's Privacy Guidelines launched in 1980[121] - in which the concept of privacy is defined as «the claim of individuals (…) to determine for themselves when, how and to what extent information about them is communicated»[122] – this law has been extended to cover the private sector[123]. In addition to the APPI, the processing of personal information is subject to the implementation of rules issued on the basis of the APPI, including an Amendment to the Cabinet Order to Enforce the Act on the Protection of Personal Information[124] and the so-called Enforcement Rules for the Act on the Protection of Personal Information adopted by the Personal Information Protection Commission-PPC[125], both acts

[118] J. Zhang, E. Johnson, *A Constitutional View of Privacy Rights in China*. Available at SSRN: uianet.org, 2020.

[119] Act No. 57, *Act on the Protection of Personal Information*, 30-03-2003, as amended in 2015 and then in 2016 and became law in 2017, in order to distinguish between different types of personal information, based on the sensitive nature of such data and providing, in the latter, that information handlers in principle are under legal obligation to obtain a prior consent of the data subject to obtainment of sensitive personal information. In 2020, the Japanese Diet approved a bill to further amend the APPI ("Amended APPI") that will come into force on April 1st, 2022.

[120] See, K. Murata, Y. Orito, *Rethinking the concept of the right to information privacy: a Japanese perspective*, in *Journal of Information, Communication and Ethics in Society* 6 (3), 233-245 (2008).

[121] The Guidelines on the Protection of Privacy and Trans border Flows of Personal Data were revised in 2013, with the aim of reinforcing the integration with other work on privacy law enforcement co-operation, they are the cornerstone of the OECD's work on privacy, representing the global minimum standard for privacy and data protection. See, on the history and achievement of the 1980 OECD guidelines on privacy, M Kirby, *The history, achievement and future of the 1980 OECD guidelines on privacy*, in *1 International Data* Privacy *Law*, 6 (2011).

[122] A.F. Westin, *Privacy and Freedom*, in *Atheneum*, 1967, 7. The book, thanks to detailed evaluation of the conflict between privacy and surveillance in modern society, such as caused, in the author's opinion, since World War II by advances in electronic spy devices, develops the concept of privacy going from the right to be let alone of 1891 to right to control personal information.

[123] See G. W. Greenleaf, *Asian data protection laws: Trade & Human Rights Perspectives*, Oxford, 2014, 11.

[124] Available at: www.ppc.go.jp/files/pdf/Cabinet_Order.pdf.

[125] The Personal Information Protection Commission (PPC), was established on the first of January, 2016 as a Japanese government commission charged with the protection of personal information. It was established as a regulatory body responsible for managing and ensuring compliance with the act. Under the act, the PPC has been granted supervisory

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entered into force on May 2017[126]. Finally, under Article 7, the Cabinet of Japan issued a 'Basic Policy' including policy orientations to «comprehensively and integrally promote measures concerning the protection of personal information». On the other hand, at the level of civil law protection, Japan uses a general protection clause. Article 709 of the Japanese civil Code, establishing «personal dignity and substantial equality of both genders», has been a very flexible provision that protects the rights of citizens, used as the highest principle in the interpretation of civil laws, in which personal dignity, as in EU vision, is thought to encompass the right to privacy.

In China instead only in 2021, following the 'legalist' turn as mentioned, we have important legislative advances for the protection of personal data: the new Civil Code, derived from the General principles of the civil law and the General rules of civil law of 2017, provides the most forceful privacy protection including a definition of personal information[127], while finally has been adopted, on August 2021, a comprehensive data protection law, i.e. the Personal Information Protection Law. This act, together with two other key laws on cybersecurity and data protection (namely the Cybersecurity Law and the Data Security Law), establishes a data protection regime for China.

6. Jurisprudence in comparison: the Japanese rulings

In a leading case called 'Utage no ato' (After the Party), a Japanese court admits in 1964 the classic right «to be let alone». Here, the Tokyo District Court defined privacy as «legal assurance or right for private life not be published unreasonably»[128].

Also, the Japanese Supreme Court pronounced on the matter.

Article 13 Cost., has set forth the rights of individuals as regards the protection of personal information. In a decision of 1969, the Supreme Court recognized the right to privacy as a constitutional right. In particular, the Court stated that «every individual is entitled to protect their personal information from being disclosed to a third party or made public without a good reason»[129]. Given this, Article 13 of the Constitution provides, according to the court, for the citizens' liberty in private life, which shall be protected against the exercise of public authority, and it can be construed that, as one of the individuals'

authority over companies that were previously regulated by the relevant competent ministers.

[126] Available at: www.ppc.go.jp/files/pdf/PPC_rules.pdf.

[127] Pursuant to Article 1032: «Natural persons have the right to privacy. No organization or single individual shall infringe upon others' right to privacy by spying, intruding, divulging or publicizing others' private matters. Private matters refer to the private peaceful life of a natural person and the private space, private activities and private information that a natural person does not wish to be known by others».

[128] A. Komatsu, T. Matsumoto, *Empirical Study on Privacy Concerns and the Acceptance of e-Money in Japan*, in *IPSJ Journal*, Vol. 52, No. 7, 2011, 2141.

[129] Japan Supreme Court, Judgment of the Grand Bench, *Japan v. Hasegawa*, 25-12-1969, Keishu, vol. 23, no 12, 1625. See, G. Greenleaf, *Asian Data Privacy Laws*, cit., 227.

liberties in private life, every individual is entitled to protect their personal information from being disclosed to a third party or made public without a good reason. Consequently, the court stated that when public authorities attempt to get evidence from third parties, they must be able to show that the evidence is absolutely 'necessary' for the purpose of investigations. Following this reasoning, the Supreme Court has consolidated this approach, stipulating limitations with respect to non-compulsory measures that interfere with the right to privacy. In this phase, if Japanese people enjoy less freedom from official interference when compared to people in the United States, there are areas of personal privacy, in which the Japanese enjoy rights not recognized by the American law like the general right not to be photographed[130]. In the interpretation of the Court, art. 13, as already seen, marks the separation between public and private space. However, in a case of 1974 regarding police control and repression of an unauthorized demonstration, the Supreme Court reaffirmed the right to private life according to article 13 and so the individual right not to have their photos taken without consent, except when needed for 'public welfare'. In this case, in the face of this vague formula, as pointed out, abuse of power is likely to be committed, and therefore unlimited protection of the use of force.

In reality, generally speaking, the Court makes an attempt to balance the individual interest with the interest of the general public. The public interest is viewed as not having the individual's rights protected from governmental intrusion, but rather is defined as the right to live in a «safe community»[131]. However, the Supreme Court has been reluctant to apply the idea of privacy as the right to control one's own information to counter threats to individual freedom[132].

Only in recent times, the Supreme Court described the right to privacy in these two areas: holding the view that it is 'natural' that individuals do not want others to obtain their personal information without a good reason (and that this expectation should be protected), it has recognized the right not to have private affairs made public without due cause and the right to control private information. One important aspect of that right is in fact, according to the Court, the freedom not to have one's personal information disclosed to a third party without permission - «without a good reason» - and not to be made public under Article 13 of the Constitution[133].

In this light, the court, in the last few years, considered that measures interfering with the right to privacy have to be «reasonable» and stay within «generally allowable limits», that is to say, they have to be directed at a suspect investigation (collection of evidence) and carried out «by appropriate methods

[130] W. B. Cleary, *The law of criminal procedure in contemporary Japan*, 1991. Available at: eprints.lib.hokudai.ac.jp › dspace › bitstream, 295.
[131] W. B. Cleary, *Opinion of a Scholar: Criminal Investigation in Japan*, in *California Western Law Review*, vol. 26, no. 1, 134 (1989).
[132] Nobuyuki Sato, cit.
[133] Japan Supreme Court, 6-03.2008, cit.

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for achieving the purpose of [the] investigation»[134]. However, in the case where there is due reason for the said disclosure and it can be socially accepted, there is no illegality and tort liability for person[135].

The Japanese sense of information privacy has been gradually updated, such as all parts of its culture, due to the pressures of technological advances and other factors. The social norms existing to provide sufficient privacy for the personal sanity and social cohesion were no longer sufficient to regulate the commercial use of personal data: overcoming its traditional culture of sacrificing private life for the sake of public interest, in the name of harmony group, it began to recognize privacy as a right and interest, despite there being no explicit legal provision for the protection of privacy during these times. In this light «the pursuit of happiness» is understood as the search for individual happiness in everyday life.

6.1 Chinese jurisprudential cases

Unlike in Japan, Chinese jurisprudential cases which directly address a right to privacy are few[136] while, since 1988, privacy question has been generally subsumed within 'reputation' cases[137]. Several causes of action in China for infringement of the right to reputation of natural persons have been considered inclusive owing to a privacy breach and invasion of privacy, especially pursuant to Article 101 of General Principles of Civil Law[138] but also under article 140 of Opinion 1988[139] and Answers 7, 8 and 9[140] of Reply 1993, issued by Supreme People's Court[141]. Indeed, the first consideration in China of the protection of

[134] Japan Supreme Court, 2016 (A) No. 442, 15-03-2017, Keishu, vol. 71, no. 3.
[135] Japan Supreme Court, 2002 (Ju) No. 1656, 12-09-2003, Minshū, vol.57, no.8 at 973.
[136] J. A. Cannataci, *The Individual and Privacy*, Volume I, London, 2016,
[137] Chinese commentators equate protecting reputation with saving face. See, e.g., T. Hui, *Mianzi, Mingyu, Mingyu Quan [Face, Reputation, and the Right to Reputation]*, nov., 2002, *available at* chinalawinfo.com/weekly/pastpub/flzk42-academic.htm.; L. Tiffany, J. Bronfman, Z. Zhou, *Saving Face: Unfolding the Screen of Chinese Privacy Law*, in *Scholarly, Commons at Boston University School of Law*, 2018.
[138] Article 101 provides that: «Citizens and legal persons exercise the right to reputation. The human dignity of citizens is protected by law. It is prohibited to harm the reputation of a citizen or legal person by such means as insult or libel».
[139] G. Whitmore, *Opinion of the Supreme People's Court on Questions Concerning the Implementation of the General Principles of Civil Law of the People's Republic of China*, in *Law & Contemp. Probs. 52*, 59-87 (1989). *Available at*: repository.law.umich.edu/articles/1542.
[140] Cfr. G. Zhu, *The Right to Privacy: An Emerging Right in Chinese Law*, in *Statute Law Review*, vol. 18, Issue 3, 1, 208–214 (1997).
[141] According to the Rules of Supreme People's Court on Judicial Interpretation (2007), in order to further standardize and improve judicial interpretation work, it may take four different forms, namely 'interpretation', 'provisions', 'reply' and 'decision' (www.law-lib.com/law/law_view.asp?id=194506). The most commonly cited interpretations in judicial practice are 'Opinions of the Supreme People's Court on Questions Concerning the Implementation of the General Principles of Civil Law of the PRC' ('Opinion 1988') and the 'Reply to Some Problems on the Trial of Cases Concerning the Right of Reputation' ('Reply 1993'). G. Whitmore, *Opinion of the Supreme People's*, cit.

privacy was a judicial interpretation by the Supreme Court[142], issued under Article 33 of Organic Law of the People's Republic of China (i.e. «the Supreme People's Court gives interpretation on questions concerning the specific application of laws and decrees in a judicial proceeding»). In particular, according to the first general judicial interpretation of 1988 regarding the application of the General principles of civil law to privacy, the Court held that «The cases in which, a person discloses personal secrets in written or oral way, or fabricates facts to publicly vilify the personal dignity, or damages the reputation by such means as insults and defamation of the others, and these acts have caused a certain negative impact on the persons concerned, shall be treated as an invasion of the right of reputation». With answers 6,7 and 9, the Supreme Court then, going on to specify how the right to reputation should be judicially determined, established that all cases concerning the invasion of privacy were to be determined in accordance with the provisions regarding the right to reputation. Since then the judges, using these judicial interpretations as the basis of judicial practice, have adopted this approach where alleged torts arising from press reports or other literary activity have been taken to court.

In this way, the right to privacy and the right to reputation can be linked to each other in all those cases where the publication of private information, since it has an impact on reputation, causes emotional damage[143]. In this sense, we can read two cases relating to the right to reputation interpreted as cases of invasion of privacy, i. e. *Two art models v The organizers of the exhibition* (1988-1989, Beijing) and *The rock' n' roll star Cui Jian v The writer Zhao Jianwei and his publisher* (1992-1993)[144] where the courts decide privacy cases in light of provisions of two judicial interpretations of the Supreme People's Court.

The first hypothesis concerns a case of an exhibition of life drawing without the consent of the models and so dealt with under the invasion of the right of portrait while some scholars thought that it was actually an invasion of privacy[145]. The other case applies instead to the freedom of the press and the behavior that the journalists should assume to avoid imprisonment: here the question, according to the judges, is the proper balance to strike between the right to privacy and the right to information.

Another case of special interest regards the introduction into the Chinese judicial system of the new concept of 'voluntary public figures' (i.e. *Yang Lijuan*

[142] According to Answer 9 the actor should bear civil liability for infringement of the other person's right to reputation and privacy when the contents of their communication is insulting, offensive, slandering or reveal private information, even if they might be 'real life' stories. See 'Reply 1993', *Available at* chinacopyrightandmedia.wordpress.com/1993/08/07/interpretation-concerning-some-questions-in-hearing-reputation-rights-cases/

[143] See, C. Yik Chan, *Truth, Fair Comments, Immunity and Public Opinion Supervision: Defenses of Freedom of Expression in Chinese Right to Reputation Lawsuits*, 27 (2013). Available at SSRN: ssrn.com/abstract=2225735 or dx.doi.org/10.2139/ssrn.2225735.

[144] C. Yik Chan, *Ibidem.*

[145] C. Jingchun, cit., 645.

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v Southern Weekend and Others[146]*)*: this figure refers to those who intentionally set out to become public figures and have become publicly known. In this case of 2009 the Guangzhou Intermediate People's Court, balancing the right of media in reporting public interest and reputation infringement, ruled that the plaintiff bore more tolerance towards the media invasion of her privacy when the latter exerts its legitimate public opinion supervision[147]. Because the plaintiffs have made themselves 'voluntary public figures' whose interest in privacy has to yield, at that point, to the public curiosity. In light of this, Courts have noted that a balance must be struck between celebrity privacy interest and the public right to know, invoking often the term "right to know" in celebrity privacy litigations, like in the Inou Case of 2004[148]. In the Chinese legal context, different from Western, the 'right to know' is used in much more general terms concerning virtually almost all types of newsworthy information. It does not concern, as in the Western legal system, the right of citizens to have information from the government such to ensure accountability of the latter. A different attitude is used by courts in involuntary figure cases that could go so far as to punish an educational television program that discloses private matters, such as the individual criminal record, even though such information had been made public previously[149].

However, the most important case, from the constitutional point of view, concerning privacy is the Qi Yuling v. Chen Xiaoqi Case of 2001[150] related to identity theft. This is the first constitutional case and a case in which a people's court relied on the Constitution as the sole legal basis for deciding a claim is questionable[151]. In this case, the plaintiff Qi Yuling filed a suit with the Intermediate People's Court of Zaozhuang City against defendants Chen Xiaoqi, Jining Business School, and The Education Committee of Tengzhou City, owing to the disputes over infringement of the right to a name, claiming

[146] Considerations about cognate issues, see e.g. H. K. Josephs, *Defamation, Invasion of Privacy, and the Press in the People's Republic of China*, in 11 *Ucla, Pac. Basin L.J.*, 191 (1993). See also H. Xue, *Privacy and personal data protection* in *China: An update for the year and 2009*, in *Computer Law. & Security Review*, 26, 284–289 (2010).

[147] Y.C. Chin, *Privilege and public opinion supervision defences in China's right* to *reputation litigation*, in *Media and Arts Law Review*, 19, 276–299, 292 (2014).

[148] This was a Case of Reputation Right Dispute Between Tianjin Press Co. Ltd. and Wu of 2014. See, regarding this point, e.g., X. Dai, *Privacy, Reputation, and Control: Public Figure Privacy Law in Twenty-First Century China*, 24, 2018. Available at SSRN: ssrn.com/abstract=3259728 or dx.doi.org/10.2139/ssrn.3259728.

[149] See, X. Dai, *Privacy, Reputation, and Control*, cit., 30.

[150] Intermediate People's Court of Zhengzhou City, *Qi Yuling v. Chen Xiaoqi et al.*, 'Dispute over Infringement of a Citizen's Basic Right to receive Education Protected by Constitution Through infringement of Right of Name', *SPC Gazette*, Issue 5, NO. 73, 2001. Available at: lawinfochina.com/display.aspx?lib=case&id=124. This Case has been widely studied. See K. Shen, *Is it the beginning of the era of the rule of the Constitution? Reinterpreting China's 'First Constitutional Case*, in *Pacific Rim law & Policy Journal*, vol 12, no. 1, January 2003, 199 – 232.

[151] See S. Kui, Y. Liu, *Is it the Beginning or the End of the Era of the Rule of the Constitution?*, cit. 214.

that her identity had been stolen and infringement of the right to receive education had been committed[152]. The Zaozhuang Intermediate People's Court ruled that the plaintiff's right to the name was infringed upon under Article 99[153] of the General Principles of Civil Law (enacted in 1986): even if the General Principles of the Civil Law do not specify the right to privacy, the Court ruled that this right would be and was protected in the event of damages as a consequence of tort. However, in the court's opinion, the law does not expressly grant the right to receive education, the last one being only a general personality right in China's legal system. Consequently, it ruled that defendant Chen Xiaoqi and others had not infringed upon Qi's right to receive education. This led to Qi Yuling lodging an appeal to the Superior Court of Shandong Province relating to the sole issue of whether Chen Xiaoqi had violated her right to receive education. Unsure of what to do with the novel right to educational claim, the Provincial court sought guidance from the Supreme People's Court that ruled that, because Qi Yuling's constitutional rights had been violated, she was in the position to claim damages at the trial.

The decision by the Supreme People's Court based on the Constitutional Right to Education directly cited the Constitution in its ruling upholding the girl's basic right to education under the Chinese Constitution as provided for in article 46[154]. Indeed, the Supreme Court ruled that «after study, we hold, on the basis of the facts in this case, that Chen Xiaoqi and others have violated the fundamental right to receive education enjoyed by Qi Yuling following the provisions of the Constitution by means of violating rights to a person's name».

[152] In 1990, the plaintiff Qi Yuling, then a 17-year-old high school student in a village in Shandong Province, had her college entrance exam scores stolen by a classmate, Chen Xiaoqi. As a matter of fact, his father and the head of Chen Xiaoqi's middle school conspired to intercept the acceptance letter without informing Qi Yuling. In this way, Chen Xiaoqi used those scores to apply to college using Qi Yuling's name, and she unfortunately missed the chance of college education. The defendant Chen Xiaoqi maintaining her false identity, went off to college and found a job working in a local bank. Years later, Qi discovered the ruse, and sued. She claimed before the Zaozhuang Intermediate Court that her identity was stolen and that Chen's actions also blocked her constitutional right to education, claiming thus compensation for the infringement of her constitutional rights as well. See, Z. Tong, *A Comment on the Rise and Fall of the Supreme People's Court's Reply to Qi Yuling's Case*, in *Suffolk University Law Review*, vol. 43, no. 669, 2010. Available at: cpb-us-e1.wpmucdn.com/sites.suffolk.edu/dist/3/1172/files/2013/01/Tong_AdvancePrint.pdf.

[153] According to this article: «Citizens shall exercise the right of personal name and shall be entitled to determine, use or change their personal names in accordance with relevant provisions. Interference with, usurpation of and false representation of personal names shall be prohibited. Legal persons, individual businesses and individual partnerships shall exercise the right to name. Enterprises as legal persons, individual businesses and individual partnerships shall have the right to use and lawfully assign their own names».

[154] This case and not the 1988 SPC Response, should be the «the ice-breaking precedent for constitutional justifiability in China». See, C. Wang, *The Constitutional Protection of Private Property in China: Historical Evolution and Comparative Research*, 287, Cambridge, 2016.

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Due to the fact that Qi Yuling's constitutional rights had been violated, she was within her rights to claim damages[155].

This decision was viewed by Chinese academics as the first step of the 'judicialization' of the Constitution[156]. Some Chinese commentators referred to Qi Yuling as China's *Marbury v. Madison*, inaugurating a new era in which the courts would play a more active role in implementing the Constitution[157]. This interpretation was one of 27 interpretations invalidated by the Supreme Court on that date. However, the Qi Yuling interpretation was withdrawn some years after, in 2008, because it was «no longer applied»[158], according to the Court's terse explanation. This has corroborated the idea that courts cannot be able to draw upon constitutional principles in civil lawsuits and safeguard rights (and possibly even interpreting the law). After this event, judges continue to invoke the Constitution mostly in the reasoning of the Court, less as a direct legal basis[159]: they hold that the rights stated in articles 33-40 of the Constitution cannot be used to vindicate privacy interests in civil disputes before Chinese courts.

Part III

7. Personal information protection laws: the Chinese cyber-sphere and Japanese Western liberal model

Over the past years, a vast array of sectorial laws has been introduced in China: however, none of these texts fitted into data protection subject matter, but rather included some data protection-specific provisions. Indeed, unlike the Japanese legislator who adopts only one text, the Chinese one establishes a legal regime following three core areas, or: 1. network (cyber) security; 2. the protection of personal information of individuals and 3. the security of data other than personal information.

Personal information has in China multiple values including not only personal dignity and freedom, but also reputation and sociality, and ultimately,

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[155] See, also, G. Greenleaf, *Asian data privacy laws: trade and human rights perspectives*, 196, OUP 2014.

[156] J. Zhang**,** *A Constitutional View of Privacy Rights in China* (2020). Available at *www.uianet.org*.

[157] K *Hand*, *Resolving Constitutional Disputes* in *Contemporary China*, in 7 *U. Pa. E. Asia L. Rev.* 51 (2011).

[158] See, T. E. Kellogg, "The *Death* of *Constitutional Litigation* in *China*?", in *China Brief*, (2009). *Available at*: jamestown.org.

[159] D. Sprick, *Judicialization of the Chinese Constitution Revisited: Empirical Evidence from Court Data*, in *The China Review*, n. 2 (2019). Avalaible at ssrn.com/abstract=3333958 o dx.doi.org/10.2139/ssrn.3333958. In this sense, according to Sprinck «the application of the Chinese constitution has since been banned from judicial practice, while legal disputes that would entail a constitutional argument had nevertheless continued to be argued before Chinese courts».

social progress, economic use, and public management and security. Consequently, it requires global governance and integrated management: being focused on potential risks, it is possible to balance interests among personal information protection, digital economic development, and public interest maintenance (related to national politics too) to achieve the unity of effective protection and rational use of personal information. In this way, China would like to resolve the tension between the non-territorial space for social interaction purposes created by networked computers and state sovereignty, which is territorially bounded[160].

This line of thought was introduced in the 2016 Cybersecurity Law of the People's Republic of China. The latter one has the ultimate aim to place cybersecurity ostensibly in the interest of national security, by at the same time reinforcing data protection. The legislative objective is indeed «the construction, operation, maintenance, and the use of networks, as well as to cybersecurity supervision and management within the mainland territory of the People's Republic of China» (art. 2). In this light, the law applies to various dimensions of domestic sovereignty, including authority over cyber activities at home, control over cross-border flows, jurisdiction over foreign entities operating in China, and authority to block unwanted information from overseas[161]. However, the right to personal information is not its subject except for art. 22 which opens the door for the incorporation of the upcoming Personal Information Protection Law when it provides that «if this involves a user's personal information, the provider shall also comply with the provisions of this law and relevant laws and administrative regulations on the protection of personal information».

A 'holistic' view of national security is instead aimed, according to its Article 4, by the Data Security Law of the People's Republic of China (the 'Data Security Law'), passed in June 2021[162], having the intention of strengthening enterprise data security governance and focus on potential risks in the field of data security. Moving from cyber sovereignty to data sovereignty, here the acquired awareness consists in data protection since it is a matter of national security. The new mission has a twofold objective. The first article clearly defined it as «ensuring data security» and «promoting development and utilization of data» in order to facilitate international cooperation and enhance China's competitiveness. From this perspective, the data security law governs basic data classification and hierarchical management. In reality, we can notice first of all 'core data', which has been afforded the highest degree of protection and regulation, broadly defined as any data that concerns Chinese national and economic security, Chinese social welfare, and considerable public interests.

[160] See M. Mueller, *Networks and states: The global politics of internet governance*, Cambridge, 2010, 1.
[161] Y. Hong, G. T. Goodnight, *How to Think about Cyber Sovereignty: The Case of China*, in *Chinese Journal of Communication (As part of special issue 'China's Globalizing Internet')*, (2019). Available at SSRN: ssrn.com/abstract=3467933.
[162] The *Data Security Law of the People's Republic of China*, 10-06-2021, no. 84. Available at en.npc.gov.cn.cdurl.cn/2021-06/10/c_689311.htm.

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Then the law provides, in addition to the general data concept, the 'important data', which is the next-most sensitive level of data after core data, owing however to problems of definitions and conceptual confusion: if the data definition seems to expand the object of regulation thus being able to generate conflict with other legal concepts such as also the concept of personal information – pursuant to art. 3 data is «any record of information or in other forms» – the important data, involving various factors like «important aspects of people's lives» (art.21), does not has one-size-fits-all or fixed rules in its identification. As the core provides for the cross-border transfer of important data by CII (critical information infrastructure), operators must be governed under the Cybersecurity Law (art. 31). Finally, if the legislative purpose is thus safeguarding data sovereignty externally and safeguarding national security internally, no mention has been made about privacy and personal information protection. However, also in this case, the law leaves room for incorporating the future Personal Information Protection Law through art. 53 that lays down that «data processing activities involving personal information shall also be carried out in compliance with the relevant laws and administrative regulations»: in this way, personal information security appears as an objective need to safeguard not only the legitimate rights and interests of citizens but also national security. As a matter of fact, it is clear that China was preparing for a global protection strategy of data and personal information, by consistently promoting the construction of network power, digital China[163]. Data and, finally, personal information security has become a major issue related to national security and economic and social development. The law that promotes the right to privacy also moves in this direction. Indeed, the personal information protection law or 'PIPL', enacted in August 2021 - which specifically governs personal information rights and interests, as well as standardizing personal information handling activities, and promoting their rational use - concerns the protection of the personal information of only Chinese residents and not, by contrast to the GDPR, the personal data of any individual, regardless of the location or immigration status of the data subject or «whether the processing of personal information takes place in the Union or not» (art. 3): so, the companies set up outside the EEA that are subject to the GDPR are under obligation to process the personal data of individuals located in the EEA in accordance with the regulation.

This attitude of the Chinese state to subsume several laws claiming China's cyber and data sovereignty for several sectors, as done likewise by the USA, as illustrated[164], isn't present in Japan, which has adopted law and administrative guidelines constituting regulatory framework only of the privacy. In this case, the aim is to protect the rights and interests of individuals while taking into consideration the usefulness of personal information in view

[163] L. Qianwen, *Data Security Law: Escorting Data Security and Helping the Development of the Digital Economy*. Available at: www.npc.gov.cn/npc/c30834/202106/b7b68bf8aca84f50a5bdef7f01acb6fe.shtml.

[164] Moreover, the US has developed a National Cybersecurity Division within its Department of Homeland Security.

of a remarkable increase in the use of personal information, due to the development of the advances in information and communication society. However, the approach of the Japanese act to the protection of personal information (APPI) containing basic data protection, adopted, as indicated above, already in 2003, subsequently amended several times, seems to be directed to protecting the personal information than the right to privacy. Actually, if it establishes uniform handling standards for personally identifiable information, regardless of its content, no one general provision regards privacy protection[165]. From this perspective, this Act has outlined only general requirements and obligations, leaving the details of its regulation and interpretation to the government ministries, which issue administrative guidelines for those business sectors for which they are responsible. The Japanese act, as amended in 2015, expands the discipline of several aspects, such as those related to the definition of 'Personal Information' newly defined, for clarification, and provided for cases where personal data is transferred to a third party in a foreign state. The scope, structure, and substance of the Japanese law resemble that of the European Union (EU) General Data Protection Regulation (GDPR) in several key ways. The approach here regarding the state's authority over internet-related public policy is similar to that of the Western liberal model being direct to protecting individual rights that can be universally applied, while it differs from China's vision that goes in the direction of opposing individualist democracies. The Chinese state's adapting, contracting, or expanding its power over cyberspace governance beyond issues of security and privacy, has made an ever-expanding state personal information control regime also in the face of intensive social dissent. Trying to create a dialect between the intra-national needs and the state priorities as well as the transnational connectivity, the state's construction of cyber sovereignty aims to ease tensions between sustaining global interdependence and safeguarding national interests.

Finally, in both cases, we can say that those laws are not yet general privacy protection laws. Indeed, it is necessary to seek legal remedies for general privacy violations under general laws of the Civil Code, in such cases, being relatively easy to receive compensation if there is specific monetary damage. However, there are difficulties in obtaining other remedies: since there is no provision statute that explicitly recognizes the 'right to be forgotten'[166], it is

[165] See, N. Sato, *Rights in the Digital Age: Japanese Viewpoint*, in *Droits international, comparé et européen.* Available at: dice.univ-amu.fr/sites/dice.univ-amu.fr/files/article/japon_rights_in_the_digital_age_japan.pdf

[166] See, in particular with regard of the Japanese Supreme Court's decision on the right to be forgotten, Supreme Court, 31 January 2017, 2017WLJPCA01319002. The Japanese Supreme Court, for the first time in its history, decided in favor of the search engine giant, Google, without referring to this emerging yet still contested right to be separated from one's past online. Noteworthy, nonetheless, is that the Japanese Supreme Court laid down certain criteria with which to mandate the removal of search results. See I. Yamaguchi, *A Japanese Equivalent of the "Right to Be Forgotten": Unveiling Judicial Proactiveness to Curb Algorithmic Determinism*, in *Ius Comparatum - Global Studies in Comparative Law*, GSCL,vol. 40, 923 (2020).

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necessary to assert this right as the content of the constitutional right to privacy in litigation.

8. Different types of personal information

The Japanese protection of personal information law introduced an additional protection system for 'sensitive information' – called 'Special care-required personal information'- which partially introduces the characteristics of a privacy protection law. Under Japanese law, more similar to European law than to the Chinese text, special care is required so as not to cause «unfair discrimination, prejudice or other disadvantages to the principal» (art. 2 (3)). Moreover, also in China, the new law introduces this category.

In fact, Chinese law defines 'sensitive personal information' interpreted as the personal information of which the «leakage or illegal use could easily lead to the violation of the personal dignity of a natural person or cause harm to personal or property safety» (art. 28). In this way, this category includes, but not limited to, information such as biometrics, religious belief, specific identity, and health status. No express reference to race herein is made, which is instead present in Japanese law and European law too, while being considered to be sensitive personal information «financial accounts, and the person's whereabouts» (in addition to «the personal information of a minor under the age of 14»), showing a certain tendency, also in this case, to raise the level of protection in cases that could put national security at risk in some way. In any case, this introduction is an important piece of news for China. For the first time, the national Chinese law covers sensitive personal information and lays down that a personal information handling business operator handling 'sensitive personal information' must follow certain stringent data protection measures provided for in the law. Indeed, according to art. 28 PIPL, sensitive personal information can be processed when there is a 'specified purpose' and when it is 'necessary' and there are 'strict measures' adopted for its protection. Here the law sets a high threshold for processing sensitive information including biometric information such as facial recognition. Precisely on these latter data in April 2021, a ruling was issued on the use of facial recognition technology for the first time in China, while in July 2021, China's Supreme People's Court (SPC) issued a judicial interpretation including guidelines for the use of facial recognition technology and protection of people's identities and privacy in civil disputes: according to this judicial interpretation, it poses an infringement of individuals' personal rights if, in violation of laws or administrative regulations, any business or public place (hotel, shopping mall, bank, transit station, airport, sports venue, entertainment venue) use facial recognition technology to verify, identify, or analyze faces (Art. 2)[167].

[167] «Provisions of the SPC on Several Issues Concerning the Application of Law in the Trial of Civil Cases Involving the Processing of Personal Information Using Facial Recognition Technology», available at: www.perma.cc

Other rules are in place for personal information. Moreover, this latter category in Chinese law has been more simplified with regard to Japanese law. As a matter of fact, according to article 2 (1) of the Japanese legislation text personal information are considered all those information relating to «a living individual which falls under any of item listed» including drawing or electromagnetic record and information that will allow making easy reference to other information and will therefore enable the identification of the person or, again, identifiable signs, such as fingerprint data and the identification numbers of many documents. The Chinese law, instead, broadly defines personal information as information only covering «any information about identified or identifiable natural persons stored in electronic or any other format» (art. 4), excluding in this way personal information irreversibly made anonymous. By the way, also this last exclusion could represent Chinese lawmakers' efforts to create a 'harmonious society' by limiting cyberspace anonymity, but, on the other hand, reducing the democratic process[168]. In truth, the Chinese state has set itself the reduction or elimination of anonymity in cyberspace its main goal[169], also according to the cybersecurity law, which includes more detailed rules associated with online real-name registration[170]. In

On the need to find balance between a set of rules governing online communication and responsible behavior in cyberspace, considering that the «right of absolute anonymity may foreclose accountability, whereas full accountability of users may mean the prohibition of anonymity», the latter one constitutes an essential protection for dissidents and is indispensable for democratic processes as it allows for minorities, see A. Wells Branscomb, *Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspaces*, in 104 *Yale L.J.*, 1639 (1995).

[168] Regarding the need to find balance between a set of rules governing online communications and responsible behaviors in cyberspace, considering that the «right of absolute anonymity may foreclose accountability, whereas full accountability of users may mean the prohibition of anonymity», the latter one constituting an essential protection for dissidents and indispensable for democratic processes as it allows minorities, see A. Wells Branscomb, *Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspaces*, in 104 *Yale L.J.*, 1639, 1641 (1995).

[169] For the purpose of fighting crime and protecting minors, the Chinese government has shown its interest in establishing a real name registration Internet policy as early as 2003, when it ordered cyber cafes to collect customers' identification information. In 2012 China decided to expand its regulation of the Internet, requiring microblog and other Internet services users to perform real-name registration. See, e.g., L. Jyh-An, L. Ching-Yi, *Real-Name Registration Rules and the Fading Digital Anonymity in China*, in *Washington International Law Journal*, vol. 25, no. 1 (2016). Available at SSRN: ssrn.com/abstract=2719384

[170] Pursuant to art. 24 «Network operators who provide network access and domain registration services for users, process network access formalities for fixed line or mobile phone users, or provide users with information publication services or instant messaging services shall require users to provide details of their identity when signing agreements with users or confirming the provision of services. If a user fail to provide their identify details, the network operator shall not provide the user with relevant services». Article 61, then, imposes legal liability for service providers' violations of the real-name registration obligation including fines ranging from RMB 50,000 to 500,000 and the suspension of business licenses.

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any case, in its simplest and most concise definition, the processing of data in China is any action carried out on data. Moving from personal data to personal information, any information capable of identifying a person in China deserves, according to the Chinese vision, protection: this has led to the growing awareness that data are a national basic strategic resource, while information protection puts into effect the overall national security concept. Both laws lay down relevant obligations imposed on processors engaged in handling such information.

Unlike the traditional legislative thinking of «limiting the regulated subjects», these legislative acts, like GDPR, define and regulate 'data processing': all subjects who carry out data processing activities are required to satisfy or comply with data protection obligations. Considering the significantly expanded utilization of personal information as advanced information and communication, based on society advances, for these laws the proper and effective application of personal information results indispensable to the realization of an evolved society and an enriched «quality of life for the people» (art. 1, Japan law). In that respect, they have approached the matter as follows: they seek a balance between the protection of personal information and the appropriate use of personal information, which is increasingly important to them. Undoubtedly, Chinese law and, after the 2020 amendment, Japanese law too, include, among other things, the right to request that a personal information operator corrects and adds one's own personal information that is incorrect (art. 2 (7), Japanese law, art. 46 Chinese law)).

9. The processing of personal information and exemptions cases are as follows: the return of public security clause

For processing of personal information, both Chinese and Japanese laws provide, of course, consent as a legal basis, which only in the Chinese case expressly provided that it should be voluntary, explicit, and all-inclusive (art. 14) and laid down when the personal information can be transferred outside of China. Moreover, the Chinese law, unlike Japanese law and GDPR or some other international legislative points of reference, does not recognize «legitimate interests pursued by the controller» as a legal basis for processing personal data.

However, under both laws, there are some exemptions in which prior consent is not required.

If in the past, in the Chinese case, consent was the only requisite for the processing of personal information, and other lawful bases were provided in national guidelines, which were not legally binding, now both Chinese and Japanese laws include many hypotheses of consent exemptions similar to some extent: cases like these are, for example, these based on laws and regulations – in Chinese case specifying 'administrative' regulation -, that responding to the need to protect human life also in order to enhance public hygiene or foster healthy children (in Japanese case) or an emergency involving life and property

(in Chinese case). Moreover, the Chinese act including employees and human resources management in the guise of protected personal information provides that this information can be processed where it is necessary for the conclusion or performance of a contract to which the individual is a part, also without consent. This means personal information related to employment and human resources, including compensation and performance review information, cannot be sent out of China unless anonymized or informed consent has been given by the employer. The reason points to the control of strategic information.

Once again, Chinese law, unlike Japanese law and also GDPR, seems characterized by its distinct characteristic of national security. In this way, we can read also the other exemption relating to the news reporting or other activities on a matter of public concern, according more to the civil code too[171]: the personal information can be processed if it is 'reasonably' processed for news reporting, media supervision, and other activities conducted in the 'public interest' (art. 13, 5).

Public security and national security are constant worries to the extent that if an organization engaging in personal information processing activities jeopardizes the national security or public interests of China: in this case it could thus be include in 'black list' by the national cyberspace department, involving consequently limits or prohibiting recipients of personal information (art. 42).

10. The fundamental values in interactions

Data protection laws are characterized widely by the constant shifting interactions of the two core fundamental values, e.g. economic growth and data privacy protection.

However, even if the highest-value objective attained by the Chinese legislation, as also by the Japanese law, seems to be that of safeguarding the rights of personal information. In both cases, there is no legal provision that explicitly protects the right to privacy. Moreover, as pointed out above, the traditional Chinese and Japanese understanding of privacy is quite different from that of Western countries. The traditional culture of these countries is largely of a collective nature even until recently. The concept of privacy, alien to their culture, is so intended as to protect not individual freedom, as it is in the individual-oriented society, like in the USA[172], or of dignity, like is in UE[173], but of public decency and reputation, social morality and, last but not least, of

[171] Pursuant to Article 999 «The name, entity name, likeness, personal information, and the like, of a person of the civil law may be reasonably used by those engaged in news reporting, supervision of public opinions, or the like, for public interests, except that civil liability shall be borne in accordance with law where the use unreasonably harms the personality rights of the person».

[172] See, A.A. Adams, K. Murata, Y. Orito, *The Japanese Sense of Information Privacy*, cit.

[173] As a matter of fact, «American privacy law is a body caught in the gravitational orbit of liberty values, while European law is caught in the orbit of dignity». See, J.Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, in 113 *Yale Law Journal*, 1151, 1163 (2004).

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public interest: in the collectivism of Chinese and Japanese traditions cultures, the honor and reputation are social public interests[174]. In this perspective the right to privacy is interpreted, particularly in China, unlike the concept of Western creation that identifies it as the individual's 'right to be let alone' but, echoing the civil code[175], as a «right exercised by a natural person, under which the person is free from publicity and any interference by others in personal matters only related to the person and personal information such as affairs, in the area of personal life»[176]. Consequently, the protection of the right to privacy can be limited by the public interest like in the case of public security. Chinese privacy law does not seem to be lacking the reference to national security. This is the third value interconnected with the other two in the Chinese framework. For example, along the lines of the Data Security Law of China ('DSL'), which represents a trigger for taking measures, such as restricting or prohibiting the provision of personal information, is the extraterritorial case of data processing activities that endanger «the national security or public interests of the People's Republic of China» (art. 42, PIPL), in addition to the infringement upon the rights and interests of its citizens. As a matter of fact, under art. 12 of cybersecurity law, every person must use the internet observing public order, and, according to its own tradition, «respect social morality», avoiding activities that jeopardize national security, national honor, and national interests. In this light, as provided for in chapter III of PIPL on 'Rules on Provision of Personal Information Across Border', where it is 'truly necessary' to provide information for a party outside the territory of the People's Republic of China, the matter shall be subjected to security assessment organized by the national cyberspace department (art. 40). Considering this profile, data protection is shown as a means to an end that is, of course, the protection of confidentiality, integrity, and availability of data, and the control and legitimacy of data processing activities, but also enhancing the general public welfare on the condition that data processing risks are reasonably and effectively minimized. Ultimately, Chinese citizens generally agree that public security is a fundamental value, and as such essential for preserving public order and social harmony, serving as a precondition for China's economic success and prosperity[177]. Under Chinese law, in case of conflicts between public security and data privacy, the solution given is that the first one would certainly prevail over the latter, since it does not provide any meaningful protection of data privacy.

[174] Indeed, in compliance with Chinese Civil Code, «a person who infringes upon the name, likeness, reputation, or honor of a hero or a martyr and thus harms the social public interests shall bear civil liability" (art. 185).

[175] Pursuant to Article 1032 «Privacy is the undisturbed private life of a natural person and his private space, private activities, and private information that he does not want to be known to others».

[176] W. Limin and Y. Lixin, above n. 7.

[177] Bo Zhao, Yang Feng, *Mapping the development of China's data protection law: Major actors, core values, and shifting power relations*, in *Computer Law & Security Review* (2020).

11. The state sovereignty and restrictions on the transfer of personal information to third parties

If Japan became, on 23rd January 2019[178] the first country to earn an adequacy decision from the European Commission, guarantying a level of protection «essentially equivalent»[179] to that ensured within the European Union (art. 104 of Regulation (EU) 2016/679) and allowing, thus, cross-border data transfers from and to the EU, the Chinese law doesn't provide for the same thing. Moreover, the Japanese adequacy clause is mutual: Japan's Act on the Protection of Personal Information requires third-party countries to have a level of data protection equal to that of Japan for the free flow of data transfers. As a matter of fact, according to article 24, as to international data transfers, the foreign country is under legal obligation to set up a personal information protection system evaluated to have «equivalent standards to that in Japan regarding the protection of individual's rights and interests».

On this basis, under this article, the Japanese Cabinet issued a decision on 12th June 2018, which delegates, by facilitating international data transfers[180], to the Personal information protection commission-PPC (as the authority competent to administer and implement the APPI), the power to establish «strict implementation of its proper handling to seek enhanced protection of individual's rights and interests, and shall take necessary action in collaboration with the governments in other countries to set up an internationally convenient system concerning personal information through fostering cooperation with an international organization and other international frameworks». In view of this, on 15th June 2018, the PPC adopted an act[181] with a view to enhancing the protection of personal information transferred from the European Union to Japan, based on the adequacy decision. Consequently, under this legal framework, the Commission concluded that it met the adequacy standards.

On the other hand, unlike the Japanese regime, Chinese law has not adopted an adequate decision mechanism. In truth, the PIPL, which is marked by its distinct characteristic of national security, requires fulfillment of certain requirements regardless of the location of the recipient of the personal information, showing itself to be more rigid than GDPR and also the Japanese law, by way of imposing specific prerequisites before the transfer.

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[178] Commission Implementing Decision (EU) 2019/419, 23-01-2019 pursuant to 'Regulation (EU) 2016/679 of the European Parliament and of the Council on the adequate protection of personal data by Japan under the Act on the Protection of Personal Information', available at: data.europa.eu/eli/dec_impl/2019/419/oj

[179] As clarified by the Court of Justice of the European Union, this does not require an identical level of protection. CJUE, *Maximillian Schrems* v. *Data Protection Commissioner*, cit., par. 73.

[180] Available at: www.ppc.go.jp/en/legal

[181] "Supplementary Rules under the 'Act on the Protection of Personal Information for the Handling of Personal Data Transferred from the EU based on an Adequacy Decision'. Available at: www.ppc.go.jp/en/legal.

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Undoubtedly, in general, the transfer of personal information outside the territory of China has to fulfill three necessary conditions – namely to (1) obtain the separate and informed consent of the subject's personal information (art. 39); (2) carry out personal information protection impact assessment and keep a record (art. 40); and (3) adopt one of the measures outlined in art. 38 of PIPL to ensure that adequate safeguards would be provided for the transfer. The measures according to art. 38 are: (1) passing a security assessment by the Cyberspace Administration of China (CAC), (2) receiving a personal information protection certification from a specialized regulatory body, (3) concluding a standard contract drawn up by the CAC, or (4) meeting other conditions provided for by laws or administrative regulations or provided for by the Cyberspace Administration of China. However, the law does not specify anything on the security valuation of the CAC: despite the GDPR, the PIPL gives full discretion to the CAC to regulate and authorize (or restrict) international data transfers.

12. Conclusion

The Japanese exceptions are similar to the Chinese ones, for example, when these can be justified by «the protection of life, body, and the property of persons»[182], or «improving public health (…)», or, again, «cooperating with public institutions», in addition to the provisions of other laws (Art. 23). However, as demonstrated, China has established in its privacy law a general no-consent of control clause - within the 'public interest'. In this way, despite the US foreign policy efforts made to extend the liberal capitalist model to the cyberspace, China has been capable of preserving some crucial political-economic and ideational foundations of self-determination while upholding its steadfast global digital convergence, keeping well in mind the scope of protection of the right to privacy limited by the public interest[183]. On the other hand, in Japan there is no law allowing compulsory requests for information or 'administrative wiretapping' outside criminal investigations, even though on national security grounds: in the latter case, information may only be obtained from an information source that can be freely accessed by «anyone or by voluntary disclosure»[184] in such a way, according to the Japanese Supreme Court, to conform to the principles of necessity and proportionality ('appropriate method')[185].

Traditional Chinese and Japanese cultures had in common a collective-oriented society: however, the Japanese more than the Chinese, favored by a changing culture, as shown, at the time of the adoption of the Meiji Constitution,

[182] Art. 13, comma 4, PIPL, «Responding to public health incidents» or, in addition, «for protecting the life, health, or property safety of natural persons in emergency situations».
[183] See, W. Limin, Y. Lixin (Eds) *The Law of the Rights of The Person*, Beijing, 1997, 147.
[184] In order to ensure «maintenance of public safety and order» (Article 35(2) in conjunction with Article 2(1) of the Police Law), the police may collect information, but only on a voluntary basis without legal force.
[185] See Japanese Supreme Court, Case No. 100 (1968 (Shi), 18-03-1969.

developed a strong sense of self-hood, albeit one which is tempered with an awareness of the position of that self within a group dynamic. A strong sense of information privacy, interpreted as control of their own information, which has long been part of the culture in Japan has faced social pressures leading to the adoption of laws on the protection of personal information, first of all in Japan and then in China. Although the concept of privacy was less developed but not alien to the Chinese and Japanese societies and culture, they have been able to apply an effective model to protect the right to privacy, also by looking at foreign practices. However, if in general the Chinese and Japanese have borrowed many techniques from the GDPR guaranteeing a high level of information privacy protection but also economic benefit, these techniques seem to be in China, more or less openly, concerned with defending, first of all, the interest of public security. From the 'substantive' law point of view and, in particular, in privacy law, it is mostly the Japanese legal system which shows having undergone a profound and actual transformation after exposure to modern Western civilization. Instead, the Chinese legal system seems to have transformed just from a formal law point of view.

Indeed, reflecting China's legislative principle of prioritizing national data security, the PIPL, for example, does not provide for derogations in case of cross-border transfers regardless of the legal basis, in such a way, the transfer shall meet all corresponding preconditions. Moreover, it includes severe administrative and criminal punishments for the violators who intentionally or unintentionally process personal information in breach of China's national security requirements. Though the PIPL provides for a graded management strategy based on different subjects and the degree of data risk to strike a delicate balance between national data security and the needs for economic development, ensuring national security seems to remain prevalent.

In this light, the concepts of protecting individual privacy in China, Japan, the EU, and the US differ widely — to the point of complete opposition, as shown, in the case of the United States and the EU — that it is unclear how they can co-exist.

In a «tripolar privacy world»[186], China, the EU, and the US are in conflict over human rights regimes. As we have seen, the United States is unable to create a coherent privacy regime while it seems to be less interested in strengthening the privacy rights of individuals, unlike in the EU where privacy is protected as a fundamental right under the Charter of Fundamental Rights of the European Union. There is a stronger cultural expectation of privacy in the EU than in the US. In the absence of federal comprehensive law, many U.S. lawmakers have enacted stringent laws, expecting the rest of the world to follow their example of surveillance capitalism. In this context, while the Japanese Privacy law is clearly in line with the European regime, on the other hand, China has been affected indirectly by the United States. If China's top-down policies, unlike the United States, have been followed by comprehensive

[186] J. Nash, *A tri-polar privacy world: China, EU, US conflict on rights regimes*. Available at www.biometricupdate.com/

DPCE online
ISSN: 2037-6677

legislation, also they consider market forces the heart and soul of technology. Chinese leaders realized also that they could utilize the data on the lives of their citizens: thus China focuses on privacy policy from the inside, wanting primarily to regulate their citizens' lives, without opposition of the population, being privacy not a core value they share.

The EU's attempts to expand, through the adequacy clause, its institutional and legal vision globally and to set new standards for world personal information protection law, have resulted in failure in the Chinese case, since the latter has opted for «socialism with Chinese characteristics» (preamble and art. 1 Constitution). The difference grounded also in the "East Asian" way of seeing society (i.e. individualism in the West v. collectivism in China and Japan), is used in China to foster the authoritarian twist.

As it disguises itself in Western values[187], China in fact controls the collective because «the exercise by citizens of the People's Republic of China of their freedoms and rights may not infringe upon the interests of the state, of society and the collective» (art. 51 Constitution), in name of the right to privacy but also with respect to public order and social harmony according to the Confucianism[188].

Emma A. Imparato
Dipartimento di Scienze Umane e Sociali
Università l'Orientale di Napoli
eaimparato@unior.it

[187] See, T. Groppi, *Costituzioni senza costituzionalismo? La codificazione dei diritti in Asia agli inizi del XXI secolo*, in *Riv. Politica del diritto*, 2/2006, 189.
[188] It is in the name of these values that the Chinese population is even willing to sacrifice civil rights if they contravene the social order. See A. Rinella, *Costituzione e economia in Cina: intersezioni*, cit., 94.